

UNIVERSITY OF CAPE TOWN



PROTECTING THE IDENTITY AND OTHER RIGHTS OF CHILDREN BORN IN 'FOREIGN LANDS' TO IRREGULAR MIGRANT PARENTS

PATIENCE RATIDZO MADAMOMBE

(MDMPAT001)

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Supervisor: Professor Rashida Manjoo

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DEDICATION

This dissertation is dedicated to the loving memory of my daughter Tererai Anashe Zoe Shumbamhini, born on 27 January 2015 and passed away on 1 February 2015. Even though the time we shared in this lifetime was too short, you will always be my girl, and I will love you till the end of time. It is also dedicated to my husband Levis and my son Anotida; your love and support during our time of bereavement has been comforting. Together we are more than conquerors. Psalm 147:3 'He heals the broken hearted and bandages their wounds.'

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Key Terms

Child

Article 1 of the Convention on the Rights of the Child¹ (CRC) defines a child as ‘... every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

Under article 2 of the African Charter on the Rights and Welfare of the Child² (ACRWC) a child is every human being below the age of eighteen years.

The definition of a child has biological connotations and it becomes problematic to ascertain the age of a child whose birth is not registered especially as they approach adulthood. Children can easily be classified as adults, denying them their protection under the CRC or the ACRWC.

Irregular Migrant

‘An irregular migrant is defined as a person who, owing to unauthorised entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country. The definition covers inter alia those persons who have entered a transit or host country lawfully but have stayed for a longer period than authorised or subsequently taken up unauthorised employment. The term “irregular” is preferable to “illegal” because the latter carries a criminal connotation and is seen as denying migrants humanity.’³

¹ United Nations Convention on the Rights of the Child General Assembly Resolution 44/25 Un Doc A44/736 (1989).

² African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), it entered into force on 29 November 1999.

³ International Organization for Migration *Key Migration Terms* available at <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Irregular-migration>. Accessed on 1 July 2014.

CHAPTER 1: INTRODUCTION

‘A child is first, foremost and only, a child. This is the starting point for any discussion about undocumented migrant children. The status of the child is secondary and arguably irrelevant.’¹

1.1 Background

The right to a name and nationality is one of the most fundamental human rights. This right is recognized in a number of international and regional treaties.² In the Universal Declaration of Human Rights³ adopted in 1948, nationality is one of the guaranteed rights. Article 15 provides that ‘[e]veryone has a right to a nationality’ and that ‘[n]o one shall be arbitrarily deprived of his nationality.’ Since then, other international human rights frameworks have advocated the right to a nationality. The first step in ensuring protection of this fundamental right is the registration of the birth as soon as possible. Children who are not registered do not officially exist and this can complicate enrolment in school, access to health care and expose them to illegal adoption, trafficking and other criminal activities.⁴ Migration is not a recent phenomenon, but it has played a major role in the number of children who are born in foreign lands. While some countries like the United States of America⁵ still recognize the right of everyone born in their territories to be citizens by birth, other countries including South Africa⁶ and the United Kingdom⁷ no longer treat citizenship as a right which accrues at birth.

There are alternatives to protecting the rights of children born in a State but are not citizens. The first step is to recognise and acknowledge their existence. Article 7(1) of the Convention on the Rights of the Child (CRC) provides that;

¹ Council of Europe ‘Undocumented migrant children in an irregular situation: a real cause for concern.’ Committee on Migration, Refugees and Population, 16 September 2011, Doc 12718 p 5.

² Universal Declaration of Human Rights 1948, Article 15; International Covenant on Civil and Political Rights 1966, Article 24; Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 9; Convention on the Rights of the Child 1989, Articles 7 and 8; African Charter on the Rights and Welfare of the Child 1990, Article 6; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990, Article 29.

³ Universal Declaration of Human Rights United Nations General Assembly Resolution 217 A (III) 10 December 1948.

⁴ UNICEF, The Progress of Nations 1996.

⁵ 14th Amendment to the United States Constitution: Civil Rights (1868).

⁶ South Africa Citizenship Act 88 of 1995 as amended.

⁷ British Nationality Act of 1981.

‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to *acquire* (emphasis added) a nationality ...’

Article 7(1) of the CRC follows the wording of article 24(3) of the International Covenant on Civil and Political Rights⁸ (ICCPR) and not that of Principle 3 of the United Nations Declaration of the Rights of the Child⁹ that ‘the child shall be entitled from his birth ... to a nationality.’¹⁰ In General Comment 17 on article 24 of the ICCPR, the United Nations Human Rights Committee observed that:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.¹¹

The nationality status of parents is one of the prohibited grounds of discrimination in according children’s rights broadly, including the right to a nationality. To ensure that the right is preserved, the child’s birth must be registered immediately after birth. Non-registration of a child’s birth makes it difficult for the child to have access to socio-economic rights. A birth certificate is visible evidence of the government’s recognition of the existence of the child and proves the relationship between the child and the parents.¹² The right to nationality affects many groups of children, including children born to refugees, asylum seekers, stateless people and migrants.

Unregistered children are almost always the children of the poor and the excluded.¹³ This exclusion might stem from the fact that they are part of a minority group or fall into one of the groups identified above. While birth registration does

⁸ International Covenant on Civil and Political Rights General Assembly Resolution 2200A (XXI) December 1966. It entered into force on 23 March 1976.

⁹ United Nations Declaration of the Rights of the Child General Assembly Resolution 1386 (XIV) 10 December 1959.

¹⁰ Jaap E. Doek ‘The CRC and the right to acquire and to preserve a nationality,’ (2006) *Refugee Survey Quarterly*, Vol. 25, No. 3 where he argues that the word ‘acquire’ was added by some States to remove any implication that a State should accord nationality to all children born on its territory regardless of the circumstances. Whether the intended results of the amendment are achieved is debatable.

¹¹ CCPR General Comment No. 17: Rights of the child (Art. 24), 7 April 1989, para 8.

¹² Marta Santos Pais (ed), *Birth Registration Right from the Start* (2002) Innocenti Digest No. 9 UNICEF, Innocenti Research Centre, Italy p 2.

¹³ *Ibid.*

not guarantee education, health, protection and participation, its absence can put these rights out of reach for the children who are already struggling to obtain them.¹⁴

1.2 Problem Statement

Children born in foreign territories to parents who are non-nationals are being deprived of the right to nationality, which in turn affects them from exercising other rights which are articulated in human rights instruments. When their births are not registered it means that they do not have birth certificates and in future they will be unable to acquire documents like identity documents and passports. Sometimes even if their births are registered, it is difficult for them to enjoy the other rights because national laws do not accommodate them. Even though all children's rights should be equally protected, this research will focus on children born to at least one parent who is an irregular migrant, and will analyse how this affects their access to the rights to education and health.

In most cases, parents are supposed to prove their identity and legality in a State before their child's birth is registered. While documented non-nationals may not encounter problems with a provision like this, irregular migrant parents will not meet these criteria. Situations like these are in sharp contrast to article 7 of the Convention of the Rights of the Child (CRC) which gives every child the right to be registered at birth by the State within whose jurisdiction the child is born. In some States, in order to access health, education and some other socio-economic rights, one has to prove their identity first. Children whose births are not registered will encounter difficulties accessing these services because they do not have the legal documents which enable them to exercise their rights. Given the indivisibility and interdependence of all human rights, the failure to protect and ensure economic, social and cultural rights can have severe consequences on civil and political rights and vice versa.¹⁵

This group of children is also at risk of being stateless, because even though they may qualify for their parents' nationality, they cannot prove it because they are not

¹⁴ Progress of Nations op cit note 4.

¹⁵ Office of the High Commissioner for Human Rights, *Out of the shadows: a human rights perspective on irregular migration and development* (October 2012).

registered.¹⁶ The risk may further be increased where States charge fees to register births. An example is the Zimbabwean practice, where a fee of US\$50 is charged for birth registrations of children born outside Zimbabwe to Zimbabwean citizens.¹⁷ Birth registration for children born in Zimbabwe to Zimbabwean nationals is free for children under 6 years of age, while foreign nationals pay a fee of US\$25.¹⁸ Practices like these make birth registrations inaccessible to all migrant parents who cannot afford the fees.

States are discriminating against the rights of children born to irregular migrants based on the migration status of the parents. The problem is that national laws do not accommodate children of irregular migrants. Children are affected and stigmatised from the moment of birth, including in taking on the irregular status of their parents. Child specific needs and individual rights of every child including the requirement to act in the best interests of the child are ignored or not separated from the parents' needs and treatment, leaving the children exposed and vulnerable.

International human rights law is constantly being developed to ensure that no one is discriminated against. However, States are slow in implementing their duties under international law and this result in many people being excluded from living their lives with dignity, and the most affected are children. By not keeping accurate statistics of all children born in their jurisdictions, States are also affected in their planning and allocation of resources. As a result, the available resources may become insufficient to meet the needs of everyone and the States will be failing even its citizens by failing to provide adequate services.

Immigration laws in different countries have played an important role in contributing to this situation of some groups of children being without any documentation. Restrictive migration and citizenship policies can place children in situations of vulnerability to human rights abuses and violate rights enshrined in the CRC as well as other human rights instruments.¹⁹ The CRC is one of the most

¹⁶ Jacqueline Bhabha (ed) *Children Without a State: A Global Human Rights Challenge* (2011) Preface xiii.

¹⁷ Information available at <http://www.rg.gov.zw/services/birth> accessed on 19 February 2015.

¹⁸ Ibid.

¹⁹ Committee on the Rights of the Child Day of General Discussion, *Access to Civil, Economic and Social Rights for Children on the Context of Irregular Migration*. (2012) UNICEF.

ratified international instruments, with only three States that have not ratified it.²⁰ Despite this high level of support for the CRC by States, only a minority of the world's children enjoy their rights to the maximum extent possible.²¹ The current trend is that more States are moving away from automatic birth right citizenship, leaving gaps in the protection of the right to a name and nationality to those children who do not qualify for citizenship. For a child, acknowledgement and inclusiveness starts with the registration of the birth and everything else should follow after that.

This thesis will also analyse the consequences of not extending all rights to children of irregular migrants and the difficulties they encounter throughout their childhood. In many destination countries there is a general lack of migration related public policies except for policies specifically targeted at controlling migration.²² Discrimination starts against the parents and it later affects their children. There is no integration of migrants into the host country and this diminishes their contributions to development and generates exclusion.²³ While this research is about children born to irregular migrants, it is important to note that at times it is difficult to separate the rights of the children from those of their parents.

The CRC articulates the rights of all children, and therefore it is the most important treaty that will be referred to discuss the issue of children born to irregular migrants. Most of the available literature focuses on the identity rights of refugee children, asylum seekers, stateless and unaccompanied children. The rights of children born to irregular migrants are only starting to gain recognition but the problem is that States look at these children from the same perspective they look at their irregular migrant parents. The best interests of the child is not considered in the restrictive policies applied to irregular migrants, and thus migration control tends to take precedence over the protection of children's rights.²⁴ Citizenship and nationality are complex issues which are affected by migration. Citizenship and immigration

²⁰ The three states are the United States of America, South Sudan and Somalia. Somalia and South Sudan have started domestic processes to being part of the Convention.

²¹ Bernice Maenzanise *Child Labour – What do you see in the eyes of children? A critical examination of child exploitation and abuse, effects and causes in Zimbabwe* (unpublished MA thesis, University of the West of England, 2011) 1.

²² UNICEF and National University of Lanus, Argentina, *Economic, Social and Cultural Rights of Migrant Children and Children Born to Migrant Parents: Challenges, Good Practices and Recommendations* (2010) p 4.

²³ Ibid.

²⁴ Platform for International Cooperation on Undocumented Migrants *Rights of Accompanied Children in an Irregular Situation* (2011) p 6 UNICEF.

laws of States influence the rights accorded to children depending on whether they acquire citizenship at birth or not.

Joppke²⁵ traces the history and development of citizenship and migration and how migration has changed the institute of citizenship. Doek states that the major focus has been on the literal translation that children have a right to acquire a name and nationality from birth.²⁶ After the children have been registered at birth, there should be continuity whereby they have equal access to rights which promote their rights to life and development. Bhabha argues that the effects of irregular migration and the lack of birth registration on the rights of children have never been considered together until recently.²⁷ *Plan International's* Universal Birth Registration Campaign²⁸ is a positive development in protecting the rights of all children without discrimination. The rights of children need to be protected uniformly to ensure uniform access to services. Some writers are of the opinion that it is difficult to regulate situations whereby children have citizenship which is different from that of their parents.²⁹ Goldston notes that even though there is growing consensus that national laws must conform to international law general principles on human rights, there is still a protection gap for non-nationals.³⁰ Children born to irregular migrants are also children as defined in the CRC; therefore they need protection and the same attention that is given to other children.

