

LLM Dissertation

An examination of the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children

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ABSTRACT

An examination of the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children.

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Undocumented foreign migrant children suffer from xenophobia, detention, deportation and abuse at the hands of South African government officials. The South African Constitution guarantees the rights of equality, humanity, dignity and non-discrimination to 'everyone' in South Africa. Section 28 of the Constitution is dedicated to children's rights and has effectively succeeded in domesticating the substance of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. South Africa has however failed in adequately domesticating the international legal provisions which protect the rights of undocumented foreign migrant children in national legislation.

This thesis examines the extent to which South Africa has domesticated the international provisions protecting this group of children. The thesis further investigates procedural gaps and makes recommendations in respect of law and procedure to ensure the adequate protection of the rights of undocumented foreign migrant children in South Africa.

15 November 2005

DECLARATION

I declare that ‘An examination of the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children’ is my own work, that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Anthea Veronica van der Burg

Date: 15 November 2005

Signed-----



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CHAPTER ONE: INTRODUCTION

1.1 Introduction

In the last few years South Africa has become home to many foreigners, seeking a better life. Among the reasons for this phenomena are severe persecution, civil strife and political and economic imbalances in their countries of origin. A large number of these foreigners are children who come to South Africa either with family members or unaccompanied.

Both internationally and in South Africa, undocumented foreign children often experience discrimination, violence and detention in the countries in which they seek protection. The legal protection of undocumented foreign migrant children is a matter of concern in South Africa. This study looks at the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children. The scope of the research is limited to the rights of identity, protection and support of undocumented foreign migrant children in South Africa.



For purposes of this dissertation 'identity' refers to issues regarding birth registration, the right to a name and status in the country of refuge. 'Protection' refers to the legal protections afforded to undocumented foreign migrant children with reference to their survival and human rights. 'Support' refers to access to education, health and social security for undocumented foreign migrant children in South Africa.

Chapter two highlights and explores the external challenges faced by undocumented foreign migrant children. The chapter looks at the specific areas of concern and makes a case for the need to review laws, practices and policy of South Africa to ensure adequate protection of undocumented foreign migrant children. The chapter concludes that undocumented foreign migrant children are vulnerable due to their age and that current law, policies and practices in South Africa do not adequately address the problem.

Chapter three investigates the international laws and treaties which South Africa has ratified and documents the relevant provisions providing protection for undocumented

foreign migrant children. The chapter seeks to analyse the relevant provisions as they pertain to the identity, protection and support rights of undocumented foreign migrant children. The chapter concludes that international law indeed offers adequate legal protection to undocumented foreign migrant children.

Chapter four explores the extent to which South Africa has domesticated the relevant international law provisions in relation to undocumented foreign migrant children. The chapter seeks to analyse the relevant domestic laws and provisions and concludes that South Africa has not sufficiently domesticated international law, nor does South African law offer sufficient protection to undocumented foreign migrant children.

Chapter five reviews case studies and extrapolates on the manner in which South African courts have applied international law. It reviews South Africa's treatment of undocumented foreign migrant children with reference to the implementation mechanisms which currently exist. The chapter concludes that South Africa does not have proper mechanisms in place to ensure the adequate protection of undocumented foreign migrant children.



Chapter six provides conclusions and proposes recommendations on the manner in which South Africa could improve on the protection of the rights of undocumented foreign migrant children.

CHAPTER 2: SECTORAL ANALYSIS

2.1 Introduction

This chapter explores the statistics, challenges and difficulties faced by undocumented foreign migrant children in the international community as well as within South African borders. The chapter serves as the basis for the argument that undocumented foreign migrant children do not receive the necessary protection in South Africa, as afforded to them in international law.

The chapter also seeks to define the particular category of children to which this thesis refers.

2.2 Definitional Issues

Foreigners in South Africa fall into different categories; they are refugees, illegal aliens, migrants, immigrants and are sometimes referred to as foreign nationals. Very little distinction is made between various categories of migrants as they tend to be thrown together in categories such as “illegal aliens”, “illegal immigrants” or simply “illegals”.¹ It is therefore necessary to distinguish at the outset between refugees, asylum seekers, migrants and immigrants to ensure clarity.

A refugee is a person fleeing from individual persecution, generalised human rights violations or armed conflict in their country of origin.² The 1951 Convention³ and the 1967 Protocol⁴ Relating to the Status of Refugees govern refugee status, at the universal level. In Africa, the 1969 Convention Governing the Specific Aspects of

¹ Crush J and Williams V, *Gender Concerns in South African Migration Policy*, Southern African Migration Project, Migration Policy Brief No.4, 2001, p.1.

² Harris B, *Foreign experience: Violence, crime and xenophobia during SA's transition*, Violence and Transition series, Volume 5, August 2001, p.15. Report accessed at <http://www.csvr.org.za/papers/papvtps.htm> on 20 December 2004.

³ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223,189 U.N.T.S. 137(Hereinafter referred to as the 1951 Convention.)

⁴ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S.267. (Hereinafter referred to as the 1967 Protocol.)

Refugee Problems in Africa⁵ caters for refugee movements on the continent.

According to the general definition in the 1951 Convention a refugee is a 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 of his former habitual residence as a result of such events, is unwilling to return to it.⁶

The 1969 Convention contains a definition of the term 'refugee' consisting of two parts: the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term 'refugee' to:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of 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.

An asylum seeker is a person who is seeking recognition as a refugee. An illegal alien is a foreigner who is in the Republic in contravention of the Immigration Act 13 of 2002.



Migrants on the other hand, are defined through the temporary nature of their stay in the country and immigrants are those who 'enter another country in order to make a permanent life and home there'. Immigrants fall into two broad categories, namely permanent residents and naturalised citizens. In the latter case, they enjoy a greater degree of permanence because the home country citizenship is surrendered in favour of South African citizenship.⁷

Undocumented foreign migrant children for the purposes of this dissertation include children of illegal aliens, asylum seekers, immigrants and in the case of unaccompanied or accompanied children such distinction will be made, where relevant. Accompanied children refers to children who find refuge in South Africa with their parents or family members, whereas an unaccompanied foreign migrant

⁵ The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969 (*OAU Doc CAB/LEG/24.3*), adopted on 10 September 1969 and entered into force on 20 June 1974 (Hereinafter referred to as the 1969 Convention).

⁶ The 1951 Convention, *op cit*, art 1A (2).

⁷ Harris B, *op cit*, p.24.

child is a child who seeks to find refuge in South Africa on her or his own without any family company.

Undocumented foreign migrant children include accompanied as well as unaccompanied minors. This group of children however, refers to the group which has entered South Africa and has not received formal refugee status.

2.3 The External Environment

The United Nations High Commissioner for Refugees estimates that at the beginning of the 21st century some 10 million of the world's 23.3 million refugees were children.⁸ By the end of 2004, United Nations High Commissioner for Refugees reported that the global number of refugees reached 9.2 million.⁹ The United Nations High Commissioner for Refugees 2005 Global Appeal reports 4.2 million adults and children of concern in Africa alone. The main countries from which these migrants originate includes Sudan, Angola, Burundi and the Democratic Republic of Congo.¹⁰

The United Nations High Commissioner for Refugees indicated that 47% of persons of concern are children under the age of eighteen and 13% are under the age of five.¹¹ Some of the key factors which influence the migration of children include trafficking and smuggling, war and poverty as well as lack of access to socio-economic rights in the countries of origin.¹²

Many of these children are unaccompanied by adults upon their arrival into countries in which they seek refuge and are more vulnerable both as children and as foreigners in an unknown country. Children who are unaccompanied or accompanied may

⁸ Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund (Unicef), 2002, p.305.

⁹ UNHCR Geneva, *2004 Global Refugee Trends*, 17 June 2005, accessed at <http://www.United Nations High Commissioner on Refugees.ch/statistics> on 8 November 2005.

¹⁰ Nicholson C, *A First Call on available resources for child refugees in South Africa*, De Jure, Volume 1, 2005, p.70.

¹¹ UNHCR Geneva, *ibid.*

¹² Bhabha J, *Demography and Rights: Women, Children and Access to Asylum*, International Journal of Refugee Law, Volume 16 (2), 2004, pp.227-243, p.235.

remain undocumented by local authorities in the countries in which they seek refuge and may have additional protection needs as a result thereof.

States, therefore, need to take account of factors such as age and levels of maturity when dealing with the legal rights of this group of children in ensuring that they have access to the rights to which they are legally entitled.

2.4 Difficulties and Challenges in South Africa

Historically, South Africa began admitting refugees as early as 1990 and refugee children may have started seeking asylum in South Africa before 1994.¹³ These refugees come to South Africa to flee persecution on any of the refugee definition grounds or find work, shelter and education for their children, access to better health care and an overall better life as opposed to the one from which they managed to escape. The International Organisation for Migration has further identified food insecurity, poor governance and the HIV/AIDS pandemic as some of the factors which influence migration choices.¹⁴



Some of the difficulties which foreigners experience in South Africa include the unavailability of proper documentation such as identity documents to ensure access to services in South Africa.¹⁵ Children experience problems of being turned away from public schools and generally most foreigners in South Africa experience xenophobia in one form or another.¹⁶ In addition, there have been reports of poor treatment by officials such as those in the Department of Home Affairs and the South African police service towards foreigners in South Africa.

A demonstration of this type of treatment was evidenced recently on national television, when a leading investigative documentary called Special Assignment

¹³ Timngum D, *Assisting Urban Refugee Children in SA: Humanitarian Challenges to State and Non State actors*, International Studies Association Annual Convention. Report accessed at <http://www.isanet.org/archive/deisre.html> on 1 February 2005.

¹⁴ International Organisation for Migration, *Current Migration Themes in Southern Africa: An IOM perspective*, May 2005, Report accessed at <http://www.iom.org.za> on 26 September 2005.

¹⁵ <http://www.pmg.org.za/viewminute.php?id=6200>, minutes of Home Affairs Portfolio Committee meeting to establish a refugee relief fund in South Africa, accessed on 5 September 2005, p.2.

¹⁶ Harris B, *op cit*, p.5.

exposed a group of policemen who regularly extorted money from undocumented migrants as well as refugees and asylum seekers at Booyens police station in southern Johannesburg. It appeared that at least twice a week, the so-called “raiding squad” rounded up persons they suspected of being undocumented migrants, but were not interested in being presented with documentation.¹⁷ Those rounded up were instead required to pay a bribe to the policemen and then released.

Foreign children experience additional difficulties particularly if they are unaccompanied upon their arrival in South Africa. Some of the difficulties they encounter include language barriers, insecurity, inadequate housing, and difficulties in integrating in schools due to the fact that they are different from the local population.

A critical case involving undocumented foreign migrant children in South Africa is the rape and subsequent imprisonment in June 2004 of two Rwandan teenage asylum seekers.¹⁸ In summary, the two teenage girls fled the Rwandan genocide. During their journey to South Africa, they were raped by a truck driver with whom they were travelling. The truck driver had promised them documentation and accommodation. However, on arriving in South Africa, neither of these was forthcoming. Instead he demanded sexual favours and threatened to abandon them if they did not comply.

Following the rape, various attempts were made by the teenagers to obtain assistance from local authorities including the police, magistrate’s court and Department of Home Affairs. The teenagers were imprisoned and later sent to a place of safety.

The Centre for Child Law and Lawyers for Human Rights, two non-governmental organisations, were appointed to provide legal representation to the teenagers. However, shortly after the appointment of the attorneys, the teenagers disappeared and were never found.

The attorneys from Centre for Child Law and Lawyers for Human Rights indicated that had the girls been found, they would have ensured that the State considered the

¹⁷ Mail and Guardian, *Corrupt Joburg cops caught on camera*, 6 September 2005. Transcripts and press releases for Special Assignment screenings are available at <http://www.sabcnews.co.za/specialassignment/archive.html> accessed on 26 September 2005.

¹⁸ Rickard C, *Shameful Truth about SA’s Treatment of Refugees*, The Sunday Times, 6 June 2004.

girls' application for asylum. The attorneys listed the following points as concerns in respect of the manner in which the teenagers were handled by South African authorities. The attorneys advised that the teenagers should immediately have been identified as children in need of care and legal representation should have been made available to them. However, none of the government departments identified the teenagers accordingly nor was legal representation afforded to them.

An additional problem was the imprisonment of the teenagers which is in direct contravention of the South African Constitution¹⁹. The Sunday Times stated that the case of these teenage girls illustrates the urgent need to provide a suitable protection regime for children's rights in South Africa.²⁰

It is my submission that the aforementioned case illustrates the lack of procedural guidelines, interdepartmental strategies, implementation and the application of Constitutional imperatives and the provision of appropriate legal representation for undocumented foreign migrant children in South Africa.



The next chapter looks at protection of undocumented foreign migrant children under international law. The chapter places particular emphasis on the rights of children in respect to identity, adequate protection from harm and general access to socio-economic rights within the countries in which they find themselves.

¹⁹ Section 28(1) (g) of the South African Constitution.

²⁰ Rickard C, *ibid.*

CHAPTER 3: INTERNATIONAL LAW

3.1 Introduction

South Africa has ratified and is legally bound by various international instruments and is therefore obliged to ensure that the human rights standards contained therein are upheld.

This chapter seeks to explore the relevant provisions of the following international legal instruments: The Convention on the Rights of the Child, the African Charter on the Rights of the Child, the UN Convention Relating to the Status of Refugees, The OAU Convention Governing Specific Aspects of the Refugee Problems in Africa, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the International Covenant on Civil and Political Rights. Each of these international instruments bears relevance to undocumented foreign migrant children and each have been ratified by South Africa.



The chapter also explores the Optional Protocol to the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, which Protocol South Africa has not yet ratified. The writer, however, seeks to analyse and explain the relevance of its potential ratification insofar as the detention of undocumented foreign migrant children is concerned.

Each international treaty will be examined and analysed with reference to the specific themes covered by this thesis namely identity, protection and support rights of undocumented foreign migrant children.

3.2 The UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) serves as the basis for children's rights throughout the world. It was ratified by South Africa in 1995. The Convention on the Rights of the Child, in its preamble, sets out the intention of the drafters by emphasising that children are entitled to special care and assistance, that the family should be given protection and assistance so that it can fully assume its

responsibilities within the community and that children should grow up in a family environment of happiness, love and understanding.²¹

The Convention on the Rights of the Child is an international treaty that recognises the human rights of children,²² who are defined as persons up to the age of 18 years.²³ It contains 41 articles and obliges States Parties to ensure that all children, without discrimination in any form, must benefit from special protection measures and have access to services such as education and health care. The Convention provides for the development of children's personalities, abilities and talents to the fullest potential. Children are entitled to grow up in an environment of happiness, love and understanding. It provides further that children should be informed of their rights and participate in achieving these rights in an accessible and active manner.

Sloth-Nielsen identifies four important aspects of the Convention; firstly, no other treaty, particularly within the human rights field, has been ratified by so many states within so short a period of time. Secondly, a key aspect of the Convention is the new philosophy of children's rights that it espouses, thirdly a notable aspect is the role played by NGOs in its gestation and birth and lastly, the Convention has been hailed as significant because of the manner in which civil and political rights are interwoven with social, cultural, economic and humanitarian rights in a single document.²⁴ The Convention has been lauded as a cornerstone in children's rights as it binds States that have ratified it to give priority to realising the rights of children generally.

The Convention's main achievement is that it establishes, with respect to all children, internationally recognized human rights covering almost every aspect of the life of a child.²⁵

²¹ The United Nations Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the General Assembly on 20 November 1989, resolution number 44/25 and came into force on 2 September 1990.

²² Sourced from <http://www.unicef.org/crc/faq.htm> and accessed on 30 July 2005, p.1.

²³ Article 1 of the Convention on the Rights of the Child.

²⁴ Sloth-Nielsen J, *Ratification of the Convention on the Rights of the Child: Some implications for South Africa*, South African Journal on Human Rights, Volume 11, 1995, 331, p.404.

²⁵ De Blanc V, *Implementation of 1989 Convention on the Rights of the Child and the Work of the United Nations High Commissioner*, in Ghent Papers on Children's Rights, University of Ghent (Belgium), July 1996, p.403.

It is particularly relevant in the case of undocumented foreign migrant children, who find themselves in foreign countries, to have access to universal rights. Within this context, the importance of States Parties ratification of the Convention on the Rights of the Child is that even though they may not have ratified refugee specific treaties, their ratification of this Convention obliges those states to protect refugee children by virtue of Article 22 and other articles contained therein.²⁶

It is with this in mind that the Convention on the Rights of the Child will be investigated to extrapolate upon the universal rights which offer protection to undocumented foreign children in the country in which they find themselves.

3.2.1 The Content of the Convention

Article 1 of the Convention defines a child as every human being below the age of 18 years within a State's jurisdiction, unless under the law applicable to the child, majority is attained earlier. This means that national law determines who may be considered as a child.



The Convention is founded on four pillars which underpin all action and matters concerning the child namely; that children may not be discriminated against;²⁷ that the “best interests of the child” should always be of paramount importance in dealing with all matters which affect the child;²⁸ that the child has the right to survival and to development²⁹ and lastly that the child should have a say in matters which affect him or her.³⁰

²⁶ De Blanc V, op cit, p.403.

²⁷ Article 2(1) of the Convention on the Rights of the Child provides that: ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, properly, disability, birth or other status.’

²⁸ Article 3(1) of the Convention on the Rights of the Child provides that: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

²⁹ Article 6(1) and (2) of the Convention on the Rights of the Child provides the following: (1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

³⁰ Article 12(1) of the Convention on the Rights of the Child provides that: ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.’

3.2.1.1 Best Interests of the Child

It is evident that the most important principle which binds States is ‘the best interests’ of the child principle and that this should always guide States in finding solutions to children’s rights and protection. The ‘best interests rule’ is of importance in the case of undocumented foreign migrants insofar as status issues, guardianship, legal representation and adequate accommodation are concerned. The ‘best interests rule’ requires States to analyse how each course of action may affect children. The government does not have to take the course of action that is best for children, but if any conflicts arise, the State must make the ‘best interests of children’ a ‘primary consideration.’³¹

In the case of an unaccompanied minor, it can be argued that the application of the ‘best interests’ principle requires states to give priority to a child’s welfare over that of an adult. The decision about a child’s best interests may be difficult particularly when having to make a decision on behalf of a child, in the absence of family members.³²



Jacqueline Bhabha asserts that the ‘best interests principle’ is relevant in respect of decisions to appoint a guardian for the child, whether or not to detain the child or to return a child to a safe third country and, generally, in respect of interviews conducted with the child.³³ In matters of status determination, the ‘best interests’ principle bears additional relevance in defining the behaviour that counts as persecution of a child, the circumstances that give rise to a well-founded fear in a child, and the threshold that a child must meet to discharge the burden of proof.³⁴

³¹ Chimini BS, *International Refugee Law: A Reader*, Sage Publications, 2000, p.199.

