

To what extent does Zimbabwe comply with its international obligations for the protection of unaccompanied and separated refugee children?

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Declaration

I, Sheena Mutsvara, do hereby declare that, *To what extent does Zimbabwe comply with its international obligations for the protection of unaccompanied and separated refugee children* is my own work, that it has not been submitted for other degree or to any other institution of higher learning, and that I have properly acknowledged all the sources which I have used by means of complete references.

Signed

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Date.....

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Dedication

To my mother, Nyarai Junior Mutsvara, you are my pillar of strength. I love you mom.



List of abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CRC	Convention on the Rights of the Child
GOZ	Government of Zimbabwe
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IOM	International Organisation for Migration
JRS	Jesuit Refugee Service
NGO	Non-Governmental Organisation
OAU	Organisation for African Unity
UN	United Nations
UARC	Unaccompanied Refugee Children
UNHCR	United Nations High Commissioner for Refugees
WFP	World Food Programme

Key words

Asylum seeker

Best interests

Children

International protection

Non - refoulement

Policy

Procedure for refugee status determination

Refugee camps

Unaccompanied

Zimbabwe



TABLE OF CONTENTS

Declaration.....	ii
Acknowledgements.....	iii
Dedication.....	iv
List of abbreviations.....	v
Key words.....	vi
CHAPTER 1.....	1
INTRODUCTION.....	1
1.1 Background.....	1
1.2 Research questions.....	5
1.3 Hypothesis.....	5
1.4 Significance of study.....	7
1.5 Methodology.....	7
1.6 Definitions.....	7
1.7 Chapter outline.....	8
CHAPTER 2.....	9
LEGAL FRAMEWORK FOR THE PROTECTION OF UARC UNDER INTERNATIONAL AND REGIONAL LAW.....	9
2.1 Introduction.....	9
2.2 International and regional refugee legal framework.....	10
2.2.1 The 1951 Convention relating to the Status of Refugees and its 1967 protocol.....	10
2.2.2 The OAU Convention governing the Specific Aspects of Refugee problems in Africa.....	12
2.3 The United Nations High Commissioner for Refugees (UNHCR).....	16
2.3.1 Role of the United Nations High Commissioner for Refugees.....	16
2.3.2 UNHCR executive committee conclusions.....	17
2.3.3 UNHCR policy on refugee children.....	19
2.3.4 UNHCR guidelines on protection and care.....	21
2.3.5 UNHCR guidelines on determination of the best interests of the child.....	23
2.3.6 Guidelines on child asylum claims.....	24
2.3.7 Interagency guiding principles.....	25
2.4 International and regional human rights framework.....	26
2.4.1 The UN Convention on the Rights of the Child (CRC).....	26

2.4.2 The African Charter on the Rights and Welfare of the Child	29
2.5 General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin	33
2.5.1 Legal obligations of State Parties	34
2.5.1.1 Non-discrimination	34
2.5.1.2 The best interests of the child	36
2.5.1.3 The right to life, survival and development	39
2.5.1.4 Right of the child to express his or her views freely	39
2.5.1.5 Respect for the principle of non-refoulement and confidentiality	40
2.5.2 General and specific protection needs	41
2.5.2.1 Initial assessment and measures	41
2.5.2.2 Appointment of a guardian or adviser and legal representative	42
2.5.2.3 Care and accommodation arrangements	43
2.5.2.4 Full access to education	44
2.5.2.5 Right to an adequate standard of living	45
2.5.2.6 Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health	45
2.5.2.7 Prevention of trafficking and of sexual and other forms of exploitation, abuse and violence	46
2.5.2.8 Prevention of military recruitment and protection against effects of war	47
2.5.2.9 Prevention of deprivation of liberty and treatment in cases thereof	47
2.5.3 Procedural issues	48
2.6 Conclusion	49
CHAPTER 3	50
AN ANALYSIS OF ZIMBABWE’S EXISTING LEGISLATION FOR THE PROTECTION OF UARC	50
3.1 Introduction	50
3.2 The Constitution of Zimbabwe	51
3.3 Subsidiary legislation protecting UARC	57
3.3.1 The Children’s Act of Zimbabwe	57
3.3.2 The Refugees Act	59
3.3.3 Immigration Act and Citizenship Act	61
3.4 Protection and provision rights of UARC	62
3.4.1 Birth registration and identity	62

3.4.2 Enjoyment of family/ parental care	62
3.4.3 Maltreatment, neglect or any form of abuse.....	63
3.4.4 Child labour	65
3.4.5 Deprivation of liberty	66
3.4.6 Right to education.....	67
3.4.7 Health care, shelter, nutrition and water.....	69
3.5 Reception centres and the camping policy.....	70
3.5.1. Refugee reception centres.....	70
3.5.2. Refugee camps.....	71
3.6 Institutional framework.....	72
3.6.1 Responsibility of refugees in Zimbabwe	72
3.6.2 Committee for refugee status determination	73
3.6.3 Coordination of refugee assistance.....	74
3.6.4 UN agencies and NGOs Involved in refugee assistance	75
3.7 Conclusion.....	77
CHAPTER 4	79
CONCLUSION AND RECOMMENDATIONS	79
4.1 Conclusion.....	79
4.2 Recommendations	82
4.2.1 Legislative framework.....	82
4.2.2 Increased support to refugees in refugee camps	83
4.2.3 General Recommendations.....	84
Bibliography	86

CHAPTER 1

INTRODUCTION

1.1 Background

After World War I (1914-1918), millions of people fled their homelands in search of refuge.¹ These people thus became the first refugees of the 20th century.² The number increased radically during World War II (1939-1945).³ In 1951, there were an estimated one million refugees within the United Nations High Commissioner for Refugee's mandate.⁴ Soon after World War II, the refugee problem was yet to be resolved. The international community, therefore, saw the need for a new international instrument to define the legal status of refugees.⁵ This saw the creation of the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention), which became the landmark for setting standards for the treatment of refugees.⁶

There was a growing number of refugees fleeing wars and internal conflicts starting in the late 1950's on the African continent.⁷ The 1951 Refugee Convention did not address the unique problems associated with African refugees. The result was the adoption, in the 1960s, of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.⁸ By the end of 2013, there were more than half a million people

¹ UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011, available at: <http://www.refworld.org/docid/4ec4a7f02.html> (accessed 20 September 2014).

² The 1951 Refugee Convention, p4.

³ The 1951 Refugee Convention, p4.

⁴ The 1951 Refugee Convention, p5.

⁵ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3.

⁶ Feller E 'International refugee protection 50 years on: The protection challenges of the past, present and future' (2001) 83 *International Review of the Red Cross* 585.

⁷ Labor A *Collection of International Instruments and Legal texts for Refugee and Others of concern to UNHCR* (2007) 596.

⁸ Organisation of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45.

of concern to the United Nations Commissioner of Human Rights (UNHCR) in Southern Africa.⁹ As of December 2012, these included some 134,000 refugees, 272,000 asylum-seekers and almost 19,740 returnees.¹⁰ Nearly five percent (or two hundred thousand) of the refugee children are unaccompanied refugee children (UARC).¹¹ Due to their heightened vulnerability, it has always been accepted that UARC require a raised level of protection and assistance in order to find durable solutions for their particularly tragic situation.¹² They face a myriad of risks, such as, unlawful military recruitment, sexual exploitation and abuse, child labour, denial of access to education and basic assistance and even death.¹³

National asylum systems in the sub-region of Southern Africa work under severe capacity constraints, and have difficulties in identifying people in need of international protection.¹⁴ While nearly all of the countries in the sub-region have ratified the 1951 Refugee Convention, its 1967 Protocol and the 1969 OAU Convention; most have done so with reservations regarding freedom of movement.¹⁵ Many countries in the sub-region hosting a significant number of refugees maintain encampment policies that restrict the freedom of movement of refugees and asylum-seekers and impede their efforts to become self-reliant.¹⁶

⁹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA) 'Mixed Migration in Southern Africa' (2014) 13 *ROSA Humanitarian Bulletin* 3.

¹⁰ UN High Commissioner for Refugee '2014 UNHCR Regional Operations Profile - Southern Africa' available at <http://www.unhcr.org/pages/49e485c66.html> (accessed 25 October 2014).

¹¹ UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care*, 1994 available at <http://www.refworld.org/docid/3ae6b3470.html> (accessed 13 October 2014).

¹² UN General Assembly *Protection and assistance to unaccompanied and separated refugee children: Report of the Secretary-General* (2001) para. 6.

¹³ UN General Assembly *Protection and assistance to unaccompanied and separated refugee children: Report of the Secretary-General* (2001) para. 6.

¹⁴ Millbank A 'The Problem with the 1951 Refugee Convention' Research Paper 5 (2000) 4 Social Policy Group.

¹⁵ UN High Commissioner for Refugee '2014 UNHCR regional operations profile - Southern Africa' available at <http://www.unhcr.org/pages/49e485c66.html> (accessed 25 October 2014).

¹⁶ Morand M 'The implementation of UNHCR's policy on refugee protection and solutions in urban areas' Global Survey 2012 available at <http://reliefweb.int/sites/reliefweb.int/files/resources/UNHCRs%20Policy%20on%20Refugee%20Protection%20and%20Solutions%20in%20Urban%20Areas.pdf> (accessed 10 October 2014).

Many of these camps have existed for decades, and the second and sometimes third generations of refugees living in them find it difficult to envision a better future.¹⁷

Refugees in Zimbabwe come from areas, such as, the Great Lakes region: More specifically, they come mostly from Rwanda, the Democratic Republic of Congo, Somalia and Malawi.¹⁸ Zimbabwe hosted about 2,000 refugees from various countries at the end of 2000.¹⁹ Some 2,000 new refugees and asylum seekers arrived in Zimbabwe during 2003, increasing their number to 12,000 by the end of the year.²⁰ The overwhelming majority of refugees lived in urban areas without significant humanitarian assistance.²¹ Zimbabwe's deteriorating economy plagued by 500 per cent inflation, rising unemployment, and growing food shortages eroded their ability to support themselves.²² The UN High Commissioner for Refugees (UNHCR) offered larger stipends to help the neediest urban refugees.²³ Refugees from the Great Lakes region entered the country, mostly Rwandans expelled from Ngora refugee camp by the Tanzanian government and fearing retribution if they returned to Rwanda.²⁴ They quickly overburdened the ill-equipped refugee transit centres in Waterfalls, Harare, and Zimbabwe's sole refugee camp, Tongogara, in the town of Chipinge in the eastern part of the country.²⁵ UNHCR continued to offer training to government officials on international refugee

¹⁷ UN High Commissioner for Refugees (UNHCR), *Global appeal 2014-2015 Southern Africa* p5 available at <http://www.unhcr.org/528a0a29b.pdf> (accessed October 5 2014).

¹⁸ United States Committee for Refugees and Immigrants 'U.S. Committee for Refugees World Refugee Survey 2004 – Zimbabwe' 25 May 2004, available at <http://www.refworld.org/docid/40b4594c0.html> (accessed 17 October 2014).

¹⁹ United States Committee for Refugees and Immigrants 'U.S. Committee for Refugees World Refugee Survey 2001 – Zimbabwe' 20 June 2001, available at <http://www.refworld.org/docid/3b31e16b18.html> (accessed 16 August 2014).

²⁰ United States Committee for Refugees and Immigrants 'U.S. Committee for Refugees World Refugee Survey 2004 – Zimbabwe' 25 May 2004, available at: <http://www.refworld.org/docid/40b4594c0.html> (accessed 16 August 2014).

²¹ UNHCR 'Urban Refugees' available at <http://www.unhcr.org/pages/4b0e4c3a6.html> (accessed 17 September 2014).

²² UN Economic Commission for Africa *Economic Report on Africa 2004 - Unlocking Africa's Trade Potential in the Global Economy Overview* (2014) 5.

²³ UNHCR 'Urban Refugees' available at <http://www.unhcr.org/pages/4b0e4c3a6.html> (accessed 17 September 2014).

²⁴ Jakachira J 'Zimbabwe hit by influx of refugees' *Daily News* 15 February 2003 available at <http://www.zimbabwesituation.com/> (accessed 5 February 2015).

²⁵ Jakachira (2003) 2.

protection standards, and urged the government to issue identity cards to all refugees and asylum seekers. At present some 7,500 refugees, mainly from the Great Lakes and the Horn of Africa, live in Tongogara camp in Zimbabwe.²⁶

The protection of UARC cannot be treated as an afterthought, but must be integrated into the design and implementation of assistance programs deliberately and early in the process.²⁷

Children are the future of this world, and it is the responsibility of our generation to protect and nurture them. It is vital, therefore, that where the most vulnerable of all children are not sufficiently protected, the law should develop to ensure such protection.²⁸ Bolton is of the view that a child's welfare and the special protection and assistance due to him or her in accordance with international standards, should prevail over the narrow concerns of refugee status. This means that the child ought to be treated and seen as a child first and a refugee or migrant second.²⁹ Due to the factors such as the absence of an older guardian or their young age, UARC face numerous risks over and above those faced by other refugee children.³⁰ It is argued that what is required is a decision concerning UARC which takes account of the best interest of the child and effectively contributes to his or her full development, preferably within a family environment.³¹

²⁶ UN High Commissioner for Refugees '2014 UNHCR regional operations profile - Southern Africa' available at <http://www.unhcr.org/pages/49e485c66.html> (accessed 25 October 2014).

²⁷ Macdonald A 'Protection responses to unaccompanied and separated refugee children in mixed migration situations' (2008) 27 *Refugee Survey Quarterly* 50.

²⁸ Swart S 'Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law' (2009) 9 *AHRLJ* 110.

²⁹ Bolton S et al *Working with refugee children: Current issues in best practice* (2011) 20.

³⁰ Derluyn I & Broekaert E 'Unaccompanied refugee children and adolescents: The glaring contrasts between a legal and a psychological perspective' (2008) 31 *International Journal of Law and Psychiatry* 325.

³¹ Macdonald A (2009) 52.

1.2 Research questions

The main research question to be answered is: Whether Zimbabwe is in compliance with its international obligations for the protection of UARC. In seeking to answer this main question, the research will address the following sub-questions:

- What is the legal framework in Zimbabwe that protects UARC?
- What obligations does Zimbabwe have, internationally to protect UARC?
- How does Zimbabwe comply with these obligations in law and in practice?
- What recommendations can be offered to Zimbabwe to facilitate the promotion and protection of the rights of UARC in Zimbabwe?

1.3 Hypothesis

This research is based on the supposition that the refugee and child policies and laws in Zimbabwe do not sufficiently provide protection to UARC. Since policy translates into practice, the current policies do not give room for a lot to be done in practise. Children are at an increased risk of becoming separated from their families and caregivers in the turmoil of conflict and flight.³² UARC are entitled to international protection under international human rights law, international refugee law, international humanitarian law and various regional instruments.³³ They often require immediate protection and assistance, most notably, against military recruitment; sexual exploitation, abuse and violence; forced labour; irregular adoption; trafficking; discrimination; and lack of access to education and recreational activities.³⁴ Both girls and boys are at risk, but girls are often the principal targets of sexual exploitation, abuse and violence and are often more disadvantaged than boys in terms of

³² UN High Commissioner for Refugees (UNHCR) *Report of the Secretary-General - Assistance to unaccompanied refugee minors* (2003) 7.

³³ Action for the Rights of Children (ARC) 'International Legal Standards' p9 available at <http://www.unhcr.org/3e37e5ba7.pdf> (accessed 10 March 2015).

³⁴ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

access to education.³⁵ In their country of refuge, refugees face manifold problems when trying to adapt to their new environment. Unfortunately, many host communities do not sufficiently acknowledge the plight of refugees and fail to provide a stable and safe environment, which in turn puts the refugees at risk of human rights abuses.³⁶ The standards laid down in the human rights treaties oblige States to promote human rights, and therefore, protect refugees.³⁷ The primary concerns of refugees, for which the International Covenant on Civil and Political Rights (ICCPR) and other international instruments provide important rights are, physical security with regard to forced removal (*non refoulement*), family unity, non-discrimination and minority rights.³⁸

The Children's Act of Zimbabwe³⁹ does not make specific provision for refugee children. It, however, refers to children in need of care and defines them as 'destitute' or 'abandoned children.' Refugee children, however, are not necessarily destitute but could be abandoned. The Refugees Act⁴⁰ and the Immigration Act⁴¹ of Zimbabwe only protect refugees and 'members of the family of such refugees' which may include children under the age of eighteen years, thus therefore excluding UARC. The Refugees Act has no specific section also for UARC. It is, therefore, beneficial to examine the mechanism for the protection of UARC and in the light of this determine whether Zimbabwe is in violation of its obligations towards protection of this group of children.

³⁵ UN General Assembly *Report of the Secretary General: Assistance to unaccompanied refugee minors* (2005) 6.

³⁶Santhosh P 'Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights' Research Paper No. 132 (2006) 20.

³⁷The Committee on Economic, Social and Cultural Rights *Fact Sheet No.16 (Rev.1)*, available at <http://www.ohchr.org/documents/publications/factsheet16rev.1en.pdf> (accessed 11 October 2014).

³⁸ Santhosh P (2006) 20.

³⁹ The Children's Act of Zimbabwe Chapter 5:06 of 1971, last amendment by Act 14 of 2002.

⁴⁰ The Refugees Act of Zimbabwe Chapter 4:03 of 1983 as amended up to Act 22 of 2001.

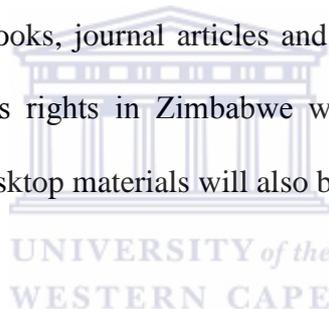
⁴¹ The Immigration Act of Zimbabwe Chapter 4:02 of 1974, as amended up to Act 22 of 2001.

1.4 Significance of study

The study will add to the already existing jurisprudence on refugee protection and will be of interest not only in Zimbabwe but to Africa as a whole. The research is necessary and of importance to Africa because of the increase in conflict caused by civil wars, political violence, terrorism and economic hardships continuously driving the movement of people on the continent.

1.5 Methodology

The researcher will analyse primary sources of law such as the relevant international conventions and protocols, the Constitution of Zimbabwe⁴² relevant legislation and case law. Secondary sources such as textbooks, journal articles and newspaper articles that deal with rights of refugees and children's rights in Zimbabwe will be referred to. Internet based publications, reports and other desktop materials will also be useful for this study.



1.6 Definitions

An unaccompanied child is a child⁴³ who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.⁴⁴ The definition also includes children who are without any adult care, children who are entirely on their own, children who are with other siblings but who, as a group, are unsupported by any adult responsible for them, and children who are with informal foster families.⁴⁵ Separated children are 'children separated from both parents or from a previous legal care-giver but not necessarily from other relatives.'⁴⁶ An asylum seeker is a person who says he or she is a

⁴² Amendment 20 of 2013.

⁴³ As defined by Art 1 of the CRC.

⁴⁴ General Comment No. 6, CRC/GC/2005/6.

⁴⁵ UN High Commissioner for Refugees (UNHCR) *Report of the United Nations High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions: Assistance to Unaccompanied Refugee Minors, Report of the Secretary-General* (1996) 1.

⁴⁶ Bhabha J *Child Migration and Human Rights in a Global Age* (2014) 328.

refugee, but whose claim has not yet been definitively evaluated and given refugee status.⁴⁷ Reference to ‘UARC’ in this thesis means an asylum seeking child and a child who has been granted refugee status. Most of the provisions and protection accorded to UARC are also applicable to separated children.

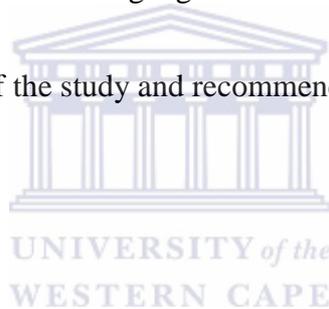
1.7 Chapter outline

The study is divided into four chapters, including this one:

Chapter 2 will examine existing legal framework governing refugee children under regional and international instruments.

