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**PROTECTION OF THE RIGHT OF ASYLUM-SEEKING CHILDREN NOT TO BE
UNLAWFULLY DETAINED: A LOOK INTO THE LAWS OF BOTSWANA**

LLM THESIS

by

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ABSTRACT

Botswana acceded to the 1951 Convention on the Status of Refugees and its 1967 Protocol and entered a reservation on section 26 relating to the freedom of movement of refugees within its borders justified on reasons of national security. As such, Botswana adopts a restrictive detention policy which requires that asylum seekers, whether alone or accompanied by their children, be held at the Francistown Centre for Illegal Immigrants pending transfer to the Dukwi Refugee Camp if their application for refugee status is successful or deportation if unsuccessful. Botswana is therefore notorious for detaining asylum seekers including children for prolonged periods, in undesirable physical conditions, and in the process violating the asylum-seeking children's rights to among others, not to be unlawfully detained, the right to an adequate standard of living, family unity, the highest attainable standard of health, and basic education.

The study therefore seeks to explore the laws safeguarding the right of asylum-seeking children not to be unlawfully detained in Botswana in an effort to assess the extent to which such laws comply with the standards set by the Convention on the Rights of the Child as the core international standard for the protection of children's rights, and other relevant international and regional instruments. In addition, the study will assess the extent to which such laws are given effect in practice. The study will also explore best international and regional practices on the protection of the right of asylum-seeking children not to be unlawfully detained with specific emphasis on the laws of Sweden and South Africa. The study concludes with recommendations based on standards set out in the Convention on the Rights of the Child and other relevant international and regional instruments, and best practices in the laws of Sweden and South Africa which Botswana may draw valuable lessons in order to effectively safeguard the right of asylum-seeking children not to be unlawfully detained.

DEDICATION

This thesis is dedicated to the loving memory of my beloved late father, Mr. Peter Tetani Slave who has always believed in me, and instilled in me the value of education and hard work, my ever loving, supportive and prayerful mother, Ms. Unami Slave, my twin brother and pillar of strength, Dr. Oneile Slave, and above all God.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ATDs	Alternatives to Detention
AU	African Union
BCSO	Botswana Civil Society Organisation
CMW	Committee on the Protection of Migrant Workers and Members of their Families
CRC	United Nations Convention on the Rights of the Child
FCII	Francistown Centre for Illegal Immigrants
GC	General Comment
HR Committee	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UPR	Universal Periodic Review
US	United States

CHAPTER 1

1.1. Introduction

Although international migration is often perceived as an activity of adults or families, (crossing borders in pursuit of employment, protection or reuniting with their families,)¹ millions of children have crossed borders or have been forced to cross borders for various reasons. UNICEF estimates that as of 2017, 30 million children were living outside their native countries due to a number of reasons including, uniting with their families, searching for education opportunities and escaping from conflict, violence and persecution. In 2016, children accounted for about half the refugees and asylum seekers, at around 12 million worldwide.² Thus, the reality of child migrants, whether accompanied, unaccompanied or separated is not novel. Children can migrate lawfully through legally gazetted points of entry with the requisite travel documentation and permission to enter the destination state, or they can migrate unlawfully circumventing immigration control or being met by immigration control without the requisite documentation. In both circumstances the position of international child's rights law is that a child migrant be treated as a child first and above all else, with the support of all the rights in the Convention on the Rights of the Child (CRC),³ and a migrant second.⁴

At the time states ratified the CRC, as almost all of them have done,⁵ they undertook to respect and safeguard the rights of every child in their jurisdiction without distinction of any sort.⁶ This implies that a refugee or migrant child regardless of his or her legal status and whether they have just arrived in a country seeking protection (to stay or in transit) has similar rights as any other children within a state's borders.⁷ Despite the aforementioned

¹ Jacqueline Bhabha 'More than Their Share of Sorrows: International Migration Law and the Rights of Children' (2003) 24 *Immigr & Nat'lity L Rev* 301.

² UNICEF 'A call to action. Protecting children on the move starts with better data' (2018) available at https://www.iom.int/sites/default/files/press_release/file/pbn_02152018_Call%20to%20action_clean.pdf, accessed 9 May 2020.

³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁴ Ciara Smyth 'Migration, Refugees and Children's Rights in Ursula Kilkely & Ton Liefaard (eds) *International Human Rights of Children*' (2019) 422.

⁵ UNICEF 'A child is a child. Protecting children on the move from violence, abuse and exploitation' (2017) available at https://www.unicef.org/publications/files/UNICEF_A_child_is_a_child_May_2017_EN.pdf, accessed 9 May 2020.

⁶ *Ibid* at 18.

⁷ *ibid*.

position that a migrant child should be treated as a child first and above all else, and clear standards set out in the CRC, the manner in which child migrants are treated in practice is inconsistent with the standards states set themselves. It has been observed that in nearly all accounts, the treatment of migrant children is determined by their migration status.⁸ Consequently, child migrants are perceived as migrants first as opposed to children first.

A quick review of state practice indicates that states employ various methods to bar migrants from entering their territories including, send offs (push backs), individual or group dismissals at the border without any formal individual evaluation. Notable is that children are often subjected to these practices which are common in Europe, Central and North America, North Africa and South East Asia.⁹ Other states detain children and families on the basis of their migration status and this continues to be a growing, and disturbing, characteristic of state migration policies worldwide.¹⁰ While the number of children detained for reasons connected to migration globally is unknown, more than 100 states are known to detain children for migration related reasons, including Botswana (my emphasis).¹¹ In practice, it is evident that such child immigration detention policies commonly infringe on several international norms.¹²

Universally, migrant children are usually incarcerated in sub-standard conditions, which at times are harsh and fall short of safeguarding them.¹³ For boys separated from their parents and incarcerated with adult men not related to them, it is an environment prevalent with risks. Similarly, the risk of abuse is especially imminent for children incarcerated together with adults of the opposite sex unrelated to them.¹⁴ Additionally, the conditions in which migrant children, are detained have been criticised by the Special Rapporteur on human rights of migrants for being punitive, for denying children care, protection and rights which they are entitled to in terms of the CRC and other international human rights standards,

⁸ *ibid* at 46.

⁹ Smyth *op cit* note 4 at 425.

¹⁰ Jacqueline Bhabha & Mike Dottridge 'Child's Right on Global Compacts: Recommendations protecting, promoting and implementing the Human Rights of Children on The Move in the Global Compacts (2017) available at <https://resourcecentre.savethechildren.net/library/child-rights-global-compacts-recommendations-protecting-promoting-and-implementing-human> accessed on 12 May 2020 at 15.

¹¹ UNICEF (2017) *op cit* note 5 at 30.

¹² Bhabha *op cit* note 1 at 313.

¹³ UNICEF (2017) *op cit* note 5 at 30.

