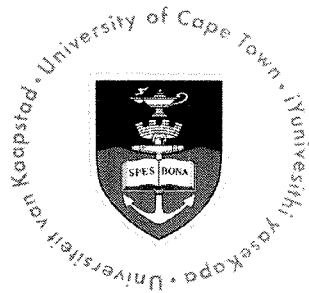


**PROTECTING FOREIGN CHILDREN WITHIN SOUTH AFRICAN BORDERS: AN  
EVALUATION INTO UNACCOMPANIED AND UNDOCUMENTED FOREIGN  
MINORS IN SOUTH AFRICA**

**MINOR DISSERTATION PRESENTED FOR THE DEGREE OF  
MASTER OF LAWS**

By Minor Dissertation with Coursework  
Human Rights Law Specialisation

**DEPARTMENT OF PUBLIC LAW  
FACULTY OF LAW  
UNIVERSITY OF CAPE TOWN**



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**23 920 (Excluding footnotes, contents page and bibliography)**

**FEBRUARY 2017**

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## PLAGIARISM DECLARATION

I, **Jamie – Lee Liedeman**, declare that '**Protecting Foreign Children within South African Borders: An Evaluation into Unaccompanied and Undocumented Foreign Minors in South Africa**', is my work and has not been submitted for any degree or examination in any other University or academic institution. All sources and materials are duly acknowledged and properly referenced.

Signature:

Signed by candidate

Date: 07 . 02 . 2017

## **DEDICATION**

I dedicate this thesis to the Almighty God, my Father who has provided me with the grace to get through all my turmoil and reminded me to have faith, all the time.

Also, to my later mother Julie Liedeman (16.06.1962 – 08.11.2012) who literally sacrificed her life for me to have a better one. You have taught me to live, laugh and most of all to extend my help, selflessly to others.

Lastly I would like to dedicate and acknowledge this thesis to all the unaccompanied minors living within the borders of South Africa.

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I would also like to thank the UCT Refugee Rights Clinic, and the staff I worked with during 2013 to 2016 whom opened my eyes to the plight of unaccompanied minors and refugees in general. I have learnt so much and wish all the best for the clinic.

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## **LIST OF ACRONYMS & ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CRC	Convention on the Rights of a Child
DSD	Department of Social Development
DOJCD	Department of Justice and Constitutional Development
DHA	Department of Home Affairs
NGO	Non- governmental organisation
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
RRO	Refugee Reception Office
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SAPS	South African Police Services
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund

## CHAPTER ONE

# INTRODUCTION INTO UNACCOMPANIED REFUGEE MINORS IN SOUTH AFRICA

## 1.1 Background Study

South Africa has one of the most progressive Constitutions in the world which protects in detail the rights of children. Children and adolescents represent the majority of migrants in Africa.<sup>1</sup> This includes the concept of non-discrimination against foreign children who enter the country with their caregivers, guardians or those who enter on their own clandestinely. Currently the refugee crisis is at its peak and one of the most complicating issues before the world today. Increasing numbers of refugees and migrants take their chances abroad hazardous unseaworthy cargo boats and dinghies in desperate attempts to reach Europe. The majority of the people fleeing are in need of international protection, fleeing war, violence and persecution in their country of origin and each year these movements take a toll on human lives. According to the United Nations High Commissioner for Refugees (referred to as “UNHCR”) reported there were 231,153 arrivals by sea in 2016; 1,015,078 new arrivals by sea in 2015 fleeing to Europe. Demographics based on the arrivals on the 01 January 2016 have further proven that 32% of the refugees and migrants fleeing are minor children.<sup>2</sup>

Moreover and in connection with my topic, figures from South Africa’s 2011 population census suggested that 3.3% - or about 1.7 million – of the country’s 51.7-million population were ‘non –South African’ citizens<sup>3</sup>. The 2011 census was carried out in October 2011 and shows that the population had climbed over 50 million people which represented a major increase of nearly six (6) million people over the course of ten years. The question as to what has caused this major increase in population has been directed to

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<sup>1</sup> In Central Africa, in the Great Lakes region, and in the East Horn of Africa regions, children and adolescents constitute 56 per cent of the people of concern to UNHCR. In 2009, more than 18,700 asylum applications were lodged by unaccompanied separated children in 71 countries, constituting 4 per cent of all claims lodge in these countries. Data also captured that is often unaccompanied or separated boys who seek asylum, in particular in industrialised countries where about two- thirds of all UASC are male, and that the number of UASC boys seeking asylum was on the rise as compared to only two or three years ago. See UNHCR Statistical year’s book 2009, available at [www.unhcr.org/4ce532f19.html](http://www.unhcr.org/4ce532f19.html) [Accessed on 19 April 2016].

<sup>2</sup> UNHCR *Refugees/ Migrants Emergency Response – Mediterranean*, available at <http://data.unhcr.org/mediterranean/regional.php> [accessed on 7 July 2016] at

<sup>3</sup> Crush J. (2011) Southern African Migration Programme, *Complex movements: Migration movements, confused responses: Labour in South Africa*, available at <http://dspace.africaportal.org/jspui/bitstream/123456789/32627/1/SAMP%20%20Complex%20Movements,%20Responses.pdf?1> [Accessed 10 June 2016] at 17.

immigration, which raising a conflicting set of views. According to the South African Migration Project, South Africa in recent years has been regarded as opposing immigrants, especially migrants and refugees who enter the country, as to anywhere else in the world.<sup>4</sup> This was evident from the 2008 xenophobic attacks which ravaged the country. In 2008 200 000 refugees applied for asylum in South Africa, representing more than four times the number declared a year before that. However, reports by NGO' have revealed that there is a prevalence of unaccompanied refugee minors' in certain parts of South Africa, insofar as a report by the African Centre for Migration and Society reported on the scale of the problem of unaccompanied refugee minors' in Musina, the border post entry between Zimbabwe and South Africa and recorded that the unaccompanied refugee minor population in the shelters only provide a partial picture of the scope of the unaccompanied refugee minors' problem, as many of the children chooses to live on the streets.<sup>5</sup>

In 2009 and 2010, DSD recorded an average of 15 new arrivals a day. However, not all of these children remained in Musina.<sup>6</sup> Many continued south in search of family<sup>7</sup> members or employment opportunities. Social workers generally reached four to six children a day. In 2012, new arrivals have dropped to half of their previous numbers, with DSD seeing between five and seven new arrivals per day. <sup>8</sup> In August 2012, DSD reported only 16 new arrivals for the day. <sup>9</sup>

The number of unaccompanied and separated children in South Africa is extremely difficult to estimate as many children cross the border irregularly and no registration mechanism has been put into place to record the entry of undocumented minor children. Although it is clear from the Refugee Centres and NGO's who working with migrant and refugee children communities, attempt to collect and record evidence regarding the number of children it is a need amongst the government agents to initiate the imitative to capture the date on a scale to be worked with. This would be beneficial to both the children and the government, insofar as proving the children with the protection in the desire and managing

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<sup>4</sup>South African World Population Review 2016, Available at <http://worldpopulationreview.com/countries/south-africa-population/> [Accessed on 07 July 2016].

<sup>5</sup> Ibid.

<sup>6</sup> Elphick R & Amit R, *Border Justice Migration Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender Based Violence in Musina*, available at [https://www.academia.edu/2236645/Border\\_Justice\\_Migration\\_Access\\_to\\_Justice\\_and\\_the\\_Experiences\\_of\\_Unaccompanied\\_Minors\\_and\\_Survivors\\_of\\_Sexual\\_and\\_Gender-Based\\_Violence\\_in\\_Musina](https://www.academia.edu/2236645/Border_Justice_Migration_Access_to_Justice_and_the_Experiences_of_Unaccompanied_Minors_and_Survivors_of_Sexual_and_Gender-Based_Violence_in_Musina) [accessed on 14 July 2016].

<sup>7</sup> Elphick op cit note 6, Social worker DSD Musina , 3 July 2012 at 45.

<sup>8</sup> Ibid

<sup>9</sup> Elphick op cit note 6, Social Worker DSD Musina, 22 July 2012 at 45.

the problem. Unaccompanied refugee minors are some of the most vulnerable migrants and require special protection appropriate to the situation they seem to find themselves in. Those unaccompanied refugee minors' travels to South Africa find themselves living in a foreign country without any adult supervision, while facing a myriad of challenges, including physical safety, shelter, employment and education issues. Moreover the legal and social discrimination they are forced to endure. Although these children have rights under both international and domestic human rights instruments, political factors combined have denied children the protection and support to which they are legally entitled. Such allegations have prompted an interest in the particular topic insofar as what the South African government's role has been in implementing policies to alleviate the current issue pertaining to unaccompanied minors'.

## **1.2 Reasons for Migration to South Africa**

This section aims to outline the children's reason for migration. It will provide an overview of both the push and pull factors with case studies collated by various NGOs researchers who have had the opportunity to interview these children.

*"I am a 16 year old boy from a rural area in Zimbabwe. My parents passed away and I was staying with an uncle who was politically active in the opposition party politics. This was a period when the violence erupted in the rural areas, when the thugs of the ruling party started attacking the people who they believed had voted for the opposition party [MDC] we were left homeless after our home was burned down in flames. Me and my family escaped to the capital city where we camped at the opposition party headquarters. At the headquarters we were surrounded again by the militia in the country which took some of our friends and family members to the cells of a local police station and some of us were dumped at the outskirts farm, displaced, without care and services being provided for us. Instead, our lives were made unbearable every day by constant attacks from the ruling party supporters.*

*With the others we left for the South African Embassy where we camped in the embassy yards only to be delivered again into the harsh hands of the country's militia. In this whole process I was displaced from my uncle and older guardians who I was separated from in the whole chaos. Afraid of going back to our home area, I had no option but to skip the country and cross the border illegally and settle in South*

*Africa. I arrived at the crowded Musina Show Ground and stayed there for a week. Later on Save the Children staff took me too the URC Shelter where I stayed for some months. Due to bullying by older boys, lack of food and not going to the shelter, I decided to leave and stay here in the street with my friends. I am still uncertain of where to get my next meal, sleep or where to get help from and whether I will manage to unite with my uncle and guardians.”<sup>10</sup> Sixteen year old Zimbabwean boy, URC Shelter, 10 November 2010*

As illustrated above, the case study of the sixteen year old Zimbabwean boy, there are hundreds of migrant and refugee children currently residing in South Africa, and many living under inhumane conditions in either shelters, on the streets and in informal settlements.<sup>11</sup> Many, who enter South Africa from the neighbouring African countries, enter it with the perception of it being the “promise land”. After the abolishment of apartheid, the essence on which the new South Africa was built on was democracy and human rights for all the people whom enter the country. Many refugees and economic migrants therefore have the said perception of the country upon entering. Refugees flee to South Africa across the African continent in the hope of finding political, economic stability and to be free from persecution, providing they receive an improve standard of living.<sup>12</sup> Since 1994 South Africa had to conduct a process of law reform in keeping with the international commitments from the perspective of refugee and migrant children. Same will be addressed in the Charter to follow. Although it is clear that the law requiring special care and protection of the unaccompanied minor exists it is also clear that the law it not always implemented and that many unaccompanied refugee minors’ also suffer as results.<sup>13</sup> One of the leading causes being that although, the Guidelines and Principles set out the standards which States have to follow: Ressler et al have stated that:

“In many past emergencies... policy and programme staff have not been prepared to make these decisions and have been uncertain as to what actions should be taken, and therefore, some unaccompanied children have received help at all ... they have been neglected, abused,

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<sup>10</sup> Elphick et al op cit note 6 at 36.

<sup>11</sup> *ibid*

<sup>12</sup> Elphick et al op cit note 6 at 39.

<sup>13</sup> Swart SJ, *Unaccompanied Minor Refugees and the Protection of theirs Socio-Economic Rights Under Human Rights Law* (unpublished LLM Thesis, University of Ghana, 2008) available at <http://www.ahrj.up.ac.za/swart-s> [accessed on 21 January 2016].

abducted, exploited; some have become malnourished, many have died. Where assistance has been given it has sometimes been inadequate or misdirected.”<sup>14</sup>

### **1.2.1 Push and pull factors to determine why Unaccompanied Minors migrate to South Africa**

Millions of children are on the move and their reasons for migration can be a confluence on many factors, which either draws a child to another country or which forces them out of their country of origin. These children are a large scale of the population of movement which is currently taking place not only in Africa but in Eastern Europe. Some children are moving with their immediate family members while others are fleeing with extended family members. Many others as this paper seeks to elicit are fleeing clandestinely, in search of alternative livelihoods.<sup>15</sup> However on the other hand it is traditional from children in African societies to be raised by extended family instead of a biological parent (s).<sup>16</sup> The questions that many seek answers to is why children move, who are they? How many are on the move? There are many terms given to children who migrate whether they are asylum seekers, refugees or economic migrants, being accompanied or unaccompanied, separated minors, trafficked and recently the nomadic group of minors. At the same time although terms are provided to these children, I came across research which has identified that the children sometimes if not most of the time has played a part in their decision making to migrate. In some instances children are powerless victims and other times they are active subjects whom are identifying strategies for their own protection.<sup>17</sup>

There are many reasons why children migrate as aforementioned, however that one needs to understand as well is that the movements and decisions are not always inherently negative. Some children come to South Africa in order to seek employment or to fulfil education opportunities which lack in their country of origin, escaping chronic poverty, escaping abuse or violence. To access consumer goods or entertainment opportunities, and in order to rebuild their lives after their families have been torn apart by HIV/AIDS.

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<sup>14</sup> EM Ressler et al *Unaccompanied children: Care and Protection in Wars, Natural Disasters, and refugee movements (1988)*.

<sup>15</sup> Save the children UK *Away from Home, Protection and Supporting children on the move*, available at [https://www.savethechildren.org.uk/sites/default/files/docs/Away\\_from\\_Home\\_LR\\_1.pdf](https://www.savethechildren.org.uk/sites/default/files/docs/Away_from_Home_LR_1.pdf) [Accessed on 20 June 2016].

<sup>16</sup> Usang Maria Assim (2015) *Understanding Kinship care of children in Africa*, Eleven International Publishing at 22.

<sup>17</sup> Save the children UK op cit note 33 at 4.

*“My brother invited me to South Africa, saying that I would have a better life than I do in Moamba, Also the school, I didn't see the advantage of continuing. Instead of continuing to sit at home, I decided to go with my brother.”* The theory for migrating to South Africa by Mozambican child.<sup>18</sup>

*“I had a friend next door who knew this place called Musina. “You know you are not in school, you are dying of hunger, and there is no point in staying here. It is better that we go to South Africa to look for a job. A Zimbabwean child in Musina, South Africa. ”*<sup>19</sup>

Moreover in a study conducted by the Scalabrini Centre of Cape Town, a renowned NGO assisting refugees and asylum seekers they have reported that of fifteen children who entered South Africa as separated minors, seven were accompanied by extended family member who had the intention of claiming for asylum; five children accompanied adults for socio-economic reasons and in three cases the reasons from migration were unknown. Of the twenty seven children were unaccompanied upon entry, eight (7%) had taken the decision to migrate themselves. The choice thus of children to migrate alone was motivated as already stated above, was in relation to the death of a care-giver, escaping from poverty, escaping from abusive domestic situations; or flight from a conflict situation in the country of origin, which was confirmed in three of the cases.<sup>20</sup> In nineteen cases, children's entered were arranged between family members in the country of origin and family already established in South Africa. Research by the NGO identified that eighteen children were sent to South Africa for economic reasons, which five (5) cases included better education opportunities, six (6) cases of the death of the primary care-giver, three (3) cases of domestic violence and lastly four (4) cases whereby the primary care- giver has been imprisoned, for reasons which were unknown to the researchers. There was however another case whereby the child's entry was arranged by extended family member after the death of the primary care- giver arose due to conflict in the country of origin.

### **1.3 Objectives of the study**

The main objective of the study is to investigate which policies are already in place pertaining to unaccompanied, separated and migrant children in South Africa. Children

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<sup>18</sup> Save the children UK op cit note 33 at 7.

<sup>19</sup> ibid

<sup>20</sup> Nielsen JS & Ackerman Marelize , *Scalabrini Centre of Cape Town : Foreign Children in care in the Western Cape Province*, available at <http://scalabrini.org.za/wp-content/uploads/2016/01/Foreign-children-in-care-in-the-Western-Cape-Province.pdf> [Accessed on 21 June 2016 ]

migrate to South Africa from neighbouring countries as Mozambique and Zimbabwe but also from countries as far away as the Democratic Republic of South Africa, without their parents or guardians. South Africa has developed legal and policy measures for securing the rights of children. Are these measures consistent with existing international frameworks and standards? Also, to what extent are these policies being used to resolve the problems unaccompanied children face? Related to this question is the issue of implementation. The thesis considers how the responsible departments and state officials such as Magistrates, social workers, police officials and the Department of Home Affairs implement these policies. This minor dissertation would then make some recommendations to the South African government.

#### **1.4 Significance of the study**

According to Sarah Jane Swart: “There is concern that the international law of the child, at the point where principles move into practice, is incomplete and narrowly defined.”<sup>21</sup> Although international legal instruments offer protection to unaccompanied minors, I am of the opinion that they are not effectively being implemented at the national level. Children are a vital tool in developing a better society. It is therefore important that they are treated with dignity and nurtured so that they realise their full potential.