Chapter 3 will analyse Zimbabwe’s existing legislation which protects refugee children.

Chapter 4 will be a conclusion of the study and recommendations.



⁴⁷ UN High Commissioner for Refugees (UNHCR) ‘Asylum seekers’ available at <http://www.unhcr.org/pages/49c3646c137.html> (accessed 2 July 2015).

CHAPTER 2

LEGAL FRAMEWORK FOR THE PROTECTION OF UARC UNDER INTERNATIONAL AND REGIONAL LAW

2.1 Introduction

Zimbabwe is a State Party to various international and regional instruments that regulate the protection of children and refugees. Zimbabwe is a State Party to the CRC⁴⁸ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁴⁹ It has also ratified a number of other international and regional human rights instruments that are pertinent to refugee protection such as the OAU Convention on refugees and the UN Refugee Convention. All these instruments emphasise the fact that the rights contained therein apply to 'everyone' thus including UARC and outline the obligations of State Parties thereto.

A number of soft laws such as General Comments and declarations also establish obligations apposite to the protection of UARC. While General Comments are not legally binding, they are today one of the potentially most significant and influential tools available to UN human rights treaty bodies in their endeavors to deepen the understanding and strengthen the influence of international human rights norms.⁵⁰ Zimbabwe as a State Party is thus bound by these instruments and has obligations flowing from them. As outlined in chapter one, this chapter will provide a more detailed analysis of the present literature on the protection of UARC. An analysis of the legal framework of State Parties' obligations regarding UARC under major international and regional instruments will also be made, together with the basic

⁴⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, A/RES/44/25.

⁴⁹ Organisation of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

⁵⁰ Alston P 'The historical origins of the concept of "General Comments" in human rights law', in de Chazournes & Debbas (eds) *The International Legal System in Quest of Equity and Universality* (2001) 16.

scheme envisaged by each of these instruments, which will later be used for assessing Zimbabwean laws, policies and practices on UARC in chapter 3.

2.2 International and regional refugee legal framework

2.2.1 The 1951 Convention relating to the Status of Refugees and its 1967 protocol

The 1951 Refugee Convention establishes a regime of rights and responsibilities for refugees and has remained the cornerstone of this regime to the present day.⁵¹ Read together with its 1967 Protocol, the 1951 Refugee Convention contains three types of provisions: provisions defining who a refugee is and when one ceases to be a refugee, provisions that define the rights and duties of refugees in their host countries and provisions dealing with implementation and States' obligations, including cooperating with the United Nations High Commissioner for Refugees in the exercise of its functions and facilitating its duty of supervising the application of the Convention.⁵² Zimbabwe assented to the 1951 Refugee Convention and its protocol on the 25th of August 1981.⁵³ The term 'refugee' as defined in Art 1A (2) of the Convention means:

'[A]ny person who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country

⁵¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 20, Human Rights and Refugees, July 1993*, No. 20, available at <http://www.refworld.org/docid/4794773f0.html> (accessed 4 March 2015).

⁵² UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV.3.

⁵³ UN High Commissioner for Refugees (UNHCR), *State Parties to the 1951 Convention Relating to the Status of Refugees and/or its 1967 Protocol*, June 2014, available at <http://www.refworld.org/docid/51d3dad24.html> (accessed 10 September 2015).

of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’⁵⁴

Academics and researchers argue that this definition is outdated, as is its notion of exile as a solution to refugee problems.⁵⁵ According to Millbank, the definition confers no right of assistance on refugees unless and until they reach a signatory country and it imposes no obligation on countries not to persecute or expel their citizens.⁵⁶ The Convention itself has been criticised for not imposing any requirement for burden sharing between States.⁵⁷ For others the 1951 Convention is inadequate for refugee protection because it is not flexible in the face of what are perceived to be the new refugees, those fleeing for example from ethnic violence.⁵⁸ Hathaway also argues that the Convention was designed in and for a different era and there is, therefore, a need for a new Convention or rather an updated one.⁵⁹ According to Shacknove, refugees should be defined as ‘persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.’⁶⁰

The 1967 Protocol extended the application of the Convention to persons who, while meeting the Convention’s definition, had become refugees ‘as a result of events that took place after 1 January 1951.’⁶¹ According to Haines, the removal of the dateline and geographical limitations by virtue of the 1967 Protocol, and developments in other bodies of international law, have ‘fundamentally transformed the 1951 Convention from a document fixed in a

⁵⁴ Art 1 of the 1951 Refugee Convention.

⁵⁵ See Millbank A (2000) 15, Alborzi M R (2006).

⁵⁶ Millbank A (2000) 15.

⁵⁷ Alborzi MR *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (2006) 172.

⁵⁸ The Refugees Convention: why not scrap it? Chatham House Publications (2005) 1 available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilp201005.pdf> (accessed 15 July 2015).

⁵⁹ Hathaway JC *The Rights of Refugees under International Law* (2005) 178.

⁶⁰ Schacknove AE ‘Who is a Refugee’ (1985) 95 *Ethics* 277.

⁶¹ UNHCR *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses.’⁶²

The Refugee Convention has been criticised for not including age as a ground for seeking asylum,⁶³ although there is a range of potential claims with an age dimension, which include forcible or under-age recruitment into military service, family or domestic violence, infanticide, forced or underage marriage, female genital mutilation, forced labour, forced prostitution, child pornography, trafficking, poverty and children born outside of strict family planning rules.⁶⁴ The Convention and the Protocol accord the same definition and protection of all refugees to refugee children. However, UARC have special vulnerabilities that require that an age-sensitive approach be adopted in relation to substantive aspects of refugee law as well as procedures.⁶⁵ Despite the extended application of the Convention by the Protocol, there still remains a gap in both the Convention and the Protocol for the protection of UARC. The Convention and the Protocol are therefore inadequate for protecting UARC. More protection for these children is found in child related laws such as the CRC and the ACRWC which will be discussed later in this chapter.

2.2.2 The OAU Convention governing the Specific Aspects of Refugee problems in Africa

The growing number of refugees fleeing wars and internal conflicts in Africa, starting in the late 1950s, led to the adoption of what is generally considered the most comprehensive and

⁶² Haines RQC ‘Gender related persecutions’ in Feller E et al *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2013) 319-350.

⁶³ Edwards A ‘Age and gender dimensions in international refugee law’ in Feller E et al *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2013) 46.

⁶⁴ Edwards A (2013) 57.

⁶⁵ UNHCR ‘Ensuring Gender Sensitivity in the Context of Refugee Status Determination and Resettlement’ Resource Package (2005) 12 available at <http://www.refworld.org/pdfid/43e73b644.pdf> (accessed 16 July 2015).

significant regional treaty dealing with refugees.⁶⁶ The Organisation of African Unity, on 10 September 1969, adopted the OAU Convention governing the specific aspects of refugee problems in Africa (OAU Convention).⁶⁷ Zimbabwe became a State Party to the OAU Convention in 1985.⁶⁸ African countries were convinced that the 1951 Refugee Convention was not designed with an African-specific approach in mind and thus was of less relevance to African refugee problems, hence the need for a regional refugee Convention.⁶⁹ Mujuzi submits that, by adopting the OAU Refugee Convention's definition, African countries wanted to ensure that the recognition of the unique characteristics of African refugees got binding legal status under the OAU treaty and not under General Assembly Resolutions and that these problems are recognised through the 'main door' rather than the 'back door' in the law of treaties.⁷⁰ African states also felt that 'well-founded fear of persecution' in the refugee definition was not sufficiently wide a criterion to cover all the refugee situations in Africa.⁷¹ Apart from the broad refugee definition, the OAU Convention also regulates the question of asylum (art. II), voluntary repatriation (art. V) and on the prohibition of subversive activities by refugees (art III).⁷²

The primary importance of this Convention is its expanded definition of the term refugee. The second paragraph of Art 1 of the OAU Convention provides that the term 'refugee' shall also apply to:

⁶⁶ Labor A *Collection of International Instruments and Legal texts for Refugee and Others of concern to UNHCR* (2007) 596.

⁶⁷ Organisation of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ('OAU Convention'), 10 September 1969, 1001 U.N.T.S. 45.

⁶⁸ Organisation of African Unity (OAU), *State Parties to the Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45.

⁶⁹ Mujuzi J D 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 *AHRLJ* 163.

⁷⁰ Mujuzi J D (2009) 166.

⁷¹ Jackson I C *The Refugee Concept in Group Situations* (1999) 177.

⁷² González-Martín F 'The African Approach to Refugees' available at <https://www.wcl.american.edu/hrbrief/v2i2/africanrefugees.htm> (accessed 10 November 2015).

‘Every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’⁷³

The wideness of the definition is clearly established because it focuses on the objective circumstances which have compelled flight and the fear of danger is not linked to the individual’s personal subjective reaction to the adversity he/she perceives.⁷⁴ Weiss opines that the definition is wide because it includes within its scope even accidental situations not necessarily based on deliberate State action and because the source of danger need not be the actions of a State or its agents.⁷⁵ Legally speaking, it is, therefore, clear that these qualities of the expanded definition offer greater protection for refugees in Africa, but, it can also be argued, even elsewhere.⁷⁶

While the OAU Refugee Convention reflects the general consensus of individual right to asylum, it, nevertheless, significantly strengthens the institution of asylum by obliging member States to use their best endeavours consistent with their specific legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.⁷⁷ The language encouraging States to grant asylum is, however, only recommendatory. Thus the 1969 Convention incrementally advances, but does not enshrine, an individual right to asylum.⁷⁸ Like the 1951 UN Refugee Convention the OAU Convention does not have an article specifically for UARC. Thus, some of the rights included therein also apply to UARC. The

⁷³ Art 1 of the OAU Refugee Convention.

⁷⁴ Weiss P ‘The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa’ (1970) 3 *Human Rights Journal* 455.

⁷⁵ Weiss (1970) 460.

⁷⁶ Okoth – Obbo G ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20 *Refugee Survey Quarterly* 112.

⁷⁷ Art II (1) of the OAU Refugee Convention.

⁷⁸ Murray R *Human Rights in Africa: From the OAU to the African Union* (2004) 189.

lack of explicit reference to refugee UARC is a shortfall for both the OAU and the UN Convention on refugees.

2.2.2.1 The principle of burden-sharing under the OAU Convention

The principle of burden sharing is the central theme of the OAU Refugee Convention. Art II (4) encourages Member States, 'in the spirit of African solidarity and international co-operation to take appropriate measures to lighten the burden of other Member States in granting asylum.'⁷⁹

Sharpe opines that such 'appropriate measures' to be taken for the sharing of burdens include: Regional resettlement, financial support, and political responsibility sharing.⁸⁰ Burden-sharing assumes different forms depending on the problem, ranging from contributions to agency programmes for bilateral assistance, provision of human resources, temporary admission of refugees or their resettlement.⁸¹ This principle originates in Paragraph 4 of the Preamble of the 1951 Refugee Convention, which expressly acknowledges that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution to the problem cannot be achieved without international cooperation, howbeit not placing a positive duty on States to cooperate.'⁸²

In terms of international law, the primary responsibility for protecting and assisting refugees lies with the host countries.⁸³ However, there should be full recognition of the heavy burden that is placed on host States, particularly during the initial emergency phase of large-scale

⁷⁹ Art II (4) of the OAU Refugee Convention.

⁸⁰ Sharpe M 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 *McGill Law Journal* 96.

⁸¹ UNHCR 'Burden-Sharing, Discussion Paper Submitted By UNHCR Fifth Annual Plenary Meeting Of The APC' (2001) 17 *ISIL Yearbook of International and Refugee Law* 3.

⁸² Thielemann E R 'Towards a common EU asylum policy: The political economy of refugee burden-sharing' Paper prepared for the conference 'Immigration Policy after 9/11: US and European Perspectives' (2006) 4. See also Handmaker J, Hunt L & Klaaren J (eds) *Perspectives on Refugee Protection in South Africa* (2001) 60.

⁸³ UNHCR 'Burden-Sharing' Discussion Paper Submitted by UNHCR Fifth Annual Plenary Meeting of the APC (2001) 17 *ISIL Yearbook of International and Refugee Law* 1.

influxes and refugees or returnees, hence the need for both regional and international actors to participate in burden sharing.⁸⁴ However, despite this progressiveness, there has been no corresponding success in implementing this principle and turning burden-sharing into reality.⁸⁵ Each possible method of responsibility sharing has, however, been constrained in practice by the limited resources of African states.⁸⁶ Thus State Parties are obliged to share the burden of UARC with host countries.

2.3 The United Nations High Commissioner for Refugees (UNHCR)

The UNHCR is an agency mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.⁸⁷ Primarily, it is tasked with the duty of safeguarding the rights and well-being of refugees.⁸⁸ It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.⁸⁹ The UNHCR is also committed to protecting and providing adequately for the needs of all refugee children within its competence.⁹⁰ Numerous policies and guidelines concerning refugee children have been issued by the UNHCR and these will be explored below.

2.3.1 Role of the United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees has a particular focus on UARC. One of the important findings of the Commissioner is that this particular group of children suffers

⁸⁴ UNHCR 'Burden-Sharing' Discussion Paper Submitted by UNHCR Fifth Annual Plenary Meeting of the APC (2001) 17 *ISIL Yearbook of International and Refugee Law* 2.

⁸⁵ Sharpe M (2012) 102.

⁸⁶ Durieux J F & Hurwitz A 'How many is too many? African and European legal responses to mass influxes of refugees' (2004) 47 *German Year book of Int'l Law* 147.

⁸⁷ Odhiambo-Abuya E 'Refugees and internally displaced persons: Examining overlapping institutional mandates of the ICRC and the UN High Commissioner for Refugees' (2003) 7 *Singapore. J. Int'l & Comp. Law* 240. For more detailed information on the work of the UNHCR visit the UNHCR's website at www.unhcr.org

⁸⁸ Trivedi S *Handbook on International Organisations* (2005) 71. See also O'Byrne D *Human Rights an Introduction* (2014) 339.

⁸⁹ Morrison A M & Mann B J *International Government Information and Country information* (2004) 232.

⁹⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82.

more as a result of their age.⁹¹ Therefore, it is difficult for them to find foster families; access post-primary education, vocational training and income generating opportunities to enable them to become self-sufficient.⁹² The UNHCR's primary goal with regard to refugee children is to ensure their protection, healthy development and to achieve lasting solutions which are appropriate to their immediate and long-term development.⁹³ The UNHCR has also paid particular attention to the fundamental right to education of all children without discrimination, sexual exploitation, and the issue of child soldiers.⁹⁴ The UNHCR, therefore, plays a significant role in the protection of refugees.

2.3.2 UNHCR executive committee conclusions

UNHCR's Executive Committee has adopted Conclusions specifically regarding refugee children. The first, Conclusion No. 47 adopted in 1987, urged action aimed at addressing the human rights and needs of refugee children and recommended regular reviews of the needs of UARC and the need to protect and assist them.⁹⁵ In 1989, in its Conclusion No. 59 (XL), the Executive Committee drew special attention to UNHCR's particular need to endeavour to ensure the right of refugee children to education, as well as their protection from military recruitment and irregular adoption.⁹⁶

In its Conclusion No.84 in 1997 the Committee urged States and concerned parties to take all possible measures to protect child and adolescent refugees, by preventing their separation

⁹¹ Evenhuis M 'Child-proofing asylum: Separated children and refugee decision making in Australia' (2013) 25 *Int J Refugee Law* 536.

⁹² UNHCR 'Review of Achievements of the Plan of Action of the World Summit for Children, and Consideration of Future Action' p9 available at http://www.unicef.org/specialsession/documentation/documents/edr_unhcr_en.pdf (accessed 3 July 2015).

⁹³ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82 para 25.

⁹⁴ UN Committee on the Rights of the Child (CRC), *General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child*, 17 March 2003, CRC/GC/2003/3.

⁹⁵ UN High Commissioner for Refugees (UNHCR), *Refugee Children*, 12 October 1987, No. 47 (XXXVIII) – 1987.

⁹⁶ Mbanungo O O 'Contentious Issues in the Protection of Displaced Children' (2015) 38 *Journal of Law, Policy and Globalization* 143. See also *UNHCR Policy on Refugee Child* 1993 para 26.

from their families.⁹⁷ The Committee also urged the UNHCR to protect orphaned and UARC by promoting care, protection, tracing and family reunification for UARC and providing medical or other special care, including rehabilitation assistance, to assist the social reintegration.⁹⁸ In Conclusion No. 88 (L) of 1999 the Committee called upon States, UNHCR and other relevant actors to give particular attention to the needs of UARC pending their reunification with their families and affirmed in this regard, that adoption of refugee children should only be considered when all feasible steps for family tracing and reunification have been exhausted.⁹⁹

In Conclusion No. 102 (LVI) in 2005 the Committee called on States to support the efforts of UNHCR in ensuring that the needs of UARC, are fully met through their identification and registration, and through UNHCR's overall protection and assistance activities, including management support, training and monitoring activities.¹⁰⁰ The Committee also stressed the importance of States intensifying their efforts, in cooperation with UNHCR and other relevant organisations, to ensure that all refugee children benefit from education which pays due regard to their cultural identity and consistent with the Millennium Development Goals.¹⁰¹ The Committee in Conclusion No. 104 (LVI) of 2005 emphasised that age and gender sensitive approaches should be made and attention given to participatory and community development processes which should permeate all activities aimed at enhancing

⁹⁷ Henckaerts JM & Doswald-Beck L (eds) *Customary International Humanitarian Law* (2005) 2990. See also UN High Commissioner for Refugees (UNHCR), *Refugee Children and Adolescents*, 17 October 1997, No. 84 (XLVIII) – 1997 A/52/12/Add.1.

⁹⁸ UN High Commissioner for Refugees (UNHCR), *Refugee Children and Adolescents*, 17 October 1997, No. 84 (XLVIII) – 1997 A/52/12/Add.1.

⁹⁹ Goodwin – Gill Guy S & McAdam J 'The Refugee in International Law: Online Resource Centre' p5 available at <http://global.oup.com/booksites/content/9780199207633/resources/annexe4> (accessed 26 August 2015). See also UN High Commissioner for Refugees (UNHCR), *Protection of the Refugee's Family*, 8 October 1999, No. 88 (L) – 1999 - A/54/12/Add.1 para C.

¹⁰⁰ UNHCR 'A thematic compilation of executive committee conclusions' (2014) 113 available at <http://www.unhcr.org/53b26db69.pdf> (accessed 25 August 2015). See also UN High Commissioner for Refugees (UNHCR), *General Conclusion on International Protection*, 7 October 2005, No. 102 (LVI)-A/AC.96/1021 para N.

¹⁰¹ UN High Commissioner for Refugees (UNHCR) *General Conclusion on International Protection*, 7 October 2005, No. 102 (LVI)- A/AC.96/1021 para O.

the capacities of unaccompanied refugees to integrate locally.¹⁰² In Conclusion No. 105 (LVII) of 2006, the Committee acknowledged that the protection of women and girls is the responsibility of the State.¹⁰³

2.3.3 UNHCR policy on refugee children

In order to improve and enhance the protection and care of refugee children, the UNHCR adopted a Policy on Refugee Children, endorsed by the UNHCR Executive Committee in October 1993.¹⁰⁴ The policy is intended to promote appropriate collaborative action among all parties to ensure the protection of and care for refugee children.¹⁰⁵

The policy firstly identifies the challenges faced by UARC and notes that: Children's vulnerability results from their dependence on their parents to provide the basic necessities of life especially in their early years.¹⁰⁶ The policy also states that the most vulnerable amongst refugee children are those who are unaccompanied and in the absence of special efforts to monitor and protect their well-being, their basic needs often go unmet and their rights are frequently violated.¹⁰⁷ They are physically and psychologically less able than adults to provide for their own needs or to protect themselves from harm thus they are at great risk from the trauma inherent in situations which cause displacement, and from the displacement itself.¹⁰⁸

¹⁰² UN High Commissioner for Refugees (UNHCR), *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) – 2005 - A/AC.96/1021 para O. See also Crisp J 'The local integration and local resettlement of refugees a conceptual and historical analysis' (2004) 12 *New Issues in Refugee Research* 1.