³² Ibid.

³³ Bhabha J and Young W, *Not adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, *International Journal of Refugee Law*, Vol.11.No.1, Oxford University Press, 1999, p.97.

³⁴ Ibid.

3.2.1.2 Non-Discrimination, Survival and the Right to be Heard

In respect of Article 2 which deals with non-discrimination, the Convention makes it clear that discrimination of any kind will not be tolerated. Therefore neither communities nor States Parties can discriminate against undocumented foreign migrant children on the basis of their parent's status, ethnicity or citizenship.

Article 6 protects the child's right to life, and obliges States Parties to ensure to the maximum extent possible the survival and development of the child.³⁵ Undocumented foreign migrant children often experience torture, recruitment to military forces or deportation and detention upon arrival in countries in which they seek protection. The Convention protects these children against any act which could potentially be interpreted or regarded as infringing upon their survival.

Article 12 of the Convention provides for the right of the child to participation. This right recognises that children as bearers of rights have a say in matters which affect them.³⁶ This is relevant in the case of unaccompanied foreign migrant children who have to prove their fear of persecution or are interviewed in respect of their status or whether or not they should be sent back to the country from whence they came. In this instance, the requirement of guardianship and legal representation becomes important in ensuring the adequate protection of the rights of the child. Guardianship is required to ensure that the child has an adult to assist with the child's needs whereas legal representation is a separate issue and is required in instances where children are required to appear in courts of law and in status determination proceedings.

It is my submission that children as the bearers of rights should be heard in all matters which concern their well-being. In the case of a young child, representation should be made available to ensure that the child's interests are adequately addressed.

³⁵ Bhabha J and Young W, 1999, op cit, p.97.

³⁶ Ibid.

3.2.1.3 Refugee Specific Articles contained in the Convention on the Rights of the Child

There are various articles in the Convention on the Rights of the Child which relate to the rights of undocumented foreign migrant children. However the article bearing the most significance to undocumented foreign migrant children is Article 22. It provides as follows:

‘States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.’³⁷

‘For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.’³⁸

This is the only provision in the Convention which speaks directly to the protection of undocumented foreign migrant children. The article offers protection to this category of children whether they are accompanied or unaccompanied and, more importantly, states that such children should be treated and receive the same protection and benefits as any other child who is a permanent resident in the country in which the undocumented child finds him/herself.

Van Bueren³⁹ and Detrick⁴⁰ agree that the Convention provides for equality in the enjoyment of applicable rights for both children recognised as refugees and children seeking asylum. In addition, Van Bueren argues that the non-discrimination clause⁴¹ is applicable to all children regardless of their citizenship, immigration status or any other status. By implication, the specific articles of the Convention on the Rights of

³⁷ Article 22 (1) of the Convention on the Rights of the Child.

³⁸ Article 22 (2) of the Convention on the Rights of the Child.

³⁹ Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1995, p. 362.

⁴⁰ Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, 1999, p.363.

⁴¹ Article 2 of the Convention on the Rights of the Child.

the Child should not be applied individually, but rather interpreted together with other rights pertaining to the undocumented foreign migrant child.

Freeman, however, criticises the definition of undocumented foreign migrant children as provided for in Article 22 and submits that the Convention employs an outdated definition and does not place a duty on states to provide asylum.⁴² The reference in article 22 to “a child who is seeking refugee status” provides protection to those children whose applications for asylum have not yet been determined. However, by its interpretation, Freeman correctly points out that it places no duty on states to provide asylum to undocumented foreign migrant children. Usually, asylum is granted in accordance with the particular States legislation, policies and procedures. The asylum seeking child is therefore left more vulnerable to the decisions of the State in which he or she seeks asylum.

Article 22 provides protection in the case of accompanied or unaccompanied children. Accompanied children would usually assume their parent’s refugee status. Difficulties arise, however, in the case of unaccompanied children. According to the United Nations High Commissioner for Refugee’s experience with accompanied and unaccompanied children, they are of the opinion that status determination based on a child’s individual claim is facilitated when the child is accompanied by a parent.⁴³ In particular, the adult can be of assistance in giving factual information, speaking on behalf of the child, providing emotional support and making a decision on behalf of the child. In the case of an unaccompanied child, he or she will have no such support in the status determination procedure and would therefore require additional support from the State.⁴⁴

Due to these experiences, the United Nations High Commissioner for Refugees has developed clear guidelines as to the treatment of these children when applying for asylum.⁴⁵ The guidelines provide the following:

⁴² Freeman M, *The International Library of Essays on Rights, Children’s Rights*, Vol 11, Ashgate Dartmouth, 2004, p.297.

⁴³ Detrick S, op cit, p.363.

⁴⁴ Ibid.

⁴⁵ Hodgkin R and Newell P, 2002, op cit, p.311. Extracts taken from executive summary of UNHCR Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum, 1997.

‘Unaccompanied children should not be refused access to the territory. There should be proper identification and registration of these children through interviews. A guardian or adviser is to be appointed as soon as the unaccompanied child is identified. The guardian should have sufficient expertise in the field of child caring. Interviews should be carried out by professionally qualified persons, especially trained in refugee and children’s issues. The views and wishes of the child should be elicited and considered, children should have access to asylum procedures. Unaccompanied children are entitled to special care and protection and should not be kept in detention. Legal representation should be given to the child.’

In essence, the guidelines provide that when an unaccompanied child is seeking asylum, particular regard should be given to the circumstances such as the child’s age and stage of development.⁴⁶ These guidelines will ensure that States have a framework within which to deal with the unaccompanied foreign migrant child.

Article 22 offers ‘appropriate protection and humanitarian assistance’ to children whether accompanied or unaccompanied. The United Nations High Commissioner for Refugees points out that refugee children are most likely to be victims of sexual abuse or military recruitment. It does not matter what pressure the receiving state is under, the legal obligations as set out in the Convention are explicit.⁴⁷ It is evident that the intention was to ensure that undocumented children receive the same protection as any other child who resides within a given state and that such children are not discriminated against by virtue of their status.

It is apparent that the various clauses as they relate either specifically to undocumented foreign migrant children or to children generally, should always be applied in the broader framework of the rights which form the pillars of the Convention. In the case of undocumented foreign migrant children, who may experience discrimination in one form or another, they are entitled to protection from such discrimination by virtue of Article 2 of the Convention on the Rights of the Child. In ensuring that the ‘best interests’ of the child is taken into account, Article 22 should be read, interpreted and applied in conjunction with Articles 2, 3, 6 and 12 of

⁴⁶ Hodgkin R and Newell P, *op cit*, p.311.

⁴⁷ *Ibid*.

the Convention on the Rights of the Child to ensure maximum protection to undocumented foreign migrant children.

3.2.1.4 Identity Rights

The importance of a child's name and registration from birth cannot be overemphasised. A name and registration of birth denotes a position in society which provides entitlements to education, health and social security. The United Nations High Commissioner for Refugees emphasises this point by stating that basic human rights can be violated in refugee situations unless particular importance and attention is given to ensuring the proper documentation of children.⁴⁸

Van Bueren⁴⁹ opines that the implementation of the entitlements of children to be registered immediately after birth and to have the right from birth to a name is of fundamental importance to undocumented foreign migrant children. She states that nationality may be granted either by the fact of being born within a state territory and acquiring that state's nationality, or by acquiring the nationality of those from whom the child is descended. The first principle is known as *jus soli* and the second is known as *jus sanguinis*.⁵⁰

Birth registration is essential for undocumented foreign migrant children to enable a date and place of birth to be established, thereby activating rights, including those rights which are dependent upon nationality and personal status. A stateless child lacks the protection of any state.⁵¹ In the case of undocumented foreign migrant children, being registered in a foreign country opens up opportunities for receiving firstly an identity document and status and with that, often entitles these children to access to socio-economic rights. Birth registration also facilitates the tracing of family members in cases where the child has become separated from them.⁵²

⁴⁸ Detrick S, op cit, p.367.

⁴⁹ Van Bueren G, op cit, p.366.

⁵⁰ Ibid, p.367.

⁵¹ Chimini BS, op cit, p.201.

⁵² Detrick S, op cit, p.367.

Undocumented foreign migrant children should therefore, in the first instance be informed of their rights and a proper assessment should be conducted into the child's identity and nationality. The acquisition of identity documents for undocumented foreign migrant children should be prioritised.

3.2.1.5 Protection Rights

Article 22 of the Convention ensures that undocumented foreign migrant children receive 'appropriate protection and humanitarian assistance' in the enjoyment of their rights. It is my submission that such protection should be interpreted to mean protection of life, body, dignity and integrity.

The Convention on the Rights of the Child makes provision for protection of the child from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'⁵³ This right is important in the case of undocumented foreign migrant children who may find themselves in the care of others and subject to exploitation in one form or another.

In addition, adoption is regulated in Article 21, the rights of disabled children are dealt with in Article 23 and Article 32 protects children against child labour. Other protection rights in the Convention which relate to undocumented foreign migrant children include Article 10 which provides for family reunification, Article 30 which provides protection to children who belong to a minority group or an indigenous group and Articles 32 to 36 which address various forms of exploitation.⁵⁴ It is evident that all of these rights apply to undocumented foreign migrant children as they do equally to children who are citizens of a particular country.

⁵³ Article 19(1) of the Convention on the Rights of the Child.

⁵⁴ Detrick S, op cit, p.368.

Article 37⁵⁵ concerns the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It also protects children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings. The reality is that increasingly States are finding it difficult to ensure that foreign migrant children have adequate and safe facilities within which they can be housed. In some cases, children are detained and held in inappropriate facilities, sometimes with adults. The United Nations High Commissioner for Refugees has recommended that due to the special situation of undocumented foreign migrant children, they should not be detained. Instead special accommodation, which should be different from detention centres, should be provided for these children and, where necessary, for members of their family who are suspected of being illegal entrants.⁵⁶ Unaccompanied foreign migrant children are subject to additional protection.⁵⁷ The additional protection is due to their additional vulnerability as mentioned above.

Furthermore, Article 37 entitles children to legal assistance and representation in any legal matters which may concern a child. This is an important right as foreign migrant children are often faced with having to prove their refugee status in judicial proceedings and when unaccompanied, require legal assistance to do so. Article 37 rights have become relevant with increasing levels of detention of undocumented foreign migrant children across the world. It appears that the basic human rights of children are continually being violated in detention centres, despite the existence of

⁵⁵ Article 37 of the Convention on the Rights of the Child provides the following: (a) 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) 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; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.'

⁵⁶ See UNHCR Guidelines, *ibid*.

⁵⁷ Van Bueren G, *op cit*, p.370.

this right.⁵⁸ South Africa is another case in point as extrapolated upon in Chapter two of this thesis. Other protection rights include article 38 which deals with children in armed conflicts, which is important because armed conflict is inevitably a cause for children seeking refuge in foreign countries.

It is clear that the Convention covers many aspects of the trials and trauma which children may face and provides broad protection, which takes into account every aspect of the child's possible journey to a country and possible harm which may be encountered within the territory in which the child finds him or herself.

3.2.1.6 Support Rights

Principal amongst the social and economic and cultural rights enshrined by the Convention are the right to health care, social security and education.⁵⁹ Article 24 obliges States to recognise 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.⁶⁰ With the increasingly high levels of HIV/AIDs in this continent, this right becomes imperative in respect of children specifically.

Article 26⁶¹ of the Convention provides for social security which is an important right for foreign migrant children, as this right would entitle them to have some means to ensure survival in the country in which they find themselves. The right to social

⁵⁸ Australia and the United States of America have particularly received much attention regarding the detention of children in their countries. The reports can be accessed at <http://www.amnesty.org> on 20 June 2005. See also, Odongo G, *Children deprived of their liberty and the implementation of domestic and international minimum standards in South Africa: A review of the practice in prisons, industrial and reform schools and places of safety*, Community Law Centre (UWC), May 2005 (unpublished), pp.1 to 50.

⁵⁹ Sloth-Nielsen J, 1995, op cit, p.404.

⁶⁰ Ibid.

⁶¹ Article 26(1) of the Convention on the Rights of the Child provides that 'States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.'

security is supplemented by the child's right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'.⁶²

The Convention makes provision for the full rights and access to education for all children. These rights are contained in Articles 28, 29(1) (c), 30 and 32 of the Convention on the Rights of the Child. The Convention places an obligation on States Parties to make primary education compulsory and freely available to all, including to non-citizens.⁶³

It has to be borne in mind, however, that without registration and status determination, these rights amount to nothing more than words on paper and will only translate into reality when the rights of identity are enforced. It is therefore imperative that undocumented foreign migrant children have their right to identity protected and have access to socio-economic rights as soon as possible after their arrival in the relevant country.

Indeed, Freeman opines that the Convention is just the beginning and that the future of children's rights requires us to build upon the Convention by concentrating on neglected groups of children such as undocumented foreign migrant children.⁶⁴ The Convention on the Rights of the Child therefore sets a framework within which States Parties who have ratified it should operate. As outlined above, it provides guidelines for the protection and care of undocumented foreign migrant children and challenges States to ensure proper implementation of the rights of undocumented foreign migrant children within their borders. The undocumented foreign migrant child's rights to identity, protection and support are therefore guaranteed by the relevant articles in the Convention.

⁶² Article 27 of the Convention on the Rights of the Child.

⁶³ Article 28(1)(a) of the Convention on the Rights of the Child.

⁶⁴ Freeman M, *op cit*, p.302.

3.3 Implementation Mechanisms of the Convention

3.3.1 Committee on the Rights of the Child

As a result of the Convention on the Rights of the Child, the Committee on the Rights of the Child was established and began its work in 1990. The Committee on the Rights of the Child is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State Parties.⁶⁵ All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of ‘concluding observations’.⁶⁶

Some examples of guidance given by the CRC on refugee issues include; in its 11th session on Finland, the CRC recommended that all arriving unaccompanied minors seeking refugee status should immediately be informed in their own language of their rights, and that family reunification cases should be decided through a co-ordinated effort between departments responsible for immigration matters and children’s welfare. The Committee went further to state that governments should make a concerted effort to reduce any negative feelings of racism towards foreigners.⁶⁷

On the issue of access to socio-economic rights, the CRC stated in response to Germany, Denmark and Sri Lanka’s report that child refugees should have access to basic services such as health, education and social rehabilitation.⁶⁸ These are merely some examples amongst others to illustrate the utility of the Committees deliberations in respect of giving meaning, content and value to the best interests of the child in the context of undocumented foreign migrant children.

The Committee publishes its interpretation of the content of human rights provisions, known as general comments, on thematic issues and organises days of general

⁶⁵ Sourced at <http://www.ohchr.org/english/bodies/crc/index.htm>, on 30 July 2005.

⁶⁶ Ibid.

⁶⁷ Ibid, p.43.

⁶⁸ Ibid, p.45.

discussion. Some of the thematic issues have included HIV/AIDS and adolescents and more recently, the Committee published General Comment Number 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin.⁶⁹

3.3.2 General Comment No.6

This General Comment was motivated by the number of protection gaps in the treatment of unaccompanied and separated children. The Committee states that the following are the most critical concerns related to these children: that they are at far greater risk in respect of sexual exploitation and abuse; of military recruitment; of being subject to child labour and detention.⁷⁰ These priority areas are the same as those already identified earlier herein. This General Comment is meant to give guidance to States Parties in respect of the manner in which they deal with this group of children.

The General Comment defines unaccompanied children as defined in article 1 of the Convention on the Rights of the Child as ‘children who have been separated from both parents and other relatives and are not cared for by an adult who, by law or custom, is responsible for doing so’. This definition accords with the writer’s understanding of an unaccompanied child.⁷¹

3.3.2.1 Legal Obligations of States Parties

The General Comment places importance on the fact that the enjoyment of rights stipulated in the Convention are not limited to children who are citizens of a state party and must also be available to all children.⁷² States are required to refrain from measures infringing on this group of children’s rights and in addition, States Parties are required to ensure the enjoyment of these rights without discrimination. By

⁶⁹ Committee on the Rights of the Child, *General Comment No.6*, 39th session, 3 June 2005.

⁷⁰ Ibid, p.2: ‘They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, and guardianship systems of legal advice.’

⁷¹ See Chapter two of this thesis, p.5, 6.

⁷² Ibid, p.3.

interpretation, this means that States should not discriminate in any manner against unaccompanied minors particularly by virtue of the fact that they are foreigners, and the same rights which apply to national citizens should apply equally to unaccompanied minors.

3.3.2.2 Best Interests, Non-discrimination, Survival and the Right to be Heard

The General Comment gives meaning to the ‘best interests’ principle as it relates to unaccompanied or separated children and states the following in this regard: ‘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.’⁷³ In this way, the General Comment has clarified what would be in the child’s best interests in this particular context.

The General Comment is explicit in the steps that States are required to take to ensure that the child’s best interests are taken into account. These steps include the appointment of a competent guardian first and foremost, as this will serve as a key procedural safeguard to ensure the best interests of the child are indeed taken into account. Only upon the appointment of this guardian, should the child then be referred to the initial assessment process and a legal representative appointed if the circumstances require such appointment.

The principle of non-discrimination prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum seeker or migrant. The General Comment does however indicate that due to the vulnerability of these children, it may require that their protection needs are provided differently due to their age.⁷⁴ The Comment states that we must not confuse non-discrimination with the obvious difference in treatment which the situation of unaccompanied minors will require States to provide as regards their protection from harm. However in all other respects, they should not be treated any different from a

⁷³ General Comment No.6, op cit, p.5.

⁷⁴ Ibid.

child citizen of that country and in this respect should be entitled to receive all the rights and benefits pertaining to those child citizens.

As regards the child's right to survival, the Committee states that unaccompanied children are particularly vulnerable to exploitation and abuse. In this regard, States are required to implement practical measures to protect children from these risks. The measures that the Committee recommends 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 the establishment of measures to provide follow-up to children particularly at risk.

It is worth noting that the General Comment has taken account of the particular risks which unaccompanied minors experience. They are often vulnerable not only because they are children, but because they are foreigners and their vulnerability encourage further abuse by those in power. In this Comment, the Committee has set clear guidelines to prevent such abuse and to protect the child in every way possible.