¹⁴ *ibid* at 9 and 30.

inclusive of among others, the right to education, physical and mental health, privacy, information, and rest and recreation.¹⁵

At the nucleus of this issue are migration and border control procedures that are usually focused on national security and migration control, which results in limited attention being paid to creating systems that address the long term ramifications of migration experiences on children.¹⁶ These penal and restrictive immigration procedures have been justified on what authors call the ‘deterrence theory’, as such procedures are perceived as necessary to discourage illegal migration. Consequently, state responsibilities to the child rights agenda tend to be outweighed by the more powerful immigration control agenda. The latter is distinguished by such measures as send offs, criminalisation of migration, and the denial of human rights of migrants. All of these are now popular migration control mechanisms.¹⁷

1.2. Background of the Study

As mentioned above, Botswana is part of the more than 100 countries which are notorious for detaining children for reasons related to immigration. Botswana acceded to the 1951 Convention on the Status of Refugees and its 1967 Protocol and entered a reservation on section 26 relating to the freedom of movement of refugees within its borders. This reservation was justified on reasons of national security since some of the refugees entering Botswana in the 1960s were members of liberation coalitions.¹⁸ Consequently, Botswana adopts a restrictive detention policy which requires that asylum seekers be held at the Francistown Centre for Illegal Immigrants (FCII) pending transfer to the Dukwi Refugee Camp if their application for refugee status is successful or deportation if their application was unsuccessful. However, the conditions of detention at the FCII fall short of international standards and some constitute human rights violations. Asylum seekers held at the FCII are subjected to detention in overcrowded conditions due to the prevalence of those who stay beyond the expected time.¹⁹ Furthermore, detention at the FCII is characterised by poor conditions, separation of families, accommodation of women and

¹⁵ Jacqueline Bhabha ‘Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights’ (2009) 31 *Hum Rts Q* 423.

¹⁶ Mary Crock & Lenny B Benson ‘Central Issues in the Protection of Child Migrants’ (2018) available at <https://www.elgaronline.com/view/edcoll/9781786430250/9781786430250.00008.xml>, accessed 15 May 2020 at 15.

¹⁷ Smyth op cit note 4 at 421.

¹⁸ Elizabeth Macharia-Mokobi & Jimcall Pfumorodze ‘Advancing refugee protection in Botswana through improved refugee status determination (2013) 13 *AHRLJ* 155.

¹⁹ Dolly Ntseane & Rodreck Mupedziswa ‘Fifty years of democracy: Botswana’s experience in caring for refugees and displaced persons’ (2018) 7(4) *International Journal of Development and Sustainability* 1415.

children in tents that are susceptible to leaking during rains, and exposure to harsh and unhygienic conditions which may exacerbate vulnerability to contracting contagious diseases, lack of access to basic education and health care.²⁰ There has also been reports of sexual abuse of minor boys by older male detainees.²¹ Of specific concern is exposure of asylum-seeking children as a highly vulnerable group to such detention and its negative effects.

It is evident from the aforementioned that due to the conditions of immigration detention in Botswana, asylum-seeking children are deprived of their rights to an adequate standard of living, access to education, the highest attainable standard of health care, family unity, and protection. This study therefore seeks to explore the laws safeguarding the right of asylum-seeking children not to be unlawfully detained in Botswana with specific focus on accompanied asylum-seeking children in an effort to assess the extent to which such laws are consistent with the standards set in the CRC as the international standard on children's rights, and other relevant international and regional instruments. This is mainly because it is from the detention conditions that all the other rights mentioned above are violated. Furthermore, the study will assess the extent to which such laws are given effect in practice. The study will also explore best international and regional practices on the protection of the right of asylum-seeking children not to be unlawfully detained with specific focus on Sweden and South Africa, and the justification for choosing these countries will be given in Chapter 5 of this study. The study will conclude with recommendations based on standards set by the CRC and other relevant international and regional instruments, as well as best practices in the laws of Sweden and South Africa that Botswana may draw valuable lessons from in order to effectively protect the right of asylum-seeking children not to be unlawfully detained.

1.3. Problem Statement

As a result of the restriction of movement of asylum seekers and the Botswana refugees encampment policy, asylum seekers are detained at the FCII until they are granted refugee status, thereafter documented refugees are encamped at the Dukwi Refugee Camp.²² Botswana thus distinguishes between refugees and asylum seekers. Contrary to the

²⁰ US Department of State 'Country Reports on Human Rights Practice-Botswana' (2017) available at <https://www.refworld.org/docid/58ec8a6713.html>, accessed 20 March 2020.

²¹ UN High Commissioner of Refugees (UNHCR) 'UNHCR submission on Botswana: 29th UPR session' (2018) available at: <https://www.refworld.org/docid/5b0813b44.html>, accessed 18 March 2020.

²² Ntseane & Mupedziswa op cit note 19 at 1415.

common perception that asylum seekers received in Botswana are mostly adults who migrate on their own,²³ reports by the US Department of State and the UNHCR have revealed that children usually constitute a significant number of asylum seekers.²⁴ A 2017 report by the US Department of State revealed that in 2015, over 400 asylum seekers inclusive of more than 200 children were detained at the FCII.²⁵ According to the report, women and children of asylum seekers were accommodated in tents susceptible to leaks in rains, there were poor sanitary conditions heightening the exposure to infectious diseases. Officials also separated families, children at the FCII could not access education, and there was a report that a boy was sexually violated by an older male detainee.²⁶

Furthermore, a 2017 report published by UNHCR in 2018, revealed that as of 2017, children constituted more than 50% of the 500 asylum seekers held at the FCII and that the children had been held for more than two and a half years and had been deprived of access to education the entire time contrary to the best interests of the child principle and the right to education envisaged in the Botswana Children's Act (Children's Act).²⁷ The UNHCR therefore recommended inter alia, that government release the rejected asylum-seeking children from the FCII and ensure long term solutions consistent with the best interests of the child, as well as ensure that the children access primary and secondary education notwithstanding their status.²⁸ The aforementioned reports by the US Department of State, and the UNHCR illustrate that the enjoyment of the right to an adequate standard of living, the right to a family life and the right to education is a problem for asylum-seeking children in immigration detention in Botswana.

The 2019 concluding observations on the combined second and third reports of Botswana by the Committee on the Rights of the Child (the Committee)²⁹ will further illustrate that the protection of the rights of asylum-seeking children in immigration detention continued to be a problem in Botswana notwithstanding, the above stated recommendations by the

²³ *ibid* at 1419.

²⁴ US Department of State (2017) *op cit* note 20 and UNCHR (2018) *op cit* note 21.

²⁵ US Department of State (2017) *op cit* note 20.

²⁶ *ibid*.

²⁷ UNHCR (2018) *op cit* note 21 at 3 and Children's Act 8 of 2009.

²⁸ *ibid*.

²⁹ UN Committee on the Rights of the Child 'Concluding observations on the combined second and third report third reports of Botswana' (2019) UN Doc CRC/C/BWA/CO/2-3 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/BWA/CO/2-3&Lang=En, accessed on 20 March 20.

UNHCR. The Committee urged Botswana to ban the detention of asylum-seeking children and put in place Alternatives to Detention (ATDs) consistent with the children's best interests and the rights to liberty and family environment as well as reinforce means to ensure complete access of all asylum seeking and refugee children to health and education facilities.³⁰ Furthermore, a 2018 position paper on the detention of asylum-seeking children at the FCII by human rights civil society organisations in Botswana, addressed to Government, detailed similar issues and proposed similar recommendations as the UNHCR and the Committee and, further called upon Government to address the situation of the children at the FCII, as a matter of urgency.³¹

It is evident from the aforementioned that the conditions of immigration detention of asylum-seeking children leads to a violation of other rights, particularly, their rights to an adequate standard of living, access to education, the highest attainable standard of health care, family life, and protection, and hence such detention can be deemed as unlawful. In addition, it appears that the immigration detention policy is applied strictly, without taking into consideration the best interests of the asylum-seeking children as enshrined in the Children's Act, and other relevant rights contained therein. Accordingly, the protection of the right of asylum-seeking children not to be unlawfully detained is a major problem in Botswana. It is therefore important to explore the laws of Botswana safeguarding the right of asylum-seeking children not to be unlawfully detained in an effort to ascertain the extent to which they safeguard such right. It is also noteworthy that although there have been various studies on migration in Botswana, studies on the protection of the rights of asylum-seeking children are scarce. Hence, this study will attempt to fill the literature gap.

