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Commercial Sexual Exploitation of Children as a Violation of Children's Rights:  
What Role for Regional Organizations?



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## Abstract

The phenomena of Child Sex Tourism (CST) and Commercial Sexual Exploitation of Children (CSEC) have penetrated every corner of the world. States have gathered together to draft and adopt international legislation to protect children from and criminalize CST and CSEC. Many States have modified their national laws and adopted extraterritorial ones to fight these problems. However States are still struggling at the national, regional and international levels.

CST and CSEC are global problems, the effects of which are comparable to issues related to human rights, environment, peace and other international challenges. Non-Governmental Organizations (NGOs) and civil society organizations are increasingly gaining ground and play an important role in influencing governments and other organizations through lobbying and spreading awareness about the worldwide problem of CST and CSEC. Nowadays it is normal for NGOs to acquire observer status in international organizations to assist governments at both the national and international levels and to publish their observations in a bid to contribute towards finding solutions for the challenges that governments or international organizations face. While, in the past, States were the exclusive actors cooperating to solve or bring challenging issues to the centre of attention, today NGOs and civil society groups are consulted for their help.

The world is no longer ruled and governed by Heads of State and Governments alone. Not only is the role of NGOs and civil society groups on the increase. There is also an increase in the role and presence of regional organizations (ROs). Apart from explaining the notion of CST and CSEC from a regional perspective, the objective of this study is equally to research the potential role of ROs like the African Union (AU), to help narrow the gap between national and international law in addressing CST and CSEC. It is revealed that, except for the AU, there is a problem of institutional weakness amongst ROs related to the regulation of children's rights. So how can ROs persuade their Member States to adhere to regional norms and standards designed to protect children from CST and CSEC? What regional best practices are useful for the AU, the European Union (EU), the Organization of American States (OAS) and, eventually, the Association of South East Asian Nations (ASEAN) in addressing the current institutional weaknesses that hamper effective responses in dealing with CST and CSEC? Can the existing regional human rights system (such as the African one) serve regional law and policy in contributing towards the enforcement of existing national and international law to address CST and CSEC? Is the regional African Court of Justice and Human Rights an option to sanction Member States that turn a blind eye to the problem of CST and CSEC for noncompliance with regional law?

Extensive analysis is required to establish the prospective role of ROs and their contribution to achieve enforcement of children’s rights, especially when Member States in ROs fail to implement or refuse to enforce regional standards aimed at eradicating CST and CSEC.

## **Acronyms**

ACHR	American Convention on Human Rights
ACJHR	African Court of Justice and Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIDS	Acquired Immuno-deficiency Syndrome
ASEAN	Association of Southeast Asian Nations
AU	African Union
CARICOM	Caribbean Community and Common Market
CEDAW	Convention to Eliminate All Forms of Discrimination against Women
CIS	Commonwealth of Independent States
COE	Council of Europe
CPTS	Complex Post-Traumatic Stress
CSEC	Commercial Sexual Exploitation of Children
CSOs	Civil Society Organizations
CST	Child Sex Tourism
DCA	Directorate for Consular Affairs
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECPAT	End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes
ESC	European Social Charter
ESCAP	Economic and Social Commission for Asia and the Pacific
EU	European Union
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Court of Human Rights

ICC	International Criminal Court
ICJ	International Court of Justice
ICT	Information and Communication Technology
ILC	International Law Commission
ILO	International Labour Organization
NAFTA	North American Free Trade Association
NGO	Non-Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
PRC	People's Republic of China
RO	Regional Organization
SEC	Sexual Exploitation of Children
SR	State Responsibility
STD	Sexually-Transmitted Diseases
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCRC	Nations Convention on the Rights of the Child
UNODC	United Nations Office on Drugs and Crime
UNICEF	United Nations Children's Fund
UNTAC	United Nations Transitional Authority in Cambodia
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

## Introduction

Are all these conventions, treaties and agreements to protect children and their human rights dead letters on recycled paper? Despite the plethora of national, regional and international instruments to regulate children's rights, including criminalising the commercial sexual exploitation of children (CSEC), States have hitherto not managed to quell this particularly abhorrent violation of children's human rights.

'*A Unilateral Promise Sensu Stricto and the Obligation of Compliance*' is a study based on unilateral acts of States and focuses on the actions on a State to State level.<sup>1</sup> Its practical relevance is deduced from an episode that has come to be known in the Netherlands as the Brazilian Child Pornography case. This concerned two Dutch men who were convicted at first instance for the commercial sexual exploitation of Brazilian girls for pornographic purposes. Pending the appeal, the defendants fled the Brazilian jurisdiction with emergency passports. In essence, the Dutch consul ignored specific conditions under which the defendants were granted *habeas corpus* by issuing them contingency-based passports. Child pornography is clearly a form of CSEC, as the aforementioned study highlights. This paper takes up this issue, but examines another area within CSEC, that of child sex tourism (CST).

The degree of criticism on the futility of international instruments and national efforts aimed at protecting children from CST and CSEC corroborate the fact that there is a need for sharper and more effective standards and mechanisms. It is undeniable that the existing measures do not suffice, and that national governments have dealt with this massive problem in an ineffective manner. As a result, CST and CSEC continue to flourish and constitute a violation of children's rights, and consequently human rights. Dealing with CST and CSEC requires the identification of deficiencies, as well as what needs to be considered to ensure proper protection of children. CST and CSEC are worldwide problems; therefore this paper addresses the issue from a regional perspective. The main objective is to research the regional enforcement of children's rights in view of CST and CSEC. In addition the study investigates whether there is a role for regional organizations (ROs) such as the African Union (AU) in the enforcement and eradication of CST and CSEC.

Part two will present an anecdotal background to the factual and legal complexities that underpin the problems of CST and CSEC. This is followed in part three by a more comprehensive discussion on the notions of CST and CSEC. A presentation of both concepts and practices in the various regions is provided in part four. Legal responses to

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<sup>1</sup> Isenia J. 'A Unilateral Promise *Sensu Stricto* and the Obligation of Compliance'. A Public International Law LL.M Thesis Leiden University (2011) (Unpublished).

these problems both at the global and regional levels are elucidated in parts five and six, respectively, with the latter part specifically discussing the enforcement of children's rights through regional human rights systems. Part seven considers the prospective role for ROs particularly that of the AU, in the enforcement of children's rights. The mechanisms that can be invoked to correct noncompliance with the ACRWC are discussed in part eight. Finally the last part is reserved for the main findings and the way forward.

A word on the method used is worthwhile. The analysis here is deduced first from the author's personal experience as a former employee in the tourism/aviation sectors. This exposed her at first hand to some of the problems germinating in the field or on the ground which affect the rights of children. Besides taking a personal interest in the area, she has also relied on extensive desk research and analysis of international and regional norms, as well as literature on the issues covered. Discussions with policy makers and activists have also been useful.

## Background<sup>2</sup>

This paper is inspired by the commercial sexual exploitation of minors which took place in the Brazilian Child Pornography case; the latter served as the starting point for the author in her LL.M thesis.

In September 2002, the Dutch Consulate in Rio was notified of the arrest of two Dutch male citizens. Due to the slow preliminary progress of the trial, a written request for information concerning the application for the suspension of temporary detention was filed with the Federal Regional Court (Court) in Rio de Janeiro on 5 February 2003, by the acting *Chef de Poste*.<sup>3</sup> Initially the Court was not in favour of suspending the detention due to the probability that the defendants would flee the country.<sup>4</sup> The first request for *habeas corpus* was denied. However, a second request was granted on 28 August 2003, followed by the temporary release of the defendants the next day.<sup>5</sup>

The Court agreed to grant *habeas corpus* on the condition that the Dutch consul would appoint a consular representative to be present at the release of the defendants. The Dutch consul was required to inform the Court of the address at which the defendants

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<sup>2</sup> The facts of the Brazilian Child Pornography case as set out here are taken from the author's LL.M thesis 'A Unilateral Promise *Sensu Stricto* and the Obligation of Compliance' (2011) (Unpublished).

<sup>3</sup> Zunderd P.J. van 'Investigation Rio de Janeiro', (2008) (summary) (An independent investigation under the command of the ex-chief of the Royal Dutch Police Force (KLPD)) pp. 9, 10. The Brazilian authorities imply the consul by the *Chef de Poste*.

<sup>4</sup> Zunderd P.J. van, *op. cit.* p. 10.

<sup>5</sup> *Ibid.*, p. 11.



would reside during the trial and make efforts to ensure that once released the defendants do not leave the judicial district.<sup>6</sup> The consul agreed that a representative would be present at the release of the defendants, and that the temporary address would be the office of the attorneys. In addition, the attorneys were to provide accommodation and to make it their responsibility that the defendants did not leave Brazil until the completion of the trial.<sup>7</sup>

Despite the Court's endorsement of the consul's written proposal, the Federal Attorneys' Office raised an objection to the appointment of the defendants' attorney as guarantors for the defendants' compliance.<sup>8</sup>

In 2003, the defendants were convicted and sentenced to eight and eleven years respectively for (a) child pornography, (b) involvement in the sexual abuse of twenty-four girls who were minors and (c) being owners of a company responsible for the distribution of pornographic pictures of their victims on the internet.<sup>9</sup>

After the conviction, it was presumed that the defendants would be taken into custody and transferred to prison. For this reason, a third request for *habeas corpus* was filed and granted on 15 December 2003, allowing the defendants to await the appeal in freedom under the condition that they report every 10 days to the Federal Police.<sup>10</sup>

Brazilian authorities had confiscated the defendants' passports as a precautionary measure and although expired, the passports would not be returned to the acting consul.<sup>11</sup> Nonetheless, the consul inquired as to the possibility of issuing passports in case the temporary detention is suspended. Confidential conversations indicated that the men wished to travel to the Netherlands.<sup>12</sup> The Dutch Directorate for Consular Affairs (DCA) argued that policy did not allow the issue of passports to temporarily-released detainees, and further that the issue of passports would lead to misunderstandings with Brazilian authorities. Moreover, the possibility of escape could not be disregarded.<sup>13</sup>

After multiple requests and an e-mail from the head of the legal department at DCA, the acting consul and the consul in Rio reached the decision to issue new passports to the defendants on 19 February 2004. Brazilian authorities had no knowledge of this. At the beginning of March, the defendants informed the consul in Rio of their arrival in the

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., p. 12.

<sup>9</sup> Handelingen 2007-2008. Nr.81 Tweede Kamer at 5746, 24 April 2008.

<sup>10</sup> Zunderd P.J. van, *op. cit.* p. 12.

<sup>11</sup> Ibid., p. 13.

<sup>12</sup> Ibid., pp. 13, 14.

<sup>13</sup> Ibid.

Netherlands after travelling via Paraguay.<sup>14</sup> In April 2008, the appeal was denied and sentences of 17 and 21 years respectively were imposed.<sup>15</sup>

The attempt to keep silent these facts, and the part played in this case by the Dutch government, is a straightforward example of how both victims of CST/CSEC and their rights were undermined, creating space for the defendants to walk away from their sentence in Brazil. Only one of the defendants was sentenced to 9 months of probation and 240 hours of community service in the Netherlands for his crimes in Brazil, as well as the possession and public distribution of child pornography.<sup>16</sup> Coming from a country that is a fervent advocate of children's rights, this was a mere token sentence, perhaps even offensive to the victims, and a slap in the face for children's rights activists. What happened in this case to the rights of the child and to the Netherlands' international treaty obligations aimed at protecting children's rights?

In support of the special safeguards and care enshrined in the 1924 Geneva Declaration of the Rights of the Child, as recognized in the 1948 Universal Declaration of Human Rights, the United Nations General Assembly acknowledged in 1959 that: "mankind owes the child the best it has to give".<sup>17</sup> The codification of what was interpreted and believed to be the 'best' took over thirty years before the United Nations Convention on the Rights of the Child (UNCRC) entered in to force in 1990. The intention was to achieve the goals outlined in the 1959 Declaration of the Rights of the Child through the UNCRC.

Following the entry into force of the UNCRC (the most successful human rights instrument in history)<sup>18</sup>, the first World Summit for Children acknowledged that the situation pertaining to the sexual exploitation of children (SEC) had become a predicament.<sup>19</sup> The latter provoked the United Nations Commission on Human Rights to take action by appointing a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.<sup>20</sup> In 1996, at the first World Congress against Commercial Sexual Exploitation of Children in Stockholm, CSEC was fully brought to the attention of the

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<sup>14</sup> Ibid., pp. 14, 15, 16.

<sup>15</sup> Ibid., p. 9.

<sup>16</sup> Ibid.

<sup>17</sup> UN General Assembly A/Res/ 1386 (XIV), *Declaration of the Rights of the Child*, 20 November 1959. Preamble to the Declaration of the Rights of the Child p. 19, available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/Res/1386%20\(XIV\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/Res/1386%20(XIV)) (Last visited 11, March 2014).

<sup>18</sup> The UNCRC is ratified by nearly all states with the exception of two states, Somalia and the United States of America. The status of the UNCRC is available at:

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (Last visited 29, December 2013. Kohm L.M. 'Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children'. 22 NYILR 57 (2009).

<sup>19</sup> McCoy A. 'Children "Playing Sex for Money" A Brief History of the World's Battle against the Commercial Sexual Exploitation of Children'. 18 N.Y.L. Sch J. Hum. Rts. 499 (2001-2002) p. 500.

<sup>20</sup> Res. 1990/68 available at: <http://www.ohchr.org/Documents/Issues/Children/SR/E-CN4-RES-1990-68.pdf> (Last visited 29, December 2013).

general public.<sup>21</sup> However, it is only recently that victims of CSEC have received the international community's full attention.

Despite the UNCRC and other conventions and treaties that protect children and their particular human rights, in practice States have not succeeded in protecting their children from CST and CSEC and in bringing culprits to justice. This is shown in the case in the Brazilian Child Pornography case: in a last attempt to bring the defendants to justice, the Dutch judges' decision merely amounted to community service and probation instead of a jail sentence for CSEC.

Child sex tourism (CST) is affiliated with sex tourism on the one hand, and on the other with the CSEC. The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) recognized three forms of CSEC: 1) child prostitution, 2) trafficking and sale of children across borders and within countries for sexual purposes, and 3) pornography.<sup>22</sup> Although not within the scope of this study, other forms of sexual exploitation of children may include (forced) child marriage which can be contractual, but not necessarily commercial, and young girls that are used as wives or sex slaves during armed conflicts. For a clear understanding of CST and CSEC, the terminology used in this paper is further explained in annex 1.

CST is a worldwide problem; it leaves no region unaffected and deprives young girls and boys of their childhood. CST and CSEC reach beyond national borders and are therefore identified as transnational crimes. Both CST and CSEC are strongly associated with human trafficking and other illicit acts such money-laundering, drug trafficking and organized begging. Moreover, it carries with it a variety of destructive effects such as HIV/AIDS. The next chapter discusses the notion of CST and CSEC.

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<sup>21</sup> First World Congress against CSEC available at: <http://www.csecworldcongress.org/en/index.htm> (Last visited 29, December 2013).

<sup>22</sup> ESCAP 'Commercial Sexual Exploitation and Sexual Abuse of Children' (1998) available at: <http://www.escap-hrd.org/csec2.htm> (Last visited 29, December 2013).

## The Notion of Child Sex Tourism (CST) and Commercial Sexual Exploitation of Children (CSEC)

***"They are sold by auction in brothels until the owner releases them to the street where they continue to prostitute themselves in order to survive".<sup>23</sup>***

***"Because of him I managed to escape because supposedly he says that he fell in love with me".<sup>24</sup>***

***"Rosario Baluyot, an 11 or 12 year old died in the Philippines, after Dr. Ritter from Australia forcibly inserted and broke an electric vibrator in her vagina. A nine-centimeter rusty screw was removed from her vagina after seven long months of pain and infection. The Philippine Supreme Court reversed Dr. Ritter his life sentence, where after he returned to Australia where he never faced charges".<sup>25</sup>***

***"Antonia Pinto describes what happened to an eleven-year-old girl when she refused to have sex with a miner: "After decapitating her with his machete, the miner drove in his speedboat, showing off her head to the other miners, who clapped and shouted their approval.""<sup>26</sup>***

Out of respect for the victims and because of the cruelties endured, the author tries to refrain from specific details throughout the paper. However, in order to communicate the gravity of CST and CSEC reference is made to the above to illustrate some experiences of victims of CSEC.

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<sup>23</sup> Jullien K. 'The Recent International Efforts to End Commercial Sexual Exploitation of Children'. 31 Den. J. Int'l L. & Pol'y 579 (2002-2003) p. 592.

<sup>24</sup> International Human Rights Law Institute (IHRLI) 'In Modern Bondage: Sex Trafficking in the Americas Central America, The Caribbean, and Brazil'. (2002) p. 3.

<sup>25</sup> Jullien K. (2002-2003) p. 594.

<sup>26</sup> Bales K. 'Disposable People: New Slavery in the Global Economy (2004) p. 5.

## Defining the Problem of CST and CSEC

In the 1980s matters related to child labor, and in particular child prostitution, were of minor concern on both the national and international levels. In the 1990s CSEC gained more public interest. This explains the recent global attention for CST and why many underlying sociological and criminological forces are not entirely understood.<sup>27</sup>

CST is a form of CSEC. The CST industry is extremely lucrative: this attracts drug traffickers to step across into this fastest-growing of criminal practices, namely human trafficking, specifically child trafficking.<sup>28</sup> CST and CSEC are inextricably linked to child trafficking. Child trafficking for sexual purposes is a form of CSEC. Generally human trafficking is not easily detected. It is less risky than drug trafficking and is far more profitable which explains why drug traffickers are increasingly switching to human/child trafficking.

Child sex tourists generally travel to poor and developing countries (receiving countries) with inadequate laws, no or weak enforcement mechanisms and high levels of corruption. They come in all sorts and from all walks of life. Office clerks, teachers, doctors, marines, lawyers, artists, bartenders, athletes, entrepreneurs amongst others. Men and women considered in their home countries to be decent people in their societies, choose to sexually exploit children in destinations where they can be anonymous and where the chances of getting caught are minimal. A special group is that of pedophiles often known and, in some countries, publicly registered as such. There are two kinds of child sex tourists. Those who engage in remunerated sexual activities with children when the opportunity arises (casual experiment), and child sex tourists who intentionally travel individually or as part of an organized tour to have sexual encounters with children.<sup>29</sup> Pedophile sex tourists most likely belong to the latter category. Although not tourists, and not necessarily within the scope of this paper, peacekeepers and military personnel have also been linked to CST and CSEC.<sup>30</sup>

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<sup>27</sup> Fredette K. 'International Legislative Efforts to Combat Child Sex Tourism: Evaluating the council of Europe Convention on Commercial Child Sexual Exploitation'. 32 B. C. Int'l &Comp. L. Rev. 1 (2009) p. 4.

<sup>28</sup> Ibid.

<sup>29</sup> Fredette K. (2009) p. 6.

<sup>30</sup> See Levin S.A. 'Sexual Exploitation of Refugee Children by UN Peacekeepers'. 19 N.Y.L. Sch. J. Hum. Rts. (2003) pp. 833-842. Jennings. K M. 'Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism'. International Peacekeeping 17:2 (2010) pp. 229-243. O'Brien M. 'Sexual Exploitation and Beyond: Using the Rome Statute of International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes'. International Criminal Law Review 11 (2011) pp. 803-827.

## Perpetrators

The perpetrators are both men and women from all walks of life. They are mostly based in the more developed countries, and travel from, for example, Europe, USA, Australia and wealthier Asian countries.<sup>31</sup> Pedophiles belong to a special group. Patrons can also be considered as perpetrators along with different colluders and conspirators in the industry.<sup>32</sup> The exact number of perpetrators is not known. In comparison with the quantity of victims, the actual cases of arrest are few. Most perpetrators simply get away without ever even being identified.

## Victims

On average, victims of CST and CSEC are boys and girls between 10-18 years old. It is becoming a trend to aim increasingly at children as young as 3 years old, as was the case of a prostituted Filipino girl.<sup>33</sup> Besides displaced children - survivors of (internal) armed conflicts or natural disasters - the background of the majority of children preyed upon by CST originate from underdeveloped or destabilized rural areas and impoverished families throughout Asia, Africa, the Americas and Eastern Europe.<sup>34</sup> There is also the group of runaway children or those that live on the streets that may easily be coerced into CST and CSEC.

The exact number of commercially sexually exploited children is not known, as it is illegal to prostitute children, but this number may well run into millions.<sup>35</sup> Government sources have a tendency to minimize the issue, in contrast to child advocacy organizations that are inclined to maximize the figures. In any event, an estimate by the United Nations Children's Fund (UNICEF) report asserts that over one million enter the industry each year.<sup>36</sup> Children who manage to escape from their patrons or perpetrators are often afraid to talk to the police out of fear that they will be arrested themselves, which makes it even more difficult to get exact numbers. Besides this, the police are often corrupt and

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<sup>31</sup> Svensson N.L. 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws'. 28 *Loy. L. A. Int'l & Comp. L. Rev.* 641 (2006) p. 643.

<sup>32</sup> Fredette K. (2009) pp. 5-8.

<sup>33</sup> Svensson N.L. (2006) p. 643.

<sup>34</sup> Fredette K. (2009) p. 4.

<sup>35</sup> Hodgson D. 'Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies'. 13 *Melb. U. L. Rev.* 512 (1993-1994) pp. 513, Berkman. E. T. 'Responses to the International Child sex Tourism Trade'. 19 *B.C. Int'l & Comp. L. Rev.* 397 (1996) p. 399, Svensson N.L. (2006) p. 644, Fredette K. (2009) p. 2.

<sup>36</sup> Beyer N. L. 'The Sex Tourism Industry Spreads to Costa Rica and Honduras: Are These Countries Doing Enough to Protect Their Children From Sexual Exploitation?' 29 *Ga. J. Int'l & Comp. L.* (2000-2001) p. 305.

they themselves sexually abuse and beat the children, subsequently returning them back to the brothels often visited by members of the police force as customers. In the worst case scenario some of the policemen themselves are involved in the trafficking and procurement of children for prostitution or they work as guards at child sex-establishments.<sup>37</sup>

## Who Benefits?

Regardless of the form (child prostitution, child pornography, CST or child trafficking) CSEC involve the participation of four parties: the perpetrator, the vendor (pimp), the facilitator (parent or recruiter) and the child.<sup>38</sup> In addition to the customer/perpetrator, others who (in) directly benefit from the CSEC include: those engaged in child pornography; corrupt law enforcement officials; tour operators; producers and publishers; and airlines and hotels offering packages.<sup>39</sup> Thus, it can be concluded that revenues from CSEC contribute significantly to the economy of receiving countries. This explains why governments often turn a blind eye to this massive form of children's and human rights violation.

## The Demand for CST and CSEC

What drives the consumer to have sex with vulnerable children? First, one must note that although there is a demand by sex tourists one must not ignore the local demand of men and women that often exploit the same children being exploited by tourists.

There are a number of factors, including the social demand for pornography on the internet, the immense promotion and marketing of women and children for sex tourism, as well as electronic mail-order brides spurring the transnational sex industry.<sup>40</sup> Adelman also argues that the demand for hyper-masculine behavior, in particular in the military, breeds a demand for illegal sex.

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<sup>37</sup> Hodgson D. (1993-1994) p. 518.

<sup>38</sup> Berkman E. T. 'Responses to the International Child sex Tourism Trade'. 19 B.C. Int'l & Comp. L. Rev. 397 (1996) pp. 398-403, Fredette K. (2009) p. 5, Hodgson D. (1993-1994) p. 516 and Beyer N. L. (2000-2001) p. 308.

<sup>39</sup> Hodgson D. (1993-1994) p. 516.

<sup>40</sup> Adelman M.R. 'International Sex Trafficking: Dismantling the Demand'. 13 S. Cal. Rev. L. L. & Women's Stud (2003-2004) p. 406.