¹⁰³ UN High Commissioner for Refugees (UNHCR), *Conclusion on Women and Girls at Risk*, 6 October 2006, No. 105 (LVII) – 2006. A/AC.96/1035. See also UNHCR 'A Thematic Compilation of Executive Committee Conclusions' (2014) 114.

¹⁰⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82.

¹⁰⁵ Zutshi RT, Satpute J & Tahir Md. S (eds) *Refugees and the Law* (2011) 176.

¹⁰⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82.

¹⁰⁷ Zutshi RT et al (2011) 174.

¹⁰⁸ Tomasevski K & Alfredsson G (eds) *A Thematic Guide to Documents on Health & Human Rights* (1998) 543. See also Mbanungo OO (2015) 142.

UNHCR has managed to include much of its field work for the psychosocial well-being of children into community services and education programmes, limiting its focus on individual children who need specialised services. Professional mental health programmes are provided in collaboration with specialised NGOs.¹⁰⁹ From the work done with the UNHCR, UNICEF estimated that around 25 per cent are severely traumatised among the UARC in Goma, Zaire and to respond to this problem, psychosocial activities have been set up through implementing partners.¹¹⁰ In Ngara, the United Republic of Tanzania, staff has been trained to be part of a comprehensive community services programme including social workers, teachers, traditional healers, health staff, women and youth groups, and church leaders to deal with some of the referral cases of children with psychological issues.¹¹¹ Refugee girls are often even more vulnerable than refugee boys. They are subject to sexual abuse, assault and exploitation in greater numbers, than are boys.¹¹²

The Policy states that children's needs must not be addressed in isolation and they are normally met most effectively within the context of family and community.¹¹³ A child's welfare is closely linked to the health and security of the primary care-giver, who is usually the mother, thus; UNHCR's staff need to strengthen the capacities of refugee families to meet their own needs and improve the participation and situation of refugee women, thereby, contributing significantly to the welfare of their children.¹¹⁴

UNHCR's effective management of refugee protection and assistance requires that the actions of its staff be tailored to the different needs and potentials of refugee children and

¹⁰⁹ UNHCR 'Implementation of UNHCR's policy and guidelines on refugee children' EC/SC.2/78 (1995) para 8.

¹¹⁰ UNHCR 'Implementation of UNHCR's policy and guidelines on refugee children' EC/SC.2/78 (1995) para 8.

¹¹¹ UNHCR 'Implementation of UNHCR's policy and guidelines on refugee children' EC/SC.2/78 (1995) para 9.

¹¹² Tomasevski K & Alfredsson G (eds) (1998) 543.

¹¹³ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82 para 23.

¹¹⁴ Zutshi RT et al (2011) 177.

other groups with distinct requirements.¹¹⁵ Their needs are not well served when, particularly in emergencies, refugees are treated as an undifferentiated mass of humanity.¹¹⁶ One of the Policy's guiding principles is that UARC must be the particular focus of protection and care.¹¹⁷

In pursuit of its goals to protect UARC, UNHCR is guided by central principles. These principles entail that in all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary consideration.¹¹⁸ The UNHCR is also guided by the principle that child-focused activities should be carried out with the full participation of their families and communities.¹¹⁹ The UNHCR has established that the success of the policy requires the cooperation of a variety of actors.¹²⁰

2.3.4 UNHCR guidelines on protection and care

In light of the policy on refugee children and international human rights and refugee law standards, the UNHCR issued updated Guidelines on Protection and Care for Refugee Children in 1994, which provides that the reception of children should be well-planned, positive and humane to meet the needs of each child.¹²¹ The first guideline set by the UNHCR is to prevent the separation of children from their families by identifying actual and probable causes of separation and intervening to establish a special programme for

¹¹⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82.

¹¹⁶ Johnson H L 'Click to Donate: visual images, constructing victims and imagining the female refugee' (2011) 32 *Third World Quarterly* 1016.

¹¹⁷ International Committee of the Red Cross 'Inter-agency Guiding Principles on Unaccompanied and Separated Children' (2004) available at http://www.unicef.org/protection/IAG_UASCs.pdf (accessed 3 May 2015).

¹¹⁸ Labor A (2007) 598.

¹¹⁹ Bakewell O 'Community services in refugee aid programs: The challenges of expectations, principles, and practice' (2003) 18 *The Fletcher Journal of International Development* 12.

¹²⁰ UNHCR UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82 para 29.

¹²¹ For additional information on UNHCR's position on the rights of asylum-seeking and refugee children, see UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an advisory opinion on migrant children presented by MERCOSUR, 17 February 2012, available at <http://www.unhcr.org/refworld/docid/4f4c959f2.html> (accessed 19 June 2014).

identifying and monitoring UARC.¹²² It was also noted that in an emergency, an agency with child welfare expertise must be assigned responsibility for the immediate and longer-term care of UARC.¹²³ The UNHCR also made the finding that there was a need for identification. Herein, unaccompanied refugee children must be searched for in hospitals and clinics, feeding centres, in orphanages, in families other than their own, and as street children.¹²⁴ During refugee registration exercises, UARC should be registered separately, but cross-referenced to the family with whom they are staying.¹²⁵ The guidelines state that guardianship legal responsibility for UARC rests with the government of the country of asylum. Further, that such country should make sure that an UARC is assigned a legal guardian with respect to involvement in any legal proceedings and to advocate for the child's interests or to make decisions on behalf of the child in other situations.¹²⁶

In regard to care arrangements, it should be ensured that each unaccompanied child has a continuous care-giver who is loving and nurturing, and meets the developmental needs of the child.¹²⁷ A child's opinion about placement and care should be given consideration and due weight.¹²⁸ In terms of the guidelines, UARC without care should be placed with a family within the child's own community and their integration should use the same schools, health services and other facilities used by other refugees of the same age, rather than isolating them

¹²² UN High Commissioner for Refugees (UNHCR) *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.refworld.org/docid/3ae6b3470.html> (accessed 3 March 2015).

¹²³ UN High Commissioner for Refugees (UNHCR) *Working with unaccompanied children: A community-based Approach* May 1996, available at <http://www.refworld.org/docid/4a54bc24d.html> (accessed 7 March 2015).

¹²⁴ UN High Commissioner for Refugees (UNHCR) *Working with unaccompanied children: A community-based approach* May 1996, available at <http://www.refworld.org/docid/4a54bc24d.html> (accessed 3 March 2015).

¹²⁵ UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care*, 1994, available at <http://www.refworld.org/docid/3ae6b3470.html> (accessed 3 March 2015).

¹²⁶ Goodwin-Gill G S 'Protecting the human rights of refugee children: Some legal and institutional possibilities', in J Doek et al (eds) *Children on the Move: How to Implement their Right to Family Life* (1996) 97.

¹²⁷ Zutshi RT et al (eds) (2011) 177.

¹²⁸ UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

through special programmes.¹²⁹ Moreover, health monitoring medical and nutritional screening must be carried out as quickly as possible and repeated periodically.¹³⁰

2.3.5 UNHCR guidelines on determination of the best interests of the child

To achieve its priorities to protect and promote the rights of all children, the UNHCR and its partners must support the strengthening or establishment of comprehensive child protection systems. This is inclusive of mechanisms to identify the best interests of the child through a best interests determination procedure (BID).¹³¹ A BID describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise and balance all relevant factors in order to assess the best option.¹³²

The UNHCR must complete a BID for all UARC to whom it provides direct or indirect care, notably those recognised as refugees, those staying in camps or facilities managed or coordinated by UNHCR, or by partners with UNHCR's support and those supported by UNHCR living in scattered locations.¹³³ There are a number of pre-conditions that are essential for an effective determination of the best interests of UARC. These preconditions include: proper identification; an adequate registration process, including documentation;

¹²⁹ UN High Commissioner for Refugees (UNHCR) *Working with unaccompanied children: A community-based approach* May 1996, available at <http://www.refworld.org/docid/4a54bc24d.html> (accessed 3 March 2015).

¹³⁰ Van Bueren G *International Documents on Children* (1998) 505.

¹³¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at <http://www.refworld.org/docid/48480c342.html> (accessed 12 September 2015).

¹³² UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at <http://www.refworld.org/docid/48480c342.html> (accessed 12 September 2015).

¹³³ Dalrymple J K 'Seeking asylum alone: Using the best interests of the child principle to protect unaccompanied minors (2006) 26 *Boston College Third World Law Journal* 150.

tracing; the appointment of a guardian, provision of temporary care arrangements and the monitoring thereof, and the opening of an individual case file.¹³⁴

According to Naik, family reunification, whenever feasible, should generally be regarded as being in the best interests of the child.¹³⁵ Once the family is traced, family relationships verified and the willingness of the child and the family members to be reunited has been confirmed, the process should not normally be delayed by a BID procedure.¹³⁶ However, prior to supporting reunification, an assessment needs to be made by UNHCR as to whether it exposes or is likely to expose the child to abuse or neglect. If there are reasonable grounds to believe that the reunification exposes or is likely to expose the child to such a risk, UNHCR must verify through a BID whether family reunification is indeed in the child's best interests.¹³⁷



2.3.6 Guidelines on child asylum claims

In 2009, the UNHCR issued Guidelines on Child Asylum Claims offering substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner.¹³⁸ The guidelines established that the principle of the best interests of the child requires that harm be assessed from a child's perspective when determining the 'well-founded fear of persecution' in the refugee definition.¹³⁹ In a concluding observation on

¹³⁴ International Organisation for Migration (IOM) 'Human Rights of Migrant Children' 2008 *International Migration Law* 28.

¹³⁵ Naik S 'Family tracing recent developments in the law and ensuing issues' Paper submitted to ILPA Refugee children's Project Seminar (2012) 6.

¹³⁶ Naik S (2012) 6.

¹³⁷ Naik S (2012) 8. A best interest's assessment is an assessment made by staff taking action with regard to individual children to ensure that such action gives a primary consideration to the child's best interests, except when a BID procedure is required. The assessment can be done alone or in consultation with others by staff with the required expertise and entails the participation of the child.

¹³⁸ Balliet C M 'National case law as a generator of international refugee law: Rectifying an imbalance within UNHCR guidelines on international protection' (2015) 49 *Emory International Law Review* 2065. See also UNHCR *Guidelines on International Protection No. 8: Child Asylum Claims under Art's 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* available at <http://www.unhcr.org/50ae46309.pdf> (accessed 28 August 2015).

¹³⁹ UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, available at <http://www.refworld.org/docid/48480c342.html> (accessed 3 March 2015).

Portugal, the CRC Committee recommended that the State party ‘develop a refugee status determination procedure for minor asylum-seekers and introduce mechanisms providing minors with access to psychological care.’¹⁴⁰

The guidelines also established procedural and evidentiary issues which are relevant in establishing appropriate and child-sensitive asylum procedures inclusive of a fair refugee status determination process. The guidelines entail that asylum claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, with reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim.¹⁴¹

2.3.7 Interagency guiding principles

These guiding principles confirm most of the basic principles formulated in UNHCR’s Guidelines and specify the four general principles that should be applied which are the best interests, non-discrimination, child’s opinion and special protection of the girl child.¹⁴² The principles require all national and international agencies dealing with UARC to work towards the preservation of family unity in the first place and invest their effort into family reunification.¹⁴³ The section on care and arrangements calls for the child’s involvement in all decisions concerning his/her placement in a family or institutional environment. It provides that the child if possible be provided with a new family within the child’s community giving preference to community care rather than institutional care.¹⁴⁴ The guidelines also state that

¹⁴⁰ Portugal, CRC, CRC/C/111 (2001) 48 at paras. 250 and 251.

¹⁴¹ Observations by UNHCR in *Defence for Children International (DCI) v. Belgium* Complaint No. 69/2011 European Committee of Social Rights para 2.2.6.

¹⁴² ICRC *Inter-Agency, Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, p17 available at http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf.

¹⁴³ Dottridge M ‘Introduction to six articles by members of the research subgroup of the inter-agency working group on children on the move’ in International Organisation for Migration (IOM) *Children on the Move* (2013) 5.

¹⁴⁴ ICRC *Inter-Agency, Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, p20 available at http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf (accessed 19 July 2015).

adoption should be considered only in cases where all efforts to trace a separated child's family and to reunite the child with his/her family have failed.¹⁴⁵

2.4 International and regional human rights framework

2.4.1 The UN Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child which entered into force in September 1989 is an international human rights instrument which sets out most international standards concerning children.¹⁴⁶ It is the most widely ratified human rights treaty in history, and is thus the most successful document in UN history.¹⁴⁷ Zimbabwe ratified the CRC without reservations on 11 September 1990.¹⁴⁸ The CRC has been hailed as a victory for the children's rights movement and over the past ten years it has helped to establish an internationally accepted framework for the treatment of all children, encouraged a positive and optimistic image of children as active holders of rights, and stimulated a greater commitment to safeguarding these rights.¹⁴⁹ There are three types of rights referred to in the CRC which are: Rights to provision, rights to protection and rights to participation.¹⁵⁰ Rights to provision and to protection mainly deal with the perceived needs of the child.¹⁵¹

The key accomplishments of the CRC have been described as five-fold.¹⁵² First, it creates new rights for children under international law that previously had not existed, such as, the child's right to preserve his or her identity and the rights of vulnerable children like refugees

¹⁴⁵ Barber J G & Delfabbro P H *Children in Foster Care* (2004) 196.

¹⁴⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 10 August 2015).

¹⁴⁷ Kohm L M 'Suffer the little children: How the United Nations Convention on the Rights of the Child has not supported children' (2009) 22 *New York International Law Review* 1.

¹⁴⁸ UN Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 20 August 2015).

¹⁴⁹ Muscroft S (ed) *Children's Rights: Reality or Rhetoric? The UN Convention on the Rights of the Child - The First Ten Years* (1999) 5.

¹⁵⁰ Alderson P 'UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses' (2000) 9 *Child Abuse Review* 441.

¹⁵¹ Alderson P (2000) 439.

¹⁵² Zeldin W 'International Laws: Children's Rights' (2007) 3.

to special protection.¹⁵³ Moreover, the CRC enshrines in a global treaty rights that had only been previously found in case law under regional human rights treaties, for example, children's right to be heard in proceedings that affect them in Art 12, which right has been described as giving the treaty a 'soul'.¹⁵⁴ The CRC also replaced non-binding recommendations with binding standards in issues like adoption procedures and with regard to the rights of disabled children in Art's 21 and 23.¹⁵⁵ In Art's 28(3) and 39, the CRC imposes new obligations on States Parties with regard to the protection of children, in areas, such as, banning traditional practices prejudicial to children's health and offering rehabilitative measures for victims of neglect, abuse, and exploitation.¹⁵⁶

Lastly, the CRC obliges States Parties not to interfere with children's enjoyment of CRC rights.¹⁵⁷ However, the CRC has also been highly criticised as being a new moral crusade to save children, especially regarding third world children whose lives do not comply with a western concept of childhood.¹⁵⁸ Some critiques of the CRC call it ineffective because it has no enforcement teeth, thereby, failing to stop the world's most horrifying abuses of children such as child trafficking for sexual exploitation, compulsory child labour, child soldiering and forcible child marriages.¹⁵⁹

¹⁵³ Zeldin W (2007) 3. For identity rights see Art's 7 and 8 of the CRC and Art's 20 and 22 on the rights of refugee children.

¹⁵⁴ Sloth-Nielsen J 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' (2009) *Speculum Juris* 1.

¹⁵⁵ Zeldin W (2007) 4.

¹⁵⁶ Art 28(3) and 39 of the Convention on the Rights of the Child.

¹⁵⁷ 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' (2001) 23 *Human Rights Quarterly* 3.

¹⁵⁸ Pupavac V 'Misanthropy without border: The International children's rights regime' (2001) 25 *Disasters* 100. See also Gadda A 'Rights, Foucault and Power: A Critical Analysis of the United Nation Convention on the Rights of the Child' (2008) 31 *Edinburgh Working Papers in Sociology* 2.

¹⁵⁹ Davidson H 'Does the U.N. Convention on the Rights of the Child make a difference? (2014) 22 (2) *Michigan State International Law Review* 522. See also Engle E 'The Convention on the Rights of the Child' (2011) 29 *Quinnipiac Law Review* 812.

The Children's Convention defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'¹⁶⁰ The provision for attaining majority early has been criticised for creating a loophole which States may abuse and set the age of a child in their respective countries at less than 18, allowing for a lesser standard of protection for children. In a concluding observation on Malawi, the CRC Committee expressed concern that the Constitution defines a child as any person below the age of 16 and recommended that the State Party take the necessary legislative measures to establish a clear definition of the child in accordance with Art 1 and other related principles and provisions of the Convention on the Rights of the Child.¹⁶¹

Although the CRC is not specifically a refugee treaty, its provisions directly affect and apply to refugee children, as defined in Art 1.¹⁶² The Children's Convention provides for the rights of unaccompanied refugee children in Art 22. It is important to note that by ratifying the CRC, governments undertake to put in place systems to protect refugee children as detailed in Art 22 of the Convention.¹⁶³

In terms of Art 22 of the Convention, State Parties should guarantee protection and humanitarian assistance to accompanied and UARC.¹⁶⁴ In addition, State Parties are obliged to cooperate with the United Nations and other intergovernmental and non-governmental organisations to protect and trace parents of unaccompanied children and to accord such children the same protection as any other child permanently or temporarily deprived of his or her family environment.¹⁶⁵ The best interests of UARC should always be taken into account.

The best interests principle for UARC has three main implications for States, agencies and

¹⁶⁰ Art 1 of the Convention on the Rights of the Child.

¹⁶¹ Malawi, CRC, CRC/C/114 (2002) 104 at paras. 397 and 398. See also Concluding Observations on Sudan, CRC, CRC/C/121 (2002) 53 at paras. 243, 244, 288,289 and Greece, CRC, CRC/C/114 (2002) 25 at paras. 121 and 122.

¹⁶² Swart S (2009) 110.

¹⁶³ Swart S (2009) 112.

¹⁶⁴ Art 22(1) of the Convention on the Rights of the Child.

¹⁶⁵ Art 22(2) of the Convention on the Rights of the Child.

individuals who act on behalf of UARC, namely: That such parties are under an obligation to protect and assist the child at all times, put the child's welfare ahead of all other considerations and meet the child's developmental needs.¹⁶⁶ Art 2 of the CRC provides that State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction.¹⁶⁷ Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must, therefore, if not explicitly stated otherwise in the Convention, also be available to all children including asylum-seeking, refugee and migrant children irrespective of their nationality, immigration status or statelessness.¹⁶⁸

2.4.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child 'recognized the need to take appropriate measures to promote and protect the rights and welfare of the African child.'¹⁶⁹ It was in order to give the CRC specific application within the African context that the Charter, the first regional treaty on the human rights of the child, was adopted by the OAU Heads of State and Governments on 11 July 1990.¹⁷⁰ Zimbabwe ratified the African Children's Charter on 19 January 1995.¹⁷¹ Chirwa is of the opinion that the African Children's Charter is the second global and first regional binding instrument that identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic judicial or administrative proceedings.¹⁷² Although the African Children's Charter's provisions relating

¹⁶⁶Ressler E M, Boothby N & Steinbock, D J *Unaccompanied children: care and protection in wars, natural disasters, and refugee movements* (1988) 282.

¹⁶⁷ Art 2 of the Convention on the Rights of the Child.

¹⁶⁸ Labor A (2007) 596.

¹⁶⁹ Kaime T (2014) 4. See also Preamble to the African Charter on the Rights and Welfare of the Child.

¹⁷⁰ Mezmur B 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 2 *AHRLJ* 6.

¹⁷¹ Ratification Table: African Charter on the Rights and Welfare of the Child available at, <http://www.achpr.org/instruments/child/ratification/> (accessed 11 August 2015).