1.4. Research aims and objectives.

This study identifies and analyses the laws protecting the right of asylum-seeking children not to be unlawfully detained in Botswana and aims to determine to what extent such laws protect the said right. The research objectives are:

- a) To explore the laws protecting the right of asylum-seeking children not to be unlawfully detained in Botswana.

³⁰ *ibid.*

³¹ Olebile Machete et al 'Position paper on the detention of children asylum seekers at the Francistown Centre for Illegal Immigrants' (unpublished, Botswana Civil Society Organisation, 2018).

- b) To assess the extent to which such laws are consistent with the standards set by the CRC as the core international standard for children's rights and other relevant international and regional standards.
- c) To assess the extent to which such laws protect the right of asylum-seeking children not to be unlawfully detained in practice.
- d) To explore regional and international best practices on the protection of the right of asylum-seeking children not to be unlawfully detained, which Botswana can draw valuable lessons from in order to effectively safeguard this right with specific focus on Sweden and South Africa.

1.5. Identifying the needs of asylum-seeking children

It is trite that asylum-seeking children, whether accompanied or unaccompanied, face a heightened risk of violence, abuse and exploitation compared to citizen or resident children. Accordingly, asylum-seeking children need safety and protection. Article 19 of the CRC enunciates the right of migrant children to be protected from all forms of violence, abuse, negligent treatment and exploitation, and such protection entails children's referral to and support from a national child protection system based on a legal framework, including formal and informal structures, with the capacity to protect them from violence abuse, exploitation and neglect.³² In the same vein, articles 37 and 40 of the CRC protects asylum seekers' children from cruel or inhumane treatment and being deprived of liberty without any justification or proper processes.³³

Closely related to the need for safety and protection is the need for a normal family life. An asylum-seeking child like any other child needs a family set-up for his or her growth and well-being. In terms of articles 7 and 16 of the CRC, asylum-seeking children have the right to know and be cared for by their parents without any unjustifiable or unlawful interference. Articles 18 and 27 of the CRC recognises the parents' primary duty to provide conditions of living that are necessary for the child's upbringing and development, and best interest. Additionally, Article 20 of the CRC requires that asylum-seeking children who are temporarily or permanently deprived of their family environment, or whose in

³² Bhabha & Dottridge op cit note 10 at 13.

³³ Jeannette A Lawrence et al 'The Rights of Refugee Children and the United Convention on the Rights of the Child' (2019) 8(9) *Laws* 20.

their best interests cannot be allowed to live in that environment be afforded special assistance and protection including, alternative care.³⁴

Furthermore, to develop and flourish, asylum-seeking children need access to physical health and education facilities, and to benefit from such services, their basic needs including, an adequate standard of living and nutrition must be met. Accordingly, conditions of living will negatively impact on other rights such as the right to education and the right to health.³⁵ All children require opportune access to health services, including preventive care. Adolescent girls, as well as adult women, require access to reproductive health services. Children suffering from stress or trauma have a special need for access to services, both upon their arrival in the country of destination and thereafter. Physical, emotional and psychological distress can have lasting, negative ramifications on developmental capacity, resulting in long-term health problems, post-traumatic stress disorder, depression and behavioural issues, including severe depression many years or even decades later.³⁶ The divergence in signs of high to low levels of health among children undergoing trauma related services indicate the need for various forms of health care and intervention that are based on the individual needs and strategies. Articles 24 and 39 of the CRC are relevant to the health situation of asylum-seeking children, they enunciate the child's right to the highest attainable standard of health and to health treatment and rehabilitation facilities, and states' obligation to ensure physical and psychological recovery of child victims.³⁷ Hence, asylum-seeking children have peculiar health needs.

Satisfactory access to education entails several aspects that surpass the formal provision of a schooling facility. For instance, there is a critical need for language and cultural obstacles to be dealt with in the system that offers education. Likewise, the particular education needs of asylum-seeking children with disabilities must be taken into account if the CRC's desired result of making education accessible for all is to be fulfilled. Secondary and higher education are essential building blocks for the social and economic inclusion of refugee and asylum-seeking children.³⁸ Article 28 of the CRC articulates every child's right to free and mandatory elementary education and encourages states to develop secondary and vocational education and to make these available and accessible to all children. This right

³⁴ *ibid.*

³⁵ *ibid* at 19.

³⁶ *ibid.*

³⁷ Lawrence et al op cit note 33 at 9.

³⁸ Bhabha & Dottridge op cit note 10 at 19.

is also recognised in the 1990, ICRMW.³⁹ Also crucial for the development and well-being of asylum-seeking children is the need for age-appropriate play and recreational, cultural, and artistic activities. The right of every child to rest, leisure, play, recreational activities and free and full participation in cultural and artistic life is safeguarded in article 31 of the CRC.⁴⁰

The right to participation is also crucial for asylum-seeking children especially in matters affecting them. Article 12 of the CRC recognises children's capability to form their views and entitles them to freely express their views in all matters affecting them and provides that their views will be considered based on their age and maturity. It further requires that the views of children subject to judicial or administrative proceedings be obtained directly or through a representative or relevant body.⁴¹

In light of the above it is submitted that asylum-seeking children, whether in detention or not, accompanied or unaccompanied, are entitled to at least safety and protection, an adequate standard of living, a normal family life, the highest attainable standard of physical and mental health, and basic education. It is however noteworthy that there is no one size fits all, the needs of an asylum-seeking child at a particular time and place is determined by his or her level of maturity and experiences.

1.6. The Conceptual Approach (Are children rights bearers?)

The notion that children enjoy rights is not novel, in fact it has been the subject of discussions and remarks for more than 30 years.⁴² There are a lot of philosophical and jurisprudential debates concerning the issue whether children can be reasonably classified as rights bearers at all. These include the choice or will theory and the interest theory. The choice or will theory gives importance to choice and maintains that choice alone is a basis of all rights. Since the existence of a right is dependent on the right bearers' interest of making a choice and most children fall short of the capacity to make choices, exponents argue that children cannot be classified as having rights. On this account, Hurt considers the term 'rights' not suitable for application to babies or in fact to animals. This argument

³⁹ *ibid* at 20.

⁴⁰ Lawrence et al *op cit* note 33 at 9.

⁴¹ Elizabeth Macharia- Mokobi 'Child Asylum Seekers in Botswana. A critique of the Ngezi and Iragi Decisions' in Mark Klaasen et al (eds) *Safeguarding Children's Rights in Immigration Law* (2020) at 223.

⁴² Jane Fortin *Children's Rights and the Developing Law* 3ed (2009) at 2.

has been criticised for having an ill-favoured reasoning and for nullifying the instinctive perspective that children must have rights or else it will be wrong to reject such theory.⁴³

The interest theory by McCormick, Raz and Campbell introduces a competing perspective that the notion of rights should not only be limited to those who can assert or relinquish them.⁴⁴ The interest theory postulates that a person has a right where his or her interests are safeguarded in particular ways by imposition of moral and legal normative restrictions on the actions and interests of others with regard to the object of one's interests.⁴⁵ On this account, children like adults have interests which require safeguarding in such a way and the application of this theory circumvents refusing them moral and legal entitlements up until they have gained the competence to make logical decisions.⁴⁶ Such theory favours the view that children's deficiency in adult capacities does not make them less valuable.⁴⁷

Furthermore, there are theoretical concerns relating to the challenges involved in the implementation of children's rights in light of their innate impotence.⁴⁸ First, children rely on those very adults who are acting in violation of their rights, most often their parents, and second, they may be inexperienced to take measures to assert their rights. Notwithstanding the divergent theories on the issue of whether children are rights bearers or not, and issues relating to challenges involved in giving effect to children's rights, the draftsmen of the CRC regarded the child as entitled to a wide range of rights.⁴⁹

Article 1 of the CRC defines a child as any person under the age of eighteen years except where the age of majority is attained earlier under the law applicable to the child.⁵⁰ Thus, the CRC recognises all children including babies as rights bearers of all rights enunciated therein, and requires that children 'be respected as persons in their own right'.⁵¹ However, it goes without saying that a new born baby is unable to enjoy his or her rights under the CRC in the same manner as for instance, a 15 year old adolescent can.⁵² Hence, the

⁴³ *ibid* at 12.