According to Batstone, author of *Not for Sale*, the Southeast Asian CST industry is the leading one because of four powerful factors: 1) poverty, 2) armed conflicts, 3) rapid industrialization and 4) the exploding population growth.<sup>41</sup> It is logical that as sending countries tighten and amend their national legislation to combat child trafficking and commercial sexual exploitation, the chance to engage in sexual activities with minors at an even more profitable price, and with less chance of getting caught will increasingly send abusers abroad where law enforcement is weak. The causes behind the existence of CST and CSEC are discussed below.

## The Causes for CST and CSEC<sup>42</sup>

Understanding the reasons inherent to CST and CSEC is crucial to the development of adequate responses to fight and end CST and CSEC. These causes may range from poverty and weak law enforcement to gender discrimination.

### *Poverty*

Poverty is often a reason why parents surrender their children under the promise and assumption that they will enjoy an education or legal employment in the city. Some children are willingly sold into prostitution to finance the family household, debt, parents' addiction or desire to purchase luxurious items.<sup>43</sup> The desire for luxury and poverty are two extremes and neither justifies the sale of children into prostitution.

### *The Tourist Link*

Organized tourism makes it possible for people to travel more frequently to further destinations. This has resulted in an increase in tourist destinations and activities such as sex tourism. Sex tourists systematically and deliberately exploit women and children who are coerced into prostitution. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography along with others such as the United Nations Working Group on Contemporary Forms of Slavery recognized that there is a direct link between (mass) tourism and CSEC of boys and girls.<sup>44</sup>

### *Weak Law Enforcement*

Almost every country that has adopted the UNCRC has also adopted domestic legislation to deal with the problem of CST and CSEC. Not considering whether implemented

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<sup>41</sup> Cotter K. M. 'Combating Child Sex Tourism in Southeast Asia' 37 Den. J. Int'l L. & Pol'y (2008-2009) p. 495. Batstone D. 'Not For Sale: The Return of Global Slave Trade and How We Can Fight It. (2007).

<sup>42</sup> Hodgson D. (1993-1994) pp. 516-521, Beyer N.L (2000-2001) pp. 306-308.

<sup>43</sup> Adelman M.R. (2003-2004) p. 388. Beyer N. L. (2000-2001) p. 307.

<sup>44</sup> Hodgson D. (1993-1994) p. 517.



correctly or not, local officials are reluctant to adopt a zero-tolerance mentality by persecuting culprits and especially sex tourists. Even when caught in the act, the most aggressive form of sanction would be deportation and no further prosecution in the country of origin.<sup>45</sup> To some degree, rapid economic growth explains the lack of political will of local governments and why they act like ostriches in sand. In addition, low wages make law enforcement officials prone to bribes and other forms of corruption.<sup>46</sup> Last but not least victims often fear reprisal and therefore are unwilling to collaborate in police investigations.

### *Organized Crime and Pedophile Groups*

CSEC and CST are inextricable from the network of organized crime, the members of which are often the funders who create, maintain and promote CSEC and CST. They have a very influential position in the market, habitually employing recruitment agents who go into villages to recruit new girls to work in brothels, and/or pursue parents to allow their children to move to the city to study or work as a domestic help.<sup>47</sup> Sometimes parents receive some money in the form of a loan and the daughter is supposed to work in a brothel to pay that loan (debt bondage).<sup>48</sup> Even if the debt is paid in manifold, the girl must continue to work and sometimes never makes it back to her parents.

Furthermore, groups of pedophiles from, mainly Western, developed countries are especially attracted to the supply of young boys and girls.<sup>49</sup>

### *Erosion of Cultural Taboos*

Globalization and the increase of consumerism have caused cultural taboos to erode through media exposure to material and luxury goods. This is particularly the case in remote and rural areas. Recruitment agents visit villages and give gifts, money, and goods in exchange (under false pretenses) for children who wish to acquire employment in the city or attend school. This is a subtle way in which children are prostituted/fall into prostitution. As a result, the perception is created that child prostitution is normal within a community that was once conservative and detached from city life.<sup>50</sup> Prostitution is also perceived as a means of survival, and in some countries as a way to maintain a household.

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<sup>45</sup> Ibid., p.518.

<sup>46</sup> Hodgson D. (1993-1994) pp. 518, Beyer N.L (2000-2001) pp. 307.

<sup>47</sup> Hodgson D. (1993-1994) p. 519.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., p.520.

### *Fear of HIV/AIDS*

The fear of contracting HIV/AIDS motivates child sex tourists and pedophiles. It is believed that young children do not contract the disease easily. This is utterly false; in fact, the contrary is true. Precisely because young children are insufficiently physically-developed their tissue lining is thin causing rupture, which increases the chances of infection.<sup>51</sup> What is more, in certain Asian and African cultures it is believed that sex with young children increases longevity and that sex with virgins cures HIV/AIDS.<sup>52</sup>

### *Gender Discrimination*

In some Asian countries girls are at a disadvantage because the family prefers the boys to have an education over girls.<sup>53</sup> This decreases future education and job perspectives for the girls, which makes them prone to prostitution. In Latin America, for example, there is a culture of machismo. Girls are considered passive property and are expected to remain in the house to perform household duties.<sup>54</sup>

## **Effects and Ramifications of Sexual Exploitation**

The nature of the effects and ramifications of sexually exploited children are both psychological and physical. Perhaps what hurts most is not the bruises from beatings each time children are punished for disobeying their patrons or customers or for trying to flee, but the psychological ones that can last a lifetime and never heal.

Sexual exploitation kills the soul of children, destroying their self-image and ability to develop emotionally which results in a total loss of dignity and confidence in self and ability to retain close relationships.<sup>55</sup> The permanent psychological stress and trauma is as a result of constant anxiety from the demands of their customers, and pressure to service the required number of customers.<sup>56</sup> In addition, the children fear being arrested.

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<sup>51</sup> Ibid., p.519.

<sup>52</sup> Schwartz A. (2004) p. 385. Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>53</sup> Hodgson D. (1993-1994) p. 521.

<sup>54</sup> Beyer N. L. (2000-2001) p. 308.

<sup>55</sup> Robinson L.N. 'the Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child'. 5 Ind. J. Global Legal Studies 243 (1997-1998) p. 251.

<sup>56</sup> Beyer N. L. (2000-2001) p. 310.

Equally important is the fact that young children are not mentally mature enough to deal with the situation they are exposed to, which may cause complex post-traumatic stress disorder (CPTS). Judith Lewis Herman argues that periods of amnesia; blackout and transient disassociation episodes as a result of traumas endured as children are not uncommon.<sup>57</sup> Furthermore, Hodgson notes that ramifications include rejection by family and society which can lead to alcohol abuse, drug dependence, criminal activities and suicide.<sup>58</sup>

Children are forced to endure physical maltreatment. High levels of stress on the children's bodies due to prolonged exposure to sexual acts at the hand of sex tourists and pimps results in severe injuries. These vary from venereal infection, rectal fissures, torn vaginas, penetration of the anus or vagina with foreign objects, body mutilation, ruptured uteruses, chronic pelvic inflammatory disease, and, in the worst cases, infertility and sexually transmissible diseases (STDs) including HIV/AIDS.<sup>59</sup>

UNICEF states that the exposure of children to HIV/ AIDS is the most frightening consequence of child prostitution. Apart from a slow and agonizing premature death, these children suffer the double stigma of being child prostitutes and HIV-positive.<sup>60</sup> Moreover, the conditions in which these children are housed are not suitable: they are packed in very small, dark and humid rooms with no ventilation and often suffer from malnourishment, as their patrons or madams aim to make as much profit as possible by not feeding the children properly.<sup>61</sup>

The combination of all the effects and ramifications of CSEC as well as the loss of their childhood, a family life, opportunities for education, healthcare, humane treatment and protection by the government all amounts to a gross violation of children's rights as recognized in international human rights law.

Before discussing the legal responses to combat CST and CSEC in view of the large-scale violation of children's rights, the next section discusses the origins of CST and CSEC per region.

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<sup>57</sup>Robinson L. N. (1997-1998) p. 251, Beyer N. L. (2000-2001) p. 311.

<sup>58</sup> Hodgson D. (1993-1994) p. 521.

<sup>59</sup> Schwartz A. 'Sex Trafficking in Cambodia' 17 Colum. J. Asian L. p. 401 (2004), Beyer N. L. (2000-2001) p. 311, Robinson L. N. (1997-1998) p. 249, p. 401.

<sup>60</sup> Hodgson D. (1993-1994) p. 521.

<sup>61</sup> Beyer N. L. (2000-2001) p. 311.

## **Child Sex Tourism and Commercial Sexual Exploitation of Children from a Regional Perspective**

The child sex industry has grown, and continues to grow, rapidly affecting every region without showing any signs of abating. The general lack of adherence to moral and ethical principles, socio-economic compulsion, and the ongoing cultural marginalization in some communities contributes to both the loss of cultural values and staggering increase of CST and CSEC. The challenges of CST and CSEC are many and global. However the explanation and driving force behind the rise of CST and CSEC and the manner in which this phenomenon has emerged may differ. Therefore, it is necessary to elucidate the origin and development of CST and CSEC in Africa, the Americas, Asia and Europe.

### **The Origin of CST and CSEC in Asia**

The supply of and demand for CST and CSEC in Asia varies per country and is associated with the historical background and cultural traditions of different countries on the continent. However, it should be noted that this phenomenon is further facilitated by tourism, socio-economic and political factors/instabilities, armed conflicts, and natural/man-made disasters.<sup>62</sup> Unlike any other region, Asia experiences CST and CSEC as a plague: CST is at its most notorious in certain Asian locations.<sup>63</sup> CST and child trafficking for sexual purposes is highly present in every country in East Asia and the Pacific, and continues to flourish because of, for example, the ill-intended use of ICT (Information and Communication Technology).<sup>64</sup> Conditions to effortlessly approach and lure children into CSEC are created via online platforms.<sup>65</sup>

History reveals a high level of acceptance of prostitution throughout Asia, and in particular Southeast Asia, to the point that it has become “culturally imbedded” and consequently regarded as “a rite of passage”.<sup>66</sup> In addition, the outrageous demand for commercial sex is attributed to the influence of Western tourists who followed the path paved by foreign military personnel who once served in the area.<sup>67</sup> The Southeast Asian sex industry is, to a certain extent, an actual projection of the past (when women were

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<sup>62</sup> Schwartz A. pp. 380-382 (2004).

<sup>63</sup> Ibid., p. 380.

<sup>64</sup> ECPAT International Annual Report July 2009-June 2010. p. 12.

<sup>65</sup> Ibid.

<sup>66</sup> Schwartz A. (2004) p. 381.

<sup>67</sup> Ibid.

considered a commodity) and foreign Western influence was at its acme.<sup>68</sup> However, it was not until late in the second half of the 20<sup>th</sup> century that mass prostitution made its appearance, resulting in a wave of well-paid unmarried men who were attracted to the region.<sup>69</sup> The demand for the Asian sex industry can be ascribed to extensive human trafficking, industrialization, urbanization, foreign and local male and female migrant workers, military personnel and peacekeeping forces, tourists, and cultural factors such as superstitious beliefs, and the increasing demand for younger Asian girls.<sup>70</sup> Nevertheless the demand is predominately determined by local Southeast Asian men.<sup>71</sup> Thus, the origin of the crisis of CST and CSEC throughout (Southeast) Asia is found in an amalgamation of regional poverty, cultural traditional perception of women, and regional economic expansion.<sup>72</sup>

Poverty and the responsibility to provide for the family have forever been used as pretexts to lure, sell and send children into prostitution. Poverty versus survival should no longer be used as a socio-economic reason to justify the supply of CST and CSEC. It is common knowledge that Asia has some of the world's fastest growing economies. This implies that poverty and CSEC should be on the decrease as the capita per head is increasing. In theory the latter should result in '*no supply no demand*'. In other words given that the capita per head is on the rise, this should reflect an increase in purchasing power, which implies less poverty and therefore less children who are sent into prostitution to meet the demand. Thus the demand for CSEC should decline, as the supply of children for commercial sexual exploitation is expected to drop subsequent to the rising capita per head. In practice and contrary to positive economic developments, the gap between the rich metropolitan areas and poor countryside continues to widen.<sup>73</sup> In other words the child sex industry should diminish as a result of open markets and economic expansion, but the opposite is true as the child sex industry continues to flourish. This is partly because of the continuous increase in purchasing power and ill-intended use of modern technology. This combination partly enhances the demand, consequently forcing a higher supply of children for commercial sexual exploitation.

The sex industry is extremely lucrative which further explains the persistent increase and supply of CST and CSEC in Asia. Apart from those directly employed or involved in the sex industry, individuals and government institutions must not be disregarded, as they

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., pp. 381-385.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., p. 387.

<sup>73</sup> Ibid., p. 388.

indirectly benefit from CST and CSEC. Earnings are redistributed from the metropolitan to the countryside areas contributing to money-laundering and drawing in international crime groups as well as local corrupt government officials, who visit, sympathize or are often co-owners of sex establishments.<sup>74</sup> In addition, earnings from CST and CSEC constitute a legitimate source of income for the tourist industry (e.g. hoteliers, air carriers and tour operators) as a whole.<sup>75</sup> Prostitution is generally illegal in Asia; nevertheless some Southeast Asian governments (including many other developing countries) consider CST and CSEC as an industry that contributes to their national economic growth.<sup>76</sup> Therefore, these governments have an economic interest in sustaining the sex industry and will go as far as to ignore legislation conflicting with their economic objective.<sup>77</sup> The following section discusses how CST and CSEC have emerged in Asia.

### *The Emergence of CST and CSEC in Asia*

Young girls are generally recruited into the Asian child sex industry through trafficking when bonded by family or an acquaintance in exchange for cash. Girls are also coerced or abducted into prostitution whereas others '*voluntarily*' join the recruitment process after being deceived about work conditions, which are, in reality, akin to slavery.

Ever since prostitution was forbidden under the Khmer Rouge in the mid to late 1970's and, apart from a slight re-emergence in the 80's, the Cambodian sex industry experienced its biggest boom in the early 1990's during the presence of the United Nations Transitional Authority in Cambodia (UNTAC).<sup>78</sup> As a result of the actions of the Khmer Rouge, Cambodia became a socially disintegrated nation<sup>79</sup> with severe institutional problems including the total devastation of its judicial system. Enforcement is fundamental even if problematic because of the lack of qualified legal professionals, magistrates and law enforcement authorities coupled with widespread corruption in the judiciary, police and military forces.<sup>80</sup> Moreover, not having the legal capacity or the political will further encourages the government to turn a blind eye towards human trafficking for the sex industry, particularly to CST and CSEC as the Cambodian economy thrives on sex tourism. The fact that (child) prostitution is socially accepted in many parts of Asia encourages local indifference and lack of political determination. This leads

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<sup>74</sup> Ibid., p. 389.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., p. 390.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid., p. 406.

<sup>79</sup> Ibid., pp. 405-406.

<sup>80</sup> Ibid., pp. 408-409.

to higher levels of impunity especially in a society that is challenged and experiences weak law enforcement. The Thai and Cambodian sex industries thrive on both local and international demand boosted by Western influence, economic growth, bondage, poverty and historical culture and human trafficking.<sup>81</sup> Prospects indicate that the Cambodian sex tourism industry will advance to and compete on the Thai level in less than half the time it took Thailand, specifically as a consequence of the abusive use of modern communication technology.<sup>82</sup> The ill-intended use of ICT and modern communication technology contributes to a rise in sexually exploited children in the production of pornographic material.

Between 1993 and 2008, it was established that Burma served as a source country for the illicit trade and trafficking of girls and women to Thailand, where they are forced into CSEC.<sup>83</sup> Today the Burmese sex trafficking practices remain practically unchanged. Burma continues to play a major role in CSEC, and functions as a source country for the trafficking of children to Thailand, the People's Republic of China (PRC), Bangladesh, India, Pakistan, South Korea and Macau.<sup>84</sup> Apart from being a source country, Burma is also identified as a transit point for trafficked women and children from Bangladesh to Malaysia and from PRC to Thailand.<sup>85</sup>

India's sex industry mainly thrives on local demand: in other words, the economic incentive from global sex tourism is not a requirement.<sup>86</sup> India is regarded both as a destination where Bangladeshi and Nepali girls are prostituted and as a transit point to traffic Bangladeshi girls to Pakistan for sexual exploitation.<sup>87</sup> Furthermore, India is considered a country of origin for children trafficked to Asia, the Middle East, and the West.<sup>88</sup> As opposed to Thailand and Cambodia where the sex industry is based on the booming economy and sex tourism, trafficking for sexual purposes in, to, and through

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<sup>81</sup> Ibid., pp. 381-383.

<sup>82</sup> Ibid., p. 408.

<sup>83</sup> Human Rights Watch, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (1993) available at: <http://www.hrw.org/legacy/reports/1993/thailand/> (Last visited 29, December 2013). U.S. Department of State, 2008 trafficking in Persons Report p.79-80. Available at: <http://www.state.gov/documents/organization/105501.pdf> (29, December 2013).

<sup>84</sup> U.S. Department of State, 2008 trafficking in Persons Report p.79-80. Available at: <http://www.state.gov/documents/organization/105501.pdf> (Last visited 29, December 2013).

<sup>85</sup> Ibid.

<sup>86</sup> Human Rights Watch, *Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels*. Vol.12, No 5 (A) (1995). Available at: <http://www.hrw.org/legacy/reports/1995/India.htm> (Last visited 29, December 2013).

<sup>87</sup> Bureau of Democracy, Human Rights & Labor, U.S. Department of State, *Country Reports on Human Rights Practices: India* (2001) 4, March 2002. Available at: <http://www.state.gov/j/drl/rls/hrrpt/2001/sa/8230.htm> (Last visited 29, December 2013).

<sup>88</sup> Ibid.

India is controlled by organized crime rings.<sup>89</sup> In Thailand the sex industry is regarded as a means by which to contribute to the national economy. Slave/brothel owners are proud to provide jobs and only care about the return of their investment in brothels, the latter is perceived to be more stable than investing in the stock market.<sup>90</sup> CSEC is socially accepted in Northern Thailand and some parts in Burma.<sup>91</sup> What is more, parents consider sending their children into prostitution as an economic enterprise or family business especially in the event that a girl succeeds her mother or sister.<sup>92</sup>

Nepal experiences severe poverty despite the 1950 treaty which provides free passage and trade across the Indian and Nepalese borders. Nepal is both politically and economically dependent on this treaty even if it entails economic dependence on India.<sup>93</sup> Since there are no border controls the trafficking of and trade in young Nepali girls destined to work in Indian brothels continues to flourish on false pretences for promised jobs or marriage by recruiters,<sup>94</sup> family members, and neighbours. For example, the latter group sometimes tricks young girls to run some errands and then abduct them. The downside of this open border policy is that it makes it difficult for the border police to check illegal activities. So, the burden to anticipate and stop suspicious-looking travellers rests on each individual police officer, who often is poorly-trained or corrupt and receives bribes at the border.<sup>95</sup> Indian and Nepali government officials tolerate and participate in the rapidly increasing trade and exodus of Nepali girls destined for Indian brothels.<sup>96</sup> They do not have the political will to enforce international and domestic laws on either side of the border, and therefore are considered as abettors.<sup>97</sup> Nevertheless, there is a sense of apathy on both sides of the border to investigate and hold those responsible accountable. Fortunately, most Asian countries have passed legislation at the domestic level, but the problem is that it is being enforced insufficiently or not at all.

The enticement and trade in Nepali girls from the poor hill villages along the border has become a traditional and socially accepted source of income and plays an important role

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<sup>89</sup> Ibid.

<sup>90</sup> Bales K. (2004) p. 52.

<sup>91</sup> Schwartz A. (2004) p. 388.

<sup>92</sup> Ibid.

<sup>93</sup> Human Rights Watch, Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels. Vol. 12, No 5 (A) (1995). Available at <http://www.hrw.org/legacy/reports/1995/India.htm> (Last visited 29, December 2013).

<sup>94</sup> Recruiters may also include women who survived the system of debt bondage, who look for another girl to take their place and so fulfil the requirements of their owners.

<sup>95</sup> Human Rights Watch, Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels. Vol. 12, No 5 (A) (1995). Available at <http://www.hrw.org/legacy/reports/1995/India.htm> (Last visited 29, December 2013).

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.



in the Indian/Nepali sex industry.<sup>98</sup> However, in other parts of Nepal there is a rise in forced trafficking for commercial sexual purposes. In contrast to Nepal, the impact of globalization and modernization in Thailand and Cambodia has been decisive for CST and CSEC. However, Cambodian women choose to enter the commercial sex industry as they are responsible to provide an income for the family and see the sex industry as a quick way to earn more money in lesser time. In Southeast Asia, NGOs and awareness on CST and CSEC are generally embraced; this is not the case in Nepal. Families are also involved in the recruiting process and know the fate that awaits their daughters in India and so they denounce any intervention offered by NGOs to stop trafficking for CSEC purposes.

Thus it can be concluded that CST and CSEC in Asia (Southeast Asia) has emerged as a consequence of an amalgamation of tourism, socio-economic factors, political factors/instabilities, weak law enforcement, armed conflicts, regional poverty, cultural/tradition perceptions of women, cultural marginalization, regional economic expansion, human trafficking, industrialization, urbanization, migrant workers, military personnel and peacekeeping forces, and ill-intended use of modern technology, corruption and lack of political will.

## **The Origin of CST and CSEC in Africa**

The African continent is left in an economically and socially-fragile position, following decades of civil and political unrest, natural disasters, famine, poverty, and pandemics such as HIV/AIDS. It is unfortunate that on such a rich and diverse continent as Africa, families struggle to survive. This often results in the exposure of their children to CSEC and CST. Factors that contribute to CSEC in East and Southern Africa are comprised of economic injustice, rapid social change and urbanization, migration, civil unrest and family disintegration.<sup>99</sup> Materialist values and goods presented by the media and the westernization of African society contribute to the erosion of traditional community and cultural support systems.<sup>100</sup> The rapid development and use of ICT in Africa is a reason for concern as children connect with their peers and the world, facing exposure to persons who may harbor the intent to deceive them for sexual exploitation.<sup>101</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>100</sup> Ibid.

<sup>101</sup> ECPAT International Annual Report July 2009-June 2010. p. 8.

Incidents of CSEC regularly go unreported, hindering adequate data collection and further deferring the documentation of the exact scale of the crisis in East and Southern Africa.<sup>102</sup> As a result, the study of CSEC in Africa requires a comprehensive study of the problems related to sexual abuse and sexual exploitation in order to come to the 'core', namely commercial sexual exploitation.<sup>103</sup> The abundance of anecdotal evidence establishes that sexual abuse and sexual exploitation is present in homes, schools, community, workplace and brothels and often lead children to CSEC.<sup>104</sup> In East and Southern Africa, CSEC is predominately identified as a means of survival for street children, nevertheless poverty (sex in return for money, provisions, clothing or school fees) continues to dominate as the primary reason why children engage in CSEC.<sup>105</sup> Early in life, Malawian girls undergo traditional initiation practices into sexual activities with older men and may end up in a sex trade as a consequence of poverty.<sup>106</sup> Poverty is also recognized as one of the principal causes of why parents may sell their children farther afield as domestic servants and why those children end up being treated as slaves and sexually exploited. Such practices have also been reported in Benin and Gabon.<sup>107</sup> Together with poverty, the increase of CSEC is associated with consumerism and parents who trade their children and or peer pressure amongst children in order to finance consumer items.<sup>108</sup> Moreover, the lack of education and low social status of women, contradicting legislation, weak law enforcement, governance and civil disorder, demand, urbanization, changing demographics (younger population is increasing), family factors (e.g. single parent homes) are all factors that predispose CSEC.<sup>109</sup>

The HIV/AIDS pandemic requires special attention as it is associated with both causes and consequences of CSEC in Africa. There is a direct link to the high number of orphans as a consequence of HIV/AIDS. Most orphans find themselves forced to earn a living on the streets and are likely to enter in the child sex industry via CST and/or risk being

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<sup>102</sup> Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Gallinetti J. and Kassan D. Trafficking of Children in Africa: An Overview of Research International Obligations and Existing Legal Provisions'. (2008) p. 242.