¹⁷² Chirwa D 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *Int J of Children's Rights* 157.

to protection of UARC are substantially similar to those of the Convention on the Rights of the Child, its strength lies in the extension of protection to internally displaced children.¹⁷³ The monitoring and enforcement of the Charter lies in the hands of the African Committee of Experts on the Rights and Welfare of the Child,¹⁷⁴ which Mezmur describes, together with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights as representing the foundational pillars of the African human rights system within the framework of the African Union.¹⁷⁵

In Art 2 of the African Children's Charter, a 'child' is defined as every human being below the age of 18. Compared to the UN Convention, the African Children's Charter offers wider protection for children than the global standard established in the CRC.¹⁷⁶ Nevertheless, defining age has many cultural implications and the definition of childhood and of a child is culture-specific.¹⁷⁷ The African Children's Charter contains stricter provisions, such as; the recruitment of child soldiers, child betrothals, other harmful and cultural practices and child refugees.¹⁷⁸ However, due to the socio-economic conditions prevalent in Africa, most African governments cannot solve the specific problem of children's human rights violations.¹⁷⁹ The Charter may also be criticised in so far as it did not allow in its drafting process for children to make their opinions clear and voice what would be in their best interests.¹⁸⁰

Notwithstanding whatever criticism may be levelled against the Charter, or whatever

¹⁷³ Kaime T 'From lofty jargon to durable solutions: Unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child' (2004) 16 *Int J Refugee Law* 340.

¹⁷⁴ Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *AHRLJ* 25.

¹⁷⁵ Mezmur B (2006) 6.

¹⁷⁶ Arts KCJM 'The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 *African Journal of International and Comparative Law* 139.

¹⁷⁷ Lloyd A (2002) 20.

¹⁷⁸ Lloyd A (2002) 21.

¹⁷⁹ Motala Z 'Human rights in Africa: A cultural, ideological, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 380.

¹⁸⁰ Ekundayo O 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underlines and repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 147.

operational problems might have been identified, there is no gainsaying the fact that it is a potentially powerful tool in enhancing the lives of millions of African children.¹⁸¹

Although the rights and duties in the African Children's Charter cover almost every aspect of a child's life, there are three principles that are so fundamental that they may be thought of as underpinning the entire Charter. These include: Firstly, the rule against non-discrimination.¹⁸² This not only implies that States must prevent discrimination, but that they must also ensure the positive enjoyment of the rights which enable children to be recognised as equally valuable members of the society.¹⁸³ By ensuring the non-discrimination of UARC, the African Children's Charter has moved the level of protection to a higher plane. It is submitted that this approach takes into cognisance the vulnerability and special needs of UARC.¹⁸⁴ Secondly, the best interests principle. The 'best interests' rule in relation to UARC, require that durable solutions be found for them as quickly as possible.¹⁸⁵ Durable solutions are those which positively contribute to the refugee child's survival, protection and development and encompass considerations such as the child's need for 'bodily and mental health, normal intellectual development, adequate material security, stable and non-superficial interpersonal relationships and a fair degree of liberty'.¹⁸⁶

The third principle is the rule requiring the child's participation.¹⁸⁷ The African Children's Charter concretised this approach by making provision for the child's participation rights, namely, the right of the child to be heard in all proceedings affecting that child and the right

¹⁸¹ Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *Int'l J. Child. Rights* 133.

¹⁸² Kaime T *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 49.

¹⁸³ Kaime T 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *AHRLJ* 230.

¹⁸⁴ Islam M R et al (eds) *An Introduction to International Refugee Law* (2013) 409.

¹⁸⁵ Van Bueren G (1995) 365.

¹⁸⁶ Sloth-Nielsen J (ed) *Children's Rights in Africa: A legal perspective* (2008) 73.

¹⁸⁷ Art 12 of the Convention on the rights of the Child.

of the child to freely express his or her opinions.¹⁸⁸ The obligation of States under these provisions is to ensure that appropriate mechanisms for the channelling of the child's views are put in place. Such mechanisms must be child centred and non-threatening.¹⁸⁹ In relation to child refugees, children's participation rights require that in the determination of their status and in any aspect of providing durable solutions, the child's views should feature prominently.¹⁹⁰

Art 23 of the Charter further indicates the measures to be taken into consideration by State Parties in addressing the needs of refugee children. Art 23 obliges State Parties to take all appropriate measures to ensure that children who are seeking refugee status or who are considered whether unaccompanied or accompanied receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the Charter and other international human rights and humanitarian instruments.¹⁹¹ Since the Charter already accords special protection and assistance to all children, the implication from this provision is that children without families are entitled to an additional level of protection and assistance above that of other children.¹⁹²

The African Children's Charter shows a great sense of realism and insight into the nature and intricacies of the refugee problem in Africa by providing that the standard of protection and treatment of refugee children, as laid down in Art 23, shall also apply to internally displaced children, whether displaced through natural disaster, internal armed conflicts, civil strife,

¹⁸⁸ Sillah R M & Chibanda T W 'Assessing the African Charter on the Rights and Welfare of the Child (ACRWC) As a blueprint towards the attainment of children's rights in Africa' (2013) 2 *IOSR Journal of Humanities And Social Science* 53. See also Art 4 (2) and 7 of the African Children's Charter.

¹⁸⁹ International Save the Children Alliance & UNHCR 'Statement of good practice' (1999) available at <http://www.unhcr.ch/i> (accessed 7 March 2015).

¹⁹⁰ Stein B N 'The Experience of being a Refugee: Insights from the Research Literature' (1980) 15 *International Migration Review* 5.

¹⁹¹ Sillah R M & Chibanda T W (2013) 2. See also Art 23 of the African Children's Charter.

¹⁹² Chirwa D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *Int J of Children's Rights* 157.

breakdown of economic and social order, or whatever cause.¹⁹³ The relevance of this development is obvious when looking at the facts: the number of internally displaced people in Africa is bigger than the number of refugees, and in some countries more than 75 per cent of the refugees and displaced persons are women and children.¹⁹⁴

2.5 General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin

States obligations for the protection of UARC are set out clearly in the Committee's General Comment 6 on the Convention on the Rights of the Child. The General Comment is given by the Committee on the Rights of the Child which is a treaty body that ensures and monitors the implementation of the Convention by member States.¹⁹⁵ The General Comment is not binding on States; nevertheless, despite its non-binding nature, this does not mean that States are free to ignore the treaty body's views. Indeed, States are under a legal obligation to engage with and attach great weight to the findings of the treaty body, even though they 'ultimately have the right to reject such finding.'¹⁹⁶

The Committee believes that reservations made by States Parties to the Convention should not in any way limit the rights of UARC.¹⁹⁷ There are four main principles which emanate from the Convention which are greatly elaborated in the General Comment. These are: The best interests of the child, non- discrimination, survival and development and the right to express views of the child. The obligations of State Parties with regard to the four cardinal principles and other principles of particular importance to UARC will be discussed below.

¹⁹³ Lloyd A (2002) 21.

¹⁹⁴ African Network on Prevention and Protection against Child Abuse and Neglect (ANPPCAN) 'Children in situations of armed conflict in Africa' Selected conference papers, Nairobi, (1988) 18.

¹⁹⁵ Mechlem K 'Treaty Bodies and the interpretation of human rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 914.

¹⁹⁶ Ulfstein G 'Individual complaints,' in Keller & Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 115.

¹⁹⁷ Labor A (2007) 598.

2.5.1 Legal obligations of State Parties

Legal obligations deriving from the Convention with regard to UARC apply to all branches of government namely the executive, legislative and judiciary.¹⁹⁸ These include the obligation to establish national legislation, administrative structures, and the necessary research, information, data compilation and comprehensive training activities to support such measures.¹⁹⁹ Such legal obligations are both negative and positive in nature, requiring States not only to refrain from measures infringing on such children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination.²⁰⁰ In case of any conflict in legislation, predominance should always be given to the Convention, in light of Art 27 of the Vienna Convention on the Law of Treaties.²⁰¹

2.5.1.1 Non-discrimination

The principle of non-discrimination, in all its aspects, applies in respect to all dealings with unaccompanied refugee children.²⁰² In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or accompanied, or as being a refugee, asylum-seeker or migrant.²⁰³ This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender.²⁰⁴ Measures should also be taken to address possible misperceptions and stigmatisation of UARC within the society.²⁰⁵ Policing or other measures

¹⁹⁸ UNICEF *State of the World's Children: Celebrating 20 Years of the Convention on the rights of the Child* (2009) 50.

¹⁹⁹ Saul B et al *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014) 820.

²⁰⁰ CRC General Comment 6 CRC/GC/2005/6 para 14.

²⁰¹ Reis Monteiro A *Ethics of Human Rights* (2014) 137.

²⁰² UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 10 (Rev.1), The Rights of the Child*, March 1997, No. 10 (Rev.1), available at <http://www.refworld.org/docid/479477390.html> (accessed 3 March 2015).

²⁰³ Labor A (2007) 598.

²⁰⁴ Van der burg A 'Legal protection of undocumented foreign migrant children in South Africa: Reality or myth?' (2006) 5 *Law Democracy and development* 55.

²⁰⁵ Van der burg A (2006) 56.

concerning UARC relating to public order are only permissible where such measures are based on the law, entail individual rather than collective assessment, comply with the principle of proportionality and represent the least intrusive option.²⁰⁶ In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.²⁰⁷

In spite of the fact that the CRC, Art 2(1), confines State parties to only ensure that children ‘within their jurisdiction’ receive the rights in the CRC without discrimination, the ACRWC does not include any such limitations.²⁰⁸ In Art 3, the African Charter clearly indicates that ‘every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed irrespective of the child’s parents or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.’²⁰⁹

In a concluding observation on the Philippines, the CRC Committee recommended that the State party increase its efforts to ensure effective implementation of existing laws guaranteeing the principle of non-discrimination and adopt a proactive and comprehensive strategy to eliminate all forms of discrimination, including forms of multiple discrimination against all vulnerable groups of children.²¹⁰ In a concluding observation on Lebanon, the Committee expressed concern that the principle of non-discrimination is not fully implemented for girls, refugee and asylum-seeking children, Palestinian children, children with disabilities, and children living in less advantaged regions and rural areas, especially

²⁰⁶ CRC General Comment 6 CRC/GC/2005/6 para 18.

²⁰⁷ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 20, Human Rights and Refugees*, July 1993, No. 20, para 18 available at <http://www.refworld.org/docid/4794773f0.html> (accessed 10 January 2015).

²⁰⁸ Mezmur B ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 23 *SA Public Law* 17.

²⁰⁹ Art 3 of the African Children’s Charter.

²¹⁰ Philippines, CRC, CRC/C/150 (2005) 24 at paras 123, 124, 132 and 133.

with regard to their access to health and adequate educational facilities.²¹¹ In accordance with Art 2 of the Convention, the Committee recommended that the State party make concerted efforts at all levels to address discrimination, notably discrimination based on gender, disability, religion, and national, ethnic, or social origin, through a review and reorientation of policies. It also recommends that there be increased budgetary allocations for programmes targeting the most vulnerable groups and ensure effective law enforcement, undertake studies and launch comprehensive public information campaigns to prevent and combat all forms of discrimination.²¹²

2.5.1.2 The best interests of the child

The principle of the best interests of the child connotes the yardstick by which to measure all the actions, laws and policies affecting children.²¹³ This principle relates to decisions by courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions.²¹⁴ Art 3 (1) of the Children's Convention states that 'in all actions concerning children, the best interests of the child shall be a primary consideration, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.'²¹⁵ The CRC Committee noted that the best interests' principle:

'... [R]equires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions by, for example, a proposed or

²¹¹ Lebanon, CRC, CRC/C/114 (2002) 11 at para 52.

²¹² Lebanon, CRC, CRC/C/114 (2002) 11 at paras 53.

²¹³ Achilihu SN *Do African Children Have Rights? A Comparative and Legal Analysis of the United Nations Convention on the Rights of the Child* (2010) 72.

²¹⁴ Moyo A 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child' (2012) 11 *AHRLJ* 142.

²¹⁵ Art 3(1) of the Convention on the Rights of the Child.

existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.’²¹⁶

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child.²¹⁷

In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interest determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied refugee child’s life.²¹⁸ The fact that the best interests of a child shall be a primary consideration in the decision affecting the child is an indication that the best interests of the child will not always be the single, overriding factor to be considered. There may be competing or conflicting human rights interests, for example, between individual children, between different groups of children and between children and adults.²¹⁹ The child’s interests, however, must be the subject of active consideration. It needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.²²⁰

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.²²¹ Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe

²¹⁶ UN Committee on the Rights of the Child (CRC), General Comment no. 5 (2003): *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 12.

²¹⁷ UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14 para 4.

²¹⁸ CRC General Comment 6 CRC/GC/2005/6 para 20.

²¹⁹ Yogi P *Human Rights and Equal Opportunities* (2006) 110.

²²⁰ UNICEF ‘Implementation Handbook to the Convention on the Rights of the Child’ 3ed (2007) 38.

²²¹ Labor A (2007) 598.

atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.²²² Subsequent steps, such as, the appointment of a competent guardian as expeditiously as possible, serve as a key procedural safeguard to ensure respect for the best interests of an unaccompanied refugee child.²²³ Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where UARC are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.²²⁴

In a concluding observation on Canada, the CRC Committee welcomed the incorporation of the principle of the best interests of the child in the new Immigration and Refugee Protection Act (2002). It also welcomed the efforts made to address the concerns of children in the immigration process, in cooperation with the office of the UNHCR and non-governmental organisations.²²⁵ For Sweden the Committee welcomed the new legislative measures and programmes incorporating the principle of the best interests of the child, in particular the 1998 amendment of the Parental Code, the instructions given to the National Board of Health and Welfare and other laws. Nonetheless, the Committee expressed concern that the best interests of asylum-seekers and migrant children are not sufficiently taken into consideration in asylum processes.²²⁶ The Committee recommended that the State Party take appropriate and efficient measures in order to ensure that the principle of the best interests of the child form the basis and guide the process and decisions in asylum cases involving children, *inter alia*, by reforming the guidelines and procedures of the Swedish Migration Board.²²⁷

²²² Gallagher A T & David F *The International Law of Migrant Smuggling* (2014) 191.

²²³ Bhabha, J 'Not a sack of potatoes: Moving and removing children across borders' (2006) 15 *Boston University Public Interest Law Journal* 197.

²²⁴ UNHCR *Report of the Committee on the Rights of the Child By United Nations, United Nations: Committee on the Rights of the Child* (2006) 22.

²²⁵ Canada, CRC, CRC/C/133 (2003) 14 at para 96.

²²⁶ Sweden, CRC, CRC/C/146 (2005) 8 at para 45.

²²⁷ Sweden, CRC, CRC/C/146 (2005) 8 at para 46.

2.5.1.3 The right to life, survival and development

The obligation of the State Party under Art 6 of the CRC includes protection from violence and exploitation, to the maximum extent possible. Herein, where such violence or exploitation would jeopardise a child's right to life, survival and development.²²⁸ UARC are vulnerable to various risks that affect their life, survival and development, such as, trafficking for purposes of sexual or other exploitation or involvement in criminal activities which could result in harm to the child; or in extreme cases, death.²²⁹ The CRC Committee is of the view that practical measures should be taken at all levels to protect children from the risks mentioned above. Such measures could include: Priority procedures for child victims of trafficking, the prompt appointment of guardians, the provision of information to children about the risks they may encounter, and establishment of measures to provide follow-up to children particularly at risk.²³⁰ The CRC Committee also reminds States Parties that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play.²³¹

2.5.1.4 Right of the child to express his or her views freely

Pursuant to Art 12 of the Convention, in determining the measures to be adopted with regard to UARC, the child's views and wishes should be elicited and taken into account.²³² To allow for a well-informed expression of such views and wishes, it is imperative that such children

²²⁸ Art 6 of the Convention on the Rights of the Child.

²²⁹ Labor A (2007) 596.

²³⁰ Achilihu S N (2010) 73.

²³¹ Committee on the Rights of the Child, *General Comment No. 7*, 2005, CRC/C/GC/7/Rev.1, para. 10 See also arts. 24, 27, 28, 29 and 31 of the CRC.

²³² Art 12(1) of the Convention on the Rights of the Child.

are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin.²³³ In guardianship, care and accommodation arrangements and legal representation, children's views should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child.²³⁴ As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.²³⁵

In a concluding observation on Poland, the CRC Committee noted the State Party's efforts to require administrative and judicial proceedings to take into account the views of the child, but is concerned that in practice this principle is not always implemented, particularly in proceedings involving unaccompanied children applying for refugee status, juvenile offenders and children placed in institutions, as well as in custody hearings.²³⁶ The Committee recommended that the State Party: Take effective measures, including legislation, to promote and facilitate respect for the views of children, by courts and all administrative bodies and the participation of children in all matters affecting them, in accordance with Art 12 of the Convention.²³⁷

2.5.1.5 Respect for the principle of non-refoulement and confidentiality

In affording proper treatment of UARC, States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and refugee law and in particular, must respect obligations codified in Art 33 of the 1951 Refugee Convention.²³⁸

²³³Juss S S & Harvey C *Contemporary Issues in Refugee Law* (2013) 120.

²³⁴Juss S S & Harvey C (2013) 121.

²³⁵ UNHCR *Report of the Committee on the Rights of the Child By United Nations, United Nations: Committee on the Rights of the Child* (2006) 18.

²³⁶ Poland, CRC, CRC/C/121 (2002) 120 at para 523.

²³⁷ Poland, CRC, CRC/C/121 (2002) 120 at para 524.

²³⁸ CRC General Comment 6 CRC/GC/2005/6 para 26. Art 33 of the 1951 Refugee Convention also prohibits refoulement of refugees.

Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, involvement of children in armed conflict.²³⁹ The definition of non-refoulement for children also covers a more expansive set of rights than other definitions of non-refoulement when considering deprivation of liberty and detention practices and so the non-refoulement protection offered by the CRC is broader.²⁴⁰ This definition of non-refoulement is, according to the Committee, based on obligations deriving from international human rights, humanitarian law, and refugee law, including the 1951 Refugee Convention, the Convention Against Torture, the Convention on the Rights of the Child (CRC), and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.²⁴¹

State Parties are obliged to protect the confidentiality of information received in relation to an unaccompanied refugee child, consistent with the obligation to protect the child's rights, including the right to privacy.²⁴² This obligation applies in all settings including health and social welfare. Care must be taken that information sought and legitimately shared for one purpose is not inappropriately used for that of another.²⁴³

2.5.2 General and specific protection needs

2.5.2.1 Initial assessment and measures

An initial assessment at the arrival of unaccompanied children is vital in determining their way forward. The Committee has stated that: 'this necessary initial assessment process, in

²³⁹ UN High Commissioner for Refugees (UNHCR), *Refugee Protection: A Guide to International Refugee Law*, 1 December 2001, 77 available at <http://www.refworld.org/docid/3cd6a8444.html> (accessed 04 March 2015).

²⁴⁰ Farmer A 'A Commentary on the Committee on the Rights of the Child definition of non-refoulement for children: Broad protection for fundamental rights' (2011) 80 *Fordham Law Review Res Gestae* 41.

²⁴¹ General Comment 6 CRC/GC/2005/6 para 27.

²⁴² UNHCR *Report of the Committee on the Rights of the Child By United Nations, United Nations: Committee on the Rights of the Child* (2006) 18.

²⁴³ CRC General Comment 6 CRC/GC/2005/6 para 26.

particular entails prioritised identification of a child as unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities.²⁴⁴ Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty.²⁴⁵ The assessment also entails providing personal identity documents as soon as possible to all unaccompanied and separated children.²⁴⁶

2.5.2.2 Appointment of a guardian or adviser and legal representative

States are required to appoint a guardian or adviser as soon as the unaccompanied refugee child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and thereby ensuring a proper representation of an unaccompanied refugee child's best interests.²⁴⁷ The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution for the unaccompanied refugee child.²⁴⁸ The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are

²⁴⁴ CRC General Comment 6 CRC/GC/2005/6 para 26.

²⁴⁵ CRC General Comment 6 CRC/GC/2005/6 para 26. See also art. 8 of the Convention.

²⁴⁶ Labor A (2007) 600.

²⁴⁷ Fonseca A et al C 'Unaccompanied migrant children and legal guardianship in the context of returns: The missing links between host countries and countries of origin' in Doek J et al (eds) *Children on the Move: How to Implement their Right to Family Life* (1996) 49. See arts. 18 (2) and 20 (1) of the Children's Convention.