⁴⁴ *ibid* at 13.

⁴⁵ *ibid*.

⁴⁶ *ibid*.

⁴⁷ *ibid*.

⁴⁸ *ibid* at 18.

⁴⁹ *ibid*.

⁵⁰ Convention on the Rights of the Child (1989) *supra* note 3.

⁵¹ Olga A Khazova 'International Children's Rights Law: Child and the Family' in Ursula Kilkely & Ton Liefwaard (eds) *International Human Rights of Children* (2019) at 167.

⁵² *ibid*.

principle of evolving capacities, one of the salient principles of the CRC enunciated in article 5 and reiterated in article 14(2), had been created to address this issue and to balance the rights of children and their parents'.⁵³

Acknowledging the child as an individualistic rights bearer has substantially contributed to the child's more agile role in the family.⁵⁴ Traditionally, the child was perceived as a 'commodity' of his or her parents and was deprived of the right to express his or her views in the family. Thus, the child was conceived as a dependent, unnoticed and passive member of the family.⁵⁵ Whereas the CRC acknowledges a child as a subject of rights and guarantees to the child who is capable of forming his or her own views the right to express and have their views in all matters concerning them in article 12(1), such views will be given due weight in accordance with their age and maturity.⁵⁶

However, the fact that the CRC contains a range of substantive rights does not inevitably validate the view that children enjoy all the rights contained therein.⁵⁷ Additionally, the fact that the CRC is ratified by nearly all states is not evidence that children's rights are applied as effectively as general adults' rights contained in globally ratified treaties or that children enjoy more human rights protection after ratification of the CRC than before.⁵⁸ Neither is it evidence that in practice all children enjoy the rights contained therein. A gap exists between theory and practice. A case in point is the situation of migrant children who are usually perceived as migrant children first and foremost, with rights and necessities that emanate from their status as children as a second thought.⁵⁹ Nevertheless, the dichotomy between theory and practice does mean that children are right less or that they are not rights bearers, children are significant rights bearers under the CRC. It is from this viewpoint that this study seeks to explore the laws safeguarding the right of asylum-seeking children not to be unlawfully detained in Botswana, in view of the CRC which is the core international standard on the protection of children's rights.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ Fortin *op cit* note 42 at 18.

⁵⁸ Bhabha *op cit* note 1 at 422.

⁵⁹ Jacqueline Bhabha 'Children on the move in the twenty-first century: Developing a Rights-Based Plan of Action' in Marcelo M. Suárez-Orozco (eds) *Humanitarianism and Mass Migration: Confronting the World Crisis* (2019) at 84.

1.7. Literature Review

Botswana has been a country of migration since the discovery of diamonds in the 1970s and has over the years welcomed forced migrants and displaced persons from various countries but mostly neighbouring countries, especially Zimbabwe.⁶⁰ In the early days of independence, Botswana accepted a number of migrants as a result of relaxed or less strict immigration policy. However, the country was compelled to change its immigration policy to a much stricter one due to a surge in numbers of migrants entering Botswana. The policy is characterised by detaining and deporting illegal immigrants, usually termed ‘undesirable elements’.⁶¹ In terms of the policy asylum seekers are detained at the FCII pending transfer to the Dukwi Refugee Camp if their application for refugee status is successful or deportation if their application was unsuccessful.⁶²

While there is a common perception that asylum seekers hosted by Botswana are mostly adults, children form a substantial portion of the population of asylum seekers since some adult asylum seekers come with their minor children. As already indicated above reports by the US Department of State and the UNHCR have revealed that in 2015 and 2017 children detained with their asylum-seeking parents at the FCII accounted for more than 50% of the number of asylum seekers, and were detained in harsh and unhygienic conditions, separated from their families or parents, and had been without access to a school for over two and a half years.⁶³

There is a wealth of academic writing on the situation of migrants in Botswana. Even so, there is miniscule writing on the situation of migrant children, particularly on the important issue relating to the laws safeguarding the right of asylum-seeking children not to be unlawfully detained. Ntseane and Mupedziswa write on how Botswana has progressed in caring for migrants and displaced persons in her fifty years of democracy, and document some of the lived experiences of migrants and displaced persons with a specific focus on deportations, shelter, employment, health, education, social welfare services and social relations. They highlight access to education as one of the challenges faced by undocumented migrants and asylum-seeking children in Botswana as it is conditional on their parents regularising their stay in Botswana. They also highlight that all migrant

⁶⁰ Ntseane & Mupedziswa op cit note 19 at 1423.

⁶¹ *ibid.*

⁶² *ibid* at 1415.

⁶³ US Department of States (2017) op cit note 20 and UNCHR (2018) op cit note 21.

children notwithstanding their level of desperation do not have access to social protection programmes available to orphans and vulnerable children in Botswana.⁶⁴

Macharia- Mokobi provides a critical analysis of the *Ngezi*⁶⁵ and *Iragi*⁶⁶ High Court decisions and the consolidated Court of Appeal decision on the said High Court decisions, with a specific focus on the courts' approach to safeguarding the rights of children asylum seekers. She discusses the rights of asylum- seeking children in view of the CRC which Botswana has ratified and domesticated, and the Children's Act in the context of refugees and asylum-seeking children. The High Court decisions concerned successful applications for habeas corpus by asylum seekers who claimed to have been subjected to lengthy and indefinite detention with their children, following their failed applications for asylum.⁶⁷ She observes that in both decisions of the High Court and the decision of the Court of Appeal there was no specific mention of the lawfulness of the children's detention and criticises the Court of Appeal for the remark that parents who seek asylum with their children will be detained with them, and for not taking into account the children's view nor making reference to the CRC or the Children's Act.⁶⁸

While acknowledging that Botswana has a legal interest in managing asylum seeker flows, Macharia argues that the Court of Appeal decision failed to recognise the particular rights of the children who constituted a significant number of persons affected by the ruling. Accordingly, the court failed to strike a balance between national security issues and the rights of the children as it gave more weight to migration control arguments to the detriment of a rights-based approach to children immigration detention. She argues that this is brought about by the fact that Botswana criminalises asylum seekers' attempts to seek protection under both international and domestic laws. Further, in view of the Children's Act which domesticates the CRC, she argues that the court appeal decision failed to discuss Botswana's obligations under its own domestic laws and international laws. She concludes with some recommendations for law and policy reform, and overall she argues for a more child rights- based approach when dealing with asylum-seeking children.⁶⁹

⁶⁴ Ntseane & Mupedziswa op cit note 19 at 1415.

⁶⁵ *Egama Ngezi and 163 Others v The Attorney General* unreported case no UAHFT 000026-17 (4 May 2017).

⁶⁶ *Marie Iragi and 2 Others v The Attorney General* unreported case no UAHFT 000017-17 (7 July 2017).

⁶⁷ Macharia- Mokobi op cit note 41 at 233.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

Notwithstanding the miniscule academic writings on the situation of migrant children in Botswana, there is a wealth of articles on the situation of child migrants worldwide, including articles specifically devoted to the situation of child migrants in particular jurisdictions especially, Europe and the US. The bulk of the articles recognise the CRC as the international standard for safeguarding the rights of all children including child migrants and point out to among others, immigration laws and policies that deny migrant children the rights they are entitled to in the CRC due to the common state practice which favours immigration policies and laws which criminalise child migrants, as well as procedures justified on national security. Therefore, there is a general consensus in the literature reviewed that international laws safeguarding the rights of child migrants generally exist, the only issue is the implementation of such laws by states.