<sup>108</sup> Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>109</sup> Ibid.

trafficked for sexual purposes within 2 to 3 years after the passing away of their parents.<sup>110</sup> Some African men share the conviction that sex with a young girl that is HIV/AIDS-free prevents them from contracting HIV/AIDS. This conviction coupled with the HIV/AIDS pandemic in e.g. Sub-Saharan Africa contributed to both a higher demand for young girls and increase of child marriages.<sup>111</sup> The significant increase of child marriages in Sub-Saharan Africa is related to both causes and consequences of the HIV/AIDS pandemic that are high in the region.<sup>112</sup>

Child marriage is a form of CSEC and is driven by poverty, cultural/traditional, religious practices, civil conflicts, family ties and debt bondage, and gender inequality. Child marriage is prohibited by law in Ghana, Ethiopia, Kenya, Sierra Leone and the Gambia.<sup>113</sup> Nevertheless, child marriages are common in Kenya among pastoral communities in the districts of Kajiado, Transmara, Moyale, Wajir, and Mandera.<sup>114</sup> Kenyan children are married off by their parents to older men in order to finance the education of their male siblings and other purposes.<sup>115</sup> Niger, Chad, Mali, Guinea and Mozambique are confronted with child marriages followed by high birth and death rates as a consequence of low levels of overall development pertaining to schooling, employment and health care.<sup>116</sup>

The African tourism industry is identified as a system that attracts foreign investments as well as foreign revenue to further Africa's economic development. Africa has been recognized as a 'Tourism Destination', with fairly good transportation services for instance connecting highways and new flights to and connecting within Africa.<sup>117</sup> Unfortunately, Africa's improved infrastructure not only provides new destinations for child sex tourists, it also encourages child traffickers to use these routes to facilitate their activities as well as those routes through some of the continent's porous borders.<sup>118</sup>

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<sup>110</sup> Sakulpitakphon P. 'African Tourism Development and the Commercial Sexual Exploitation of Children' In: ECPAT International, *Confronting the Commercial Sexual Exploitation of Children in Africa*. (2007) p. 5.

<sup>111</sup> Ibid., pp. 23-24. Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>112</sup> Lebbie H. 'Child Marriage as a form of Commercial Sexual Exploitation of Children in Africa'. In: ECPAT International, *Confronting the Commercial Sexual Exploitation of Children in Africa*. (2007) p. 24.

<sup>113</sup> Ibid., p. 21.

<sup>114</sup> Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

<sup>115</sup> Ibid.

<sup>116</sup> Lebbie H. (2007) p. 21.

<sup>117</sup> Sakulpitakphon P (2007). p. 9.

<sup>118</sup> Insight I. 'Trafficking in Human Beings, Especially Women and Children, in Africa' UNICEF 2<sup>nd</sup> ed. (2005) p. 13. Martens, J., Pieczkowski, M., and Van Vuuren-Smythe, B, 'Trafficking in Women and Children for Sexual

Border patrols and checkpoints on some routes are more effective than others. This entails that law enforcement officials may be corrupted by criminal groups and, for example, show favoritism towards certain known individuals at checkpoints or fail to conduct a passport check.<sup>119</sup> Moreover, criminal groups may gain control of a particular entry point into a country and that route may then become a 'highway' for traffickers.<sup>120</sup> So, it is easier for traffickers and child sex tourists to find their way in and out of Africa. Consequently, some of these countries have emerged as CST destinations. It should be noted however, that the magnitude of the CST in Africa remains unclear because of limited documentation and thus no access to actual numbers.

South Africa provides an example of how greater openness to the world can engender unintended consequences in the realm of CSEC. After the end of apartheid, South Africa's new democratic and non-racial constitution enhanced South Africa's international relations. However by attracting international tourism, CST became a fact of life in a country that was still dealing with the fresh scars caused during the years of apartheid. Before long the phenomena of CST and CSEC emerged as a social problem affecting South Africa: the trafficking of children into and via South Africa for sexual exploitation purposes had begun.<sup>121</sup> Migrants and refugees from Southeast Asia and other African countries cross into South Africa and become prey for trafficking to, within, and out of South Africa. Contrary to a country like Nigeria, South Africa serves as a destination for CST, both a source and transit country, which increases the magnitude of the problem of CST/CSEC, and trafficking for commercial sexual purposes. South Africa's importance as a source/transit country is of immense value to regions such as Europe and the Americas. The South African government has pledged to finalize the bill on anti-human trafficking providing special provision in regard to children.<sup>122</sup> The next section discusses some developments concerning African CST and CSEC with particular attention placed on trafficking for commercial sexual exploitation purposes within and out of South Africa.

### *The Emergence of CST and CSEC in Africa*

Studies conducted by the Ghanaian NGO Coalition on the Rights of the Child indicate that child sex tourists are aware of the lack of child protection mechanisms and weak law enforcement. This encourages sex tourists to target vulnerable children, especially

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Exploitation in Southern Africa (International Organization for Migration) (2003) p. 16. Sakulpitakphon P. (2007) p. 9.

<sup>119</sup> Insight I. (2005) p. 13.

<sup>120</sup> Ibid.

<sup>121</sup> Vrancken P. and Chetty K. 'International Child Sex Tourism: A South African Perspective'. Journal of African Law, 53, 1. p. 114 (2009).

<sup>122</sup> ECPAT International Annual Report July 2010 - June 2011 p. 34.

boys.<sup>123</sup> In 2006 Asian child sex tourists frequented Benin, Ghana, Kenya and Sierra Leone according to ECPAT (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) member groups who study and share information on CSEC patterns.<sup>124</sup>

Gambia attracts both male and female sex tourists who want to have sexual activities with young Gambian men. Minors in the beaches and other tourist areas offer to be friends or personal guides and engage in commercial sex or act as pimps.<sup>125</sup> European and African nationals travel to the Kenyan coast, where it is believed that about 75 percent of the members in the tourism industry, government staff, NGOs, parents, student, community leaders and faith-based organizations regard the practice of CST as 'socially accepted'.<sup>126</sup> The demand for child sex workers reaches its highest peak during the low season and is driven by local Kenyan men.<sup>127</sup>

ECPAT International's observations classify Benin, Cameroon, Cote d'Ivoire, Ghana, Kenya, Madagascar, Mauritius, Morocco, Nigeria, Senegal, South Africa, The Gambia, and Tanzania as the most affected by the CST.<sup>128</sup> Nevertheless, Nigeria is rather a source of child sex tourists in other African countries than destination for CST.<sup>129</sup> Research on trafficking for CSEC purposes in Nigeria illustrates that child victims are habitually coerced and made to swear a secrecy oath in front of '*juju priests*'.<sup>130</sup> The child victims believe that a breach of this oath will result in the forfeiture of their protection from contracting HIV/AIDS and will instead lead to detention by immigration authorities, death or madness.<sup>131</sup> Apart from Nigeria, the majority of trafficked persons originate from West Africa: Benin, Ghana, and Morocco are identified as countries of origin.<sup>132</sup>

Over the years Africa has invested to improve its infrastructure. Due to its direct flights and shipping routes, South Africa is classified as a transit point for trafficking operations between Europe, United States and Canada and the rest of the developed world.<sup>133</sup> Up to

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<sup>123</sup> Ghana NGO Coalition on the Rights of the Child: Commercial Sexual Exploitation of Children in Tourism and Its Implications for the HIV/AIDS Pandemic in Ghana – the boy-child in focus (June 2006).

<sup>124</sup> Sakulpitakphon P. (2007) p. 9.

<sup>125</sup> Ibid., p. 7.

<sup>126</sup> Ibid., p. 7. Jones C.S. 'Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast' (A study conducted by UNICEF and Government of Kenya) (2006) pp. 25, 34-35.

<sup>127</sup> Sakulpitakphon P. (2007) p. 7.

<sup>128</sup> Ibid., p. 6.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid., p. 7.

<sup>131</sup> Ibid.

<sup>132</sup> 'Trafficking in Persons: Global Patterns', United Nations Office on Drugs and Crime (UNDOC) (2006) p. 87.

<sup>133</sup> Martens, J., Pieczkowski, M., and Van Vuuren-Smythe, B, 'Trafficking in Women and Children for Sexual Exploitation in Southern Africa (International Organization for Migration) (2003) p. 79.

2003, nine different operations had been identified.<sup>134</sup> Cross-border trafficking is common; women and girls from Mozambique are trafficked to Gauteng and KwaZulu-Natal.<sup>135</sup> Malawian women and girls are trafficked overland to South Africa.<sup>136</sup> In addition both Malawian girls and boys are trafficked to Northern Europe.<sup>137</sup> Within South Africa children are also trafficked from the Kingdom of Lesotho (landlocked by Republic of South Africa) to towns in eastern Free State of South Africa.<sup>138</sup>

Furthermore, the cross-border trafficking of children and women in South Africa also includes (Southeast) Asians.<sup>139</sup> Eager to learn English or work in a Chinese-owned business or fishing vessel, Chinese and Taiwanese youngsters pay their way out, to be trafficked to South Africa.<sup>140</sup> Some do get the opportunity to enrol and learn English; however towards the end of the course they are forced to work in the sex industry where some end up being transferred to Europe or the USA.<sup>141</sup> Eastern Europeans are trafficked by mainly Russian and Bulgarian criminal organizations on falsified South African visas under false prospects of jobs as waiters, dancers and hostesses.<sup>142</sup> The truth is that these women have to work in the sex business while on the road to South Africa, which they do fearing that the mafia will hurt their families back home.<sup>143</sup>

In view of the taboos involving sexual exploitation of children in North Africa, little is documented on the trafficking of children for sexual purposes. Observations in Algeria corroborate the existence of some trafficking of young girls to Europe and particularly Italy where the girls are forced into marriage with North Africans.<sup>144</sup> UNICEF confirms that poor young Egyptian girls are trafficked to marry rich men in the Gulf States and Arab States.<sup>145</sup>

Human trafficking is relatively well documented in West Africa, Southeast Asia and Eastern Europe. Nevertheless limited information is known on trafficking of children for sexual exploitation in Central and East Africa.<sup>146</sup> Much more is known about the different

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid., pp.4, 21-29, 79. The Lesotho Government Portal. Available at: <http://www.gov.ls/about/default.php> (Last visited 13, February 2014).

<sup>139</sup> Ibid., pp. 60-74.

<sup>140</sup> Ibid., p. 5.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid., p. 6.

<sup>143</sup> Ibid.

<sup>144</sup> ECPAT International. 'Looking Back: Thinking Forward'. p.11 (2000).

<sup>145</sup> Ibid., p. 11.

<sup>146</sup> Gallinetti J. and Kassan D. (2008) p.241.

forms, causes and ramifications of sexual exploitation than on the actual trafficking of children for the purpose of sexual exploitation in Central and East Africa. Followed by East Africa and Central Africa, Western Africa is reported in the Trafficking Database by 39 of the 113 sources as the major point and origin of reported human trafficking in Africa.<sup>147</sup> South Africa, however is reported by 13 sources as a destination, while North Africa is identified as both an origin and a transit region for trafficking in persons by 18 sources.<sup>148</sup> The aforementioned reports on the African sub-regions encompass human trafficking in the broadest sense. According to the United Nations Office on Drugs and Crime (UNODC), the sources reporting the trafficking of African boys and girls are respectively 3 and 18 out of 39.<sup>149</sup> In its report, the UNODC reveals that human trafficking in Africa is associated by 27 sources with sexual exploitation and by 14 sources with forced labor.<sup>150</sup> The report does not analyse by sub-region or by the profile of the victims of human trafficking for the purpose of sexual exploitation in Africa. In other words, the data and sources are in relation to trafficking in persons in Africa instead of a specific sub-region (e.g. Central and East Africa), and does not distinguish between children and adults as the victims of human trafficking for the purpose of sexual exploitation. So, we conclude, with Gallinetti and Kassan, that the information on trafficking of children for sexual exploitation in Central and East Africa is limited. In contrast to sexual exploitation, the UNODC report underlines that both trafficking in children and forced labor are more frequently reported in Central African countries than the rest of Africa.<sup>151</sup> It is noted that the trafficking trend in Central Africa predominantly involves trafficking for cheap child labor instead of sexual purposes.

Apart from domestic labor and organized begging, studies indicate that in West Africa and in particular Senegal women and children are trafficked for purposes of prostitution and sex tourism.<sup>152</sup> Of all African countries, Senegal is the only African nation to have legalized and regulated prostitution by law, however a number of prostitution-related activities (soliciting, aiding and abetting the practice of prostitution, living off profits, acting as an intermediary, and impeding efforts to control, assist and re-educate persons vulnerable to prostitution) are prohibited.<sup>153</sup> Could these exceptions explain the reason why children are trafficked for CSEC? Factors that may have increased trafficking in the

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<sup>147</sup> 'Trafficking in Persons: Global Patterns', United Nations Office on Drugs and Crime (UNODC) (2006) p. 85.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*, p. 68.

<sup>151</sup> *Ibid.*

<sup>152</sup> Moens B, Zeitlin V, Bob C, and Gaye R. 'Study on the Practice of Trafficking in Persons in Senegal' (2004) p. vii.

<sup>153</sup> Mgbako. C and Smith. L. A. 'Sex Work and Human Rights In Africa', 33 *Fordham Int'l L.J.* p. 1185 note 53 (2009-2010).

region can be attributed to: perspectives for a better life; increasing commercial sexual exploitation; high profits; and the low risk of arrest and prosecution of African traffickers.<sup>154</sup>

## The Origin of CST and CSEC in the Americas

Children from all over the world are trafficked to the United States of America (USA) and Canada for CSEC. On the other hand, some Americans and Canadians travel the world to sexually exploit children.<sup>155</sup> Nevertheless and despite all the attention given to CST and CSEC on the international level, it is revealing to learn that CSEC has never been studied before in the North American Free Trade Association (NAFTA) region (USA, Canada and Mexico) until 2001.<sup>156</sup> Mexico, a destination country functions as a source and transit country to the USA for the most part. The phenomenon of CST originates from the Vietnam War and the high demand among US military personnel in Asia for prostitution services. There is no doubt that the promotion of economic globalization, internationalization, and free trade helped fuel the rise of CSEC.

Contributing factors to CSEC in the USA range from: "1) *macro/contextual factors*, i.e. external broad-based social processes that exist in the larger environment over which individuals can exercise only minimal control but which, nonetheless, exert a powerful influence on their lives; 2) *micro/situational factors*, i.e., external processes and events that impact individuals directly and over which they can exert some measure of control; and 3) *individual/internal factors*, i.e., cognitive and psychogenic forces that influence a person's sense of mastery over her/his own personal environment and future".<sup>157</sup>

Children at risk include those that have been previously sexually exploited and live in their own homes, those that do not live in their own homes (children who have run away from home or juvenile institutions, abandoned children, and homeless children), female gang members, transgender street youth, and children who travel abroad and children who (are coerced) to travel to the USA for sexual purposes, and children exposed to online sexual victimization.<sup>158</sup> However, children that have not been sexually exploited

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<sup>154</sup> Fitzgibbon K. 'Modern-Day Slavery? The Scope of Trafficking in Persons in Africa', *African Security Review* 12(1) (2003) p. 83-86.

<sup>155</sup> Svensson N.L. (2006) p. 649. ECPAT the Netherlands, 'Offenders Beware! Child Sex Tourism Case Studies' (2009) p. 5,7.

<sup>156</sup> Estes R. and Weiner N. A. 'The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico'. Executive Summary (Of the U.S. National Study) revised 2/0/2002. p. 1.

<sup>157</sup> *Ibid.*, p. 6.

<sup>158</sup> *Ibid.*, pp. 11-14 (See charts).



are also at risk and easily lured especially because of the high use of, even dependency on, ICT in this part of the world.

As in other regions CSEC is often organized and maintained by organized criminal groups. These syndicates operate both within and outside the USA, or along its borders, predominately its southern border with Mexico. The trafficking of children includes both US citizens who are trafficked as part of a national criminal sex organization and foreign children who are trafficked from around the world for CSEC.<sup>159</sup> The main group of US citizens that are trafficked for CSEC comprises Native American Indian girls. The sexual exploitation of Native American Indians can be traced to the colonial times and up into to the 20<sup>th</sup> century by state actors, suffering sexual violence and exploitation at a higher rate than any other ethnic group.<sup>160</sup> As of the 1970s, this indigenous group had become vulnerable to private sexual exploiters and are now trafficked to Alaska, Washington, Oregon, Minnesota, and South Dakota.<sup>161</sup> Today's traffickers work in association with gangs and drugs trafficking on tribal land. However the exact data on trafficking is difficult to acquire as the facts keep changing.<sup>162</sup>

The U.S.-Mexican border is notorious for both drugs and human trafficking. Young Mexican girls dream of a better life in the US and voluntarily take their chances to cross the desert. Nowadays, with the war on drugs going on, criminal gangs traffic girls across the border for CSEC purposes.<sup>163</sup> The myth of good job prospects is still alive. In reality, these girls are sexually exploited until they pay the costs of the journey. More and more, the southern border is used to smuggle Russian and Eastern European girls into the USA.<sup>164</sup> They initially arrive in Mexico as tourists and then continue north. Thus Mexico is both a country of origin as well as a transit point.

Unlike the USA, Mexico is also a destination country for CST. Indeed, the Mexican border has developed into a centre for CST. American pedophiles travel to the South by the

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<sup>159</sup> Ibid., p. 17.

<sup>160</sup> Johnson A. L. 'A Perfect Storm: The U.S. Anti-trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls'. Columbia Human Rights Law Review Vol. 43, No 2 (2012) p. 619.

<sup>161</sup> Ibid., pp. 619-620.

<sup>162</sup> Ibid., pp. 622-623.

<sup>163</sup> Walters J., 'Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border'. In: Journal of Applied Research on Children: Informing Policy for Children at Risk, Vol.2, Issue 1 Human Trafficking Article 6 (2011) pp. 3,4,10.

<sup>164</sup> 'Trafficking in Persons: Global Patterns', United Nations Office on Drugs and Crime (UNDOC) (2006) p. 95, 99.

thousands to gratify their sexual fantasies with minors at a cheap rate, setting a trend that is followed by other Western countries.<sup>165</sup>

The Mexican government has committed to developing mechanisms to combat human-trafficking and CST. However, in contrast to the attention and resources that are reserved to combat drug and organised crime, there is a lack of resources and political attention for CSEC.<sup>166</sup> The involvement of criminal groups in CSEC and CST makes it difficult to collect accurate figures on the magnitude of the problem.<sup>167</sup> Despite this, it can be observed that CST in the US-Mexican border area is on the decline.<sup>168</sup> This can be ascribed to the on-going war on drugs in this area. Although violence has intensified there are no signs of diminution in the trafficking of girls into the USA. The actual decrease of CST in the border area may imply that the problem of CST manifests itself in other Mexican cities.

Moving away from the border into Mexican cities, tens of thousands of girls and boys prostitute themselves, serving the tourist industry to 'survive' or support their families.<sup>169</sup> The use of the internet as a fast, easy and anonymous channel of communication, has contributed to the recent rise of CST in Mexico compared to other global regions where the roots of CSEC and CST are established in communities.<sup>170</sup> However, as in Africa and Asia, some Mexican parents do sell their children into prostitution.<sup>171</sup> In Mexico the fate of trafficked children is the opposite of that of those in Asia, for they are not excommunicated from their community or stigmatised. In Mexico, children often continue living with their families despite being trafficked as they remain in the commercial sex scene and contribute to the household.

Studies reveal that 80 percent of children up to 9 years and 95 percent of children between 10 and 18 years from Latin America and the Caribbean have regular access to

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<sup>165</sup> Walters J., 'Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border'. In: Journal of Applied Research on Children: Informing Policy for Children at Risk, Vol.2, Issue 1 Human Trafficking Article 6 (2011) p. 9.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid., p. 10.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid., p. 11.

<sup>171</sup> Adelman M. R. (2003-2004) p. 388. Schwartz A. (2004) p. 388. Analysis of the Situation of Sexual Exploitation of Children in the Eastern and Southern Africa Region: The Vicious Cycle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violations of Children's Human Rights' (2001). Available at: [http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#\\_Toc527979962](http://www.unicef.org/events/yokohama/csec-east-southern-africa-draft.html#_Toc527979962) (Last visited 10, February 2014).

ICT.<sup>172</sup> Although an opportunity for education and leisure, the internet is also a window for those who seek to contact and sexually exploit children through online platforms.<sup>173</sup>

Despite the new threat from ICT, CSEC itself is not new in Central America and the Caribbean.<sup>174</sup> In some countries in Central and South America, CSEC is a longstanding practice which has been historically and culturally-imbedded for centuries.<sup>175</sup> Following the prohibition of sexual exploitation of children, CSEC is kept 'hidden', but remains a deep-seated social acceptance.<sup>176</sup> Perhaps the latter explains why some people originating from this region, whether highly-educated or not, would react fiercely to any suggestion that CSEC and CST have become socially accepted. The social tolerance of CSEC is attributable to the scale of the problem of CST and CSEC. The victim may fear conviction by the community and believe that there is no alternative. Sadly, some perpetrators believe that they are actually helping their victims with their social-economic problems by sexually exploiting them.

The high level of violence and machismo in the region are contributing factors that are characteristic of Central and South America. Armed conflicts,<sup>177</sup> guerrilla and drug-related movements during the last 20 to 30 years of the past century have affected the region's economy and capacity to develop, causing economic stagnation which is reflected in families throughout the community. Secondary effects of this history of violence lead to poverty and inequality in the economic status of families.<sup>178</sup> Subsequently, increased marginalization, discrimination and exclusion contribute towards how children are perceived in the social and cultural scene.<sup>179</sup> This has consequences for how children, especially girls, perceive themselves and their future prospects in a male-controlled society where men are considered the head of the family and decision-maker and women are supposed to stay at home to care for the children and tend to the household.

Issues such as class, ethnicity, age, gender discrimination, single parent homes, emotional abandonment, neglect, generational conflicts, poverty, and physical violence produce runaway children that are likely to end in CST or CSEC. Some girls and boys are influenced by older friends who have experiences with prostitution.

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<sup>172</sup> Bringué Sala X. 'Generaciones Interactivas en Iberoamérica: Niños y Adolescentes frente a las Pantallas'. Fundación Telefónica. (2008) p. 90. ECPAT International Annual Report July 2009- June 2010 p. 10.

<sup>173</sup> ECPAT International Annual Report July 2009- June 2010 p. 10.

<sup>174</sup> International Human Rights Law Institute (IHRLI) 'In Modern Bondage: Sex Trafficking in the Americas Central America, The Caribbean, and Brazil'. 2<sup>nd</sup> edition (2005) p. 1.

<sup>175</sup> Villareal M. E. 'Children Sexual Exploited in Central America' p. 2.

<sup>176</sup> Villareal p. 5.

<sup>177</sup> Ibid., p. 2.

<sup>178</sup> Ibid., p. 3.

<sup>179</sup> Ibid.

National legislation (often weak) and international conventions adopted by many countries do not protect children from sexual exploitation. Costa Rica is considered a good example. Its legislation has been improved to criminalize adequately CSEC. The Costa Rican law aims to close loopholes that previously resulted in sex offenders avoiding prosecution (for example, women can now also be charged with rape).<sup>180</sup> Corrupt policemen, customs officers, judges, and government officials are hampering the prosecution and protection of children from CST and CSEC thereby encouraging impunity.<sup>181</sup> The lack of political commitment, institutional mechanisms, extra-territorial legislation, and agreements between States all exacerbate the problem.

CST and CSEC are linked with the trafficking of children for sexual purposes. Trafficking happens on a large-scale and numbers are not known but the problem is visible because of international attention. Most countries in the region have criminalized international sex trafficking except for El Salvador.<sup>182</sup> Trafficking in Central America and the Caribbean happens at the domestic, regional, inter-regional and international levels.<sup>183</sup> Belize imports women and children from Guatemala, Honduras, El Salvador, and Nicaragua.<sup>184</sup> Minors from Colombia and the Dominican Republic are trafficked to Costa Rica, where the presence of Thai and Eastern European minors has also been reported.<sup>185</sup> Costa Rican minors are trafficked internally to tourist hot spots.<sup>186</sup> Internal trafficking of Dominican girls from rural areas to tourist areas and of Haitian girls along the border have been documented.<sup>187</sup> From the Dominican Republic trafficking reaches from nearby St. Martin and Curaçao as far as Argentina and Europe.<sup>188</sup> The trafficking routes are extensive: family and friends are often part of the trafficking network.