The Committee emphasises the child's right to be heard and states that this right can be implemented by allowing the child to have a well-informed expression of his or her views and wishes, it is imperative that such child is provided with all relevant information to be in a position to make an informed decision concerning the asylum process, family tracing and the situation in the country of origin. This right to be heard is also of paramount importance in guardianship, care and accommodation arrangements and provision of legal representation when a child's views should be taken into account. The Committee does however acknowledge the child's vulnerabilities by stating that information must be provided in a manner that is appropriate to the maturity and level of understanding of each child.⁷⁵

It is noteworthy to see meaning being given to the rights in the Convention on the Rights of the Child in respect of the best interests of the child, non-discrimination, survival and the right to be heard. These four cornerstone rights are often the ones which are the most violated in the case of unaccompanied minors. The challenge is

⁷⁵ General Comment No 6, op cit, p.6.

for States to take cognisance of the guidance provided by the Committee and ensure that unaccompanied minors are treated in the manner in which the Committee has intended in this General Comment.

3.3.2.3 Initial Assessment and Measures

The General Comment sets out guidelines aimed at the initial assessment stage of an unaccompanied minor as follows: States should prioritize the identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities. Prompt registration by means of an initial interview conducted in an age-appropriate and gender sensitive manner should be undertaken. Where necessary, the recording of further information to meet the specific needs of the child should be carried out. States should ensure the provision of identity documents and the tracing of family members should begin as soon as possible.⁷⁶

The General Comment adds that unaccompanied or separated children should have appropriate guardianship and in cases where such children are involved in asylum seeking procedures, the child should be provided with legal representation.⁷⁷ Goodwin-Gill opines that the legal responsibility for unaccompanied refugee children rests with the government of the country of asylum. An unaccompanied child should have a legal guardian with respect to involvement in any legal proceedings and may need a legal guardian to advocate for the child's interests or to make decisions on behalf of the child in other situations.⁷⁸

It is clear that often the asylum seeking procedure is where states struggle with proper implementation of the rights of the Convention, and this General Comment has served as a benchmark for States to ensure that unaccompanied minors are dealt with appropriately. The most important procedure which has been highlighted by the Committee has been the appointment of a guardian. This is imperative in the case of

⁷⁶ General Comment No.6, op cit, p.7 and 8.

⁷⁷ Ibid.

⁷⁸ Goodwin-Gill G, *Protecting the Human Rights of Refugee Children. Some legal and Institutional possibilities, Children on the Move, How to implement their right to family life*, Martinus Nijhoff Publishers, 1996, p.100.

an unaccompanied minor because a guardian will ensure that the child has the necessary emotional and procedural support which is lacking when a child arrives in a foreign country on his or her own. The other important procedure is the appointment of a legal representative to assist the child in any status determination procedure. These procedures will require states to ensure that they have effective policies and procedures in place to implement these guidelines adequately.

3.3.2.4 Care and Accommodation Arrangements

The Committee acknowledges the special care arrangements that are necessary for unaccompanied minors and reiterates Article 20(3) of the principle Convention, which provides for accommodation as follows: ‘...*inter alia*, foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children.’ The Committee advises that when a state is selecting from these options, the particular vulnerabilities of the child having lost his or her family connections and finding him or her outside of the country of origin, as well as gender and age needs, must be taken into account. The Committee sets out a comprehensive list of parameters within which states should comply in making the decision regarding care and accommodation arrangements including that the child not be deprived of liberty, that the care be considered to be in the best interests of the child and that the notion of family unity be adhered to as far as possible.⁷⁹

The Committee also makes a point concerning the issue of deprivation of liberty in respect of unaccompanied minors and refers to Article 37 in this regard. The Committee makes it clear that detention of children is not desirable, but where no other option exists, the conditions of detention must be governed by the best interests of the child and pay respect to article 37(a) and (c) of the Convention and other international obligations. The Committee obliges States to make special arrangements for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s best interests not to do so. The underlying

⁷⁹ General Comment No 6, op cit, p.9.

approach should be ‘care’ and not ‘detention’. Children who are kept in institutions are entitled to medical treatment, education, play and legal advice.⁸⁰

The care and accommodation arrangements of undocumented foreign migrant children have been a matter of grave concern internationally. States do not seem to have effective procedures and facilities in place to adhere to the requirements as set out above. However, the recent General Comment will go a long way in providing the framework within which the international community should work regarding the accommodation of these children.

The Committee has highlighted the socio-economic rights to which unaccompanied minors have access. These include the right to education, and to an adequate standard of living and health care. The Committee makes it clear that children should have equal access to these rights irrespective of their nationality and whether or not they are in places of detention.⁸¹ The Committee provides for the protection of these children from trafficking and military recruitment.

3.3.2.5 Procedural Issues



The Committee reiterates the fact that unaccompanied minors should receive access to the necessary asylum procedures, but should always be protected by child welfare legislation in a particular country. The Committee highlights the needs of such children, the protection measures which States are required to implement and the possibility of family reunification in certain instances as possible solutions.⁸²

The Committee provides recommendations for States and suggests that specialized training is important for legal representatives, guardians, interpreters and others dealing with separated and unaccompanied children. In addition, the Committee recommends the development of a detailed and integrated system of data collection on

⁸⁰ General Comment No 6, op cit, p.12 and 13.

⁸¹ General Comment No 6, op cit, pp.9, 10 and 11.

⁸² General Comment No 6, op cit, pp. 13, 14 and 15.

unaccompanied and separated children for the development of effective policies for the implementation of the rights of such children.⁸³

The General Comment provides States Parties with sufficient detail and guidance on dealing with specific cases. Unaccompanied and separated foreign migrant children are the most vulnerable given the fact that they are not accompanied by adults and find themselves alone in foreign countries. This particular General Comment acknowledges the special needs of unaccompanied minors and provides a framework for States. In this way States receive clear guidance on the application of the rights in the Convention to the situation of unaccompanied minor children.

In addition to the Committee on the Rights of the Child, another implementation mechanism which has been formed specifically in respect of refugees is the United Nations High Commissioner on Refugees.

3.3.3 The Role of the United Nations High Commissioner for Refugees

In South Africa, often in the absence of assistance to refugee children from government, assistance is provided by non-state actors and the United Nations High Commissioner for Refugees. In 1987, the United Nations High Commissioner for Refugees put the situation of refugee children on the agenda of its Executive Committee by stating its intention to include within its protection and assistance activities, 'refugees, asylum seekers and displaced persons of concern to the United Nations High Commissioner for Refugees, up to the age of 18, unless under applicable national law, the age of majority is less.'⁸⁴

In 1988, the United Nations High Commissioner for Refugees issued the first edition of its Guidelines on Refugee children, in which the office confirmed its policy, not only to intervene with governments, but also to assume direct responsibility in many situations for protecting refugee children.⁸⁵ These guidelines were updated in 1993 to

⁸³ General Comment No 6, op cit, p.19.

⁸⁴ General Comment No 6, op cit, p.99.

⁸⁵ Sourced from <http://www.unhcr.ch>, Summary Note, accessed on 31 June 2005.
<http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b84c6c67>
accessed on 27 September 2005.

ensure that they are relevant to the changing needs of refugee children in respect of their protection and care.

Various international legal instruments⁸⁶ constitute the framework for the work of the United Nations High Commissioner for Refugees.⁸⁷ The global office of the United Nations High Commissioner for Refugees prioritises separation, sexual exploitation, abuse and violence, military recruitment and education. In addition to this, the United Nations High Commissioner for Refugees also addresses regional issues such as child labour, birth registration and harmful traditional practices.⁸⁸

The United Nations High Commissioner for Refugees has a particular focus on unaccompanied minor children and find that this particular group of children suffer more as a result of their age. It is therefore difficult for them to find foster families, to access post-primary education, vocational training and income generating opportunities to enable them to become self sufficient.⁸⁹ Some issues which the United Nations High Commissioner for Refugees has focussed on and provided guidance on are sexual exploitation, HIV/AIDS and child soldiers. The United Nations High Commissioner for Refugees has also paid particular attention to the fundamental right to education of all children without discrimination.⁹⁰

Other general activities of the United Nations High Commissioner for Refugees include enhancing the capacity of States to receive and protect refugees, making representations to governments and other relevant actors on protection concerns, promoting national legislation and asylum procedures, involvement in national refugee status determination procedures, undertaking determination of refugee status and providing advice and developing jurisprudence.⁹¹

In sum, the Committee on the Rights of the Child provides the interpretative guidance in respect of translating laws into practice and the United Nations High Commissioner for Refugees provides practical assistance and statistical data to countries hosting

⁸⁶ The 1951 United Nations Convention Relating to the Status of Refugees, *ibid.*

⁸⁷ United Nations High Commissioner for Refugees, *ibid.*

⁸⁸ United Nations High Commissioner for Refugees, *op cit*, p.2.

⁸⁹ United Nations High Commissioner for Refugees, *op cit*, p.3.

⁹⁰ United Nations High Commissioner for Refugees, *ibid.*

⁹¹ Goodwin-Gill G, *op cit*, p.7.

undocumented foreign migrant children. The two bodies therefore complement one another in respect of addressing the legal rights and protections of undocumented foreign migrant children.

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

In 1979, the Organisation of African Unity (OAU) Assembly of Heads of State and Government adopted a Declaration on the Rights and Welfare of the Child at its 16th ordinary session which recognised the need to take all appropriate measures to promote and protect the children in Africa.⁹² The African Charter on the Rights and Welfare of the Child was adopted in Ethiopia in 1990 and entered into force in November 1999. This Charter was ratified by South Africa on 7 January 2000. The African Human Rights System is the first regional system to adopt a treaty specifically dealing with children's rights and children's issues, providing for the promotion, protection and monitoring of the rights and welfare of the child and provides for the performance of duties on the part of everyone, as well as parents, guardians and children.⁹³



The Charter reflects the same minimum acceptable standards of the treatment of children as the Convention on the Rights of the Child. However, many provisions offer a higher standard and thus both complement the Convention on the Rights of the Child and ensure a higher threshold for the promotion and protection of children's human rights.⁹⁴

The Charter in its preamble, notes 'that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs

⁹² Lloyd A, *Regional Developments on the Rights and Welfare of Children in Africa: A general report on the African Charter on the Rights and Welfare of the Child and the African Committee of Experts*, Centre for Legal Research, Faculty of Law, University of the West of England, Bristol, UK, 2003, unpublished article. Report accessed at <http://www.uwe.ac.uk/law/research/acr/report.htm> on 30 September 2004, p.1.

⁹³ Lloyd A, *Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet*, *The International Journal of Children's Rights* 10: 179-198, 2002, p.179.

⁹⁴ Lloyd A, 2003, op cit, p.1.

special safeguards and care.’ In particular, one can see that this added protection is imperative given the high volumes of migration between African States and the additionally high levels of persecution and violence.

Chirwa opines that the African Charter on the Rights and Welfare of the Child is a 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.⁹⁵ The assertion of rights however also rests on corresponding obligations both on the child and on the state.

The African Charter is unique in the sense that it takes account of the particular problems faced by Africa as a whole. In particular it gives credence to the rights of African children and their specific needs as opposed to the needs of children of the globe.

3.4.1 Best Interests and Non-Discrimination



The Charter contains some similar provisions to that contained in the Convention in respect of the best interests of the child,⁹⁶ the right of a child to a name and nationality,⁹⁷ freedom of expression⁹⁸ and the right to education and health.⁹⁹ The African Charter also provides that State Parties shall take all appropriate measures to eliminate harmful social and cultural practices prejudicial to the welfare, dignity and development of the child.¹⁰⁰

The Charter sets out a uniform definition of age and specifies that childhood ends at eighteen years.¹⁰¹ This is unlike the Convention on the Rights of the Child that appends a rider to that definition, namely ‘unless, under the law applicable to the

⁹⁵ Chirwa D, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, *The International Journal of Children’s Rights*, Kluwer Law International, 10, pp. 157-177, 2002, p.157.

⁹⁶ Article 4 of the African Charter on the Rights and Welfare of the Child.

⁹⁷ Article 6 of the African Charter on the Rights and Welfare of the Child.

⁹⁸ Article 7 of the African Charter on the Rights and Welfare of the Child.

⁹⁹ Articles 11 and 14 of the African Charter on the Rights and Welfare of the Child.

¹⁰⁰ Sloth-Nielsen J, *op cit*, p.404.

¹⁰¹ Chirwa D, *op cit*, p.158.

child, majority is attained earlier'.¹⁰² Lloyd is of the view that the Charter offers wider protection of young people than the global standard established by Article 1 of the Convention on the Rights of the Child. The Charter states that a child is every human being below the age of 18, there are no conditions such as the suspension of this right if the child participates in armed conflict.¹⁰³ This view is correct in the sense that a child may be deemed an adult in another country due to national legislation. This is particularly important to undocumented foreign minor children who may lack the maturity as a result of their age, but due to the laws of the country they find themselves in, may be treated as an adult at a stage and age at which they lack the capability to act as an adult.

Kaime opines that there are 3 fundamental rights including the right against non-discrimination,¹⁰⁴ best interests rule¹⁰⁵ and the rule requiring the child's participation,¹⁰⁶ and that these particularly apply to the specific cases of unaccompanied children.¹⁰⁷

Chirwa argues that since the best interests of the child must be the 'primary consideration' in all actions concerning the child, this offers better protection for children since the best interests principle under the Charter is the overriding consideration. In contrast, the Convention on the Rights of the Child regards the principle as 'a primary consideration' meaning that other considerations are equally determinants.¹⁰⁸ I agree that the African Charter offers broader protection because it places an obligation on states to ensure that the best interests of the child are upheld, this is particularly important in the case of undocumented foreign migrant children who are confronted with many obstacles upon seeking refuge in foreign states. In their particular case, any decision made in respect of finding solutions to their dilemmas needs to take into account their best interests first and foremost.

¹⁰² Chirwa D, op cit, p.158.

¹⁰³ Lloyd A, 2002, op cit, p.184.

¹⁰⁴ Article 3 of the ACRWC.

¹⁰⁵ Article 4 of the ACRWC.

¹⁰⁶ Article 7 of the ACRWC.

¹⁰⁷ Kaime T, *From Lofty Jargon to durable solutions. Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child*, International Journal of Refugee Law, 2004 Vol 16 (3), p.338.

¹⁰⁸ Chirwa D, op cit, p.160.

Olowu¹⁰⁹ opines that the best interests of the child principle connotes the yardstick for measuring all actions, laws and policies of a state affecting children. Kaime is of the view that since the list of interests competing for the care of the child's best interests is almost endless and will vary depending on each particular factual situation, the provision requires that careful and objective assessment of the child's competing needs are made.¹¹⁰ Kaime argues further that in respect of unaccompanied refugee children, the best interests of the child require that durable solutions be found as quickly as possible.¹¹¹

In respect of non-discrimination, it has been shown that undocumented foreign migrant children experience high levels of discrimination and yet the right not to be discriminated against is guaranteed in both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Olowu argues that the essence of the non-discrimination clause is equality of opportunity for children of both sexes, refugees, foreign origins, indigenous or minority groups and children with disabilities.¹¹²



Kaime is of the view that Article 3 of the Charter implies that States must prevent discrimination and ensure the positive enjoyment of the rights which enable children to be recognised as valuable members of the society.¹¹³ Every child within a State's jurisdiction holds all the rights guaranteed under the Charter without regard to political opinion, citizenship, immigration status or any other status.¹¹⁴

Non-discrimination therefore affords undocumented foreign migrant children the right to exercise all their rights in the same way as if they were always children born of the country in which they find themselves irrespective of nationality or citizenship.

¹⁰⁹ Olowu D, *Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child*, The International Journal of children's rights, Kluwer Law International, Volume 10, No 2 , pp 127 – 136, 2002, p.129.

¹¹⁰ Kaime T, op cit, p.340.

¹¹¹ Kaime T, op cit, p.129.

¹¹² Olowu D, op cit, p.129.

¹¹³ Kaime T, op cit, p.339.

¹¹⁴ Ibid.

3.4.2 Refugee Specific Provisions

The article which deals specifically with refugee children in the Charter is Article 23(1) of the African Charter. It states the following in respect of refugee children:

States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which States are Parties.

Notably, the reference in the Convention is to ‘special protection’ compared to the reference in the Charter to ‘appropriate protection’ which denotes a clear difference in the intention of the drafters of the two instruments. It is my submission that the Convention provides broader and more comprehensive protection, as it amplifies the vulnerability of the child refugee. However, the Charter only offers protection which is ‘appropriate’ which denotes a lesser protection as opposed to ‘special’.

Gose refers to Article 23’s reference to the ‘enjoyment of rights’ whereas the Convention refers to ‘applicable rights’ and argues that the Charter is broader as it does not place restrictions on the application of the rights of the refugee child.¹¹⁵ Gose clearly supports the Charter in many respects and finds that the content provisions are much broader and more comprehensive than the Convention on the Rights of the Child in this respect.

Kaime¹¹⁶ opines that Article 23(3)¹¹⁷ implies that the extent of the State’s obligations must be sourced from Article 25¹¹⁸ of the Charter which obliges States to accord

¹¹⁵ Gose M, *The African Charter on the Rights of the Child*, Published by Community Law Centre, UWC, 2002, p.121.

¹¹⁶ Kaime T, op cit, p.344.

¹¹⁷ Article 23 (2), (3) and (4) are as follows in the African Charter on the Rights and Welfare of the Child: (2) States Parties shall undertake to cooperate with existing international organisations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family. (3) Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason. (4) The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

¹¹⁸ Article 25 of the African Charter on the Rights and Welfare of the Child: Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to

special protection and assistance to any child who is permanently or temporarily deprived of his or her family environment. 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.

International law and refugee policy emphasise that the first priority in caring for unaccompanied children is family reunification.¹¹⁹ However, family reunification may not always be the best solution as undocumented foreign migrant children may be trying to escape abuse at the hands of the family. In this regard, States will have to exercise objectivity in determining whether reunifications in the case of unaccompanied children are indeed in their best interests.

The contents of Article 23 in the African Charter are not substantially different to that of the Convention, but seem, by interpretation of certain aspects, to contain a higher degree of protection to undocumented foreign migrant children. In addition, the African Charter bears more relevance to undocumented foreign migrant children in Africa.



3.4.3 Identity Rights

The right to a name, nationality and registration from birth is important and has been emphasised in the chapter dealing with the Convention on the Rights of the Child. In the African Charter on the Rights and Welfare of the child, this right is contained in Article 6.

Chirwa notes that the African Charter joins the Convention on the Rights of the Child in guaranteeing the child's right to be given a name, to be registered immediately after

special protection and assistance. States Parties to the present Charter: shall ensure that a child who is parentless or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children; shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters (3) When considering alternative family care or the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background.