Other themes common in the literature reviewed include the disempowerment of child migrants in refugee and international law as rights bearers in practice, particularly as suitable asylum claimants, and criticisms on the detention of migrant children, whether accompanied, unaccompanied or separated. In general, the articles assert that there is a dichotomy between domestic and international laws safeguarding the rights of child migrants and practice, and that immigration laws and policies fall short of a child's rights or best interests of the child approach. Hence, most of the scholars in the literature reviewed call for the repositioning of migrant children rights into the core of the protection discourse and advocate for the incorporation of a child rights or best interest of the child approach into migration laws, policies and procedures.

Professor Francois Crepeau, UN special rapporteur on the human rights of migrants writes on the rights of all children in the context of international migration.⁷⁰ He attributes the violation of the rights of migrants in practice by states, especially irregular migrant children to the wide criminalisation of irregular migrants. He discusses the four main principles of the CRC in the context of migrant children, and underscores that despite the existence of the CRC and other international laws tailored to safeguard the rights of children, states are behind in fully giving effect to these rights for the migrant child. States usually overlook a migrant child as a distinct rights holder in developing migration laws and policies.⁷¹ He

⁷⁰ International Organisation for Migration (IOM) 'The rights of all children in the context of international law by Professor Francois Crepeau, United Nations Special Rapporteur on the human rights of migrants' (2013) available at https://publications.iom.int/system/files/pdf/children_on_the_move_15may.pdf, accessed on 9 May 2020.

⁷¹ *ibid.*

therefore argues for the mainstreaming of a child's rights based approach to migration into domestic legislation and policies, plans, programs and practices and a consideration of the effect of migration on children in the elaboration and application of domestic development schemes inclusive of those concerning poverty alleviation, rights safeguarding and access to public services.⁷²

Lawrence et al discuss the rights of refugee children in light of the CRC and argue that although children are recognised as right holders by the CRC, their rights are not equally respected in the policies and practices of current states. They assert that the extent to which the CRC safeguards the rights of refugee children is partly based on what it means to be a refugee child and partly on how the rights bearing status of refugee children is recognised, honoured and given effect in immigration and legal systems. They also argue that a CRC's rights-based approach affords particular recognition to migrant children with peculiar needs, and that it is more appropriate for the safeguarding of refugee children compared to the welfare approach.⁷³ They argue that in practice states violate the rights-based approach enshrined in the CRC as they favour the national well-being and border security over the well-being of refugee children. Lawrence et al further state that there is a tendency to neglect children as unseen or to refuse that they are children and argue for a comprehensive shift of refugee children into the core of state policy and practice.⁷⁴

Bhabha writes about international migration in the context of children's rights. She traces the advent of children's rights to the establishment of the Declaration on The Rights of the Child in 1924, and the emergence of the issue of refugee children to the establishment of the refugee system. She discusses the principle of non-discrimination and the right to respect for family life in the CRC in the context of migrant children, and asserts that the CRC provides a far-reaching international framework as it codifies and broadens international, regional and bilateral agreements on child-specific rights and protection.⁷⁵ She therefore asserts that the legal framework for rights enforcement on behalf of child migrants usually exists, what trails behind is the political will and consensus that is needed to give effect to such rights. She highlights that children are usually unnoticed as human rights bearers in international law, and that as non-voting members of the community, holders of a bare citizenship, they are especially vulnerable to mistreatment that minor and

⁷² *ibid.*

⁷³ Lawrence et al *op cit* note 33.

⁷⁴ *ibid.*

⁷⁵ Bhabha *op cit* note 1 at 301.

passive groups are exposed to. Furthermore, child migrants are subjected to twice the vulnerability of dual minority status set on age and nationality. The difficulty for advocates and policy makers is therefore to actualise children's migration rights in the absence of political leverage.⁷⁶

Overall, Bhabha argues that notwithstanding that international law addresses the specific rights and needs of children more comprehensively than it does those of any other general demographic groups, and the fact that the best interests of the child principle is a universally acknowledged yardstick of the international normative framework that applies to all children without distinction of any form, children remain in a peculiarly disempowered, ambiguous position as rights bearers.⁷⁷

Bhabha also writes about developing a rights-based approach for children on the move in the twenty-first century.⁷⁸ She notes that the common reason advanced for disregarding children affected in one or more ways by migration is the invisibility of migrant children, and argues that in her view the main reason for the disregard of the rights of migrant children is the profound uncertainty concerning them rooted in the institutional beliefs and values of migration-control systems and therefore of the authorities giving effect to those systems.⁷⁹ She states that uncertainty is characterised by a protective imperative that prioritises consideration of 'the best interests of the child' arising from the human rights and child rights systems, that has been in place for decades on the one hand, and an unfriendly and exclusionary pressure that supports the perception that child migrants are potential criminals, threats, insubordinates and even terrorists on the other hand. She highlights that this perception has had an influence on decision making authorities at the borders and migration facilities. Consequently, policies concerning child migrants have been extremely inconsistent, and protection imperatives continue to be commonly disregarded.⁸⁰

Most importantly Bhabha argues for a more dynamic flexible and progressive agenda that recognises youthful agency and initiative and that places the right to safe, and legal child and adolescent migration at its core, to supplement the focus of current work. She suggests that a comprehensive and fair agenda in the twenty-first century must include as necessary

⁷⁶ *ibid* at 306.

⁷⁷ *ibid* at 322.

⁷⁸ Bhabha *op cit* note 59 at 83.

⁷⁹ *ibid*.

⁸⁰ *ibid* at 84-5.

as a start policies that safeguard vulnerable children from the root causes of migration, and argues that lack or inadequacy of such policies in so many regions today has brought about the large outflows of young people so much in evidence since 2014, outflows that are not proof of a migration crisis but instead of a migration instinct or opportunity. She further suggests that a modern agenda for migrant children should also give detailed solutions to the current refugee and migration issues that are not dealt with in the existing toolkit of protective measures.⁸¹

Estin argues for a best interests approach for unaccompanied child migrants in the US with particular focus on the laws that govern the treatment of unaccompanied minor children in the US. She underscores that the US like other states experiences challenges in dealing with the surge of children in practice, and as an issue of policy, as striking a balance between the aim to control immigration on one hand and conserving families or children on the other has been a challenge. She also asserts that although states have sovereign rights to determine their citizenship, to control their borders, and to determine when and on what conditions foreigners may enter, children are entitled to special consideration, especially when they are unaccompanied.⁸² She opines that states' responsibility to protect unaccompanied minors can be based on the Constitutional principles of due process and equality; the doctrine of *parens patriae* and best interests of the child principle, familiar from family law; and international human rights law, including the CRC.⁸³ She suggests that to ensure that the best interests of child migrants are safeguarded, there is need to first hold all authorities responsible for unaccompanied minors accountable. Second, work towards better coordination and communication between all relevant authorities and lastly, advocate for law reforms incorporating the best interests of the child considerations into all immigration laws.⁸⁴

Dechent, Tania & Mapulanga-Hulston write about the situation of asylum-seeking children in Nauru and Australia's international human rights obligations and operational realities. They explored Australian policies and laws relating to asylum seeking and refugee children transferred to Nauru, assessed the conditions encountered by the children against salient

⁸¹ *ibid* at 83.

⁸² Ann Laquer Estin 'Child migrants and Child Welfare: Toward a Best Interests Approach' (2018) 17(3) *Wash U Global Stud L Rev* 589.