### *The Emergence of CST and CSEC in the Americas*

Many would argue that CST and CSEC are common and happen everywhere but not on the exotic Caribbean paradise-like islands. Despite widespread international research on child sexual abuse, few empirical studies have been carried out in the Caribbean and there are no reliable statistics on the prevalence of child sexual abuse, or indeed on

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<sup>180</sup> Beyer N. L. 'The Sex Tourism Industry Spreads to Costa Rica and Honduras: Are these Countries Doing Enough to Protect Their Children From Sexual Exploitation?' 29 Ga. J. Int'l & Comp. L. 301 (2000-2001) pp. 314-316.

<sup>181</sup> Beyer N. L. (2000-2001) p. 318.

<sup>182</sup> International Human Rights Law Institute (IHRLI) 'In Modern Bondage: Sex Trafficking in the Americas Central America, The Caribbean, and Brazil'. 2<sup>nd</sup> edition (2005) p. 2.

<sup>183</sup> Ibid., p. 6.

<sup>184</sup> Ibid., p. 3.

<sup>185</sup> Ibid., p. 3.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid. The island of Hispaniola contains the sovereign nations of Dominican Republic and Haiti.

<sup>188</sup> Ibid.

attitudes and perceptions of abuse across the region.<sup>189</sup> This undoubtedly contributes to and, to some extent, explains the skepticism and sense of denial regarding CST and CSEC in the Caribbean. It may not be as visible as in Asia or on such a large-scale but it is happening. The Caribbean is a favorite tourist destination. In the 17<sup>th</sup> Century the Caribbean was associated with products such as sugar and human trafficking for forced labor. The League of Nations conducted a three year investigation of trafficking around the world and concluded that "Latin America is the traffic market of the world".<sup>190</sup> Today the Caribbean and Latin America still serve as a transit route and a source of origin for human trafficking for sexual exploitation. Jones and Trotman Jemmott note that "in common with many countries of the world, the commercial sexual exploitation of children in the Caribbean is a persistent and growing problem."<sup>191</sup> Like in other parts of the world, CST and CSEC found their way to the former colonies in the Caribbean (Commonwealth countries).<sup>192</sup> In part 3 we elaborated on the causes for CST and CSEC. Negative social and economic characteristics in the Caribbean are generally linked back to CSEC. So, while many Caribbean governments may still struggle to acknowledge and face the harsh reality of child sexual abuse, including CSEC, exploiters take advantage of the situation to maintain and expand their already considerable networking resources and technical capabilities.<sup>193</sup>

The upcoming Free Movement of Skilled Nationals within the Caribbean Community and Common Market (CARICOM) may well result in an increase of human trafficking according to Fernando Garcia- Robles of the Organization of American States (OAS).<sup>194</sup> The Caribbean is vulnerable to high migration levels, porous borders and dependence on tourism.<sup>195</sup> Jamaica for instance is a country that is well visited by Americans, Canadians and Europeans who, next to their all-inclusive holiday in an adult-only resort, mingle not only for cultural but also sexual experiences with the local people.

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<sup>189</sup> Jones A. D. & Trotman Jemmott E, 'Child Sexual Abuse in the Eastern Caribbean' p. 6 (2009) Available at: [http://www.unicef.org/infobycountry/files/Child\\_Sexual\\_Abuse\\_in\\_the\\_Eastern\\_Caribbean\\_Final\\_9\\_Nov.pdf](http://www.unicef.org/infobycountry/files/Child_Sexual_Abuse_in_the_Eastern_Caribbean_Final_9_Nov.pdf) (Last visited 28 November 2013).

<sup>190</sup> Wilson Harris H. 'Human Merchandise: A Study of International Traffic in Women' (1928) p. 187. International Human Rights Law Institute (IHRLI) 'In Modern Bondage: Sex Trafficking in the Americas Central America, The Caribbean, and Brazil'. 2<sup>nd</sup> edition (2005) p. 6. Wilson Harris H. ' Human Merchandise: A Study of International Traffic in Women' (1928) p. 187

<sup>191</sup> Jones A. D. & Trotman Jemmott E (2009) p. 25.

<sup>192</sup> 'Trafficking in Persons: With Special reference to the Commercial Sexual Exploitation and Abuse of Women and Children' A paper by the Commonwealth Secretariat. 1999 Meeting of Commonwealth Law Ministers and Senior Officials LMM 99(28) p. 163.

<sup>193</sup> Jones A. D. & Trotman Jemmott E (2009) p. 25.

<sup>194</sup> Alleyne O. 'Sex Tourism Growing in Favoured Destinations in Caribbean'. Available at: <http://www.stabroeknews.com/2010/archives/10/15/sex-tourism-growing-in-favoured-destinations-in-caribbean/> (Last visited 28, November 2013).

<sup>195</sup> 'Antigua & Barbuda Ready to Crack Down on Human Trafficking, Sex Tourism' Source: Caribbean News Digital 04-02-2011 Available at: <http://www.caribbeannewsdigital.com/en/noticia/antigua-barbuda-ready-crack-down-human-trafficking-sex-tourism> (Last visited 29, December 2013).

It is reported that more and more boys are becoming victims of CSEC in Guatemala. They have no services available to which they can turn for help; the exploitation is taking place in the red light area, school, public parks and gay bars.<sup>196</sup> Medellin and the Caribbean coast are becoming popular CST destinations for CST tourists from the USA, Europe and South America. The Medellin mayor attributes the increase of child sex tourists to the internationalization of Colombia's second largest city. The State Department however holds that there is a lack of effective prosecution of child sex tourists.<sup>197</sup>

With the upcoming FIFA World Cup in 2014 and the 2016 Summer Olympics in mind Brazil needs to brace itself for two back-to-back major world events. These events are on the calendar of sports enthusiasts all over the world who will be traveling to experience these sport events. It is arguable that there will be some individuals who travel for sports and Brazilian culture, but also for the [female] beauty Brazilians have a popular reputation for. Unfortunately, it is inevitable that some minors will become prey to revelers. What measures have the Brazilian authorities put in place to protect its boys and girls from CSEC and CST during these massive events?

Natural disasters can also be a factor that lead to CSEC and even raise CSEC figures. This was the case in Honduras in 1998 after hurricane Mitch had smashed several countries in Latin America. Many children had no alternative but to live on the streets after Mitch: they would sleep in abandoned building parks under bridges or doorways in an effort to survive. To help their families they would go further than begging, selling small items, shining shoes or washing cars and they would sell their bodies.<sup>198</sup> The latter is an example of the fact that is not always justified to believe that the culture or society has accepted child prostitution as a way of life. Natural disasters can be deviant catalysts for perversity. Nevertheless, these children have a right to be children and not be sexually exploited because of the dire situation they find themselves in.

## The Origin of CST and CSEC in Europe

Like in Southeast Asia and South Asia, economic and political problems contribute to sex trafficking and child sex trafficking in particular in Europe. Unemployment, poverty, the

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<sup>196</sup> ECPAT International Annual Report July 2009- June 2010 p. 11.

<sup>197</sup> 'Medellin and Caribbean are Colombia's Main Sex Tourism Destinations: US' Source: Colombia Reports Available at: <http://colombiareports.com/colombia-news/news/24697-medellin-and-caribbean-are-colombias-main-sex-tourism-destinations-us.html> (Last visited 29, December 2013).

<sup>198</sup> Beyer N. L. (2000-2001) pp. 319-320.

social problems of alcoholism, drug abuse, single parent homes, unsupervised children, homeless children and other particular problems such as an influx of displaced and illegal migrants are determining factors.<sup>199</sup> The post-communist era contributed to migration and trafficking for commercial sexual purposes in Western Europe. The fall of the Iron Curtain and links between European Union countries have opened up borders and travel opportunities which increased aspirations to migrate and work abroad. This widened the gap between rich and poor and simultaneously attracted international crime.<sup>200</sup> Many children would travel alone despite the lack of proper information on their rights, legal procedures to travel abroad, and risks related to migration adding to their vulnerability.<sup>201</sup> Runaway boys from Slovak, Russian, Romanian, and Ukrainian children's homes end up in cities such as Prague and turn to homosexual prostitution as a survival strategy.<sup>202</sup> Russian boys risk being trafficked within Russia and the Commonwealth of Independent States (CIS) countries but not outside of Eastern Europe.<sup>203</sup>

Due to their social grouping, Roma children are marginalized in Albanian, Czech and Romanian societies and risk getting involved in prostitution. This is a fast and lucrative way of making money, but traditionally an unacceptable practice in the Roma community.<sup>204</sup> Underage Russian girls that work as models and refugee girls coming from areas of internal armed conflict often end up being trafficked abroad for sexual exploitation.<sup>205</sup> No exception is made for educated girls. It is common for Moldovan and Ukrainian students to prostitute themselves in order to pay for their studies or finance their education abroad.<sup>206</sup>

After being lured for work, study or marriage, trafficked children are prostituted and used for the production of pornographic material.<sup>207</sup> The very young ones are used for purposes of begging, manual labor in the agriculture sector, stealing, drugs peddling and organ transplantation (the latter is reported in some countries but there is a lack of evidence to actually prove this).<sup>208</sup> State institutions are supposed to be a safe haven for

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<sup>199</sup> ECPAT European Law Enforcement Group, 'Joint East West Research on Trafficking in Children for Sexual Purposes in Europe: The Sending Countries' (2004) pp. 27-28.

<sup>200</sup> *Ibid.*, p. 30.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*, pp. 28-29.

<sup>205</sup> *Ibid.*, p. 29.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*, p. 58.

<sup>208</sup> *Ibid.*, pp. 49,53.

children; this is rather an illusion as children are often sexually abused while in care of the State.<sup>209</sup> Some children's homes are actually fertile grounds for CSEC recruiters.<sup>210</sup>

For some years now the 'lover-boy' syndrome in the Netherlands and 'grooming' in the United Kingdom (UK) have become the trend to lure girls into prostitution. Girls are seduced and then sexually exploited and coerced into prostitution. Social media, schools, and friends are used by 'lover boys' to recruit girls. Recruiters frequently penetrate a circle of friends and nowadays use girls as recruiters to coerce peers into prostitution. Social media and internet are used as platforms to initiate contact with girls. This channel of communication allows 'lover-boys' to stay anonymous for quite some time since 'lover-boys' use multiple identities. When a girl is reported as missing, the involvement of 'lover-boys' is seriously considered by parents and Dutch authorities ever since this phenomenon made its way into Western Europe. Luckily some girls do manage to get out of the grip of their 'lover-boy'.

As in other global regions, the sale of children by their parents or family members is also a common route into prostitution in Europe. Also common is parents or guardians offering their children for sexual exploitation. This is not only the case in Eastern Europe. It is revealing to hear on the eight o'clock news about parents that offer their children online for sexual services.

Despite the efforts by State, civil society and the private sector, CSEC continues to flourish in Europe and CIS. It is hard to acquire exact numbers on the scale of the problem as the online distribution of child pornography has increased and serves as a catalyst that fuels child trafficking and with that attracts CST to Europe and CIS.<sup>211</sup> Webcam child sex tourism is recently becoming a trend that does not require perpetrators physically to travel to engage in sexual activities with minors. Terre des Hommes Netherlands has disclosed an international online sex case study identifying over 1000 adults from more than 65 countries. This was achieved using an innovative technology: the virtual character Sweetie (representing a ten year-old Filipino girl) was created to be controlled by Terre des Hommes researchers.<sup>212</sup>

From a regional perspective, Europe qualifies as a source, a destination, and a transit point. Research shows that the Balkans and CIS served as sources for Western Europe. Romania, Balkans, Ukraine, the Russian Federation and the Republic of Moldova stand

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<sup>209</sup> Ibid., pp. 29, 49.

<sup>210</sup> Ibid.

<sup>211</sup> ECPAT International Annual Report July 2009- June 2010 p. 15.

<sup>212</sup> Terre des Hommes Press release (4 November 2013). Available at:

<http://www.terredeshommes.org/wp-content/uploads/2013/11/PR-Webcam-Child-Sex-Tourism-TDH-NL-04.11.2013.pdf> (Last visited 29, December 2013).



out.<sup>213</sup> However, South American girls are increasingly trafficked to Spain, Italy, Portugal, France, the Netherlands, Germany, Austria and Switzerland for sexual purposes.<sup>214</sup> The demand for Thai women is high, and other East Asian women including Chinese, Cambodian and Vietnamese are also sexually exploited in massage parlors, saunas and beauty centers.<sup>215</sup> The African continent is also a source for Europe. In the West, Nigeria is mostly affected, followed by Uganda and Kenya in the East where young girls are mainly trafficked to the UK.<sup>216</sup> The demand for CSEC supply from Northern African countries such as Morocco and Tunisia may evolve in the near future.<sup>217</sup> Europe has the entire world at its feet as it has become a destination for victims who are trafficked for CSEC.<sup>218</sup> Amsterdam is traditionally a favorite destination for tourists from all over the world because of its famous red light district. Are all the young women that offer their services in the red light district of age and are they acting voluntarily?<sup>219</sup> Finally, Europe also functions as a transit point for Asian, Eastern European and African girls who are trafficked to the Americas.<sup>220</sup>

### *The Emergence of CST and CSEC in Europe*

It is known that, for example, in Moldova (where both boys and girls are recruited for sexual exploitation) legal entities such as tourism agencies, employment, and modeling and marriage agencies also act as recruiters.<sup>221</sup> When a recruiter who belongs to the Roma community fails to take a child away from its parents (under false pretenses) the child is kidnapped and trafficked to Russia, Ukraine and other countries.<sup>222</sup> The majority of trafficked children leave Moldova accompanied by their mothers or sent abroad with their mothers' consent under false pretenses, unaware that they are actually aiding traffickers.<sup>223</sup> Uncontrolled trafficking and migration including that of minors is possible as there are no visa requirements for Moldavians to enter Romania or CIS countries.<sup>224</sup>

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<sup>213</sup> 'Trafficking in Persons to Europe for Sexual Exploitation' A UNDOC Report extracted from; 'The Globalization of Crime – A Transnational Organized Crime Assessment' p. 2.

<sup>214</sup> *Ibid.*, p. 2.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> Wylie G. and McRedmond P. 'Human Trafficking in Europe: Character, Causes and Consequences' (2010) p. 7.

<sup>219</sup> Deighan C. 'A Business of Supply and Demand: The Trafficking of Women and Girls from Russia and Ukraine' In; Human Trafficking in Europe: Character, Causes and Consequences (2010) p. 85.

<sup>220</sup> International Human Rights Law Institute (IHRLI) 'In Modern Bondage: Sex Trafficking in the Americas Central America, The Caribbean, and Brazil'. 2<sup>nd</sup> edition (2005) p. 3.

<sup>221</sup> ECPAT European Law Enforcement Group, 'Joint East West Research on Trafficking in Children for Sexual Purposes in Europe: The Sending Countries' (2004) p. 53

<sup>222</sup> *Ibid.*, p. 53.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*, p. 54.

Furthermore a great part of the Moldovan border with Ukraine is not supervised by Moldovan authorities.<sup>225</sup>

Russian children are often lured through advertisements, acquaintances who propose jobs or educational exchange programmes abroad.<sup>226</sup> It is attractive to remove children before they turn six years old since minors are recorded in their parents passports without a photo until age six, a photo is attached from age six to fourteen.<sup>227</sup> Nevertheless in Russia, it is fairly easy to acquire forged passports for an older child.<sup>228</sup> Although a great number of children are trafficked abroad (including to CIS countries) for sexual exploitation, some are trafficked within Russia on a voluntary basis under the presumption of a job offer, but nothing is true once in the big cities as they are sexually exploited in the production of pornographic films or other sexual activities.<sup>229</sup>

A small number of Ukrainian girls are familiar with the sex industry and leave Ukraine consciously; the majority comprises girls that are promised adoption, marriage and employment also in prostitution.<sup>230</sup> Job announcements published in newspapers or on the internet are not verified for authenticity by the companies and the local police lack legal grounds to investigate these advertisements.<sup>231</sup> As well as the traditional ways to recruit girls, some Ukrainian girls aspire to wed a Western man and become a 'mail order bride'.<sup>232</sup> Russian and Ukrainian traffickers are very active as Russian and Ukrainians are sexually exploited in all corners of the world and often have the highest number of girls and women in cities all over the world. Russians and Ukrainians stand out in, for example, Israel, Turkey and the Netherlands.<sup>233</sup>

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<sup>225</sup> Ibid.

<sup>226</sup> Ibid., p. 57.

<sup>227</sup> Ibid., p. 58

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid., p. 59.

<sup>231</sup> Ibid.

<sup>232</sup> Deighan. C (2010) p. 91.

<sup>233</sup> Ibid., pp. 87-89.

## Legal Responses and Efforts to Combat CST and CSEC

### Domestic Legal Responses

In terms of article 4 of the United Nations Convention on the Rights of the Child (UNCRC) State Parties to the Convention are required to take all appropriate legislative, administrative and other measures for the implementation of the rights enshrined in this Convention. This means that once implemented, article 19 of the UNCRC must be adhered to under national law. This article specifically aims at the protection of the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardian(s) or any other person who has the care of the child. In other words, since all countries (with the exception of the USA and Somalia) have ratified the UNCRC, this means that all States are expected to comply with this and take measures at the national level to combat CST and CSEC.

Indeed, nearly all countries, especially those that are frequented by sex tourists and pedophiles, have adopted legislation or amended their domestic penal codes criminalizing CST and CSEC, especially child prostitution and child pornography. In light of regional and international cooperation it is recommended that states harmonize their domestic legislation pertaining to, for example, the minimum age.<sup>234</sup> The legal response is complicated because of the lack of harmonization of the domestic legislation on CSEC. Harmonization is very important as it will enhance the coordination and effectiveness of actions taken on the national and international levels.

Practice teaches us that legislation alone is not sufficient and that adequate law enforcement is required to contribute to the success of a legal instrument. Therefore it is vital to include mechanisms to ensure compliance of State parties. This is unfortunately not the case with the UNCRC. Poor law enforcement is one of the main problems why sex tourist destinations (mainly developing countries) fail to combat CST and CSEC, horrific crimes that have taken on an international nature. The lack of rigorous enforcement is attributable to corruption within the police force and the fact that CST is good for many economies leaving public authorities to turn a blind eye to the problem.<sup>235</sup>

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<sup>234</sup> Hodgson D. (1993-1994) p. 523.

<sup>235</sup> Berkman E.T. (1996) p. 404.

Besides legislation, other interventions and strategies are required to combat CST and CSEC.<sup>236</sup> States are called to no longer deport culprits but to sentence them in the country where they sexually exploit children and to increase the prison sentences to the level of drug-related crimes.<sup>237</sup> In the last decade and a half terrorism has made such an impact that States have pledged not to tolerate acts of terrorism on their soil and consequently reformed their penal code to put terrorists behind bars for long periods of time. So, why not increase the degree of penalty for commercial sexual exploiters who rob children of their childhood and often adolescence? The police corps needs to be reformed which includes the establishment of a special child protection police unit with the mandate to investigate and prosecute CSEC. Campaigns to end CST warning both tourists and locals and preventive information in schools and villages for young children and their parents have all been initiated to prevent and end CST and CSEC. Such domestic initiatives relieve an international community pressured to combat CST and CSEC by means of international mechanisms.

On the other hand, the sending countries are also required to take action at the national level to prevent the massive flow of sex tourists and to end CST as the number of children victim to CSEC continues to grow at staggering rates. Sending countries pursue legislation to address the lacuna on a domestic level and to facilitate the prosecution of their nationals for the sexual exploitation of children while abroad. It is suggested by international organizations that sending countries should consider extraterritorial legislation to prosecute their citizens in their national courts for engaging in the sexual exploitation of children while abroad.<sup>238</sup>

In essence extraterritorial legislation provides a country with jurisdiction to prosecute its nationals for criminal offenses committed abroad.<sup>239</sup> So often, perpetrators escape criminal prosecution in the country where the crimes of CST and CSEC occur. Although criticized for the procedural and evidentiary hurdles and the small number of convictions compared to the number of child sex tourists, extraterritorial legislation nevertheless is a mechanism of final recourse that can give victims justice and only a part of mechanisms to fight and defeat CST and CSEC. On the other hand the small number of convictions proves the ineffectiveness of extraterritorial legislation according to Svensson.<sup>240</sup>

There are adversaries to the application of the extraterritoriality principle. In 1994 the British Parliament defeated an amendment to the Criminal Justice Bill denying the British

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<sup>236</sup> Hodgson D. (1993-1994) p. 528.

<sup>237</sup> Ibid., p. 529. O'Grady R. "The Child and the Tourist" (1992) p. 127.

<sup>238</sup> Berkman E.T (1996) p. 408.

<sup>239</sup> Svensson N.L. (2006) p. 641, Fredette K, pp.17-27.

<sup>240</sup> Svensson N.L. (2006) p. 642.

court extraterritorial jurisdiction over British sex tourists.<sup>241</sup> In the past Britain raised the argument, that it would consider extraterritorial legislation if it is successful in other countries.<sup>242</sup> What is more, the governments of the receiving countries have to do more as they have the primary responsibility to tackle CST and CSEC.<sup>243</sup> In other words it is the responsibility of the country in which CSEC takes place to eradicate CSEC, nevertheless the application of extraterritorial legislation in British courts would not be ruled out definitively until proven successful in other sending countries.

Furthermore, it is questioned whether there is a basis under international customary law for a State to claim extraterritorial jurisdiction in child sex exploitation cases, and so are the burden of proof and the procedural rights of the defendant (procedural issues).<sup>244</sup> Presuming that evidentiary and procedural concerns are guaranteeing a fair trial for the defendant there are four bases to claim extraterritorial jurisdiction under customary international law: the effects doctrine<sup>245</sup>, nationality<sup>246</sup>, protective principle<sup>247</sup> and universality principle.<sup>248</sup> Sending countries that apply the extraterritoriality principle include e.g. Sweden, Australia, and Germany and over 30 countries that do.<sup>249</sup> For example, Germany has made the requirement of double jeopardy obsolete and the victim is no longer required to be of German nationality.<sup>250</sup> So it is no longer required for the crime to be criminalized in both the country where the crime occurred and the country in which the prosecution will take place.<sup>251</sup>

In spite of the fact that the USA has not ratified the UNCRC it has ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child

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<sup>241</sup> Berkman E.T. (1996) p.416.

<sup>242</sup> *Ibid.*, p. 417.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*, p. 418.

<sup>245</sup> Cassese A. 'International Criminal Law' (2003) p. 78. The effects doctrine is a corollary of the principle of territoriality. A State may exercise jurisdiction even where a crime is committed outside the territory and if its effects will be felt in the territory.

<sup>246</sup> Under the active nationality principle a State may assert jurisdiction over criminal offences committed by its nationals abroad. See Cassese A. (2003) p. 281.

<sup>247</sup> Cryer R. 'An Introduction to International Criminal Law and Procedure' (2008) p. 43. According to the protective principle a State is entitled to assert jurisdiction over extraterritorial activities that threaten State security.

<sup>248</sup> Under the universality principle any State is empowered to exercise jurisdiction over international crimes that affect the international legal order as a whole (e.g. piracy, slave trade, war crimes, crimes against humanity, genocide and torture) regardless of the place of commission of the crime, nationality of the suspect or victim. See A. Cassese (2003) p. 284 and Cryer p. 44.

<sup>249</sup> Austin S. 'Commercial Sexual Exploitation of Children: How Extra-territorial Legislation Can Help, in Violence against Women: From Silence to Empowerment 53 (Don Brandt ed., World Vision International 2003) (citing ECPAT international survey).