1.3 Aims and Objectives

The purpose of this study is to analyse the existing protection systems for children born to irregular migrants and to ascertain what can be done to increase protection of the rights of these children. An in-depth analysis of the current position of children born to irregular migrants will be undertaken to identify the gaps in the current system and recommendations will be made to ensure equal protection of their rights.

²⁵ Christian Joppke *Citizenship and Immigration* (2010).

²⁶ Doek op cit note 10.

²⁷ Bhabha op cit note 16 p 3.

²⁸ Simon Heap and Claire Cody 'The Universal Birth Registration Campaign' (2009) *Forced Migration Review* Issue 32 p 20-22.

²⁹ Valerie Leiter, Jeniffer Lutzy MacDonald and Heather T Jacobson 'Challenges to children's independent citizenship: Immigration, Family and the State' (2006) *Childhood*.

³⁰ James A. Goldston 'Holes in the Rights Framework: Racial Discrimination, Citizenship and the Rights of Non Citizens' (2006) *Ethics and International Affairs*, Vol 20, Issue 3 p 321-347.

As stated above, birth registration is an important milestone in a child's life and it must also be made available to children of irregular migrants. If the children are not registered at birth it means that they do not have a legal identity. Without such an identity they cannot be recognised as legal subjects and neither can they enforce their rights. Children who are born to irregular migrants in countries in which their births are registered at birth should also be able to access civil, political, social, cultural and economic rights on grounds similar to those of other groups of children. The study also aims to increase awareness of the vulnerability of children of irregular migrants.

1.4 Methodology

The research is desk based, with a critical analysis of primary and secondary literature on the identity rights of children of irregular migrants and how they impact other rights. A few countries' national laws and policies will be critically analysed to determine the extent to which they are protecting the rights of children born to irregular migrants in their territories. International and regional laws will be used to assess the level of compliance of these countries. Best practices found in these countries will be used as recommendations to other States on how to protect the rights of children born to irregular migrants. The literature on stateless and refugee children will be analysed and certain aspects will also be used to advance the need to increase protection of rights of children born to irregular migrants.

1.5 Proposed Structure

CHAPTER 1: Introduction

This chapter will introduce the thesis as a whole, the aims and objectives as well as the methodology and chapter synopsis.

CHAPTER 2: Citizenship, Migration, Immigration Laws and the Right to a Nationality

The focus of this chapter will be on how migration and immigration laws have impacted on the rights of children. The theories of citizenship, migration and the right to a name and nationality will be analysed. Key concepts such as citizenship, nationality and regular migrants will be defined. A brief overview on the recognition

of the rights of children of other non-national groups will follow. For example children of migrant workers (regular), refugees/asylum seekers, residents (temporary or permanent) will be analysed, but the focus will primarily remain on children of irregular migrants. The effects of non recognition of the rights of children born to irregular migrants will be discussed.

CHAPTER 3: International and Regional Protection of Children's Rights

This chapter will look at the development of children's rights broadly and more specifically the right to a name and nationality. These developments will be looked at from both an international and regional law framework. Socio-economic rights will be discussed with emphasis on the rights to education and health and applied to children born to irregular migrants. The general principles will be looked at and applied to this group of children. The importance of extending economic, social, cultural, civil and political rights to these children will be discussed.

CHAPTER 4: State Practices

This chapter will provide an analysis of three country case studies and look at the issue of discrimination against children born to irregular migrant parents. The States to be discussed in this chapter are South Africa, United Kingdom (UK) and United States of America (US). The reason for choosing to focus on these countries is that they fall under the top ten countries with the largest numbers of international migrants in search of better living conditions.³¹ The countries' national laws will be critically analysed to establish the extent to which they protect the rights of this group of children. The national laws will be measured against applicable international and regional laws to determine if they are meeting their obligations.

CHAPTER 5: Conclusion

The concluding chapter will provide an overview of the subject matter and will also include recommendations on how to protect the rights of children born to irregular migrant parents.

³¹ United Nations Department of Economic and Social Affairs, Population Division, *International Migration Report 2013* p5 available at http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf accessed on 19 February 2015.

CHAPTER 2: CITIZENSHIP, MIGRATION, IMMIGRATION LAWS AND THE RIGHT TO A NATIONALITY

'There is no greater sorrow in life than the loss of one's native land.'

- Euripides, 431 B.C.

2.1 Introduction

Even though it is difficult to access accurate statistics, there is no denying that many children are born outside their parents' countries of origin with different consequences for these children. In the United Kingdom, it was reported in 2011 that 31 per cent of the children born there had at least one parent who was not a British citizen.¹ Depending on whether the country of birth grants nationality at birth or not, the children who are not granted nationality are most likely to face difficulties. Their parents effectively have to comply with the immigration laws of the country of birth for their child to fully enjoy the services of the country. As stated in the previous chapter, in section 1.2, parents in irregular migration situations are the most affected because they need to prove their legality in a State before their child can be registered at birth. Their children are affected to the extent that they are excluded from full membership in the country where they live, which might be the only one they have ever known, or they will ever know.²

Article 2 of the Convention on the Rights of the Child (CRC) obliges States to ensure that all the rights of children within its jurisdiction are protected and respected without discrimination. The Committee on the Rights of the Child has addressed the vulnerability of children born in irregular migration situations and has called upon States to guarantee that these children have access to appropriate and effective services.³ Discrimination needs to be prevented whether it comes from the family, the community at large or even from private or State institutions.⁴ There is a duty on States to educate its citizens on how to co-exist with non-nationals, so that they understand better the situations of non-nationals and what led them to leave

¹ Melanie Hall *Third of children born in England has foreign-born parent*, The Telegraph (1 May 2013) available at <http://www.telegraph.co.uk/news/uknews/10029547/third-of-children-born-in-England-has-foreign-born-parent.html> Accessed on 2 July 2014.

² Bronwen Manby, *Citizenship Law in Africa: A comparative study* 2 ed (2010) 3.

³ Committee on the Rights of the Child, *General Comment No. 7*(UN Doc. CRC/C/GC/7/Rev.1, 2005).

⁴ *Ibid.*

their countries of origin. Tolerance across communities may lead to peaceful co-existence and acceptance of others, especially among officials who interact with migrants seeking State services.

2.2 Citizenship and Nationality: Meaning, origins and application

The puzzle of citizenship and nationality is whether they fall within the exclusive jurisdiction of States or whether they are regulated by international law norms. With regards to nationality, article 1 of the Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws provides that States may determine who its nationals may be but ‘[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international customs and the principles of law generally recognised with regard to nationality.’⁵ In discussing the above provision, Weis argues that even though the nature of nationality includes matters of domestic jurisdiction it does not preclude the existence of international laws relating to nationality, and that State sovereignty may be restricted by the conclusion of international treaties concerning nationality.⁶

In 1923, the Permanent Court of International Justice declared that nationality was a matter within the reserved domain of domestic jurisdiction.⁷ In *Liechtenstein v Guatemala (Nottebohm Case)*⁸ this position was affirmed. However, the Inter-American Court of Human Rights later on declared that ‘nationality was an inherent right of all human beings; the manners in which States regulate matters bearing on nationality could no longer be deemed within their sole jurisdiction, but are circumscribed by their obligations to ensure the full protection of human rights.’⁹ As civilisations evolve, it is also important to reform laws to keep up with current trends. Human rights law has undergone a huge change and it is clear that the issue of nationality should be equally transformed to keep pace with the changes.

⁵ League of Nations, 13 April 1930, Treaty Series Vol 179 p 89 No 4137.

⁶ Paul Weis *Nationality and Statelessness in International Law* 2 ed (1979) Preface XIII-XIV.

⁷ *Tunis and Morocco Nationality Decrees Case*, (1923) Permanent Court of International Justice Ser B, No 4, 4.

⁸ *Liechtenstein v Guatemala* ICJ Reports, 1955, p 20: ‘It is for Liechtenstein as it is for every sovereign State, to settle by its own legislation rules relating to the acquisition of nationality ...’

⁹ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984. See also Johannes M M Chan ‘The Right to Nationality as a Human Right: The Current Trend Towards Recognition,’ (1991) *Human Rights Law Journal* 12.

Domestic nationality laws should therefore be consistent with international laws regarding this issue.

The term nationality is frequently used synonymously with citizenship although other writers prefer to keep them separate. In this thesis, nationality and citizenship will be used to imply more or less the same concept. ‘Conceptually and linguistically the terms “nationality” and “citizenship” emphasise two different aspects of the same notion: State membership ... Nationality is the delimitation of personal jurisdiction, while citizenship refers to a legal relationship of the citizen to the State.’¹⁰ Citizenship is attached to some rights like political participation in the life of a community, the right to vote, the right to receive certain protection from the community, and it also comes with obligations towards the community.¹¹ These aspects or rights do not apply to non-nationals in a State’s jurisdiction.

Since citizenship attaches certain rights, it implies exclusion of non-citizens, thus perpetuating inequality based on whether one is a citizen or not.¹² The effects of this exclusion need to be explored to determine the extent to which children are affected, considering that they are the most vulnerable members of society. The roots of citizenship can be traced back to ancient Greek city States and it was very important, as, if a man did not belong to the city he was ‘less than what he could be.’¹³ What one should bear in mind is that citizenship in that period was reserved for men, excluding women, children and slaves. Participation by those deemed to be non-citizens was almost non-existent. Citizenship as it is known today still excludes some people from participation, albeit on different grounds. Exclusion for any reason means that those who are excluded do not enjoy their full rights on the same level as those who are citizens. Unfortunately in most cases this exclusion tends to extend to descendants who are born later, and it affects their well-being because they may lack any basis to claim any rights or protection in the ‘foreign land.’

¹⁰ Weis op cit note 6 at 4.

¹¹ Virginia Leary ‘Citizenship, Human Rights and Diversity’ in Alan C Cairns, John C Courtney, Peter MacKinnon, Hans J Michelmann and David E Smith (eds) *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (1999) 247.

¹² Ibid 248.

¹³ Dora Kostakopoulou *The Future Governance of Citizenship* (2008) 14.

2.2.1 Citizenship by birth or by descent

Where children are concerned, citizenship is determined by whether they have been born in a State or by the original citizenship of their parents, depending on the national laws of the country in which the child is born. Adults on the other hand can acquire citizenship of a State through administrative processes such as naturalization or marriage. *Jus soli* means ‘the right of the soil’ and this gives rise to rights of nationality or citizenship as a right of anyone born in the territory of a State, despite parentage.¹⁴ *Jus sanguinis* on the other hand is citizenship by blood which is determined by having one or both parents having citizenship of the State.¹⁵ The application of the *jus sanguinis* principle has the effect that children born by non-citizens are automatically excluded from citizenship of the State they are born in, unless their parents have fulfilled other immigration related requirements.

According to a 2010 study, of the 194 countries in the world, only 30 still practice *jus soli* or citizenship by birth.¹⁶ The recent practice is that many countries are moving away from automatic birth right citizenship, due to the large influx of irregular migrants in their territories.¹⁷ If States are revising their laws purely as a basis for denying citizenship to children born to irregular migrants, there is discrimination against these children, based on the immigration status of their parents. States would therefore need to implement other measures to ensure that these children are protected and have access to their rights, despite being non-citizens, in compliance with international human rights law.

2.3 Migration: Effects and Consequences

Migration can be defined as the movement of people from one place to another. It can either be internal, whereby movement is within a State’s boundaries, or external, where people cross an international boundary to resettle in another State. People migrate for various reasons and the main aspects are push or pull factors. In 2013 the United Nations Population Division on International Migration reported that 232

¹⁴ Ibid 26.

¹⁵ Ibid.

¹⁶ Jon Feere ‘Birthright Citizenship in the United States: A Global Comparison,’ Centre for Immigration Studies (August 2010) 2 available at <http://www.cis.org/birthright-citizenship> accessed on 10 July 2014. Research has shown that this position is still accurate to date.

¹⁷ Ibid.

million people, about 3.2 per cent of the world's population, lived outside their country of origin.¹⁸ Most migrants settle in developed regions as compared to a few who are in less developed regions.¹⁹ Circumstances in one's country, such as conflicts may be push factors why people leave their countries to settle in other countries. On the other hand, the prospect of better opportunities in other countries, including better jobs and facilities, could be a pull factor for migration. A State can therefore have a mix of migrants ranging from refugees, asylum seekers to documented or undocumented migrants.