The fight for unaccompanied refugee minors’ have been side tracked for far too long by the international and especially the national communities. This study thus seeks to shed the light on the phenomenon in South Africa, which has in recent years received an influx of unaccompanied minors from Somalia, the Democratic Republic of Congo, Malawi and Zimbabwe. Stories of refugee lives and their experiences have been told all over the world for centuries, which can be traced back to the 20 August 1922 when the League of Nations, the forerunner of the United Nations appointed Doctor Fridjof Nansuns the First high Commissioner for Refugees. On the 10<sup>th</sup> December 1948, the United Nations proclaimed the Universal Declaration of Human Rights.<sup>22</sup> Article 14 of the UDHR stipulates that: Everyone has the right to seek and enjoy in other countries asylum from persecution.

However with children it is imperative that these refugees especially children not only enjoy their asylum away from persecution but also to enjoy the human rights which enables

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<sup>21</sup> Swart op cit note 13 at 2.

<sup>22</sup> Universal Declaration of Human Rights 10 December 1948.

them to access various essential services such as health, social security and socio-economic integration in their host countries. Furthermore according to Ressler et al<sup>23</sup>, “unaccompanied have existed in virtually every past war, famine, refugee situation and natural disaster... on the basis of past and present experience, it is certain that the future will and undoubtedly has already produced its share of unaccompanied children.”<sup>24</sup>

Same is evident in the current status of refugees and migrants in both Africa and Europe at current date. In a case study conducted in Sweden the major influx of refugees and migrants from Syria, Afghanistan, Eritrea, Ethiopia has put a strain on many countries immigration systems, and as a result of the shortcoming the children are not receiving the care and attention which international and domestic law has afforded to them. The international NGO Human Rights Watch have finds that some children, including those who experience sexual abuse have not received adequate health screening or mental and physical healthcare, although the law provides that same be complied with. The report also found that amid a backlog of asylum cases there is a lack of the prioritization of their asylum applications.<sup>25</sup> This is not only evident in Europe but also in South African and many African countries, however as my thesis is focused on South Africa’s responses to unaccompanied refugee minors’, this definition in all aspects seeks to include both migrant and refugees children, has seen many children having problems when making applications for asylum. One major problem which too will be discussed further in the thesis is the fact that they are not allowed to apply for asylum without a court order which is granted by the Children’s Court and the children Court is reluctant to assist with an inquiry as many children do not have legal documentation within the country.

## 1.5 Literature Review

There is limited literature on the flight of unaccompanied refugee minors; moreover focus is kept of the adult refugees and their plight. The earliest literature, in 1988 which was titled unaccompanied children by authors Everrete M Ressler, Neil Boothby and Danel J Steinbock aimed to address the study about unaccompanied children in emergencies: children who have been separated from their families due to natural disasters, during wars and refugee movements. Its primary purpose was to provide guidance for policy makers a programme

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<sup>23</sup> Ressler et al *op cit* note 14.

<sup>24</sup> Ibid.

<sup>25</sup> Human Rights Watch, *Seeking Refuge: Unaccompanied Children in Sweden*, 8 June 2016, available at: <http://www.refworld.org/docid/575910a54.html> [accessed 7 July 2016] at 10-11.

staff in all phases of their dealings with unaccompanied minors'.<sup>26</sup> A handful of past LLM students have written on the child refugee. The earliest was in 2000 Mwalimu<sup>27</sup> written on social economic right of refugees in Africa with a special focus on children. In 2006 Esom<sup>28</sup> wrote on an assessment of the unaccompanied refugee child's right to family unity and reunification. Also in 2006 Livesy wrote on the extent of xenophobia towards refugee children.<sup>29</sup> In 2007 Bizimana<sup>30</sup> wrote on the child refugee's right to education. Lastly in 2008, Swart wrote about unaccompanied minors refugees and the protection of their socio economic rights under human rights law. In n 2011, Chiguvare<sup>31</sup> wrote about unaccompanied minors crossing the border post at Musina and entering South Africa, and the challenges faced upon their arrival in South Africa. Also in 2011 Iman Hashim and Dorte Thorsen wrote a book about child migration in Africa which gives the reader a fascinating insight in to the complexities of children's migration in West Africa, where the children make the decision independently to migrate.<sup>32</sup> More recently in 2014, Alexie<sup>33</sup> wrote a thesis on realising the socio-economic rights of refugees under International human rights law, using South Africa as a case study.

This study however, will focus on the current policies within South Africa, if any, whether they are in line with international laws and whether they are being properly executed. Moreover, the recommendations which should follow whether the policies are too vague, not properly executed, or even non-existent.

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<sup>26</sup> Ressler EM et al op cit note 14 at 3.

<sup>27</sup> Mwalimu S *The Socio-economic Rights of Refugees in Africa* (unpublished LLM thesis, University of Pretoria 2000).

<sup>28</sup> Esom, K Cc *Twice Traumatized : Assessing the unaccompanied refugee child's right to family unity and reunification* (unpublished LLM Thesis, Makerere University, Kampala, Uganda, 2006) Available at , <http://repository.up.ac.za/dspace/handle/2263/1212> [ accessed on 25 November 2015].

<sup>29</sup> Livesey TK *A Survey on the extent of xenophobia towards refugee children* (unpublished LLM Thesis, University of Pretoria dissertation, 2006, Available at <http://www.sahistory.org.za/sites/default/files/file%20uploads%20/dissertation.pdf> [accessed on 18 February 2016].

<sup>30</sup> Bizimana S, *A critical Analysis of the right of education for refugee children in Great Lakes : the case study of Burundi*, (unpublished LLM thesis, University of Pretoria, 2007 ) Available at <http://repository.up.ac.za/bitstream/handle/2263/5296/bizimana.pdf;sequence=1> [Accessed on 24 November 2015].

<sup>31</sup> Chiguvare B, *Children Crossing Borders-: An evaluation of state response to migrant Unaccompanied Minors at Musina – Beit Bridge border post of South Africa* (unpublished Master of Arts Thesis, University of Johannesburg , 2011) Available at, <http://ujdigispace.uj.ac.za/bitstream/handle/10210/8278/Chiguvare.pdf?sequence=1> [Accessed on 15 July 2016].

<sup>32</sup> Hashim I et al *Child Migration in Arica* (2011) at vii.

<sup>33</sup> Alexie TK, *Realising the socio-economic rights of refugees under International human rights law: A case study of South Africa* (unpublished LLM Thesis, University of the Western Cape, 2014) Available at, [http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/3853/Alexie\\_LLM\\_2014.pdf?sequence=1](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/3853/Alexie_LLM_2014.pdf?sequence=1) [Accessed on 15 July 2016].

## 1.6 Methodology

The study is library based research, insofar as it will use primary sources of the law, such as treaties, statutes and books relating to unaccompanied minors'. Including both asylum seekers and separated minors'. This thesis will also look at the instruments which offer these children human rights protection. Secondary sources will also be used as an important component in my research, namely the UNHCR handbooks, UNHCR reports, internet, NGO reports, which will provide in depth information on the actual situation of unaccompanied and separated minors within South Africa.

## 1.7 Definitions

According to section 1 of the Children's Act 38 of 2005, a "child" is a person under the age of 18 years. Foreign children are included in this definition and should be afforded the same protection as any South African child would. Unaccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Separated children on the other hand are children, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may therefore include children accompanied by other adult family members.

The African Charter on the Rights and Welfare of the Child<sup>34</sup>, means every human being below the age of 18 years. While it is debatable whether this definition includes a foetus,<sup>35</sup> the Charter clearly sets out a uniform age at which childhood ends. This is unlike the Convention on the Rights of the Child<sup>36</sup> that appends a reader to that definition namely "unless, under the law applicable to the child, majority is attained earlier."<sup>37</sup> The CRC definition was motivated by the awareness of the fact that communities view durations of childhood differently.<sup>38</sup>

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<sup>34</sup> Adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999.

<sup>35</sup> Viljoen F, *The African Charter on the Rights and Welfare of the Child*, in CJ Davel (ed, *Introduction to child Law in South Africa* Juta Law, 2000 at 214.

<sup>36</sup> Adopted by the UN General Assembly on the 20 November 1989 and entered into force on 02 September 1990.

<sup>37</sup> Art 1 of the UNCRC.

<sup>38</sup> Chirwa DM, *The merits and demerits of the African Charter on the rights and Welfare of the Child*, in *The International Journal of Children's Rights* Kluwer Law International 2002 at 158.

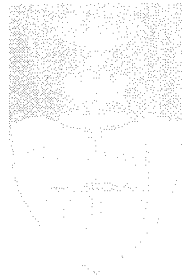
## **1.8 Overview of Chapters**

The first chapter sets out the context of the research question, and briefly reviews the existing relevant literature, the objectives and significance of the study, as well as the recommendations to ensure the success of the study. It will also look at the reasons why children have moved to South Africa and the challenges they are faced with upon entry within South Africa. Chapter two examines the international law and treaties which govern and advocate for unaccompanied and separated minor. Chapter three will examine the law in domestic legal framework and critique whether these legal frameworks advocate for the rights of unaccompanied refugee minors' in terms of the international standards of protection as set out in chapter two, and how the government officials and departments are to address the unaccompanied minor child when they come into contact with them and how to ensure that they are legalised upon entering South Africa. Chapter four will address the reasons why children leave their country of origin and enter their host countries as well as how they address the human rights violations they endure when in the host country. The outcome of this research will indicate that South Africa, although equipped with access and involvement in international, regional and domestic law have failed to implement same. It has constitutional obligations in terms of the Bill of Rights to do so, and afford these rights to unaccompanied minor migrants. Many migrant organizations exist but whose aims are to work specifically addresses the rights of unaccompanied minors. It is rather sad that same is being attended to by these NGOs such as providing shelter and food to unaccompanied minors and migrants with minimal support coming from the South African government. The main issues but not limited to relate to failure to access to the relevant departments and their access to legal documentation. The fifth chapter highlights specific obstacles which need to be address in order to sufficiently set recommendations to alleviate the problem and for effective implementation of the unaccompanied minors' rights. It also summarises the findings of the study and makes concluding remarks.

## **1.9 CONCLUSION**

This chapter was divided into two sections. The first outlined the introduction and what the thesis will focus on, with an insight into the push and pull factors which minors either migrate or flee to South Africa and are left in the host country without any parental supervision. The section looked at the push and pull factors, why children flee and migrate to

South Africa. In some instances there were the obvious reasons for migration which children expected to live a better life in South Africa due to poor conditions in their country of origin. Others might have been forced to flee due to civil outbreak which we see commonly happening in the eastern Democratic of Congo in the cities as Uvira and Goma, and not to mention the on-going violence in Somalia which has left many fleeing. The second part looked at the objectives of the study, the literature which I will look at during my research, the methodology will focus on the way I have implemented my research to compile my thesis. Lastly I will give an overview of the chapters – setting out briefly what each chapter will be about and the states responsibilities to take into consideration international law, in order to minimise the phenomenon of unaccompanied refugee and separated minors within South Africa.



## CHAPTER TWO

### INTERNATIONAL LAW GOVERNING UNACCOMPANIED REFUGEE MINORS

#### 2.1 Introduction

According to Freeman<sup>39</sup> children rights have been taken more seriously over the decades as many conditions experienced by many children make it more important that their rights should be taken seriously. Rights are important if children, are going to be treated as autonomous beings – which children have proven over the years, that they do possess the autonomy to act on their own accord, whether it is rational or not.<sup>40</sup> *Ubi ius, ibi remedium*, where rights exist redress is possible, this was lawyers' discourse deeply rooted in the legal culture. Although these specific professional have not sought to address the reason why this correlatively important, thus jurists and philosophers have sought out the justification stating that rights are 'valuable commodities' (Waserstrom 1964).<sup>41</sup> The international community has framed its much lauded Convention on the Rights of the Child, which will be discussed in detail I the receding sections. Legislators and judges in the Western world, have become conscious to the need to recognize the individuality and autonomy of older children.<sup>42</sup> Children have become and fall victim more easily thus it is important that certain mechanism needed to put into place to hold states accountable for their actions where children are concerned. Furthermore children have been seen as a 'problem population', and reduced to being seen as property.<sup>43</sup> In 1924 the fifth Assembly of the League of Nations adopted the declaration of the Rights of the Child, this instrument was the first human rights Declaration adopted. The Declaration established that 'mankind owes to the child the best interest it has to give'.<sup>44</sup>

This chapter seeks to look at the international legal instruments which gave effect to the rights of the child. Moreover those instruments which will address the unaccompanied

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<sup>39</sup> Professor Michael Freeman, University College London, Faculty of Law, Bentham House, Ensligh Gardens, London.

<sup>40</sup> Freeman M, 'Taking children's rights more seriously' in P Alston et al (eds) *Children, rights and the law* (1992) at 52.

<sup>41</sup> Freeman op cit note 40 at 53.

<sup>42</sup> Freeman op cit note 40 at 52.

<sup>43</sup> Freeman op cit note 40 at 56.

<sup>44</sup> Geraldine van Bueren *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff 1995) Chapter 1 – 'The history of the international law on the right of the child' at 6.

refugee and separated minor issue. This chapter will identify the provisions which relate to the international protection of children, bearing in mind the most vulnerable, namely the unaccompanied refugee children. I will firstly look at the international instruments and thereafter analyse the regional instruments which stems from the aforesaid. The provisions in all of these instruments paints a picture of human rights for all children regardless of nationality and race but to offer a level of protection and care which will not only ensure the child's physical but also their psychological well-being.

## **2.2 International and Regional Human Rights Law**

Human rights language attempts to articulate a sort of principle whereby all people would be afforded the same level of respect and dignity in whichever country they might find themselves, and whereby they are afforded the same legal protection and assurances of dignity and ensuring that no one is treated in a discriminatory manner<sup>45</sup> These rights have been envisioned in the international treaty of the Universal Declaration of Human Rights, which South Africa, since its democracy has signed and ratified, and whereby they have a constitutional obligation to consider international law.

### **2.2.1 The United Nations Convention on the Rights of the Child (CRC)**

The CRC is an international treaty which was entered into force in September 1989 and was ratified by South Africa on 16 June 1995. 2016 sees the Convention celebrating 27<sup>th</sup> anniversary of its adoption. What makes the CRC even more unique is the fact that not only was it the most ratified treaty in the history of human rights treaties,<sup>46</sup> or the record speed at which ratification took place.<sup>47</sup>

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<sup>45</sup>Englund K *Protecting the Human Rights of Unaccompanied Immigrant Migrants*, available at <https://ssa.uchicago.edu/protecting-human-rights-unaccompanied-immigrant-minors>, [accessed on 02 June 2015] at 2.

<sup>46</sup> The only two states which has not ratified the Convention is Somalia and the United States of America (USA). Somalia is unable to ratify the Convention because it does not have a recognised government, and the USA's possible motives relates to the fact that Article 37 of the Convention prohibits sentencing children under 18 years old to life imprisonment or the death sentence.

<sup>47</sup> The Convention required 20 state ratifications to bring it into force. Within 9 months of being adopted more than the required states had ratified it. See Fact Sheet No. 10 'The Rights of the Child', available at <http://www.ohchr.org/Documents/Publications/Factsheet10rev.1en.pdf> [accessed on the 05 September 2016].

The CRC states that all children<sup>48</sup> are to be given equal status regardless of their nationality, requiring of states to take appropriate measures to ensure that each child within its jurisdiction is protected against all forms of discrimination or punishments.<sup>49</sup> Moreover, Article 22 of the CRC applies specifically to unaccompanied minors whether accompanied or unaccompanied, should receive appropriate protection and humanitarian assistance in the enjoyment of the applicable rights set out in the Convention and in any other international human rights or humanitarian instruments.<sup>50</sup> This thus means that all refugee children should be afforded all the humanitarian privileges that would be provided for to refugees in a general sense by state organizations and the international community as a whole. States should cooperate with international organisations providing family tracing and reunification services and where no legal guardians or close relatives can be found, the child should be afforded the same protection any other child who is temporarily deprived of their family environment.<sup>51</sup>

In addition, article 20 states that a child “temporarily or permanently deprived of his/her family environment.... shall be entitled to special protection and assistance provided by the state.” In addition article 38 (4) states should take feasible measures to ensure of the protection of the children who have been affected by armed conflict. Therefore refugee children who have escaped war torn areas, such as Somalia or the eastern DRC, and enter South Africa are entitled to specific protection which is explicitly stated. Lastly it is important to note article 3(b) that the child’s best interests shall be the primary consideration. The CRC thus as a whole is very comprehensive as it covers and includes the socio economic and human rights of the child.

The UNHCR’s mandate has been to protect uprooted people and to find permanent situations to resolve their displacement.<sup>52</sup> Children have special needs which must be identified and met. They have special problems in the areas of protection, assistance and durable solutions (local integration and resettlement) resulting from their precarious situation.<sup>53</sup> It is therefore essential that that UNHCR has demonstrated that effective protection and assistance provide action on behalf of refugee children as requires, in order for them to be identified and documented as quickly as possible. While refugee children have

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<sup>48</sup> Art 1 of CRC.