¹¹⁹ Kaime T, op cit, p.342.

birth, and to acquire nationality.¹²⁰ Chirwa highlights Article 6(4) of the Charter¹²¹ as obliging States to bring their Constitutional provisions in accordance with the provisions of the Charter with regards to acquisition of nationality of a child who would be stateless. Similarly, the Convention on the Rights of the Child enjoins State Parties to ensure the implementation of nationality rights in accordance with their national law and their obligations under relevant international instruments.¹²²

Kaime emphasises the importance of Article 6 rights as guaranteeing that the existence of a child is legally recognised.¹²³ Identity rights are of paramount importance for undocumented foreign migrant children because registration will assist in the tracing of family members for the purposes of reunification and the protection of the child's cultural, racial, linguistic and religious identity, which in turn will inform the process of determining the child's best interests.¹²⁴

Gose submits that the right to nationality is an empty shell if there is no particular state to turn to in order to apply for nationality. Gose is of the view that the Charter enshrines the principle of *ius soli* according to which a child shall acquire the nationality of the country in which it is born. The African Charter therefore imposes a concrete obligation on states to grant nationality.¹²⁵ Chirwa notes that the weakness in the Charter is its failure to provide for the right of the child to preserve his or her identity and states that this right is important in cases of trafficking and abductions of children.¹²⁶

Kaime's notion of identity rights is important in the case of both accompanied and unaccompanied foreign migrant children as without a name and nationality children cannot lawfully access civil, political and socio-economic rights as guaranteed by the African Charter.

¹²⁰ Chirwa D, op cit, p.165.

¹²¹ Article 6(4) of the African Charter: States Parties to the present Charter shall undertake to ensure that their Constitutional Legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.

¹²² Chirwa D, op cit, p.165.

¹²³ Kaime T, op cit, p.345.

¹²⁴ Ibid, p.346.

¹²⁵ Gose M, op cit, p.95.

¹²⁶ Chirwa D, op cit, p.165.

3.4.4 Protection Rights

The thesis has already established that undocumented foreign migrant children often face greater risks of abuse and exploitation and therefore the protection rights provided in international legal instruments are of particular importance.

Kaime submits that the African Charter on the Rights and Welfare of the Child brought fundamental and profound changes in the protection of children generally and unaccompanied refugee minors especially.¹²⁷ He states that although the Charter's provisions relating to protection of unaccompanied refugee children are substantially similar to that of the Convention on the Rights of the Child, their strength lies in the extension of protection to internally displaced children, which the Convention on the Rights of the Child does not do.¹²⁸

The Charter protects all children from torture, physical or mental injury and abuse, neglect or maltreatment.¹²⁹ The child also has the right to be protected from sexual exploitation as well as economic exploitation and from performing work that is likely to be harmful to the child's health or physical, mental, spiritual, moral or social development.¹³⁰ These protections are similar to those provided for in the Convention on the Rights of the Child.

¹²⁷ Kaime T, op cit, p.337.

¹²⁸ Kaime T, op cit, p.338. This view is also shared by Olowu D, Van Bueren G as noted above, Viljoen F in Davel C J noted below. Olowu, 'The Charter gives recognition to the problem of internal displacement in Africa by extending its provisions on refugee children to cover internally displaced children. This is a marked extension of the provisions of Article 22 of the Convention on the Rights of the Child'; Van Bueren, 'The African Charter on the Rights of the Child incorporates broader OAU definition of refugee but raises standards significantly by providing that provisions relevant to child refugees apply 'mutatis mutandis' to children who are internally displaced 'howsoever caused'. This is important because it places an obligation on States who are party to both the Convention and the Charter to provide appropriate protection and humanitarian assistance to internally displaced children and tracing services; Davel, 'In respect of protection of child refugees, the African Charter includes internally displaced children, which the Convention on the Rights of the Child has neglected to do the African Charter has succeeded in addressing concerns of particular relevance to Africa and has supplemented the Convention on the Rights of the Child with regional specificities.'

¹²⁹ Article 16 of the African Charter on the Rights and Welfare of the Child.

¹³⁰ Article 15 of the African Charter on the Rights and Welfare of the Child.

Viljoen in Davel¹³¹ opines that States Parties must ensure that undocumented foreign migrant children receive appropriate protection and humanitarian assistance. Where the parents, legal guardians or close relatives of a child cannot be located, the child should be accorded the same protection ‘as any other child...deprived of his family environment for any reason.’ By interpretation, this means that the same protection which states afford to a child citizen in respect of neglect, care and issues regarding separation for whichever reason, should be afforded to undocumented foreign minor children. These foreign children should therefore be afforded the same level of protection and should not be discriminated against on the basis of their nationality.

Chirwa however notes that the one important failure of the Charter is the absence of a provision similar to Article 37(a) of the Convention on the Rights of the Child to protect children from life imprisonment without a possibility of release.¹³² All of these protection rights apply equally to undocumented foreign migrant children.

3.4.5 Support Rights

The African Charter does not distinguish between civil and political, economic, social and cultural rights, reflecting interdependency and unity of all human rights.¹³³ Accordingly, a similar interpretation should therefore apply to access to socio-economic rights of undocumented foreign migrant children such as the right to education,¹³⁴ right to leisure, recreation and cultural activities,¹³⁵ the right to health and health services¹³⁶ and the right to care and support for handicapped children.¹³⁷

This non-distinction is important in ensuring that while children enjoy civil and political rights, they should concurrently have access to education, health care and social security.

¹³¹ Viljoen F, *The African Charter on the Rights and Welfare of the Child*, in Davel CJ (ed), Introduction to Child Law in South Africa, Juta Law, 2000, p.221.

¹³² Chirwa D, op cit, p.161 and 162.

¹³³ Lloyd A, 2003, op cit, p.3.

¹³⁴ Article 11, African Charter on the Rights and Welfare of the Child.

¹³⁵ Article 12, African Charter on the Rights and Welfare of the Child.

¹³⁶ Article 14, African Charter on the Rights and Welfare of the Child.

¹³⁷ Article 12, African Charter on the Rights and Welfare of the Child.

It is clear from the foregoing that the rights in the African Charter takes account of the specific needs of undocumented foreign migrant children, within an Africa-specific context. In some instances, the Charter is broader than the Convention on the Rights of the Child and in others it falls short in providing adequate protection particularly in respect of deprivation of liberty of undocumented foreign migrant children which seems to be critical in the international community and the African setting.

3.5 Implementation Mechanism of the African Charter

3.5.1 The African Committee on the Rights and Welfare of the Child

As with the Convention on the Rights of the Child, the African Charter establishes an oversight body, the Committee on the Rights and Welfare of the Child which serves as an implementation mechanism for the rights provided for in the African Charter on the Rights and Welfare of the Child.¹³⁸ The African Committee was established in July 2000. It is charged with the promotion and protection of the rights and welfare of children by virtue of Article 32 of the African Charter on the Rights and Welfare of the Child.



The Committee will give its views and recommendations to governments, by laying down principles and rules aimed at protecting the Rights and Welfare of Children in Africa.¹³⁹ The African Committee has the authority to formulate and lay down principles aimed at protecting children's rights in Africa and, on request from State parties and institutions of the OAU, can interpret the Charter's provisions. The UN Committee was not given this task, but can express its views as regards the interpretation of the Convention on the Rights of the Child.¹⁴⁰

The African Committee considered the following thematic areas as deserving priority attention during its first session: children in armed conflicts, child labour, child trafficking, sexual abuse and exploitation of children, orphans affected and infected

¹³⁸ The African Charter on the Rights and Welfare of the Child, Part II, Chapter Two.

¹³⁹ Lloyd A, *How to guarantee credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child*, The International Journal of Children's Rights, Martinus Nijhoff Publishers, Volume 12 No.1, 2004, p.21.

¹⁴⁰ Lloyd A, 2002, op cit, p.186.

by HIV/AIDS, and children's right to education.¹⁴¹ The Committee has, however, failed to achieve its goals because it has invested much effort in planning and elaboration of strategies for implementation of the proposed activities. Funding has been another major bottleneck. Indeed, the Committee has recognised that previous work plans had only partially been implemented due to resource constraints and under-funding.¹⁴²

Within the last few years the African Committee has managed to effectively implement only a small proportion of planned activities such as envisaged. A number of States have established national institutions such as children's parliaments and the enactment of legislation for example the Children's Act in Kenya in 2001.¹⁴³

Lloyd is of the opinion that the inaction of the Committee is not through incompetence or unwillingness, but due to a lack of resources. She states that the credibility of the Committee is enhanced by continual representation by the African Union at all its meetings. Although the two bodies are independent, Lloyd is of the view that closer collaboration will ensure that issues relating to children will be dealt with expeditiously and with support from all human rights institutions.¹⁴⁴

By the fourth ordinary session in 2004, the Committee had still not received any country reports in terms of Article 43 of the African Charter on the Rights of the Child and a discussion followed on timeframes for reporting and the appointment of a secretary to ensure proper co-ordination.¹⁴⁵ The Committee has to date, provided no guidance on the protection of undocumented foreign migrant children. It is submitted that this matter should be of primary importance to the Committee, given that Africa is increasingly facing this dilemma.

¹⁴¹ Lloyd A, 2004, op cit, p.29.

¹⁴² Ibid, p.31.

¹⁴³ Ibid, p.35.

¹⁴⁴ Ibid, p.37.

¹⁴⁵ Lloyd A, *The Fourth Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child*, Faculty of Law, University of the West of England, Bristol, June 2004, accessed at [http://www.uwe.ac.uk/law/research/acr/4th ordinarySession ACRWC.pdf](http://www.uwe.ac.uk/law/research/acr/4th%20ordinarySession%20ACRWC.pdf), on 9 November 2005.

3.6 Refugees Specific International Legislation

3.6.1 1951 UN Convention Relating to the Status of Refugees

Refugee status is regulated in international law by the 1951 UN Convention on the Status of Refugees and the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa. South Africa ratified both Conventions in 1996 and was obliged to develop a specific refugee policy.¹⁴⁶ The 1951 Convention has a widely accepted definition of who a refugee is. It provides that a refugee is:

any person who 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 of his former habitual residence as a result of such events is unable or owing to such fear, is unwilling to return to it.¹⁴⁷

The 1951 Convention does not pay significant attention to the needs and special circumstances of refugee children. Children are implicitly excluded from the refugee definition by the failure to insert age as a ground of persecution.¹⁴⁸ The absence of age in the definition of refugee in this Convention is a grave oversight on the part of the drafters. Although undocumented foreign migrant children are entitled to access the same protection as adults, their special vulnerabilities require that age be inserted to ensure that their special needs are taken into account. In addition, the omission creates the risk of failing to recognise child-specific forms of persecution or underestimating the particular needs of children.¹⁴⁹

Status determination of a minor may be problematic, more particularly when applying the criteria of 'well-founded fear' as one cannot attach the same meaning to the impressions of a minor as to those of an adult. It is my submission that fear as determined by an adult cannot be equated with the fear experienced by a child and often the expression and explanation of such fear would be different in the case of

¹⁴⁶ Van Garderen J & Winterstein S in Padayachee, S, *Children and the Law: a Manual (2nd edition)*, Durban Lawyers for Human Rights, 2005, p.208.

¹⁴⁷ Van Bueren G, op cit, p.360.

¹⁴⁸ Bhabha J, 2004, op cit, p.228.

¹⁴⁹ Edwards A, *Age and gender dimensions in international refugee law*, extract from UNHCR, *Refugee protection in International Law*, UNHCR's Global consultations on international protection, Cambridge University Press, 2003, p.57.

adults and children. For this reason, states need to ensure that policies are in place to address the needs of these children at the initial assessment stage of enquiry.

The requirement that the fear must be ‘well-founded’ implies that the state of mind must be supported by objective criteria. This does not give rise to problems for accompanied children, but it does give rise to problems of determination in the case of unaccompanied minor children.¹⁵⁰ As we evidenced in General Comment 6 above, the special vulnerabilities of undocumented foreign migrant children need to be taken into account, when states are required to make these assessments.

Due to various problems experienced by contracting states in this regard, the United Nations High Commissioner for Refugees released Guidelines on Refugee Children in 1993.¹⁵¹ These guidelines note that children may express their fears differently from adults, and recommends that those assessing the child’s status ought to have the same cultural background and mother tongue as the child. The guidelines state that in the case of children, states need to apply a liberal application of the benefit of the doubt.¹⁵² In addition, to these guidelines, states can now rely on the Committee’s comments in General Comment No 6 for guidance and assistance in dealing with this issue regarding undocumented foreign migrant children.

In sum, the 1951 Refugee Convention is inadequate in providing for the needs of children. In instances like this, relevant provisions are to be sourced from children-specific Conventions such as the Convention on the Rights of the Child and the African Charter to reinforce the need to provide adequate protection to undocumented foreign migrant children.

3.6.2 The 1969 OAU Convention Governing Specific Aspects of the Refugee Problems in Africa

South Africa acceded to this Convention on 15 December 1995. This Convention seeks to find ways of alleviating the misery and suffering of refugees in Africa by providing them with a better life and future. The Convention therefore specifically

¹⁵⁰ Van Bueren G, op cit, p.363.

¹⁵¹ See chapter 3, 3.3.3 above.

¹⁵² Ibid, p.364.

recognises the increasing concern of refugees in African States and the Convention seeks to eliminate or alleviate any disputes that may arise between African countries in this respect.

This Convention endorses the definition in the 1951 Convention but goes further by stating that the term “refugee” shall also apply to 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 or 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.¹⁵³

The definition of a refugee as well as status determination issues has been widely debated. Some writers argue that there seems to be a ‘consensus’ amongst writers that the OAU definition is much wider than the 1951 definition and others argue that the OAU definition as it stands has been ill defined and therefore leaves much to interpretation by States having to decide on refugee status.¹⁵⁴



The OAU definition captures four events: namely external aggression, occupation, foreign domination and events seriously disturbing public order. Rankin argues that the Convention failed to provide an interpretive framework and may undermine the broadness and flexibility of the definition by limiting situations in which it could be applied.¹⁵⁵ Van Beek¹⁵⁶ refers to Hathaway who describes the four features of the OAU refugee definition. Firstly, it recognises that abuse may occur as a result of government’s loss of authority due to external aggression, occupation or foreign

¹⁵³ Article 1(1): For the purposes of this Convention, the term “refugee” shall mean every person who, 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 of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it. Article 1(2) The term “refugee” shall also apply to 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.

¹⁵⁴ Rankin M, *Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on*, UNHCR, Working Paper No.113, 2005, p.4. Sourced from <http://www.unhcr.ch/refworld/pubs/pubon.htm> accessed on 8 August 2005.

¹⁵⁵ *Ibid*, p.8.

¹⁵⁶ Sourced from <http://www.lhr.org.za/refugee/publics/perspect/ingrid.htm>, accessed on 12 November 2004, p.3.

domination. Secondly, it acknowledges that people can be refugees because of circumstances of generalised danger. The OAU definition therefore leaves open the possibility that the norm may be indeterminate, instead of the UN definition which links refugee status to the prospect of abuse resulting from some personal or group characteristic.¹⁵⁷

Van Beek goes further to argue that the OAU definition lacks clarity on the part of ‘events seriously disturbing public order’ and concludes that the OAU definition is less restrictive. She refers to Mendel who she quotes as stating that ‘both Conventions establish quite different schemes for the protection of refugees and that compliance with one implies, in practice if not in legal theory, non-compliance with the other.’¹⁵⁸ I disagree with this view, a need exists to consider the range of international legal instruments and where one instrument falls short in respect of particularly undocumented foreign migrant children, application should be found in other legal instruments which provide adequate protection.

Gorlick¹⁵⁹ argues the humanitarian nature of the international refugee law and the obligations on states to protect refugees requires the refugee definition and determination procedures to be interpreted and applied in a liberal manner. He states that the liberal interpretation should not require too high a standard in order for a victim of persecution to prove his or her claim. Gorlick further states that in assessing claims of persecution, if there is doubt regarding a claim the applicant should be provided with a reasonable opportunity to present further evidence in order to clarify any aspects which the decision-maker deems not credible.¹⁶⁰ Given language barriers as well as cultural difficulties, I agree with Gorlick that the special circumstances of foreigners need to be taken into account and that they should be given the benefit of the doubt.

Gorlick goes further to note the different needs and requirements which are applicable to child claimants and states that a legal representative has to be appointed to assist a

¹⁵⁷ Sourced from <http://www.lhr.org.za/refugee/publics/perspect/ingrid.htm> accessed on 12 November 2004, p.3.

¹⁵⁸ Ibid, p.4.

¹⁵⁹ Gorlick B, *Human Rights and Refugees: enhancing protection through international human rights law*, 2000 p.7, sourced from <http://www.unhcr.ch/refworld/pubs/pubon.htm> on 8 August 2005.

¹⁶⁰ Ibid.

child through the determination procedures. Factors to consider in assessing the evidence of children should include a child's age at the time of the events, the time that has elapsed since the event, the level of education, ability to understand and relate his or her experiences, understanding of the need to tell the truth, capacity to recall certain events and the capacity to communicate intelligibly or in a form capable of being rendered intelligible.¹⁶¹ This point is important and valid and Gorlick reaffirms the guidance provided by General Comment 6 as discussed in the previously herein.

3.7 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The International Organisation for Migration reports¹⁶² that child abuse and child prostitution are increasing in South Africa. Many minor children who cross the border are victims of trafficking and of physical and emotional abuse, domestic and cross border trafficking, sex slavery and prostitution.

South Africa ratified this Protocol in February 2004, as it is increasingly becoming apparent that both adults and children are being trafficked¹⁶³ in and out of South Africa for the purposes of prostitution, child labour and drug trafficking.¹⁶⁴

Key lobby groups in South Africa are advocating for the adoption of South African anti-trafficking legislation. The South African Law Commission has drafted a discussion document to be used as a basis for drafting a Bill. This piece of legislation will be important for undocumented foreign migrant children as it will provide protection for children who find themselves in South Africa as a result of having

¹⁶¹ Gorlick B, op cit, p.7.

¹⁶² International Organisation for Migration, *Eye on Human Trafficking*, Issue 5, January 2005, p.2.

¹⁶³ The Protocol defines trafficking as: the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

¹⁶⁴ Van Garderen J and Winterstein S, op cit, p.208.

being trafficked. According to the International Organisation for Migration, the current Bill should become an Act of Parliament in 2006.¹⁶⁵

3.8 The 1966 International Covenant on Civil and Political Rights

140 State parties have ratified this Convention and South Africa is one of them. South Africa ratified this Convention in December 1998. The essence of this Covenant is contained in its preamble which states the following: ‘Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as economic, social and cultural rights.’