For some migration is an empowering experience, for others the reality is exploitation and abuse in the destination country especially for women and children.²⁰ Depending on the laws and practices of the destination State, migration can have positive consequences for both the migrant and the destination State, or it can turn out to be a fight for resources between citizens and migrants. Not all States view migration as a positive aspect to development and many migrants find it difficult to integrate into the destination State.²¹ On International Migrants Day the United Nations Secretary-General Ban Ki-moon stated that international migration was a great tool for poverty alleviation as migrants enhance benefits for themselves, the destination country as well as their countries of origin through essential labour and remittances.²²

Professional regular migrants are held in high regard while refugees, asylum seekers and irregular migrants are not being fully accepted. They struggle to enforce their rights and their struggles are transmitted to their children who also are not fully accepted in society. At the moment of birth, the children born to some groups of non-nationals are denied access to the civil registry so they do not possess birth certificates. Their parents cannot travel back to their countries of origin to register the births of their children, due to the manner in which they may have left their countries, and thus the children are at the risk of being stateless. As a result, these

¹⁸ United Nations Department of Economic and Social Affairs Population Division, available at <http://www.esa.un.org/unmigration/wallchart2013.htm> accessed on 12 July 2014.

¹⁹ Global Migration Group *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (2008) 1.

²⁰ Ibid.

²¹ Ibid 4.

²² United Nations Secretary-General, Ban Ki-moon 'Reject Xenophobia, Embrace Migration as Key Development Enabler', 17 December 2013, available at www.un.org/News/Press/docs/2013/sgsm15547.doc.htm accessed on 12 July 2014.

children are growing up without any documentation and at some point it becomes difficult to keep track of their actual ages which may affect their protection under children's rights laws.²³

2.3.1 Protection of children born to asylum seekers and refugees

The United Nations High Commissioner for Refugees (UNHCR) defines asylum seekers as people who say that they are refugees but whose claims have not been definitely evaluated.²⁴ People who are seeking asylum flee from their countries fearing persecution based on race, religion, nationality, membership of a certain political party or social group as well as due to conflict and war. Article 14(1) of the UDHR provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.' Article 14(2) further qualifies that asylum is intended for genuine persecution which is not related to the commission of crimes. The process of determining whether a person meets the requirements for asylum is left to the individual countries and they determine whether to grant refugee status or not.

The processes involved in seeking asylum, to finally being granted refugee status are usually long and protracted, leaving some protection gaps in people's rights. This is common in countries where asylum seekers are not allowed to work before their applications are finalised. This would affect even the rights of children who are born to asylum seekers during this period, as regards their legal status in the country in which their parent(s) are seeking asylum. The laws on the treatment of asylum seekers are not universal, thus States have the discretion to enact relevant laws.

In South Africa, pending the application to be recognised as a refugee, an asylum seekers permit is issued, which gives the holder legal residence, the right to work and study in the Republic of South Africa.²⁵ As long as the permit is valid, the residence in the Republic is legal and any legal activities that the asylum seeker pursues, is also legal. The rights of children born in South Africa to asylum seekers are dependent on the outcome of their parents' application. This means that children

²³ Marta Santos Pais (ed), *Birth Registration Right from the Start* (2002) Innocenti Digest No. 9 UNICEF, Innocenti Research Centre 1.

²⁴ Available on <http://www.unhcr.org/pages/49c3646c137.html> accessed on 12 July 2014.

²⁵ Section 22 of the Refugees Act 130 of 1998 of the Republic of South Africa.

in most cases are entitled to the same rights that accrue to their parents as asylum seekers. When the asylum application is successfully reviewed, refugee status is granted.

Even though the CRC remains the most important convention for the protection of children's rights, children born to refugees have the added advantage of a specific convention designed for refugees. The 1951 Convention Relating to the Status of Refugees²⁶ as well as its 1967 Protocol²⁷ is an internationally recognised treaty concerning the rights and obligations of refugees. Considering that 147 countries are party to either the convention or the protocol or both, one can conclude that at least the rights of refugees are being progressively realised. The convention and its protocol set standards that apply to children born to refugees, similarly to adult refugees.²⁸ Article 22 of the 1951 Convention states that refugees must receive the same treatment as nationals in primary education, and treatment, at least as favourable as that given to non-refugee aliens, in secondary or tertiary education. The right to education in this instance puts refugee children (and refugee adults pursuing education) in a favourable position. The general expression under international law is that refugees must have rights on a platform similar to citizens, except only for those rights which are exclusively for citizens.

The arguments above do not imply that refugee rights are recognised around the world by all States, in compliance with the Refugees Convention. Most countries still have policies and practices which do not recognise children born to refugees as nationals. Refugees also encounter problems in registering the births of their children or accessing State services. The UNHCR has stated in the relevant policy guidelines that children born to refugees are at the risk of being stateless, especially when there is conflict of nationality laws. The guidelines also state that all children born in the country of asylum must be considered as having or being able to acquire nationality through naturalisation.²⁹

²⁶ United Nations General Assembly Resolution 429(V) of 14 December 1950. The Convention entered into force on 22 April 1954.

²⁷ The Protocol which is attached to United Nations General Assembly Resolution 2198(XXI) of 16 December 1967 was an amendment removing the geographic and temporal limits of the 1951 Convention.

²⁸ UNHCR *Refugee Children: Guidelines on Protection and Care* (1994) UNHCR, Geneva 4.

²⁹ *Ibid.*

On the other end of the spectrum, if asylum is refused, the asylum seeker will have to leave the destination State or risk being an irregular migrant. The children of the failed asylum seeker may be left unprotected in the State they are born in, unless the country is one which recognises *jus soli*. The rights of the children caught up in these situations still need to be evaluated and protected, to ensure that they have access to birth registration, health, education and other rights.

2.3.2 Protection of children born to regular migrants

A regular or documented migrant is defined as ‘a migrant who enters a country lawfully and remains in the country in accordance with his or her admission criteria.’³⁰ Regular migrants are allowed to participate in almost all legal activities open to citizens in compliance with their visas, except exercising political rights such as voting.³¹ The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families offers protection to all migrant workers whether they are in a regular or irregular situation.³² However, regular migrants have a legitimate claim to more rights than irregular migrants.³³ Regular migrants are legally recognised in destination countries and thus, they have better access to socio-economic rights. The children of regular migrants also have the privilege of having their births registered at birth. Even though they may not qualify for citizenship, the regular status of their parents accrues to them. This however does not imply that children born to regular migrants are fully protected. They risk being stateless if the State they are born in does not apply *jus soli* citizenship and does not recognise them as citizens; and, if their parent(s) State of origin also does not recognise *jus sanguinis* citizenship.

³⁰ International Organization for Migration, *Key Migration Terms* available at <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#documented-migrant>. Accessed on 1 July 2014.

³¹ Peter V Schaeffer and Malugeta S Kahsai ‘A Theoretical Note on the Relationship between Documented and Undocumented Migration.’ *International Journal of Population Research* (2011) 1.

³² United Nations General Assembly Resolution A/RES/45/158 of 18 December 1990. It came into force on 1 July 2003.

³³ Examples of such rights are the right to be informed by their countries of origin and employment about conditions concerning their admission (article 37), the right to move freely in the destination country and to freely choose their residence (article 39), to enjoy socio-economic services as nationals (articles 43 and 45).

2.4 The position of children in irregular migration situations

Children who are born to irregular migrants find themselves in irregular migration situations due to different factors. Those born in a State which applies *jus soli* become citizens at birth but are affected by the irregular migrant status of their parents. Children depend on adults to enforce their rights in relation to the State.³⁴ The effect of this situation is that even though the children qualify for all citizenship benefits, they are deprived of these benefits because their parents are afraid of detection by the authorities. The births of this group of children are registered, but their citizenship is ineffective because they cannot fully enjoy all their rights.

The other group is that of children born to irregular migrants in a State which does not recognise them as citizens. This group is the one likely to have high numbers of non-registration of births which can potentially lead to statelessness. Statelessness occurs in various forms but the one that can potentially affect children of irregular migrants is *de facto* statelessness. Bhabha defines *de facto* statelessness as ‘... the absence of a legal migration status despite a legal nationality.’³⁵ What this means is that literary speaking the children are nationals of the country of their parent(s) origin but they lack the proof of their nationality.

The absence of a birth certificate may disqualify a child from eligibility for his or her parent(s) nationality.³⁶ If a child were to be separated from his or her parents, or if the parents were to die, it would be difficult to prove parentage or nationality of the child. Birth registration is an administrative process of recording the name(s) of the child, sex, date and place of birth as well as the names of the parents, including their nationality where necessary. Family ties are important and should be preserved as elaborated in article 8 of the CRC which states that;

³⁴ Valerie Leiter, Jeniffer Lutzy MacDonald and Heather T Jacobson ‘Challenges to children’s independent citizenship: Immigration, Family and the State’ (2006) *Childhood* 13.

³⁵ Jacqueline Bhabha ‘From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century’ in Jacqueline Bhabha (ed) *Children without a state: A Global Human Rights Challenge* (2011) 3.

³⁶ *Ibid*, at 7.

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Identity is very important because it gives a person belonging to a family and personal ties.³⁷ The States' obligations to preserve identity according to article 8 can be compromised when the identities of children without any identity documents are falsified for illegal adoption purposes or for child trafficking.³⁸

The safety of children is also important as unregistered children can easily become victims of abduction and trafficking. The Human Rights Committee in a commentary on article 24 of the ICCPR said '[t]he main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant.'³⁹

A birth certificate can also prove its importance when there are disputes regarding the age or nationality of the child. In some countries scientific methods of determining ages are used when there is no legal proof of the actual ages. The Committee on the Rights of the Child has expressed concerns about the unreliability of current age determination methods especially for children between the ages of 16 and 18.⁴⁰ The establishment of correct ages is important as it makes a difference between being treated as a child or as an adult. The United Nations Children's Fund (UNICEF) has noted that there is a link between birth registration and access to State benefits for children.⁴¹ A birth certificate could therefore make it easier for a child to access State benefits, especially in those States which offer services based on proving one's identity.

³⁷ Brad K Blitz 'Neither seen nor heard: Compound Deprivation among Stateless Children' in Jacqueline Bhabha (ed) *Children without a state: A Global Human Rights Challenge* (2011) 46.

³⁸ Santos Pais op cit note 22 at p 6.

³⁹ Human Rights Committee, General Comment No 17 (1989), UN Doc. HRI/GEN/1/REV 1 para 7.

⁴⁰ Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of Migration* para 49. Available at www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf accessed on 16 July 2012.

⁴¹ UNICEF, *The 'Rights' Start to Life: A Statistical Analysis of Birth Registration*, UNICEF, 2005.

The fear of detection and deportation that the irregular migrant parents of citizen children experience, are the same fears that irregular parents of non-citizen children have, even if they are in a State that allows registration of their children's births.

Administrative processes that are linked to immigration policies make it difficult for parents to seek State services. In General Comment No 7 on 'Implementing child rights in early childhood', the Committee on the Rights of the Child advocates for a universal birth registration system.⁴² A universal birth registration system would require national laws to make birth registration for all children born in a State's territory compulsory for both the parents and the State, without discrimination on the basis of nationality.⁴³

2.5 Conclusion

Nationality/citizenship or the lack thereof, affects all children born outside their parents' State of origin, although the consequences are not necessarily the same, depending on the parents' legal status. For children born in an irregular migration situation their welfare is compromised because they are regarded similarly as their parents. People in irregular migrant situations are 'vulnerable to discrimination, exclusion, exploitation and abuse at all stages in the migration process.'⁴⁴ The family unit is held in high regard in the CRC because it is regarded as the natural environment where children should grow, and one that should be assisted to ensure their optimal survival.⁴⁵ Children need to have all their rights respected and protected as prescribed by law, for their well-being and survival.

The concept of total parental autonomy whereby parents 'own' children is no longer relevant, due to powers of States to intervene when necessary. Children are dependent on States for basic services, and also when their families are unable to

⁴² Committee on the Rights of the Child, General Comment No 7, (2005) CRC/C/GC/7/Rev.1 para 25.

⁴³ Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3 ed) UNICEF (2007) 100.

⁴⁴ Ms Navi Pillay, High Commissioner for Human Rights 'Equal rights for all migrants: A call for the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families', address to the Graduate Institute of International and Development Studies, Geneva 14 December 2011 available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E> accessed on 20 February 2015.