<sup>49</sup> Art 2 of CRC.

<sup>50</sup> Art 22 of the CRC.

<sup>51</sup>Palmary | *For Better Implementation of Migrant Children’s Rights in South Africa* , available at [http://www.unicef.org/southafrica/SAF\\_resources\\_migrantchild1.pdf](http://www.unicef.org/southafrica/SAF_resources_migrantchild1.pdf) [accessed on 10 June 2016] at 7.

<sup>52</sup> UNHCR Child Protection Conference Report in South Africa dated 2-4 December 2014. On hand with author, at 5.

<sup>53</sup> Ibid.

always been a major concern for the UNHCR, they have been receiving major attention in recent years, as is visible today with the recurring refugee crisis in Europe and the moral police within society trying to prevent more minor children washing up on shore.<sup>54</sup>

The UNHCR has issued numerous policies and guidelines concerning refugees, some of which focus on child refugees, particularly unaccompanied minors. These will be discussed in detail below to give the reader an understanding of the current policies implemented by the UNHCR. According to Ressler, these policies “constitute a broad body of substantive rules for decision on the issues of care and placement of the unaccompanied children falling within the agency’s jurisdiction.”<sup>55</sup> The policies are therefore important as they constitute the de facto legal and administrative structures of... International organization [which] must be recognised as one part of the legal framework which has come to influence the treatment of unaccompanied children.<sup>56</sup> These policies will be discussed in detail in the next section.

### **2.2.2 UNHCR Refugee children: Guidelines on Protection and Care, 1994**

The UNHCR Guidelines<sup>57</sup> on refugee children is one of the many policies incorporated by the UNHCR to attend to the needs of unaccompanied refugee minors. The Guideline was first published in 1988, and aimed at providing child welfare agencies and state organizations with solutions to problems that should be kept in mind when coming into contact and considering the needs of unaccompanied and separated refugee children. This current discussion relating to children is enormously important as children are vulnerable beings. They are susceptible to disease, malnutrition and physical injury. Children are dependant; they need the support of adults, not only for their physical well-being but also for their psychological well-being.<sup>58</sup> This is the general description, and unfortunately a reality in many countries around the world. It was initiated by the UNHCR in 1987 by the 1987 Note on Refugee Children, which finally drew a distinction between refugee adults and refugee children, and acknowledge that over half of the world’s refugees are children.<sup>59</sup>

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<sup>54</sup> UNHCR Note on Refugee Children, available at <http://www.unhcr.org/excom/scip/3ae68ccc18/note-refugee-children.html> [accessed on 12 August 2016].

<sup>55</sup> Ressler et al op cit note 14 p 275.

<sup>56</sup> Ressler et al op cit note 14 p 272.

<sup>57</sup> UN High Commissioner for Refugees (UNHCR), Refugee Children: Guidelines on Protection and Care, 1994, available at: <http://www.refworld.org/docid/3ae6b3470.html> [accessed 15 May 2016]

<sup>58</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at preamble.

<sup>59</sup> Swart op cit note 13 at 3.

As the former stated children are vulnerable beings, however, refugee children face far greater dangers than the average child. The sudden given violent on set of emergencies at any given time, be it war, or famine the disruption of family and community structures are inevitable and they affect the physical and psychological well-being of the refugee child.<sup>60</sup> This guideline thus seeks to guide anyone that comes into contact with a refugee child particularly in relation to this thesis, an unaccompanied minor. The CRC states that. Every child has the right to “know and be cared for by his or her parents” (Article 3). As the definition has set out before an unaccompanied minor is a child who has been separated from either his or her parents and not being care for by an adult, who by law or custom, is responsible to do so.<sup>61</sup> The terms unaccompanied minor is used instead of an orphan, to depict the difference, because an orphan is a child who has lost either his or her parents.<sup>62</sup> This Guideline also sets out the plan of action when coming into contact with unaccompanied minors.

The children should be identified, and not only once they have been located and brought to an UNHCR office of state organization, however the guidelines states that state organizations, and designated child welfare agencies should search for these children – in hospitals, clinics, feeding centres, orphanages, shelters, refugee camps, or those who reside on the streets.<sup>63</sup> Once the child is identified the designated child welfare agent should ensure that the child is settled in a place of safety and carry out the next steps to ensure the care and protection of the unaccompanied minor. Registration should duly follow the identification, insofar as a registry should be completed with the details of the child, even if it is only their name and surname and their country of origin should be recorded. Documentation is vital aspect to the unaccompanied minor as will be discussed in the preceding chapters.<sup>64</sup> This will not only help to identify the unaccompanied minor, but will aid them to identify their refugee status and be entitled to the protection in terms of the said policies.

Once an unaccompanied is identified, registered and provided with the relevant documentation to legalise their stay in their host country the child care agency should ensure that the unaccompanied minor legal guardian who meets the continuous care and nurturing of the unaccompanied minor and who will meet their developmental needs.<sup>65</sup> However

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<sup>60</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at preamble.

<sup>61</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 121.

<sup>62</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 122.

<sup>63</sup> Ibid.

<sup>64</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 125.

<sup>65</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 126.

consideration should also be given to the placement of the child, to ensure that in the environment is safe and conducive to their well-being, placement with a family within the unaccompanied minor's own community is preferable. Even though the unaccompanied refugee minor has been placed in safe keeping the search for their minors' parents should continue, and should be effective once the unaccompanied minor has been identified. Furthermore the tracing should commence even though the unaccompanied minor has allegedly claimed either his or her parents are dead. There is also the possibility that there are other family members whom are of the means to care for the unaccompanied minor.<sup>66</sup> Durable solutions which include the unaccompanied minors' integrated into their host country community; repatriation to their country of origin and resettlement to another country where family has been located should be identified and implemented on a case by case basis.<sup>67</sup>

On the other hand the Guidelines also briefly refers to unaccompanied minors' who although have applied for asylum their claims has been rejected after due process has concluded, the question relating to the return to their country of origin will arise. The Guidelines states that unless alternative care arrangements prior to return has been made the child welfare agent has to consider at the foremost the best interest of the unaccompanied minor requires that the child should not be returned unless, prior to return:

- (a) A parent has been located in the country of origin who can take care of the child , and the parent is informed of all the details of the return; or
- (b) A relative, other adult care-taker, government agency, or child care agency has agreed, and is able, to provide immediate protection and care upon arrival.

This guideline thus sought to provide tools to states organizations, child welfare organizations and individuals who have an interest in children to enable them to reach policy objectives and enable the protection of refugee and moreover unaccompanied minors children. Moreover, strongly worded statements are used to emphasise that standard practice procedures<sup>68</sup> have been set and which should be followed to achieve the rights set out in the CRC and the ACRWC.

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<sup>66</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 128.

<sup>67</sup> Ibid

<sup>68</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at preamble.

### **2.2.3 UNHCR: Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, 1997<sup>69</sup>**

This documents seeks to acknowledge the special needs of children seeking asylum, and thus to promote the awareness of unaccompanied minors' and the rights reflected in the CRC in order to stimulate the discussion on how to develop the principles and practices of the Conventions, some already discussed and some in preceding chapters to follow to ensure the needs of unaccompanied minors are met. To ensure that these documents provide guidelines for recommendations to government bodies and specialised agencies to deliver effective continuum of care and protection to unaccompanied minors'.<sup>70</sup> An on-going theme in this paper and envisioned in the guidelines, which were created in 1997, states that "[all] children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection.<sup>71</sup> Section 1(2) reiterates the fact that unaccompanied children often have little or no choice in the decision that has led to their predicament... [Thus] they have special needs that need to be met. With this being said the guidelines stress that considering the vulnerability of the children, it is essential that children who are applying for refugee status be give a priority and an effort be made to give priority to their outcomes.<sup>72</sup>

Moreover the guiding principle in any child care protection action is the principle of the "best interests of the child", which should be taken into consideration in any situation regarding children, in particular unaccompanied refugee minors,<sup>73</sup> who often find themselves in complex situations.<sup>74</sup> Some children I will later discuss may have left their country of origin due to various reasons, willingly or otherwise. However notwithstanding any of these motives, unaccompanied children often have no other choice in their decisions which leads to the predicament and vulnerability which they find themselves in, for this reason the UNHCR embraces the universal principles of child care and protection that are embodied in the CRC, in particular, Article 3 paragraph 1 which provides that:

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<sup>69</sup> UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, available at <http://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> [Accessed on 15 May 2016].

<sup>70</sup> Ibid.

<sup>71</sup> Article 7(1) of UNHCR Guidelines and Policies in Dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 10.

<sup>72</sup> Executive summary, UNHCR Guidelines and Policies at 1.

<sup>73</sup> UNHCR Guidelines on Polices dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 1.

<sup>74</sup> UNHCR Guidelines on Polices dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 4.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”<sup>75</sup>

This policy thus incorporates the principles of the CRC and having identified the unaccompanied and separated minors phenomenon have set out specific procedures when states come into contact with unaccompanied refugee minors’ and to ensure policies are being implemented in countries where they do not directly exist. As mentioned in the aforesaid section which set out the procedure by the UNHCR in terms of the protection and care of refugee children, so too do these Guidelines seek to heighten the procedure and encompasses that identification of the unaccompanied refugee minors’ – who they are and where they reside.<sup>76</sup> Equally important is the interviews being held by the relevant organisations and government officials whereby same needs to be conducted in a child friendly environment. Thereafter the registration and documentation of the undocumented minor should be attended to and a guardian appointed. Insofar as the legal guardian or care- giver concerned, the person should have the necessary expertise in the field of child-caring, so to ensure that the unaccompanied refugee minor’s best interests are safeguarded.<sup>77</sup>

This policy assists and makes it desirable for agencies and state departments dealing with unaccompanied refugee minors’ to establish special practices within their own structures and to assume responsibility of the care of children and their needs to elevate it in the most effective way, to benefit the unaccompanied refugee minors’.<sup>78</sup>

#### **2.2.4 International Committee of the Red Cross (ICRC): Inter Agency Guiding Principles on Unaccompanied and Separated Children**

The Head of the Central Trading Agency and protection Unit of the ICRC<sup>79</sup> has stated that the

“Range and complexity of situations in which children become .... Unaccompanied and the diverse needs of children, themselves, mean there is no single organisation can hope to solve

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<sup>75</sup> Ibid.

<sup>76</sup> UNHCR Guidelines on Policies dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 7.

<sup>77</sup> Ibid.

<sup>78</sup> UNHCR Guidelines on Policies dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 17.

<sup>79</sup> ICRC : Inter Agency Guiding Principles on Unaccompanied and Separated Children, January 2004, available at [http://www.unicef.org/protection/IAG\\_UASCs.pdf](http://www.unicef.org/protection/IAG_UASCs.pdf) [accessed on 15 May 2016].

the problem alone.<sup>80</sup> For this reason the Inter Agency Working Group of Unaccompanied and Separated Children was initiated in 1995, bringing together the International Rescue Committee which founder in 1933 is a voluntary organization serving refugees and victims of oppression.<sup>81</sup> Save the Children UK also an organization, works to improve the lives of children around the world – with the aim to provide immediate relief and providing long term recovery and development.<sup>82</sup> The United Nations Children’s Fund, mandated by the United Nations General Assembly was incorporated to help meet children’s basic needs and help them to reach their full potential. The Fund is committed to ensuring the special protection for the most disadvantaged children, including unaccompanied and separated children at the forefront.<sup>83</sup> Lastly the World Vision organization is a Christian relief and development partnership aimed at promoting the rights of children whom are in dire need of protection. Those living on the streets, suffering from exploitive labour, or exposed to trauma World Vision working to restore hope and bring justice.<sup>84</sup>

The guiding principles and objectives of these organizations have set out the approach which the aforesaid organizations and anyone else whom has come into contact with the unaccompanied and separated children and to consider that all children are entitled to protection under international law. The primary responsibility for ensuring the children’s survival and well-being lies with their parents, family members and community members. The national and local authorities are responsible for ensuring that children’s rights are respected.

It is imperative that amongst all organizations concerned are critical for care and protection to be heightened. It is important that all action be coordinated where the relevant government authorities, unless this is not in the best interests of the child. Many of the policies include the principle of family unity – which states that all children have a right to a family and have a right to care for their children. Whereby unaccompanied and separated minors must be provided with services aimed at reuniting them with their parents or primary legal or customary care-givers as quickly as possible.<sup>85</sup> The best interest of the child – constitute the basic standard for guiding decisions and actions taken to help children whether by national or international organizations, courts of law and administrative authorities. Same

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<sup>80</sup> Swart op cit note 13 at 12.

<sup>81</sup> ICRC op cit note 79 at 7.

<sup>82</sup> ICRC op cit note 79 at 8.

<sup>83</sup> ICRC op cit note 79 at 9.

<sup>84</sup> ICRC op cit note 79 at 11.

<sup>85</sup> ICRC op cit note 79 at 16.

should be taken into account when determining the best interests of the child in any given situation.<sup>86</sup> Lastly the child's opinion should be listened to and given due weight in relation to the child's age and majority. They should also be kept up to date about any matter which affect them, insofar as placements and care, family tracing and family reunification. Importantly the principle of non-discrimination, which has been envisioned in the CRC and the ACRWC is important as it is the tenets of international humanitarian law. insofar as all protection should be granted to all without discrimination.<sup>87</sup> Thus, the Inter Agency Guiding Principles on Unaccompanied and Separated children were a product of this working group and they are intended to guide future action for "national, international and non-governmental organisations, as well as governments, in their effort to meet their obligations, and for donor when making decisions on funding."<sup>88</sup> The principles seek to ensure that all actions and decisions taken in respect of separate and unaccompanied children anchored in protection framework, and that the best interests of the child re respected at all times.<sup>89</sup>

### **2.2.5 General Comment 6 of 2005: Treatment of Unaccompanied and Separated Children outside their Country of Origin**

In 2005 the Committee on the Rights of the Child adopted the General Comment No. 6<sup>90</sup> – to address the most critical concerns relating to those vulnerable unaccompanied and separated minor children who are at a far greater risk of being sexually exploited, forced into conscription as child subjected to child labour and detention. Based on the legal framework of the CRC the General Comment places emphasis on the states parties to adhere to the fact that the rights in the Convention without any discrimination and are to be enjoyed by everyone and not limited to children who are not citizens to certain states. Nonetheless the rights should be enjoyed without any discrimination and should be in the best interest of the child.

General Comment No.6 gives meaning to the definition of the "best interest" principle as it relates to unaccompanied refugee minors' and separated minors, stating that: "[A] determination of what are the best interests of the child requires a clear and comprehensive

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<sup>86</sup> ICRC op cit note 79 at 17.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> UNHCR General Comment No. 6, adopted by the Committee on the Rights of the Child, 17 May -03 June 2005.

assessment of the child's identity, including her of his nationality. Upbringing, ethnic, cultural and linguistic background, particularly vulnerabilities and protection needs." The General Comment also discusses the fact that unaccompanied refugee minors should receive the necessary assistance to the asylum processes and procedures.<sup>91</sup> And to ensure that a child's best interests are taken into account, the need to appoint competent care-giver will serve as a safeguard to the said as well as being provided or given the opportunity to seek legal representation during asylum procedures.

The Comment also acknowledges the special care arrangements that are necessary for unaccompanied minor children and confirms the importance of article 20(3) of the CRC which states that there is a duty to accommodate such children "inter alia" [through], foster placement, Kafalah Islamic Law, adoption or, if necessary, placement in suitable institutions for the care of the children.<sup>92</sup> Paragraph 40 of the General Comment notes that that mechanisms established under national law for regulation the accommodation of children must apply to unaccompanied children, with options such as foster care, adoption or any institution deemed to advance the best interests of the child. The Comment comprehensively sets out the social and political rights the children are entitled to.<sup>93</sup>

The objective of this section was to provide guidelines to state parties ensure that their practices are in line with the aforementioned, to ensure that the best interests of the unaccompanied and separated minors be met at all costs., and the proper treatment of unaccompanied refugee minors' are met on the backdrop of the CRC.

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

Five years after the CRC was implemented, South Africa ratified the ACRWC. Much like the CRC the ACRWC enumerates the same spectrum of minimum rights for unaccompanied refugee minor children, regardless of citizenship. It mandates that "in all actions concerning the child undertaken by any person or authority the best interest of the child remains the

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<sup>91</sup> General Comment No. 6 op cit note 90 at para 64-78.

<sup>92</sup> General Comment No. 6 op cit note 90 at para 40.