<sup>250</sup> Hodgson D. (1993-1994) pp. 529-530.

<sup>251</sup> Shaw M. N. 'International Law' (2003) p. 610. Double jeopardy/criminallity is a procedural requirement for extradition from State A to B, the crime involved must be a crime in both States concerned. See Cassese A. (2003) p. 282.

Prostitution and Child Pornography, which is generally applicable in case of extradition. On the national level the USA under President Clinton passed the Violent Crime Control and Law Enforcement Act of 1994 (The Crime Bill).<sup>252</sup> What is special about this law is that it criminalizes the 'intent'. Thus those who travel and those who intend to travel outside of the USA to engage in any sexual activities with minors that would have been illegal had they occurred in the United States of America are prosecutable. Nevertheless, this bill has been queried in terms of its legality in the context of extraterritoriality.<sup>253</sup> It is logical that by prosecuting based on the intent to prevent CSEC the principle of extraterritoriality becomes superfluous. The advantage lies in the gathering of evidence. The application of the extraterritoriality principle would require prosecutors to gather their evidence from abroad which can be problematic at times and elongate the trial. Prosecution on the basis of the Crime Bill means that the evidence to prove the 'intent' can predominantly be found within the USA, which is an advantage. Moreover the Crime Bill as a mechanism deters and actually tackles the problem of CST and CSEC from the source.

## International Legal Responses

The international responses to matters such as trafficking in persons, prostitution and exploitation date back to the 20<sup>th</sup> century when the international community adopted anti-trafficking and anti-slavery conventions. The battle against CST and CSEC has gained attention on the international plane due to the enormous efforts of many NGOs that operate worldwide. Besides the UNCRC there is an array of international instruments that either complement UNCRC or otherwise applies to the protection of children's rights. They may not all be as effective to combat CST and CSEC but fortunately they exist because there was a time when there was none at all and these instruments helped to create awareness and solutions that will hopefully end CST and CSEC.

### *Convention on the Rights of the Child*<sup>254</sup>

The most relevant articles in relation to CSCE are articles 34, 35, and 36 of the UNCRC. State Parties are specifically called upon to protect children from all forms of sexual exploitation and sexual abuse. They are also required to prevent child trafficking

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<sup>252</sup> Violent Crime Control and Law Enforcement Act of Sept. 13, 1994, Pub. L. No. 103-322, 108 Stat. 1976, Title VI, §§.

<sup>253</sup> Berkman E.T. (2006) p. 416.

<sup>254</sup> Adopted and opened for signature, ratification and accession by General Assembly, resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

regardless of the purpose and protect children against all other forms of exploitation prejudicial to any aspects of the child's welfare. The general economic exploitation and hazardous work that interfere with the child's education, health, physical or mental states are referred to in article 32. Article 19 (1, 2) in conjunction with article 39 requires Member States to the UNCRC to take appropriate measures to promote physical and psychological recovery and social reintegration of victims. However the UNCRC does not provide enforcement measures in case of violation of its obligations. The Committee of the UNCRC merely has an advisory capacity (articles 43-45). The authority of the Convention is further weakened by the requesting 'procedures' as an alternative to mandating 'explicit programs' for the establishment of social programs to protect children. The latter explains and confirms why the UNCRC is perceived by many as perhaps not comprehensive, or inadequate as a means or instrument to combat CST.<sup>255</sup>

### *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

Member States to the UNCRC are encouraged to adopt the Optional Protocol to further achieve the purposes of the UNCRC. This is also the case in relation to CSEC and the effectuation of articles 32-36 of the UNCRC. Essentially article 1 of the Protocol prohibits CSEC: the sale of children, prostitution and child pornography and defines these in article 2 for the purposes of this Protocol. In view of article 2 State Parties to the Protocol ought to criminalize CSEC in their domestic penal code. This protocol is vital in cases of extradition and State Parties are therefore required to strengthen the international cooperation for the prevention, detection, investigation, prosecution and punishment of those responsible for CST and CSEC.<sup>256</sup> The Optional Protocol is open for signature and ratification by both parties and non-State Parties to the UNCRC. In fact the USA is a State Party to this Protocol.

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<sup>255</sup> Kohm L.M. (2009) pp.1-43.

<sup>256</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Article 10.

*Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000)*<sup>257</sup>

This Protocol is also known as the Trafficking Protocol or Palermo Protocol. The definition of 'trafficking in person' include the transportation, transfer, harboring or receipt of a child (article 3 (c)) for the purpose of exploitation even if it does not meet the criteria in subparagraph 2 of article 3. Article 3 (a) makes explicit reference to what exploitation shall include namely at a minimum the exploitation of the prostitution of others or some other form of sexual exploitation, forced labor or services, slavery or practices similar to slavery and servitude.

Also relevant is article 6 which prevents the trafficking of women and children. The Palermo Protocol requires States to take legislative measures to ensure border controls (article 11), travel and identification documents (article 12) and the repatriation of victims of trafficking (article 8). This article is applicable to both adults and children which imply that no distinction is made. The extensiveness of the Protocol and the transnational nature of trafficking emphasize the importance and need for regional and international cooperation to ensure effective prevention, investigation and prosecution of trafficking for commercial sexual exploitation.

*Worst Forms of Child Labor Convention 1999 (No. 182)*

In addition to the UNCRC in 2000 the International Labour Organization (ILO) played a significant role in addressing issues pertaining to children's rights. One of the major accomplishments was the Convention No. 138 concerning the minimum age of employment. Actually Convention No. 182 complements Convention No. 138 by emphasizing the importance of the minimum age standard.<sup>258</sup> Convention No. 182 defines the worst forms of child labor as slavery, bondage, prostitution, drug trafficking and any other work that may harm the health, safety or morale of children in article 3 (a-d). The article also makes specific mention of the production of pornography and pornographic performances in subparagraph b. In view of article 1 in conjunction with article 6 the Convention stipulates that it is of utmost urgency for State Parties to this Convention to implement programs to eliminate the worst forms of child labor. In addition parties are called upon to identify and reach out to children at risk but especially

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<sup>257</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15, November 2000 (not in force).

<sup>258</sup> Celek B.M. 'The International response to Child Labor in the Developing World: Why Are We Ineffective?' 11 Geo. J. on Poverty L. & Pol'y (2004) p. 102.



girls must be taken into account and prevented from engaging into and removed from worst forms of labor.

### *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*<sup>259</sup>

This Convention is essential in extradition cases according to articles 8-10 and 13. Member States to this Convention have an obligation in the sense of article 20 to supervise employment agencies to prevent persons who seek employment being exposed to the danger of prostitution. It still happens today that women, especially, who believe that they are being helped by a job agency to find employment, end up working in countries such as Saudi Arabia as domestic help or nannies with an extra benefit or in the worst case scenario simply end up in a brothel in Asia, Europe or the USA.

Despite the response on the international plane, practice shows us that CST and CSEC is still a growing problem. The instruments may not be perfect but the will and effort to combat this crime is there. However, it takes a bottom-up approach to combat CST and CSEC and the international community cannot do it alone. States can no longer continue to hide and depend on the international community. The problem is in their back yard and it has to be dealt with. Instead of being passive and in the meantime contributing to the violation of children's rights they should in fact be sending the signal that the human rights of children are important. The following part briefly discusses the enforcement of children's rights through regional human rights systems.

## **Enforcement of Children's Rights through Regional Human Rights Systems**

We have hitherto discussed the legal response to CST and CSEC from a national and international perspective and the fact that States have failed to protect their children based on their domestic law and international mechanisms such as the UNCRC. Awareness about children's rights is increasing at the regional level. How is the protection of children's rights regulated at the regional level and how is it enforced? To gain insight on this matter we shall look at the regional human rights systems of Europe, the Americas, and Africa and, to limited extent, Asia.

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<sup>259</sup> Approved by the General assembly resolution 317 (IV) of 2 December 1949. Entry into force 25, July 1951.

## European Human Rights Systems

The application of both regional and international child rights principles by regional human rights bodies make international law norms more effective according to Kilkelly.<sup>260</sup> In general the European Convention on Human Rights (ECHR) applies to 'all'; it makes no distinction between e.g. adults and children. In other words article 1 of the ECHR has a wide scope and ensures the rights and freedoms of 'everyone' on an equal basis. As a result neither the European Commission of Human Rights nor the European Court of Human Rights (ECtHR) placed express or general limits on the application of the ECHR in cases pertaining to children.<sup>261</sup> Since the ECHR is not specifically drafted to cover substantive rights of children and many of its provisions are phrased in broad terms the UNCRC serves as an interpretative guide in both an expansive and imaginative way.<sup>262</sup> The ECHR is considered a dynamic instrument which explains constant developments to adhere to the changing legal and social climate.<sup>263</sup> Moreover, the ECtHR applies a margin of appreciation that allows State parties to the Convention some discretion in their legislative, administrative and judicial actions.<sup>264</sup> This margin of appreciation is justified as a contributor to the ECHR's reputation as a 'living instrument' which elucidates the need to evolve and for the ECHR to maintain its relevance. Consequently, it is not uncommon for the ECtHR to rely on and make reference to the provisions of the UNCRC as these serve as an interpretive guidance.<sup>265</sup> Actually, the UNCRC complements the ECHR by successfully enhancing European needs and concerns.<sup>266</sup> It is not uncommon that reference was made by both the Court and the Commission to the provisions of the UNCRC. As a matter of fact this approach has raised the attention and profile of the right of the child in both the ECtHR's trials and at the national level.

Apart from cases pertaining to juvenile justice and family life the UNCRC is also extensively applied as an interpretive guideline in European cases related to neglect and abuse such as physical punishment.<sup>267</sup> Furthermore, the ECHR cases involving children mostly require the application of articles 3, 8, or 14 of the Convention for the Protection

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<sup>260</sup> Kilkelly U. 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child'. 23 Hum. Rts. Q. (2001) pp. 308-326.

<sup>261</sup> Kilkelly U. (2001) p. 314. On 1 November 1998, with the coming into force of Protocol No. 11, the system of the Court/Commission was merged creating one single Court, It is now the Court alone which examines applications presented under the Convention and its Protocols. The Explanatory Report on Protocol No. 11 is available at: <http://conventions.coe.int/Treaty/EN/Reports/HTML/155.htm> (Last visited 17, February 2014).

<sup>262</sup> Kilkelly U. (2001) p. 313.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid., p. 326.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid., p. 324.

of Human Rights and Fundamental Freedoms.<sup>268</sup> For example, in *Costello-Roberts v. UK* (a physical punishment/abuse case of a 7 year old boy in a private school in the UK) the Court applied UNCRC provisions to reach a decision.<sup>269</sup> According to the victim the corporal punishment meted out comprised inhumane/degrading treatment (article 3 ECHR) and a violation of respect for his right to a private life to which physical integrity is essential (article 8 ECHR).<sup>270</sup> In the end the ECtHR decided that there was no violation of either articles invoked, however it decided that a State may be held responsible for noncompliance with the ECHR.<sup>271</sup> With the *Costello-Roberts* case the ECtHR has set a precedent that would give form to the ECtHR in its reliance on the UNCRC.<sup>272</sup>

But is it correct to assert that the ECHR is the knight in shining armor in terms of implementing the UNCRC? Adjudication as a means to settle individual complaints of children is neither easily assessed nor accessible because of a lack of a powerful UNCRC enforcement system that passes judgment on cases pertaining to the rights of the child.<sup>273</sup> This has resulted in a lack of case law and application of UNCRC standards to individual cases at the international level.<sup>274</sup> When reference is made by the ECtHR to the UNCRC, the Court can only refer to the provisions of the UNCRC and not to case law as there is a lack of a UNCRC enforcement system such as a 'United Nations Human Rights Court' that actually adjudicates and develops case law. For example, the United Nations has the International Court of Justice (ICJ) as its principal judicial organ to settle disputes and ensure compliance with the Charter of the United Nations as provided in article 92. The International Criminal Court (ICC) is established and empowered to step in and take over from any State Party that does not comply with the Statute at the national level.<sup>275</sup> The unwillingness or inability of a State party to implement the Statute of Rome to genuinely investigate or prosecute at the domestic level makes a case admissible to the ICC.<sup>276</sup> In other words, it is 'complementary' to all national criminal jurisdictions (State Parties to the Rome Statute) to investigate and prosecute. The ICC may exercise jurisdiction if a case is referred to the prosecutor by the Security Council, based on State referral, or if the prosecutor acts *proprio motu* as provided in article 13 of the Statute.

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<sup>268</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Available at: [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (Last visited 29, January 2013).

<sup>269</sup> *Costello-Roberts v. UK*, 25 March 1993, §§ 27, 35.

<sup>270</sup> *Ibid.*, §§ 29-32, 33-36.

<sup>271</sup> *Ibid.*, §§ 32, 36, 27-28. There was no breach of articles 3 and 8 of the ECHR therefore the UK could not be held responsible.

<sup>272</sup> *Ibid.*, §§ 27, 35.

<sup>273</sup> Kilkelly U. (2001) p. 309.

<sup>274</sup> *Ibid.*

<sup>275</sup> Article 1 Rome Statute of the International Criminal Court.

<sup>276</sup> Article 17 (1) (a, b) Rome Statute of the International Criminal Court.

The examples above (ICJ and ICC) are by no means analogous to the UNCRC as the UNCRC is a human rights document but serves to illustrate the lack of an enforcement system. The UNCRC does not provide a mechanism that empowers e.g. a Court or Commission to step in and prosecute when States fail to comply with the provisions of the Convention. The UNCRC does not go any further than the implementation of the Convention and is silent on enforcement mechanisms. In contrast to the UNCRC the Rome Statute has the ICC as a back up to ensure enforcement/compliance. Apart from national Courts the ICC has the power to enforce the Rome Statute, adjudicate and develop case law. In other words the UNCRC is a set of rules without an enforcement system such as e.g. a United Nations Court of Human Rights as an enforcement system to pass judgment and develop case law. Therefore, it can be argued that the ECHR saves the UNCRC to a certain extent seeing that the UNCRC is actually enforced through European law and its human rights systems. To this end, both the UNCRC and the ECHR complement each other. The UNCRC complements the ECHR by enhancing European needs and concerns and the ECHR complements the UNCRC by enforcing the UNCRC through European human rights systems.

The UNCRC is heavily dependent on national and regional human rights/judicial bodies for its enforcement, and leaves a mere advisory role for the UN Committee on the Rights of the Child to the promotion and protection of children's rights. The latter is not necessarily negative and can be seen as remedy for the UNCRC's lack of an enforcement system. What's more this observation is food for thought in relation to the increasing and future role of ROs in the fight against CST and CSEC which is a violation of children's (human) rights.

The lack of a United Nations (UN) enforcement system to ensure the enforcement of the UNCRC is an opportunity for regional human rights/judiciary bodies to cooperate and support the UN in its work by enforcing the UNCRC through, for example, European human rights systems and simultaneously to scrutinize the implementation and application of the UNCRC by State Parties on a national level. In addition to the previous State reports submitted to the UN Committee on the Rights of the Child by, for example, European States may serve to give the UN an overall and broad indication on the enforcement of the UNCRC and case law that comes forth from the individual cases adjudicated in national courts, the European Court and regional human rights bodies. This would be particularly the case at the European level given that State Parties to regional organizations such as the EU and Council of Europe are obliged to adhere to European standards and legislation. Thus far these ROs function effectively as a regional apparatus of general human rights protection which is of added value to the protection and promotion of children's rights. It remains to be seen if this formula can also be

sustainable and involve such benefits in other regions such as Africa, the Americas and Asia in the near future.

By revising the 1961 European Social Charter (ESC) in 1996 the Council of Europe expressed the need for the effective exercise of rights of children in article 7 and 17 of the ESC.<sup>277</sup> Article 17 (1b) of the ESC calls on Parties to the Charter to undertake, either directly or in co-operation with public and private organizations, all appropriate and necessary measures designed to protect children and young persons against negligence, violence or exploitation.<sup>278</sup> The Council of Europe (COE) was the first RO to identify the worldwide involvement of Europeans in child prostitution.<sup>279</sup> In 1998 the Council of Europe took up its responsibility to address the problem and recommended all European countries to introduce extraterritorial jurisdiction to allow courts to prosecute nationals for crimes committed abroad.<sup>280</sup> In 2007 it went further and adopted the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, CETS No. 201).<sup>281</sup> Although criticized and contrary to the ECHR the Convention deals with children's rights and specifically with sexual exploitation and abuse in a regional effort to combat CSEC. Thus the UNCRC is enforced through European law on two different levels. That is at the European Union (EU) level and that of the Council of Europe (COE) which is an additional avenue to enforce the UNCRC. A second advantage is that the COE has more Member States than the EU.<sup>282</sup> Finally, article 45 (1) of the Convention stipulates that non-member signature is available for all participants that have participated in its elaboration.<sup>283</sup> This entails that a greater number of States take on the mandate to adhere to the UNCRC and specifically the protection of children against sexual abuse as provided in the Convention of the Council of Europe (COE).

In line with the role of ROs, the EU followed the initiative of the Council of Europe (COE) to deal more specifically with the phenomenon of CSEC. The Directive of the European Parliament and the European Council of 13 December 2011 on Combating the Sexual

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<sup>277</sup> Article 7, 17 European Social Charter (revised 1996). Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (Last visited 19, November 2013).

<sup>278</sup> Article 17 (1b) European Social Charter (revised 1996). Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (Last visited 19, November 2013).

<sup>279</sup> Healy M. A. '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?' 18 *Fordham Int'l L.J.* (1995) p. 1886.

<sup>280</sup> *Ibid.*

<sup>281</sup> Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007. Available at: <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm> (Last visited 29, December 2013).

<sup>282</sup> The Council of Europe has 47 Member States while the European Union has 28 Member States. Canada, The Holy See, Israel, Japan, Mexico and the United States of America enjoy observer status. Available at: <http://hub.coe.int/> (Last Visited 29, December 2013).

<sup>283</sup> Fredette K. (2009) p. 43. It is highly unlikely that non-European popular CST destinations will apply article 45(1) since the Convention failed to include measures to empower Convention members to invoke sanctions against States that tolerate CST.

Abuse and Sexual Exploitation of Children and Child Pornography replaces the Council Framework Decision 2004/68/JHA entered into force on 17 December 2011.<sup>284</sup> The Directive harmonizes about twenty relevant criminal offences, aims at higher penalties, and includes provisions to combat sex tourism and online child pornography, prevent convicted pedophiles to move to other EU countries and engage in professional activities involving contacts with children, and introduces measures to protect child victims during investigation and legal procedures.<sup>285</sup> The EU envisaged its members bringing the necessary laws, regulations and administrative provisions into force and to comply with the Directive by 18 December 2013.<sup>286</sup>

## Inter-American Human Rights Systems

After the ECtHR the Inter-American Court of Human Rights (IACHR) is the most developed. The ECtHR has predominantly ruled on national law cases pertaining to family rights, corporal punishment and juvenile justice in the ambit of fundamental human rights dissimilar to the Inter-American Court of Human Rights which deals with egregious child rights violations. The IACHR decided on a number of high profile cases of extreme and egregious violations of children's rights such as *Villagrán-Morales et al. v. Guatemala*<sup>287</sup> and *Gómez-Paquiyaury Brothers v. Peru*.<sup>288</sup> The child rights-related cases brought before the Inter-American Court are characterized as egregious and mostly committed by State officials. For the interpretation of the rights of the child and like the ECtHR the IACHR also makes reference to the UNCRC.<sup>289</sup> By drawing from the UNCRC, regional Courts contribute to the application and harmonization of international standards.

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<sup>284</sup> Directive 2011/92/ EU, EU Official Journal of the European Union L335/1, 17, December 2011.

<sup>285</sup> Council of the European Union 16898/11 Press 428, 15, November 2011.

<sup>286</sup> Article 27 Directive 2011/92/EU.

<sup>287</sup> Case of the 'Street Children' (*Villagrán-Morales et al.*) v. *Guatemala*. 19, November 1999. This case concerns the abduction, torture and murder in 1990 of five Guatemalan boys (all minors) by two National Police officers and the failure of State mechanisms to deal with articles 1, 4, 5, 6, 7, 8, and 25 of the American Convention on Human Rights.

<sup>288</sup> The *Gómez-Paquiyaury Brothers v. Peru*. 8, July 2004. In 1991 the Gómez-Paquiyaury brothers (14 and 17 years of age) were tortured, executed by Peruvian State agents in search of suspected terrorist and found dead one hour after their arrest. The Court decided that Peru had violated articles 1 ((1), 4(1), 5, 6, 7, 8, 9, 19, and 25 of the American Convention on Human Rights. The victims their family were subsequently harassed by the State therefore the Court ruled that Peru has violated articles 1((1), 5, 8, 11, and 25 of the American Convention on Human Rights.

<sup>289</sup> Case of the 'Street Children' (*Villagrán-Morales et al.*) v. *Guatemala* § 188. The Gómez-Paquiyaury Brothers v. Peru § 162.

The IACHR has particularly contributed to the awareness of the predicament of marginalized children in Latin America nevertheless and unfortunately only the worst forms of State abuse make it to the Court. Besides the IACHR, human rights are enforced by the Inter-American Commission on Human Rights which serves as a gate keeper. The Inter-American Commission accepts petitions from both individuals and NGOs and makes an effort to reach a settlement between parties before turning the matter to the Inter-American Court of Human rights. Regrettably, there is no direct access to the Court other than via the Commission. What is more, the Court may exercise its jurisdiction only when the defending State has ratified the Inter-American Convention, and accepted the contentious jurisdiction of the Court.

Article 19 of the American Convention on Human Rights (ACHR) provides that every minor child has the right to the measures of protection required by his condition as minor on the part of his family, society and the State. This is the only article in the ACHR to directly address the rights of the child; for all other matters concerning the Rights of the Child the IACHR turns to the UNCRC for interpretation. So, in comparison to the ECHR the ACHR refers specifically to minor children contrary to article 1 of the ECHR that makes reference to 'all'. However, the rights of the child entail more than that which is provided for in article 19 of the ACHR. Thus the UNCRC complements both the needs and concerns of the ECHR and that of the ACHR.

## **The African Human Rights System**

The African human rights system is based on the African Charter on Human and Peoples' Rights.<sup>290</sup> However, this general human rights instrument proved to be insufficient to protect children's rights in Africa. Therefore and unlike Europe and America, Africa has uniquely adopted special rules contained in the African Charter on the Rights and Welfare of the Child (ACRWC) to ensure children's rights.<sup>291</sup>

In principle the African children's rights Charter is directly derived from the UNCRC ideals. Nevertheless, the ACRWC is truly unique because its provisions go beyond those enshrined in the UNCRC and address themes from the perspective of African realities.

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<sup>290</sup> The African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) (Last Visited 29, December 2013).

<sup>291</sup> The African Charter on the Rights and Welfare of the Child (1990) OAU Doc. CAB/LEG/24.9/49. Available at: [http://www.au.int/en/sites/default/files/Charter En African Charter on the Rights and Welfare of the Child AddisAbaba July1990.pdf](http://www.au.int/en/sites/default/files/Charter%20En%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20AddisAbaba%20July1990.pdf) (Last visited 29, December 2013).

These needs range from themes such as child soldiers, internal displacement, African culture and traditions pertaining to the upbringing of children by an extended family and the disadvantages of the African girl child.<sup>292</sup> The ACRWC is furthermore distinguished as it includes a set of dangerous circumstances children have to be shielded from. The Charter provides for all aspects related to children's rights. These include civil, political, social and cultural practices, recognizing the best interest principle, protection from child labor, sexual exploitation, etc. To remain within the context of this paper, the ACRWC underlines CSEC and included specific provisions for this purpose. Article 15 criminalizes child labor and all forms of economic exploitation. Sexual abuse is enshrined in article 16 followed by article 27 which criminalizes sexual exploitation. Article 29a is on sale, trafficking and abduction for any purpose.