⁴⁵ Preamble 5 of the CRC.

provide for them.⁴⁶ When there is no legal basis or relationship between the State and a child, States will not intervene to enable the child to gain access to social and economic services, which is the case where the child is born to irregular migrants. Children born to asylum seekers, refugees and regular migrants have an established relationship which States recognise. This should however not be taken to imply that these groups of children are without problems in accessing State services. When these services are not available for some groups of children, it means that the State is failing those children. Having a States' nationality or a legal identity, through birth registration, is almost always the starting point in realising the rights of children.

⁴⁶ Bhabha op cit note 34 at 13.

CHAPTER 3: INTERNATIONAL AND REGIONAL PROTECTION OF CHILDREN'S RIGHTS

'The idea of children's rights, then, may be a beacon guiding the way to the future – but it is also illuminating how many adults neglect their responsibilities towards children and how children are too often the victims of the ugliest and most shameful human activities.'

- Kofi Annan, *Former UN Secretary-General, September 2001.*

3.1 Introduction

To be able to understand the concept of children's rights today, it is important to know the history and development of childhood and children's rights. One author describes the history of childhood as '... a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorised and sexually abused.'¹

According to early historians, children's rights were unknown among ancient civilisations.² Far from being considered as autonomous beings, children were originally regarded as a species of property.³ Parents could make decisions for their children as they wanted. Parents could do whatever they wanted to their children and society would not intervene. Children were believed to be too immature to know what was good for them and could not make decisions. This principle of parental control over their children became known as parental autonomy and it translates to the right of parents to raise their children in whatever way they see fit. It means that parents can make any decisions regarding the welfare of their children without any interference from other people or the State. Though not owed any particular rights, children were obliged to honour parents and, if necessary, to support them.⁴

¹ Lloyd de Mause 'The Evolution of Childhood' in Lloyd de Mause (ed) *The History of Childhood* (1974) 1.

² Samuel M Davis & Mortimer J Schwartz, *Children's Rights and the Law* (1987).

³ Stephen R Arnott 'Autonomy, Standing and Children's Rights' (2007) *William Mitchell Law Review* Vol 33 p 809.

⁴ Alberto Maffi 'Family and Property Law' in Michael Gagarin and David Cohen (eds) *The Cambridge Companion to Ancient Greek Law* (2005) 255.

Everything that children did was supposed to be for the common good and furthering the interests of the family, and not for them as autonomous individuals.⁵ It was the parents who decided what was good for the family, and children had no say even if it meant being sold into slavery or forced labour.

‘The theory of children as their fathers’ property flowed naturally from the story of procreation as told by a patrilineal society ... Flesh of their father’s flesh, children rightly belonged to the patriarch, to be worked, traded and given in marriage in exchange for money.’⁶ In Roman times the father had the power of life and death over his children.⁷ Towards the end of the nineteenth century, an emerging children’s rights movement opposed the view that children were primarily ‘quasi-property’ and economic assets.⁸ Many atrocities were being committed against children by their parents, including examples of practices of marrying off of young girls, the selling of children into slavery and the many harmful cultural practices that children were subjected to. With the development of principles of human rights, children began to be recognised in human rights treaties,⁹ but this did not lead to changes in practices regarding children as human beings.

Van Bueren notes that the text of the Declaration of the Rights of the Child places the duty to provide the best regarding the welfare of the children on men and women, while no duties were placed on States.¹⁰ This supports the argument that States were not involved in the welfare of the children and believed that children were the sole responsibility of their parents and best supported in a family setup. ‘For well over a century, family law resisted with apparent success the impulse of modernity towards autonomous individuality.’¹¹ Courts were guided by a tradition of family autonomy that kept the government out of purely family affairs, thereby

⁵ John Eeklaar ‘The Emergence of Children’s Rights’ *Oxford Journal of Legal Studies* (1986) Vol 6 No. 2, 163.

⁶ Barbara Bennett Woodhouse ‘From property to personhood: A child-centred Perspective on Parents’ Rights’ (1998) V(2) *Georgetown Journal on Poverty Law and Policy* 313.

⁷ For more information on the rights of the father over his family see George Long ‘Patria Potestas’ in William Smith, *A Dictionary of Greek and Roman Antiquities* (1875) 873-875.

⁸ Arnott op cit note 3.

⁹ Geneva Declaration of the Rights of the Child 1924, adopted 26 September 1924, League of Nations OJ. Spec. Supp. 21.

¹⁰ Geraldine Van Bueren *The International Law on the Rights of the Child* (1995) 7.

¹¹ Michael Grossberg *Governing the Hearth: Law and the Family in Nineteenth Century America* (1985) 4-7.

limiting the government's role in protecting children.¹² The rise of incidents of child abuse and exploitation of children by their parents developed the tendency by States to intervene in family affairs.¹³ The vulnerability of children during the two World Wars gave rise to philanthropic acts to save children from suffering.

This chapter will thus seek to trace the emergence and development of children's rights. Without losing sight of the focus of the thesis, it will highlight how the right to a name and nationality developed in all the stages of the development of children's rights. Much emphasis will be given to the Convention on the Rights of the Child (CRC), and reference to regional developments will also be looked at.

3.2 Development of Children's Rights

The earliest protection of children was developed in a piecemeal manner aimed at specific forms of exploitation, for example, the 1919 Convention adopted by the International Labour Conference¹⁴ which was aimed at combating economic exploitation of children.¹⁵ During the twentieth century, international law on the rights of the child developed parallel to international human rights law, based on the premise that all individuals, including children, are equal and in need of international protection.¹⁶ In 1924 the League of Nations adopted The Declaration of the Rights of the Child.¹⁷ The text of the Declaration of the Rights of the Child is based on a draft by Eglantyne Jebb¹⁸ who believed that children should be treated with dignity and protected. Although the Declaration of 1924 does not place binding obligations on States, it is concerned with the welfare and protection of children, and was

¹² Elizabeth Bartholet, 'The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect' (2004) 3 *Whittier Journal of Child and Family Advocacy* 215,217.

¹³ Walter H Bennett Jr 'A Critique of the Emerging Convention on the Rights of the Child' (1987) *Cornell International Law Journal* 15.

¹⁴ Minimum Age (Industry) Convention, 1919 (No.5), Convention Fixing the Minimum Age for Admission of Children to Industrial Employment. It entered into force on 13 June 1921 and is currently listed as an outdated instrument by the International Labour Organization.

¹⁵ Geraldine Van Bueren (ed) *International Documents on Children* 2 ed (1998) (xv).

¹⁶ Van Bueren op cit note 10 at 1.

¹⁷ Ibid.

¹⁸ For the life of Eglantyne Jebb, her work and how she founded the Save the Children Fund, and drafted the inspiration behind the Declaration of the Rights of the Child see Clare Mulley *The Woman Who Saved the Children: A biography of Eglantyne Jebb Founder of Save the Children* (2009).

influential in laying a foundation on the concept of the rights of the child, although formulated as duties accepted by ‘men and women of all nations’.¹⁹

In 1948 the Universal Declaration of Human Rights (UDHR) was adopted and in principle it applies equally to children, specifically article 25(2) which provides that ‘[m]otherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.’ A revised Declaration of the Rights of the Child²⁰ was adopted in 1959. It is an indication of the evolution of the rights of the child, and the principles contained in the 1959 Declaration are formulated as rights.²¹ In the 1924 Declaration the child was seen as an object of international law, but by 1959 the child was starting to gain recognition as a subject capable of enjoying the benefits of rights.²² The 1959 Declaration was necessary in so far as it is similar to the UDHR because it illuminates human rights from a child’s perspective. It places obligations upon parents, men and women, voluntary organisations, local authorities and national governments to recognise these rights and strive for their observance.²³ However, the emphasis of this Declaration was focused on safeguarding and protecting the child, rather than on empowering the child.²⁴

3.2.1 Emergence of the Right to Nationality

Some authors have long been proponents of the right to nationality²⁵, but it was first recognised in the American Declaration of the Rights and Duties of Man.²⁶ During that time the world was still recovering from the horrors of World War II when the Nazi strategies had adopted the Reich Citizenship Law in 1935 which had stripped

¹⁹ Van Bueren op cit note 10. See also Sharon Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 13.

²⁰ UN General Assembly Resolution 1386(XIV) of 20 November 1959.

²¹ Detrick op cit note 19.

²² Van Bueren op cit note 10 at 12.

²³ Paragraph 6 of the Preamble.

²⁴ Philip Alston and John Tobin *Laying the foundations for children’s rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (UNICEF 2005) 5.

²⁵ See for example James W. Garner ‘Uniformity of Law in Respect to Nationality’ (1925) 19 *American Journal of International Law* 547.

²⁶ Organisation of American States (OAS) Resolution XXX adopted by the Ninth International Conference of American States, 1948. Article XIX provides that ‘[e]very person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.’

Jews of their citizenship and had forced them into concentration camps. It was then the need to regulate the right to nationality at an international level was realised. Less than a year after the adoption of the American Declaration of the Rights and Duties of Man, the UDHR was also adopted.

In debating the text of Article 15 of the UDHR, the Drafting Committee held that the right to nationality was designed to ensure that ‘individuals should not be subject to action such as was taken during the Nazi regime in Germany when thousands had been stripped of their nationality by arbitrary government action ...’²⁷ The actual text of article 15 was also the cause of much debate as some States including the United Kingdom (UK) which preferred a watered-down text with less obligations on States, thereby avoiding interference with State sovereignty.²⁸ The UK wanted article 15 to read that ‘[p]ersons shall not be deprived of their nationality, which they have acquired at birth, unless possessing another nationality.’²⁹ Article 15 was however adopted as it stands today and states that;

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Being a resolution of the United Nations General Assembly (UNGA) the UDHR was not a legally binding instrument, but it has since gained the status of customary international law, and is now regarded as legally binding. The provisions of the UDHR were subsequently expanded into legally binding obligations in the form of two International Covenants that is on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) of 1966. Together with the UDHR, the two covenants make up the International Bill of Rights. The general emphasis of the International Bill of Rights is that children are best cared for in a family environment; and therefore special attention is given to the family as the most important group.³⁰

²⁷ As quoted by Ineta Ziemele and Gunnar G Schram ‘Article 15’ in Gudmundur Alfredsson and Asbjørn Eide (eds) *The Universal Declaration of Human Rights: A common Standard of Achievements* (1999) at 301.

²⁸ UN ECOSOC ‘Commission on Human Rights Drafting Committee, Second Session: Summary Record of the Thirty Ninth Meeting’ E/CN.4/AC.1/SR.39, 1 June 1948 at 6.

²⁹ *Ibid.*

³⁰ Articles 16(3) of the UDHR; 23(1) of the ICCPR and 10(1) of the ICESCR.

The ICCPR articulates child specific rights,³¹ which includes the right to a name and nationality embodied in article 24(3). The Human Rights Committee has elaborated that ‘... the rights provided for in article 24 are not the only ones that the Covenant recognises for children and that as individuals, children benefit from all the civil rights enunciated in the Covenant.’³² Other conventions that were adopted after the UDHR also support the importance of having a nationality.³³

The period following the adoption of these two Covenants of 1966 saw the emergence of a strong recognition of children’s rights in international law.³⁴ 1979 was proclaimed the International Year of the Child.³⁵ Commenting on what happened after this proclamation, one author stated;

Never before had the cause of children received so much concentrated attention. Children were studied as they had never been before, playgrounds were constructed where there had been none, and family allowances were introduced in countries that had never had them. Children’s needs were included – often for the first time – in long term national planning, and funding was provided for child-oriented programmes at an unprecedented level.³⁶

In support of the International Year of the Child, the government of Poland drafted a children’s rights treaty which was submitted to the Commission on Human Rights.³⁷ This was the beginning of the process of drafting a convention for children which was adopted in 1989 as the Convention on the Rights of the Child (CRC).

Regionally the right to nationality is also gaining recognition. In America the non-binding provisions of the American Declaration of the Rights and Duties of

³¹ Articles 10(3) and 14 are specific to juvenile offenders; article 24 articulates the rights of children to protection without any discrimination.

³² UN Human Rights Committee, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989.

³³ Convention Relating to the Status of Stateless Persons (1954); Convention on the Nationality of Married Women (1957); Convention on the Reduction of Statelessness (1961) articles 1 and 2; International Convention on the Elimination of All Forms of Racial Discrimination (1965) article 5(d)(iii); the Convention on the Elimination of All Forms of Discrimination against Women (1979) article 9 and the Convention on the Rights of the Child (1989).

³⁴ See Maggie Black *Children First: The Story of UNICEF, Past and Present* (1996).

³⁵ UN General Assembly Resolution A/RES/31/169.

³⁶ Michael Jupp ‘The International Year of the Child: Ten Years Later’ (1989) *Proceedings of the Academy of Political Science* Vol 1, 31.