<sup>93</sup> Articles 28, 29 (1)(c),30 and 32 of the CRC provide for access to education and section 41 of the General Comment reiterates that every unaccompanied and separated child , irrespective of status shall have full access to education in the country that they have entered. The General Comment also paragraph 44 addresses the children's right to an adequate standard of living, which is provided for in article 27 of the CRC. Finally, the General Comment in ... 46 refers to the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health, which reflects article 23, 24 and 39 of the CRC.

primary consideration.<sup>94</sup> However, many of the provisions of the ACRWC offer a higher standard and threshold of rights than that in the Convention, especially regarding children who hail from Africa. From the outset, it must be granted that many readers will be familiar with the tails of Africa's misery and woe that constantly feature in popular media reports, in hard hitting research reports and in global debates about the continent's future (both from an economic and from a human rights perspective).<sup>95</sup> As Viljoens writing in 2008, pointed out:

“In many respect, children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on any other continent. Causes of human rights violations in Africa, such as poverty, HIV/AIDS, warfare, famine and harmful cultural practices have a disproportionate impact on the continents children.”<sup>96</sup>

At least 23 African countries are either engaged in some form of armed conflict or just emerging from one,<sup>97</sup> and been so the after effects of the conflict has seen many countries attempting to stabilize the situation, but many are some of the most till suffering as result of the violence. These conflict are widespread from the never- ending lawlessness in Somalia, the on-going civil war in Uganda, the Eastern Democratic Republic of Congo, South Sudan and the Manu- River states of Sierra Leone and Liberia make Africa one of the most unstable continents. Additionally politically instability in states such as Zimbabwe, Burundi and Ethiopia has caused massive social dislocation resulting in many people seeking refuge elsewhere. Although the provisions in the ACRWC are similar to the CRC, but specific attention hold be paid to Article 23 of the ACRWC deals specifically with refugee children ad read as follows:

“State parties to the present charter shall take all appropriate legislative, administrative and other measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international and national law shall, whether accompanied or unaccompanied by parents, legal guardians or close relatives, receives appropriate protection and humanitarian assistance in the enjoyment of the

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<sup>94</sup> Article 11 of ACRWC.

<sup>95</sup> Julian Sloth Nielsen 'Children's rights and the Law in African Context: An Introduction' in Julia Sloth Nielsen (ed) Children's Rights in Africa: A Legal Perspective, 2008 at 3.

<sup>96</sup> Ibid.

<sup>97</sup> Thako Kaime 'The Protection of Refugee children Under the African Human Rights system – Finding Durable Solutions in International Law ' in Julia Sloth Nielsen (ed) Children's Rights in Africa: A Legal Perspective, 2008 at 183.

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, whereas the Charter makes reference to “appropriate protection” which denotes a clear difference in the intention of the drafters of these two renowned instruments.<sup>98</sup> This Convention also extends its strength to extend its protection primarily to internally displaced children, something that the CRC does not provide for.<sup>99</sup> However, given the many resource deficiencies in the continent, effective protection is not always possible- later same will be discussed as South Africa as a case study. This Charter may cover every aspect of a child’s life. There are four fundamental principles underpinning the entire Charter, namely the right to non-discrimination – whereby Article 3 of the Charter (guarantees every child the enjoyment within the charter without discrimination (see also Children’s Rights Convention Committee 2005, paragraph 18). This therefore places a positive obligation on states to ensure that the state parties ensure that ALL children within their jurisdiction will be granted the rights envisioned in the Charter without being unduly discriminated against. Taking into consideration the obvious vulnerabilities of the unaccompanied minor.

## **2.4 International and Regional Refugee Law**

### **2.4.1 The 1951 United Nations Convention and the 1969 Protocol Relating to the Status of Refugees**

South Africa ratified the Convention and the Protocol on the 12 January 1996. The 1951 Convention and the 1967 Protocol Relation to the Status of Refugees defines a refugee regardless of age, hence this is why this Convention is important to the study as it regards anyone to be a refugee as defined in terms of the application of the criterion of “well-founded fear” of persecution. Firstly the majority of the child will determine the manner in which refugee status will have to be determined by the refugee status determination officer. Where a child is mature enough to express their well-founded fear of persecution, the case will then be

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<sup>98</sup> Van der Burg A, *A Legal protection of undocumented foreign migrant children in South Africa: Reality or Myth* (2009) available at <http://www.saflii.org/za/journals/LDD/2006/12.pdf> [Accessed on 16 December 2015].

<sup>99</sup> Kaime op cit note 97 at 184.

treated in a similar way to that of an adult asylum seeker. Where a degree of maturity does not exist then objective factors such as the current situations prevailing in their country of origin and the circumstances of family members should be taken into consideration as it would carry more weight to the objective leg of the inquiry.<sup>100</sup> This criterion does not seem to offer any problems to those children who are already accompanied by their parents as is the majority of children, because the general principle of family unity, states that if the head of the family meets the criteria of the definition, his or her dependants are automatically acquire and are granted refugee status.<sup>101</sup> Regrettably the Convention does not make direct reference to the principle of family unity, but there are other rights in the Convention which alluded to the principle<sup>102</sup>, and as a result many countries are silent on this regard. However there are several UNHCR Executive Committee conclusions that obligate states to take measures and promote family unity and recognise the family as the natural and fundamental group unity of society.<sup>103</sup> A conference which consisted of governments of 26 states, represented by delegates unanimously adopted the aforesaid recommendations, which emphasises the family as a right, one which is threatened for refugees. And ensuring the protection of refugees who are minors, in particular unaccompanied children especially the girl child, with special reference to guardianship and adoption.<sup>104</sup>

The CRC is the normative frame of reference for the UNHCR in its international protection of the unaccompanied refugee and separated minors. Their aim is to prevent separations and identify children who have been separated from their families to ensure that they receive the protection and assistance they need to reunite with their families.<sup>105</sup> However the Convention does not explicitly mention or have any provisions relating to the best interests of the child principle. In contrast to the ACRWC, the 1951 Convention does not provide exhaustive protection against discrimination against children, but only the preamble affirms the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. It goes further to state that all the provisions in the Convention shall apply to refugees without discrimination as to race, religion or country of origin.

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<sup>100</sup> General Comment No.6 op cite note 73 at 71-73.

<sup>101</sup> UNHCR Note op cit note 54 at 27.

<sup>102</sup> Hathaway *The Rights of Refugees* 569 comments that art 12 (2) provides that the “right to marriage shall be protected”; art 22 concerns the public education of children and art 24 concerns family allowances and other related social security as may be offered to nationals.

<sup>103</sup> Palmary op cit note 51 at 9.

<sup>104</sup> 1951 UNHCR Convention at 13.

<sup>105</sup> ICRC op cit note 79 at 19.

## **2.4.2 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OPCAT)**

Although OPCAT<sup>106</sup> is not a refugee treaty its relevance as a human rights treaty is very relevant to the reader as will be identified in this paragraph and the preceding chapters. The Protocol was ratified by South Africa in 1998. The objective of the Convention is to establish a system whereby regular visits are undertaken by independent international and national bodies to places where people are being deprived of the liberty and in an attempt to prevent torture and cruel inhuman degrading treatment or punishment. For the purpose of this discussion and which will be discussed in detail to the deprivation of liberty- particularly children who are kept in detention facilities, detention facilities being police stations, immigration centres and juvenile centres. It is therefore clear that unaccompanied refugee minors' detained fall within the jurisdiction of this protocol.<sup>107</sup>

Although the detention of minors in South Africa is and should always be the last resort to any minor who find him/herself in trouble with the law, this protocol places a duty on all states who signed the protocol to ensure that several national preventative measures are put in place within one year of ratification. Local human rights commissions, NGO's, should make regular visit to detention centres, to look for unaccompanied and separated minors and remove them from those facilities to a place which will meet their physical and psychological well-being. These bodies should then make recommendations to ensure better implementation of their rights in the centres. This framework will at least aim to improve the centres for those children who although not supposed to but are detained and thus to ensure their accommodation needs are met.<sup>108</sup> This Convention is thus relevant insofar as state officials, namely police officials and immigration officials should refrain from detaining unaccompanied refugee minors' and holding them for lengthy periods in inhumane conditions. Given the human rights abuses which arise when unaccompanied refugee minors' are detained, in the obvious protection which OPCAT could provide as a measure of clear oversight over detention facilities, it is imperative that South Africa had ratify this Protocol.<sup>109</sup> Although South Africa announced their intention to deposit the instrument of

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<sup>106</sup> Adopted by the UN General Assembly on 18 December 2002 and entered into force on 22 June 2006.

<sup>107</sup> Van der Burg op cit note 98 at 90.

<sup>108</sup> Ibid.

<sup>109</sup> Van der Burg op cit note 98 at 91.

ratification of the OPCAT in September 2012, South Africa has not yet ratified the OPCAT.<sup>110</sup>

## 2.5. Conclusion

From all the guidelines in international and regional law the best interest's principle shall be a primary consideration which was established in both regional law and domestic law as we see in the latter chapters. The CRC stood at the forefront with its introduction of this principle and incorporated it into its Guidelines as well. The CRC aimed to set a standard whereby all state parties who signed and ratified the CRC will abide by the provisions within the Convention and apply it to their legal framework to ensure that all children's needs are being met. The UNHCR policies set out that special protection be offered to unaccompanied and separated foreign minors. When coming into contact with unaccompanied refugee minors' it is important they be identified as either being unaccompanied or separated, moreover what was mentioned in the UNHCR 1994 policy – stated that officials, government, UNHCR, should go out into refugee camps, clinics, hospital and identify unaccompanied refugee children, because only once they are identified can one extend to them the rights as envisioned in international human rights law. Once same has been addressed placement in to a safe environment, family tracing which needs to be conducted immediately, family reunification, documentation and possible durable solutions should follow. Like international instruments, on the other hand regional law has extended and placed greater emphasis on the best interest's principle, stating that unaccompanied refugee minors' best interest being of 'the' primary consideration. Chapters three and four seeks to critique whether the conventions are being implemented in accordance with international standards of the protection of unaccompanied refugee minors''.

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<sup>110</sup> United Nations Human Rights Office of the High commissioner: View the ratification status by country or by treaty, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT-OP&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT-OP&Lang=en) [accessed on 02 September 2016].

## CHAPTER THREE

### NATIONAL AND DOMESTIC LEGAL POLICIES

#### 3.1 Introduction

By signing the UNCRC, the South African state has committed itself to treat all children equally, irrespective of their nationality and documentation status.<sup>111</sup> In order to give effect to its international obligations, South Africa has adopted various policies and laws relevant to the protection of refugees and unaccompanied refugee children. Some of these policies and laws apply to unaccompanied refugee children directly such as the Refugees Act and the Immigration Act, while others do so indirectly. The 1996 Constitution<sup>112</sup> which will be discussed in detail below contains provisions which determine the status and application of international law in South Africa. Accordingly to section 39 and section 233 respectively, court and tribunals must consider international law when the interpret rights contained in the Bill of Rights and when national legislation is interpreted courts and tribunals should refer an interpretation that is consistent with international law.<sup>113</sup> The most effective way of ensuring that the international conventions, in particular the CRC's principles and standards are given effect in domestic law is through national legislation. According to section 231(4) of the Constitution international agreements which are not self-executing can only become law in South Africa if they are enacted into law by national legislation. Thus states who are parties to certain international legislation can hold another state accountable if they fail to imply the principles of the said treaty.<sup>114</sup> This chapter examines the adequacy of these policies and laws in the light of the country's international legal obligations.

##### 3.1.1 The South African Constitution

The Constitution is central to promoting human rights in South Africa without discrimination. After the end of apartheid the drafters of the new Constitution provided for a broad range of

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<sup>111</sup> Legal Resources Centre Guide 4 on Unaccompanied and Separated Children (2015), available at [http://www.probono.org.za/Manuals/RefugeeManual/2015\\_Asylum\\_seeker\\_guide\\_Unaccompanied\\_Separated\\_foreign\\_children.pdf](http://www.probono.org.za/Manuals/RefugeeManual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf) [Accessed on 16 May 2016] at 2.

<sup>112</sup> South African Constitution Act 108 of 1996.

<sup>113</sup> Prislean Mahery, 'The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law' in Tyrnie Boezaart (ed) *Child law in South Africa (2009)* at 323.

<sup>114</sup> Mahery op cit note 113 at 324.

human and civil rights. The preamble of the South African Constitution state, “We, the people of South Africa .... Believe that South Africa belongs to all who live in it, united in our diversity.” Most of the rights in the Bill of Rights, chapter 2 of the Constitution apply to everyone. These include the rights to equal treatment, dignity, life, freedom and security of the person, privacy and best interests of the child, access to courts, access to information and just administrative action as well as socio- economic rights.

The case of *M v S*<sup>115</sup> the Constitutional Court held that section 28<sup>116</sup> must be seen as responding in an expansive way to ensure our international obligations as a state party to the CRC are being met.<sup>117</sup> The importance of the CRC principles in the application of section 28 of the Constitution was also recognised in the aforesaid case where the court found that these principles, “guide all policies in South Africa in relation to children”.<sup>118</sup>

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<sup>115</sup> *M v S* (Centre for child Law as Amicus Curiae) 2008 (3) SA 232 (CC), available at [http://www.centreforchildlaw.co.za/images/files/ourcases/our\\_cases\\_m\\_v\\_s.pdf](http://www.centreforchildlaw.co.za/images/files/ourcases/our_cases_m_v_s.pdf) [accessed on 10 September 2016].

<sup>116</sup> 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

<sup>117</sup> *M v S* supra note 115 para 16.

<sup>118</sup> *M v S* supra note 115 para 17.

Therefore one can see that the drafters of the Constitution took the provisions of the CRC very seriously and into special account when drafting section 28, which constitutionalized nine of the CRC's provisions.<sup>119</sup> Including the principle of the best interests of the child being of primary importance in any matter concerning the child.<sup>120</sup> Moreover, section 28 of the Constitution guarantees all children the rights enlisted in the Bill of Rights – extended to unaccompanied foreign migrant children, who find themselves in South Africa. The importance therefore of the Constitution to the rights of unaccompanied, separated and migrant children is envisioned in section 28 (1), stating that the children's best interest are considered of paramount importance in all matters concerning them. It also sets out the rights which include the right to “right to family or parental care or to appropriate alternative care when removed from the family environment”.<sup>121</sup>

Although these rights can be limited when it is reasonable and justifiable to do so, refugees fall within the ambit of “everyone” and therefore may not be discriminated against, but case law has proven yet again that many refugees rights are not being adhered to, but the courts found in favour of the refugees by taking into consideration their legal obligations to the international treaties and what our domestic legislation has stated. In 2009 the Aids Law Project made an application to the High court to appoint a *curator ad litem* for 56 named foreign children and many others that would be identified, many of whom were unaccompanied or separated from their care-givers, and were staying at the Central Methodist Church of Johannesburg. The , Anne Skelton of the Centre for Child Law, provided the court with a comprehensive report including her findings and recommendations. In particular, and most relevant to this report, she stated that “there needs to be more effective system for unaccompanied children as they enter the country”<sup>122</sup> and she strongly called for the “full implementation of the Standard Operating Procedures for the identification, documentation, tracing and reunification of children”<sup>123</sup> to be implemented. Based on this statement from the curatrix is clear that the international and domestic legislation set out in chapter 2 and 3 was not been properly implemented and should be addressed immediately. The recommendations which will follow in the preceding chapters aims to offer some sort of guidance to the government to pave the way forward for proper implementation of the said conventions.

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<sup>119</sup> The provisions which we re selected were from the Preamble to Article 38.

<sup>120</sup> Fritsch et al op cit note 125 at 637.

<sup>121</sup> Section 28 (1)(a).

<sup>122</sup> *The Aids Law Project v Minister of Social Development and Others South Gauteng High Court (52895/09)* Curatrix Ad Litem's Report filed 8 February 2010, at para 6.4.1 -6.4.2.

<sup>123</sup> Ibid. The Curatrix was referring to the, at the time still in- development DSD Guidelines, which are discussed in greater detail in the next section of this minor dissertation.

### 3.1.2 The Immigration Act 13 of 2002

The Immigration Act<sup>124</sup> is the primary for of legislation that provides for the entry of foreigners into South Africa and the departure of South African's from the country. The Act reached the apartheid government legislation which governed foreigners in South Africa, the Aliens Control Act of 1991. Unlike the Aliens Control Act, the intended purpose of the Immigration Act was to facilitate temporary skilled labour migrants to South Africa.<sup>125</sup> The Act also sought to prevent and counter xenophobia and to promote a 'human rights' based culture of enforcement of the Act, and complying with international obligations and education civil society about the rights of foreigners and refugees.<sup>126</sup> The Act came into force into 2003 but was amended in 2004.<sup>127</sup>

The applicable regulation for asylum seekers is section 23, which provides for as asylum transit permit. This section provides that all asylum seekers who enter the country at the border will be issued with transit permit which legalise their stay within the country but only for four days (4). Within those four days the asylum seeker has to report of one of the five Refugee Reception Offices to apply for asylum under section 21 of the Refugees Act<sup>128</sup>. By the end of the four days the individual is automatically classified as an "illegal foreigner" under the Immigration Act. This time period has been reduced from the initial fourteen day period in the Immigration amendment Act of 2004, to protection for those few days.

Moreover, section 31(2) (b) allows for a ministerial exemption from the standard permit requirements under the Act. The Minister is given substantial discretion under the Act to implement this provision under his/ her own "terms and conditions" where necessarily special circumstances arise. Specifically, the Minister can upon application and after consultation with the Board:

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<sup>124</sup> Immigraion Act 13 of 2002.

<sup>125</sup> Cerise Fritsch, Elissa Johnson and Aurelija Juska , *The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: ACall for Comprehensive Legislative Action*, available at <http://www.law.du.edu/documents/djilp/38No4/Juska.pdf> [Accessed on 09 June 2016]at 638.