²⁴⁸ Bhabha J & Crock M *Seeking Asylum Alone, A Comparative Study of Laws* (2007) 90.

appropriately covered.²⁴⁹ In addition to the appointment of a guardian in cases where children are involved in asylum procedures or administrative or judicial proceedings, they should be provided with legal representation.²⁵⁰

2.5.2.3 Care and accommodation arrangements

A wide range of options for care and accommodation arrangements for UARC exist and are explicitly acknowledged in Art 20 (3) as including foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children.²⁵¹ When selecting from these options, the particular vulnerabilities of a child, as well as the child's age and gender should be taken into account.²⁵² In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process.²⁵³ Such care and accommodation arrangements should not be that a child is deprived of liberty and where there are siblings they should be kept together in light of the principle of family unity.²⁵⁴

Children must also be kept informed of the care arrangements being made for them and their opinions must be taken into consideration.²⁵⁵ The ACRWC also obliges State Parties to ensure that children deprived of a family environment be provided with alternative family care which may include amongst others placement in foster care, adoption or suitable institutions for the care of children.²⁵⁶ On its Day of General Discussion on 'Children without

²⁴⁹ Kanics J et al *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* (2010) 64.

²⁵⁰ Angel W.D et al *The International Law of Youth Rights 2ed* (2015) 1254.

²⁵¹ Labor A (2007) 601.

²⁵² Angel W.D et al (2015) 1255.

²⁵³ Gaines K 'Assessment of international efforts to protect the rights of unaccompanied minors' Independent Study Project (ISP) Collection Paper 1148 (2011).

²⁵⁴ Angel W.D et al (2015) 1255.

²⁵⁵ CRC General Comment 6 CRC/GC/2005/6 para 30.

²⁵⁶ Art 25 (2) (b) of African Children's Charter.

Parental Care’ the Committee stated that: ‘Children feel better in their own environment and this should be taken into consideration when they are placed into out of home care.’²⁵⁷

2.5.2.4 Full access to education

The CRC Committee has stated that every unaccompanied refugee child, irrespective of status, shall have full access to education in the country that they have entered.²⁵⁸ Such access should be granted without discrimination and in particular, unaccompanied refugee girls shall have equal access to formal and informal education, including vocational training at all levels and early learning programmes for young children.²⁵⁹ States are obliged to ensure that access to education is maintained during all phases of the displacement cycle. For education to be accessible it has to be physically and economically accessible and without discrimination.²⁶⁰

In a concluding observation on Netherlands, the CRC Committee showed concern over various forms of discrimination and exclusion which affect the right to education of certain groups of children, such as pregnant adolescents, undocumented children and children with disabilities, reflecting insufficient attention to Art’s 28 and 29 of the Convention.²⁶¹

In terms of General Comment 13 of the International Committee on Economic, Social and Cultural Rights (ICESCR), accessibility of education in human rights instruments has three overlapping magnitudes. These are physical accessibility, economic accessibility and non-discrimination. Physical accessibility suggests that schools should be within the safe physical reach of all children of school-going age and attendance is also indispensable.²⁶² The

²⁵⁷ Committee on the Rights of the Child, *Report on the fortieth session*, September 2005, CRC/C/153, para 673.

²⁵⁸ CRC General Comment 6 CRC/GC/2005/6 para 40. This is in line with Art’s 28, 29 (1) (c), 30 and 32 of the Convention and the general principles developed by the Committee.

²⁵⁹ Angel W.D et al (2015) 1256.

²⁶⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 6.

²⁶¹ Netherlands (Antilles), CRC, CRC/C/118 (2002) 129 at paras 575 and 576.

²⁶² Mapuva L & J ‘New Constitutional dispensation and children's right to education’ 2014 *Peace and Conflict Monitor* 3.

international human rights instruments explicitly provide that primary education must be free and compulsory.²⁶³ In addition to the principle of accessibility; is the principle of availability, acceptability and adaptability. Availability means that educational institutions must be available in sufficient quantity, and must contain adequate and appropriate infrastructure.²⁶⁴ Acceptability means that the form and substance of education, including curricula and teaching methods, must be relevant, culturally appropriate, and of high quality.²⁶⁵ Adaptability means that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.²⁶⁶

2.5.2.5 Right to an adequate standard of living

States are obliged to ensure that UARC have a standard of living adequate for their physical, mental, spiritual and moral development.²⁶⁷ States are also obliged to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.²⁶⁸

2.5.2.6 Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health

²⁶³ UNICEF *A human rights-based approach to education for all: A framework for the realization of children's right to education and rights within education* (2007) 85.

²⁶⁴ Zimbabwe Lawyers for Human Rights & the International Human Rights Clinic at Harvard Law School 'Analysis of Provisions Relevant to Economic, Social, and Cultural Rights in Zimbabwe's 2013 Constitution' 2014 *Briefing Paper* 7.

²⁶⁵ Beiter KD *The Protection of the Right to Education by International Law* (2006) 492.

²⁶⁶ Mapuva L & J (2014) 3.

²⁶⁷ CRC General Comment 6 CRC/GC/2005/6 para 44.

²⁶⁸ Art 27 (2) of the CRC.

Under Art 24 of the Convention, States are obligated to ensure that UARC have the same access to health care as children who are nationals.²⁶⁹ In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children. Herein, States must take into account the fact that UARC have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence.²⁷⁰ The obligation under Art 39 of the Convention sets out the duty of States to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally appropriate and gender-sensitive mental health care should be developed and qualified psychosocial counselling provided.²⁷¹

2.5.2.7 Prevention of trafficking and of sexual and other forms of exploitation, abuse and violence

Trafficking is one of many dangers faced by UARC, which threatens the fulfilment of their right to life, survival and development.²⁷² Unaccompanied refugee girls are at particular risk of being trafficked, including for purposes of sexual exploitation.²⁷³ The Committee has stated that Art's 34 to 36 of the Convention must be read in conjunction with special protection and assistance obligations to be provided according to Art 20 of the Convention, in order to ensure that UARC are shielded from trafficking, and from sexual and other forms of exploitation, abuse and violence.²⁷⁴

²⁶⁹ Art 24 states that: States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

²⁷⁰ CRC General Comment 6 para 47. See also Angel W.D et al 2015) 1257.

²⁷¹ Robinson P 'The Right of child victims of armed conflict to reintegration and recovery' (2012) 15 *Potchefstroom Electronic Law Journal* 47. See also CRC General Comment 6 para 48.

²⁷² CRC General Comment 6 CRC/GC/2005/6 para 52. See also Art 6 of the Convention on the right to life, survival and development.

²⁷³ Gallagher A.T *The International Law of Human Trafficking* (2010) 429.

²⁷⁴ CRC General Comment 6 CRC/GC/2005/6 para 51.

2.5.2.8 Prevention of military recruitment and protection against effects of war

As under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life.

State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 'entail extraterritorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment or participation, directly or indirectly, in hostilities.'²⁷⁵

States must also take all necessary measures to prevent recruitment or use of UARC children by any party to a conflict.²⁷⁶ States are also obliged to develop, a comprehensive age-appropriate and gender-sensitive system of psychological support and assistance for UARC affected by armed conflict, in cooperation with international agencies and NGOs.²⁷⁷

2.5.2.9 Prevention of deprivation of liberty and treatment in cases thereof

In application of Art 37 of the Convention and the principle of the best interests of the child, UARC should not, as a general rule, be detained.²⁷⁸ Detention cannot be justified solely on the basis of the child being unaccompanied, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in

²⁷⁵ CRC General Comment 6 CRC/GC/2005/6 para 58.

²⁷⁶ Labor A (2007) 604.

²⁷⁷ CRC General Comment 6 CRC/GC/2005/6 para 60.

²⁷⁸ CRC General Comment 6 CRC/GC/2005/6 para 61.

accordance with Art 37 (b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time.²⁷⁹ States must also respect their obligations deriving from Art 31 (1) of the 1951 Refugee Convention in developing policies on UARC, including those who are victims of trafficking and exploitation.²⁸⁰

2.5.3 Procedural issues

The obligation stemming from article 22 of the Convention is to take ‘appropriate measures’ to ensure that a child, whether unaccompanied or accompanied, who is seeking refugee status receives appropriate protection. This entails, inter alia, the responsibility to set up a functioning asylum system and, in particular, to enact legislation addressing the particular treatment of UARC. In addition, ‘States need to build capacities necessary to realise the treatment of these children in accordance with applicable rights codified in the Convention and in other international human rights, refugee protection or humanitarian instruments to which the State is a party.’²⁸¹

According to Ehrenreich, minimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters.²⁸² When assessing refugee claims of UARC, States are obliged to interpret the refugee definition in the Refugee Convention in an age and gender-sensitive manner. In this process, States must take into account the particular motives for, and forms and manifestations of,

²⁷⁹ Art 37(b) provides that: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

²⁸⁰ S 37 obliges states not to impose penalties, on refugees on account of their illegal entry or presence, in their territory without authorisation.

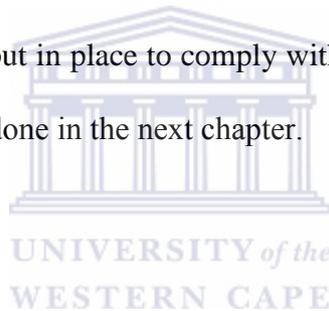
²⁸¹ CRC General Comment 6 CRC/GC/2005/6 para 64.

²⁸² Ehrenreich R *Slipping through the Cracks: Unaccompanied Children detained by the US Immigration and Naturalisation Service* (1997) 84.

persecution experienced by children.²⁸³ Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds.²⁸⁴

2.6 Conclusion

In light of the above discussion, one could argue that UARC are protected sufficiently both regionally and internationally. It is thus the duty of States to protect these children and comply with the various obligations detailed in these instruments. Zimbabwe as a State Party should ensure that measures are put in place to comply with these obligations. An analysis of Zimbabwe's compliance will be done in the next chapter.



²⁸³ Edwards A 'Age and gender dimensions in international refugee law' in Feller E et al *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2013) 70.

²⁸⁴ Edwards (2013) 75.

CHAPTER 3

AN ANALYSIS OF ZIMBABWE'S EXISTING LEGISLATION FOR THE PROTECTION OF UARC

3.1 Introduction

Zimbabwe has a number of laws such as, the Children's Act²⁸⁵, the Immigration Act²⁸⁶, the Citizenship Act²⁸⁷, the Refugees Act²⁸⁸ and the Constitution,²⁸⁹ which govern the protection of UARC, as children and as refugees. Care, security and protection of UARC is provided for in terms of these laws and through other mechanisms, such as, the National Programme of Action for Children (NPAC), which facilitates and coordinates the implementation, monitoring and evaluation of the CRC and the ACRWC to ensure survival, development and protection.²⁹⁰ Other mechanisms for child protection include the Victim Friendly System²⁹¹ and the National Action Plan for Orphans and Vulnerable Children which also cater for UARC.²⁹² The judiciary is an important arm of the State when it comes to the interpretation

²⁸⁵ The Children's Act of Zimbabwe.

²⁸⁶ The Immigration Act of Zimbabwe.

²⁸⁷ The Citizenship of Zimbabwe Act of Zimbabwe.

²⁸⁸ The Refugees Act of Zimbabwe.

²⁸⁹ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

²⁹⁰ Children's Rights International Network (CRIN) 'Zimbabwe: Child Rights References in the Universal Periodic Review' available at <https://www.crin.org/en/library/publications/zimbabwe-child-rights-references-universal-periodic-review> (accessed 6 June 2015), See also Magidie F & Goro T 'Reflecting on child rights and Zimbabwe's harmonisation of its international obligations' 2013 *University of Zimbabwe Journal* 6.

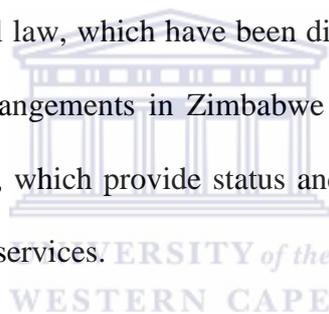
²⁹¹ Save the Children *Mid Term Evaluation Final Report - Victim Friendly System* (2014) 1 – 56: The Victim Friendly System is the culmination of a number of initiatives aimed at providing essential support services to boys and girls affected by abuse. Coordinated by the Ministry of Justice and Legal Affairs, in collaboration with the Ministry of Labour and Social Services, Zimbabwe Republic Police, Ministry of Education and various nongovernment organisations, the system seeks to deliver comprehensive, specialised psychosocial care, medical, legal and referral services to boys and girls who have witnessed, experienced or perpetrated abuse. The System has various elements which include the Victim Friendly Courts, Victim Friendly Police Units established in 267 police stations across the country, Victim Friendly Health Services, The Department of Social Services and the Victim Friendly Referral System.

²⁹² Children's Rights International Network (CRIN) 'Zimbabwe: Child Rights References in the Universal Periodic Review' available at <https://www.crin.org/en/library/publications/zimbabwe-child-rights-references-universal-periodic-review> (accessed 6 June 2015), The government continued Phase II of its National Action Plan for Orphans and Vulnerable Children, which included a focus on equity and access to quality education for children. The policy prescribed a three-pronged approach to assisting at risk children, including providing child protection and health services, delivering conditional cash transfers, and continuing the basic education assistance module (BEAM).

of constitutional rights and values and is also one of the measures used to cement the implementation of child related laws in Zimbabwe.²⁹³

Refugees and asylum seekers in Zimbabwe are housed at Tongogara Refugee Camp situated in Chipinge District. A brief background and history of the camp will be given and an analysis of how children's rights are protected at this camp will also be made. As of July 2015 there was a total of two thousand one hundred and eighty four (2 184) refugee children at Tongogara refugee camp in Zimbabwe.²⁹⁴

This chapter offers an analysis of Zimbabwe's legal framework that regulates the protection of UARC. The chapter also seeks to examine whether Zimbabwe, through these laws, fulfils its obligations under international law, which have been discussed in chapter 2. This chapter also reviews the institutional arrangements in Zimbabwe providing protection to refugees, which includes those institutions, which provide status and documentation as well as those, which provide the actual welfare services.



3.2 The Constitution of Zimbabwe

The Constitution is the supreme law of Zimbabwe²⁹⁵ and the obligations imposed by it are binding on every natural or juristic person.²⁹⁶ The presence of children's rights in the Constitution is a major milestone towards the protection of children in Zimbabwe especially the enshrining of the best interests of the child principle.²⁹⁷ It is vital to note that children's

²⁹³ Magidie F & Goro T (2013) 5. The Independence of the judiciary is enshrined in s164 of the Constitution.

²⁹⁴ Zimbabwe's State party's report submitted to the CRC Committee, 2012 para 126, 71 Pre-Sessional Working Group (08 Jun 2015 - 12 Jun 2015). The Report will be reviewed between the 11th & the 29th of January 2016.

²⁹⁵ S 2 (1) of the Constitution.

²⁹⁶ S 2 (2) of the Constitution.

²⁹⁷ Justice for Children Trust (JCT) 'Constitutionalising the best interests of the child principle' (2012) 1 *The Child Law Bulletin* 2. Before Amendment (No 20) of 2013, there was no reference to children's rights in the Constitution of Zimbabwe 1980 as amended at 1st February, 2007.

rights were not included in Zimbabwe's previous Constitution²⁹⁸; hence their inclusion in the new Constitution is a great improvement.²⁹⁹ In terms of the Constitution, the State has a duty to ensure that all international Conventions, treaties and agreements to which Zimbabwe is a party, are incorporated into domestic law.³⁰⁰ This provision is a limitation on the direct application of international law in the country. Chapter 4 contains the Declaration of Rights, which provides that international law must be considered when interpreting the Declaration of Rights and foreign law may be considered.³⁰¹ According to Magidie, the problem is not the adoption of these international instruments but the implementation of these laws in Zimbabwe.³⁰² Section 81 of the Constitution is the basis for protection of children's rights in Zimbabwe.³⁰³



²⁹⁸ The Lancaster Constitution of 1979 and its subsequent amendments.

²⁹⁹ Mukai 'Children's rights in Zimbabwe: An analysis of how the state seeks to protect children's' rights' available at <http://www.jescom.co.zw/index.php/mukai-vukani/257-2014/mukai-vukani-no-67/603-children-s-rights-in-zimbabwe-an-analysis-of-how-the-state-seeks-to-protect-children-s-rights> (accessed 20 May 2015).

³⁰⁰ S 34 of the Constitution. In terms of s327 of the Constitution, an International convention or treaty is not law in Zimbabwe unless it has been incorporated into law through an Act of Parliament and is not binding until it has been approved by Parliament.

³⁰¹ S 46 (c) and (e).

³⁰² Magidie F & Goro T (2013) 5.

³⁰³ S 81 of the Constitution: Rights of children

(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—

(a) to equal treatment before the law, including the right to be heard;

(b) to be given a name and family name;

(c) in the case of a child who is—

(i) born in Zimbabwe; or

(ii) born outside Zimbabwe and is a Zimbabwean citizen by descent; to the prompt provision of a birth certificate;

(d) to family or parental care, or to appropriate care when removed from the family environment;

(e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;

(f) to education, health care services, nutrition and shelter;

(g) not to be recruited into a militia force or take part in armed conflict or hostilities;

(h) not to be compelled to take part in any political activity; and

(i) not to be detained except as a measure of last resort and, if detained—

(i) to be detained for the shortest appropriate period;

(ii) to be kept separately from detained persons over the age of eighteen years; and

(iii) to be treated in a manner, and kept in conditions, that take account of the child's age.

(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

The Constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law.³⁰⁴ UARC being ‘persons’ are squarely within the ambit of the protection by the Constitution. Unfair discrimination on the grounds of nationality, tribe, place of birth, ethnic or social origin, language, culture, age is also prohibited.³⁰⁵ UARC can therefore not be discriminated against on the basis of their nationality, ethnic or social origin. Thus, they therefore have equal access to education, healthcare and protection, as any other person in Zimbabwe. The government is, however, still to amend other discriminatory laws to bring them in line with the Constitution.³⁰⁶

The Constitution enshrines the ‘cardinal’ principles for protection of children as provided by the CRC. These are the best interests of the child, non - discrimination, respect for the child’s views and the right to life survival and development, discussed extensively in chapter two above.³⁰⁷



The State is obliged by the Constitution, to adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.³⁰⁸ The Constitution also provides that a child’s best interests are paramount in every matter concerning the child.³⁰⁹ To ensure that this principle is enforced, the high court is legally

³⁰⁴ S 56 (1) of the Constitution.

³⁰⁵ S 56 (3).

³⁰⁶ S 22 of the Marriage Act Chapter 5:11 which allows girls to marry at 16 years and boys at 18 years. The Customary Marriages Act Chapter 5:07 which does not set a minimum age of marriage for girls. The Guardianship of Minors Act which provides that upon separation of parents, custody of a child should be given to the mother. Besides being discriminatory this provision may defeat the principle that the best interests of the child should be paramount in all cases involving children. S 12 of the Births and Deaths Registration Act Chapter 5:02 which still provide that men who father children out of wedlock are not compelled to register their children’s birth. Such children are registered in their mothers’ maiden surnames and their birth certificates do not show details of their fathers thereby making it difficult for them to inherit from their fathers. This has resulted in the non-registration of many children, as women do not want to register these children using their maiden surnames due to, inter alia, cultural considerations.

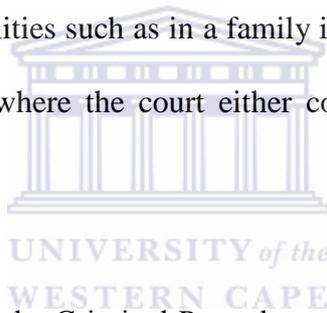
³⁰⁷ At 2.6.1.1, 2.6.1.2, 2.6.1.3 and 2.6.1.4.

³⁰⁸ S 19 (1).