'The African Committee of Experts on the Rights and Welfare of the Child' (the Committee) was established as a monitoring body stipulated in article 32 ACRWC. After a slow start because of factors such as insufficient nominees to actually constitute the Committee in 2002 the governance structure was established so that the Committee could start to fulfill its mandate.<sup>293</sup> With no permanent secretariat (because of the lack of staff) and having to rely on donations, inter-agency participation and collaboration forced the Committee to prioritize and reduce its work plan from its inception.<sup>294</sup> Considering that, the Committee was established in a transition period of the OAU to AU and relied on the AU to fund the work of the Committee.<sup>295</sup> The mandate of the Committee as the implementation arm and monitoring body of the ACRWC are enshrined in articles 33-41 of the ACRWC.

The African Court of Human and People's Rights merged with the African Court of Justice and is now known as 'The African Court of Justice and Human Rights' (ACJHR). The ACJHR has the competence to take final and binding decisions on human rights violations. In terms of article 5(3) and 34(6) of the African Court Protocol <sup>296</sup> the ACJHR may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases before it, provided the State involved has declared its acceptance of the jurisdiction of the Court.

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<sup>292</sup> Sloth-Nielsen J. 'Children's Rights in Africa'. In: The African Regional Human Rights System 30 Years after the African Charter on Human and People's Rights. (Ed. Ssenyonjo M) (2012) p. 164.

<sup>293</sup> Lloyd A. 'The African Regional System for the Protection of Children's Rights'. In: Children's Rights in Africa: a Legal Perspective (Ed. Sloth-Nielsen J.)(2008) p. 41.

<sup>294</sup> Ibid., pp.42-44.

<sup>295</sup> Ibid.

<sup>296</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). Available at: [http://www.au.int/en/sites/default/files/PROTOCOL\\_STATUTE\\_AFRICAN\\_COURT\\_JUSTICE\\_AND\\_HUMAN\\_RIGH TS.pdf](http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf) (Last visited 29, December 2013).



The rights of the African child are under review as State Parties to the ACRWC reflect their willingness to protect and respect African law by incorporating the ACRWC at the domestic level. South Africa and Namibia have taken the principle of children's responsibilities to new heights.<sup>297</sup> So too have Kenya, Nigeria, Botswana and Tanzania in relation to the duties of the child.<sup>298</sup> Nigeria, South Africa and South Sudan have all incorporated the minimum age of marriage at the national level.<sup>299</sup> Following the domestication of harmful traditional practices such as female genital mutilation in Tanzania, South Africa incorporated the prohibition of social and religious practices in its national law.<sup>300</sup> At last the Tanzanian Law of the Child Act and the Nigeria Child Rights Act stipulate that children of imprisoned mothers must receive the required child care.<sup>301</sup>

The development of jurisprudence by African Courts throughout the African continent is evidence of the incorporation of the world's only regional treaty on the rights of the child (ACRWC). In other words the implementation of the ACRWC in African domestic legal systems is a reality to the point that national African Courts draw from the ACRWC in their decisions. For instance, in *S v. M (Centre for Child Law as Amicus Curiae)*<sup>302</sup> the Constitutional Court of South Africa relied on the ACRWC to reach a verdict by making new law. This case concerned a mother of three minor children who appealed the sentence of a court for fraud and theft while on bail for similar offences. In contrast to the UNCRC that is silent on the children of imprisoned mothers, article 30 of the ACRWC does take into consideration the rights of the child and effects of an imprisoned mother on the child. Guided by the ACRWC and concerned about the faith and wellbeing of the 3 minors the Constitutional Court appointed a *curator ad litem* to care for the children. In essence the Court created new law.<sup>303</sup>

Earlier we elaborated on the fact that at the regional level the UNCRC is referred to by both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR). This exercise bridges the distance between international and regional law, whereas the application of the ACRWC, 'a regional treaty', brings regional

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<sup>297</sup> Sloth-Nielsen J. (2012) pp. 169-170. For further reading on domestication of children's rights read; Sloth-Nielsen J. 'Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects', In: Children's Rights in Africa: a Legal Perspective (Ed. Sloth-Nielsen J.)(2008) pp. 53-72.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> *S v. M (Centre for Child Law as Amicus Curiae)*. Case CCT 53/06, 2007 (12) BCLR 1312 (Constitutional Court of South Africa) 26 September 2007.

<sup>303</sup> Case CCT 53/06 (n 37), § 33. "...focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests, including those of the children placed at a risk. This should become a standard pre-occupation of all sentencing courts."

and national law in close proximity. It equally narrows the gap between the international and the national since the ACRWC is based to a great extent on the ideals of the UNCRC. The enforcement of the ACRWC is essential to achieve the necessary protection of children's rights in Africa and serve as a model in other regions that are short of a specific document for the protection of children's rights.

Incorporation/harmonization and enforcement of the ACRWC in national Courts and enforcement through the African Court of Justice and Human Rights will contribute to the overall and fundamental role of the AU as a regional organization (RO) to ensure adequate protection and respect for children's rights in the region. So, the acceptance of a regional treaty such as the ACRWC is a window of opportunity that increases the prospects for the acceptance of international treaties at the national level and with that the protection of children. More to the point, the development of case law may serve as a point of reference to reach a decision in future cases (internationalization of jurisprudence) or as inspiration to draft regional children's rights documents in the EU, the Americas and Asia. The section below is dedicated to a brief study of Asia and human rights followed by part 7 in which we will explore the possible role for ROs.

## Asia and Human Rights

Of all the regions discussed above, Asia was the last region to have a human rights document. In 1993 the Foreign Ministers of ASEAN introduced the idea of establishing an inter-governmental mechanism on human rights for the region. The ASEAN Intergovernmental Commission on Human Rights (AICHR), the first in Asia, set up a working group with the mandate to formulate the ASEAN Human Rights Declaration (AHRD). In January 2012 a draft of the AHRD was submitted to the AICHR for deliberation. Eventually, the AHRD was adopted at the 21<sup>st</sup> ASEAN Summit in Phnom Penh on 18 November 2012.<sup>304</sup>

From a regional point of view the completion and adoption of the AHRD marks a major achievement for ASEAN given that ASEAN was not designed to promote social rights but to initially combat communism and mainly enhance economic development.<sup>305</sup>

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<sup>304</sup> The AHRD was adopted by ASEAN Member States Brunei, Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Available at: <http://aichr.org/press-release/the-adoption-of-the-asean-human-rights-declaration-ahrd-at-the-21st-asean-summit-and-the-special-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/> (Last visited 29, December 2013).

<sup>305</sup> <http://www.aseansec.org/overview/> Last visited 29, December 2013).

Nevertheless this first step towards the acknowledgement of human rights in Asia is not celebrated by all for two reasons. The first draft of the AHRD was rejected by some members of civil society and international agencies who criticized the AICHR for excluding civil society by curbing the diversity of voices and overall lack of transparency during the creation/drafting process of the AHRD.<sup>306</sup> Furthermore some civil society members were concerned that the AICHR will undermine present international human rights standards as the first draft was silent on, for example, minorities (especially sexual minorities), migrant workers and indigenous populations.<sup>307</sup> Optimistically this first draft of the AHRD will serve as a framework and opportunity to further study the development of the AHRD and give Asians the necessary protection according to the social, economic, political, cultural, religious and legal needs in the region.

As discussed above, it can be asserted that the EU and OAS are short of a regional instrument that regulates children's rights. Reference is made to 'all' which implies that no distinction is made between adults and children in terms of article 1 of the ECHR. Article 19 of the ACHR is the single provision to address children's rights. As anticipated the AHRD applies to everybody and does not distinguish between adults and children. Thus Africa maintains its status as the only region to have a codified the rights of the child.

In the Preamble of the AHRD reference is made to the Universal Declaration of Human Rights (UDHR) but not to the UNCRC. However, the AHRD is not entirely silent on the protection of children. The right of the child is briefly pointed out in article 4 of the AHRD. Article 26 (3) of the AHRD provides: "No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labor should be prohibited and punished by law." It is undeniable, there are positive developments in Asia with regard to children's rights. On 7 April 2010 the Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was inaugurated with the mandate to develop policies, programs and innovative strategies *vis-à-vis* the right of women and children in the region.<sup>308</sup> The ACWC for example focuses on effective regional

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<sup>306</sup> Welch S, 'ASEAN: Political Value of Human Rights' (3, November 2012) <http://bpr.berkeley.edu/2012/11/asean-political-value-of-human-rights/> (Last visited 29, December 2013).

<sup>307</sup> Ibid.

<sup>308</sup> Wahyuni S. 'ASEAN Gets Commission for Children and Women' (8, April 2010) Available at: <http://www.thejakartapost.com/news/2010/04/08/asean-gets-commission-children-and-women.html> (Last visited 17, December 2013).

implementation of common issues concerning the rights of the girl child in the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) and UNCRC.<sup>309</sup> Nevertheless at the time of writing it is not known if the AICHR or ACWC have any prospects to draft a regional document that exclusively addresses children's rights comparable to the ACRWC.

After all apart from article 1 of the ECHR, Europe does not have a regional document that specifically protects the rights of the child. In response to effects of the lack of a regional children's right document Europe issued the Directive of the European Parliament and the European Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Together with the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, it can be said that in their capacity as ROs the EU and the COE contribute towards the creation of a legal framework to combat both the sexual abuse and sexual exploitation of children (SEC). In other words from a European perspective the Council of Europe (COE) serves as a second line through which (European) human rights are enforced in the ECtHR. The AU and OAS have one single line of enforcement to ensure compliance. Namely through the African Court of Justice and Human Rights and the IACHR.

In view of the obligation to domesticate and put the regional law into effect, State Parties to the e.g. ECHR may perceive an effective human rights system as an incentive. Thus the ECHR functions as a gate keeper to ensure the Convention is enforced and that State Parties act accordingly. If a State party to the Convention fails to meet its obligations the Court uses its jurisdiction (human rights system) to enforce the law and can hold the particular State accountable.

Through their human rights systems both the European Human Rights Convention and the Inter-American Court of Human Rights make reference to the UNCRC and with that accept international law into their regional and implicitly national legal frameworks. In addition to domestication we identify the access and intervention of the Court in the European and American human rights systems as instrumental to enforce the law against State Parties in the event of noncompliance. This is particularly so in the Inter-American Court of Human Rights where States are predominately held responsible for the violation of children's rights by State officials. So, the result of incorporation and enforcement at

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<sup>309</sup> 'Effective Implementation of the Common Issues in CEDAW and CRC with Focus on Girl Child and Right to Nationality' (Press release 19-22, August 2013) Available at: [http://www.asean.org/images/2013/socio\\_cultural/acwc/effective%20implementation%20of%20the%20common%20issues%20in%20cedaw%20and%20crc%20with%20focus%20on%20girl%20child%20and%20right%20to%20nationality.pdf](http://www.asean.org/images/2013/socio_cultural/acwc/effective%20implementation%20of%20the%20common%20issues%20in%20cedaw%20and%20crc%20with%20focus%20on%20girl%20child%20and%20right%20to%20nationality.pdf) (Last visited 17, December 2013).

the regional level helps to narrow down the gap between international and national law and brings international law closer to the municipal level. Based on the effects of domestication and enforcement through human rights systems, it can be claimed that the legal framework for children's rights is operational at three levels (national, regional and international).

The AU is a pioneer as it uniquely created the ACRWC: a special children's rights document. From an African perspective, it was noted above that the AU has taken on the leading role to help bridge the gap between international and national rights of the child by putting the ACRWC in place which is enforced through the African human rights system. As a regional instrument the ACRWC is designed to meet African needs and is far more detailed than the UNCRC. African States review and adapt their national law in order to meet regional demands enshrined in the ACRWC.<sup>310</sup> Consequently, the revision and incorporation of the rights of the child enshrined in the ACRWC at the national level (by Member States to the ACRWC) contributes to bridge the distance between international and national law. The domestication of the ACRWC is evidence of the eagerness and commitment of States Parties to implement, enforce and accept regional law. In addition, States have voluntarily submitted country reports to the Committee and it is now up to the Committee to report its findings.<sup>311</sup>

So, there are roles that ROs can take on to remedy what we have identified as institutional weakness. Institutional weakness can be reflective of the lack of a regional children's rights document. Institutional weakness can occur as the consequence of deficiency, excessive or inadequate plans to evaluate and monitor the implementation of regional law. No or inadequate enforcement through regional human rights systems by means of adjudication (e.g. no access to justice) and creation of jurisprudence can also represent a form of institutional weakness. The following part explores some routes that are key to make ROs (more) effective in the fight against CST and CSEC.

## **What Role for Regional Organizations?**

The study on the enforcement of children's rights through human rights systems in chapter 6 reveals that there is a matter of institutional weakness within ROs. An important objective here is to define institutional weakness in order to identify the

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<sup>310</sup> Sloth-Nielsen J. (2012) pp. 169-172.

<sup>311</sup> Ibid p. 168.

area/form of weakness that affects ROs in the enforcement and protection of children's rights. In the case of the rights of children, institutional weakness represents any missed opportunities for ROs to engage and work towards solutions to maximize the protection of children and specifically end CSEC. It is fundamental to focus on the area of institutional weakness and study how to achieve the highest level of protection of children's rights. It is in this view and following a comparative exercise between the ACRWC and the UNCRC that the introduction of a regional children's rights document and its significance is considered. Inspired by the application of Montesquieu's Trias Politica<sup>312</sup> we identify the area of institutional weakness and explore possible roles for ROs to remedy the fault lines in the legal architecture on children and intensify the protection of children to tackle CSEC in each region. Finally we discuss the actual role of the AU in the enforcement of the ACRWC and look into measures to deal with noncompliance.

## Institutional Weakness

To elucidate the notion of institutional weakness we shall first elaborate on the terms 'institutions' and 'weakness'. Inspired by North,<sup>313</sup> Levitsky, Murillo and Helmke define institutions as a set of (in) formal rules and procedures that constrain, enable or structure actors' actions.<sup>314</sup> Traditionally formal institutions are referred to as State organs and State-enforced rules whereas informal institutions are indicated as civil society, organizations/networks and societal enforced rules.<sup>315</sup> Formal institutions according to Helmke and Levitsky are openly codified and communicated through channels that are recognized as official.<sup>316</sup> In contrast socially shared rules are usually unwritten, created, communicated, and enforced outside of officially sanctioned channels consequently exemplifying an informal institution.<sup>317</sup> So, ROs such as ASEAN, AU, EU and OAS are considered to fall within the scope of formal institutions. We distinguish between

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<sup>312</sup> Trias Politica is the separation of powers which is used as a model to govern States. The legislature, executive and judiciary all have independent powers and function as check and balance. See: Möllers C. 'the Three Branches: A Comparative Model of Separation of Powers'. (Oxford University Press 2013). Kusrin Z. M. 'Montesquieu and the Doctrine of Separation of Powers'. In: The Malayan Law Journal (Issue 6, 2012).

<sup>313</sup> North Douglass C. 'Institutions, Institutional Change, and Economic Performance'. (New York: Cambridge University Press, 1990) pp. 3-4.

<sup>314</sup> Levitsky S. & Murillo M. V. 'Argentine Democracy: The Politics of Institutional Weakness' Penn State Press, (2005) p 2. Helmke G & Levitsky S. 'Informal Institutions and Comparative Politics: A Research Agenda'. (Kellogg Institute, Working Paper 307 - September 2003) p. 8.

<sup>315</sup> Ibid., p. 8.

<sup>316</sup> Levitsky S. & Murillo M. V. (2005) p. 2. Helmke G & Levitsky S. (2003) pp. 8-9.

<sup>317</sup> Brinks D. 'Informal Institutions and the Rule of Law: The Judicial Response to State Killing in Buenos Aires and Sao Paulo in the 1990s', A paper prepared for the conference, Informal Institutions And Politics in the Developing World, Harvard University, April 5-6, (2002) pp. 9-10. Helmke G & Levitsky S. (2003) p. 9.

institutions ('the rules of the game') and organizations ('the players').<sup>318</sup> In other words we consider ROs (institutions) as the creators of 'the rules of the game' and State Parties (organizations) to, for example, ACRWC as 'the players' who have to comply with the rules enshrined in the Charter.

Weakness is identified as the inability and or inefficiency to function as intended.<sup>319</sup> To better understand institutional weakness we shall first discuss the opposite, namely institutional strength. Institutional strength comprises two dimensions; (1) enforcement or degree to which existing written rules are complied with in practice; and (2) stability or degree to which rules survive minor fluctuations in the distribution of power and preferences, such that actors develop shared expectations based on past behavior.<sup>320</sup> Therefore when one or both dimensions are missing we reckon that there is a matter of institutional weakness, which explains the inability and or inefficiency to function as intended. The fact that apart from the AU all other ROs are short of children's rights document does not necessarily classify these ROs as weak institutions. Depending on the purpose for which for example ASEAN, the EU and the OAS were founded, they for the greater part function as intended upon creation. Nevertheless the lack of a document that regulates the rights of the child on a regional level constitutes a vacuum and thus a form of institutional weakness. Non-execution or non-enforcement of, for example, the ACRWC could qualify as a form of institutional weakness on the external level. Institutional weakness is also at hand, for example, in the process of harmonization (domestication) in which an article of the ACRWC is fragmented or misinterpreted because of different cultural values/beliefs, and loses the object and purpose for which it was written. It is in this context that poor or non-implementation, poor or non-enforcement and instability in a (n) (in) formal institution show signs of institutional weakness.

Instability can also result during the interpretation process (prior to harmonization) ensuring a conflict between regional law and national law. The conflict between regional and national law is an indication of institutional weakness. Apart from two different legal orders regional law is higher in hierarchy than national law. For example, a provision in the regional children's rights document infringes with a clause in the national constitution. In the ACRWC a minor is considered a child that is under 18 years of age. There are States in which a child is younger than 15 years. In view of the interpretation

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<sup>318</sup> Levitsky S. & Murillo M. V. (2005) p. 2. (Citing North Douglass C. (1990) pp. 4-5).

<sup>319</sup> Vladimirov Zhelyu, 'The Value Crisis and the Weakness of Democratic Institutions in the Post Totalitarian Societies in Eastern Europe (The Bulgarian Case)' ((Final Report). NATO Fellowships Programme 1995-1997) p. 6.

<sup>320</sup> Levitsky S. & Murillo M. V. (2005) pp. 2-3.

of laws, and to secure stability, the '*lex specialis derogate legi generali*'<sup>321</sup> principle may be useful. The ACRWC governs children's rights, so is a special law. However the national constitution is an agglomeration of various laws at the municipal level. Due to the hierarchy of the ACRWC, it has precedence over the national constitution. Also in terms of '*lex specialis derogate legi generali*' the AWCRC continues to dominate. The State in question may express its reservations. The possibility to opt out on that specific provision may be a solution, if the treaty provides such mechanism. Another way to resolve the conflict between the two legal orders would entail the modification of the national law. The latter could be a solution, depending on the political will to adapt national law to accommodate regional or international law.

In political science formal institutions are associated with stable and effective institutions in which actors have both the will and capacity to create formal rules and are believed to be able and willing to enforce them.<sup>322</sup> As discussed above one of the prerequisites for formal institutions to be recognized as such is the need for rules to be codified. To an extent, the codification of rules contributes to the stability within an institution and thus makes acceptance easier with actors. However for a stable institution to be less vulnerable to weakness it requires the enforcement of its (codified) rules to guarantee practical compliance. Failure to enforce means failure to achieve stability which is an open door to institutional weakness. Institutional weakness becomes patent when codified rules which were previously accepted by powerful actors are successfully contested.

Montesquieu introduced the doctrine of checks and balances by separating the three powers into individual powers to circumvent the abuse of power when governing a State. The separation of powers can be applied to illustrate the common institutional structure by which ROs operate. With the exception of ASEAN we can trace the operation of ROs especially the AU and EU, and to a lesser extent the OAS, back to the three powers as if they were States.<sup>323</sup> By applying Montesquieu's separation of powers to ROs (in relation to the absence of a regional children's rights document in the fight against CSEC) we can attribute the mandate of the judiciary to the various regional (human rights) courts. To

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<sup>321</sup> The law that governs a specific subject matter overrides the law that governs general matters.

<sup>322</sup> Levitsky S. & Murillo M. V. (2005) p. 284.

<sup>323</sup> For more on the structure, institutions and bodies of the AU, EU, OAS and ASEAN visit:

<http://www.au.int/en/> (Last visited 4, December 2013). [http://europa.eu/about-eu/institutions-bodies/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/index_en.htm) (Last visited 4, December 2013). [http://www.oas.org/en/about/our\\_structure.asp](http://www.oas.org/en/about/our_structure.asp) (Last visited 4, December 2013). <http://www.asean.org/> (Last visited 4, December 2013).



the organ responsible for policy and law making within the RO can be attributed the function of legislature, and finally one can consider the executive arm or secretariat of the RO to provide the necessary staff, methods, knowhow and cooperation in the enforcement, implementation, monitoring and evaluation. The separation of powers within ROs could be perceived as a means of governance to bring the rights of the child in the fight against CSEC to new heights.

Minimize or avoiding institutional weakness within ROs will require the legislator to draft a regional children's rights document. The executive arm within the RO has to enforce the rules in the document containing the rights of children with the help of national governments through harmonization, but increasingly that of civil society stake holders and the private sector. Furthermore the judiciary must be endowed with the jurisdiction to adjudicate cases in existing regional human rights systems, and preferably establish a special Chamber that rules in child-related cases, specifically CSEC. The legislative arm has the power to codify rules (a regional child rights document) and bind each ratifying State, while the judiciary adjudicates and ensures compliance with the law. Besides implementation (harmonization) enforcement is fundamental. This an important role of the executive arm. Without enforcement it will be very difficult to tackle CSEC. Moreover partnership with civil society groups is significant. Members of civil society by and large bring forth firsthand information, know-how and firmly established networks reaching the grassroots level. Civil society groups have become powerful and indispensable partners. This is all the more reason to include them in the fact-finding, decision-making, implementation and enforcement process considering that their expertise facilitates the work of ROs in preventing and dealing with institutional weakness.

Civil Society Organizations (CSOs) are independent from the State or government. Like NGOs, CSOs have a voice and try to influence the government in its decision making. We see on a regular basis that the government and CSOs form an alliance when they have similar goals. CSOs range from grassroots organizations to established national, regional and international organization. Ordinary citizens are essential because they are often the drive behind local grassroots organizations. CSOs include NGOs (with an observer status), charities, faith-based groups, academic institutions, interest groups and so on. What is more, the private sector also voice their point of view as a member of civil society. They initiate campaigns individually, in collaboration with other CSOs and even with the government.

Without deviating from Montesquieu's separation of powers, we identify the nature of the role of the legislature and judiciary within ROs as crucial because what happens at the

internal level is of great importance for the executive power of ROs, and that which can be achieved at the external level. Thus quality input at the internal level contributes and determines the quality of the output on the external level. In the same manner we distinguish two categories of institutional weakness. Internal weaknesses can be linked to the lack of a regional document for the protection of children from CSEC. Lack of a regional document constitutes a weakness that relates to the legislative arm of the RO (internal weakness). As a result the RO does not have a policy in place to tackle CSEC. In essence the AU, EU and OAS (ROs) all have a human rights system and courts to accommodate the judiciary. However apart from regional legislation (legislative power) the action (executive power) of ROs in the form of methods, tools, knowhow, cooperation, implementation, enforcement, monitoring, and evaluation are detrimental in the fight against CSEC. Why is this so? A piece of legislation with rights and duties is merely a piece of paper with words, until it is given any effect. The way to give effect to legislation is to act upon it through implementation, enforcement, evaluation, cooperation, know how, tools etc. So, it is the actual execution of the words in the legislation in order to enjoy the right and duties prescribed. Only then will the written words become applicable and tangible. In other words any form of internal or external institutional weakness is an impediment for ROs. Such impediments lead to institutional weaknesses affecting, for example, the executive role that ROs take on to enhance their activities more efficiently and effectively to curb CSEC.