<sup>126</sup> Ibid.

<sup>127</sup> Due to the 2002 Act being largely inconsistent with stated government goals and policies, President Thabo Mbeki directed the Ministry of Home Affairs to amend the Act to make it easier for skilled migrants to enter the country. The Immigration Amendment Act No. 19 of 2004 became effective on July 1, 2005 with the publication of the new Immigration Regulations. See Johnathan Crush & Vincent Williams, " International Migration and Development: Dynamics and Challenges in South and Southern Africa," United Nations Expert Group Meeting on International Migration and Development, Population Division, Department of Economic and Social Affairs , United Nations Secretariat, New York, July 6-8, 2005, 24; HUMAN RIGHTS WATCH, KEEP YOUR HEAD DOWN:UNPROTECTED MIGRAANTS IN SOUTH AFRICA (2007).

<sup>128</sup> Refugee Act 130 of 1998.

- (i) Allow a distinguished visitor and certain family member of his/her immediate family to be admitted and sojourn to the Republic for a period not exceeding six months.<sup>129</sup>
- (ii) Grant a foreigner or category of foreigners the right of permanent residence for a specified or unspecified period of time provided that the Minister may-
  - (a) Exclude one or more identified foreigners from such categories; and
  - (b) For good cause, withdraw such rights from a foreigner or a category of foreigners.<sup>130</sup>

It can therefore be argued that the unique situation of unaccompanied refugee minors should qualify as “special circumstances” and once granted such permanent residence in term of the Act, these unaccompanied refugee minors’ will be entitled to all the rights, privileges and duties of a South African citizen.<sup>131</sup> Despite NGO’s support for the implementation of section 31(2) (b) the intention of the Act may have certain ramifications – because the purpose of the Act is to control the migration into South Africa, and many of the provisions are aimed at restricting those who are not legalised to stay within South Africa. The Act allows for the automatic deportation of all persons who an Immigration Officer has reasonable suspicion to believe to be an illegal foreigner.<sup>132</sup> This appears to be in conflict with the Immigration Regulations of June 2005 which provide that unaccompanied minors are not subject to detention and make it illegal to deport minors without the legal procedures set out in the Children’s Act 41 of 2007<sup>133</sup> – same will be discussed in detail in the preceding sections. Under section 29 of the Immigration Amendment Act, children who are found to be without legal documentation and residing within the South African borders. Such persons will be classified as “prohibited persons,” which disqualifies them from obtaining visa, which included study and work visas or a temporary or permanent residence permit. This is therefore not in par with the international treaties as discussed in chapter 2 – whereby children’s best interests should be taken into consideration, and their rights not discriminated against.

Despite the restrictive provisions of the Act, South African courts have interpreted the Act in a positive light, favouring foreigners. In *Lawyers for Human Rights v. Minister of Home Affairs*, the court Constitutional Court held that when the South African Constitution

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<sup>129</sup> Section 31(2) (a) of the Immigration Act.

<sup>130</sup> Section 31(2) (b) of the Immigration Act.

<sup>131</sup> Fritsch op cit note 125 at 639.

<sup>132</sup> Section 34 of the Immigration Amendment Act 19 of 2004.

<sup>133</sup> Children’s Amendment 125 Act 4 of 2007.

limits rights to only citizens, it clearly expresses that limitation. Therefore, because the Constitution does not limit the rights in Chapters 2, all those living within South African borders are entitled to them.<sup>134</sup> Moreover with specific attention to unaccompanied refugee minors the courts once again held in the 2005 seminal case of *The Centre for Child Law v Minister of Home Affairs & others*<sup>135</sup>, the court firmly held that South Africa has a direct responsibility to care and protect unaccompanied foreign children. The case arose out of a situation in which several unaccompanied foreign children were being detained for lengthy periods of time in Lindela Holding Centre,<sup>136</sup> accompanied together with adults, and stood to be deported by truck to their country's border and then on to their nearest police station within their country. On the recommendation of the *curator ad litem*<sup>137</sup>, who was appointed on behalf of the children, the children were transferred to a Place of Safety pending finalization of their Children's Court Inquiries, but the DSD did nothing to facilitate the children being brought before the Court or investigations into the children's investigations into the children's circumstances.

The Court held that the Respondents constituted a serious infringement of the children's fundamental rights and that the government's failure to act in the best interest of the children was shameful.<sup>138</sup> It further stated that a crisis existing in the handling of the unaccompanied foreign children in South Africa; that such children were treated in a horrifying manner; exacerbated by an insufficiency of resources, in adequate administrative systems and procedural oversights.<sup>139</sup> The court was abundantly clear that all unaccompanied foreign children found in need of care and protection should be dealt with in accordance with the Child Care Act.<sup>140</sup> This case clearly illustrates that the South African authorities sometimes fail to treat undocumented minors in a manner that conforms to the requirements of the Constitution and existing legislation. It is clear that there are problems providing children with alternative care, suitable guardians, and the provision for legal representation.<sup>141</sup>

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<sup>134</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (CC) at 13-14, available at <http://www.saflii.org/za/cases/ZACC/2004/12.html>.

<sup>135</sup> *The Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 T.

<sup>136</sup> Lindela is the holding facility in Krugersdorp, South Africa for deportation, whereby illegal foreigners are detained while awaiting their deportations. The conditions are not very hygienic and many people are left for days on end before they finally return home to their country of origin.

<sup>137</sup> Is a legal representative appointed by a court to represent, during legal proceedings, the best interests of a person who lacks the mental capacity to make decisions for themselves. A curator may be appointed for a child or for a person who is mentally or physically incapacitated.

<sup>138</sup> At para 31.

<sup>139</sup> At para 14.

<sup>140</sup> Child Care Act No. 74 of 1983, which was replaced by the Children's Act of 2005.

<sup>141</sup> Van der Burg op cit note 98 at 96.

Thus although the courts have properly interpreted the rights of unaccompanied minor in terms of international legislation the current Act fails to make provision for unaccompanied refugee minors in terms of international treaties and the case law should thus be considered by the legislature when acts are being implemented and should utilise the CRC at the forefront of all domestic legislation.

### **3.1.3 The Refugees Act 130 of 1998 & the Refugees Amendment Act 33 of 2008**

The Refugees Act<sup>142</sup> came into effect in 2000, focusing on refugee law in South Africa and reflects many of the standards in perspective with refugees set out in the 1957 Convention and the AU. The Act aims to regulate the stay of foreign nationals who enter South Africa with the intention of making applications for asylum in terms of the three categories of applicants who can apply for refugee status. Moreover, section 32 of the Refugees Amendment Act<sup>143</sup> has included this section in line with the Children's Act and with international treaties to accommodate unaccompanied refugee minors'. The Act states that in cases where unaccompanied children are found to be in need of care and protection the following should be applied:

- (1) Any unaccompanied child who is found under circumstances that clearly indicate that he /she is an asylum seeker or a child in need of care contemplated in the Children's Act 38 of 2005, must-
  - (a) Be issued with an asylum seeker permit in terms of section 22, and
  - (b) In the prescribed manner, be brought before the children's court in the district in which he/she was found to be dealt with in terms of the Act.

Therefore in the narrow sense, an unaccompanied refugee minor who is under 18 and not in contact with his or her biological parents. Section 32 of the Act as mentioned above authorises the RRO to bring the unaccompanied refugee minor before the Children's Court in the district in which he or she was found" and the Children's Court may order that the unaccompanied refugee child" be assisted in applying for asylum application in terms of the Act. This will be in line with the international treaties and policies which have been developed by the UNHCR.

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<sup>142</sup> Refugees Act 130 of 1998.

<sup>143</sup> Refugees Amendment Act 33 of 2008.

The aforesaid section within the Act is in line with the international treaties and Guidelines by the UNHCR. With reference to the 1994 guideline<sup>144</sup> the child care agency that comes into contact with the unaccompanied refugee minor should foremost identify the child as being in need of care and protection, namely because they are without any adult supervision, this will need to be concluded upon an interview of the minor. Immediately thereafter registration should take place with the care giver at the same time making contact with agencies mentioned in chapter two to conduct family tracing to locate the minor's parents. Once the child is registered documentation is imperative to ensure that they will be equipped to legalise their stay within the host country. However the Guidelines also make reference to unaccompanied minors whose asylum applications have been deemed unsuccessful asylum seekers and whereby the child care worker, or in South Africa the social worker should determine whether it be in the best interest so of the child to be returned to his or her country of origin, where they will be suitable family members to care for the minor. Despite the legal framework in the Act on how unaccompanied refugee minors can apply for asylum within South Africa, there have certainly been many shortcomings which are noted, leaving children vulnerable and unprotected.

Initial hurdle children face when applying for asylum in the procedures to do so, there are not aware of South African policies and are not adequately informed about them either. They are also not aware of the ramifications of not applying for asylum within the prescribed time frame.<sup>145</sup> In addition to the very narrow interpretation of the Refugees Amendment Act, by the officials of the DHA, only a limited number of children are given refugee status<sup>146</sup>, and fail to consider the international Guidelines in Chapter 2 or the best interest's principle are overlooked in practice. The Act further requires a guardian to be present when a minor applies for asylum which presents certain challenge as firstly the Act does not explicitly state who the guardian should be. However the 1994 and 1997 UNHCR guidelines in chapter 2, make mention of the fact that the legal responsibility of all unaccompanied refugee minors' rests with the government of the country of asylum.<sup>147</sup> The Guidelines does however make specific attention to the fact that he guardian or adviser<sup>148</sup>

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<sup>144</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57.

<sup>145</sup> Fritsch op cit note 125 at 646.

<sup>146</sup> Ibid.

<sup>147</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit note 57 at 53.

<sup>148</sup> Article 5(7) of UNHCR Guidelines and Policies in Dealing with Unaccompanied Children Seeking Asylum op cit note 69 at 7.

### 3.1.4 The Children's Act 38 of 2005

The purpose of the Children's Act<sup>149</sup> is to provide the legislative background which the state has to ensure the rights of all children, as envisioned by the Constitution of South Africa as well as the international legislation. The Act provides for the protection of **all** children in South Africa, although does not mention the foreign or migrant child. The Act aims to promote and preserve families and give effect to the Constitutional rights of children. It sets out the principle of the *best interests of the child*.<sup>150</sup> Section 18 sets out the parental responsibilities and rights in respect of the child. Furthermore section 42 of the Act mandates that every Magistrates Court to become Children's Court and have jurisdiction on any matter arising from the application of this Act as well as every magistrate shall be a presiding officer of a Children's court. The Act also emphasises the child's right to participate in decisions affecting him/her – right to legal representation at court proceedings. The Act goes further to define a “child in need of care and protection” extending the definition of a child who has been abandoned or orphaned, children who live on the streets.<sup>151</sup> Once a child is considered to be in need of care and protection, he/she must be referred for investigation by a designated social worker, who needs to take necessary measures to assist the child.

Most notable is the reference to migrant children which were a part of the draft bill, were removed from the final draft of the Children's Act whilst the Department of Social Development argued that this was because it was not necessary to specially identify migrant children, whether this limits or expands to rights for migrant children remains to be seen.<sup>152</sup> In an address at the conference “Getting South Africa Ready to implement the Children's Act, Minister of Social Development, Zola Skweyiya, stated:

“Let me remind you that all that section 1 of the Children's Act defines a child as a person under the age of 18 years. It does not add any additional requirements such as South African citizenship or that the child has to be born in South Africa. This means that foreign children are offered the same protective measures in terms of this legislation whilst they are in South Africa. Foreign children may be placed in temporary safe care and children's court enquiries may be opened in order to determine whether the child in need of care and protection. If the Court finds a foreign child to be in need of care the court will have the same options to order

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<sup>149</sup> Children's Act 30 of 2005.

<sup>150</sup> Section 9 of the Children's Act.

<sup>151</sup> Section 150 of the Children's Act.

<sup>152</sup> Palmary op cit note 51 at 11.

the future care situation of the child. This means that foreign children may be admitted to Child and Youth Care Centres or be placed in foster care in order to serve their best interest” (27 May 2008).<sup>153</sup>

With the aforesaid being said by the Minister and what has been discussed in chapter 2, what can be established is that she might have said what is politically correct insofar as claiming that all children are to be treated equally and thus not discriminated against because of their nationality. This being in line with the non-discrimination clause in the CRC, section 2, but in practice children have been brutally victimised. Furthermore our democratic Constitution itself guarantees all the rights in the bill of rights to all children. However, in the case of *Shaaffi Daahir Abdulaahi and Others v. Minister of Home Affairs and others* in the North Gauteng High Court, the DHA Refugee Reception Office refused to document an unaccompanied foreign Somali child as an asylum seeker in the absence of a parent or guardian or a Children’s Court Order for placement in temporary safe care in terms of the Children’s Act as a child in need of care or protection.<sup>154</sup> This was in light of the fact that the DSD social worker, following a home visit to the room that the child shared with some other unaccompanied foreign children, came to the conclusion that the child was not in a vulnerable position and decided not to open a Children’s Court inquiry as he did not believe that the child in need of care and protection.<sup>155</sup> In light of this impasse, the matter was brought before the court and on 2 May 2011, the court ordered that the child be documented by the DHA Refugee Reception Office with a section 22 Asylum Seeker permit, pending the finalization of the matter.<sup>156</sup>

### **3.1.5 Child Justice Act 75 of 2008**

The Child Justice Act<sup>157</sup> introduced a criminal justice system designed for children who are accused of committing criminal offences. The provision of the Act and the protective measures although not explicitly stated apply equally to unaccompanied foreign children who may find themselves on the wrong side of the law. The Act reiterates the principle that

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<sup>153</sup> Palmary op cit note 51 at 11.

<sup>154</sup> *Shaaffi Daahir Abdullahi v. Minister of Home Affairs and others* (26572/2011) North Gauteng High Court, Pretoria, Founding Affidavit, para 47-49.

<sup>155</sup> Ibid.

<sup>156</sup> Shreier op cite note 58 at 13.

<sup>157</sup> Child Justice Act 75 of 2008.

detention of minors however should always be the last resort.<sup>158</sup> Although both International and Domestic legislation has the same sentiments as the aforesaid on paper the reality is that although children should only ever be detained as a last resort, and for the shortest appropriate amount of time. This wording is reflected in the United Nations CRC<sup>159</sup> and the UNHCRs Revised Guidelines on applicable Criteria and Standards Relating to the Detention of Asylum seekers<sup>160</sup> state unequivocally that children who are asylum seekers should not be detained.<sup>161</sup> As a general principal in international human rights law asylum seekers should not be detained.<sup>162</sup> Moreover in chapter 2 we have seen that OPCAT has made endearing recommendations to states to ensure that the detention of unaccompanied minors should not take place. In instances however, where children are detained the conditions of their detention should meet the unaccompanied refugee minors physical and psychological well-being. Furthermore the judgment in the *Centre for Child Law*<sup>163</sup> case, the judge displayed their disapproval of the treatment of the minor children held in the detention facility and made an order to have them removed and placed in a place suitable to their well-being. Moreover children's safety is at times threatened in any normal given situation; however refugee children are more vulnerable to detention. The term refugee itself speaks to the child being in need of international protection regardless of their legality or illegality in the host country. Whether refugee status has been formally recognised or not. Therefore it is not infrequent that many refugee minors are subjected to abuse by military and police officials in the host country. The 1994 Guidelines have however stated that in instances where children have been detained they should not be kept in conditions which could impair their right to human dignity and infringe their liberty, but instead special arrangements should be made for living quarters suitable to childrens' wellbeing.<sup>164</sup> If children are to be detained

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<sup>158</sup> Child Justice Act 75 of 2008 & Art 37 of the CRC.

<sup>159</sup> Article 37.

<sup>160</sup> UN High Commissioner for Refugees (UNHCR), UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, available at: <http://www.refworld.org/docid/3c2b3f844.html> [accessed 10 September 2016].

<sup>161</sup> Guideline 6 of the Guidelines on applicabkle Criteria and Standards relating to the Detention of Asylum Seekers.

<sup>162</sup> According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

<sup>163</sup> Centre for Child Law supra note 135.

<sup>164</sup> UNHCR Refugee Children Guidelines on Protection and Care op cit 57.

there needs to be a proper justification<sup>165</sup> for the detention and the conditions where the children are being kept needs to be humane,<sup>166</sup> including protection from physical and psychological abuse.