³⁰⁹ S 81 (2). The principle had been adopted in selected acts in Zimbabwe such as the Guardianship of Minors Act and the Matrimonial Causes Act. The selected application of this principle meant that children’s best interests were in selected issues, thus not comprehensive. Its application in practice has also been said to be less

recognised as the upper guardian of all minors.³¹⁰ The inclusion of the best interests' principle for children in the Constitution reinforces protection for UARC. This principle will be used as described in the CRC's General Comment No. 6, for all processes dealing with UARC, from their status determination until they are settled.³¹¹

According to the African Committee of Experts, all laws, policies and programmes related to the improvement of the birth registration system as well as the acquisition of a nationality must also be in conformity with the best interests of the child.³¹² These are essential especially for UARC whose interests in most instances are not given paramountcy. The Children's Act only includes the best interests principle in cases of removal of a child from places of safety to other care facilities such as in a family in which the child grew up in or in a community³¹³ and in matters where the court either confirms or cancels its provisional adoption order.³¹⁴



Laws such as the Children's Act, the Criminal Procedure and Evidence Act,³¹⁵ the Domestic Violence Act,³¹⁶ the Social Welfare Assistance Act³¹⁷ and the Maintenance Act³¹⁸ seek to ensure the right to life, survival and development of the child. While the laws are in place, implementation challenges including inadequate resourcing abound. The National Action Programme for Orphans and Vulnerable Children is a program used to fulfill the right to life,

satisfactory. The adoption of this principle is in line with the CRC and the ACERWC which makes the best interests of a child a paramount consideration.

³¹⁰ S 81(3) provides that children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

³¹¹ General Comment No. 6, CRC/GC/2005/6.

³¹² African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Art 6 of the ACRWC: 'The Right to a Name, Registration at Birth, and to Acquire a Nationality'*, 16 April 2014, ACERWC/GC/02 (2014).

³¹³ S 14(2) of the Children's Act.

³¹⁴ S 65 (3).

³¹⁵ Chapter 9:07 as amended by Act 14 of 2002.

³¹⁶ Act 24 of 2006 (Chapter 5:16).

³¹⁷ Act 10 of 1988 as amended by Act 22 of 2001 (Chapter 17:06).

³¹⁸ Act 51 of 1971 as amended by Act 9 of 1997.

survival and development of the child, however these programmes are largely dependent on donor funding.³¹⁹

S 81(1) provides that every child has the right to equal treatment before the law, including the right to be heard. Laws such as the Children's Act³²⁰ and the Administration of Estates Act³²¹ promote the participation of children in issues that concern them. The extent of consideration of their views, however, as well as the weight attached to such views, is not decisive as these are considered together with other facts and circumstances, and generally subject to the best interests of the child.³²² In practice, children are usually excluded due to their lack of capacity and cultural considerations which inhibit child participation. Denial of the right to be heard is a denial of the right for one to exist, as communication is the life blood of human existence and co-operation within human affairs.³²³ There are a number of initiatives being undertaken to facilitate child participation in Zimbabwe, but these mechanisms are not far - reaching as children in rural areas are short of information.³²⁴ Both the CRC and the ACRWC recognise that the discussion on rights is of particular importance for children. It provides them with a status and a stake in the debates about issues which affect them.³²⁵ Involving children in the design and implementation of programmes helps to

³¹⁹ Magidie F & Goro T (2013) 5.

³²⁰ S 61 (c) of the Children's Act requires considering a child's views in adoption proceedings.

³²¹ S 68 of the Administration of Estates Amendment Act No. 6 of 1997.

³²² Magidie F & Goro T (2013) 5.

³²³ Hill L K 'Right to be heard: Voicing the due process right to counsel for unaccompanied alien children' (2011) 31 *Boston College Third World Law Journal* 50.

³²⁴ For example the National Youth Policy (2000) facilitates the participation of young people in the mainstream development process of the country. Zimbabwe has also established the Child Parliament, Cabinet and Council to promote child participation in issues that affect children. These structures are however not adequately resourced to function effectively on the ground hence they remain unknown to most children and hardly represent the views of the majority of children in Zimbabwe. Their interaction with senior Parliament, Cabinet and Council is limited hence reducing their effectiveness in representing children's issues.

³²⁵ Mezmur B & Sloth-Nielsen J 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *AHRLJ* 10.

realise their right to be heard. Whatever their circumstances, ethnic group, gender, culture or background, children have equal rights.³²⁶

In international refugee law the four cardinal principles are directly related to the principle of non refoulement.³²⁷ The Refugees Act of Zimbabwe provides in Chapter 13 against the refoulement, extradition or expulsion of any person who as a result of the expulsion will be subjected to persecution.³²⁸ However, this does not seem to be the case as refugees and even UARC are reported to being returned to their countries of origin although it is clear to the State that the refugees are fleeing persecution from their countries.³²⁹

Section 19 of the Constitution details the obligations of the State, *vis-à-vis*, the protection of children.³³⁰ The State is obliged to adopt policies and measures within its available resources

³²⁶ Action for the Rights of Children (ARC) ‘ARC resource pack: Critical issue module 7 - Children associated with armed forces or armed group’ 2009, available at <http://www.refworld.org/docid/4b55d3b62.html> (accessed 11 June 2015).

³²⁷ See discussion in Chapter 2 at 2.5.1.5.

³²⁸ S13 provides that:

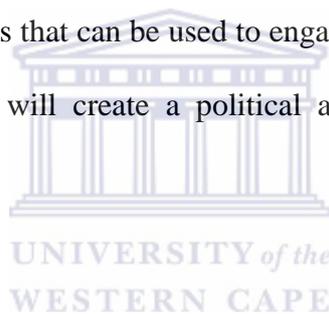
- (1) Notwithstanding any other enactment, no person shall be refused entry into Zimbabwe, expelled, extradited or returned from Zimbabwe to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—
 - (a) he may be subjected to persecution on account of his race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or the whole of that country.

³²⁹ As reported by the herald on July 13 2015, Thirty-six Congolese and five Burundi asylum seekers were intercepted at the Plumtree Border Post and transported back to Tongogara Refugee Camp in Manicaland where they had escaped after being denied asylum status and were waiting to be deported to their respective countries. The group comprising of adults and children, was arrested while trying to use an illegal point to enter Botswana. The Department of Social Services said the immigrants had indicated that they had fled their respective countries to seek refuge from wars prevailing there and were not keen to return to their respective countries, which explains why they fled from the refugee camp. This is an indication that the State is not willing to protect refugees and asylum seekers. Posted by Kaelynn on Jul 13, 2015 in 2015 Press Review 29 available at <http://www.scalabrini.org.za/2015/13-july-to-19-july-2015/> (accessed on 27 October 2015).

³³⁰ S 19 provides that

- (1) The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.
- (2) The State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children—
 - (a) enjoy family or parental care, or appropriate care when removed from the family environment;
 - (b) have shelter and basic nutrition, health care and social services;
 - (c) are protected from maltreatment, neglect or any form of abuse; and
 - (d) have access to appropriate education and training.

and in some instances take legislative and other measures to ensure the fulfillment of children's rights. Although the State is mandated to provide for the rights of children, such duty has been limited within the State's available resources. Hence this provision might not achieve its desired result. These obligations have been included in chapter two of the Constitution as national objectives and directive principles of state policy. Being national objectives they guide State policy and influence the interpretation of other constitutional provisions and law, and may be justiciable, but will require an interpretation by the courts for a positive duty against the State.³³¹ Although they may influence political processes and provide a foothold for civil society activism, the justiciability of these national objectives is not as secure as those contained in the Declaration of Rights.³³² Chiviru asserts that this compromise sets out societal goals that can be used to engage government and the legislature, but not the courts; however, it will create a political and societal space for a just and democratic society.³³³



3.3 Subsidiary legislation protecting UARC

3.3.1 The Children's Act of Zimbabwe

The Children's Act of Zimbabwe is the primary source of protection for all children in Zimbabwe, irrespective of their origin, status or nationality. It gives effect to their constitutional rights as set out in s81 of the Constitution. The Children's Act defines a child

-
- (3) The State must take appropriate legislative and other measures—
(a) to protect children from exploitative labour practices; and
(b) to ensure that children are not required or permitted to perform work or provide services that—
(i) are inappropriate for the children's age; or
(ii) place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.

³³¹ Chapter 2 of the Constitution.

³³² Zimbabwe Lawyers for Human Rights & the International Human Rights Clinic at Harvard Law School 'Analysis of Provisions Relevant to Economic, Social, and Cultural Rights in Zimbabwe's 2013 Constitution' Briefing Paper (2014) 10.

³³³ Chiviru T 'Socio-economic rights in Zimbabwe's new constitution' (2014) 36 *Strategic Review for Southern Africa* 113.

as a person under the age of sixteen and includes an infant.³³⁴ The Act, by defining a child as under sixteen, allows for lesser protection of children's rights and falls within the loophole in the CRC's definition of a child, discussed in Chapter 2 above.³³⁵ On the other hand the Constitution of Zimbabwe has defined a child as anyone below the age of 18, thus setting a higher standard for protecting children, as that of the ACRWC.³³⁶ The Children's Act therefore needs to be aligned with the Constitution and the ACRWC to enable children to be afforded the maximum protection they deserve.

The Act does not make specific reference to UARC but refers to children in need of care and defines such as 'a destitute and an abandoned child, or a child both of whose parents are dead or cannot be traced and who has no legal guardian; or... who begs or, being a child, engages in street trading contrary to this Act or any other enactment or...'³³⁷ An unaccompanied refugee child although not specifically catered for, can be protected by this definition as a child in need of care or a child without a legal guardian. Schreier opines that the non-specific reference to refugee children in a Children's Act leads to restrictive and exclusionary interpretations of the Act and thus causing many foreign children to fall through the cracks rather than squarely falling within the robust child protection regime.³³⁸ Section 14 provides for the removal of such children in need of care from any place to places of safety.³³⁹ Any child who is found in Zimbabwe should be brought before the Children's Court. The

³³⁴ Children's Act of Zimbabwe.

³³⁵ See discussion on 2.4.1. Criminal Law (Codification and Reform) Act also defines a child as a person under the age of eighteen. Other laws in Zimbabwe also provide for different ages for a child and need to be aligned with the Constitution. These allow exploitation of children's rights. S 2(1) of the Public Health Act defines a child who has attained sixteen years as an adult. The minimum age for girls (16) and for boys (18) is under the Marriage Act (s22) which is discriminatory towards girls. The Customary Marriages Act on the other hand does not provide for a minimum age of marriage. This obviously opens a door to sexual exploitation of the girl child.

³³⁶ See discussion of the ACRWC at 2.5 in Chapter 2 above.

³³⁷ S 2 of the Children's Act.

³³⁸ Schreier T 'Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the UCT Refugee Rights Unit' (2011) 4 *UCT Working Paper Series* 12.

³³⁹ Such places of safety mean any police station or hospital or any place suitable for the reception of a child or young person into which the occupier thereof is willing to receive a child or young person or any place established by the Minister for the purposes of reception of children.

Children's Court is empowered to decide whether a child is in need of care and has the power to order that the child be placed in foster care.³⁴⁰ UARC are then sent to Tongogara Camp where refugees are accommodated.

3.3.2 The Refugees Act

The adoption of a national refugee legislation is key to making protection of refugees more effective and providing a basis for seeking solutions to the plight of refugees.³⁴¹ Incorporating international law into national legislation is particularly important in areas on which the Refugee Convention is silent, such as, procedures for determining refugee status.³⁴² The Zimbabwean Refugee Act incorporates both the African Children's Charter and the UN CRC's Convention's definition of a refugee.³⁴³ This is a positive aspect of the Refugee Act because it takes cognisance of the fact that conflict and persecution can exist side by side. At the same time, it also stays true to the purpose of the OAU Refugee Convention which is to complement the UN Refugee Convention. Parliament can, thus, be applauded for providing for such a wide definition which caters for almost all refugee situations. While the Refugee Act bears substantial merit, it does not fall short of criticism. Similar to the Refugee

³⁴⁰ S 20 of Children's Act.

³⁴¹ UN High Commissioner for Refugees (UNHCR), 'Refugee Protection: A Guide to International Refugee Law,' 1 December 2001, p78 available at <http://www.refworld.org/docid/3cd6a8444.html> (accessed 21 April 2015).

³⁴² UNHCR 'Refugee Protection: A Guide to International Refugee Law' (2001) 78. See Also Art 1(6) of the OAU Refugee Convention.

³⁴³The Refugee Act of Zimbabwe provides that a person shall be a refugee for the purposes of the Act if

- (a) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- (b) not having a nationality and being outside the country of his former habitual residence, he is unable or, owing to a well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is unwilling to return to it; or
- (c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality; or
- (d) he has been considered a refugee under the Arrangements of the 12th May, 1926 and the 30th June, 1928, or under the Conventions of the 28th October, 1933 and the 10th February, 1938, the Protocol of the 14th September, 1939 or the Constitution of the International Refugee Organisation; or
- (e) He is a member of a class of persons declared to be refugees.

Convention and the ACRWC, the Refugee Act does not make specific reference to refugee children, more specifically UARC. Thus, the same definition and rights of refugees also apply to children. The rights of refugees are contained in s 12 of the Act.³⁴⁴ UARC are also protected by Constitution and child protection legislation such as the Children's Act.

The Act also incorporates Schedule 1 Arts of the Refugee Conventions applicable to recognised refugees and protected persons in Zimbabwe. The incorporated arts include Art 3³⁴⁵, Art 4³⁴⁶, Art 22³⁴⁷, Art 34³⁴⁸, Art 27³⁴⁹, Art 28³⁵⁰, Art 16³⁵¹ and Art 12.³⁵² In terms of s4, the Commissioner of Refugees is obliged to ensure the provision of adequate facilities and services for the reception and care of refugees within Zimbabwe.³⁵³ The State has made reservations to the Refugee Convention on Art 22 (1) pertaining to elementary education,³⁵⁴ Art 23 pertaining to public relief and assistance³⁵⁵ and Art 24 pertaining to labour legislation and social security.³⁵⁶ The State has considered these articles as mere recommendations hence not being fully bound by these provisions. In the second schedule, the Act provides

³⁴⁴ S12 provides for the rights and duties of recognized refugees and protected persons within Zimbabwe.

(1) Subject to this Act, every recognized refugee and every protected person within Zimbabwe— (a) shall be entitled to the rights and be subject to the duties contained in—

(i) the Articles of the Convention relating to the Status of Refugees of the 28th July, 1951, which are set out in Part I of the Schedule; and

(ii) the Articles of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of the 10th September, 1969, which are set out in Part II of the Schedule; as if the references therein to refugees were references to recognized refugees and protected persons; and

(b) shall be subject to all laws in force within Zimbabwe.

³⁴⁵ Art 3 provides for non- discrimination by contacting states on the grounds of race, religion or country of origin.

³⁴⁶ Art 4 provides for the right to religion of refugees and freedom pertaining to religious education of refugee children.

³⁴⁷ Art 22 provides for the right to public education.

³⁴⁸ Art 34 pertains to naturalization.

³⁴⁹ Art 27 provides for Identity papers

³⁵⁰ Art 28 pertains to travel documents.

³⁵¹ Art 16 provides for the right of a refugee to free access to courts of law which includes legal assistance. This is particularly important for refugee children who do not have guardians and need legal assistance in matters concerning them. In this regard legal assistance should be provided for free to these refugee children.

³⁵² Art 12 pertains to personal status. Refugee children should be afforded their own personal status.

³⁵³ S 4 of the Refugees Act.

³⁵⁴ Art 22 (1) provides that the Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

³⁵⁵ In terms of Art 23 the State party is obliged to provide to refugees the same treatment accorded to nations in respect of public relief and assistance.

³⁵⁶ Art 24 provides for labour legislation and social security.

that children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee in respect of accompanied refugees.³⁵⁷ The Act does not state whether UARC are provided with their own personal identity documents as required by the CRC.³⁵⁸ The Act also incorporates Art's III³⁵⁹ and Art's V³⁶⁰ of the OAU Refugee Convention.

3.3.3 Immigration Act and Citizenship Act

Section 41 of the Immigration Act empowers the Minister of Home Affairs to promulgate regulations to govern the entry and exit of people into and out of Zimbabwe. Further, the section empowers the Minister of Home Affairs to determine the conditions under which non-Zimbabweans can stay in the country. Recognised refugees are permitted to enter, remain or exit the country in terms of the Immigration Act³⁶¹ and are not prohibited persons in terms of the Act.³⁶²



In terms of s 36 (3), a child found in Zimbabwe, who is, or appears to be, less than fifteen years of age, and whose nationality and parents are not known, is presumed to be a Zimbabwean citizen by birth.³⁶³ A child who is not a Zimbabwean citizen, but is adopted by a Zimbabwean citizen, is entitled, on application, to be registered as a Zimbabwean citizen.³⁶⁴

Manby is of the opinion that, granting citizenship to refugees is one of the durable solutions

³⁵⁷ Schedule 2 of the Refugees Act.

³⁵⁸ CRC General Comment No. 6, CRC/GC/2005/6 para 32.

³⁵⁹ Prohibition of subversive activities.

³⁶⁰ Voluntary repatriation.

³⁶¹ S 11 of the Immigration Regulations Statutory Instrument 195 of 1998.

³⁶² S 15 Immigration Act.

³⁶³ S36 (3) of the Constitution.

³⁶⁴ S 38(3) of the Constitution.

to the refugee problem in host countries.³⁶⁵ Thus, UARC found in Zimbabwe or adopted by Zimbabweans are citizens of Zimbabwe in terms of the law.

3.4 Protection and provision rights of UARC

3.4.1 Birth registration and identity

Section 81 (1) (b) of the Constitution provides that every child has the right to be given a name and family name. The right to a name has the purpose of protecting a child's legal identity especially for UARC.³⁶⁶ The Constitution does not provide for the right to a nationality of a child born in Zimbabwe. The right to a nationality is intended to protect a child's international legal identity and in particular protect the child against statelessness.³⁶⁷ Children born to refugees are registered and accorded the citizenship status of their parents.³⁶⁸ To protect unaccompanied refugee children from statelessness, the State should provide identity documents to UARC after having been granted their refugee status. One of UNHCR's protection strategies in Zimbabwe in 2015 was a focus on the improvement of documentation, including birth registration and child protection³⁶⁹ Failure to provide birth documentation for UARC, impedes on their access to public services, such as, education and health care, resulting in them being unable to attend school and increasing their vulnerability to exploitation. Thus, registration of births among refugees is vital for their survival.

3.4.2 Enjoyment of family/ parental care

Section 19 obliges the State to adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children enjoy family or parental care, or

³⁶⁵ Manby B *Citizenship Law in Africa* (2009) 34.

³⁶⁶ Hodgson D 'The International Legal Protection of the Child's Right to a Legal Identity and the problem of Statelessness' (1993) 7 *International Journal on Law, Policy, Family* 260.

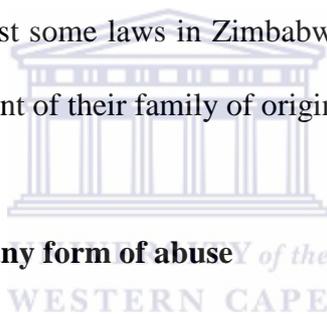
³⁶⁷ OHCHR 'Children's right to a nationality' available at www.ohchr.org (accessed 21 May 2015).

³⁶⁸ State Party Report 2012.

³⁶⁹ UNHCR '2015 UNHCR sub regional operations profile-Southern Africa' available at <http://www.unhcr.org/pages/49e485c66.html> (accessed 10 October 2015).

appropriate care when removed from the family environment.³⁷⁰ UARC are children temporarily or permanently deprived of their family environment and, as such, are beneficiaries of the States' obligations under Art 20 of the CRC and are entitled to special protection and assistance provided by the relevant State.³⁷¹

In terms of s 81, children also have a right to family or parental care, or to appropriate care when removed from the family environment.³⁷² This implies then that UARC have the right to family care as they have been removed from the family environment. Alternative care can be used as a means of ensuring the right to family life for UARC. Other measures, such as, adoption, temporary or permanent, can also be used as means of ensuring the right to family care.³⁷³ There, however, still exist some laws in Zimbabwe which attempt to guarantee that children grow up in an environment of their family of origin.³⁷⁴



3.4.3 Maltreatment, neglect or any form of abuse

The State has a duty to protect children from maltreatment, neglect or any form of abuse.³⁷⁵

In terms of s 81 of the Constitution, every child has the right to be protected from economic and sexual exploitation and from maltreatment, neglect or any form of abuse.³⁷⁶ Child maltreatment refers to 'any non-accidental behaviour by parents, caregivers, other adults or older adolescents that is outside the norms of conduct and entails a substantial risk of causing

³⁷⁰ S 19 (2) (a) of the Constitution.