³⁷ Alston and Tobin op cit note 24 at 6.

Man were codified in the American Convention on Human Rights³⁸ and article 20 contains the right to nationality. In the Middle-East the right was recognised in article 24 of the 1994 Arab Charter on Human Rights³⁹ which was replaced in 2004 by the Arab Charter on Human Rights⁴⁰ (article 29). The European Convention for the Protection of Human Rights and Fundamental Freedoms⁴¹ as well as the European Charter of Fundamental Rights⁴² does not have provisions for the right to nationality. The right is embodied in the European Convention on Nationality⁴³ which promotes State sovereignty regarding the granting of nationality⁴⁴ but also requires States to do so in a non-discriminatory manner to avoid statelessness.⁴⁵ Of all regions, Africa has the most progressive system for the protection of children's rights,⁴⁶ including the right to a name and nationality.

The first effort in promoting children's rights was in 1979 when the then Organisation of African Unity (OAU) adopted the non-binding Declaration on the Rights and Welfare of the African Child⁴⁷ which laid the foundation for the development of children's rights. At the time, the OAU showed its support in many matters involving children on an international platform by getting involved in matters of child labour, child trafficking and children in armed conflicts.⁴⁸

The African Charter on Human and People's Rights⁴⁹ (Banjul Charter) which was adopted in 1981 did not substantively cater for children's rights. Viljoen comments that 'children are only referred to on one occasion, as an afterthought, in the context of women's rights: "The State shall ensure ... the protection of the

³⁸ Organization of American States, American Convention on Human Rights 'Pact of San Jose', Costa Rica, 22 November 1969.

³⁹ League of Arab States, Arab Charter on Human Rights, 15 September 1994.

⁴⁰ League of Arab States, Arab Charter on Human Rights, 22 May 2004.

⁴¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms- as amended by Protocols No. 11 and 14, 4 November 1950 ETS 5.

⁴² European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01).

⁴³ Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166.

⁴⁴ Ibid article 3.

⁴⁵ Ibid article 5.

⁴⁶ Amanda Lloyd 'The African Regional System for the Protection of Children's Rights' in Julia Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2013) 33.

⁴⁷ Declaration on the Rights and Welfare of the African Child AHG/St 4 (XVI) Rev 1 (1979).

⁴⁸ Lloyd op cit note 46 at 34.

⁴⁹ African Charter on Human and People's Rights OAU Doc CAB/LEG/67/3 Rev5. It was adopted on 27 June 1981 and entered into force on 21 October 1986.

woman and the child as stipulated in international declarations and conventions”.⁵⁰ This provision is article 18(3) of the Banjul Charter. The Banjul Charter has no direct provision on the right to nationality but in 2013 the African Commission on Human and Peoples’ Rights (ACHPR) passed a resolution on the right to nationality.⁵¹ The resolution acknowledges all the international conventions on the right to a nationality and emphasises its importance. The African Charter on the Rights and Welfare of the Child⁵² (ACRWC) was adopted in 1990 to satisfy the cultural diversity which could not be accommodated in the CRC.⁵³ African states had been under represented in the drafting process of the CRC, therefore this idea ‘originated from a desire to address certain peculiarly African problems.’⁵⁴ Among the problems identified was the situation of children under apartheid; problems faced by girl-children; and the influence and role of the extended family and the community in raising a child.⁵⁵ Over and above conferring rights on children, the ACRWC also recognises that children have responsibilities towards ‘family and society, the State and other legally recognized communities and the international community’.⁵⁶ The right to a name and nationality in the ACRWC is contained in article 6 and article 6(4) obliges States to have laws conferring nationality on children born in their territories if the child does not acquire nationality from another State.

3.2.2 The Convention on the Rights of the Child

The CRC is a product of a ten year process of negotiations and drafting, as it was difficult to reach an agreement on what rights to include.⁵⁷ In the end however, a compromise was reached, which catered for religious and cultural differences⁵⁸ and

⁵⁰ Frans Viljoen ‘Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child’ (1998) 31 *The Comparative and International Law Journal of Southern Africa* 204-205.

⁵¹ ACHPR, Resolution on the Right to a Nationality No. 234, 23 April 2013 available at <http://www.achpr.org/sessions/53rd/resolutions/234/>

⁵² African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

⁵³ Lloyd op cit note 46 at 34.

⁵⁴ Lee G Muthoga ‘Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child’ (paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape, 1992).

⁵⁵ Viljoen op cit note 50 at 206.

⁵⁶ Article 31 of the ACRWC.

⁵⁷ Michael Freeman ‘The Future of Children’s Rights’ *Children and Society* (2000) vol 14, 278.

⁵⁸ Ibid.

thus a convention specifically for children was adopted. The 1924 and 1959 Declarations of the Rights of the Child did not define who a child is and the starting point of the CRC was to provide this definition. Article 1 states that ‘... a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.’ The convention changed the way children were viewed and made them rights holders, with the ability to assert their rights in their own capacity against other people, including their parents. The CRC established a direct relationship between the child and the State and this rebutted the presumption of total parental autonomy over their children.⁵⁹ Simply put, the State is no longer a passive player in the wellbeing of children; active participation and accountability is now required in the promotion and protection of rights.

The CRC protects civil, political and socio-economic rights of all children in one treaty.⁶⁰ It accentuates that socio-economic rights should receive the same recognition as civil and political rights to eradicate poverty.⁶¹ The principles of non-discrimination, best interests, participation and the rights to life, survival and development of the child are at the cornerstone of the convention.

3.2.3 The General Principles

This section will look at the general principles contained in the CRC and their significance to the protection of rights of children born to irregular migrant parents. What is important about these general principles is that they are connected and in totality strive to protect the enjoyment of all the rights in the CRC. The intertwining effects of the principles are important, because to enjoy the protection of the one, the other principles must also be taken into account. Any exclusion can potentially affect a child’s participation, best interests, development and also lead to discrimination. ‘The Committee has repeatedly stressed that the Convention should be considered as a whole and has emphasised the interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2, 3,

⁵⁹ Holmberg B and J Himes ‘Parental Rights and Responsibilities’ in Petren A and J Himes (eds) *Children’s Rights: Turning Principles into Practice* (2000).

⁶⁰ Danwood M Chirwa ‘Combating Child Poverty: The Role of Economic, Social and Cultural Rights’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 93.

⁶¹ Ibid.

6 and 12).'⁶² The objectives of the CRC can therefore be interpreted as ensuring provision and protection for all children without bias.

The CRC reflects the universal aspiration for the protection of children⁶³; therefore the burden of implementation is on the States. Its role is to influence attitudes and set normative standards for incorporation into domestic laws.⁶⁴ A State which ratifies the CRC accepts the obligations to implement and apply the standards of the convention to all the children in its jurisdiction. The CRC Committee has also emphasised the importance of domestic laws to reflect the general principles.⁶⁵

Over and above the provisions dealing with the general principles, the CRC articulates the importance of having an identity and preserving it⁶⁶, the rights to the highest attainable standard of health and facilities⁶⁷, education⁶⁸, play⁶⁹ and social security.⁷⁰ It addresses the plight of vulnerable groups of children such as refugees⁷¹ and disabled children.⁷² The need for alternative care for children who for any reason cannot be raised in a family is also addressed.⁷³ Articles 30, 32 to 40 contain special protection measures for children, including from abuse (in and outside the family), the use of narcotics and drugs, exploitation (economic, sexual and so on), and abduction, sale and trafficking.

3.2.3.1 Non-discrimination

Non-discrimination as a principle of children's rights is contained in article 2 of the CRC. The Human Rights Committee has defined discrimination as 'any exclusion, restriction, treatment or preference based upon reasons such as...birth or any other

⁶² R Hodgkin and P Newell 'Best interests of the child' in R Hodgkin et al (ed) *Implementation handbook for the Convention on the Rights of the Child* (2007) 37.

⁶³ Cris R Revaz 'An introduction to the U.N. Convention on the Rights of the Child' in Jonathan Todres, Mark E Wojcik and Cris R Revaz *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications for U.S Ratification* (2006) 9.

⁶⁴ Michael Jupp 'The UN Convention on the Rights of the Child: An opportunity for advocates' (1990) 12(1) *Human Rights Quarterly* 130-135.

⁶⁵ Committee on the Rights of the Child, General Comment No. 5 (2003), *General measures of the implementation of the Convention on the Rights of the Child*, CRC/C/GC/2003/5.

⁶⁶ Articles 7 and 8.

⁶⁷ Article 24.

⁶⁸ Article 28.

⁶⁹ Article 31.

⁷⁰ Article 26.

⁷¹ Article 22.

⁷² Article 23.

⁷³ Article 20.

social condition, and which aim at or result in invalidating or undermining the recognition, enjoyment or exercise of human rights and basic liberty of individuals under equal terms'.⁷⁴ Non-discrimination entails that all children in a State's jurisdiction have equal access to rights without differentiating them based on any ground, including the irregular migrant status of their parents. Article 2 ensures all the rights to children without discrimination. The Committee on the Rights of the Child has stated that discrimination excludes children from full participation and hinders their parents' capacities to fulfil their responsibilities towards their children.⁷⁵ States are obliged to take positive steps to ensure that the vulnerable children in society, including children with disabilities and those born to irregular migrants enjoy their human rights; and also to not interfere with the rights of other children who are already enjoying those rights.⁷⁶

3.2.3.2 Best Interests

Article 3 of the CRC provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The CRC Committee has held that the application of the best interests principle means considering how decisions and actions affect children's rights.⁷⁷ In analysing the meaning of 'a primary consideration' in article 3, it was held that it implies 'that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.'⁷⁸ A decision to limit or withhold a right from a child born to irregular migrant parents should be analysed to see if it is in the best interests of that particular child. More often children rely on adults to claim the enjoyment of their rights. As stated in chapter two, irregular migrants are afraid to claim the enjoyment of any rights they are entitled to, let alone the rights of their children. This is when States are expected to address the disadvantaged position of these children and implement policies

⁷⁴ See Human Rights Committee, ICCPR General Comment 18 'Non-discrimination' (1989) para 7.

⁷⁵ Committee on the Rights of the Child, General Comment No 7, CRC/C/GC/7/Rev.1 para11(b)(iv).

⁷⁶ See article 2(2) of the CRC.

⁷⁷ CRC General Comment No. 5 op cit note 65 at para 12.

⁷⁸ Committee on the Rights of the Child, General Comment No. 14 (2013), *on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 at para 37.

which are in the best interests of the children. The optimal development of a child must be taken into consideration in all situations.

Best interests can also be used to resolve the conflicts between child autonomy, parental rights and State intervention. It is in the best interests of a child that no absolute powers should rest in the hands of only one of the mentioned groups. Distributing responsibility serves to ensure that optimal observance of children's rights is achieved. It would not be in the best interests of the child if they are allowed to have complete control of their lives uninhibited,⁷⁹ even though their views should be considered. At the same time checks are placed on parents and obligations imposed on the State in the best interests of the child.⁸⁰ When it comes to the protection of the rights of children born to irregular migrants, their best interests should also be a primary consideration in any decisions that affect their wellbeing.

3.2.3.3 Life, Survival and Development

The right to life, survival and development may be at risk if opportunities for realising human potential are restricted.⁸¹ This right is contained in article 6 of the CRC, and the Human Rights Committee has held that the right to life is the 'supreme right from which no derogation is permitted even in times of public emergency which threatens the life of a nation'.⁸² The CRC Committee notes how violence and exploitation specifically affect the right to life, survival and development in the context of unaccompanied and separated children outside their country of origin,⁸³ and this can be equally applied to children born to irregular migrants. The Committee explores how they are particularly vulnerable to trafficking for sexual, labour and criminal activities.⁸⁴

⁷⁹ See BC Hafen 'Individualism and Autonomy in Family Law: The Waning of Belonging' (1991) *Brigham Young University Law Review* 1.

⁸⁰ See for example articles 9(1), 9(3), 18(1), 20(1) and 21 of the CRC.

⁸¹ CRC General Comment No 7 op cit note 75 para 10.

⁸² Human Rights Committee, CCPR General Comment No. 6, *Right to Life* HRI/GEN/1/Rev.8 (1982) para 1.

⁸³ Committee on the Rights of the Child, CRC General Comment No. 6 (2005) *The treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6 at para 23.