### **3.2 Conclusion**

When a government signs and ratifies human rights treaty, it is bound internationally to perform the obligations contained therein and not to act in any manner that is inconsistent with the treaty provision.<sup>167</sup> Like many international instruments, the South African Constitution draws no distinction between citizens and foreigners in the country, for most of the rights envisioned in the bill of rights. The fundamental concepts within the bill of rights is the concept of human dignity which section 28 of the Constitution has already stated, should benefit all children, regardless of their nationality. As international law is a guideline for states to construct their own legal frameworks, the constitution expressly states that that the courts “must consider” international law when interpreting the bill of rights. Which from the aforesaid discussion, the constitution has incorporated 9 of the CRC’s provisions. South Africa is obliged to ensure the rights of every child within its jurisdiction is met and not unfairly discriminated against. Unaccompanied refugee minors’ are also entitled to rights in terms of Refugees Act and he provisions benefit children when they apply for asylum, thus the children are offered further rights of non-discrimination already implied by the Constitution, and furthermore they are offered the right to equality, the right to administrative justice in terms of asylum applications as well as the right to freedom and movement. However as aforementioned there has been shortcomings in the Refugees Act as well, which we will later analyse as the officials whom apply the act are interpreting the Act in a narrow sense and not applying it in terms of the CRC convention and the UNHCR Guidelines and the police that the child’s best interest should be of paramount importance- which should be conducted on a case by case business. To sum up, there are a range of legal provisions and precedents available to apply to the protection of unaccompanied or separated foreign children, and South Africa’s domestic law provides for comprehensive legal protection for this vulnerable category of migrants with certain shortcomings as discussed in the preceding sections, the aforesaid judgements set out that various government officials fail to work

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<sup>165</sup> Article 37 (b) of the CRC.

<sup>166</sup> Article 37 (c) of the CRC.

<sup>167</sup> Article 27 of the Vienna Convention on the Law of Treaties, 23 May 1969.

together to solve these problems, which leads to violation of the children human rights in terms of both the domestic law and South Africa's legal obligations.<sup>168</sup> This is thus where South Africa's child protection service is lacking and needs resourcing of the system itself.<sup>169</sup>



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<sup>168</sup> Ibid.  
<sup>169</sup> Ibid.

## CHAPTER FOUR

### CURRENT POLICIES AND IMPLEMENTATION THEREOF SURROUNDING UNACCOMPANIED REFUGEE MINORS' IN SOUTH AFRICA

#### 4.1 Introduction

This chapter will analyse the current policies held in South Africa, including the Special Operation Procedures for unaccompanied refugee minors' by the various departments and the government official's implementation thereof, and whether they are being properly implemented in terms of international standards. Since 1994 South Africa has signed and ratified many significant conventions (which include the CRC, the ACRWC and one not specifically mentioned but a human rights treaty the Convention on the Elimination of All forms of Discrimination against Women<sup>170</sup>) and has conduct a process of law reform in keeping with the commitments from the perspective of refugee and migrant children. Although it is clear that the law requiring special care and protection of the unaccompanied minor exists it is also clear that the law it not always implemented and that many unaccompanied refugee minors' also suffer as results. One of the leading causes being that although, the Guidelines and Principles set out the standards which States have to follow: Ressler et al have stated that:

“In many past emergencies... policy and programme staff have not been prepared to make these decisions and have been uncertain as to what actions should be taken, and therefore, some unaccompanied children have received help at all ... they have been neglected, abused, abducted, exploited; some have become malnourished, many have died. Where assistance has been given it has sometimes been inadequate or misdirected.”

#### 4.2 Domestic Policy Framework and Government Actors

“There is no clear procedure as to what to do when we receive unaccompanied minors” – *Department of Home Affairs, Johannesburg Refuge Reception Office, September 9, 2004.*<sup>171</sup>

Since 1994 RSA has signed a number of significant Conventions and has extensive legislation pertaining to the rights of children. Although it seems ideal on paper the actual

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<sup>170</sup> Adopted by the General Assembly on 18 December 1979 and entered into force on the 3 September 1981, ratified by south Africa on 15 December 1995.

<sup>171</sup> Human Rights Watch *Living on the Margins : Inadequate protection for refugees and asylum seekers in Johannesburg*, available at <https://www.hrw.org/report/2005/11/16/living-margins/inadequate-protection-refugees-and-asylum-seekers-johannesburg> [Accessed on 26 February 2016] at 45.

approach on the ground is far from ideal – while policy development for the management of unaccompanied refugee minors surfaces. The preceding paragraphs will thus highlight the policies drafted and the implementation of same by the relevant department to alleviate the problem of unaccompanied refugee minors’ and the effectiveness of same.

### **4.3 DEPARTMENT OF SOCIAL DEVELOPMENT**

DSD is the primary government department responsible for the implementation of the Children’s Act and it is also has the primary obligation to provide for the care and protection of the minor children who find themselves within South Africa. The preceding chapters will identify the guidelines by the departments and how it affects unaccompanied refugee minors’.

#### **4.3.1. The 2011 Guidelines on Separate and Unaccompanied Children Outside their country of Origin**

The 2011 Guidelines set out in detail the international and the domestic legal standards which need on be executed an addressed when officials come into contact with unaccompanied refugee minors’ to acknowledge their vulnerability and ensure their protection. The 2011 Guideline provide sufficient, however not exhaustive steps to follow when assisting unaccompanied refugee minors’ as well as the initial assessment phases that social workers must undertake when a child is identified as a unaccompanied or separated minor refugee child. The Guidelines state the following:

“Children who are identified as separate or unaccompanied should be referred to a Social Worker or Police Official. Unaccompanied children should be assumed to be children “in need of care and protection” and may be placed in temporary safe care. If the current care circumstances of separated children do not put them at immediate risk, separated children may be assessed by a social worker without being placed in temporary safe care. However, if the separated child appears to be a victim of an exploitive or abusive relationship, he or she should immediately be placed in temporary safe care.”

The above directive suggests that once a child is referred to a social worker, investigations by the social worker are to take place in order to determine whether the child is in need of care

and protection. Bearing in mind Regulation 54 of the Children's Act, which sets out the procedure and method of investigation by the social worker to determine whether the child is in need of care and protection.

### **4.3.2. National Social Development Children's Act Practice Note No. 2 of 2011**

With many restrictive and exclusionary interpretations of the Act by government officials, this has led to many foreign children to fall through the cracks rather than squarely within the protection regime of all children within South Africa.<sup>172</sup> The National Social Development Children's Act Practice Note No. 2 of 2011<sup>173</sup> seeks to give effect to the uniform interpretation and implementation of the Children's Act,<sup>174</sup> and to reiterate to the officials, which include all social workers, all auxiliary social workers, all child and youth care workers and all community development practitioners to ensure that the best interest so of the child is of paramount importance. Although the Note sought to summarise the Children's Act for those who are in daily contact with children, specific reference in the Note regarding unaccompanied minors was in section 10. It stated that that all children whether documented or not and who are in need of care and protection MUST be treated the same way as a child of South African nationality and therefore the provisions of the Act extend to unaccompanied refugee minors' too. As already established and a recurring theme in my thesis is that that unaccompanied refugee minors are in need of care and protection.<sup>175</sup>

## **4.4 Department of Justice and Constitutional Development**

The DOJ's main responsibility according to Advocate Pritima Osman who was the speaker at a UNHCR Conference in 2014 stated that the DOJ's main responsibility rests with the implementation of children's courts.<sup>176</sup> For the purposes of the Act, every magistrate's court, shall be a Children's Courts and shall have the jurisdiction on any matter arising from the

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<sup>172</sup> Khan F & Schreier T, *Refugee Law in South Africa* (2014) 232. Schreier op cit note 172 at 10.

<sup>173</sup> National Social Development Childrens Act Practise Note No. 2 of 2011, available at <http://www.lexisnexis.co.za/pdf/Childrens-Act-Practice-Note-2-of-2011.pdf> [accessed on 15 August 2016].

<sup>174</sup> Practice Note No. 2 op cit note 149 at 1.

<sup>175</sup> Practice Note No. 2 op cit note 149 at 8.

<sup>176</sup> UNHCR Conference report op cit note 52 at 14.

Children's Act.<sup>177</sup> The proceedings are not of an adversarial nature but rather inquisitorial, similar to South Africa's justice system. This is important as the presiding officer/ magistrate seeks to arrive at a point of resolving, clarifying or to determine issues which affect the child and families. The inquiry is thus a powerful tool to make a finding which seeks to protect the best interest of the child. The finding starts off with the report of the social worker on the needs of the child which needs to be decided. This is in line with the UNHCR guidelines in chapter 2 stating that an official who has experience with the needs and protection of children should approach and consult with the unaccompanied refugee child. The practice of identification within international framework is imperative, so to ensure that once the child is identified, he or she can be registered and be placed into a place of safety and be afforded all the basic human rights everyone is incumbent to. This practice is furthermore envisioned in terms of the Children's Act, is that if the child is found to be in need of care and protection, the child should immediately be taken to a RRO for assessment if they have mentioned that they want to apply for asylum or even if after the interview by the social worker can provide that the child is claiming asylum.

Children who attend Children Court Inquiries need to be treated as children regardless of their nationality. In the case of *Centre for Child Law and Ellis N.O v. Child Commissioner of Krugersdorp*<sup>178</sup>, the matter was clarified in the High Court and resulted in an instruction to all children Court Commissioners of child welfare in South Africa. The case asserted the jurisdiction of the children's court to hold inquiries for any foreign child found to be in need of care and protection in terms of Section 14 (4) of the child Care Act,<sup>179</sup> which has since been changed to the Children's Act.<sup>180</sup> This case placed a duty on the Commissioners of child welfare to treat all foreign children as children first and as foreigners second. Here again displaying the core principles of the best interests of the child and the principle of non-discrimination as envisioned in the CRC. If the social worker and the CCI have found the child to be in need of care and protection, the Children's Court Commissioner may confirm the placement of the child in alternative care.<sup>181</sup> As a result of working with refugees for a while it is my own knowledge they many refugee minors are often

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<sup>177</sup> Section 42 (1) of the children's Act.

<sup>178</sup> *Centre for child Law and Ellis N.O v. Child Commissioner of Krugersdorp* (12923/2004) PTD Division.

<sup>179</sup> Victoria Mayer, Jacob van Garderen, Jeff Hanmaker and Lee ann de la Hunt, *Protecting the Most Vulnerable : Using the existing Policy Framework to Stregthen Protection for Refugee Children* in J Handmaker (ed) *Advancing Refugee Protection in South Africa* Berghahn Books , 2008 at 197.

<sup>180</sup> Section 150 -154 of the Children's Act deals with childrenwho are deemed to be in need of care and preotection.

<sup>181</sup> Section 152 (1) (a) (i) –(ii) of the children's Act.

accompanied by other refugees from the community or extended family members and friends who accompany them to NGO's and to DSD to assist with the unaccompanied refugee minor's placement, although it is the duty of the social worker to find that the living conditions are suitable for the child. In practise many social workers who find the child living with an adult care-giver fail to open a CCI if the child is not in need of care and protection. Arguably, the lack of sufficient social workers and the knowledge by social workers and Magistrates of the legal frameworks and procedures pertaining to unaccompanied refugee minors' contributes directly to discrimination which many children suffer.<sup>182</sup>

#### **4.4.1. South African Police Station- Special Procedures for Children and Vulnerable Groups**

The mandate of SAPS to protect children is supported by International Conventions (eg. The 1951 Convention; the CRC; and the ACRWC), Constitutional and National Legislation. Accordingly unaccompanied refugee minors' are referred to as children in need of care and protection. The following procedures apply: The station commander must identify and determine the nature of the services available for temporary safe care, counselling and any other relevant support service.<sup>183</sup> Furthermore, all members of SAPS who came into contact with unaccompanied refugee minors ought to complete a SARS 581 (b) notice for social workers accredited child protect organisations to investigate and determine further steps necessary to be taken including repatriation of the unaccompanied refugee minor. SARS 581 (a) notices and Form 36 must be completed in order to place the child in alternative care for safety and well-being. Thirdly emphasis should be placed on a duty to report this onus rests in immigration officers and any person who has reasonable grounds to believe that a child is in need of care and protection.<sup>184</sup> The aforesaid procedures also apply to any child who has been a victim of crime.<sup>185</sup> One of the most notable challenges as discussed at the 2014 UNHCR Conference and which will be addressed in much more details in the preceding chapters was regarding the lack of nationwide availability of partnerships and services by other departments and service providers.

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<sup>182</sup> National Department of Justice and Constitutional Development and Correctional Services, 3 December 2014 sides titled ' Children's Court Inquiries and Adoptions in terms of the Children's Act, 2005 (Act No. 38 of 2005) same is on file with the author.

<sup>183</sup> UNHCR Conference report op cit note 52 at 17.

<sup>184</sup> Ibid.

<sup>185</sup> UNHCR Conference report op cit note 52 at 18.

The policies on paper are consistent with the international UNHCR guidelines insofar as it states that unaccompanied refugee minors are vulnerable children in need of care and protection and as soon as a SAPS officials comes into contact with an unaccompanied minor they should identify the child and contact either an immigration official or a social worker who needs to facilitate the arrangements for placement and registration, immediately. Chapter four, will however give an insight as to the shortcomings by the SAPS officials which lead to discrimination and abuse. As SAPS officials usually come into contact with unaccompanied refugee minors' during raids and children whom are just destitute they should be educated by government officials of DHA and DSD to inform them of the vulnerability of unaccompanied refugee minors, something which they should be aware of already and thus to ensure the children's needs are being met.

## **4.5 Department of Home Affairs**

DHA is responsible for dealing with all categories of foreign migrants within South Africa. It further provides documentation to the aforementioned category which included asylum seekers. This includes who is eligible to enter the country at all border posts. With regards to the unaccompanied refugee minor once the child's protection is assured the appropriate documentation solutions must be explored thus documentation is an integral part of child protection in South Africa revolves around legal documentation. This entail entry, residence and departure and without documents they are vulnerably heightened. Identification documents are required for various transactions, however a minor child's documents usually depends on that of his/ her care-givers. With that being said as soon as the child reaches the age of majority and have no documentation they are at the risk of deportation.

### **4.5.1. Documentation status of Unaccompanied Refugee Minors'**

Documentation is an integral and often overlooked component of child protection especially in South Africa. One needs identification in our daily lives and for children who enter the country without any proof of identity leads to many social problems.<sup>186</sup> The UN Guidelines in the Alternative Care of Children (2009) recommended that authorities make all reasonable efforts to procure documentation and information in order to conduct an assessment of risks,

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<sup>186</sup> Nielsen op cit note 95 at 18.

as well as social and family conditions in the country of habitual residence, to assist in the future of planning the future of unaccompanied refugee minors' and separated children. Thus the purpose of documentation is to identify the child and to legalize the foreign children in South Africa in terms of the laws governing migration. Although some children may enter their desired country to reside in they only enter with their identity documents and sometimes their passports but without any valid stamp from the immigration officials they are not legal within the country. Many enter the country without any valid documentation for various reasons which need to be assessed on a case by case study. That is many minors might have fled their countries and were unable to access their personal belongings prior to departure and others might have left their country of origin without the thought of taking with any proof of identification.

Nationally, DHA requires the immediate registration of all births and identification of minors, but no indication as to home this should be done has been indicated. The DHA has made mention that they will be moving to the usage of a biometric data of all persons in the country, undocumented children however are still excluded.<sup>187</sup> Currently, using the report and research conducted by the researchers regarding foreign unaccompanied minors and separated minors in the Western Cape at the Scalabrini Centre has identified that fifty six respondents (51%) held documentation held under the Refugees Act – which may have been expired or valid, but which only allow temporary legal stay in South Africa. The research was dived amongst thirty three children (28%) who held Asylum Seeker Permits, in terms of section 22 of the Refugees Act and twenty five children (23%) who held refugee status permits.<sup>188</sup> This might be due to their derivative status of their primary care-givers. Moreover twenty six children had no documentation at all, whereby sixteen other children were in possession only of birth certificates issued by authorities of various countries,<sup>189</sup> usually in the language of the country of origin, and which is usually rejected by the officials at the DHA.

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<sup>187</sup> Ibid.

<sup>188</sup> Nielsen op cit note 20 at 19.

<sup>189</sup> Ibid.

#### **4.5.1.1 Registration and the Documentation Process of Unaccompanied Refugee Minors'**

It is difficult to accurately assess the number of unaccompanied refugee minors' in South Africa, because many children have fallen through the cracks of the justice system and now live informally and fall outside of the child protection system, making it hard to track them. Some children even lie about their ages in order to get documentation easier, as they have been told by friend or other asylum seekers at the Refugee Reception offices in Musina, Pretoria, and Durban, Cape Town, that they will not be able to assess the documentation if they have no care-giver or social worker present. However the DSD and SAPS and other institutions dealing with children should be aware of the fact that the child should be brought before a children's Court and the Children's Court Commissioner should appoint a district surgeon to determine the age of the child.