Article 24¹⁶⁶ of this Covenant sets out specific rights of children and reinforces the rights as set out in the Convention on the Rights of the Child as well as those contained in the African Charter.

Broadly speaking the Covenant reaffirms the child’s right to civil and political rights. More specifically, the Covenant states that ‘every child has the right to acquire a nationality’. This confirms the rights contained in the Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child. The rights accorded to asylum seekers are derived from and should be viewed against a broad framework of human rights standards.

International human rights law dictates that the child born of an asylum seeker has the right to a family life. This right has to be accorded to a child to ensure that the best interests of the child are upheld and implemented without any form of

¹⁶⁵ International Organisation for Migration, *Eye on Human Trafficking*, Issue 6, April 2005.

¹⁶⁶ ICCPR G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, Article 24(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of the family, society and the State. Article 24(2) Every child shall be registered immediately after birth and shall have a name. Article 24(3) Every child has the right to acquire a nationality.

discrimination.¹⁶⁷ Once again, in this treaty, the best interests of the child are taken into account.

3.8.1 Human Rights Committee

Article 28 of the Covenant provides for the establishment of a Human Rights Committee. The Human Rights Committee has provided guidance on refugee protection by publishing General Comment No 15 on the Position of Aliens¹⁶⁸ in which the Committee stated that an alien may enjoy the protection of the Covenant even in relation to entry or residence. The Committee went further to state that ‘aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person.’

In respect of children, the Committee stated that ‘their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority, they shall not be denied the right to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.’¹⁶⁹ By interpretation, this means that undocumented foreign migrant children cannot be discriminated against and children should be entitled to all the rights equivalent to the rights bestowed upon children who are nationals of the country they find themselves in.

In respect of a United Kingdom report relating to Hong Kong,¹⁷⁰ the Human Rights Committee expressed concern that many Vietnamese asylum seekers were subjected to long-term detention under deplorable conditions. The Committee raised the issue

¹⁶⁷ Breen C, *Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating against the rights of the child*, International Journal of Refugee Law, Vol.15.No.4, Oxford University Press, 2003, p.757.

¹⁶⁸ Gorlick B, op cit, p.14. Human Rights Committee, General Comment No 15: *The position of aliens under the Covenant*: 11 April 1986, (Twenty-Seventh Session, 1986).

¹⁶⁹ Ibid.

¹⁷⁰ ICCPR 1976/95/Add.5 and HRI/CORE/1/Add.62.

that children living in the camps were deprived of their rights under the ICCPR due to their parents' status as illegal immigrants. The Human Rights Committee also expressed concern regarding the conditions under which deportations of non-refugee Vietnamese were carried out.¹⁷¹

The detention of migrant children remains a problem in various countries. Implementation of policies and ensuring adequate state co-operation and capacity seem to be the key stumbling blocks in effectively addressing this concern.

The Human Rights Committee is able to provide further guidance on the protection of undocumented foreign migrant children and States should therefore rely on the guidance provided by all the aforementioned committees in ensuring that such children receive the requisite protection.

3.9 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OPCAT)



The Optional Protocol was adopted in 2002 by the UN General Assembly. The principal Convention against Torture was ratified by South Africa in 1998. South Africa has still not signed the Optional Protocol, but is expected to do so.¹⁷²

Article 1 of the Protocol states that the objective is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The places of detention referred to in the protocol include police stations, security force stations, pre-trial centres, remand prisons, prisons for sentenced persons, centres for juveniles, immigration centres, international transit zones, centres for detained asylum seekers, psychiatric institutions and places of administrative detention.¹⁷³ The Protocol therefore ensures

¹⁷¹ ICCPR, op cit, p.50.

¹⁷² Sloth-Nielsen J, *Optional Protocol Against Torture and Similar Treatment or Punishment*, Article 40, Volume5, Number3, October 2003, p.1.

¹⁷³ Association for the Prevention of Torture, *The Optional Protocol to the UN Convention against torture: frequently asked questions*. Sourced from <http://www.apt.ch> accessed on 30 June 2005.

that detention facilities where undocumented foreign migrant children are held are part of its mandate.

The OPCAT will ensure a system of regular visits to places of detention carried out by international and national independent expert bodies. The international sub Committee will consist of 10 independent, multi-disciplinary experts, who will conduct regular visits to places of detention in all States. When the OPCAT enters into force, within one year of its ratification, States Parties must have one or several national preventive mechanisms in place. The Human Rights Commission, Ombudsmen, Parliamentary Committees or NGOs could carry out this function within respective states. Following their visits to detention centres, these bodies will make recommendations for improvements in the treatment and the conditions of detention of persons deprived of their liberty. This framework would seek to address concerns related to the detention of children.

Internationally, undocumented foreign migrant children often find themselves held in detention centres for long periods of time, in deplorable conditions and often with adults or detainees in the same facility. The detention of children is undesirable in terms of the Convention on the Rights of the Child and in respect of other international treaties. Often the fault lies with the fact that upon their arrival in a country of asylum, undocumented foreign migrant children are not dealt with adequately by the recipient authorities and the institutions they are eventually placed in.

Van Bueren submits that this situation is further amplified by the fact that very little treaty law exists which sets out the objectives of the institutions in which children are deprived of their liberty. She submits that a binding legal framework would serve to ensure oversight and accountability and could be used as an effective tool to prevent abuses.¹⁷⁴ Van Bueren opines that article 3(3)¹⁷⁵ of the Convention on the Rights of the Child is applicable to all types of institutions in which children are deprived of

¹⁷⁴ Van Bueren G, op cit, p.217.

¹⁷⁵ Article 3 (3) provides the following: States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

their liberty, but the article does not provide guidance as to which are the relevant standards which these institutions are required to uphold.¹⁷⁶

The other international guidance which may be used is the United Nations Standard Minimum Rules for the Treatment of Prisoners of 1955. These standards are internationally recognised and stipulate that all those held in detention, whether nationals, non-nationals, asylum seekers or refugees, criminally accused or convicted, should be held in conformity with the minimum standards for the treatment of all individuals in detention.¹⁷⁷ These rules are therefore equally applicable to undocumented foreign migrant children in detention facilities.

UNHCR has also developed guidelines on the detention of asylum seekers¹⁷⁸ which acknowledges that the standards of treatment in international instruments are applicable to asylum seekers and stateless persons. Guideline six states that unaccompanied minors should not be detained and should instead, where possible, be released into the care of family members. In instances where such family members do not exist or such release is not possible due to other circumstances, alternative care arrangements should be made by child care authorities for minors to receive adequate accommodation and appropriate supervision.¹⁷⁹

In the event that none of these alternatives exist, the detention of minors should in accordance with Article 37 of the Convention on the Rights of the Child, be used as a measure of last resort and for the shortest possible time. Lastly, a legal guardian or adviser who is familiar with the minor's language and culture should be appointed to assist unaccompanied minors.¹⁸⁰

The aforementioned laws and policies address some of the lacunae in the oversight of detention facilities, but another measure may be the ratification of the Optional

¹⁷⁶ Ibid.

¹⁷⁷ The South African Human Rights Commission, *Lindela at the crossroads for detention and repatriation, an assessment of the conditions of detention*, Johannesburg, December 2000, p.22 sourced from http://www.sahrc.org.za/sahrc_cms/publish/cat_index_41.5html accessed on 15 August 2005.

¹⁷⁸ UNHCR, *UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers*, February 1999, sourced from <http://www.unhcr.ch> on 26 September 2005.

¹⁷⁹ The South African Human Rights Commission, *op cit*, p.24.

¹⁸⁰ Ibid.

Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Protocol provides the basis for oversight of detention facilities across the world and could go a long way in ensuring that undocumented foreign migrant children are not detained in conditions which violate their rights in the countries in which they seek asylum. Hence, it is submitted that South Africa should ratify this Protocol to ensure the protection of undocumented foreign migrant children in places of detention.

3.10 Concluding Observations

Gorlick is of the view that the human rights machinery of the United Nations is plentiful, evolving and provides a number of complementary legal standards which can be employed to enhance the protection of refugees.¹⁸¹ It is apparent that children and particularly undocumented foreign migrant children are protected in various international legal instruments in respect of their identity, protection and support rights. In instances where one Convention does not provide adequately, it is clear that States can always rely on the others to ensure that the best interests of the child are upheld.



The international legal framework provides overall protection for the rights of undocumented foreign migrant children in respect of their identity, protection and support rights. In sum, the international legal framework provides adequate protection to undocumented foreign migrant children. One weakness exists in the Refugee specific Conventions, which fails to take account of child specific protection. In this way, the children's rights legislation would cover the gap to some extent if States Parties have ratified the child specific pieces of legislation.

¹⁸¹ Gorlick B, op cit, p.14: Not only do some human rights mechanisms provide legal remedies in the form of complaints procedures, but the decisions, reports, information and attention that these bodies focus on refugee issues provide a rich source of international jurisprudence, country of origin information and modes of cooperation with states and other actors in order to better ensure the protection of refugees. This is not to say that the UN human rights mechanisms can in all instances provide an effective remedy. The sheer number of these mechanisms and the fact that many of them have a universal mandate and are severely overburdened results in delays and unnecessary overlap which, in turn, may lead to confusion and problems of coordination.

The various Committees have succeeded in interpreting relevant legislative provisions and provided guidance on policy implementation. General Comment No 6 of the Committee on the Rights of the Child provides an adequate and comprehensive framework to guide States in addressing the needs of undocumented foreign migrant children.



CHAPTER 4: SOUTH AFRICAN LEGAL FRAMEWORK

4.1 Introduction

This chapter provides an overview of the South African legal framework with regard to undocumented foreign migrant children and discusses the extent to which international law has been incorporated into domestic law and policy. The Chapter further investigates the extent to which South African law protects undocumented foreign migrant children.

The Chapter discusses the relevant provisions of the South African Constitution, the South African Refugees Act 130 of 1998, Immigration Act 13 of 2002, the Child Care Act 74 of 1983 and the Children's Bill 70B of 2005.

4.2 The South African Constitution

Having discussed the international legal regime in the protection of undocumented migrant children, it is essential to understand how the ratification by South Africa of the aforementioned pieces of legislation affects South African law and policy. In this respect, Sections 231, 232 and 233 of the South African Constitution, deal with the use of international law in South Africa. The effect of these sections is that international law has persuasive authority in the courts, but is not binding unless passed into legislation under the domestic law.¹⁸²

¹⁸² The Constitution of the Republic of South Africa, Act 108 of 1996: Section 231

(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect. Section 232- Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Section 233- When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Bill of Rights in the Constitution¹⁸³ contains a comprehensive list of fundamental rights and freedoms that are applicable to both adults and children. Apart from a few exceptions such as citizenship, voting rights, and trade and employment, the rights contained in the Bill of Rights are applicable to every person present in South Africa regardless of their legal status. The Constitution is therefore an important source of law for undocumented foreign migrant children.¹⁸⁴

4.2.1 General Provisions of the South African Constitution

The South African Constitution guarantees equality for all people, including foreign children. Selected rights contained in the Bill of Rights apply to specific groups; for example section 28 applies solely to children as a specific group.¹⁸⁵

Section 9 (1) guarantees the right to equality before the law and equal protection and benefit of the law. Section 9 (3) and (4) prohibits unfair discrimination by the State and by private entities on a non-exclusive list of grounds. One of the listed grounds is age and the other is birth.¹⁸⁶ A foreign child cannot therefore be discriminated against on the basis of citizenship. Such children should be entitled to all the rights afforded to any other person who is a South African citizen.

Children are entitled to the right to privacy (s14), the right to freedom of religion, belief and opinion (s15), the right to freedom of expression (s16) and the right to freedom of association (s18). The rights to religion, belief and opinion are particularly important for refugee and immigrant children, as these are often the rights which they are least able to exercise given the different cultural context in which they find themselves as a result of their migration.

The Constitution, under section 26, guarantees everyone the right to access housing. Section 27 guarantees access to health care while section 29 provides everyone with

¹⁸³ The Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2.

¹⁸⁴ Van Garderen J and Winterstein S, op cit, p.209.

¹⁸⁵ Bekink B and Brand D in Davel CJ, *Introduction to Child Law in South Africa*, Chapter 9, Juta Law, 2000, p.173.

¹⁸⁶ Ibid, p.178.

the right to education. Section 28 is specific to the rights of children and is the focus of this Chapter.

4.2.2 Section 28 of the South African Constitution

The South African Constitution, section 28¹⁸⁷ focuses on the rights of children and contains concepts which have been developed in international treaties for the protection of children. The Constitution has thus incorporated the best interests principle as defined in the Convention on the Rights of the Child and as in the African Charter on the Rights and Welfare of the Child.

Section 28 of the Constitution is the basis for the protection of the rights of all children in South Africa, including undocumented foreign migrant children. In the case of *Larbi-Odam and others v Members of the Executive Council for Education and another*¹⁸⁸ the Constitutional Court averred that non-nationals are a vulnerable group in society, being a minority, and because they do not have the political muscle to defend their interests. This means that by excluding certain categories of non-citizens, such as permanent residents, from social benefits and opportunities, it could



¹⁸⁷ Section 28 (1) Every child has the right –

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

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

(3) In this section "child" means a person under the age of 18 years.

¹⁸⁸ *Larbi-Odam and others v Members of the Executive Council for Education and another* 1997 (12) BCLR 1655(CC), par.19-20.

amount to unfair discrimination.¹⁸⁹ Unfair discrimination is prohibited in section 9 of the Constitution.

4.2.2.1 Identity Rights

Section 28 of the Constitution provides a leading framework for children's rights in South Africa. This section has an impact on the relationship between children, parents and the state and is therefore of importance to the rights of undocumented foreign migrant children in South Africa.¹⁹⁰

Section 28 (1) provides that every child has the right to a name and nationality from birth. The right to a name has the purpose of protecting a child's legal identity.

The right to a nationality is intended to protect a child's international legal identity and in particular protect the child against statelessness.¹⁹¹ Once acquired, the South African nationality and citizenship of a child is protected by section 20 and section 21 of the Constitution.¹⁹²



Citizenship encompasses the rights and obligations between citizens and the state while nationality concerns the connection between the state and the individual in the international arena.¹⁹³ Section 28(1)(a) of the South African Constitution grants a right to nationality and applies to all children inside South Africa, regardless of where they were born. The section guarantees that children resident in South Africa cannot be rendered stateless.¹⁹⁴ It is therefore apparent that the section 28 right includes undocumented foreign migrant children in respect of protecting their right to nationality.

¹⁸⁹ Liebenberg S and Pillay K, *Socio Economic Rights in South Africa: a Resource Book*, published by Community Law Centre (UWC), 2000, p.34.

¹⁹⁰ Currie I and De Waal J, *The Bill of Rights Handbook (5th edition)*, LHR and the Law Society of South Africa, Juta Publishers, 2005, p.602.

¹⁹¹ Bekink B and Brand D in Davel CJ, op cit, p.180.

¹⁹² Currie I and de Waal J, op cit, p.605.

¹⁹³ Friedman A and Pantazis A, *Constitutional Law of South Africa*, Second Edition, Juta and the Centre for Human Rights, 2004, par. 47-1.

¹⁹⁴ Ibid, par. 47-2.

However Sloth-Nielsen is of the view that many children born of non-nationals do not have a claim to South African citizenship, despite having been born here.¹⁹⁵ She opines that section 28(1) seems to indicate that every child has the right to a name and a nationality from birth. As such, irrespective of where a child is born if they are not able to acquire the nationality of their country of birth and happen to be in South Africa, the State is obliged to grant them nationality. Section 2(4) of the Citizenship Act provides that where the child concerned would otherwise be stateless and has no claim to the citizenship and nationality of another country, such child shall be accorded South African citizenship.¹⁹⁶ The ‘statelessness exception’ in the Citizenship Act seems to comply with the obligations sought by the UN Convention on the Rights of the Child regarding the rights of a child who would otherwise be stateless if not granted citizenship by the host State.¹⁹⁷

Section 28 of the South African Constitution and section 2(4) of the Citizenship Act ensures that citizenship and nationality of undocumented foreign migrant children are protected.



4.2.2.2 Family Care

Section 28 (1) (b) states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

In *Patel and another v Minister of Home Affairs and another*,¹⁹⁸ the court had the occasion to decide whether or not to deport the second applicant from South Africa in

¹⁹⁵ Sloth-Nielsen J, *Children*, Cheadle H, Haysom N and Davis D (eds), South Africa Constitutional Law: The Bill of Rights, Durban, Lexis Nexis Butterworths, 2005, pp. 23 (1) -23 (32), p.514.

¹⁹⁶ Ibid.

¹⁹⁷ See CRC General Comment No 6 as above note 67 (iv) A: State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention are 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. See also Keightley R, *The Child’s Rights to Nationality and the Acquisition of Citizenship*, 1998 (14) SAJHR 411 at p.419.

¹⁹⁸ 2000 (2) SA 343, 350, par. E-F (D).

terms of the Alien's Control Act (96 of 1991). In making this decision, the court took the right of his children to family or parental care into account and agreed that section 28(1)(b) has three purposes. The section is firstly aimed at the preservation of a healthy parent child relationship in the family environment.¹⁹⁹ Secondly, the section also requires that care of a certain quality be given to all children and the duty rests on parents and other family members to provide such care. Lastly, only in the absence of such parental care, a clear duty rests on the State to provide appropriate care.

Sloth-Nielsen interprets the state's role in such situations as requiring appropriate alternative family care or institutional placement having due regard to the child's cultural background.²⁰⁰ Undocumented foreign migrant children are therefore clearly entitled to state protection when they have no family members accompanying them in South Africa.

4.2.2.3 Socio-Economic Rights

Section 28 (1) (c) states that every child has the right to basic nutrition, shelter, basic health care services and social services. Bekink and Brand in Davel notes that this right is grounded in a more expansive range of services that a child is entitled to in terms of Section 26(1) and 27 (1) which encompasses everyone's right to access housing, adequate food and water, medical services and social security and assistance.²⁰¹

These broader rights are, however, limited by the State having to meet them only progressively, through reasonable legislative and other measures, and within the resources available to the State. In *Grootboom* the Constitutional Court stated that where children are in parental or family care, the State's obligation would normally include passing laws and creating enforcement mechanisms for children's maintenance and for their protection from abuse, neglect and degradation.²⁰² However, the Court conceded that the State would incur a primary obligation where

¹⁹⁹ Friedman A and Pantazis A, op cit, par. 47-5.