⁸⁴ *Ibid.*

The socio-economic conditions of a child also have an impact on his or her survival and development.⁸⁵ The right to life, survival and development imposes on the State the duty to provide goods and services ‘that are most basic to the child’s existence’.⁸⁶ These services come in the form of the provision of adequate nutrition, access to healthcare, social security, education, play and a safe environment. Development embodies the physical, spiritual, moral, social, emotional, political and intellectual developments and all these aspects of development should be nurtured in children. Chirwa has held that ‘[a]ny significant harm to the child’s physical and mental development sustained in childhood might doom the child’s chances of an independent and worthy adult life for good, that is if the child is lucky enough to make it to adulthood.’⁸⁷

For children born to irregular migrants these rights which should promote their life, survival and development are often withheld from them by the State, unless their parents can actually afford to provide for them. However, without any State assistance, most irregular migrant parents find it difficult to provide the basics of life for their children. States Parties should therefore promote the right to life, survival and development for all children including those born to irregular migrants.

3.2.3.4 Participation

The adage that ‘children should be seen and not heard’ finds no place in the implementation of the CRC. Children are encouraged to express their views and to have those views taken into account in any decisions that affect them.⁸⁸ Lansdown argues that participation goes beyond engaging in conversation, games, cultural activities and contributing to the economic security of the family; it is also about belonging within a family or community.⁸⁹ The CRC recognises the separate identity and personhood of a child, thus giving rise to rights that are distinct from the rights

⁸⁵ UNCHR *Legislative History of the Convention on the Rights of the Child* Volume 1 (2007) 365-66, para 21.

⁸⁶ Hodgkin and Newell *op cit* note 62 at 84.

⁸⁷ Danwood Chirwa ‘Children’s rights’ in Danwood Chirwa *Human rights under the Malawian Constitution* (2011) 193, 203.

⁸⁸ Article 12 of the CRC. Also see General Comment No. 12 (2009), *The Right of the Child to be Heard*, for a detailed analysis of article 12.

⁸⁹ Gerison Lansdown ‘The realisation of children’s participation rights: Critical Reflections’ in B Percy-Smith and N Thomas (eds) *A handbook of children and young people’s participation perspectives from theory and practice* (2010) 1.

of others, including their parents. Article 12 of the CRC gives children the power to assert their rights and to be heard in proceedings that affect them.

This principle has been challenged for taking away parental rights and interfering with family life but if the CRC is read within a holistic approach, one notes that this right is limited by the best interests of the child. Having said that, the participation of children born in irregular migrant situations should also be sought before policies are implemented. This enables States to view life from these children's perspectives, so that policies and laws are more inclusive.

3.3 Obstacles in implementing the CRC

Article 4 of the CRC states that;

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures *to the maximum extent of their available resources* (emphasis added) and, where needed, within the framework of international co-operation.

The function of article 4 is closely related to article 2(1) which obliges States to respect and protect the rights contained in the CRC to each child in the State's jurisdiction without discrimination.⁹⁰ States can use the above provision to allocate insufficient funds to child-oriented programmes or to even exclude some groups of children, such as children in irregular migrant situations, and cite insufficient resources. The CRC Committee has indicated that this should not be used as an excuse and States must demonstrate that they have implemented measures to the 'maximum extent of their available resources' and to even seek international assistance.⁹¹

3.4 Protecting the Rights of Children born in Irregular Migration Situations

Considering the history and development of children's rights, this section will try to analyse how children born to irregular migrants fit in the human/child rights

⁹⁰ Detrick op cit note 19 at 100.

⁹¹ CRC General Comment No. 5 at para 7.

framework and expand on the significance of the general principles of the CRC. These children are doubly vulnerable by being born in an irregular migration situation and also by virtue of being children.⁹² The Committee on the Rights of the Child has noted that children born to irregular migrants face barriers in accessing healthcare, education, housing and other socio-economic rights.⁹³ These rights are integral to the general wellbeing of children and have an impact on their life, survival and development.

Administrative procedures make it difficult for these children to regularise their stay and children lose their protection when they turn eighteen.⁹⁴ The Secretary of State for Work and Pensions in the United Kingdom once wrote that ‘poverty is about more than income, it is about lack of opportunity, aspiration and stability.’⁹⁵ How a child is brought up has a huge impact on who he becomes as an adult and there is a relationship between poverty and legal status.⁹⁶ Social and economic exclusion of children born to irregular migrant children can at times lead them to destitution.⁹⁷ The following section will only be limited to the right to education and the right to health, but acknowledges the importance of protecting all rights.

3.4.1 The right to education

The right of ‘everyone’ to education is recognised in article 13 of the ICESCR. Article 28 of the CRC is similar to article 13 of the ICESCR and provides that States Parties should recognise the right of the child to education ‘with the view to achieving this right (...) on the basis of equal opportunity’. In interpreting article 13 of the ICESCR the Committee (CESCR) has held that ‘[e]ducation is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and

⁹² Council of Europe, Committee on Migration, Refugees and Population, *Undocumented migrant children in an irregular situation: a real cause for concern*, Doc 12718 16 September 2011, p 2.

⁹³ Committee on the Rights of the Child 2012 Day of General Discussions, *The Rights of all Children in the context of International Migration: Access to Civil, Economic and Social Rights for Children in the context of Irregular Migration*.

⁹⁴ *Ibid* at 4.

⁹⁵ Iain Duncan Smith in the foreword to the ‘Child Poverty Strategy’ (Department for Work and Pensions, Department for Education 2011).

⁹⁶ Nando Sigona and Vanessa Hughes ‘No Way Out, No Way In: Irregular migrant children and families in the UK’ Research Report, University of Oxford, COMPASS, (May 2012) 10.

⁹⁷ *Ibid*.

socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.’⁹⁸

The CESCR went on to confirm the principle of non-discrimination and stated that the right to education applies to everyone in a State’s jurisdiction regardless of their nationality and legal status.⁹⁹ Other conventions including the Convention on the Elimination of all forms of Racial Discrimination¹⁰⁰ (CERD) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁰¹ extend education rights to people in irregular migration situations including to their children. The Committee on the Elimination of Racial Discrimination made recommendations that non-citizens and children born to undocumented (irregular) migrants must have access to public educational institutions.¹⁰² Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families states that children of migrant workers shall have the basic right to access education and this right should not be denied on the basis of the irregular migrant status of the parents or the child.

Children born in irregular migration situations have difficulties in some States in accessing their right to education because they are expected to show some identification.¹⁰³ The impact of non-registration of birth becomes apparent when children are not admitted in schools. For those States which allow all children to have an education in their territories, there are possibilities that during detention pending deportation, the right to education is ignored and children might end up not receiving a full education.¹⁰⁴ The importance of education cannot be underplayed in the current global context. It is important for the overall development of an individual and society at large, as children’s cognitive and psychological developments are impacted by a lack of education.¹⁰⁵

⁹⁸ CSECR, General Comment No. 13 *The right to education* (article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para. 1.

⁹⁹ *Ibid* para. 34.

¹⁰⁰ See Article 5(e)(v). See also footnote 102 below.

¹⁰¹ Adopted by General Assembly Resolution 45/158 of 18 December 1990.

¹⁰² Committee on the Elimination of Racial Discrimination, General Recommendation 30, *Discrimination against non-citizens* (Sixty-fourth session, 2004), UN Doc CERD/C/64/Misc.11/rev.3 (2004) para 30.

¹⁰³ Sigona and Hughes *op cit* note 96 at 30.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Op cit* note 88 at 2.

3.4.2 The right to health

The World Health Organization (WHO) defines health as ‘[a] state of complete physical, social and mental wellbeing and not merely the absence of disease or infirmity ...’¹⁰⁶ The right to health is articulated in article 24 of the CRC and article 12 of the ICESCR. Article 24 of the CRC is seen as building on the right to life, development and survival (article 6) as well as the principle of non-discrimination (article 2).¹⁰⁷

The right to health includes such components such as preventive and primary health care, health education and accessibility.¹⁰⁸ Research has shown that:

Millions of children die of preventable diseases before reaching the age of five. Ineffective systems of birth registration play a role in this crisis since unregistered children may be unable to gain access to health care services or may have to pay more than the registered child. In some countries a child without proof of citizenship will also be denied access to free or subsidised vaccination programmes.¹⁰⁹

The right to health should be understood and implemented in light of the CRC as a whole. Inadequate legislation and administrative policies make it difficult for irregular migrants and their children in some States to access health care. The obligation to report irregular migrants may also impact access to health care.¹¹⁰

The CESCR highlighted that ‘States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services’.¹¹¹

¹⁰⁶ World Health Organisation Constitution of 1948. The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946.

¹⁰⁷ Hodgkin and Newell op cit note at 344.

¹⁰⁸ María José Peiro and Roumyana Benedict (eds), *Ensuring the Right of Migrant Children to Healthcare: The Response of Hospitals and Health Services* International Organization for Migration (2009) 8.

¹⁰⁹ Nicola Sharp *Universal Birth Registration – A Universal Responsibility* (2005) 16 Plan International.

¹¹⁰ OHCHR, *Out of the shadows: a human rights perspective on irregular migration and development* (2012) 8.

¹¹¹ CESCR, General Comment No. 14, *The right to the highest attainable standard of health*, (2000) paragraph 34.

3.5 Conclusion

International law has been framed, and in cases of ambiguities, interpreted to accord all children equal guarantees to rights. Denying a child any right by reason of that child being born to an irregular migrant parent cannot be justified in international human rights dialogue. The development of children's rights and the history of the right to a nationality show the importance of non-discrimination in today's society. States have a responsibility in the wellbeing of children. In many States (in the form of their High or Supreme Courts) they are appointed as upper guardians of children. This means that the ultimate responsibility for the welfare of children rests with the State.

The holistic nature of the CRC makes it the best tool to fight for rights of children. The general principles are framed in such a way that they give meaning to all the rights in the CRC and how they apply to *all* children without discrimination. They also promote children's best interests and the right to life, survival and development, through active participation by the children. States have responsibilities to ensure that all children have a nationality at birth and also have access to other rights as articulated in human rights treaties. The CRC does not categorise or provide a hierarchy of rights, therefore it is not possible to fulfil one right and neglect others.¹¹²

¹¹² Peiro and Benedict op cit note 108.

CHAPTER 4: STATE PRACTICES

‘No one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts off its youth severs its lifeline.’

-Kofi Anan (1998)

4.1 Introduction

Having discussed the available laws at international and regional level, this chapter will look at practices in South Africa, United Kingdom and United States of America to determine how they are implementing their obligations domestically. The extent to which the rights of children born to irregular migrants are protected will be analysed. State compliance will be assessed by looking at child specific legislation based on the principles embodied in the Convention on the Rights of the Child (CRC) and specifically the rights to nationality (article 7); education (article 28) and health (article 24).

4.2 South Africa

During apartheid South Africa was excluded from participation in the international community, but being part of the international human rights community was important for the government.¹ It signed the CRC on 23 January 1993 and ratified it on 16 June 1995.² In 1997 South Africa signed the African Charter on the Rights and Welfare of the Child (ACRWC) and ratified it on 7 January 2000.³ After its transition to democracy and following the adoption of the interim constitution of 1993, there was a degree of consensus that children’s rights should be included in the final constitution.⁴ The applicability of international agreements such as the CRC in South African courts is determined by section 231 of the Constitution of South

¹ Julia Sloth-Nielsen and Benyam D. Mezmur ‘2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)’ *The International Journal of Children’s Rights* 16 (2008) 1.

² Information accessed on 6 August 2014 at http://treaties.un.org/Pages/ViewedDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

³ Information accessed on 6 August 2014 at <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc/ratifications/>.

⁴ Sloth-Nielsen and Mezmur op cit note 1.

Africa, 1996; specifically section 231(4), which states that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

Some of the provisions in the CRC have been specifically incorporated into the Constitution.⁵ The Constitution of South Africa is the supreme law therefore any 'law or conduct [that is] inconsistent with it is invalid ...'⁶ The constitution is further supported by enabling legislation which provides clarification and expand on provisions contained therein. The South African constitution is unique in that the rights contained in its Bill of Rights are justiciable in a court of law. This means that anyone alleging deprivation or infringement of a right contained in the constitution can approach the courts for a remedy. Section 38 lists the groups of people who are competent to approach the courts when a human right is infringed. Section 39 makes it compulsory to consider international law when interpreting the Bill of Rights. This means that in human rights cases courts must interpret the rights in a manner that is consistent with international treaties that South Africa is party to. Discrimination and limitation of rights is only allowed if they can fulfil the limitation clause in section 36.

⁵ Section 28 outlines the rights of the child as follows;

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

⁶ Section 2 of the Constitution.