As aforesaid the DHA is the main body which regulates the process of applying for asylum and thereafter being issued with documentation. It has been alleged by a DHA representative at the 2014 UNHCR Child Protection conference that when a minor is received at the port of entry and approaches the Refugee Reception office, the DHA official must create a conducive environment for the child, moreover minors should not queue for assistance. The DHA official should then [immediately] liaise with a social worker from the DSD in the relevant jurisdiction, in terms of the children's Act to bring the child before a children's court. The Children's Court will appoint a guardian to assist the minor with his/her asylum application. The application should be treated as priority insofar as the DHA official must consider the age and the circumstances of the child and be sensitive to any special vulnerability on the part of the child. The official should also ensure that the interpretation process is fair and accurate, to ensure that the asylum application is not biased. If the asylum application is approved the section 24 permit will be issued to the legal guardian. However, if the application is rejected, a rejection letter is handed to the guardian and DSD must then take further action, including exploring tracing and family reunification options.<sup>190</sup>

However as could be expected there are different practices in each province where there are RRO's and which inevitably lead to challenges for the vulnerable unaccompanied and separated minors. Addressed by Ms Thobeka again in the conference report she mentioned that the practise in Musina RRO is somewhat different to what has been addressed

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<sup>190</sup> UNHCR Conference op cit note 52 at 11.

in the aforesaid paragraph insofar as unaccompanied refugee minors' are not captured on the system and no interviews are conducted with them. It is therefore alleged that DSD should interview the child and inquire about the whereabouts of the child's parents or relatives. DSD's findings are then compiled in a report and presented to the Children's Court for appointment of a guardian if the parents or relatives are not found. The court order will thus legalise the child's stay in the country till the age of 18 years of age or when they reach the age of majority. Thereafter upon reaching the age of majority approach the RRO for an application for asylum<sup>191</sup> this seems problematic though from my point of view as the child might have left their country of origin at the time that the persecution occurred and when they reach the age of majority they might not have all the reasons for fleeing in a chronological order and as the years have passed the reasons which initially compelled the children to flee may have changed over the course of the years. That is why it is imperative that children are interviewed and documented as soon as they enter South Africa, because one could argue that if these children were allowed an able to apply for asylum within a reasonable time they would have qualified for refugee status in terms of the Refugees Act.

Thus the overall conclusion of the preceding section is that the said SOP's drafted by the various departments are in line with the international UNHCR children guidelines as reflected in chapter 2 and has furthermore been incorporated by the legislature regarding the legal framework in accordance with unaccompanied refugee minors, but the only initial hurdle is the implementation thereof.

#### **4.6. Challenges to Effective Protection of Unaccompanied and Separated Minors by Institutional Government Actors**

There is an under interface between the refugee regime and the child protection regime, and one which needs to be addressed by the public servants who come into daily contact with their children. There is a lack of legal documentation which is seen as a prominent part of the unaccompanied and separated minor and a lack of the level of knowledge and framework by government officials and service providers required by international law when coming into contact with unaccompanied refugee minors'.<sup>192</sup> This is evident from the aforementioned judgments in the foregoing chapters handed down by the courts, the disturbing factor was that

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<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

they were brought forth by NGO's and members of civil society on behalf of foreign unaccompanied and separated minors who were not able to successfully access the child protection system in South Africa. Arguably the lack of knowledge by social workers and magistrates to address this phenomenon of the legal framework and procedures pertaining to unaccompanied foreign children contributes directly to this said problem. Furthermore the confusion between DHA officials, social workers and presiding officers of the Children's Court regarding the aforementioned interface is another related factor. It also cannot be ignored that many officials demonstrate dormant xenophobic attitudes towards foreign children, as it is difficult to understand why vulnerable children's rights are being ignored on the basis that they are not South African.<sup>193</sup>

#### **4.6.1. CHALLENGES BY DHA AFFECTING THE WELL-BEING OF UNACCOMPANIED REFUGEE MINORS'**

##### **4.6.1.1 Failure to Contact DSD Immediately upon Interacting with an unaccompanied refugee minor**

DHA is the responsible for issuing the immigration permits and identity documents the children need to attend school and to access social services, but will refuse to attend to attend to same if the child has not been assigned a social worker in order for a children's court to grant an order setting out the child's care arrangements. "This is where the major problem arises," said Moletsale of the UNHCR, explaining that the type of assistance social workers are supposed to provide is not clearly defined and that there are inconsistencies between different government departments about which should come first – documentation or the children's court order. "Children's Court , Social Development and DHA all have different standard operation procedures when it comes to unaccompanied minors , said Samantha Mundeta of Lawyers for Human Rights, who is currently helping 75 such children navigate the maze of conflicting regulations. However, Claudia Serra, director of RAO, believes that is not just a dysfunctional system that is working against unaccompanied refugee minors' but an

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<sup>193</sup> Unicef Children on the Move, A reflection of the challenges of non-national unaccompanied minors in South Africa , a power point presentation obtained by an ex colleague of the UCT Rights Unit stakeholders confirms that "undertones of discrimination [in terms of the attitude of social workers at intake] have been noted in parts of the country. In one location where children were referred to social workers, discriminatory remarks were cited by the children, including statements such as " You do not deserve places that were created from South African tax payers money" or " You are 17 and will be on the streets in one year so there is no point in formally placing you. "

unwillingness to view them as deserving of care. “There is a xenophobic element to it, especially when the attitude is, “I’d rather help a South African child’,” she told IRIN.<sup>194</sup> The DHA biggest failure of their lack of their interaction with DSD the moment that they interact with an unaccompanied refugee minor. They do not have their contact list of social workers on hand. This will assist them to immediately contact DSD to ensure that the child is recognised as being in need of care and protection and thus expedite their documentation and placement process.<sup>195</sup>

#### **4.6.1.2 Failure to Prioritise the Unaccompanied refugee minor’s asylum application**

Although as aforementioned the DHA SOP’s have clearly stated that once the department comes into contact with an unaccompanied refugee minor they need to ensure that the minor child is attend to immediately and should be a priority. Before the 2010 establishment of the children’s court order procedure under the Children’s Act, unaccompanied refugee minors’ who approached the RRO together with a social worker in order to issue them with an asylum seeker permit. DHA treated the social workers as the children’s guardians for the purposes of obtaining documentation, although many were still left undocumented under this system.<sup>196</sup> However since the implementation of the Children’s Act, DHA has now required a court order from the children’s court and a court order before documenting the minor.<sup>197</sup> Many social workers do not know the asylum application processes and although many NGOs including the Scalabrini Centre, Legal Resources Centre and UCT Refugee Rights Unit offer such training many it is done maybe one every few years<sup>198</sup>, and during that time the social workers might have left or been promoted to different departments.as a result although children might have valid asylum claims, the social worker will not be aware of same and might not know to refer the child to the RRO, while other who do not qualify for asylum might be directed to the asylum application.

#### **4.6.1.3 Failure to conduct RSD interview with Unaccompanied Refugee Minors’**

DHA will issue an asylum seeker permit as stated above to an unaccompanied refugee minor with a court order and with the assistance of a social worker, but it does not conduct a refugee status determination to determine their status, instead a permit is printed and handed to the

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<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Elphick et al op cit note 6 at 63.

<sup>197</sup> Refugees Act, section 32.

<sup>198</sup> The author, (who has previously worked at the Clinic as a Candidate Attorney ) is aware that UCT Refugee Rights Unit has conducted the last training session with DSD in 2012 and 2014.

unaccompanied refugee minor where after they will have to return to the RRO after three or six months to extend the permit until the child reached 18 years of age. Thereafter they are released from the DSD system and whereby they need to approach the DHA on their own accord for an application of the asylum claim. International law dictates that the asylum application of the unaccompanied refugee minor should be prioritised,<sup>199</sup> as an on-going theme in the thesis. However, the damaging consequences of waiting to conduct the RSD interview until the child reaches the age of 18 years;

- 1) The situation in the country of origin might have changed;
- 2) The permanent residency option that is opened to person whom have refugee status for more than five consecutive years will be delayed; and
- 3) The child's memories of his or her reasons for leaving the country of origin may have faded by the time the RSD interview takes place

At the same time those unaccompanied refugee minors' who do not have a valid refugee claim will be held until they are deported as soon as they turn 18. The Committee on the Right of the Child has stated that Children, who are not in need of international protection, should not be referred to the asylum system, but should be protected under the relevant child protection mechanisms.<sup>200</sup>

## **4.6.2 Challenges faced by the DSD affecting Unaccompanied and Separated Refugee Minors' Rights**

### **4.6.2.1 Lack of Office Equipment**

DSD as mentioned above is the primary institution who is responsible for the implementation of the Children's Act. However their lack to attend to the Act is allegedly due to serious resource constraints. Three of the social workers within the Musina area whom were tasked with managing unaccompanied refugee minors' allege that they were not provided with office equipment such as computers and printers, but had to make use of their own personal laptops and internet access.<sup>201</sup> Until 2012, they did not have their own car and were unable to transport the children to places of safety. Such eminent lack of resources hinders the efforts

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<sup>199</sup> Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005) at paragraph 70.

<sup>200</sup> Ibid.

<sup>201</sup> Elphick op cit note 6 at 56.

of Social workers. Furthermore many social workers are not available after hours, regardless of the situation. Although there SOP's states that after hour social workers should be on call if an emergency relating to children are concerned. As a result of this unaccompanied refugee minors' who have been detained well remain in their detention centres until DSD arrives to conduct an interview and to determine that the child is indeed in need of care and protection, as any unaccompanied refugee minor should be, however an assessment needs to be conducted and only once same is realised will the social worker remove the child and place the child in a place of safety.

#### **4.6.2.2 Language Barriers & a Lack of Diverse Language Skills**

Another challenge faced by DSD and the children whom they interact with are the language barriers, as social workers are generally able to communicate with children from Zimbabwe, Mozambique and Malawi as they speak relevantly fair English, but they often face challenges when communicating with unaccompanied refugee minors' from other countries. Particularly children from the Democratic Republic of Congo, Somalia and Rwanda.<sup>202</sup> In such cases DSD is required to make use of volunteer translators to assist them – generally locals with whom they have relations with. The problem with this is however, the fact that because these locals are offering their services on a volunteer basis it hinders the social workers direct interaction with the child, and might limit the unaccompanied refugee minors' opportunity to actively participate in his or her best interest determination.<sup>203</sup> Furthermore another challenge which follows would be whether the translation received by the interpreter is the direct translation of what the unaccompanied refugee minor has said. In many instance although children might come from the same country as the interpreter, there are various languages – for example the east of the Democratic Republic of Congo speaks mainly Swahili whereas the central Democratic Republic of Congo's mother tongue would be Lingala. Although French is the main language in the Democratic Republic of Congo if a child never went to school they would know very little French growing up in a rural village.<sup>204</sup> Language barriers also make it difficult for the unaccompanied refugee minors' to assimilate into society, and in shelters and school.

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<sup>202</sup> Elphick op cit note 6 at 57.

<sup>203</sup> Ibid.

<sup>204</sup> The author has worked at the UCT Refugee Rights Unit and thus has interacted with many refugees on a daily basis thus has knowledge regarding the difference between interpreters and refugees.

#### 4.6.2.3 Lengthy Placement Procedures

The process of obtaining a court order from the Children's Court can take up to a month or even longer, both because of the investigation processes and the court rolls. Children thus in need of care and protection are placed in shelters during this period, and the fact that they rarely receive any counselling during this periods, many of them leave the shelters before they are formally placed.<sup>205</sup>

#### 4.6.3 Challenges affecting Unaccompanied and Separated Refugee Minors' and by SAPS

Although the former chapters have reiterated the importance of children to be treated as children before they are seen as refugees, reports by human rights organizations and news reports have shown that unaccompanied refugee minors have reported on gross human rights violations. This section aims to look at the experiences of unaccompanied refugee minors and the socio-economic rights which although international, regional and domestic law entrusts to them they are being denied of it.

*"I was caught by the police when they asked for my passport. There were fifteen other young people with me who were also asked. We said, 'Oh, we have no passports.' We said, 'We are South Africans' they said, 'NO, you're not.' They loaded us in a van and took us to jail. We stayed there from Friday, and on Monday they took us to the border post. The next day I came back. I was the only one to come back. I just wanted money. In jail the only thing that happened was they kicked us when they put us in the van.... I have been deported four times during my time here. The same thing happened each time. They just brought us to the border."* Komatipoort, 17 years old.<sup>206</sup>

##### 4.6.3.1 Identification and Determination of Unaccompanied Refugee Minors'

Although DSD has the primary responsibility for identifying children in need of care and protection it is the policemen who are called upon to assisting the removal of the children and

<sup>205</sup> Elphick et al op cit note 6 at 57.

<sup>206</sup> Save the children UK, *Children on the Move : Protecting unaccompanied migrant children in South Africa and the region*, available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/2665.pdf> [accessed on 28 March 2016] at 15.

take them to the place of safety under the supervision of DSD.<sup>207</sup> However many unaccompanied refugee minors' are initially detained at the border by SANDF, who then hands them over to SAPS. SAPS often detain these unaccompanied refugee minors' until DSD arrives to conduct their identification processes. More times than less NGOs are the organizations who contact DSD rather than SAPS when they are made aware of unaccompanied refugee minors' presence in holding cells. Even if the detention is for DSD to facilitate the identification of the children, the detention of minors remains illegal in terms of the Constitution, the Children's Act, and the Immigration Act.<sup>208</sup>

#### **4.6.3.2 Unaccompanied Refugee Minors' reports of Harassment**

Outside of the refugees' status determination process, asylum seekers and refugees are often subjected to harassment, mistreatment and extortion by police. Numerous reports have highlighted that a darker skin are not 'sounding South African' are common reasons why police may question detain certain people.<sup>209</sup> The SAPS are responsible for policing and ensuring the safety of the all the people who live within the borders of South Africa, and to ensure crime prevention within the country. In various parts of the country there are different procedures which take place, - for example in Johannesburg the Johannesburg Metropolitan Police Department are responsible for enforcing the municipal by- laws and to ensure the safety of the people living within the city. However, reports by refugees and asylum seekers living in neighbourhoods with the highest immigrant populations in Johannesburg such as Hillbrow, Yeoville, Doornfontein and Berea tend to be patrolled more vigorously by police than many other areas.<sup>210</sup>

### **4.7 The problem of accessing socio-economic rights by Unaccompanied Refugee Minors'**

Despite the existence of the aforesaid legal instruments and policies under international law and regional law, there still seems to be many challenges faced by the unaccompanied refugee minor. Many international treaties touch on the issue of the plight of unaccompanied refugee minors' and yet against the aforesaid discussion displayed the importance of documentation in South Africa for any foreign person living here, and without it the living

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<sup>207</sup> Centre for Child Law op cit note 135.

<sup>208</sup> Elphick et al op cit note 6 at 51-52.

<sup>209</sup> Pelea M & Hlongwa W, *Focus in Home Affairs Bulges: Dark Skin nearly Lands Locals in Zimbabwe*, The City Press, October 3, 2004 [Accessed on 15 April 2016].

<sup>210</sup> Living on the Margins, op cit note 171 at 36.

situation can become strenuous to many adults, yet alone on innocent children. The South African Bill of Rights ensures that socio-economic rights enjoy the same mixture of international, constitutional and statutory protection as civil and political rights. Social Rights are positive rights which impose certain obligations on states which they need to fulfil.<sup>211</sup> Currie and de Waal state that: “The socio -economic rights accordingly oblige the state to do as much as it can do to secure for all members of society a basic set of social goods – education, healthcare, food, water, shelter, access to land and housing.”<sup>212</sup>

#### **4.7.1 The right to Education**

In South Africa basic education is an immediately realisable right, which is entrusted to all whom live within it. The Refugees Act<sup>213</sup> makes reference to the fact that education is a basic right, furthermore the Constitution’s Bill of Rights, states that “Everyone has the right to a basic education, including adult basic education”.<sup>214</sup> ‘Everyone’ has been explicitly interpreted to include non-citizens.<sup>215</sup> Both the domestic law and international law has explicitly stated the right of any child to education. The South African Schools Act 84 of 1996 has stated that: ‘Every learner must attend school from the first school day when they reach 7 years old until the last school day of the year when the child reaches 15 years or the ninth grade, whichever occurs first.’<sup>216</sup> ‘[Also] any person who without, just cause, prevents a learner from attending school is guilty of an offense and liable to a fine or conviction to imprisonment for a period not exceeding 6 months.’<sup>217</sup>

As has been previously discussed many of the children who migrate stated that work and education seem to be the main reasons for migration, and those children whom flee due to refugee reasons have stated their desire to continue with their education while residing in South Africa. Many children named school as the ‘best part’ of South Africa<sup>218</sup> and have a legal document allows them to do this. However the research conducted by the Scalabrini Centre has concluded that, children spent lengthy periods in the public school system. Twenty five percent have spent more than seven years in a South African School; eleven percent had spent five to seven years in school; 18 percent had completed three to five years

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<sup>211</sup> Currie and J de Waal *the Bill of Rights in Handbook* 6 ed (2013) 564.

<sup>212</sup> *ibid*

<sup>213</sup> Section 27 (g) of the Refugees Act.

<sup>214</sup> Section 29 (1) (a) of the Consitution.

<sup>215</sup> Schreier op cit note 172 at 10.

<sup>216</sup> Section 3 (1) of the South African Schools Act.

<sup>217</sup> Section 6 (b ) of the South African Schools Act.

<sup>218</sup> Save the Children UK op cit note 89 at 18.

of schooling; 22 percent have attended school for between one and three years. Whereas eight percent has spent less than a year in school.<sup>219</sup> The only possible reasons for this would be that some have valid permit while other children are not documented which lead to issues at school and children feeling discriminated which causes them to drop out.