⁸³ *ibid* at 591.

⁸⁴ *ibid* at 614.

obligations that bind Australia under the CRC and other relevant principles of international law, and concluded that the reports and findings examined indicate that the Australian government had failed to provide the children with their CRC rights relating to health, education and family matters. Most importantly, the government had failed to protect them from arbitrary detention and to consider the children's best interests.⁸⁵

Schoenholtz calls for action in developing the substantive best interests of child migrants. He outlines reasons for treating children as special in an effort to create a basis for policy makers to perceive children migrants as children first and above all else. He also considers standards and practices that view the distinctiveness of children, especially children migrants.⁸⁶ He asserts that children are unique in the sense that compared to adults, they are growing human beings both cognitively and biologically, and that the CRC is established on this perception of child evolution. He highlights that the best interests of the child which is the most important and widely known international and domestic legal concept recognises this concept of child evolution by ensuring that the voice of the child is heard, the child as a thoughtful and emotional being is understood, and particular developmental and survival needs are addressed. He asserts that the CRC requires governments to apply the best interests of the child in a manner that respects this unique evolving nature.⁸⁷ He also asserts that the best interests of the child enshrined in the CRC applies to all children as well as to a significant number of child migration issues, and argues for its inclusion in domestic immigration.⁸⁸

Smyth explored the nexus between the rights of the child and general human rights standards of relevance to immigrants and with international refugee law, and compared the normative landscape with the reality experienced by child migrants on the ground, interrogating whether the routine and widespread ill treatment of irregular migrant children is due to some ambiguity or under development in the standards or a failure by states to implement the standards. She found that the issue has little do to with the content of the relevant standards but more with failure to give effect to the said standards or rather states

⁸⁵Susanna; Tania & Mapulanga-Hulston 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31(3) *International Journal of Refugee Law* 83.

⁸⁶ Andrew I Schoenholtz 'Developing the Substantive Best Interests of Child Migrants: A Call for Action' (2012) 46 *Val U L Rev* 991.

⁸⁷ *ibid* at 1000-1001.

⁸⁸ *ibid* at 1012.

practice. She attributes this to the fact that state obligations to the child rights agenda tend to be outweighed by the more powerful immigration control agenda.⁸⁹

1.8. Research Methodology

This is a qualitative research study that will adopt socio-legal or non-doctrinal research as a method of inquiry. Simply defined, qualitative research, is research that is non-numerical.⁹⁰ While doctrinal or theoretical research is plainly defined as research which asks what the law is in a specific area,⁹¹ socio-legal research is defined as research into the nexus between law and other behavioral sciences. It gives importance to the nexus between law, and people, social values and institutions and seeks to draw attention to the relationship between law and other behavioural sciences and social realities. Inquiry in this research method is aimed at the effects of law on human behavior or vice-versa, and the researcher seeks to know the extent to which particular regulations are applied or have been applied.⁹² Furthermore, instead of seeking to develop theories like the doctrinal research method of inquiry, socio-legal research seeks to ascertain whether the theories presumed to be relevant to apply in a society at a particular time, are still sound and appropriate. Thus, while doctrinal research method is ‘research in law’, socio-legal research is ‘research about the law’.⁹³

Furthermore, socio-legal research aims at underlining the loopholes that exist between the law, thus the law in statutes or in paper and the law in reality or how it is viewed in reality, and its influence on the social behavior. The former reveals the gap between the legal optimism and social reality and as a result it underlines the dichotomy between the law in theory and in reality, and the latter underlines the factors impeding the functioning of the law, and enables a researcher to identify the loopholes in an enactment and the problem of its implementation, and its impact on the society.⁹⁴ In essence, socio-legal research is not only concerned with what the laws in a particular area are, but how the laws apply in practice. Since this study explores the existing laws on protecting the right of asylum-

⁸⁹ Smyth op cit note 4 at 421.

⁹⁰ Ian Dobinson & Francis Johns ‘Qualitative Legal Research’ in Mike McConville and Hong Chui (eds) *Research Methods for Law* (2007) at 19.

⁹¹ *ibid.*

⁹² Khushal Vibhute & Filipos Aynalem ‘Legal Research Methods Training Material’ (2009) Chilot Word Press available at https://www.coursehero.com/register/?login_user_type=&__chid=d856c039-b0e6-439c8cab1535c703374a accessed on 24 May 2020.

⁹³ *ibid* at 70-71.

⁹⁴ *ibid* at 89.

seeking children not to be unlawfully detained in Botswana, assesses the extent to which such laws apply in practice and recommend policy and law reform based on the findings, the socio-legal research seems to be the most suitable method of inquiry in this account.⁹⁵

Comparative legal research method will also be adopted in this study, particularly in the chapter that explores laws from other jurisdictions in an effort to identify best regional and international practices on the protection of the right of asylum-seeking children not to be unlawfully detained. It is asserted that comparative legal research provides a good method for introducing novel ideas into a legal regime, and a good comparative approach to law provides guidance to lawmakers as well as appropriate solutions to legal challenges.⁹⁶ Comparative legal research has mostly been validated for the gains it brings to a legal system which include providing recommendations for future developments, providing alerts on possible challenges, and as a result providing an opportunity for a researcher to critically assess their own national system.⁹⁷

This study will be desktop-research based and secondary data analysis will be used throughout the entire study. Secondary data analysis is the use of data that is already in existence in the area of interest, and it is further defined as a systematic process of research which entails the application of theoretical knowledge and conceptual skills to answer research questions. Accordingly, the first step in the process is to come up with research questions. Considering that this process is predominantly based on data that is already in existence, an extensive literature review on the topic of interest will be conducted in order to address the questions of the study.⁹⁸ This study will therefore start by developing questions based on the topic of study, and as tools for answering the questions or data analysis sources such as treaties, statutes, judicial decisions, textbooks, journals, and internet sources will be used. Court cases relevant to the topic will also be considered and internet databases and websites such as the UNHCR, OCHR and other relevant databases will be used to access national reports and general comments and recommendations, as well as concluding observations of various United Nations (UN) treaty bodies relevant to

⁹⁵ *ibid* at 87.

⁹⁶ Vibhute & Aynalem *op cit* note 92 at 103.

⁹⁷ *ibid*.

⁹⁸ Melissa P Johnston 'Secondary Data Analysis: A Method of which the Time Has Come' (2014) 3 *QJML* 619.

the area of research. The study will also use information from online library books (e-books). An intentional attempt will also be made to use the most recent sources on the area of study.

1.9. Chapter Synopsis

This thesis will consist of six chapters.

Chapter 1 has provided an understanding of the research study. It also provided the background of the research study and outlined the aims and objectives of the study. It also included a problem statement, an identification of the needs of asylum-seeking children, a conceptual approach, a literature review, and the research methodology.

Chapter 2 will give a comprehensive overview of the relevant standards on the protection of the right of asylum-seeking children not to be unlawfully detained as set out in the CRC and other relevant international and regional instruments.

Chapter 3 will discuss the laws protecting the right of asylum-seeking children not to be unlawfully detained in Botswana and determine whether Botswana in its efforts to provide for this right complies with the minimum standards set by the CRC as the core international standard on children's rights and other relevant international and regional instruments as will be discussed in Chapter 2 of this study.

Chapter 4 will assess the extent to which the laws protecting the right of asylum-seeking children not to be unlawfully detained in Botswana are given effect in practice.

Chapter 5 will assess regional and international best practices on the protection of the right of asylum-seeking children not to be unlawfully detained with specific focus on Sweden and South Africa.

Chapter 6 will provide a conclusion of the findings of the study and recommendations that Botswana can implement in order to effectively safeguard the right of asylum-seeking children not to be unlawfully detained based on the findings of the study.