Similar to the CRC and the ACRWC, South African law defines a child to be anyone below the age of eighteen.⁷ Even though the constitution has a specific section embodying children's rights, children also enjoy the protection of the other rights contained in the Bill of Rights - unless they are expressly excluded.⁸ The Bill of Rights is founded on the principles of among others equality⁹, human dignity¹⁰ and life.¹¹ Regarding children, an important additional principle addresses the issue of the best interests of the child.¹²

Since the best interests of the child is considered to be important in South African law, courts have paid substantial attention to interpreting the meaning of section 28(2) of the Constitution.¹³ It has been held that whilst the best interests of the child is of paramount importance, this standard must not be viewed in isolation and it should be used to support other rights, as subject to the limitations clause.¹⁴ The constitution recognises that even though children have autonomy, they are in need of protection. In most cases adults play a vital role in children's rights, particularly the very young, and those who are vulnerable, including children with disabilities. As such, autonomy is very important for children and they must not be seen as extensions of their parents or guardians. In *S v M* Judge Sachs held that '[i]f a child is to be constitutionally imagined as an individual with a distinct personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.'¹⁵

Like most rights in the constitution of South Africa which are preceded by 'everyone' and 'no one', section 28 applies to every child. This begs the question if

⁷ See section 28(3) of the Constitution above.

⁸ Exclusions can be seen for example in section 19(3) which not only limits the rights to vote and hold public office to citizens but also to adults, meaning children are excluded from exercising this right.

⁹ Section 9 of the Constitution.

¹⁰ Section 10 of the Constitution.

¹¹ Section 11 of the Constitution.

¹² Section 28(2) of the Constitution.

¹³ See for example *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC); 2003 (2) SACR 445 (CC) and *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232, 2007 (2) SACR 539 (CC) where the courts have looked in depth at the meaning of section 28(2).

¹⁴ *S v M* ibid at paragraph 26.

¹⁵ Ibid at paragraph 18.

the drafters of the constitution envisaged that those rights would apply to everyone in South African territory without discrimination, including non-citizens.

4.2.1 Citizenship/Nationality

According to section 2 of the South African Citizenship Act 88 of 1995 as amended, a person is a citizen whether born in or outside the Republic if one of the parents is a citizen or permanent resident of the Republic at the time of birth. A person also qualifies for South African citizenship if born in the Republic, but does not meet the criteria in the above scenario if he or she does not have citizenship or nationality of another country. This provision ensures that South Africa meets its international obligations to reduce statelessness. South Africa therefore utilises a combination of *jus soli* for children born in the Republic to citizens and permanent residents and *jus sanguinis* to children born outside the country to South African citizens. On the basis of admitting children born to permanent residents it indicates that lawful residence in the country is the important factor. Children born to other groups of foreign parents who are not permanent residents can gain citizenship in terms of section 4(3) when they reach the age of eighteen, and if they have remained in South Africa.

In terms of the Births and Deaths Registration Act all children born in South Africa must have their births registered.¹⁶ Different birth certificates are issued depending on whether the child is a citizen or not. Birth certificates for non-citizen children automatically classify them as foreigners and they will have to meet the immigration requirements of the country, for them to be deemed lawful residents.

Based on the application of the South African Citizenship Act a child is a non-citizen if *both* parents are not citizens or permanent residents. Where one parent is a regular migrant it is up to that parent to ensure that they regularise their child's stay in the country or else the child's stay in the country will be irregular. Difficulties are faced when both parents are irregular migrants, because of the challenges they face interacting with the Department of Home Affairs to obtain a birth certificate for their child. When registering a child's birth, parents must provide documentation to prove the legality of their stay in the country otherwise they risk deportation.¹⁷ A child

¹⁶ Section 9 of Act 51 of 1992.

¹⁷ See s 44 of the Immigration Act of 2002 where organs of state have a duty to report irregular migrants seeking services.

born to both parents who are irregular migrants automatically obtains the irregular migrant status of the parents. This has far reaching implications for these children, because the South African immigration system views children of irregular migrant parents as extensions of their parents, and not as autonomous human beings with distinct rights. The next sections will explore if this has any effects on the rights of children born to irregular migrants to education and access to healthcare.

4.2.2 The right to education for children born to irregular migrants

The importance of education in an individual's life can never be overemphasised. Bray argues that education 'is of cardinal importance for meaningful human existence because it allows individuals to develop whole and mature personalities and empowers them to fulfil a role that is enriching for them and beneficial to society.'¹⁸ Emerging from apartheid when the most basic fundamental human rights were denied to black people, South Africa sought to focus on education for all, as an empowerment tool.

The right to education in South Africa is entrenched in section 29 of the Constitution. It is further supplemented by the South African Schools Act 84 of 1996 as amended (hereinafter Schools Act) and various provincial legislations. Even though the constitution does not have a provision for compulsory education, section 3(1) of the Schools Act does.¹⁹ Public schools are required to admit learners without discriminating in any way.²⁰ The right to education imposes obligations on the State to provide the necessary facilities and remove factors that inhibit the enjoyment of the right.

Since children born to irregular migrants in South Africa are already classified as foreign nationals, they must meet the immigration requirements in section 13 of the Immigration Act 32 of 2002 as amended, should they wish to be admitted in schools from the age they qualify to attend school. Even though section 1 does not define a

¹⁸ Elemene Bray 'Law, Education and the Learner' in Trynie Boezaart (ed) *Child Law in South Africa* (2009) 456.

¹⁹ Section 3(1) of the Schools Acts states: Compulsory attendance.—(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

²⁰ See section 5(1) of the Schools Act.

learning institution, it is interpreted as an institution dedicated to education. Section 39 makes it illegal for learning institutions to admit foreigners who do not possess the required section 13 visas. Moreover section 42(1) provides that ‘... no person shall aid, abet, assist, enable or in any manner help an illegal foreigner ... [by] providing instruction or training to him or her ...’ Section 49 makes it an offence to assist an irregular migrant in contravention of the Act and fines are imposed on institutions and individuals who contravene it. In researching for this thesis, it has been realised that there is a lack of adequate statistics and information on access to education for children born to irregular migrants in South Africa. There are reports of many schools which do not admit children because they do not possess the required documents.²¹ Children born to irregular migrants in South Africa are classified in the same category as children who migrate into the country irregularly. Thus both groups are denied access to education when they reach school going age.

To be able to meet the requirements which enable parents to apply for section 13 visas for their children, parents must also submit accompanying documents which prove their legality and financial means in the country. For those children who somehow manage to attend school without the required documents they face a further challenge at completing school because they cannot write the final senior certificate examinations (matric) which requires a birth certificate to register.²² This practice is contrary to the provisions of the constitution and section 5 of the Schools Act which do not allow discrimination. Unfortunately to date there has not been any constitutional challenge on this practice, therefore the discretion lies with a particular school on whether to admit or deny these children to access the right to education.

4.2.3 The right to health for children born to irregular migrants

Section 27(1)(a) of the Constitution grants everyone the right to access health care services. However this right is limited by subsection 2 whereby the State can only do this within its available resources. In terms of section 28(1)(c) every child has the right to basic health care services. Unlike section 27, section 28(1)(c) is unqualified.

²¹ Ockert Dupper ‘The human rights of (irregular) migrants: An International, Regional and South African Perspective (part 2)’ *International Journal of Social Security and Workers Compensation* (2011) 3(1) 72.

²² Ibid.

These provisions in the Constitution are further supported by the National Health Act 61 of 2003. Free health care is made available to pregnant and lactating women as well as children below the age of six in public establishments.²³ Local clinics in South Africa continue to offer health care to everyone free of charge. For children born to irregular migrants, problems will be encountered if they are above the age of six and if they are referred to hospitals, as hospital fees have to be paid prior to admission, which some parents may not be able to afford. Hospitals generally charge for health care unless one falls into the category which qualifies one for free medical assistance. Under such circumstances, they will only qualify for emergency medical treatment in accordance with section 27(3) of the Constitution and section 5 of the National Health Act.

The National Department of Health has issued directives and memorandums, such as the 2007 National Department of Health Revenue Directive – Refugees/Asylum Seekers with or without a permit.²⁴ It states that irregular migrants must receive the same health care as South African citizens, but there have been reports and studies which show that some health institutions refuse to attend to irregular migrants, or that they charge these people exorbitant amounts for services.²⁵ This impacts their access to health care services, despite laws and policies which appear to be inclusive.

4.3 The United Kingdom (UK)

The UK signed the CRC on 19 April 1990 and ratified it on the 16th of December 1991²⁶ but it has yet to fully incorporate it into national law. This means that a child cannot go to court relying on the CRC only. The CRC is however meant to be implemented and referred to by courts, tribunals and administrative processes when making decisions that affect children. The UK signed the European Convention on Human Rights on the 4th of November 1950 and it is part of English law because of

²³ Section 4(3)(a) of the National Health Act.

²⁴ Reference: BI 4/29 REFUG/ASYL 8 2007.

²⁵ For the compiled studies see the report by the AIDS Consortium, Consortium for Refugees and Migrants in South Africa, Forced Migration Studies (Wits University) et al 'Challenges to the successful implementation of policy to protect the right of access to health for all in South Africa' (2008) available at <http://cormsa.org.za/wp-content/uploads/Research/Access/MigrantGautengDoH.pdf> accessed on 21 January 2015.

²⁶ https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en accessed on 21 January 2015.

the enactment of the Human Rights Act of 1998. The UK does not have a single codified constitution as is the case in many countries.²⁷ Much of its constitution is contained in written documents within statutes, court judgments, works of authority and treaties as well as unwritten sources like parliamentary constitutional conventions.²⁸ The UK is characterised by parliamentary sovereignty which allows parliament to overrule fundamental rights.²⁹

The Children's Act of 2004 as well as the 'Every Child Matters' national policy framework, have transformed child welfare policies in the way agencies and institutions should work with all children. A 2012 study found out that of a population of about 120 000 migrant children, over half of them were born in the UK to irregular migrant parents.³⁰ Under much of UK law children born to irregular migrant parents have the same entitlements as citizen children, although this is not always upheld in practice.³¹

4.3.1 Citizenship/Nationality

British citizenship or nationality is determined by the British Nationality Act of 1981. According to section 1(1) a child is a citizen if born in the UK by a parent who is a citizen or is settled in the UK. The UK uses a combination of *jus soli* and *jus sanguinis* for children born outside the UK to British citizens. UK born children to irregular migrants are also irregular migrants as their status is determined by their parents' status.³² All other children born in the UK who do not attain citizenship at the time of birth can become citizens at the age of ten years on application if they meet the requirements of the act.³³ This means that even children born to irregular migrants can become citizens if they remain in the UK until they reach the age of ten. However, not all children have the opportunity to regularise their stay due to the

²⁷ Hilaire Barnett *Constitutional and Administrative Law* 10th ed (2013).

²⁸ *Ibid.*

²⁹ Eric Barendt 'Is there a United Kingdom Constitution' (1997) *Oxford Journal of Legal Studies* 137.

³⁰ Nando Sigona and Vanessa Hughes 'No way out, no way in: Irregular migrant children and families in the UK' University of Oxford (2012) vii.

³¹ Kamena Dorling 'Growing up in a hostile environment: The rights of undocumented migrant children in the UK' Coram Children's Legal Centre (2013) 12.

³² Sigona and Hughes op cit note 30 at viii.

³³ Section 1(4) of the British Nationality Act.

high cost of the applications, which is currently £669.³⁴ If the parents cannot afford to make the application then the child will continue being an irregular migrant. There seem to be few difficulties for registering births in the UK for children born in medical facilities, as birth certificates are issued soon after a child is born.³⁵ Obstacles are encountered only when the parents are afraid of being detected should they go to have the child's birth registered at the register office.³⁶

4.3.2 The right to education and health of children born to irregular migrants

Article 2 of the First Protocol to the European Convention on Human Rights states that no person should be denied the right to education. Article 14 of the ECHR further prohibits discrimination of any kind. In terms of section 13A of the Education Act of 1996 all local education authorities have a duty to provide a place in school for every child between 4 and 16 years. Parents also have a duty 'to cause their child to receive appropriate and efficient full-time education.'³⁷ There is also no obligation on schools neither to ask for a child's immigration status nor to inform the UK Border Agency if such status is disclosed.³⁸ Where the right to education is concerned, the UK appears to have non-discriminatory policies as it is compulsory for all children to go to school. The problems that children born to irregular migrant parents face at school is that they are not entitled to benefits such as school meals, financial support and transport to and from school. The denial of such benefits can affect a child's attendance and performance.³⁹

When it comes to health care children born to irregular migrants (as with all irregular migrants) can access free primary health care through a General Practitioner and also from community care services.⁴⁰ However, secondary health care from hospitals is subject to a fee.⁴¹ Another challenge is whether or not the

³⁴ Information accessed online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301380/Master_Fees_Leaflet_Apr_2014.pdf on 21 February 2015.