²⁰⁰ Sloth-Nielsen J, 2005, op cit, p.516.

²⁰¹ Bekink B and Brand D in Davel CJ, op cit, p.187.

²⁰² *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

children are removed from or lack a family environment such as orphaned or abandoned children.²⁰³ In *Minister of Health & Others v TAC & others*²⁰⁴ the Constitutional Court reaffirmed the *Grootboom* decision with respect to the fact that the State is obliged to ensure that children are accorded the protection contemplated by Section 28 that arises when the implementation of the right to parental or family care is lacking.²⁰⁵

Another South African case which dealt with section 28 (1) (c) is *Khosa and others v Minister of Social Development and another*.²⁰⁶ This case dealt with the rights of permanent residents to social security and the court ordered the extension of all social grants to all permanent residents who met the relevant criteria.²⁰⁷

4.2.2.4 Maltreatment, Abuse or Degradation

Section 28 (1) (d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation. Bekink and Brand in Davel opine that the right imposes a duty on private persons as well as on the State to refrain from these forms of treatment. In addition, it requires the State to act positively to prevent abuse, maltreatment, neglect or degradation.²⁰⁸

Section 28(1) (e) states that every child has the right to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that: (i) are inappropriate for a person of that child's age; (ii) places at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

These protection rights are of particular importance to undocumented foreign migrant children as they suffer abuse and exploitation. It is clear that the South African

²⁰³ *Grootboom*, op cit, p.1204, par. 77.

²⁰⁴ *Minister of Health and Others v Treatment Action Campaign and others* (1) 2002 (10) BCLR 1033 (CC).

²⁰⁵ *Grootboom*, op cit, p.1056, para. 79.

²⁰⁶ 2004 (6) BCLR 569 (CC).

²⁰⁷ See detailed discussion of this case in Chapter 5 of this thesis.

²⁰⁸ Bekink B and Brand D in Davel CJ, op cit, p.188.

Constitution takes account of these violations by providing protection in these sections.

4.2.2.5 Detention and Legal Representation

The South African Constitution Section 28 (1)(g) provides that ‘Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be; (i) kept separately from detained persons over the age of 18 years and (ii) treated in a manner, and kept in conditions, that take account of the child’s age’.

Generally this right gives expression to the right contained in article 37 of the Convention on the Rights of the Child which provides for similar protection and limits deprivation of liberty. In South Africa, undocumented foreign migrant children are often detained with adults and are subject to abuse and gross human rights violations upon their arrival and subsequent detention.



Sloth-Nielsen²⁰⁹ amplifies the interpretation of section 28 (1) (g) by stating that it does not mean that children will never be detained. However in instances where they are detained, authorities dealing with children need to take account of their age, seriousness of the offences, interests of justice and many other factors which may affect the child. She confirms that internationally, deprivation of liberty includes children in welfare institutions, places of safety, secure care facilities and reform schools. An acceptance of this interpretation of deprivation of liberty would allow one to conclude that undocumented foreign migrant children held in detention centres are protected by virtue of this wide interpretation. In sum, in seeking to protect the rights of this category of children, it appears that one needs to read the national legislation in the light of international legal obligations to ensure total protection of the rights of children who are detained.

²⁰⁹ Sloth-Nielsen J, 2005, op cit, p.530.

Section 28 (1) (h) states that every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Section 8 A(1) of the Child Care Act 74 of 1983 as amended provides that a child is entitled to legal representation at any stage of the relevant proceedings.²¹⁰ This right is applicable to a range of civil proceedings affecting the child, including children's court proceedings. Section 8A²¹¹ has however never been promulgated due to the inability of government departments to effectively apply the principles and implement them accordingly. A key reason for the failure of the state to promulgate this section has been in respect of the expenditure which will occur in its application. Skelton and Zaal²¹² argue that if the state expenditure matter can be resolved, more lawyers can be trained to represent children specifically. They argue that the right to representation is not enough, the specialised training is required to ensure that children receive effective legal representation in South Africa.

Friedman and Pantazis²¹³ emphasise the child's right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice will otherwise result. They make a further note that in any matters in which a child is to appear before a children's court, the child is entitled to legal representation. Sloth-Nielsen²¹⁴ expresses a similar opinion and expands the right further to include deportation cases of non-nationals. On the question of the 'substantial injustice' test, Sloth-Nielsen opines that the test should take into account the complexity of the case, age and the ability of the child to express his or her views.

Therefore, where undocumented foreign migrant children are entitled to appear before the children's court to determine their status or where they should be placed, they are

²¹⁰ Bekink B and Brand D in Davel CJ, op cit, p.193.

²¹¹ Section 8 A (1) of the Child Care Act states that: 'A child may have legal representation at any stage of a proceeding under this Act.' Section 8 A (3) states that children are entitled to 'a right to request representation at any stage of the proceedings if they are capable of understanding this right.' Section 8 A (5)-(6) states that the costs of representation for a child in children's court proceedings will, if necessary, be borne by the state.'

²¹² Skelton A and Zaal N, *Providing effective representation for children in a new constitutional era: Lawyers in the Criminal and Children's Courts*, 14 SAJHR, 1998, p.559.

²¹³ Friedman A & Pantazis A, op cit, par. 47-27, 28.

²¹⁴ Sloth-Nielsen J, 2005, op cit, p.535.

equally entitled to legal representation. If legal representation is not given to undocumented foreign migrant children, and in light of the language, cultural differences and extreme vulnerabilities, substantial injustice could result. It is therefore imperative to ensure that legal representation is made available, and also that language barriers are adequately addressed by using interpreters in legal proceedings concerning refugee children.

Although the Constitution and statutes make provision for the protection of the rights of children including undocumented foreign children, in practice South Africa still falls short of international standards. For example, there exists no legal representation for undocumented foreign children and as such the right to a fair hearing before courts or tribunals that determine their status in South Africa, is often flouted. The right to a nationality in South Africa for undocumented children is also not guaranteed, irrespective of the fact that most of these undocumented migrant children have nowhere else to turn to.²¹⁵

4.2.2.6 Best Interests of the Child



The content of section 28(2) concurs with international law as it provides protection for the best interests of the child. However, the question which has often arisen is what the best interests of the child really mean?

It has been argued²¹⁶ that the best interest principle is a factual question and when it arises in any particular case, it needs to be decided based on the facts of each individual case. In *Bannatyne v Bannatyne*,²¹⁷ the court held that the best interest principle entailed an obligation on parents to care for their children. In addition, it required the state to provide the necessary infrastructure to protect the rights of children. Friedman and Pantazis²¹⁸ argue that the best interests must reflect three concerns. In the first instance, the child's interests must be taken into account where the matter involves a child. Secondly, children's interests alone are made a

²¹⁵ Sloth Nielsen J, 2005, op cit, p.535.

²¹⁶ Bekink B, *Defining the standard of the best interest of the child: Modern South African Perspectives*, De Jure, Vol 1, 2004, p.23.

²¹⁷ 2003 (2) SA 363 (CC), par.24, taken as an extract from Currie I and De Waal J, op cit, p.619.

²¹⁸ Friedman A and Pantazis A, op cit, par.47-31.

constitutional right and lastly determining the best interests requires a weighing up process of the interests of children, with the end result being the decision of what is ultimately the best decision for them.

In conclusion, the South African Constitution provides an important protection for the rights of children by the inclusion of Section 28. Nicholson²¹⁹ argues that section 28 can be regarded as creating a positive duty on the state to provide for the needs of children. It is my submission that this is correct, but the challenge is to ensure that section 28 is included in all pieces of legislation dealing with children.

4.3 The Refugees Act 130 of 1998 and Immigration Act 13 of 2002

The rights of foreigners in South Africa are governed by the aforementioned pieces of legislation. The Department of Home Affairs is in charge of the issuance of permits in terms of the Immigration Act²²⁰ and the Refugees Act.²²¹

The Immigration Act aims to regulate and facilitate the exit and entry of non-South Africans. This piece of legislation does not mention children as a category, as children automatically fall under the Child Care Act 74 of 1983 and the recently passed Children's Bill 70B of 2005. An important section of the Immigration Act is section 25 (1) which provides that 'the holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.' This is important in the case of children who have residence status by virtue of their parents' status or who have successfully gone through the status determination process and who have been granted residence in South Africa. It does not provide protection for the broad class of undocumented foreign migrant children who do not have residence status in South Africa.

This research focuses on the Refugees Act which deals with the application process and the status of refugees and asylum seekers in South Africa. It also includes details

²¹⁹ Nicholson C, *A first call on available resources for child refugees in South Africa*, De Jure, Vol 1, 2005, p.75.

²²⁰ Act 13 of 2002.

²²¹ Act 130 of 1998.

on the application requirements, the appeals procedure and the rights and obligations of refugees.

4.3.1 Content of the Refugees Act

The Refugees Act²²² defines a child as any person under 18 years of age.²²³ Asylum means refugee status recognised in terms of this Act.²²⁴ Asylum seeker means a person who is seeking recognition as a refugee in the Republic.²²⁵ A refugee is defined as any person who has been granted asylum in terms of the Act.²²⁶ The definitions in the Act are important in ascertaining whether an undocumented foreign migrant child falls within the protection offered by the Act.

Section 3 of the Act²²⁷ echoes the definition provided in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.²²⁸ The definition contained in the South African Refugees Act therefore takes account of the particular problems facing Africa as a whole. Section 3 defines a refugee as someone who was forced to flee his or her country as a result of a well-founded fear of persecution or civil war, serious human rights violations and armed conflict.

In order to apply for recognition as a refugee, an asylum seeker must show that he/she has a well-founded fear of persecution based on one or more of five grounds: political opinions, race or ethnic origin, membership of a social group, religious beliefs and nationality.²²⁹ In addition, an asylum seeker must prove that he/she is outside the country of origin, and is not protected by the government of his country of origin or is compelled to flee the country in order to seek refuge in another country as a result of external aggression, occupation, foreign domination, or events seriously disturbing

²²² Act 130 of 1998.

²²³ The Refugees Act 130 of 1998, op cit, section 1(vii).

²²⁴ Ibid, section 1(iv).

²²⁵ Ibid, section 1(v).

²²⁶ Ibid, section 1(xv).

²²⁷ Section 2(a) provides that no person may be refused entry into the Republic, expelled, extradited or returned to any other country, if such person is compelled to return to or remain in a country where he or she may be subjected to persecution on account of race, religion, nationality, political opinion or membership of a social group. In addition, subsection (b) states that his / her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or whole of that country.

²²⁸ OAU Convention, footnote 5, op cit, Article 1(1).

²²⁹ Van Garderen J and Winterstein S, op cit, p.210.

public order.²³⁰ The list of requirements is cumbersome if one is to apply them to a young unaccompanied child.

The Refugees Act makes no distinction between children and adults and requires both categories to follow the same procedure when applying for asylum or refugee status in South Africa. In many cases, child asylum seekers do not have identification papers, such as a passport or birth certificate.

Two broad categories of child refugees exists; those who enter the country with, and remain accompanied, by their parents or other legal guardians, and those who are unaccompanied or become separated from their parents or legal guardians. Generally, an accompanied child asylum seeker's status is dependent on the parent's status. The child's status as a dependent or a recognised refugee may change when the parent's status is withdrawn, suspended or the child's dependent dies.²³¹ In these circumstances, the child will be permitted to remain in the country and apply independently for refugee status.



Accompanied children may also bring their own asylum applications separately from those of their parents. The Act requires the guardian or parent to assist the dependent child in this application process.²³² Section 27 of the Act states that a refugee enjoys full legal protection and this protection includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic.

4.3.2 Arrest, Detention and Deportation of Children

Section 29 (2) of the Refugees Act and section 34 of the Immigration Act provides for the protection of children in detention. Section 32 of the Refugees Act²³³ provides for the protection and care of any child who appears to be in need of care and who

²³⁰ Ibid.

²³¹ Van Garderen J and Winterstein S, op cit, p.214.

²³² Ibid, p.215.

²³³ Section 32(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act No.74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found. Section 32(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act. Section 32(3) Any mentally disabled person who appears to qualify for refugee status in terms of section 3 must be assisted in applying for asylum in terms of this Act.

qualifies for refugee status.²³⁴ Section 32 of the Refugees Act prescribes that the Child Care Act must apply in cases where refugee and unaccompanied children are found to be in need of care. The Refugee Act makes provision for measures such as legal representation for children, removal of a child to a place of safety, and bringing a child before a Children's Court.²³⁵

The Children's Court is required to place a child in foster care, children's home or a school of industries.²³⁶ The Court protects the rights of foreign children, especially in relation to the departure and removal of children who have been declared as illegal aliens in terms of the Immigration Act. The Children's Court enquires into the reasons for the child's presence in South Africa to determine whether the unaccompanied child has a refugee status and if he/she should be assisted in making the application. Ultimately, the Children's Court should oversee the deportation process to ensure that it is sensitive towards the rights and needs of child deportees and upholds the best interest of the child principle.

Undocumented foreign migrant children, who may not qualify as refugees, may not be protected by the Refugee Act. These children are required to follow the same complicated procedures to apply for asylum or refugee status as adults. The procedure fails to prioritise the best interests of the child and as a result, undocumented foreign migrant children are vulnerable to the procedural technicalities of the refugee status determination process. There is a gap in providing protection for undocumented foreign migrant children in the Refugee Act.

4.4 Child Specific Legislation in South Africa

Currently, the protection of children in South Africa is governed by the Child Care Act 74 of 1983. However, civil society and various other stakeholders have been lobbying for the enactment of the Children's Bill. The Child Care Act provisions do not adequately take account of the increasing needs of children in South Africa. The

²³⁴ Van Garderen J and Winterstein S, op cit, p.215.

²³⁵ A children's court is a part of the magistrate's court system in South Africa. The Child Care Act provides for children who are abused or neglected to be brought before the children's court to hold an enquiry to decide whether the parents are fit to have custody of the child. Extract taken from Paralegal Manual, Education and Training Unit, 2005, p.296.

²³⁶ Van Garderen J and Winterstein S, op cit, p.217.

Children's Bill was passed by Parliament in June 2005 in respect of national competencies and has to now be passed by the National Council of Provinces. The portion of the Children's Bill dealing with provincial competencies will be passed through the same process.²³⁷ However, the Child Care Act 74 of 1983 governs the protection of children in South Africa until the Children's Bill is passed as an Act of Parliament.

4.4.1 Child Care Act No 74 of 1983

The Child Care Act defines a child as a person under 18 years of age,²³⁸ but contains no specific reference to refugee or foreign children. Section 11(1) of the Child Care Act²³⁹ should also apply in the case of unaccompanied foreign migrant children in South Africa. Due to the absence of a specific reference to foreign children in the Child Care Act, one could infer that such children are partly covered by Section 14(4)²⁴⁰ of the Act which sets out the grounds for determination of a child to be

²³⁷ Section 75 Bill: Once an ordinary Bill that does not affect the provinces has been passed by the National Assembly, it is referred to the National Council of Provinces (NCOP). The council must pass the Bill, subject to amendments proposed by the Council or reject the Bill. If the council passes the Bill without proposed amendments, the Bill must be submitted to the President for assent. If the NCOP passes a bill subject to proposed amendments or if the NCOP rejects a Bill, it goes back to the National Assembly. The National Assembly must then reconsider the Bill by taking any amendments proposed by the NCOP into account and may pass the Bill again or may decide not to proceed with the bill. A Bill that has been passed by the National Assembly must then be submitted to the President for assent. Section 76 Bill: Once an ordinary Bill that affects the provinces has been passed by the National Assembly, it must be referred to the NCOP. The Council must pass the Bill, pass an amended Bill or reject the Bill. A section 76 Bill must, if it was passed by the Council without any amendment, be submitted to the President for assent. If the Council passes an amended Bill it goes back to the National Assembly and if the National Assembly passes the amended Bill, it must then be submitted to the President for assent. Information taken from <http://www.doj.gov.za/2004dojsite/legislation/legprocess.htm> accessed on 15 September 2005.

²³⁸ Section 1(v).

²³⁹ Section 11(1) If it appears to any court in the course of any proceedings before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety and be brought as soon as may be thereafter before a children's court.

²⁴⁰ Section 14(4) At such enquiry the children's court shall determine whether –

- (a) the child has no parent or guardian; or
- (b) the child has a parent or a guardian or is in the custody of a person who is unable or unfit to have the custody of the child, in that he-
 - (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child;
 - (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated;
 - (iii) has caused or conduced to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts;
 - (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child;
 - (v) fails to maintain the child adequately;
 - (vi) maintains the child in contravention of section 10;
 - (vii) neglects the child or allows him to be neglected;

declared in need of care. The Act vests the Children's Court with the power to decide what should happen to the child thereafter. Therefore in the case of undocumented foreign migrant children, they should be brought before the Children's court to decide whether or not they have at least adult supervision and if they should be referred for help or to an appropriate place of safety.

The absence of a reference to refugee or foreign children is a significant gap in this legislation given the fact that until the Children's Bill is passed, it remains in force. Due to the many changes which have been made to the Children's Bill, refugee or foreign children remain an unidentified class of children in the Bill as well, as is argued below.

4.4.2 The Children's Bill

The Children's Bill was passed on 22 June 2005 to protect the rights of children in South Africa. However, it fails to include a specific section on refugee children. At present, lobbying organisations are trying to have the chapter on refugee children included before it is passed in the provincial legislature.²⁴¹ However, it may be too late and the Bill may have missed an opportunity to address this vulnerable group of children in the Children's Bill.

In 2003, the South African Law Commission²⁴² recommended that a provision guaranteeing that refugee children and children seeking refugee status enjoy the rights set out in Chapter 4 of the proposed Children's Bill should be included.

In 2004, key lobby groups mainly led by Lawyers for Human Rights refugee rights project, suggested that refugee and unaccompanied minors be allocated a specific section in the Bill including the provision that no child may be refused entry into the

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- (viii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance;
 - (ix) has abandoned the child; or has no visible means of support.

²⁴¹ Lawyers for Human Rights and the National Consortium for Refugee Affairs, *Submission for inclusion in the Draft Children's Bill*, 2004, p3. Sourced from http://web.uct.ac.za/depts/ci/plr/pdf/subs/jul04/lhr_foreignch.pdf, accessed on 12 August 2005.

²⁴² South African Law Commission, *Report on the Review of the Child Care Act*, 2003, part 2 of 3, p.292.