#### **4.7.2 Access to Food, Shelter and Healthcare**

Many children are stating poverty as their push factor to South Africa. Section 28 of the constitution states that it is the responsibility of the government to ensure that every child has the right to basic, healthcare and social services. One of the CRCs four P's stands for "provision of assistance to children's basic needs".<sup>220</sup> One of the solution's by the Department of Health was to issue a national Revenue Directive<sup>221</sup> on the applicable fees for refugees and asylum seekers to be able to access basic healthcare and antiretroviral therapy. This directive confirms all refugee and asylum seekers with or without permits, to access basic health care on the same basis as South African citizens. Furthermore housing and shelter are basic needs for one's survival, many children live in dire conditions because South Africa does not provide refugee camps and those which are erected are poorly managed. Many children will end up sleeping at churches or in the streets until they are discovered by SAPS and then assessed by the DSD and taken to a place of safety.<sup>222</sup>

#### **4.8 Conclusion**

This chapter has aimed to sum up all the policies already put into place by the Departments and government officials to assist with the phenomenon of unaccompanied refugee minors' and separated minors' within South Africa, in relation to its international and domestic conventions obligations. This chapter has attempted to give a holistic view of the policies incorporated by the various departments within South Africa, which included DHA, DSD and SAPS, in light of the international and domestic framework depicted in chapters 2 and 3. Each of these aforesaid departments have their own protocol whereby they need to adhere to

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<sup>219</sup> Nielsen op cit note 95 at 14.

<sup>220</sup> Chiguvare op cit note 31 at 74.

<sup>221</sup> Department of Health Revenue Directive of 19 September 2007 Reference B! 4/29 REFUG/ ASYL 8 2007. This directive was issued as a result joint advocacy efforts by the United Nations High Commissioner for Refugees and Lawyers for Human rights, and the author has a copy on hand with her.

<sup>222</sup> Shabangu T & Mbecke P *Practical Guide for Defending the Rights of Refugee Children and Refugee Unaccompanied Minors in South Africa* Available at [http://researchspace.csir.co.za/dspace/bitstream/10204/5537/1/Shabangu\\_2008.pdf](http://researchspace.csir.co.za/dspace/bitstream/10204/5537/1/Shabangu_2008.pdf) [Accessed on 16 July 2016] at 56.

the policies, being in line with international and domestic frameworks which have been implemented to ensure that the rights of unaccompanied refugee minors' are being met.

DSD is regarded as being the basis which is used to implement the rights of the Children's Act which extensively envision the rights of all children. The first SOP which was implemented by the DSD was the 2011 Guidelines on Separated and unaccompanied children which took into consideration on the international and the domestic framework and in essence sought to uphold the right of all children – stating that children found to be in need of care and protection should be referred to the department for assessment, placement and assistance when making an application for asylum. As the thesis has proven the policies implemented by the departments have sought to protect the rights of unaccompanied refugee minors' insofar as identifying unaccompanied minors and contacting DSD for assessment in terms of regulation 54 of the Children's Act. Although these policies have been put into place it seems like the enforcement of same is not being implemented accordingly. This has been discussed above whereby the departments have given their reasons for the failure to act in the best interests of the unaccompanied refugee minor, thus proves that shortfalls are bound to happen. These shortfalls as this thesis has depicted after research shows that the departments who are supposed to be implementing the legal framework to ensure the children's rights are met are not doing same. The failure however, cannot be attributed only to the nature of the obligations which and rights which state parties have to international bodies and treaties but it is a matter of weak implementation, "a problem of perception and resolve".<sup>223</sup> Thus this practice is thus surely in contradiction to the international obligations as envisioned in chapter 2 and 3. The chapter to follow will however try to provide recommendations to the officials to ensure proper implementation and adjustment of the regulations which have already been to put into place.

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<sup>223</sup> Leckie S, "Another step towards indivisibility: Identify key features of violations of economic, social and cultural rights" (1998) 20 Hun. Rts. Quarterly 81 124.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS TO THE SOUTH AFRICAN GOVERNMENT

#### 5.1 CONCLUSION

In the words of Dr Zaheerah Jinnah, “Migration cannot be stopped and it will not end.”<sup>224</sup> This is a truth that is well worth recognising and that the relevant government actor’s should seriously engage with. The question is thus that the migration should not be stopped but how to handle the situation in a humanitarian manner. Given the finding of the study, it is clear that the South African government had failed to implement much of its signed treaties. On paper it follows the international obligations to unaccompanied refugee minors but in practice it is overlooked, by the departmental officials and the government as they fail to hold department and their officials accountable for their actions. Based on the finding of my study, a recurring theme which the research has proven is that unaccompanied refugee and separated minors should first be treated as children and treated in terms of international human rights and children legal frameworks before they are seen as refugees claiming asylum. With this being said case law in the aforementioned chapters has proven that the rights of children supersede their rights as refugees.

Chapter 1 introduced the reasons behind children’s migration to South Africa which included, but certainly not limited to a poor economy in their country of origin, education opportunities in South Africa, domestic violence and events which were seriously disturbing in their country of origin. What this study however has proven is that children migrated on their own accord most of the time. Millions of children are on the move nationwide, and this number could drastically grow in the next decades as consequences of trends as urbanisation occurs. Although the exact number of unaccompanied minors are recorded , many NGOs and thus researchers for these institutions have attempted to do field research in an attempt to quantify the total number of unaccompanied minors’ within the South African borders. This is imperative if the government wants to honour their international obligations and proceed with international standards and guidelines regarding unaccompanied minors, in so far as ensuring that these children are identified, registers, provided with documents which will

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<sup>224</sup> Dr. Jinnah made this statement at the Roundtable on the 30<sup>th</sup> June 2013, available at <http://www.e-ir.info/2013/08/20/the-securitization-of-the-border-are-we-really-protected/> [accessed on 15 May 2016].

ensure their stay and their rights in South Africa are being protected. It is therefore that the migration of children should not be ignored – but that policy makers within South Africa should realise that this is taking place, whereby children are leaving their country of origin for economic reasons or fleeing to seek asylum in South Africa. This phenomenon needs to be addressed as soon as the children enter the South African border and immediately respond to unaccompanied refugee and separated minors' needs and to ensure that as they are vulnerable beings they should be protected within the international and domestic frameworks.

Chapter 2 we were introduced to the international provisions of the best interest's principle. Where the CRC the best interests as "the" best interests of the child being of paramount importance, whereas the ACRWC placed the principle at a higher standards stating that "a" child's best interests are of paramount importance. The latter later being adopted by the 1996 Constitution. Hence its broad notion as the aforementioned should be dealt with on a case by case basis. In terms of chapter 1 the cases by case basis is imperative as this thesis aimed at looking at the children's reasons for leaving their country of origin. Chapter 3 and 4 we have seen that the South African government has attempted to incorporate the international legal frameworks in their own legal frameworks. Although some has been incorporated case law has proven to prevail. With that being said, although legislation in South Africa seek to protect the best interest of the child, the courts were nonetheless faced with situations where minor children were being denied access to schools, health, freedom of movement and documentation. Seminal cases, as discussed have proven that the drafters of the Constitution, moreover section 28 of the Constitution intended that the rights envisioned in it would be to all the people residing within South Africa, and namely that children be treated accordingly as reflected in section 28. South Africa has an obligation to the international organisations, namely the UNHCR and to the CRC. The courts have furthermore stated that South Africa has a direct duty and responsibility to care and protect any child who finds themselves on South African soil. In essence the courts have taken a sympathetic and unbiased decision when they decided on certain matters, and have further stated that the serious infringements of foreign children's rights are shameful. The preceding recommendations do not call for the state to go above and beyond but to recognise that unaccompanied and refugee minors' and separated minors are vulnerable being and are entitled to human rights under international law and national law, and to do what is within their means to eliminate the inequalities currently existing.

## **5.2 Recommendations**

Despite the efforts made by local society, NGOs' and local government, the discussion above has identified that the needs of many unaccompanied refugee minors' and separated minors go largely unmet. This chapter will thus aim to provide recommendations to the various bodies that come into contact with unaccompanied refugee minors' and separated minor children to ensure that their rights are being protected as both asylum seekers and under the international law for the general protection of children. A key problem for unaccompanied refugee children is the search for an appropriate durable solution - voluntary repatriation, local integration or resettlement. In seeking such solutions, regard should be given to the principles of family unity and the best interests of the child.

The latter requires that decisions on durable solutions for unaccompanied refugee children be taken by competent expert bodies. Cases must be thoroughly assessed on an individual basis. The procedure should permit the effective participation of the refugee child and, as with status determination; arrangements may be made for him or her to be represented. Where possible, the views of the parents or others in loco parentis should be obtained. The best durable solution for an unaccompanied refugee child will depend, of course, on the particular circumstances of his or her case, in the light of the principles of family unity and best interests of the child. The possibility of voluntary repatriation should at all times be kept under review and actively pursued whenever appropriate. Where this is not possible, local integration or resettlement should be envisaged.

### **5.2.1 Improving the Humanitarian Services Offered to Unaccompanied Refugee Minors'**

Part of the present crisis in South Africa is a direct result of poor follow through on the part of government entities.<sup>225</sup> One of the major barriers as discussed above is the increasing unaccompanied refugee minor population in South Africa and the lack of places of safety and drop-in centres for the minors. DSD is responsible to determine that once they have addressed that the child is in need of care and protection to then find a suitable and safe placement for the child.<sup>226</sup> Furthermore schools need to waive the documentation and school

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<sup>225</sup> Fritsch C, et al op cit note 125 at 654.

<sup>226</sup> Fritsch op cit note 125, Interview with Motlalepule Nathane, Social Worker Doctoral Candidate, University of Witwatersrand, School of Human and Community Development : social Worker, in Johannesburg (March 4, 2009) at 655.

uniform requirement in order to provide unaccompanied refugee minors' with the constitutional right – which entitles them to free primary education. The government should also look into partnering with NGOs and providing them with facilities to conduct ad hoc settings such as churches, tents, which although not ideal will allow these children to receive a basic education, and accomplish the goal of providing education to all children within South Africa.<sup>227</sup>

### **5.3 Durable Solutions**

The basic criterion for good programmes is self-reliance. The protracted refugee crisis- many have been refugees for decades, remain dependant on humanitarian assistance.<sup>228</sup> In particular and in relation to this discussion, the particular vulnerability of unaccompanied children, every effort should be made to ensure that decisions relating to them are taken and implemented without any undue delays.<sup>229</sup>

#### **5.3.1 Family Tracing**

Family tracing is a crucial step towards finding a durable solution for unaccompanied refugee minors' and separated minors in South Africa<sup>230</sup> and should be the first priority as it is essential that unaccompanied refugee minors' are assisted in locating and communicating with their family members.<sup>231</sup> Concurrent to ensuring protection and exploring documentation options for the unaccompanied refugee minors', the designated DSD social worker should endeavour to locate the separated minors' family members. In order to expedite the search the matter should immediately be referred to the provincial focal point of International Social Services (ISS) which is a component of DSD. The role of the ISS is to initiate contact with the counter –part organizations of NGO's as the International Community of Red Cross (ICRC) International Community for Migration (IOM) in the country of origin of the child.<sup>232</sup> It is imperative to note that family reunification should not be pursued where there is evidence that there is a risk of abuse or if it is otherwise not in the

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<sup>227</sup> Fritsch op cit note 125 at 657.

<sup>228</sup> UNHCR Framework for Durable Solutions for Refugees and Persons of Concern, Geneva May 2003, available at <http://www.unhcr.org/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html> [Accessed on 23 August 2016] at 5.

<sup>229</sup> Ibid.

<sup>230</sup> Nielsen op cite note 20 at 22

<sup>231</sup> UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (2007), available at <http://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> [Accessed on 26 March 2016] at 15.

<sup>232</sup> LRC Guide 4 Op cit note 111 at 6.

best interests of the child to be reunited with his/ her family. Scholars have expressed their concerns stating that DSD social workers are failing to maintain constant contact with unaccompanied refugee minors'. Out of more than 100 children interviewed in shelters, indicated that they did not know who their social workers were, or ever having been introduced to a social worker, or been introduced to the concept of family tracing, verification, reunification and follow ups.<sup>233</sup> It seems that many are just not of their duties or are just reluctant to do their work since it seems that no –one is monitoring their work. <sup>234</sup>

### **5.3.2 Family Reunification**

It has been observed that progress regarding DSD to locate unaccompanied refugee minors' and separated minors' family members within South Africa, but cross border family reunification as not being pursued. Thus this is something that needs to be effectively addressed by the DSD.

## **5.4 Recommendations to the DSD**

Data indicated that 61% of children in care had been resident in South Africa for more than 5 years, and that 41% have been in care for more than five years. This is contrary to the international standards, which state that children need to be placed in institutionalised care for the shortest possible duration. It is therefore recommended as follows<sup>235</sup>:

### **5.4.1 At a National and Provincial Level**

- ❖ The Minister and the MEC for the Social Development should ensure that the provision of adequate funding to establish child Youth Care centres in South Africa should be made a priority. Mainly along borders where many of the children illegally enter the country.
- ❖ DSD should facilitate an awareness campaign with all social workers within the relevant metropolitan areas, who are responsible for the cases of foreign children, with the objective of gaining full understanding of unaccompanied refugee minors'.
- ❖ Greater resources should be provided to social workers, as discussed in chapter 4 highlighted this by social workers.

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<sup>233</sup> Elphick et al op cit note 6 at 26.

<sup>234</sup> Chiguvare op cite note 31, NGO employee at Musina, November 2010, at 174.

<sup>235</sup> Nielsen op cit note 94 at 29.

- ❖ Many children who have migrated or fled their country of origin have probably suffered in their country or along the way to South Africa, and therefore the Department should ensure that the therapeutic needs of the children
- ❖ Ensuring that all DSD officials have access to contact an interpreter when required, and that the funding will be provided for by the DSD. This will eliminate the use of volunteers which are always not reliable.

#### **5.4.2 At a local level**

- ❖ The current National Guidelines and Standard Operating Procedures in dealing with unaccompanied refugee minors' and separated minors should be amended in order to include clear instructions, designation of tasks, discussion of various outcomes and brief description of the applicable laws around documentation, which is vital for the minor.
- ❖ The provision of services should be done on a case by case basis as many children have entered the country for various reasons but all should be protected under the international children's legal policies.
- ❖ The designated social workers should be made aware of the refugee process and when a child will qualify for refugee status in terms of section 3 of the Refugees Act.
- ❖ Once same has been established the social worker needs to be familiarised with the practise at the RROs, whereby the DHA requires a social worker to be present when a child is brought forth to apply for an application for asylum.
- ❖ All efforts should be made to reunite the minor with their family, and same should be clearly documented in the minor's case file.
- ❖ In cases however, where family members are not located, and tracing efforts have failed or where reunification is not in the best interests of the child, it is imperative that durable solutions should be explained.

### **5.5 Recommendations to the DHA**

- ❖ Children who are identified at the border should not be detained or prohibited by immigration officers from entering at the borders without a procedure for ensuring their care and protection, and without being referred immediately to the DSD. Also

the location and identity of the family member should be gathered as far as possible.<sup>236</sup>

- ❖ DHA should eliminate the guardian requirement, and create a special body to review unaccompanied and separated refugee minors' making asylum applications to ensure a speedy recovery for asylum applications.
- ❖ Make sure that all staff at the RROs is aware of the international obligations of South Africa and the officials who come into contact with the unaccompanied refugee minor and separated minors that they have a legal duty to ensure the protection of all minors.
- ❖ Officials should have a directory of all the designated social workers within the jurisdiction of the RROs in order to call on them when DHA has come into contact with unaccompanied refugee minors'.
- ❖ DHA should prioritise all asylum claims for unaccompanied refugee minors, which included conducting refugee status determination interviews in the presence of a social worker and interpreter, if same is required.
- ❖ Develop mechanisms to document minors who do not qualify for asylum.
- ❖ It is further recommended that all applications for permanent residence in terms of section 31(2)(b) of the Immigration Act be made accessible to unaccompanied and separated minors in care by setting certain guidelines for care- for example taking into consideration the reasons for migration, reasons for placement, the number of years and setting minimum standards for monitoring and evaluating family tracing and reunification efforts, DHA would be in a better position to regulate such efforts.<sup>237</sup>

## 5.6 Recommendations to the SAPS/SANDF

- ❖ Proper training should be provided to officers to be made aware of the processes when coming into contact with an unaccompanied refugee minor or separated minor, and if protocol is not being followed they should be disciplined.
- ❖ Should not detain minors at all but rather contact the DSD officials to assist the children in placing them in care. However in cases where age determination is necessary, and if the unaccompanied refugee minor is to be detained, they should be

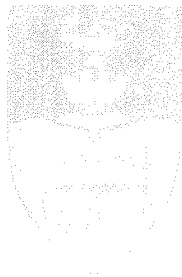
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<sup>236</sup> International committee of the Red Cross (2004) *Inter Agency Guiding Principle on Unaccompanied and Separated Children*, available at [http://www.unicef.org/violencestudy/pdf/IAG\\_UASCs.pdf](http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf) [Accessed on 22 August 2016].

<sup>237</sup> Nielsen op cit note 94 at 31

held in a cell separate from adults to ensure their safety and for the shortest period possible.

- ❖ Officers should be made aware of the fact that all unaccompanied refugee minors' should not be deported but instead remove unaccompanied refugee minors in dangerous situations – example those on the streets to be removed and taken to shelters and for DSD to be contacted.



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