### **The Advantage of a Regional Codified Document**

We have established that there is a gap between international and national law which can complicate the acceptance of international law at the national level. With the exception of Africa, no other region has invested in a document that concentrates on children's rights. This constitutes a form of institutional weakness amongst the remaining regions. For this reason we shall compare the ACRWC (a regional document designed according to African needs) and the UNCRC (an international document addressed to all States in view of 'the best interest of the child') to identify any discrepancies. This comparative exercise reflects the advantages of a regional children's rights document. Acquaintance with these advantages is important. To understand and have knowledge of the content of the ACRWC and the UNCRC feeds the proliferation *vis-à-vis* prospects for regional law. This combination of information and knowledge also serve as a source of inspiration that gives birth to new ideas and roles intended for ROs to maximize their results in the protection of children and fight against CSEC. Ultimately the creation and enforcement of regional law will increase acceptance and ease the gap between national and international law. A

regional document ought to be designed in answers to regional needs and challenges. More so, those who seek justice acquire additional remedies in addition to the Court of First instance (national court) and can find justice in a regional court.

### *The ACRWC vs. UNCRC: a Comparison*

The ACRWC is the only regional document exclusively designed for the respect and protection of the rights of the child. The absence of a regional document for the protection of children implies that in Europe and the Americas children's rights are enforced through human rights systems where courts mainly depend on the UNCRC. Note that in Africa State Parties to the ACRWC have incorporated the Convention at domestic level. The basis for the enforcement of the rights of the child are enshrined in the ACRWC. Therefore at national and regional level African Courts primarily depend on the ACRWC. However, it is likely that some reference is made to the UNCRC or any other mechanism in the framework of applicable laws to protect children. Regional human rights courts such as the Inter-American and European Court of Human Rights refer to international law (UNCRC) because it serves as an interpretive guide. Though a useful mechanism, the UNCRC does not necessarily fill the gap at regional level. However the UNCRC is maybe an indication that the Court applies the highest legal norms in its decisions.

Although the UNCRC has been adopted by all States apart from the USA and Somalia, it is sometimes difficult for States and their citizens to culturally relate to and accept international law. If each region would have their own regional children's rights document it would make it easier for States and its citizens to relate to (culturally) and accept international law in a manner that averts the political pressures that so often characterize the operation and functioning of national bodies that enforce human rights.<sup>324</sup> Moreover there are a couple of advantages patent in the African system of human rights protection. The AU benefited from the opportunity to tailor the ACRWC according to the needs of African States by taking their cultural, social and economic background in to consideration. Taking the cue from Africa and the AU each region could create a regional document on the rights of the child that take their regional challenges, cultural, socio-economic aspects into consideration and that reflect the underlying tenets of international law (UNCRC). Furthermore, if each region could have a child rights document, it could serve as a regional safeguard/watchdog to ensure States comply with regional and international treaties once a regional convention on the rights of the child is in force.

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<sup>324</sup> Dillon S. 'International Children's Rights' (2010) p. 833.

In view of article 1 ECHR and article 19 ACHR a regional document like the ACRWC will be more comprehensive than the UNCRC, article 1 of the ECHR, article 19 of the ACHR and article 4 and 26 (3) of the AHRD. In this view it is advisable for each regional human rights system to institute a special Chamber that will rule on matters pertaining to the children. A children's Chamber requires special expertise which is an asset to reduce the time spent in Court contributing to the efficient creation of effective jurisprudence. This approach would lessen the stress children undergo during a conventional or normal legal process and increases adequate child participation which is an advantage for the child and evolution of the legal process.

Sloth-Nielsen notes that the UNCRC no longer holds water as the parent document to the ACRWC.<sup>325</sup> The UNCRC was drafted from the perspective of the State as a subject of international law and duty bearer. The ACRWC instead refers directly to the 'child' as an individual subject of international law and holder of rights.<sup>326</sup> The UNCRC allows the 'best interest' principle to be put in the back seat by competing agendas or adult interests, whereas the ACRWC maximizes the influence and supremacy of the principle over any other provisions and considerations.<sup>327</sup> In article 4 (1) of the ACRWC the 'best interest' principle is maximized by the words 'any person or authority', whereas the scope for the application of the 'best interest' is significantly narrower than article 3(1) of the UNCRC by excluding public or private welfare institutions, courts of law, legislative bodies and administrative authorities.

For the reasons mentioned above it may be evident that the ACRWC offers better protection covering areas of concern that have been understated or ignored in the UNCRC.<sup>328</sup> More so because the ACRWC is specific on who ought to apply the 'best interest' principle, namely any person considering any matter pertaining to children (article 4(1) of the ACRWC). Also in view of the 'best interest' principle the ACRWC highlights child participation and the right for a child to be heard directly or by an impartial representative and for the views of the participant child to be taken into account.<sup>329</sup> Subsequently the approach of the ACRWC puts the right to participation on a higher scale rather than merely making the child a beneficiary of the bearer of a party status in legal proceedings as provided in Article 12 UNCRC.<sup>330</sup> Both Chirwa and Sloth-

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<sup>325</sup> Sloth-Nielsen J. (2012) pp. 165-166.

<sup>326</sup> *Ibid.*, p. 164.

<sup>327</sup> *Ibid.*, p. 164-165.

<sup>328</sup> *Ibid.*, p. 165.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

Nielsen concur that no mention is made of the 'State' in the ACRWC concerning the nature of obligation to abstain from discrimination, this in contrast to article 3 of the UNCRC which implies that the prohibition not to discriminate is equally binding upon States as other actors.<sup>331</sup> Article 2 (1) of the UNCRC protects only those children that are within the jurisdiction of State parties to the UNCRC. The scope of the ACRWC does not adhere to such discriminatory limitations.<sup>332</sup> Altogether the illustrations stated above are all valid reasons as to why Member States and civil society groups with ROs should consider a regional document and the roles attached to enhance the protection of children from CSEC.

### *The Added Value of a Regional Codified Document*

The differences between the ACRWC and UNCRC in the foregoing paragraph demonstrate the added value of a regional document focusing on the rights of children such as the ACRWC and its effect on the protection of children. From a regional perspective article 1 of the ECHR and article 19 of the ACHR are the only articles dedicated to the protection of children. Characterized by their wide scope these two articles encompass all the themes pertaining to children. However they are not substantive enough to protect the rights of the child. Like Africa, the Americas, Asia and Europe experience their own cultural, social and economic challenges unique to each region. These challenges are insufficiently or altogether not provided for in the UNCRC. Therefore each region would be well-served to take the responsibility and consider the notion of a regional children's rights document that corresponds with regional needs. This could provide an opportunity for ROs to address specific issues that present challenges to the respective regions, by enhancing the (national) protection of children and by bridging the gap with the UNCRC. Although the AHRD was only adopted in November 2012, Asia does not have to stay behind. Like its predecessors, (Africa, the Americas and Europe) Asia will have one day have a human rights system. In that respect a regional document designed to address the rights of children would be significant in empowering the Asian human rights system which is still in its infancy.

To give effect to a regional children's rights document as stipulated in article 1 ACRWC, it entails that States Parties must undertake "...necessary steps, in accordance with their constitutional processes and with the provisions of the Present Charter, to adopt such legislative or other measures as may be necessary...". States Parties have to adapt their

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<sup>331</sup> Ibid., p. 165, Cit. Chirwa D. 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' 10 International Journal on Children's Rights (2002) p. 159.

<sup>332</sup> Sloth-Nielsen J. (2012) p. 165.

norms on a national level to ensure harmonization between the regional children's rights document and the national constitution. Harmonization is achieved by incorporating the regional children's rights document in the national law. In other words each State must domesticate the children's rights document through legislative reform. Harmonization excludes any ambiguities regarding, for example, the minimum age for marriage and cultural, social and religious practices damaging to the health and welfare of children.<sup>333</sup> Harmonization is fundamental because it provides a platform for ROs to oversee and assess compliance with regional law. In practice harmonization and the elimination of ambiguities facilitates and advances regional enforcement. Harmonization is an effective gauge to measure the political willingness and level of acceptance of regional law as part of the national legal framework. It sometimes happens that States ratify treaties for political reasons and/or because they feel pressured. The ongoing legislative reform to enforce the ACRWC is a positive development which proves Africa's commitment. Optimistically, it is a source of inspiration for the Americas, Asian and Europe.<sup>334</sup>

A regional children's rights document that is inspired by the UNCRC, but tailored to regional challenges is more likely to be accepted and honored by member States (national level) that opposed the UNCRC. These opposing voices of the UNCRC hold that the Convention does not necessarily provide for the unique and ever-changing challenges each region is facing. To some extent an internationally inspired regional children's rights document helps to bring the UNCRC closer to the municipal legal systems and as such closes the gap or reduces the tension between international and national law. Thus by applying regional children's rights at the national level States indirectly also accept and uphold the UNCRC.

The current protection regime of children's rights in article 1 of the ECHR, article of the 19 ACHR and article 4 and 26 (3) of the AHRD is broad. However a regional document like the ACRWC has the merit of being comprehensive. Those who seek justice and have exhausted the national judicial system have additional legal remedies at their disposal in addition to municipal options and they can also make recourse to regional courts.

The adoption of a regional children's rights document serves as an additional incentive for States to enforce children's rights at the national and regional levels. Noncompliance with children's rights at the national level may require the enforcement of children's rights through a regional human rights system. The decision of the Court to acquit or convict the noncompliant party contributes towards the development of jurisprudence that can be used in the national and regional enforcement of children's rights. In part 6

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<sup>333</sup>Sloth-Nielsen J. (2012) pp. 169.

<sup>334</sup>Ibid., pp. 169-170.

we established that the UNCRC depends on the ECHR and IACHR for enforcement. Conversely both Courts refer to the provisions of the UNCRC and use these as an interpretive guide. The capacity to create international case law at the global level is inexistent since the UNCRC is bereft of an enforcement system such as a 'United Nations Human Rights Court' that actually adjudicates and develops case law. This is so because the subjects of UNCRC (State Parties to the Convention) carry the mandate to execute and enforce the UNCRC at the national level. All in all regional law enforcement and justice strengthens the regional human rights systems. To a certain point these two legal orders complement each other. Nevertheless a regional children's rights document is a key factor for the creation of case law that is based on specific children's rights enshrined in that document. Regional case law offers additional points of reference in the adjudication of regional matters. Regional case law also contributes to the administration of justice and creation of jurisprudence at the national level.

Apart from State reports, ROs implicitly assess compliance with children's rights document through their regional human rights systems. Based on article 44 (b) of the UNCRC, the UN assesses compliance with the UNCRC every five years. Article 43 (b) of the ACRWC provides a three year period for States to submit their reports for evaluation. Since the ACRWC is inspired by the UNCRC there can be a degree of overlap in the reports submitted to the AU and UN. Thus theoretically if States Parties to the ACRWC uphold the rights enshrined in the ACRWC, they implicitly meet the basic criteria of the UNCRC on which the regional children's rights document (ACRWC) is based. In effect State compliance with the ACRWC functions as a guideline to maintain the UNCRC. The UN has an important task to assess and comment on State reports. Practice indicates that amongst others, because of the number of State reports it can take years before the UN comments on these reports. Perhaps it is worthwhile to consider a partnership between ROs (AU) and the UN. For example the UN can gauge State compliance in the intervals of reports. Or, as a last resort it can refer a critical matter of noncompliance with the UNCRC to an appointed RO for investigation and/or prosecution of the State in question through its regional human rights system based on a prior agreement. It can be concluded from the above that the creation and adoption of a regional children's rights document entail additional responsibility and tasks for ROs. These roles are discussed in the next section.

### *Roles for Regional Organizations*

We have established that ASEAN, the EU and the OAS experience a degree of institutional weakness for lacking regional children's rights documents. Certainly, a

regional children's rights document designed according to regional needs and challenges narrows the gap between international and national law of the State in question. Regional law not only serves as a bridge it also addresses issues that are insufficiently or not regulated in the international and/or national framework. On a specific note a regional children's right document contributes to the promotion and protection of children against exploitation including CSEC. The document is also a mechanism to keep States Parties to the regional children's rights treaty on the same wavelength considering that States Parties must all honor the treaty or be held accountable. How can ROs transcend institutional weakness to achieve effective protection of the most vulnerable? How can the established institutional weakness amongst ROs that affect children's rights be eliminated? We live in a dynamic rather than a static world. This entails that the areas in which children need protection change as a result of globalization, socio-economic conditions, cultural and traditional customs, technology, natural disasters and warfare. The possibilities are multiple and vary from region to region.

Whether the first step to create a children's rights document is the initiative of an RO, a move by NGOs/civil society or a combination thereof, it requires a sense of consciousness to identify and accept the fact that there are regional problems that are not provided for in the UNCRC. Therefore a regional document is necessary to incorporate mechanisms to tackle these challenges. It is not without reason that we refer to NGOs and civil society. Their expertise and experience is of utmost significance in the identification process. As such, it is useful to include them in the drafting process from the onset. If the RO is short of a legislative arm it can establish a Commission or working group endowed with the mandate to draft a children's rights document.

Effective and lasting results in the regional protection of children and their rights takes more than a regional children's rights document. Enforcement is absolutely fundamental for the protection of children's rights to take root. To give effect to regional law States Parties must bring regional and national law into harmony. The process of harmonization equates to the incorporation (implementation) of the regional children's rights document in the national law. To increase the probability of success of the document ROs could assist (in any possible way) States Parties if they encountered any difficulties during implementation. Failure to or poor implementation can never result in effective enforcement. For this reason ROs can establish a Commission to monitor the implementation process in order to better address extant and prospective challenges. A monitoring and evaluation plan is another requirement that can include a reporting system upon completion of each implementation phase. It is essential to give States feedback on the implementation, because it allows States to consider how to best



approach implementation. ROs, also learn from the information they gather from the States Parties.

It is the task of the judiciary to pass judgment in the event of disputes or noncompliance. Fortunately the AU, the EU and OAS already have human rights systems in place with the capacity to receive and handle complaints. The Courts in these respective regional systems function as safeguards and oversee whether States Parties observe the law and enforce the Courts' judgments. Once again it comes down to enforcement. Apart from adjudication the Court also has the task to create jurisprudence which can be referred to a national and regional levels.

From an executive point of view, ROs need to establish Commissions with the mandate to raise awareness about the RO and the rights of children. This is especially the case because the regional document involves children. NGOs and civil society groups have a crucial role in raising awareness. Thus it is essential for ROs to create networks that include the media, faith-based organizations and other key stakeholders. Regional conferences on the rights of children constitute an additional platform for ROs to gauge the sentiment amongst States Parties and those that are part of the network by taking their comments and findings onboard. Moreover ROs and States Parties can exchange information and establish cross-regional cooperation on the national and regional level. Cooperation also needs to be promoted amongst stakeholders. Last but not least a research team (this can be a Commission or working group) is indispensable to study and document developments. The collection and processing of data from States Parties, Courts, NGOs and civil society groups, etc. help to bring the regional protection of children into perspective and reflect new trends that can advance the protection of children. Part of raising awareness and promoting children's rights includes the publication and dissemination of these findings. In the foregoing section we have looked at certain aspects of the attributes of ROs in the realm of the rights of children. In order to better understand the role of the AU in particular in the enforcement of children's rights we shall study the ACRWC in the section below.

## **The African Charter on the Rights and Welfare of the Child (ACRWC)**

Under the aegis of the OAU<sup>335</sup>, Africa stood out in comparison to both Europe and the Americas as the only region to have ever adopted a Charter that essentially regulates

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<sup>335</sup> The African Union (AU) was established in 2000 to replace the Organization of African Unity (OAU). See Constitutive Act of the African Union, Available at:

children's rights. The latter has remained unchanged since the AU took on a distinct role to protect the rights and welfare of the child as a regional organization. Inspired by the UNCRC the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted on 1 July 1990 and entered into force on 29 November 1999. In view of preventing CST and the CSEC the ACRWC provides specific provisions that prohibit child labor and all forms of economic exploitation (article 15), protection against child (sexual) abuse and torture (article 16), sexual exploitation (article 27), and the sale, trafficking and abduction of children (article 29).

In its preamble Member States of the OAU and State Parties to the ACRWC acknowledged that the promotion and protection of the rights and welfare of the child would require the performance of duties on the part of 'everyone'. Moreover, all actions by any 'person or authority' should be in accordance with '*the best interest of the child*' principle (article 4). All States Parties to the ACRWC shall recognize the rights, freedoms and duties protected in the Charter and take all necessary steps in conformity with their domestic constitutional processes and the present Charter to pass legislation and other measures to give effect to the ACRWC.<sup>336</sup> In other words, States Parties to the ACRWC have the primary obligation to adhere and take all appropriate measures to implement the ACRWC. It aims to guarantee that the stipulated rights are enjoyed, by protecting children from becoming victims to the actions proscribed in the Charter. In addition to governments, all other persons, although not part of a government apparatus, have an obligation to contribute. All other persons include and may range from parents, teachers, entrepreneurs to civil society activists. Notwithstanding that domestic governments are primarily responsible for the wellbeing of their citizens, a combination of and cooperation between the different actors is fundamental to give effect to the ACRWC or for that matter any endeavour to eradicate the problem of CST and CSEC.

The Committee is tasked to promote and protect the rights in the ACRWC; to monitor the implementation of the Charter; to interpret provisions of the ACRWC at the request of a State Party, and to perform tasks entrusted by the organs of the AU.<sup>337</sup> In terms of article 45 the Committee may resort to the investigation of any matter within the scope of the ACRWC. It may request States Parties for relevant information pertaining to the implementation of the Charter and investigate adopted measures for implementation purposes. The latter implies that the Committee may resort to investigate any matter

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[http://www.au.int/en/sites/default/files/ConstitutiveAct\\_0.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_0.pdf) (Last visited 29, December 2013). The former OAU shall be referred to as AU, except if the matter explicitly concerns the OAU.

<sup>336</sup> African Charter on the Rights and Welfare of the Child (ACRWC) Article 1.

<sup>337</sup> ACRWC Article 42.

enshrined in ACRWC, subsequent to a communication from any person, group or NGO recognized by the AU, a State party to the ACRWC or the United Nations.<sup>338</sup>

Within two years of the entry into force of the ACRWC States Parties are required to report on the measures taken to give effect to the Charter, and on the advancement made in the realization of these rights.<sup>339</sup> From then on, the reporting procedure is repeated every three years.<sup>340</sup> Unfortunately, like the UNCRC, the ACRWC is silent on enforcement mechanisms in the case of noncompliance. What are the Committee's powers, and what remedies are at the disposal of the Committee apart from mere investigation in the event of noncompliance related to implementation or enjoyment of the rights covered in the Charter? How does the Committee deter or prevent recurrence and stimulate other States parties towards compliance? The lack of noncompliance mechanisms may be a legitimate reason to amend the ACRWC or to allow the AU to intervene to repair this vacuum. This is especially considering the gravity of the atrocities committed against children. An amendment may be time-consuming but necessary. Considering that the AU is a regional organization, it could summon and reprimand its Member States in the event of noncompliance with regional law, more so when it concerns the ACRWC. To remedy the lack of compliance assistance could be offered where needed ('soft' enforcement) without delay.

Active involvement in the enforcement of its regional rules and international law such as the UNCRC, permits the AU and its organs to serve as a supervisory body to ensure its Member States act accordingly. Having direct powers or control in or of matters related to compliance, allows the AU to respond more effectively to issues affecting the region. Additionally, an active stand towards the respect for regional norms sends a clear signal to AU Member States, while reinforcing the AU's authority and competence as a regional organization. What role must the AU appropriate to attain the respect of its Member States in the enforcement of children's rights?

## **The Role of the AU in the Enforcement of Children's Rights**

Criticism of national and international measures and in particular of the UNCRC's alleged ineffectiveness in combatting CST and CSEC, could serve as pretexts for ROs such as the AU to serve as a bridge to narrow the gap between national and international law, and to pave the way for widespread and effective enforcement of children's rights codified in the

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<sup>338</sup> ACRWC Article 44.

<sup>339</sup> ACRWC Article 43(1) (a).

<sup>340</sup> ACRWC Article 43 (1) (b).

ACRWC. With the adoption of ACRWC, the AU eliminated a vacuum that still represents a form of institutional weakness for other ROs. One of the principal roles of the AU is to ensure the enforcement of the ACRWC. Enforcement is essential for the overall success of regional human rights systems. This is also tenable for the ACRWC and thus children's rights.

However, the lack of noncompliance mechanisms (not uncommon) in human rights treaties, can provoke States Parties to abandon their obligations. As a result, other States may give expression to such behaviour, encouraging compliant States Parties to temporarily suspend or altogether terminate their obligations. This means that the shortage of noncompliance mechanisms epitomizes a form of institutional weakness which can jeopardize not only the objective of the Charter and its future success but also future negotiations, agreements and cooperation. So, apart from a judicial system and all necessary measures to actively enforce the ACRWC, it is pivotal to make this Charter work and to have enforcement mechanisms to ensure State compliance.

How can the AU ensure that the ACRWC achieves maximum efficacy, despite a dearth in compliance mechanisms? The Charter was adopted within the framework of the AU. In this light as a regional organization, the AU has the overall power (whether explicit or implied). As such it also has the responsibility to make the Charter work. After the implementation, monitoring and evaluation process the regional organization must ensure that States Parties implement the Charter by actually enforcing it. Second, non-enforcement is the primary reason that can bring the objective of the ACRWC into jeopardy. After all, the ACRWC was not adopted as a public relations stunt. But how can the AU make States Parties to the ACRWC abide by their obligations when the Charter does not provide any noncompliance mechanisms? What is the most optimal way to make the ACRWC work in Africa?

## **Measures**

Although, the ACRWC entered into force almost 15 years ago, it is useful to take stock and assess if the Charter is indeed implemented adequately, evaluate if it is applied properly and adhered to by States Parties. It is necessary to take stock to determine whether the children's rights provided for in the ACRWC are respected and fully implemented after harmonization. Furthermore assessment is critical to acquire insight on the current status *vis-à-vis* the overall protection of children particularly from CST and

CSEC. The AU has the enormous task to guarantee the enforcement of the ACRWC. But how can Africa achieve the highest level of State compliance through the enforcement of the ACRWC if the Charter is silent on a noncompliance mechanism?

## Dispute Settlement and Noncompliance Procedures

Like other treaties, the ACRWC is itself a mechanism. It is one that invites and encourages States to respect the rights of African children. As way of an extra safeguard to guarantee compliance, implementation mechanisms are generally included in treaties. Traditionally States Parties prefer practical mechanisms to pressure States to respect treaty obligations, and thereby elevate the level of effectiveness. Forms of the latter include dispute settlement procedures, and noncompliance procedures. Legal disputes are predominantly adjudicated through negotiation, mediation, conciliation, and settled through arbitration or international courts and tribunals.

In the event of noncompliance with treaty obligations, recourse can also be made to an invocation of 'soft' or 'hard' enforcement. Public naming and shaming of a non-compliant State, often induces the State towards compliance. It can also happen that a State is at fault because of the lack of expertise, financial incapacity or technological reasons. In such instances assistance is offered. Besides, noncompliance can be approached through 'hard' enforcement, which usually entails sanctions or a temporary suspension of rights and privileges. Moreover, the 1996 Vienna Convention on the Law of Treaties (VCLT) is generally applicable in the event of regular or systematic instances of noncompliance.

With regard to the noncompliance procedures mentioned above, it has increasingly become a trend to consider supervisory organs and noncompliance committees in human rights treaties. This phenomenon reflects the tendency to move from an enforcement approach towards a managerial approach to tackle noncompliance.<sup>341</sup> The latter would be less confrontational and diminish the risk of undermining cooperation which is an essential element to actually make a treaty work. What is more, a noncompliance committee of independent experts in combination with external reports from sources (e.g. civil society) other than the State in question, serves as valuable means to cross-check the information supplied by a State (the ACRWC applies periodic reporting as a

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<sup>341</sup> Ulfstein G., Marauhn T. and Zimmermann A. 'Making Treaties Work: Human rights, Environment and Arms Control'. Cambridge University Press (2007) p. 9.

compliance control mechanism).<sup>342</sup> It allows the Committee to deal with first-hand matters of noncompliance, instead of referral to a third party (tribunal or court).