CHAPTER 2

An overview of international standards relevant to safeguarding the right of asylum-seeking children not to be unlawfully detained.

2.1. Introduction

This Chapter gives a comprehensive overview of the relevant standards on the protection of the right of asylum-seeking children not to be unlawfully detained set out in the CRC and other relevant international and regional instruments. It will include a brief background on the CRC and its core concepts, the right of the child not to be unlawfully or arbitrarily detained as envisaged in article 37 of CRC, and similar provisions contained in other international and regional instruments, the concepts of ‘arbitrariness’ and ‘last resort and shortest appropriate period of time’ in article 37 of CRC, conditions of child detention, and a move beyond the detention of children as a measure of last resort.

2.2. A brief background on the CRC and its core principles

In 1989, the UN unanimously adopted the CRC which was ratified within a year by a great majority of states. Accordingly, making it the most widely and swiftly ratified human rights treaty, and a great milestone in the legal protection of children as it documented and expanded international, regional and bilateral agreements on rights and protection specific to children.⁹⁹ The CRC stipulates international minimum standards with regard to the protection of children’s rights, and it is the first international human rights instrument to recognise the interdependence and equal protection of political, civil, social, economic and cultural rights of the child.¹⁰⁰ The CRC contains four key principles which when combined create a new view towards children.¹⁰¹ Article 2 of the CRC articulates states obligation to respect the right of the child without discrimination on the basis of nationality of the child or his or her parents and ensure that children are not subjected to any form of punishment on the same basis.¹⁰² Thus, the provisions of the CRC apply to both citizen and non-citizen children.¹⁰³ Article 3(1) provides that the best interests of the child must be a paramount

⁹⁹ Bhabha op cit note 1 at 305.

¹⁰⁰ Schoenholtz op cit note 86 at 1001.

¹⁰¹ UNICEF ‘Four Principles of the Convention on the Rights of the Child’ (2019) available at <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>, accessed on 22 September 2020.

¹⁰² Convention on the Rights of the Child (1989) supra note 3.

¹⁰³ Schoenholtz op cit note 86 at 1001.

consideration in all actions concerning children, article 6(1) enunciates the states' responsibility to protect to the highest level possible the child's right to life, survival and development, and article 12(1) affords children the right to express their views and have them heard in all proceedings affecting them.¹⁰⁴

In addition to the aforementioned principles, the CRC contains two articles that refer to child migrants in unique ways.¹⁰⁵ Article 22 requires governments to ensure that asylum-seeking and refugee children, whether unaccompanied or accompanied, receive protection and assistance to enjoy the rights set forth in the CRC and other international human rights instruments.¹⁰⁶ Article 29 obliges governments to ensure that the education of the child is directed at '[t]he development of respect ... for the national values of the country in which the child is living' as well as for 'the country from which he or she may originate'.¹⁰⁷ Therefore, the CRC provides a far-reaching and legally binding framework for safeguarding the rights of all children including, asylum-seeking children.¹⁰⁸

2.3. The right of the child not to be unlawfully or arbitrarily detained in article 37 of the CRC and similar provisions in other international and regional instruments.

Particularly related to the issue of immigration detention is article 37 of the CRC, which is the key human rights norm for protecting children deprived of their liberty.¹⁰⁹ Article 37(b) generally outlaws the arbitrary or unlawful deprivation of liberty of children.¹¹⁰ In a similar vein, general human rights instruments established prior to the CRC, although not limited to children, recognise the right of an individual not to be arbitrarily or unlawfully deprived of their liberty. Article 9 of the ICCPR enunciates every individual's right 'to liberty and security of person', and prohibits the arbitrary arrest or detention of an individual.¹¹¹ The UDHR also safeguards everyone's right 'to liberty and the security of person', and the right not to be exposed 'to arbitrary arrest, detention or exile' particularly, at articles 3 and

¹⁰⁴ Convention on the Rights of the Child (1989) supra note 3.

¹⁰⁵ Schoenholz op cit note 86 at 1002.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ Bhabha op cit note 1 at 306.

¹⁰⁹ Vitit Muntarbhorn 'The Global Compacts and the Dilemma of Children in Immigration Detention' (2018) 30(4) *International Journal of Refugee Law* 672.

¹¹⁰ Convention on the Rights of the Child (1989) supra note 3.

¹¹¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 article 9(1).

9, respectively.¹¹² Furthermore, at AU level, article 6 of the ACHPR safeguards every individual's right to liberty and security of person, and also outlaws arbitrary arrest or detention.¹¹³ In the context of the ICCPR, the HR Committee in its GC No.35 on liberty and security of person has clarified, that the rights safeguarded in article 9 are relevant to 'everyone' including among others, boys and girls, aliens, asylum seekers and refugees.¹¹⁴

Similarly, the provisions of the UDHR are addressed to 'everyone' or 'no one' and do not provide for any age requirement, no developmental yardstick, no nationality, or even legitimacy requirement. Consequently, undocumented and non-citizen children seem to be clearly included in the scope of general protection.¹¹⁵ It is asserted that the same applies to provisions of the ACHPR. This is also based on the essence of equality and non-discrimination enshrined in these instruments and couched in a similar language as article 2 of the CRC referred to above. Therefore, the human rights contained in the treaties aforementioned apply to all human beings including, children without any form of distinction.

2.4. The concept of 'arbitrariness'

Noteworthy is that the notion of 'arbitrariness' is not defined in the CRC, and neither has it been susceptible to remark by the CRC Committee. However, in the situation of the ICCPR, the Human Rights Committee has clarified that 'arbitrariness' should be broadly defined to include 'elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.¹¹⁶ Thus, detention that is void of any legal justification and regular reviews of the basis for carrying on with the deprivation of liberty is arbitrary.

2.5. The concept of 'last resort and shortest appropriate period of time'

Also noteworthy is that article 37(b) of CRC does not absolutely prohibit child detention. It creates the universal principle that a child may be detained as a 'measure of last resort and for the shortest appropriate period of time' and requires that detention be consistent

¹¹² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

¹¹³ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev.5, 21 I.L.M 58.

¹¹⁴ UN International Covenant on Civil and Political Rights, Human Rights Committee General Comment No.35 (2014) UN Doc CCPR/C/GC/35 paragraph 3.

¹¹⁵ Bhabha op cit note 15 at 425.

¹¹⁶ Human Rights Committee General Comment No.35 (2014) op cit note 114 paragraphs 12.

with the relevant law of the state. Hence, the presumption that child migrants could be deprived of their liberty as a measure of last resort.¹¹⁷ The requirement of last resort and shortest appropriate period of time obliges states to use detention in respect of children in moderation and only after careful thought, grounded on an individual examination with respect to the need and proportionality of the detention, while allowing for a consideration of the child's best interests in conformity with article 3(1) of the CRC. In essence this requirement is predicated on the accessibility and utilisation of alternatives, and the individualised interests of the child.¹¹⁸

As mentioned above, Article 3(1) of the CRC obliges member states to ensure that in all actions regarding children, including actions by administrative officials and legislative bodies, the child's best interests shall be a paramount determinant.¹¹⁹ Notable is that the best interests of the child principle, which is one of the core concepts of the CRC is also enshrined in the African Charter on the Rights and Welfare of the Child (ACRWC),¹²⁰ which is the primary standard setting instrument for safeguarding the right of the child at AU level, and relatively contains similar rights as the CRC.¹²¹ According to the CRC Committee, the principle of the best interests of the child applies on divergent levels: as a substantive entitlement, as a procedural norm, and as a concept for construing provisions of the law.¹²² Consequently, the concept of the best interests of the child is the norm against which all measures, policies and legislation that have an impact on children should be assessed.¹²³ The CRC Committee has persistently and plainly expressed that the best interests of the child should outweigh all other national factors including, migration restrictions.¹²⁴ The CRC Committee in its GC No.6, asserted that the best interests principle

¹¹⁷ End Immigration Detention of Children 'The International Human Rights Community Affirms that Immigration Detention is a Violation of the Rights of Children. Children, First and Foremost' available at [https://endchilddetention.org/toolbox/issue-child-immigration-detention/international-law/child-rights/#:~:text=Specifically%2C%20Article%2037\(b\),shortest%20appropriate%20period%20of%20time](https://endchilddetention.org/toolbox/issue-child-immigration-detention/international-law/child-rights/#:~:text=Specifically%2C%20Article%2037(b),shortest%20appropriate%20period%20of%20time), accessed on 7 June 2020.