³⁵ Michael Miller 'Birth registration and the rights of the child' (2007) A report prepared for the European Parliament 6.

³⁶ Ibid.

³⁷ Section 7 of the Education Act of 1996.

³⁸ Sigona and Hughes note 30 at 11.

³⁹ Ibid at 30.

⁴⁰ Statutory Instruments No. 614 of 2004, The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, March 2004.

⁴¹ Ibid.

treatment will be provided, and also the ability to pay. Another factor that will be taken into consideration is whether the treatment is considered ‘immediately necessary’, ‘urgent’ or ‘non-urgent’.⁴² A major problem in the UK is that constantly changing policies and cuts in public spending affect these children’s access to public services; therefore it is difficult to ascertain an accurate picture as regards healthcare access for such children.⁴³

4.4 The United States of America (US)

The US signed the CRC on 16 February 1995 but to date has not ratified it.⁴⁴ The paradox lies in its non-ratification of the CRC because of the active role that it played in the decade-long drafting sessions; commenting on all the substantive articles and proposing the original texts of seven of the articles, three of which are directly from the US Constitution.⁴⁵ The reasons why the US has not ratified the CRC are outside the scope of this thesis but in 2002 it ratified the CRC’s two optional protocols which are the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict. The US signed the American Convention on Human Rights in 1977 but has not ratified it as well.⁴⁶ It has also not signed the Additional Protocol in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)⁴⁷ which contains the rights to education and health among other economic, social and cultural rights.

The US does not have a good reputation at international law when it comes to either signing or ratifying human rights treaties. The next section will explore how it

⁴² Department of Health, ‘Implementing the Overseas Visitors Hospital Charging Regulations’, 2011, paragraph 4.8-4.9, available online at: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254530/ovs_visitors_guidance_oct13a.pdf. Accessed on 22 January 2015.

⁴³ Sigona and Hughes op cit note 30 at vii (Executive Summary).

⁴⁴ Information accessed online at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en on 25 January 2015.

⁴⁵ Jenni Gainborough and Elisabeth Lean ‘Convention on the Rights of the Child and Juvenile Justice’ (2008) *The Link* 7(1), Child Welfare League of America, 1. The articles are Articles 10 (Family Reunification), 12 (Freedom of Opinion), 13 (Freedom of Expression), 14 (Freedom of Thought, Conscience, and Religion), 15 (Freedom of Association and Assembly), 16 (Right to Privacy), and 25 (Periodic Review of Placement for Children in Alternative Care).

⁴⁶ Information accessed online at http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights_sign.htm on 22 January 2015.

⁴⁷ Information accessed online at <http://www.oas.org/juridico/english/sigs/a-52.html> on 22 January 2015.

upholds children's rights at the national level particularly those born to irregular migrant parents.

4.4.1 Citizenship/Nationality

A person is presumed to be a US citizen if born within the territorial limits of the United States. Section 1 of the Fourteenth Amendment of the US Constitution of 1868 as well as section 301(a) of the Immigration and Nationality Act of 1952 states that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.' In *United States v Wong Kim Ark* it was held that US born children of foreign nationals were US citizens regardless of alienage and national origin of their parents, with the exception of children of foreign diplomats and hostile invasion forces of foreign nations.⁴⁸ This has been applied even to children born in the US to irregular migrant parents. As US citizens, children born to irregular migrant parents are entitled to the responsibilities and benefits of their status.⁴⁹

4.4.2 The rights to education and health of US citizens born to irregular migrants

The right to education is not explicitly mentioned in the US Constitution. However, the Supreme Court decision of *Brown v Board of Education* held that 'education is the foundation of citizenship' and also that 'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.'⁵⁰

Health programs such as the State Children's Health Insurance Plan (SCHIP) and medical aid are available to citizen children, but they cannot utilise this if they are children of irregular migrant parents, because of the federal duties imposed to report the presence of irregular members of the family.⁵¹ As citizens the children also qualify for State assistance both in healthcare and education, but because the parents

⁴⁸ *United States v. Wong Kim Ark* (1898)169 U.S. at 675, 682-688.

⁴⁹ MiaLisa McFarland and Evon M Sppangler 'A parent's undocumented immigration status should not be considered under the best interests of the child standard' (2008) *William Mitchell Law Review* 35(1) 258.

⁵⁰ *Brown v Board of Education* (1954) 347 U.S 483 at 493.

⁵¹ See John A Castro 'Second-class citizens: The schism between immigration policy and children's health care' (2009) *Hastings Constitutional Law Quarterly* 37(1).

have to claim the benefits on behalf of the children, many fail to do so due to fear of detection.⁵² This impact is experienced less in the education sector, as compared to the healthcare system. The fear that is instilled in the irregular migrant parents in turn results in decreased access to health care for citizen children.⁵³ Pregnant irregular migrant women do not make use of available prenatal care with the result that the effects are felt by children who are later born as citizens.⁵⁴ Prenatal care can result in avoidance of lifelong health problems and could save burdening the health system later in a child's life.⁵⁵

These children have been relegated to second-class citizens because they do not fully enjoy the citizenship they have. This attitude towards children born to irregular migrants led one scholar to note that '[h]aving failed in our attempts to directly halt the flow of undocumented aliens, we have turned to indirect methods to stop it. We have punished children of the undocumented to discourage those parents from staying here and to discourage other parents and potential parents from either illegally bringing their children to this country or from giving birth here to United States citizen children.'⁵⁶

4.5 Conclusion

The role of immigration laws and policies continue to impact on children's rights in migrant families. From the above State practices, whether the children are citizens or not, the fact that they are born in irregular migrant families affects them one way or the other. Even when laws expressly make it possible for children to enjoy their rights, they are hindered in accessing rights because of the fear of their parents of being detected and deported. It is unfortunate for these children because their childhood is affected. In attempts to curb irregular migration, State laws and policies often do not take into consideration children's rights. Whilst the limits of this thesis only focused on education and health, the children are affected in other areas such as social assistance and housing, leaving them at a disadvantage when compared to other groups of children who fully enjoy their rights.

⁵² Roche J 'Children: Rights, Participation and Citizenship' (1999) *Childhood* 6: 483.

⁵³ Castro note 50 at 214.

⁵⁴ *Ibid* at 215.

⁵⁵ *Ibid*.

⁵⁶ Bill Piatt 'Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents' (1988) 63 *Notre Dame Law Review* 35-36.

CHAPTER 5: CONCLUSION

'History will judge us by the difference we make in the everyday lives of children.'

-Nelson Mandela (2002)

5.1 Summary of findings

The aim of this thesis was to highlight the vulnerability and disadvantages faced by children born to irregular migrant parents. Whether their country of birth confers citizenship on them or not the children face challenges in accessing their human rights. This is contrary to international and at times domestic laws which seek to treat all children equally, despite their immigration status. The thesis also highlighted how immigration laws and policies are at the forefront of denying these children some of their basic rights. The children are a marginalised group because of the way that society looks at their parents.

States have sovereign rights to manage their borders and impose immigration laws and policies, but when they fail to comply with international standards, they should not use the denial of basic rights to children, as a weapon to force the parents back to their countries of origin. This violates the international obligations for States, which are parties to treaties whose aim is to uphold and protect children's rights. As Sigona and Hughes highlight in their report, children born to irregular migrants are 'citizens in becoming' where legislation allows them grounds to apply for citizenship after a number of years of residence¹, as is the case in the UK and South Africa. If the children become citizens, the negative implications of childhood experiences will be reflected in their adulthood, more so when they seek State assistance, due to denied opportunities.

While the focus of this thesis was only on children born to irregular migrant parents, it is important to treat all children as children and to not deny them their human rights as articulated in human rights treaties. States also have an obligation to achieve substantive equality and to eliminate discrimination by adopting 'special

¹ Nando Sigona and Vanessa Hughes 'No way out, no way in: Irregular migrant children and families in the UK' University of Oxford (2012) viii.

measures to attenuate or suppress conditions that perpetuate discrimination.’² This entails adopting laws which promote equality for all children in their territories, and repealing laws that discriminate against them.

To achieve both formal and substantive equality, the thesis highlighted the importance of the right to a name and nationality, as well as preserving it. This right is protected when a child’s birth is registered at birth. Birth registration proves the relationship between a parent and a child, thereby protecting the child’s identity. The role of migration and how it impacts on the right to nationality was explored. This showed the different treatment accorded to citizen and non-citizen children, and how it impacts the enjoyment of other rights by non-citizen children, especially children born in irregular migration situations. In some States, services are only available to individuals with a recognised legal status.

The history of children’s rights has shown that international law has attempted to bridge the differences that exist among different groups of children. Exclusion of any group of children may lead to destitution and poverty, with particular focus on the rights to education and health. The chapter on State practices showed how South Africa, the UK and the US meet their international law obligations in children’s rights domestically. The discovery was that at times State laws are inclusive and non-discriminatory, but in practice children born to irregular migrants are discriminated against.

5.2 Good practices

The following good practices were found in the legislations of the countries which try to include children born to irregular migrant parents.

5.2.1 Birth registrations

In the Netherlands the Dutch Civil Code Book 1 article 1:19e stipulates the obligation to register all new-born births. This law makes it possible for a third party

² CESCR General Comment No 20: *Non-discrimination in economic, social and cultural rights (article 2 para 2 of the International Convention on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20 para 9.

to register a child's birth if irregular migrant parents are afraid to go to the municipality to register the births themselves.³

5.2.2 Right to education

In Argentina, Article 7 of the Ley de Migraciones, Law (Migration Law) 25.871, 2004 encourages school authorities to play an active role to include children of irregular migrants.⁴ It also stipulates that they should provide legal advice and necessary arrangements to regularise irregular migrant children enrolled in their schools.⁵

5.2.3 Right to health

In Argentina the Ley de Migraciones, Law 25.871, 2004 (article 8) provides that health authorities should provide legal assistance to irregular migrant children who seek health care, and to assist in regularising their stay in Argentina.⁶

5.3 Recommendations

5.3.1 Policies

The importance of registering a child soon after birth has been highlighted. States should endeavour to have births registered and for the children to obtain birth certificates before they leave health facilities. States should also make birth registrations free, so that the service is accessible to both citizen and non-citizen parents. Countries with practices such as the South African practice should have a different birth registering facility, so that the irregular migrant status of the parent does not affect a child in not getting a birth certificate. A separation of functions where birth registrations are concerned should be established so that parents register their children's births without fear of detection. This also includes prohibition of sharing sensitive information between service providers and immigration authorities.

³ UNICEF Written Submissions 2012 Day of General Discussions CRC *Access to civil, economic and social rights for children in the context irregular migration* 17.

⁴ UNICEF and National University of Lanus, Argentina, *Economic, Social and Cultural Rights of Migrant Children and Children born to migrant parents: Challenges, Good Practices and Recommendations* Draft (2010) 3.

⁵ Ibid.

⁶ Ibid.

5.3.2 Laws

Immigration laws and other child related legislations in some States need to be revised, so that they are in line with State obligations under the international law on children's rights. The inconsistencies make it difficult for children to access their basic rights.

5.3.3 Programmes

Children's organisations could play a positive role particularly where the rights of vulnerable children are under threat. Many parents are not aware of the rights that their children have, therefore they should be educated so that they are able to make informed decisions. They should be in a position to know which organisations to approach should their children's rights be violated. Legal assistance should be readily available to all children without discrimination.

5.3.4 Child autonomy – international and national practices

States must put in place policies which do not view children as extensions of their parents. A child born in a State to an irregular migrant parent must be assisted to regularise his or her stay so that they are not affected by the parent's status. The *Case of the Yean and Bosico Children v The Dominican Republic* has held that the migratory status of parents should not be transmitted to their children.⁷ The costs of regularising such stays or applying for citizenship should be reasonable and affordable to parents.

5.4 Conclusion

Due to limitations and constraints, this thesis did not discuss the Millennium Development Goals (MDGs). However, for the sake of completeness, if the Post-2015 Development Agenda is to be successfully achieved, particularly transformative shift 1, 'Leave No One Behind'⁸, children born to irregular migrants

⁷ *Case of the Yean and Bosico Children v The Dominican Republic*, Inter-American Court of Human Rights, 8 September 2005 para 156.

⁸ The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development* (2013) 7-8 United Nations Publications available at http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf accessed on 21 February 2015.

should not be denied their human rights, including their rights to education and health, in the global quest to end 'extreme poverty.' States should endeavour to fulfil their obligations by implementing and supporting laws, policies and programmes which are child oriented.

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