Republic.²⁴³ The substantiation for a specific section dealing with refugee children was based on the fact that both the Immigration Act and Refugees Act are inadequate in protecting the rights of foreign children; hence such an inclusion is necessary in the Children's Bill. The Children's Bill had also undergone various changes and the submission made reference to the first draft which had included in Section 21, which contained certain rights relevant to refugee and foreign children. This section was however later omitted by the drafters and the legislature.

Lawyers for Human Rights included recommendations in respect of specific sections in the draft which could be extended to ensure the adequate protection of the rights of foreign children. These included a recommendation that the Children's Court should be regarded as the first point of initial entry for any foreign child and that section 45 should be extended to include this.²⁴⁴ The submission recommended that the orders of the Children's Court should include: 'An order instructing the circumstances when and the manner in which children, who had been declared to be illegal foreigners in terms of the Immigration Act, are detained and removed from the Republic.'²⁴⁵ Most importantly, Lawyers for Human Rights recommended that 'unaccompanied refugee and foreign children be recognised as children in need of care and protection, who are entitled to be dealt with in terms of Children's Court proceedings.'²⁴⁶ To this end, Lawyers for Human Rights recommended that '(j) is an unaccompanied foreign child' be added to Section 150 to ensure that such child is protected adequately and receives care and protection.

²⁴³ Lawyers for Human Rights (LHR) and the National Consortium of Refugee Affairs, op cit, p.3. Lawyers for Human Rights recommended that the following section be included as a specific section dealing with refugee and unaccompanied minors:

1. Every child who is a refugee or asylum seeker in terms of the Refugees Act and every unaccompanied foreign child, have –
 - (a) the rights set out in this Chapter,
 - (b) the right to be re-united with his or her parents or family if the child was separated from his or her parents or family.
- (2) No child may in any way whatsoever be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such a refusal, expulsion, extradition, return or other measure, such child is compelled to return to or remain in a country where –
 - a. He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
 - b. His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, other events seriously disturbing or disrupting public order in either part of the whole country.

²⁴⁴ Ibid, p.4.

²⁴⁵ Ibid, p.5.

²⁴⁶ Ibid, p.5.

However, despite the efforts of these lobby groups, the Children's Bill passed on 22 June 2005, did not include the submission in respect of a specific section for refugee children.²⁴⁷ One key inclusion in the Children's Bill was the recognition of unaccompanied foreign children as children in need of care and protection.²⁴⁸ Hence, the submission regarding the extension of Section 150 to include an unaccompanied foreign child was included. This inclusion provides a minimal level of protection for foreign children but does not cover the other areas of concern in respect of the role of the children's court and the orders which they should be entitled to make or the deportation of foreign children generally.

It is of great concern that despite recent media coverage of the gaps in South Africa's implementation procedures regarding foreign children, the legislature failed to take account of the recommendations made by Lawyers for Human Rights and others in respect of the protection of foreign children. If legislation and policy remains inadequate in protecting these children, implementation will invariably be inadequate. In addition, the failure to include this specific section is a grave oversight in respect of ensuring the domestication of the Convention on the Rights of the Child in South African legislation.

4.5 Concluding Observations

It is evident from the discussed South African legislation that South Africa has addressed the needs of undocumented foreign migrant children in a piecemeal fashion. Each piece of legislation does not specifically address the legal requirements of undocumented foreign migrant children and as such their needs are addressed on an ad hoc basis. This in itself is a cumbersome process for legal officers who are required

²⁴⁷ See Children's Bill, B70B-2003

²⁴⁸ Children's Bill, B70B-2003, Section 150(2)(b) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker in terms of section 155(2):

- (a) a child who is a victim of child labour.
- (b) An unaccompanied foreign child;
- (c) A child who is a victim of trafficking;
- (d) A street child; and
- (e) A child in a child-headed household.

to have specialised knowledge in order to provide immediate and effective assistance to such children.

In addition, the passing of the Children's Bill without a specific inclusion of the legal rights of refugees or unaccompanied foreign children rights is a great omission on the part of the legislature. This group of children therefore remain legally excluded in respect of addressing their rights.

The South African Constitution provides a fall back position in respect of claiming the rights of undocumented foreign migrant children. Constitutional imperatives should, however, be amplified in specific pieces of legislation dealing with children generally and with undocumented foreign migrant children specifically.

In conclusion, the South African legal framework does not adequately provide for the needs of undocumented foreign migrant children. The Refugees Act, the Child Care Act No 74 of 1983, and the Children's Bill need to be amended to incorporate the increasing needs of undocumented foreign migrant children as a specific group of children in need of care.



CHAPTER 5: DOMESTIC CASE LAW

5.1 Introduction

In the previous chapter, the South African legal framework was investigated as it pertains to the rights of undocumented foreign migrant children. This chapter discusses the domestic courts application of the legal framework in its judgments. This is aimed at assessing the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children through jurisprudence.

The chapter also seeks to investigate the extent to which South African courts are incorporating international laws and standards into their judgments. Sloth-Nielsen is of the view that South African domestic courts are bound by section 39 of the Constitution which requires courts to consider international law in their deliberations.²⁴⁹



5.2 South African Courts Judgments on Socio-Economic Rights

In the *Grootboom* case²⁵⁰ a group of families, including young children, were evicted from land which they had been unlawfully occupying. The Constitutional provisions which came under scrutiny in this case were section 26 which grants everyone access to adequate housing and section 28 (1) (c) which places an obligation on the State to provide children with shelter, basic nutrition, basic health care and social services.²⁵¹

The court held that the rights enshrined in section 28 must be read with the child's right to family or parental care, or to appropriate alternative care when removed from the family environment. The court held further that where children are in parental or

²⁴⁹ Sloth-Nielsen J, *Children's Rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child*, The International Journal of Children's Rights, Volume 10, 137-156, 2002, p.139. Section 39 (1) (a) requires a court, tribunal or forum, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39 (2) provides that when interpreting any legislation, or developing the common law or customary law, every court must 'promote the spirit, purport and objects of the Bill of Rights.

²⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

²⁵¹ Sloth-Nielsen J, 2002, op cit, p.148.

familial care, the State's obligation would entail passing laws and creating enforcement mechanisms and in respect of housing, the State is only required to provide that on a programmatic basis subject to available resources.²⁵² Wesson opines 'that courts should protect the interests of vulnerable minorities who, by virtue of being minorities are unable to avail themselves of majoritarian political processes. The courts should, in other words, regard themselves as guardians of the interests of such groups.'²⁵³ An implication of this judgment is that the State would take responsibility for the socio-economic rights of children in cases where parental or family care is absent, as would be the case of unaccompanied foreign children.

Sloth-Nielsen opines that the *Grootboom* case does refer to the Convention on the Rights of the Child but no influence of the Convention in the final decision can be evidenced.²⁵⁴ In my view, the Constitutional Court should give meaning to the Conventions which South Africa has ratified as this will provide guidance, particularly on matters dealing with children.

The Constitutional Court of South Africa had occasion to determine the constitutionality of certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act which limits social grants, child support grants and care dependency grants respectively, to South African citizens.²⁵⁵ This was in *Khosa/Mahlaule and others v Minister of Social Development and others*²⁵⁶ where the Court stated the following:

'The socio-economic rights in sections 26 and 27 of the Constitution are conferred on 'everyone' by subsection (1) in each of those sections. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of 'all people in our country', and in the absence of any indication that the section 27 (1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word "everyone" in this section cannot be construed as referring only to "citizens".²⁵⁷

In the *Khosa/Mahlaule* case, the applicants in both cases had acquired permanent residence status in South Africa by virtue of exemptions granted to them under the Aliens Control Act 96 of 1991. They were prevented by sections 3 and 4 of the Social

²⁵² Sloth-Nielsen J, 2002, op cit, p.149.

²⁵³ Wesson M, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, Volume 20, 2004, p. 292.

²⁵⁴ Ibid.

²⁵⁵ *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC), p.607, par. 99 E.

²⁵⁶ Ibid.

²⁵⁷ *Khosa v Minister of Social Development*, op cit, p.590, para. 46 B.

Assistance Act 59 of 1992 from benefiting from social grants due to the fact that such grants were only available to South African citizens.²⁵⁸

The applicants relied on the wording of section 27 (1) (c) of the Constitution, which states that ‘everyone’ has a right to access social security; that their exclusion from the social security scheme amounted to unfair discrimination.²⁵⁹ The applicants argued that the exclusion of primary caregivers, who were permanent residents, from accessing the Child Support Grant for children in their care, especially where the children were South African citizens, constituted a violation of the children’s rights in section 28 of the Constitution.²⁶⁰

The State confirmed that children who were South African citizens should not be denied access to the Child Support Grant and that a provision in legislation that denies them this access would be unconstitutional. The court confirmed further that the exclusion of children from access to these grants amounted to unfair discrimination on the basis of their parents’ nationality and that denial of support to children trenches upon their rights under section 28 (1) (c).



The majority of the court concluded that the ‘the Constitution properly interpreted provides that a permanent resident need not be a citizen in order to qualify for access to social security’.²⁶¹ The court reiterated that there is no citizenship requirement in respect of the foster parents of a care dependent child.²⁶²

In assessing the value of socio-economic jurisprudence in South Africa over the last couple of years, Wesson opines that the key judgments which are *TAC*, *Grootboom* and *Khosa*, all concern cases of exclusions of particular groups from socio-economic programmes.²⁶³ Sloth-Nielsen, however, advances the argument that *Grootboom* and

²⁵⁸ Ibid, p.575, par. D-F. Social Assistance Act as referred to above has been replaced by the Social Assistance Bill, B57B-2003. However this legislation is not currently in operation.

²⁵⁹ Sloth-Nielsen J, *extending access to social assistance to permanent residence*, ESR Review, Vol. 5, No. 3, July 2004, Community Law Centre (UWC) p.2, accessed at http://www.communitylawcentre.org.za/ser/esr2004/2004july_access.php accessed on 27 September 2005.

²⁶⁰ Ibid.

²⁶¹ *Khosa v Minister of Social Development*, op cit, p.592, par. F.

²⁶² Ibid, p.600, par. A.

²⁶³ Wesson M, op cit, p.297.

TAC required the Constitutional Court to evaluate the compliance of State programmes with Constitutional requirements. Sloth-Nielsen emphasises that Khosa/Mahlaule specifically concerned the exclusion of non-citizens from the programme at issue.²⁶⁴

The implementation of this jurisprudence was recently challenged in the unreported *Coco, Musenge, Maulu v Minister of Social Development and Others case*.²⁶⁵ This case concerned a high court application by political refugees seeking immediate access to foster care grants for children in their care. Three refugees from the Democratic Republic of Congo lodged an application for access to government's R570 monthly foster care grant for each of the nine children in their combined care.²⁶⁶

The case was brought in the form of a class action on behalf of all refugees experiencing problems accessing the grant in South Africa. The children on behalf of whom the applicants were seeking foster care grants for were aged between four and sixteen years. In their founding affidavits, the applicants stated that they had been trying to access the foster grant for one and two years respectively. The government's computer systems rejected their identity numbers and were therefore unable to process their applications. The applicants sought an order compelling the government to put mechanisms in place to allow their applications to be processed and for the grants to become payable within 10 days of the court's judgment. In addition, they sought R66 100 in arrears payable since their applications were first made.

On the 7th of September 2005, the Transvaal Provincial Division ordered that the Department of Social Development adjust its administrative and computer infrastructure so that it is able to process the foster care grant applications and similar applications which are brought by refugee parents in terms of the Social Assistance Act 59 of 1992.²⁶⁷

The court ordered that pending such adjustment, the Department should pay R530 to second and third applicants per month in respect of their foster children. The court

²⁶⁴ Sloth-Nielsen J, July 2004, op cit, p.9.

²⁶⁵ Transvaal Provincial Division, Case Number 9841/2005, unreported judgment.

²⁶⁶ http://www.lrc.org.za/Articles/Articles_Detail.asp?.art_ID=148, accessed on 4 November 2005.

²⁶⁷ *Coco, Musenge and Maulu v Minister of Social Development and others*, op cit, p.1.

ordered that the arrear amounts be paid from the date of first application to the date of payment to the applicants.²⁶⁸

This case illustrates the court's willingness to implement the interpretation of the law in the Khosa judgment and sets a precedent for future access to foster care grants for foreign children. It is clear from the facts of the case that the Department of Social Development is required to make internal changes and to uphold the rights enshrined in the South African Constitution to ensure that equality applies to both South African and non South African citizens.

5.3 South African Jurisprudence on Detention and Deportation of Children

In *Lawyers for Human Rights v Minister of Home Affairs*²⁶⁹ the applicants sought confirmation of a High Court order declaring certain provisions of the Immigration Act 13 of 2002 unconstitutional. The government opposed the application and appealed against the judgment. The relevant provisions were all part of Section 34²⁷⁰ of the Act, which was concerned with the way in which illegal foreigners were to be



²⁶⁸ Ibid, p.2.

²⁶⁹ *Lawyers for Human Rights v Minister of Home Affairs*, 2004 (4) SA125 (CC).

²⁷⁰ Section 34(1) of the Immigration Act 13 of 2002 provides the following: "Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General, provided that the foreigner concerned-

- (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
- (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
- (d) may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and
- (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."

Section 34(2) provides: "The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four pm of the first following court day."

removed from the country and the way in which they were treated pending their removal or deportation.²⁷¹

The Court stated that the rights of the Constitution which were implicated were section 12²⁷² and section 35(2).²⁷³ The Court further indicated that

the provisions challenged in the High Court were of immense public importance. It reiterated that it was a delicate issue that had implications for the circumstances and the extent to which restrictions are placed to the liberty of human beings who may be said to be illegal aliens. The determination of the question may adversely affect not only the freedom of the people concerned but their dignity as human beings. The very fabric of society and the values embodied in the Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving national integrity.²⁷⁴

Yacoob J, reiterated that persons within the South African border have the protection of the South African courts and should be given the benefit of 'everyone' in section 12 (2) and section 35 (2) of the Constitution.²⁷⁵ The court found section 34 (8) to be inconsistent with the Constitution in that it did not allow the protection afforded to a



²⁷¹ *Lawyers for Human Rights v Minister of Home Affairs*, op cit, p.131, par.3 A-B.

²⁷² Section 12: "Everyone has the right to freedom and security of the person, which includes the right

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent."

²⁷³ Section 35(2) provides: "Everyone who is detained, including every sentenced prisoner, has the right-

- (a) to be informed promptly of the reason for being detained;
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned to the detained person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- (f) to communicate with, and to be visited by, that person's-
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counselor; and
 - (iv) chosen medical practitioner."

²⁷⁴ *Lawyers for Human Rights v Minister of Home Affairs*, op cit, p.137, par.20 D.

²⁷⁵ *Ibid*, p.138, par.I.

detainee in terms of section 34 (1) (d) and the court ordered the amendment of the wording in the section.²⁷⁶

The judgment succeeds in confirming that the Constitution is applicable to citizens and non-citizens equally.

5.3.1 Centre for Child Law Case

In *Centre for Child Law v Minister of Home Affairs & Others*²⁷⁷ the applicant brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela Repatriation Centre.

5.3.1.1 Facts of the Case

At the time of the application in March 2004, the children were being held together with adults detained at Lindela Repatriation Centre and were facing deportation. The Court granted an interdict preventing the Minister of Home Affairs from proceeding with the deportation of the children, and appointed a curator ad litem for the children. The curator ad litem was required to investigate the circumstances of the children in detention and to make recommendations to the Court regarding their treatment and to institute legal proceedings in enforcement of their rights.²⁷⁸ The curator recommended that the children be moved immediately to a place of safety known as Dyambu, and that the Children's Court inquiries should be held in respect of each of them. The children were then moved from Lindela to Dyambu Youth Centre on 2 April 2004.²⁷⁹

During May 2004, the Krugersdorp Commissioner of Child Welfare refused to conduct Children's Court inquiries in respect of these children and advanced the reason that foreign children fell outside the ambit of the Child Care Act 74 of 1983. On 21 May 2004 the High Court set aside the Commissioner's refusal to conduct Children's Court proceedings, and ordered him to conduct such inquiries.²⁸⁰

²⁷⁶ Ibid, p.144, par. A.

²⁷⁷ *Centre for Child Law v Minister of Home Affairs & Others*, 2005 (6) SA 50 (T).

²⁷⁸ *Centre for Child Law case*, op cit, p.55, par. 4, 5 & 6.

²⁷⁹ Ibid, par. 8.

²⁸⁰ Ibid.

5.3.1.2 The Role of the Children’s Court and the Department of Social Development

Children’s Court enquiries are held to establish the status of children. Lawyers for Human Rights²⁸¹ opined that affidavits before the Court demonstrated that South African children had been found at Lindela on suspicion of being foreign children. If unaccompanied foreign children are to be repatriated, international law requires that there must be a proper investigation into whether there is a suitable home for them to return to, and adequate arrangements must be made for their safe reintegration into their communities. The South African Department of Home Affairs’ standard practice has been to transport the children by train or truck and dump them without money, food or assistance at the nearest police station on the other side of the border, or at the border itself.²⁸² In sum, the Department of Home Affairs did not conform to international standards in respect of deportation or repatriation of foreign children.

The Department of Social Development is tasked with the responsibility of opening enquiries into the circumstances of children, which they failed to do. Lawyers for Human Rights wrote to the Chief Director in the Department of Social Development in early August, warning that the matter would have to go back to court if the children’s court inquiries were not opened by a specified date, to which no reply was received. The inaction on the part of the Department of Social Development necessitated the urgent application on behalf of the children.²⁸³

5.3.1.3 Decision of the Court

The Transvaal Provincial Division relied on section 28 (2) of the Constitution which provides for the ‘best interests of the child’. In considering the socio-economic rights of children, the Court held that the State is under a direct duty to ensure basic socio-

²⁸¹ Lawyers for Human Rights assisted the Centre for Child Law in representing these children.

²⁸² Sourced from <http://www.lhr.org.za/home/news04.htm>, accessed on 9 November 2005.

²⁸³ *Centre for Child Law v Minister of Home Affairs*, p.56, par.9.

economic provision for children who lack family care as do unaccompanied foreign children.²⁸⁴

The court referred to chapter 3 of the Child Care Act 74 of 1983 and stated that the Act provides the necessary mechanisms for the protection of children.²⁸⁵ The court further referred to section 12(2) (c)²⁸⁶ of the Child Care Act as another relevant provision in this particular case. The court found that policemen, social workers and authorised officers had not done what they were required to do in terms of section 12(2)(c), and thereby infringed upon the children's rights as protected in the Constitution and the Child Care Act. The court highlighted the fact that foreign citizens have the right to legal representation as was decided in *S v Thomas*.²⁸⁷

In respect of the legal representation of children; 'that in the circumstances of this case all unaccompanied children that find themselves in South Africa illegally should have legal representation appointed to them by the State'.²⁸⁸ The court stated:

The order granted is merely the first step towards finding proper solutions to the problem presently faced by unaccompanied foreign children in South Africa. To my mind, the respondents have a duty to liaise with each other, to find a solution and to work on detailed practical arrangements to ensure that unaccompanied foreign children are dealt with in accordance with the principles already set out above.²⁸⁹

The Minister of Social Development, the Director General Department of Social Development and the Member for the Executive Committee of the Gauteng

²⁸⁴ Ibid, p.57, par.17.