³⁷¹ CRC General Comment 6 CRC/GC/2005/6 para 39.

³⁷² S 81 (1) (d) of the Constitution.

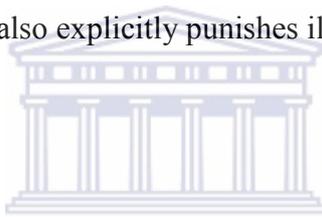
³⁷³ UN General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, 24 February 2010, A/RES/64/142.

³⁷⁴ These laws include the Education Act (Chapter 25:04), 1987, the Children's Act, the Guardianship of Minors Act (Chapter 5:08), 1961, the Sexual Offences Act (Chapter 9:21), 2001. The Matrimonial Causes Act (Chapter 5:13), 1986 exhorts judicial officers to ensure that in handing down orders for divorce or judicial separation they make provision for the custody and maintenance of children in that relationship. While the Maintenance Act (Chapter 5:09), 1971 seeks to ensure that children are taken care of.

³⁷⁵ S 19 (2) (c) of the Constitution.

³⁷⁶ S 81(1) (e) of the Constitution.

physical or emotional harm to a child or young person.³⁷⁷ Neglect means the failure to meet children's physical and psychological needs, protect them from danger, or obtain medical, birth registration or other services when those responsible for children's care have the means, knowledge and access to services to do so. It includes physical and psychological or emotional neglect, educational neglect and abandonment.³⁷⁸ UARC are more prone to abuse as they are usually by themselves with no adult to guide them. Some of them are in urban areas where they can be abused by adults in exchange for money. To ensure protection from sexual abuse, the Children's Act prescribes deterrent forms of punishment for sexual offenders. The definition of a sexual offender adopted by the Act includes persons who, although not directly involved, allow the abuse of children, either on their premises or elsewhere.³⁷⁹ The Children's Act also explicitly punishes ill-treatment and neglect of children and young persons.³⁸⁰



Zimbabwe is a source, transit and destination country of human trafficking which is rife as most people pass through Zimbabwe en route to South Africa, and UARC can be targets for trafficking.³⁸¹ UARC are more prone to trafficking, especially those in urban areas as they can be solicited with money or promise of a better life. Therefore, the State should ensure that maximum protection is afforded to them. If they are fostered in families checkups should be made to ensure that they are not being ill-treated or abused in those families. Unaccompanied refugee girls usually suffer more than boys due to their vulnerability as girls. Provisions for

³⁷⁷ UN Committee on the Rights of the Child (CRC), *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* (Arts. 19; 28, Para. 2; and 37, inter alia), 2 March 2007, CRC/C/GC/8. See also Christoffel K. K, Scheidt PC, Agran PF, Kraus JF, McLoughlin E & Paulson JA 'Standard definitions for childhood injury research: Excerpts of a conference report' (1992) 89 *Pediatrics* 1028.

³⁷⁸ UN Committee on the Rights of the Child (CRC), *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13.

³⁷⁹ The Children's Act of Zimbabwe.

³⁸⁰ S 7 of the Children's Act.

³⁸¹ US Department of State *Trafficking in Persons Report 2012 – Zimbabwe* (2010) 365. The Sexual Offenses Act also criminalises the transportation of persons across borders for sex.

immediate safe care for UARC from abuse include placing a ban on adoptions and removal of UARC without government permission, except for medical treatment.³⁸² It is important that children who are without parental care, be quickly identified and coordinated tracing systems should be established immediately so that children should be reunited as soon as possible with their families. Transport and travel of children should be limited to reduce the risk of trafficking and abduction. Structures should be put in place, such as identified meeting points, so that in the event of accidental separations children can be reunited as soon as possible.³⁸³

3.4.4 Child labour

The State also has a duty to take appropriate legislative and other measures to protect children from exploitative labour practices.³⁸⁴ The State must also ensure that children are not required or permitted to perform work or provide services that are inappropriate for the children's age³⁸⁵ or place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.³⁸⁶ Zimbabwe ratified the International Labour Organisation (ILO) Convention No. 182 on the Worst Forms of Child Labour in 2000 and the ILO Convention No. 138 on the Minimum Age of Employment. Resultantly, it has obligations flowing from these international instruments to protect children from child labour.

Art 15 of the ACRWC provides that, 'every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to

³⁸² Elam J 'Natural disaster throws children into the arms of pedophiles' *Community Digital News* 31 December 2012 2.

³⁸³ Delaney S 'Protecting Children from Sexual Exploitation & Sexual Violence in Disaster & Emergency Situations' ECPAT International March 2006 available at http://www.preventionweb.net/files/2709_protectingchildren.pdf (accessed 19 May 2015).

³⁸⁴ S 19 (3) (a) of the Constitution.

³⁸⁵ S 19 (3) (b) (i) of the Constitution.

³⁸⁶ S 19 (3) (b) (ii) of the Constitution.

interfere with the child's physical, mental, spiritual, moral, or social development.³⁸⁷ UARC are particularly at risk of child labour, especially the worst forms. Contributing factors for child labour include the economic insecurity of refugee families, the lack of educational opportunities for refugee children, poverty and social norms that overlook the practice.³⁸⁸ A number of provisions of the Labour Relations Amendment Act³⁸⁹ were designed to give effect to the ILO Conventions. The Act also prohibits forced labour and prescribes punishments of up to two years' imprisonment.³⁹⁰ However, child exploitation has been in Zimbabwe especially in rural areas and mining towns.³⁹¹

3.4.5 Deprivation of liberty

In terms of s 81 (1) (h) of the Constitution, every child has the right not to be detained except as a measure of last resort and if detained, for the shortest appropriate period.³⁹² If detained children are to be kept separately from detained persons over the age of eighteen; and to be treated in a manner, and kept in conditions that take account of the child's age. These rights are additional to the rights of detained persons provided in s50 of the Constitution. This provision is consistent with Art 37(b) of the CRC.³⁹³ The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.³⁹⁴ A number of concerns have been raised by human rights experts pertaining to the detention of refugees in Zimbabwe especially at the

³⁸⁷ Art 15(1), Organisation of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

³⁸⁸ UNHCR *Protection of refugee children in the Middle East and North Africa* (2014) 22.

³⁸⁹ Act 17 of 2002.

³⁹⁰ The Labour Relations Amendment Act (No. 17 of 2002) prohibits employers from hiring a person under 18 to perform hazardous work.

³⁹¹ Gallinetti J *Child trafficking in SADC countries: The need for a regional response* (2008) 13.

³⁹² S81 (1) (I) of the Constitution.

³⁹³ Art 37 of the CRC states that: No child shall be deprived of his or her liberty unlawfully or arbitrarily.

³⁹⁴ Human Rights and Equal Opportunity Commission 'A last resort? National inquiry into children in immigration detention' 2004 available at https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf (accessed 10 October 2015).

border posts.³⁹⁵ Section 84 of Children's Act also provides for detention as a last resort. Therefore, UARC if found at border posts or anywhere in the country are not to be detained, but to be taken to reception centers, but it does not seem to be so in practice. The State should conscientise the police all over the country, about these laws, such that they are well informed and know what to do when they meet refugees.

3.4.6 Right to education

The State has an obligation to provide access to appropriate education.³⁹⁶ The State's obligation pertains only to access to appropriate education.³⁹⁷ Education is considered a key factor for bringing stability and security to children affected by forced displacement. For UARC, education not only promotes healing and rehabilitation, but is also a driving force for continuity and normalcy.³⁹⁸ Education is also regarded as the most effective initial means of ensuring protection for refugee children in general, and for UARC in particular, by shielding them from abusive activities such as child labour, military recruitment or sexual exploitation and abuse.³⁹⁹ One of the hindrances to access education for UARC is the lack of a birth certificate, which makes it difficult for them to be enrolled in the education system in many countries.⁴⁰⁰ Furthermore, UARC often have to provide for themselves in order to survive, and working is their only option which makes them drop out of school, yet, access to quality education is their only hope for an income and economic security throughout their lives.⁴⁰¹

³⁹⁵ Madube 'Imprisoned Prisoners: The Double Tragedy of Refugees in Zimbabwe' 2012 2 available at <https://madubesbrainpot.wordpress.com/2012/03/20/imprisoned-prisoners-the-double-tragedy-of-refugees-in-zimbabwe/> (accessed 2 June 2015).

³⁹⁶ S 19 (2) (d) of the Constitution.

³⁹⁷ See discussion at 2.5.2.4 pertaining to what accessibility entails.

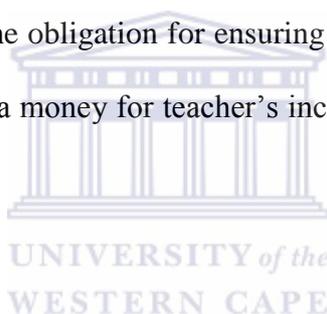
³⁹⁸ UNHCR *Report of the Secretary-General Assistance to unaccompanied refugee minors* (2003) 11-13.

³⁹⁹ UNHCR 'Summary Update of Machel Study Follow-Up Activities in 2001-2002' (2003) available at <http://www.unhcr.org/408e04074.pdf> (accessed 02 July 2015).

⁴⁰⁰ UNHCR *Protection of refugee children in the middle east and north Africa* (2014) 18.

⁴⁰¹ Martone G 'Educating children in emergency settings: An unexpected lifeline' (2007) available at <http://www.rescue.org/sites/default/files/migrated/resources/irc-education-in-emergencies-martone-august-2007.pdf> (accessed 2 June 2015).

In line with the CRC, every child has a right to education in terms of the Constitution of Zimbabwe.⁴⁰² Zimbabwe has always pursued a policy of ‘education for all.’⁴⁰³ This was done despite the fact that no such provision existed in the Constitution. The Education Act provides that every child in Zimbabwe has the right to formal education and parents are obliged to send their children to a school of their choice.⁴⁰⁴ The Government has also set up a number of institutions to ensure that education is accessible to as many children as possible.⁴⁰⁵ However, education is not necessarily free as the Act requires school fees to be maintained at the lowest possible levels. Students are required to pay tuition fees as well as development levies.⁴⁰⁶ The Government has also abandoned the policy of free education for every child choosing to impose the obligation for ensuring compulsory education on parents, by requiring that parents pay extra money for teacher’s incentives, thus, negatively affecting access to education.⁴⁰⁷



Education is offered for free to all children at the Tongogara camp, including UARC.⁴⁰⁸ Upon arrival at the camp, children are offered English and Shona lessons to enable them to overcome the language barrier since most of them come from French speaking countries.⁴⁰⁹

All UARC benefit from the distribution of uniforms and books.⁴¹⁰ However the problem for

⁴⁰² S 81 (1) (f) of the Constitution.

⁴⁰³ Zimbabwe Lawyers for Human Rights & the International Human Rights Clinic at Harvard Law School ‘Analysis of Provisions Relevant to Economic, Social, and Cultural Rights in Zimbabwe’s 2013 Constitution’ 2014 *Briefing Paper* 10.

⁴⁰⁴ The Education Act (Chapter 25:04) of 2004.

⁴⁰⁵ Art 5 of the Education Act, states that, the objective in Zimbabwe is that primary education for every child of school-going age shall be compulsory and to this end it shall be the duty of the parents of any such child to ensure that such child attends primary school.

⁴⁰⁶ S 6 of the Education Act.

⁴⁰⁷ Child Rights Coalition *Complementary Report to the African Committee of Experts on the Rights and Welfare of the Child* (2014) 9.

⁴⁰⁸ There are about 1,260 students enrolled in the Tongogara Primary school. Almost 360 students receive secondary education: 329 students are in lower secondary grades and 28 students are in upper secondary.

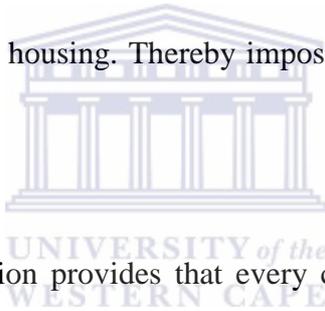
⁴⁰⁹ Zimbabwe State Party Report 2012.

⁴¹⁰ Mapiko E & Chinyoka K ‘Exploring the effects of displacement on academic performance of unaccompanied girl children at a refugee camp in Zimbabwe’ (2013) 1 *European Journal of Academic Research* 102.

these children is not access to education but the quality of education.⁴¹¹ According to the WFP Report teachers are always absent as they will be looking for other means of survival due to the economic hardships in the country.⁴¹²

3.4.7 Health care, shelter, nutrition and water

The State also has a duty to provide shelter and basic nutrition, health care and social services for children.⁴¹³ In terms of s81 of the Constitution, every child has the right to health care services, nutrition and shelter.⁴¹⁴ The right to health care is in line with Art 12 of the Covenant on Economic Social and Cultural Rights (CESCR) and Art 16 of the African Charter on Human and Peoples' Rights (ACHPR).⁴¹⁵ The right to shelter as provided can be interpreted to include the right to housing. Thereby imposing a duty on the State to provide the necessary shelter for UARC.



In addition, s76 of the Constitution provides that every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services.⁴¹⁶ This right is exclusive to citizens and permanent residents, thereby, excluding asylum seekers and refugees. The Public Health Act makes provision for public health and the government has adopted National Health Strategies to guide the provision of health services.⁴¹⁷ The right to sufficient food and portable water in s77 has not been limited to citizens and permanent residents only,

⁴¹¹ UNHCR & WFP *Joint Assessment Mission Report Tongogara Refugee Camp, Zimbabwe* (2014) 27-29.

⁴¹² UNHCR & WFP (2014) 27.

⁴¹³ S19 (2) (b) of the Constitution.

⁴¹⁴ S 81 (1) (f) of the Constitution.

⁴¹⁵ Art 12 of the CESCR, states that, everyone should enjoy the highest attainable standard of physical and mental health and Art 16 of the ACHPR provides that, every individual shall have the right to enjoy the best attainable state of physical and mental health. The 'highest attainable standard' and 'the best attainable standard' is in my view the same.

⁴¹⁶ S 76 (1) of the Constitution.

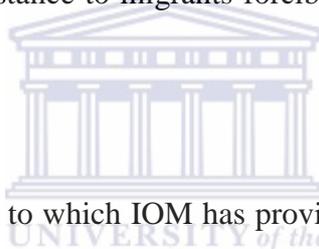
⁴¹⁷ The Ministry of Health and Child Welfare 'The National Health Strategy-Working for Quality and Equity in Health' (1997-2007) and 'the National Health Strategy for Zimbabwe - Equity and Quality in Health: A People's Right' (2009-2013).

but to every person in the territory of Zimbabwe.⁴¹⁸ The role of the courts will be significant in providing sufficient judicial protection of socio-economic rights in Zimbabwe.

3.5 Reception centres and the camping policy

3.5.1. Refugee reception centres

The Government of Zimbabwe with support from the IOM opened the Beitbridge Reception Centre in May 2006 and the Plumtree reception centre in 2008.⁴¹⁹ IOM has made various interventions over the years in Zimbabwe in supporting the government to better manage migration. The Reception and Support Centres were established primarily to offer post arrival comprehensive humanitarian assistance to migrants forcibly returned from South Africa and Botswana.⁴²⁰



Zimbabwe is one of the countries to which IOM has provided humanitarian assistance to the highest number of unaccompanied migrant children.⁴²¹ The Department of Social Services (DSS), which operates under Zimbabwe's Ministry of Labour and Social Services, automatically assumes the role of legal guardianship of UMCs by offering interim care, family tracing, reunification, referrals to other child-centered organisations before and after assessment of UARC's families, registration and birth entries, and protection assistance to

⁴¹⁸ S 77 of the Constitution provides that every person has the right to (a) safe, clean and potable water; and (b) sufficient food.

⁴¹⁹ Mehler A, Melber H, & van Walraven K *Africa Yearbook: Politics, Economy and Society South of the Sahara* (2007) 481. See also Human Rights Watch 'Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province' 2006 15 available at <https://www.hrw.org/report/2006/08/08/unprotected-migrants/zimbabweans-south-africas-limpopo-province> (accessed 2 August 2015).

⁴²⁰ International Organisation for Migration 'IOM Zimbabwe Strategic Plan 2015 -2018' 3 available at <http://zimbabwe.iom.int/sites/default/files/Docs/IOM%20Zimbabwe%20Strategic%20Plan.pdf> (accessed 15 October 2015).

⁴²¹ International Organisation for Migration 'The official handover of Beitbridge reception and support center to the government of Zimbabwe' available at <https://zimbabwe.iom.int/news/official-handover-beitbridge-reception-and-support-center-government-zimbabwe> (accessed 10 October 2015).

those returned.⁴²² Nevertheless, there is a reported need for their efforts to be complemented by other relevant agencies and organisations with a child protection mandate on the ground for the effective execution of their duties.⁴²³ As coordination with relevant ministries in charge of legal guardianship in host countries is limited, state actors in Zimbabwe rely heavily on the work of and assistance from IOM and other protection agencies mainly for the provision of safe accommodation, food and other basic services.⁴²⁴

3.5.2. Refugee camps

Refugee camps in Zimbabwe were created in accordance with the provisions of s 12 (2) of the Zimbabwe Refugee Act, which authorises the Minister to designate places and areas within which recognised refugees and protected persons should live.⁴²⁵ Notwithstanding the provisions of s12, as much as one-quarter of refugees living in urban Harare at end of 2013, were without the permission of the government and are at risk of arrest and return to the refugee camp.⁴²⁶

There are two main camps which house refugees and asylum seekers who come to Zimbabwe. These are: Tongogara refugee camp and Waterfalls transit camp. The Tongogara camp is the oldest camp located in Chipangayi area of Chipinge District, Manicaland Province, some 550 kilometres south - east from Harare.⁴²⁷ Tongogara Refugee Camp has been hosting refugees from countries, such as, the Democratic Republic of Congo, Rwanda,

⁴²² Fonseca A, Hardy A & Adam C 'Unaccompanied migrant children and legal guardianship in the context of returns: The missing links between host countries and countries of origin' in International Organisation for Migration *Children on the Move* (2013) 45 – 62.

⁴²³ Fonseca A (2013) 46.

⁴²⁴ Fonseca A (2013) 48.

⁴²⁵ S 12 (2) of the Refugee Act.

⁴²⁶ Zimbabwe US Embassy 'Human Rights Report 2013' available at http://harare.usembassy.gov/human_rights_report_2013.html (accessed 24 June 2015).

⁴²⁷ UNHCR & WFP (2014) 2.

Burundi, Somalia, Ethiopia and Eritrea.⁴²⁸ Waterfalls transit camp was set up in 1981, and is located in Harare the capital city of Zimbabwe. It provides temporary shelter and other needs to refugees undergoing the status determination process. It also accommodates, on temporary basis, refugees from Tongogara who are on referral cases for medical assistance or resettlement consideration, refugees who have some protection issues to settle or be settled, as well as those requested to come for further investigations by the Zimbabwe Refugee Committee.⁴²⁹

3.6 Institutional framework

3.6.1 Responsibility of refugees in Zimbabwe

Refugee matters in Zimbabwe are administered by the government through the Department of Social Welfare (under the Ministry of Public Service, Labour and Social Welfare) with funding support from UNHCR. The Department of Social Welfare ensures profiling and initial registration of new arrivals, status determination, civil status documentation for refugees, assists with shelter construction, education, medical referrals and community services.⁴³⁰ A special office called the Refugees Unit is used for refugee matters. The office, falls under the Commissioner for Refugees. The functions of the Commissioner are to recognise persons as refugees and endeavour to ensure the provision of adequate facilities and services for the reception and care of refugees within Zimbabwe.⁴³¹

The Camp Administrator has overall responsibility for activities in the camp and co-ordinates the functioning of NGOs who render assistance to refugees. Most assistance coming from UN

⁴²⁸ UNHCR & WFP (2014) 3.