The ACRWC's compliance control is set within two years after entry into force and every three years thereafter. Three years is relatively reasonable, as some other treaties opt for a period of 5 years. However, apart from the three year period, the Committee should have the freedom to request a report at any given time it considers it necessary. Moreover, this could be decided on a case-by-case basis depending on a State's commitment and/or level of compliance. It is possible that State A's three year report is satisfactory, but State B's report is not convincing. In such an event following the Committee's recommendations, the Committee should be in the position to request a report to monitor and evaluate if the recommendations are complied with at an earlier stage than the 3 year period. Furthermore, the Committee could be competent to go as far to shorten the due date of the next report if necessary.

## Referral to Courts and Special Rapporteurs

States Parties are hesitant to become involved with courts and tribunals. To avoid a court case States Parties to a treaty prefer to resolve disputes within the framework of the organization.<sup>343</sup> So, they prefer to apply or invoke mechanisms provided in e.g. the treaty. This approach gives the States Party certain control to influence the process and the outcome of the dispute. The latter is not possible if the dispute was to be handled in a court or tribunal.<sup>344</sup> For that reason noncompliant States Parties prefer noncompliance procedures. In contrast to the OAU, the AU has charged the Court of Justice of the African Union with matters arising from the implementation and application of the Constitutive Act.<sup>345</sup> With this the AU has taken an avenue that is less preferred by the organization, but may at times be necessary as a last resort to pressure a State Party towards compliance. In addition, it sends a signal of impartiality, further increasing the authenticity and cause for which the organization was established. In other words, analogous to the Constitutive Act of the AU, and in light of the ACRWC, it is worthwhile to consider the competence of the African Court of Justice and Human Rights to adjudicate matters pertaining to noncompliance, and the potential to include a provision to legally establish the jurisdiction of the Court, which is another deficiency of the ACRWC.

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<sup>342</sup> *Ibid.*, p. 10.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> Schermers H. G. & Blokker N. 'International Institutional Law'. Martinus Nijhoff Publishers (2005) p. 854. The African Court of Justice was merged in 2008 with the African Court of Human and People's Rights to become what is now known as 'The African Court of Justice and Human Rights'.

Besides dispute settlement and noncompliance procedures, the AU can also resort to special non-treaty based procedures, for example, those applied by the United Nations Commission on Human Rights. This includes the creation of working groups and the appointment of Special Rapporteurs. Working groups research the current state of enforcement and protection of rights, and rethink ways of further advancement by making recommendations. If allowed entry into the State concerned, the Special Rapporteur conducts specific investigations and calls on governments to comply with treaty obligations. Although, the ACRWC is silent on Special Rapporteurs, and make no mention of e.g. country visits, further development of treaty systems as a consequence of relevant State practice should not be excluded, in terms of article 31(3b) of the VCLT.<sup>346</sup> This was at issue with the European Framework Convention for the protection of Minorities, where a Committee of experts was granted entry into a Member State based on state practice.<sup>347</sup>

## Individual complaints

It is essential to explore and develop an individual complaint mechanism that goes beyond article 45 of the ACRWC. The current 'recognition' prerequisite prescribed by the AU may become a hindrance for individuals, for example those at grassroots level or members of civil society organizations, who wish to bring a complaint or point of view before the Committee. In addition, no recognition of the AU can limit the access to a court when seeking justice. It is understandable, that the Committee may perish because of the quantity of complaints; nevertheless individuals should be able to express their grievances or suspicions of noncompliance.

Allowing individual complaints will serve as an additional source of information for the Committee. The Committee acquires first-hand information, for example, regarding compliance, and information on what is really at hand in practice directly from victims or whistle-blowers. Hence, relevant information to guide the Committee and organs of the AU on further steps to be taken to ensure compliance with the Charter, and identify those areas where children's rights are respected or, in contrast, need to be enhanced. It is the responsibility of the AU to supply the Committee with the required manpower and funds to process complaints. Given that the information which the Committee receives helps to

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<sup>346</sup> Ulfstein G., Maruhn T., and Zimmerman A. (2007) p. 44.

<sup>347</sup> Ibid.

facilitate its work, if necessary the Committee could refer the case to the Court after preliminary investigations.

Corruption is one of the main factors that account for the ever-increasing growth of CST and CSEC, both in Africa and the other regions in the world. CST and CSEC are lucrative means to earn fast money. Unfortunately, States that depend on tourism and the fact that CST and CSEC contribute to the economy and public treasury, entice public officials (ranging from the police force, the judiciary and high public officials) to turn a blind eye to the horrific reality of child victims.<sup>348</sup> Corruption is a deeply rooted problem in Africa, meaning that an individual who does not meet the 'recognition' criteria is most likely not to have access to justice if corruption is at play. If the 'recognition' element would be revised, the Committee can serve as a last resort for individuals.

At the universal level human rights treaties grant individuals the right to make complaints with the bodies established for that purpose. In the same manner regional treaties such as the ACRWC should allow individuals to bring a complaint, giving the individual the assurance that their complaint will be dealt with. The results of the complaint are not binding, as it has not been adjudicated by a court or tribunal by means of *res judicata*. So, this means that the Committee's findings can in fact serve as recommendations to the decisions of the African Court of Justice and Human Rights<sup>349</sup>

Recommendations ought to be made known to the Council of Ministers in order to be monitored for compliance (on behalf of the Assembly).<sup>350</sup> Despite the fact that the ACRWC is silent on the role of the Assembly, which is composed of the Heads of State and Government, the findings and recommendations of the Committee ought to be made known to the supreme organ of the AU. The functions of the Assembly comprise: receiving, considering and taking account of the recommendations from the organs of the AU.<sup>351</sup> Thus even though the decisions and recommendations of the Committee are non-binding, the Assembly should be notified pursuant to article 31 of the Protocol on the establishment of the African Court of Human and People's Rights, especially to report noncompliance with the ACRWC by States Parties.

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<sup>348</sup> Schwartz (2004) p. 389. Berkman E.T. (1996) p. 404.

<sup>349</sup> Ulfstein G., Maruhn T., and Zimmerman A. (2007) p. 31.

<sup>350</sup> Article 29 (2) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of on Human and People's Rights. The African Court of Justice was merged in 2008 with the African Court of Human and People's Right to become what is now known as 'The African Court of Justice and Human Rights'.

<sup>351</sup> African Union Assembly of Heads of State and Government. Source available at: <http://www.au.int/en/organs/assembly> (Last visited on 29, December 2013).



The added value of notifying the Ministers and in particular the Assembly, allows the Assembly which is the highest power to establish noncompliance with the ACRWC as a priority that has to be dealt with, while monitoring compliance of the recommendations of the Committee. Besides, the Assembly has the power to order the establishment of organs of the AU. In view of the ACRWC, CST and CSEC continue to flourish, the creation of a Council should be considered that solely deals with matters pertaining to the best interest of the child. In this light and inspired by the independent agency that deals with corruption in Hong Kong, the AU can consider cooperation with a specialized and independent agency that investigates and combats CST and CSEC.

In view of the group the Charter aims to protect, namely minors and the nature of the rights provided for in the ACRWC, all individuals should be granted access to make their complaint known without any distinction. Particularly, in cases of CST and CSEC, where often governments turn a blind eye to the problem, as they themselves are perceived to benefit from CST and CSEC.<sup>352</sup>

### *Interstate Complaints*

The ACRWC makes no mention of what is perhaps the most controversial mechanism: interstate complaint. Interstate complaints allow States Parties to a treaty to address the State that is in violation or directly present the matter to the Commission (or dispute settlement body), as provided in articles 47 and 49 of the Banjul Charter.<sup>353</sup>

Interstate complaint is not a popular control mechanism for the simple reason that States do not want to double-cross each other or imperil their external relations with other States. This can be linked to various reasons such as historic ties, trade, defence, politics, and religion or simply, because the alleged complaining State itself is in default with treaty obligations. Nevertheless, it can be helpful to incorporate such a mechanism and allow States Parties to adopt it optionally. To grant each State the prospect of deciding whether or not to adopt interstate complaints as a reporting mechanism would be less intrusive. Furthermore, an optional clause will reduce the chance of a State renouncing the treaty as a whole.

An interstate complaint mechanism serves as a tool to gauge where States are at in the sense of conformity with treaty obligations. A State which is in violation will not want to adopt the provision. On the contrary, a noncompliant State will be much more eager to adopt an interstate complaint provision. After all, it seeks not to conceal the violation,

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<sup>352</sup> Schwartz (2004) p. 389. Berkman E.T. (1996) p. 404.

<sup>353</sup> The Banjul treaty is also referred to as the African Charter on Human and People's Rights.

but instead show willingness to redress the violation. The latter, may pave the way for 'soft enforcement', for example, by assisting a noncompliant State in dealing with the violation. Thus 'soft enforcement' is not a negative measure. In addition, a coherent message is fostered among States. The fact that States are critical of each other, serves as an incentive to promote State compliance. To take stock and evaluate the enforcement, compliance and effect of the ACRWC at the domestic level provides the Commission/AU and States Parties with insight. The results of the evaluation may indicate areas in which States may need assistance with implementation/enforcement, and whether it is necessary to place a State under a stricter degree of supervision. To keep an eye on States Parties in view of an interstate complaint provision does not provide States with State immunity or something of that sort. States that adopt the interstate complaints provision undergo the same evaluation process and will also be monitored like any other States Parties.

### **State responsibility and Diplomatic protection**

In terms of article 2 of the ILC (International Law Commission) Draft Articles on State Responsibility (SR), the failure to adhere to treaty-based (for example, ACRWC) or customary human rights constitutes an international wrongful act. Accordingly, apart from interstate complaints, article 41 SR provides a second ground on which a State can bring a matter of noncompliance forward. Invoking State responsibility to bring a halt to the violation of a *jus cogens* norm requires a serious breach (the effects of which are widespread)<sup>354</sup> of an international obligation such as the protection of human beings. The violation of a human rights treaty such as ACRWC constitutes an obligation *erga omnes* towards States Parties to the Charter, and to the international community as a whole.<sup>355</sup>

These two ways of raising noncompliance by a State actually complement each other. Thus the fact that the ACRWC does not provide interstate mechanisms, does not exclude State responsibility as a ground to address noncompliance. In reality, and as mentioned above States are reluctant to turn to the more formal treaty-based mechanism of interstate complaint, but are less hesitant to invoke State responsibility, a common mechanism applied in the event of the violation of treaty obligations. Both the avenue of interstate complaint and State responsibility, and especially the latter, make States more inclined to respect children's rights in the ACRWC. It is both a matter of compliance with treaty obligations and community interest.

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<sup>354</sup> The widespread scale is not required in the context of SR. Article 12 SR states that the origin or character of the breach of the international obligation is not relevant.

<sup>355</sup> Article 33, 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (SR).

Whether State responsibility is a practical tool to ensure compliance can be tricky, as the ACRWC falls within the scope of human rights. States are considered wronged when affected, according to article 42 SR. It may be a challenge to prove how a State is affected when it concerns human rights. But this is not necessarily the case. CST and the CSEC are heavily related to human trafficking which is a form of CSEC. Child trafficking and CSEC constitute a violation of both children's rights and human rights. For example a child is a citizen of State A and is trafficked into State B. Given that the child has the nationality of State A, it can hold State B accountable based on the genuine link principle,<sup>356</sup> which is the nationality of the child for CSEC. In other words, States can offer these children diplomatic protection, and pave the way to hold governments who tolerate CST and CSEC by ignoring the problem accountable by means of State responsibility.

There are exceptions to the exhaustion of all local remedies requirement as stipulated in article 15 of the 2006 Draft Articles on Diplomatic protection. As mentioned above, corruption is a big problem also in the judiciary and this may be a hindrance to exhausting local remedies. For example, there are countries where women do not have access to justice which can make it difficult or even impossible to duly and fairly exhaust local remedies. The exhaust of local remedies is also impossible when the judicial system is not operational. This can be the case following the collapse of the entire system after a period of war, occupation, and *coup d'état* or military governance. Although States are by no means obliged to offer diplomatic protection, it should be taken into consideration that CST and CSEC involve defenceless children. This alone could be a sufficient reason for every State to come to terms and defend its children.

In the situation of a State that allows its children to be exploited for commercial sexual activities, which is a direct violation of ACRWC and children's (human) rights, any State other than the affected State, should hold the State that is noncompliant with the ACRWC responsible, based on *erga omnes* obligations towards the international community as a whole<sup>357</sup>, as provided in article 48 SR. Every State has an (international) positive obligation to protect its citizens, more so when it comes to children's rights which is a part of human rights.

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<sup>356</sup> The condition of genuine link was raised in a judgement of the International Court of Justice (ICJ) Nottebohm case (Liechtenstein v. Guatemala) ICJ Reports, 1955, pp. 4, 22-23.

<sup>357</sup> Barcelona Traction, Light and Power Company Limited case (Belgium v. Spain), ICJ Reports 1970, pp. 33, 32.

Invoking accountability will send a strong message to the world, resulting in States taking effective measures to eradicate CST and CSEC or face the option of being held accountable for both gross violation of children's rights and human rights. At least the victims can receive justice and/or reparation for their government's failure to protect them or for the foreign State that allowed them to be sexually exploited. The decision as to whether to invoke diplomatic protection or State responsibility should be decided on a case-by-case basis. It is perfectly possible to invoke both, although that might unnecessarily elongate the (judgment) process.

The success of the ACRWC requires States Parties actually to comply with the Charter through enforcement. In essence the lack of enforcement will lead to the failure to protect African children. Therefore the AU has to take on the leading role by implementing measures to ensure compliance with the Charter. Also important is to consider an individual complaint system for individuals and civil society. These two groups are essential to assist the AU and the Committee with valuable information to ensure the success of the ACRWC. After all, everyone must contribute to ensure the rights enshrined in the Charter are realized. Thus, eradicating CST and CSEC takes more than legislation, political will or civil society, it requires cooperation. Children's rights are part of human rights and each State has an obligation *erga omnes* to abide and respect international law. The windows of diplomatic protection and State responsibility are two avenues to remind States of their obligations by holding them accountable for failing to comply with children's rights, as noncompliance can damage the international reputation of a State. Perhaps it is worth considering holding individual members of the government apparatus accountable regardless of their position or office? This includes: heads of state, Ministers (of Children's Affairs), law enforcement officials and members of the judiciary. Apart from being sacked, or naming and shaming them, they could also pay reparation to victims with their personal assets. The introduction of such deterrents may contribute to a more active enforcement of the ACRWC. In this same light, it is essential to establish a platform to further deliberate on how to criminalize the failure to protect children specifically in relation to CST and CSEC as a crime against humanity. It requires little study to prove that local governments fail systematically to protect children from CST and CSEC in times of peace.<sup>358</sup> The latter failure also includes CSEC during conflict and peace building by peacekeepers and national soldiers in the frontlines.<sup>359</sup>

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<sup>358</sup> Beyer N. L. (2000-2001) p. 318. Schwartz (2004) p. 389. Berkman E.T. (1996) p. 404.

<sup>359</sup> See Levin S.A. (2003) pp. 833-842. Jennings. K M (2010) pp. 229-243. O'Brien M. (2011) pp. 803-827.

## Conclusions

The commercial sexual exploitation of children (CSEC) is a worldwide problem that has left no region unaffected. Child sex tourism, a form of CSEC is linked to the extremely lucrative child trafficking for sexual purposes, which attracts drug traffickers to the fastest growing criminal trend namely human trafficking (child trafficking). CSEC is the result of factors that range from poverty, weak law enforcement to gender discrimination. Child sex tourists come in all forms and from all walks of life and generally travel to poor developing countries (receiving countries) with inadequate laws, no or weak enforcement mechanisms and high levels of corruption. Local men and women also contribute to the problem of CSEC. They are predators that sexually exploit children who are also exploited by (sex) tourists. Victims of CSEC are often displaced children, survivors of (internal) armed conflicts or natural disasters or runaway children that live on the streets. Nonetheless, the majority of victims to CSEC originate from underdeveloped or destabilized rural areas and impoverished families throughout Asia, Africa, the Americas and (Eastern) Europe.<sup>360</sup>

In addition to the customer and perpetrator there are others who (in) directly benefit from CSEC. Remunerations are redistributed from the metropolitan to the countryside areas contributing to money-laundering, accordingly attracting international crime groups including local corrupt government officials, who visit, sympathize or are often co-owners of sex establishments.<sup>361</sup> In fact CST and CSEC constitute a legitimate source of income for the tourist industry (e.g. hoteliers, air carriers and tour operators) as a whole.<sup>362</sup> Governments regard the CST/CSEC industry as a contribution to the national economic growth, and go as far as to ignore conflicting legislation to their economic objective.<sup>363</sup> This explains why governments often turn a blind eye to this massive form of children's and human rights violation. The effects and ramifications of CSEC and deprivation from childhood, a family life, education, healthcare, humane treatment and protection by the government comprise the violation of children's rights recognized in international human rights law.

Appalled by the staggering rate at which CSEC continues to flourish we argue that the national and international (UNCRC in particular) legal response to CST and CSEC do not offer sufficient protection to children. In the hope of finding a regional safety net to fill the deficiencies between national and international law, we analyzed the enforcement of

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<sup>360</sup> Fredette (2009) p.4.

<sup>361</sup> Schwartz (2004) p. 389.

<sup>362</sup> Ibid., p. 389.

<sup>363</sup> Ibid., p. 390.

children's rights in Europe, the Americas, Africa and Asia. In terms of article 1 of the (ECHR) reference is made to "all" which implies that no distinction is made between adults and children. Article 19 of the (AICHR), is the single provision to address children's rights. ASEAN adopted the AHRD in November of 2012 and, while the ACWC is currently in the process to develop policies, programs and innovative strategies *vis-à-vis* the right of women and children. It can be asserted that the EU and OAS are short of a regional instrument that regulates children's rights which constitutes institutional weakness amongst ROs. This leaves the AU as the only RO with a children's rights document.

The ACRWC is inspired by the UNCRC, but is designed to provide for the needs and challenges Africa faces. The comparative exercise in section 7.2.1 confirms that the UNCRC was designed from the prospective of the State as a subject of international law and duty bearer. On its part the ACRWC instead refers directly to the 'child' as an individual subject of international law and holder of rights. This alone is sufficient reason to vouch for the regional regulation of children's rights. With the focus on the individual as a subject of international law it enhances the overall protection of children as the right and duty bearer and opens a world of possibilities. The advantages of a regional children's rights document are many. The application of article 1 of the ECHR and article 19 of the ACHR are broad yet not substantive enough for the protection of children, as a result both the ECHR and IACHR rely on the UNCRC as an interpretive guide. In contrast we assert that the UNCRC is heavily dependent on the national and regional human rights systems for the enforcement of children's rights.

By incorporating regional needs to which people can relate in a regional document (although inspired by international law), international law is brought closer to where it matters most: the municipal level. This approach is practical, as it responds regional challenges that are overlooked in international law (UNCRC). What is more, it increases the level of acceptance which helps to bridge the gap between national and international law. State Parties to the ACRWC endorsed the regional children's rights document which resulted in the legal reform of national laws and acquiescence in the submission of State reports.

What role could the AU take on as a regional pioneer that has regulated children's rights? In view of its legislative role and to do away with institutional weakness the AU created the ACRWC. Together with the States Parties to the Charter, the AU has to take all the necessary steps to give effect to the Charter. As an organ of the AU, the ACJHR has the task to assess whether the ACRWC and decisions of the Courts are enforced. The Court adjudicates and creates jurisprudence that can be used as a point of reference at both the national and regional levels. The executive role of the AU is more substantive. The

AU and the established Commission are responsible for activating the actual enforcement of the Charter, ensuring the implementation of the ACRWC is monitored and evaluated to identify problems States Parties may encounter. Moreover the AU and the established Commission also give feedback to State Parties which have submitted their State report. These are two occasions on which the AU can intervene by assisting the State Party with the implementation which is fundamental to jump-start the success of the Charter. The involvement of NGOs, civil society groups and other stakeholders also contributes to the success of the Charter. It is the task of the AU and its organs to involve these groups in the early stages at the drafting table and invite them to be part the implementation process. Furthermore, relevant NGOs to the Commission could be entitled with an observer status and a platform on which to raise their views based on their expertise and network with grassroots organizations. The preceding is especially critical in ROs' efforts against CSEC. More so, as a RO, the AU must spread awareness of the rights of the child and prevention of issues such as CSEC. Citizens are empowered when they know their rights and will seek justice when deprived of their rights. Thus it becomes more difficult for authorities not to enforce the law especially when NGOs and civil society groups are standing on the sidelines to safeguard the rights of the vulnerable. Furthermore the silence on noncompliance mechanisms must be broken. What happens in the event of noncompliance? What role is there then for the RO?

Almost 15 years later the AU still holds a unique position as the only RO with a regional children's rights document. It is useful to take stock and assess whether the Charter is indeed implemented adequately, evaluate if it is applied properly and adhered to by State Parties. This stock-taking is necessary to ascertain whether the children's rights provided for in the ACRWC are respected and enjoyed. Regulation alone is insufficient if not enforced. Contemplating the enforcement of children's rights and the fight against CSEC, we must involve everybody that is part of a child's life. The best interest of the child is no longer just the government's responsibility. NGOs and civil society groups have an influential position. So the enforcement of children's rights will require a fusion of the top-down and bottom-up approach. This approach will serve as a sort of check and balance system. ROs that still experience institutional weakness should consider the regulation of children's rights. The regional regulation of children's rights could enhance the work of ROs and bring the cooperation between ROs in the fight against CSEC to new heights.

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## Annex 1: Terms and Definitions

### Child:

In terms of article 1 of the UNCRC a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### Child Sex Tourism (CST):<sup>364</sup>

End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) defines CST as “the commercial sexual exploitation of children by men or women who travel from one place to another, usually from a richer country to one that is less developed, and there engage in sexual acts with children, defined as anyone aged under 18”.<sup>365</sup>

### Commercial Sexual Exploitation of Children (CSEC):<sup>366</sup>

The Declaration of the World Congress against Commercial Sexual Exploitation of Children defines CSEC as “sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labor and a contemporary form of slavery”.<sup>367</sup>

### Primary forms of CSEC<sup>368</sup>

### Child prostitution:

“An act of engaging or offering the services of a child to a person to perform sexual acts for money or other consideration with that person or any other person”.

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<sup>364</sup> The UNCRC is silent on ‘child sex tourism’ however; ‘child sex tourism’ is referred to in article 10 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

<sup>365</sup> ECPAT CSEC terminology available at: [http://www.ecpat.net/EI/Csec\\_cst.asp](http://www.ecpat.net/EI/Csec_cst.asp) (Last visited 29, December 2013)

<sup>366</sup> The reduction of the complex meaning of CSEC to the main attributes deemphasizes other elements/ factors that constitute CSEC. Studies indicate that the definition and understanding of CSEC and its many forms (e.g. child marriage) have evolved over the years. The focus is no longer on the contractual or commercial element the exploiter and violence that come at hand are also regarded.

<sup>367</sup> First World Congress against Commercial Sexual Exploitation of Children. Declaration and Agenda for Action (5, June 1997). § 5, available at: <http://www.hartford-hwp.com/archives/28/024.html> (Last visited 29, December 2013)

<sup>368</sup> The definitions used are above taken from the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) available at: <http://www.escap-hrd.org/csec2.htm> (Last visited 29, December 2013)

**Child pornography:**

“Visual or audio material which uses children in a sexual context. It consists of the visual depiction of a child engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals intended for the sexual gratification of the user, and involves production, distribution and or use of such material”.

**Trafficking and sale of children for sexual and pornographic purposes:**<sup>369</sup>

“Trafficking across borders and within countries for sexual purposes is the transfer of a child from one party to another for whatever purpose in exchange for financial consideration or other rewards. Sexual trafficking is the profitable business of transporting children for commercial sexual purposes. It can be across borders or within countries, across state lines, from city to city, or from rural to urban centers”.

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<sup>369</sup> Fitzgibbon K. ‘Modern-Day Slavery? The Scope of Trafficking in Persons in Africa’. African Security Review 12(1) (2003). pp. 81-89