²⁸⁵ Ibid, p.57, par.18: Chapter 3, section 13 of the Child Care Act provides that any child who has no parent or guardian must be brought before the Children's court for an inquiry to determine whether the child is a child in need of care and whether that child should be removed to safety.

²⁸⁶ Ibid, p.58, par.21: Section 12 (2) (c) of the Child Care Act provides for policemen, social workers or authorized officers to remove a child to be placed into safe care.

²⁸⁷ 2001 (2) SACR 608. In this case the court decided that 'Everyone' in section 9 of the Constitution establishes that everyone within the borders of South Africa is entitled to the protection of the Bill of Rights and in particular the equality provisions thereof. It protects everyone against unfair discrimination in particular based upon their ethnic or social origin which is relevant to the present matter where the accused is an Angolan citizen. In addition to these equality rights, section 35(3) is also relevant. It provides: (3) Every accused has the right to a fair trial which includes the right: (f) to choose, and be represented by, a legal practitioner, and to be informed of this right; (g) to have a legal practitioner assigned to the accused by the State, and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly,' Claassen J held that 'it would seem abundantly clear to me that the equality provisions read jointly with the right to legal representation afforded 'every accused', would also accrue to foreigners accused of criminal conduct within the borders of South Africa.' p.609, par.4 & 5.

²⁸⁸ *Centre for Child Law v Minister of Home Affairs*, p.59, par.29.

²⁸⁹ Ibid, par.31.

Department of Social Development were directed to take the thirteen unaccompanied foreign children, detained at Dyambu Youth Centre, within 5 days from the date of the order, to the Krugersdorp Childrens Court to conduct enquiries in terms of section 14 of the Child Care Act.²⁹⁰

It was further ordered that the Centre for Child Law, the curator ad litem and Lindela Repatriation Centre, adhere to the following procedure in respect of unaccompanied foreign children detained at Lindela Repatriation Centre: to compile a list containing the names, ages, sex, gender and countries of origin of all foreign children in detention at Lindela and to assist the Social Development departments to immediately remove these children and place them in an appropriate place of care or place of safety.²⁹¹

The court ordered that the Minister of Safety and Security and the National Commissioner for the South African Police Services comply with section 12(2)(c) of the Child Care Act and to ensure that foreign children appear before a children's court prior to being arrested.²⁹²



Lawyers for Human Rights expressed the view that the importance of this judgment was the fact that foreign children have the right to legal representation and that there is a positive duty on government departments to liaise with one another to formulate and implement practical arrangements regulating unaccompanied foreign children in South Africa.²⁹³

It is observed that this case demonstrates weaknesses in South Africa's treatment of undocumented foreign migrant children. Issues regarding the appointment of a guardian, lack of legal representation, the failure to bring the children before the children's court, the lack of proper care and accommodation arrangements as well as the inability of various government departments to work together are evident. South Africa, in this instance has acted in violation of international and national norms and standards in respect of the treatment of undocumented foreign migrant children.

²⁹⁰ Ibid, p.60, par.2.

²⁹¹ Ibid, p.60. par.4.

²⁹² Ibid, p.60, par.7.

²⁹³ <http://www.lhr.org.za/home/news04.htm>, accessed 9 November 2005.

5.4 Implications of the Centre for Child Law Case

Ann Skelton, who was involved in the litigation on behalf of the Centre for Child Law, provides an overview of key and critical gains which this case has made in respect of the treatment of unaccompanied foreign minor children.²⁹⁴ She states that under South African law, a Children's Court inquiry is governed by the Child Care Act and the inquiry is held in matters where there are reasons to believe that a child is in need of care and protection. The rationale in requiring that a Children's Court inquiry be held in respect of unaccompanied foreign children arises from the fact that they are not living with a parent or legal guardian. Children's Court proceedings therefore establish the status of children.²⁹⁵ Indeed, the judgment places an obligation on government officials to ensure that foreign children appear before a children's court as a point of initial enquiry.

The judgment placed a positive duty on government departments to liaise with one another. The judgment made reference to the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the 1951 Convention Relating to the Status of Refugees.²⁹⁶ The court's order highlighted the lack of procedure and co-ordination between government departments in respect of foreign children specifically. The court's reference to international law, demonstrates the commitment to ensure that international law guides decision making and practical implementation in South Africa.

Skelton advises that an agreement has been entered into between the Legal Aid Board and a group of legal practitioners from around the country who will be trained to provide legal representation for unaccompanied foreign children. Notably, undocumented foreign migrant children require specialised legal assistance, given firstly the fact that they are children and, secondly, the fact that they are at a distinct legal disadvantage upon their arrival in a foreign country. Hence, specialised legal

²⁹⁴ Skelton A, *No Dumping: litigating for the proper treatment of unaccompanied foreign children in South Africa*, A paper presented at the 4th World Congress on Family Law and Children's Rights 20th-23rd March 2005, Cape Town, p.1 (unpublished paper).

²⁹⁵ Skelton A, *op cit*, p2.

²⁹⁶ Skelton A, *op cit*, p4.

training is crucial in optimising the legal protection of foreign children in South Africa.

In a different analysis of the judgment, Abeda Bhamjee critically reflects on the role of the curator ad litem amongst others.²⁹⁷ Bhamjee avers that the children were removed from Lindela and taken to Dyambu Youth Centre which hosts awaiting trial juvenile offenders. She states that the placement of unaccompanied foreign minors with juvenile offenders goes against international norms.²⁹⁸ I agree with this view as international law prescribes that unaccompanied foreign minors should be placed in appropriate accommodation taking into account their specific needs. Unaccompanied foreign minors are not on trial or accused persons and therefore should not be accommodated with those accused of criminal offences. In addition, the South African Constitution clearly stipulates that children should only be detained as a last resort and for the shortest possible period of time.

Bhamjee concedes that the case has succeeded in highlighting the issue of unaccompanied minors in detention and forced government to face this issue. However, she states that the weakness in the case is that it has not provided an example of best practices to the extent that the law demands.²⁹⁹ In this regard she states that the deportation of children with no Children's Court proceedings has been highlighted. She contends that despite the judgment, children are continually being detained in a facility for awaiting trial juveniles and as a result, minors are now being released by police to fend for themselves as a result of Lindela turning them away.³⁰⁰ Her contention suggests that no meaningful alternative has been found to accommodate these children in the future.

In 2000, a report on Lindela Detention Centre recommended that children under 18 years be detained as a measure of last resort, be kept separate from adult detainees and

²⁹⁷ Bhamjee A, *Aiding the least and loneliest: Developing Law and Best practice for the detection, treatment and deportation of undocumented foreign unaccompanied minors in South Africa*, published by the University of Witwatersrand, September 2004.

²⁹⁸ Bhamjee A, op cit, p.17.

²⁹⁹ Bhamjee A, op cit, p.23.

³⁰⁰ Ibid.

be treated in a manner and kept in conditions that take account of the child's age.³⁰¹ The report had suggested the introduction of a separate judicial inspectorate for undocumented migrants arrested and held in detention at correctional services, police stations and other facilities such as Lindela and that such inspectorate should be accountable to the South African Human Rights Commission.³⁰² Despite these recommendations, unaccompanied foreign minor children still experienced problems upon their arrival in South Africa which clearly indicates that the recommendations were never implemented.

5.5 Policy and Procedure – Centre for Child Law

Fritz Gaerdes, an attorney at Lawyers for Human Rights,³⁰³ who was involved in the Lindela case, indicated that since the judgment, Lindela is no longer admitting foreign minor children and this situation is being closely monitored by Lawyers for Human Rights. He indicated that specialised legal training was currently underway with Legal Aid Board attorneys to ensure that the legal requirements of undocumented foreign migrant children are adequately addressed. He confirmed the previous report of Ann Skelton insofar as implementing changes after the *Centre for Child Law* judgment. It is evident though, that the onus does not rest on these attorneys only, more importantly government departments need to address changing attitudes to the treatment of foreign children and to rectify the obvious flaws in their current procedures and practices.

On 30 August 2005, the Home Affairs Portfolio Committee held meetings in respect of establishing a refugee relief fund and key concerns in respect of discrimination, xenophobia, the issuing of identity documents and the treatment of foreign children in South Africa were raised by various stakeholders.

At the same hearings, the United Nations High Commissioner for Refugees stated that it was difficult for refugee children to get a proper education and recommended that

³⁰¹ http://www.sahrc.org.za/sahrc/cms/publish/cat_index_41.5html, accessed on 15 August 2005, *Lindela at the Crossroads for detention and repatriation, an assessment of the conditions of detention by the SAHRC, JHB, December 2000*, p.71.

³⁰² *Ibid*, p.76.

³⁰³ Telephonic interview conducted between the writer hereof and Fritz Gaerdes, Lawyers for Human Rights on 2 November 2005.

these children be afforded free primary education as enshrined in the Convention on the Rights of the Child. In addition, the United Nations High Commissioner for Refugees recommended that the South African government consider an extension of social security to refugees. The Director General of Social Services in the Western Cape stated that the laws did not allow refugees to qualify for social security but that the children of refugees were entitled to the Foster Parent Grant, identity documents and birth certificates. It is notable that despite this contention, as was indicated earlier in this chapter, foreigners are currently continually experiencing problems in accessing social security in South Africa.³⁰⁴

The South African Human Rights Commission (SAHRC) made two key recommendations to address the situation of refugees in South Africa. Firstly, it recommended the establishment of a refugee council in South Africa which would be made up of government and non-governmental organisations, including refugees. The council would discuss formulate and implement strategies for dealing with the situations faced by refugees. In the second instance, the SAHRC recommended that an inter-governmental body be established with the sole aim of dealing with refugee matters only. This body would facilitate inter-departmental co-ordination and co-ordination between the different tiers and different levels of Government in respect of refugees.³⁰⁵ It is my submission that the establishment of an interdepartmental body would be helpful in assisting undocumented foreign migrant children, given the recent developments in the *Centre for Child Law* case.

In sum, this meeting demonstrates that South Africa is acknowledging that it has procedural problems in respect of foreigners and undocumented foreign migrant children. This is however only a beginning and clearly requires a focussed strategy to ensure that all the aforementioned challenges are addressed.

5.6 Concluding Observations

South Africa has yet to ensure adequate protection of undocumented foreign migrant children. The *Centre for Child Law* case clearly demonstrates the weaknesses in

³⁰⁴ Sourced from <http://www.pmg.org.za/viewminute.php?id=6200> on 5 September 2005. Minutes of Home Affairs Portfolio Committee meeting on the establishment of a Refugee Relief Fund.

³⁰⁵ Ibid.

current policy and practice in South Africa. The *Centre for Child Law* case and the case study on the two Rwandan refugee children,³⁰⁶ illustrates that the various government departments responsible for ensuring the adequate protection of the rights of undocumented foreign migrant children, fail to work together or to act in accordance with the rights enshrined in the South African Constitution. It is further observed that the nature of the cases which have been decided upon by the Constitutional Court indicate that South Africa is not adhering to its international obligations.

The rights of undocumented foreign migrant children especially in respect to detention, legal representation and deportation continue to be violated in South Africa and until the recommendations discussed above are implemented, the State will continue to flout its domestic and international obligations of upholding children rights. There is an urgent need to revisit and amend policy and procedural frameworks to protect undocumented foreign migrant children in South Africa.



³⁰⁶ As discussed in Chapter Two on page 8 of this thesis.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This thesis has highlighted the practical challenges faced by South Africa in its dealings with undocumented foreign migrant children. The myriad of media reports in the last two years clearly indicate that issues of xenophobia, physical abuse and government official's corruption influence the treatment of refugees generally and children specifically in South Africa. The plight of the Rwandan teenagers, as discussed in Chapter two and the *Centre for Child Law* case, as discussed in Chapter five hereof, indicate the gaps which exist in procedure in South Africa.

6.2 Procedural Gaps

Some of these gaps include lack of guardianship, legal representation, children's court proceedings and adequate accommodation for undocumented foreign migrant children. The attitudes of public officials such as the South African police services, magistrates and the Department of Home Affairs leaves lots to be desired and indicates an unwillingness to adhere to international norms and standards in respect of foreign children. However, proper procedure cannot be expected to exist without the necessary legislative framework.

6.3 Legislative Weaknesses

South African legislation is seriously lacking in addressing the needs of undocumented foreign migrant children. The Refugee Act, as discussed in Chapter four hereof, clearly falls short in addressing the specific needs of children. The definition of refugee does not take account of a minor and the Act requires children to prove their fear of persecution in the same manner as adults. However, South African law is guided by international law and as is clear in this thesis, the South African Refugee Act fails in addressing the needs of children.

In the event that refugee specific legislation falls short in respect of children, one necessarily investigates children specific legislation in the form of the Child Care Act and the Children's Bill as referred to in this thesis. Notably, neither of these critical pieces of legislation takes account of the specific needs of undocumented foreign migrant children. As an aside, the only reference to this group of children in the current Children's Bill has been an insertion in respect of unaccompanied foreign children as being children in need of care. It is my submission that this provision is wholly inadequate and that the legislature should have taken Lawyers for Human Rights and other lobbying groups' recommendations on inserting a specific section on undocumented foreign migrant children into account in the final draft bill. The failure to prioritise this category of children, speaks to a greater problem of possible xenophobic attitudes at a higher level, the same attitudes as were evident in the treatment of the children in case studies presented herein.

6.4 International Guidance

In respect of children's rights, international law has provided ample guidance in the form of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The United Nations High Commissioner for Refugees has prioritised the needs of children and drafted guidelines aimed at assisting States to ensure the protection of this marginalised group of children. In addition, the recently released General Comment Number 6 by the Committee on the Rights of the Child provides recommendations in respect of specialised training for legal representatives, guardians, interpreters and others dealing with foreign children.

The General Comment has unequivocally stated that the detention of undocumented foreign migrant children is undesirable and that alternative accommodation should be made available to cater for the needs of this group of children. However despite these international legal guidelines, South African authorities appear to be unaware of the correct procedures to adhere to in respect of foreign children, specialised expertise in dealing with these children is absent and proper accommodation has not been prioritised. This is evident from what has occurred subsequent to the *Centre for Child Law* case, where authorities are turning foreign children away from Lindela

Repatriation Centre without providing alternative accommodation. Inevitably, foreign children are now in a worse position, having to fend for themselves on the streets.

6.5 South African Jurisprudence

Notably, however in various judgments presented herein, the South African courts are increasingly referring to international norms and standards in deciding upon the plight of foreigners generally and minors specifically as was particularly evidenced in the *Centre for Child Law* judgment.

However, jurisprudence provides guidance but the real challenge is implementation and despite the *Khosa* judgment in respect of social assistance, the facts of the new unreported *Coco, Musenge and others* case, indicated that for two years, foreigners in South Africa were struggling to access the foster care grant. The case illustrated major flaws in government's ability to issue child care dependency and foster grants to foreign children in South Africa. These two judgments were, however, precedent setting in respect of access to social assistance for foreign children in South Africa and it is hoped that the orders of the court will influence the Department of Social Development's practices in the future in ensuring that foreign children receive the grant timeously.

6.6 Detention and OPCAT

The greatest failing in South Africa is in respect of the detention of undocumented foreign migrant children. Article 37 of the Convention on the Rights of the Child stipulates that detention should only occur as a last resort and for the shortest possible time. The *Centre for Child Law* case and the case of the Rwandan teenagers clearly demonstrates a violation on the part of South African authorities to adhere to this rule which has also been domesticated into the South African Constitution. In addition, South Africa continues to delay the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

The ratification of this Protocol by South Africa will place an obligation on government authorities to monitor the conditions of correctional facilities as well as

detention centres such as Lindela Repatriation Centre and in this way ensure that children are not held with adult detainees and if held in such centres, that their basic human rights are not violated in any way. It is my submission that currently in South Africa; the Office of the Judicial Inspectorate is well placed to take on the responsibility of monitoring the conditions of detention facilities and safe houses which could house undocumented foreign migrant children. By ratifying this Protocol, South Africa would be adhering to the fundamental principles of openness, fairness and transparency as is guaranteed by the Constitution.

6.7 Concluding Recommendations

The South African government needs to ensure that the Department of Home Affairs specifically leads the establishment of a policy and procedural framework to ensure that undocumented foreign migrant children's needs are addressed. Training across government departments including Home Affairs, police, social workers, magistrates, interpreters and legal practitioners needs to be prioritised and the training needs to ensure that those who work with foreign children understand their specific needs as children firstly and as foreigners.



In particular, the recent recommendations made by the South African Human Rights Commission in respect of the establishment of a Refugee Council which will include both government and civil society representatives should be undertaken. This type of council will ensure that government representatives are informed of the problems faced by the refugee population as a whole and by including a civil society representative dealing with undocumented foreign migrant children specifically, the council will ensure that any new policy initiatives address the needs of children as well. The second recommendation forwarded by the South African Human Rights Commission concerned the establishment of an intergovernmental body to facilitate government co-ordination. It is my submission that this body should be established urgently as it is clear from the case studies presented herein that a critical flaw currently relates to the lack of knowledge by various government departments in dealing with undocumented foreign migrant children and the lack of referral or co-ordination between these government departments.

The situation of foreign children in Africa has been particularly identified and Africa as a continent should be applauded for the enactment of African specific legislation. To this end, the African Commission, the African Committee on the Rights and Welfare of the Child, the African Court on Human and People’s Rights and the African Peer Review Process has recently been established in South Africa to assess the socio-economic achievements or gaps. To ensure the legal protection of undocumented foreign migrant children, it would be important for civil society organisations that protect the rights of these children to become involved in these African-specific initiatives to ensure that South Africa is held accountable to the African norms and standards which it has agreed to abide by.

South Africa should ensure it upholds the provisions of the international instruments it has ratified and the Bill of Rights as enshrined in the Constitution. South Africa therefore has to revisit its laws, policies and practices to ensure that sufficient resources are allocated to protect the rights of undocumented foreign migrant children who find themselves within South Africa’s borders.



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