⁴²⁹ Chitsama S *How does refugee protection policy respond to the needs of refugees with physical disabilities in Tongogara and Waterfalls refugee camps in Zimbabwe?* (unpublished Master in Peace, Leadership, and Governance Thesis, Africa University, 2011) 11.

⁴³⁰ UNHCR & WFP (2014) 2.

⁴³¹ S 4 (2).

agencies such as UNHCR is channelled through the camp administrator's office. He has an administrative team under him that keeps camp records, distributes food, attends to water supply, looks to the smooth provision of education and health and is responsible for the general welfare of the camp inhabitants.⁴³²

3.6.2 Committee for refugee status determination

The Refugees Act establishes a Zimbabwean Refugees Committee which consists of the Commissioner who is the chairperson⁴³³ and not less than three other members appointed by the Minister.⁴³⁴ The Committee's function is to receive and consider asylum applications and is expected to maintain independence and objectivity at all times.⁴³⁵ A UNHCR representative has an advisory role.

The refugee status determination procedure is crucial to the issues of refugee status. It is the first point of contact for refugees and thus should be effected carefully and with due regard to the rights of refugees. The importance of the identification procedure is that early intervention can be made so that children are placed in safe environment and family reunification can be made quicker.⁴³⁶ Both the UN Convention and the OAU Convention do not provide for the status determination procedure for refugees. The State Party has the mandate to establish its own procedure for refugee status. The procedure for status determination is contained in s7 of the Zimbabwean Refugees Act. UARC are automatically granted refugee status whilst accompanied refugee children are considered together with their

⁴³² UNHCR & WFP (2014) 2.

⁴³³ S5 (1) (a).

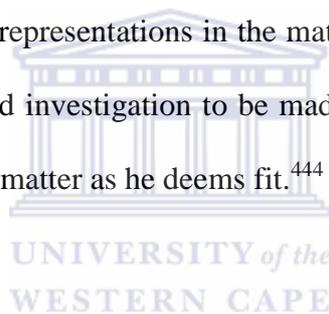
⁴³⁴ S5 (1) (b).

⁴³⁵ S 6 (a). In 2014, a total of 2,469 persons were interviewed by the Zimbabwe Refugee Commission (ZRC). Out of these, 968 individuals were granted refugee status while 317 were rejected for various reasons. Decisions were deferred for another 1184 individuals pending administrative reviews. By the end of 2014, 681 individuals were still awaiting ZRC interviews.

⁴³⁶ Schreier T (2012) 12.

parents.⁴³⁷ Upon arrival at the camp, asylum seekers are settled at the reception center within the camp where they await refugee status determination conducted by the Zimbabwe Refugee Committee.⁴³⁸

The Committee then considers all asylum applications referred to it within thirty days and may, either within such period of thirty days or thereafter, make an inquiry or investigation as it deems necessary into any application.⁴³⁹ An aggrieved applicant may within seven days of being notified of the refusal of a refugee status, appeal to the Minister in writing.⁴⁴⁰ The Minister can either confirm or set aside the decision of the Commissioner and his decision is final.⁴⁴¹ During the appeal the Minister may invite the representative in Zimbabwe of the UNHCR to make oral or written representations in the matter⁴⁴², refer the matter back to the Committee for further inquiry and investigation to be made⁴⁴³ or himself make such further inquiry and investigation into the matter as he deems fit.⁴⁴⁴



3.6.3 Coordination of refugee assistance

In Zimbabwe, the body that coordinates refugee assistance is referred to as the National Implementation Committee.⁴⁴⁵ The Committee is chaired by the Commissioner for Refugees and made up of representatives of government ministries that provide services to refugees, and representatives of non-governmental organisations involved in refugee assistance.⁴⁴⁶ The Committee's main role is to effectively coordinate all assistance rendered to refugees. In

⁴³⁷ Zimbabwe State Party Report 2012.

⁴³⁸ UNHCR & WFP (2014) 32.

⁴³⁹ S 7(3).

⁴⁴⁰ S 7(5).

⁴⁴¹ S 7(5).

⁴⁴² S 7(6) (a).

⁴⁴³ S 7(6) (b).

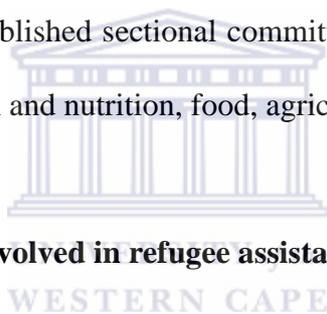
⁴⁴⁴ S 7(6) (c).

⁴⁴⁵ Mupedziswa R & Makanya S *Report on governments, non-governmental organisations and refugee assistance in Southern Africa: The case of Zimbabwe* (1992) 9.

⁴⁴⁶ Mupedziswa R & Makanya S (1992) 9.

addition, it holds regular and frequent meetings to plan and monitor assistance programmes and to provide a platform for both formal and informal exchange of information.⁴⁴⁷ The main aim of these meetings is the development of complementary programmes of assistance, prevention of duplication of services and ensures the sharing of technical information available.⁴⁴⁸

The Committee also has the responsibility of developing specific standards and norms for the delivery of assistance to refugee.⁴⁴⁹ The Committee also has the responsibility to provide an induction to new agencies arriving on the scene and to give them advice pertaining to what is going on and how best to get involved effectively in the assistance exercise.⁴⁵⁰ The Coordinating Committee has established sectional committees (i.e. sub-committees) in areas like education and training, health and nutrition, food, agriculture and clothing.⁴⁵¹



3.6.4 UN agencies and NGOs Involved in refugee assistance

3.6.4.1. UN agencies

UN Agencies play a big role in providing assistance to refugees. The most significant agencies at present are UNHCR and IOM. IOM provides specific activities to be implemented which include conducting rapid assessments, provision of emergency assistance, such as, food and non-food items, temporary shelter, establishing referral systems for effective coordination of assistance to the beneficiaries and the provision of technical

⁴⁴⁷ UNHCR & WFP (2014) 32.

⁴⁴⁸ Zimbabwe State Party Report 2012.

⁴⁴⁹ UNHCR 'UNHCR Operation in Zimbabwe Factsheet January 2015' available at <http://www.unhcr.org/524d88609.pdf> (accessed 20 May 2015).

⁴⁵⁰ Mupedziswa R & Makanya S (1992) 9.

⁴⁵¹ Mupedziswa R & Makanya S (1992) 9.

assistance to local authorities and communities.⁴⁵² The UNHCR provides technical assistance to the GOZ especially in the area of policy.⁴⁵³ UNHCR also funds most of the programmes at the camp, while NGO's such as World Vision implements them by providing assistance in terms of food, water and sanitation etc.⁴⁵⁴

3.6.4.2 Non - Governmental Organisations

Most of the NGO's are implementing and coordinating partners of the UNHCR. They receive funding from the UNHCR and in turn provide assistance to refugees. The Jesuit Refugee Service (JRS) is involved in training of sewing and computer skills as well as environmental cleaning among other activities. It also provides other services such as scholarships for primary and secondary education, vocational training, clothing, food and medical referrals.⁴⁵⁵ Christian Care majors in water and sanitation programmes as well as food security.⁴⁵⁶ Christian Care is also involved in the implementation of refugee protection policies in the camp. The International Committee of the Red Cross (ICRC) helps with the tracing of parents or other relatives of UARC and also facilitates voluntary repatriation.⁴⁵⁷ Where the parents or relatives are not identified, the children are either fostered within the refugee families or sent to institutions of care. The process of placing these children in institutions is the same with that of locals.⁴⁵⁸

⁴⁵² International Organisation for Migration 'US backs efforts to address needs of migrants in Zimbabwe' available at <http://www.iom.int/news/us-backs-efforts-address-needs-migrants-zimbabwe-08/09/13> (accessed 16 June 2015).

⁴⁵³ UNHCR 'UNHCR Operation in Zimbabwe Factsheet January 2015' available at <http://www.unhcr.org/524d88609.pdf> (accessed 20 May 2015).

⁴⁵⁴ For a detailed discussion on the role of the UNHCR see discussion in Chapter 2 on 2.3.

⁴⁵⁵ Chimedza N C *The Psychosocial challenges facing Unaccompanied Refugee Children in Urban Zimbabwe* (unpublished Master of Arts thesis in Forced Migration, Witwatersrand University, 2005) 59.

⁴⁵⁶ Chitsama S (2011) 11.

⁴⁵⁷ Mapiko E & Chinyoka K (2013) 3.

⁴⁵⁸ Zimbabwe State Party Report 2012.

3.7 Conclusion

It is clear that while significant progress has been made in relation to legislative reform, gaps still remain in the law reform and implementation of the laws and policies which promote children's rights in Zimbabwe. As Zimbabwe progresses, there is great potential for the children's rights movement to influence the direction of the country so that the ideals of children's rights are fully realised.⁴⁵⁹ The inclusion of children's rights in the constitution is a major milestone which, if implemented well, will see greater protection for children being offered in Zimbabwe.

Formally, Zimbabwe has accepted international standards of child protection and has taken steps to support them in law and policy. In spite of diminished services, there has been some attention to children's rights in Zimbabwe. For example, in 1990, Zimbabwe was one of the early countries to ratify the CRC. The Government of Zimbabwe (GOZ), sometimes under pressure from international child protection agencies such as Save the Children and UNICEF, other donors and governments, has continued to establish legislation and policies for the protection of children's rights but has rarely provided funds to support these policies.⁴⁶⁰ As a study of the relevant international and domestic law revealed⁴⁶¹, there is indeed a gap between the rights provided for UARC in Zimbabwe and the realisation of the said rights.

As illustrated above, aid to UARC is mainly dependent upon UNHCR and other international organisations. The State has to take its place and play its role towards protecting unaccompanied refugee children. However, economic instability is a major stumbling block for the State to take action towards fulfilling its obligations. It can, therefore, be argued that

⁴⁵⁹ Magidie F & Goro T (2013) 5.

⁴⁶⁰ Imoh A.T & Ansell N (eds) *Children's Lives in an Era of Children's Rights: The progress of the Convention on the Rights of the Child in Africa* (2014)107.

⁴⁶¹ See discussion at 2.2 and 3.3.

the State has partially fulfilled its legal obligations towards protecting refugee children through the inclusion of children's rights in the Constitution, reference to children in need of care in the Children's Act, the Refugees Act and other related laws. There is still much room for improvement for protecting UARC. Major reforms, such as, making specific reference to UARC in the above stated laws, providing quality education on an equal footing with other children nationally, improving service delivery in terms of adequate food and shelter still need to be made.



CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

This study set out to analyse Zimbabwe's obligations under international law for the protection of UARC. Chapter one was an introduction to the study laying out the background of refugee and child protection. The background established that it was after World War II that the international community saw the need for an international instrument to define the legal status of refugees, after the refugee problem had not been resolved after World War I. This development saw the creation of the 1951 UN Refugee Convention. On the African continent the large number of people fleeing wars and internal conflict led to the adoption of the OAU Convention to address the unique problems associated with African refugees.

The chapter also established that the protection of UARC should be integrated early into the design and implementation of assistance programmes. A child ought to be treated as a child first and as a refugee second. The main hypothesis of the research as set out in the chapter was that the children and refugee policies and laws in Zimbabwe do not sufficiently protect children in vulnerable situations such as UARC. Subsequent chapters addressed the issues raised in chapter one, that is outlining the obligations that Zimbabwe has internationally and showing whether these obligations are being fulfilled.

Chapter two of the study examined Zimbabwe's obligations in both international and regional law for protection of UARC. The study concluded that Zimbabwe by ratifying all refugee and children's conventions, regionally and internationally is bound to protect refugee children, especially those who are unaccompanied. The chapter also established that the refugee Conventions do not fully protect UARC, as the definition of a refugee does not cater for

children. It was submitted that these definitions require amendment. Specific protection for refugee children is provided in Art 22 of the CRC and Art 23 of the ACRWC, establishing that the best interests' of the child principle is paramount especially to unaccompanied refugee in all stages of their displacement cycle until they receive appropriate accommodation. General Comment 6 lays out the various legal obligations that States have which include the obligation to respect the best interests of the child, the obligation pertaining to non-discrimination, providing care and accommodation arrangements and respect for the child views. Although being soft law, the General Comment as discussed in chapter two cannot be simply ignored as it is a vital tool used by treaty bodies to further explain or give flesh to rights provided in a UN Convention. Included in these obligations are also procedural needs and general and special protection needs.

Chapter two also established that pertinent to the issue of refugee protection is the issue of burden sharing which entails that a State that faces difficulties in refugee protection issues can appeal for help from other States. Zimbabwe needs to cooperate with other States such as South Africa which hosts most refugees in Africa, if the rights of UARC are to be fully realised. Such cooperation can range from assisting children to trace their families, reunification and the issuing of identity documents. The government though has and continues to engage with non-governmental organisations to ensure that it fulfils its obligations. It is also established that the UNHCR plays a very significant role in refugee protection and is the central agency for refugee protection. It has published various executive committee conclusions on UARC emphasising the need for cooperation between States in protection issues.⁴⁶²

In chapter three, the study examined Zimbabwe's legislation that protects unaccompanied refugee children and Zimbabwe's encampment policies, concluding that there are still gaps in

⁴⁶² See discussion in Chapter 2 at 2.3.2.

the law that protects UARC and asylum seekers. By and large, the Children's Act of Zimbabwe conforms with international treaties. In particular, it declares that the best interest of the child shall be paramount in matters concerning them; however, it is largely silent on children's right to participation.⁴⁶³ Reference to UARC in the Children's Act can be inferred from the reference made to children in need of care. As highlighted in chapter 3 above, this provision is highly inadequate and in need of amendment. The Refugees Act of Zimbabwe, as discussed in chapter three, clearly falls short in addressing the specific needs of children by not providing a specific section that relates to children. It, further, omits to take into account the fact that children in some instances become refugees as a result of socio economic factors such as poverty amongst others. The definition of a refugee in the Act does not accommodate children since it is basically a duplication of the 1951 Convention and the OAU Conventions' definitions which do not cater for children as discussed in chapter 2 above.

The Constitution of Zimbabwe is very significant in that it provides for rights exclusively applying to children over and above those provided to everyone resident in Zimbabwe.⁴⁶⁴ The State is obliged to adopt policies and measures to fulfil these rights, however, subject to the limitation of available resources. The limitation, however, has not been subjected to progressive realisation, which implies that the State is not committed to the immediate and tangible progress towards realising children's socio economic rights.⁴⁶⁵ The CESCR has reiterated that progressive realisation implies a specific and continuing obligation on states to, as much as possible, be expeditious and effective in working towards the full realisation of the rights.⁴⁶⁶

⁴⁶³ Imoh AT & Ansell N (eds) (2014) 107.

⁴⁶⁴ See discussion on 3.2 in Chapter 3 above.

⁴⁶⁵ Arguments as presented by Chenwi for an understanding of progressive realisation in Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' 39 (2013) *De Jure* 744.

⁴⁶⁶ CESCR General Comment No 13 *The Right to Education* UN doc E/C12/ 1999/10 (1999) par 44.

Implementation of these laws is also still a problem in Zimbabwe. The current economic problems in Zimbabwe, in which the State is failing to cater for its own people, hinders the State from fully fulfilling its obligations towards UARC. Thus, although the government has in place a social and legislative mechanism aimed at promoting the rights of children, it has not been able to fulfil its obligations in full because its duty has been limited to the State's available resources. This study, therefore, makes the submission that NGO support and international cooperation is highly necessary for the realisation of refugee children's rights in Zimbabwe. The study also established that there is need for proper accommodation, adequate food and quality education for UARC at the Tongogara refugee camp in Zimbabwe.

4.2 Recommendations

Based on the findings of the study, few recommendations can be drawn from this study. They appear in no particular priority order: Legislative framework and increased support to refugee camps and general recommendations. Some recommendations were made in each chapter and will not be repeated here.

4.2.1 Legislative framework

The study recommends that the Children's Act and the Refugee's Act of Zimbabwe should be amended to include a provision specifically on UARC. The study also recommends that the policies and laws should also be amended to be brought in line with international guidelines and principles of protection for refugee children such as UNHCR Guidelines and Inter-agency Guiding Principles, which provide for the treatment of UARC. The government should review the legislative framework with a view to harmonise the definition of a child

under the law to align the age to eighteen years with no exceptions as similarly provided for by the ACRWC. The parliament of Zimbabwe, as the legislative body in government, should therefore ensure that the recommended amendments and review of policies and laws is done.

4.2.2 Increased support to refugees in refugee camps

The Ministry of Primary and Secondary Education together with the Ministry of Health and Child Welfare need to embark on psycho-social support programmes at the camp schools, which will entail the training of teachers and social workers in trauma handling and counselling. Training on how to handle UARC and the laws applicable to them, should also be provided to Camp Administrators by legal officers.

Efforts should also be made by the Ministry of Primary and Secondary Education to ensure that all children of school going age remain in school. The camp schools have very limited resources which makes it difficult for UARC to acquire the quality and standard of education they desire. A proposed incentive for teachers is made to ensure that they are always present in schools. It is also proposed that the government, through the Department of Home Affairs should expediate birth registration processes for UARC to enable them to be enrolled in schools.

All interventions for UARC should strive to allow for their participation if their plight is to be addressed. It is proposed that UARC be consulted when decisions concerning them are being made at the camps.

It emerged from the study that foster parenting is one method used to offer UARC a homely environment which covers up for the missing parental love and care. It is therefore proposed that foster families be provided with additional food rations and be monitored to ensure that

the fostered children attend school and are living in a suitable environment. There is also need for increased financial support from UNHCR especially towards UARC.

To begin the process of increased support to UARC, there need to be a fundamental change in the mind-sets of the legislatures, from the present one, which thinks of UARC as migrants or refugees first, children second, to one which thinks and acts on the basis that an unaccompanied refugee child is a child first and migrant or refugee second. This change in thinking and perception will facilitate the transition required and begin to address the systemic gaps present.⁴⁶⁷

4.2.3 General Recommendations

Zimbabwe also needs to adopt an inclusion approach which requires the child protection system to adapt to the particular needs of children, versus requiring children to change to fit the system.⁴⁶⁸ To apply this principle to the inclusion of UARC, systematic linkages need to be established between Zimbabwe and each country's national child protection system within Africa as a whole.⁴⁶⁹ It also requires a greater emphasis on linkages between all service providers, and particularly between social services, education and immigration services.⁴⁷⁰

There is also need for the State to provide technical support to the Department of Social Development and the Children's Court to promote the best interests principle in the care and protection of UARC. This would mean that UARC are included in orphan and vulnerable children (OVC) and child protection plans, budgets, monitoring and coordination

⁴⁶⁷ Macdonald A (2008) 27.

⁴⁶⁸ Wessels M G 'Bottom-up approaches to strengthening child protection systems: Placing children, families, and communities at the center' (2015) 43 *Child Abuse & Neglect* 12.

⁴⁶⁹ Davis R, McCaffery J & Conticini A 'Strengthening child protection systems in sub-Saharan Africa' Working Paper (2012) 17.

⁴⁷⁰ Davis R (2012) 20.

mechanisms.⁴⁷¹ It also means that UARC are informed of their rights and consulted on matters that affect their lives, with due weight given to their interests in alignment with their evolving capacities.⁴⁷² Moreover, it requires UARC to be reported to child protection services for consideration as children in need of care and protection.

The GOZ also need to work with the Department of Home Affairs or the Embassy/Consulate of UARC's country of origin to permit them to access proper and appropriate identification. However, the possession of identity documents should not be a prerequisite for access to services.⁴⁷³ UARC should have the same access to services as children who are nationals. This would mean that a clear procedure is developed for UARC to be able to access a passport and visa to study or engage in safe work if determined to be in the best interest of the child.⁴⁷⁴



⁴⁷¹ Wessels (2015) 15.

⁴⁷² Thomas N 'Children's rights: policy into practice' Centre for Children and Young People: Background Briefing Series no. 4 (2011) 11.

⁴⁷³ Thomas N (2011) 15.

⁴⁷⁴ Thomas N (2011) 15.

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