¹¹⁸ Ton Liefaard 'Deprivation of Liberty of Children in Ursula Kilkely & Ton Liefaard (eds) *International Human Rights of Children*' (2019) at 329.

¹¹⁹ Convention on the Rights of the Child (1989) supra note 3 at article 3(1).

¹²⁰ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49

¹²¹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 'Mapping Children on the Move within Africa' (2018) available at https://www.acerwc.africa/wp-content/uploads/2019/03/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-_A4_Website-version.pdf, accessed on 7 June 2020 at 5.

¹²² Estin op cit note 82 at 593.

¹²³ ACERWC op cit note 121 at 14.

¹²⁴ End Immigration Detention of Children op cit note 117.

obligates states to make a direct and thorough evaluation of the child's age and identity, including their citizenship, upkeep, ethnic, cultural and linguistic, and any specific risks or safeguard requirements they may have.¹²⁵ Accordingly, in detaining children with their parents or guardians a balance must be struck between among others, the right to the family and private life of the family as a unit, the suitability of the detention amenities for the children, and the child's best interests.¹²⁶

In fact, the right to family unity for both adults and children is safeguarded by other regional and international binding treaties including, article 16 of the UDHR which recognises the family as a 'natural and fundamental group' requiring protection by both the society and the state.¹²⁷ Similar language is used in articles 23(1) of the ICCPR and 10(1) of the ICESCR.¹²⁸ The only difference is that the ICESCR requires that the family be afforded the 'widest possible protection and assistance'.¹²⁹ In addition, articles 12 of the UDHR and 17 of the ICCPR prohibit arbitrary or unlawful interference with an individuals' family life.¹³⁰ At AU level, both the ACHPR and the ACRWC recognise the 'family as the natural unit and the basis of the society, which is in need of protection by the state'.¹³¹ Put together, these provisions create a strong international legal norm safeguarding the right to family unity, and for children this norm is compelling.¹³² On that account, separating children from their parents in detention is contrary to the use of detention of children as a measure of last resort.¹³³ Hence, when detaining parents cannot be circumvented, the children's destiny should be set on their best interests.¹³⁴

¹²⁵ UN Committee on the Rights of the Child (CRC), CRC General Comment No.6 (2005) UN Doc CRC/GC2005/61 paragraph 20.

¹²⁶ UN High Commissioner for Refugees (UNHCR) 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention' (2012) paragraphs 53.

¹²⁷ Universal Declaration of Human Rights (1948) supra note 113 at article 16(3).

¹²⁸ International Covenant on Civil and Political Rights (1966) supra note 112 and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹²⁹ International Covenant on Economic, Social and Cultural Rights (1966) supra note 128 article 10(1).

¹³⁰ Universal Declaration of Human Rights (1948) supra note 113 and International Covenant on Civil and Political Rights (1966) supra note 112.

¹³¹ African Charter on Human and Peoples' Rights (1981) supra note 114 at article 18(1) and African Charter on the Rights and Welfare of the Child supra note 121 article 18.

¹³² Bhabha op cit note 1 at 312.

¹³³ International Organisation for Migration (IOM) 'IML Migration Note on International Standards on Immigration Detention and Non-Custodial Measures' (2011) available at <https://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf>, accessed on 10 June 2020 at 6.

¹³⁴ *ibid.*

Moreover, the ‘last resort and shortest appropriate period of time’ requirements validate the comprehensive requirement of legitimacy, which entails non-arbitrariness and lawfulness, and which a child can question before ‘a court or other competent, independent and impartial authority’ in terms of article 37(d) of the CRC. This right of allowing a child to question the legality of his or her detention before a court or other competent body also concerns the lawfulness of continued detention. Thus, a form of detention may initially be legal, and change with time.¹³⁵ The HR Committee has ascertained that the concept of legality is infringed if a person is detained on reasons which are not plainly founded in national law. Put differently, legality requires that the reasons for detention must be founded in law.¹³⁶

2.6. Conditions of child detention

Article 37(c) of the CRC governs the conditions of child detention. It requires that children denied their basic right to liberty be treated with humanity and respect for the intrinsic integrity of the person, and in a way that considers child age specific needs, and that such children be separated from adults not related to them except in circumstances where it is deemed in the best interests of the child not to do so and be permitted to be in touch with family, by means of correspondence and visits, save in exceptional cases.¹³⁷ This essentially mirrors the universal human rights perspective on individuals denied of their liberty, which presumes that every individual deprived of their liberty remain entitled to all rights and freedoms under international human rights law. State parties are therefore obliged to protect these entitlements and ensure that children effectively exercise their rights.¹³⁸ Similarly, article 10 of the ICCPR requires that every person deprived of his or her liberty ‘be treated with humanity and with respect for the inherent dignity of the human person’, and that children be isolated from adults unrelated to them, and be afforded treatment relevant to their age and legal status.¹³⁹ Essentially, article 10 prohibits states from treating a person inhumanely and obliges states to take positive steps to ensure a minimum standard for humane conditions of detention, despite the state’s economic or financial constraints.¹⁴⁰ Accordingly, failure to adopt such measures may result in violation

¹³⁵ Liefwaard op cit note 118 at 333.

¹³⁶ ‘Chapter 5 Human Rights and Arrest, Pre-Trial Detention and Administrative Detention’ available at <https://www.ohchr.org/documents/publications/training9chapter5en.pdf>, accessed on 16 June 2020.

¹³⁷ Convention on the Rights of the Child (1989) supra note 3 at article 37(c).

¹³⁸ Liefwaard op cit note 118 at 322.

¹³⁹ International Covenant on Civil and Political Rights (1966) supra note 112 at article 10 (1) and (2).

¹⁴⁰ IOM (2011) op cit note 133 at 4.

of article 7 of the ICCPR which prohibits torture or cruel, inhumane or degrading treatment.¹⁴¹

Article 5 of the ACHPR also recognises the right of every person to ‘dignity inherent in a human being’ and outlaws all kinds of exploitation and degradation of man including torture, cruel, inhuman or degrading punishment and treatment.¹⁴² Article 16 of the ACRWC requires states to adopt legislative, administrative, social and educational measures specific to safeguarding children from all forms of torture, inhuman or degrading treatment and particularly physical or psychological abuse, neglect or ill-treatment including sexual abuse.¹⁴³ The prohibition against cruel, inhumane and degrading treatment is also enunciated in article 37(b) of the CRC.¹⁴⁴ Thus, the ban on torture, cruel, inhuman or degrading treatment is strongly entrenched in international law, and in the context of detention, it goes beyond physical abuse to also require that the state of detention should be suitable and humane, and that health care, as well as sufficient food, water, recreational opportunities and other basic needs be accessible.¹⁴⁵ Additionally, children deprived of their liberty should be afforded psychological therapy and the right to education, preferably outside the detention facility for ease of continuance of their education at the time of release.¹⁴⁶ The state parties’ obligation to ensure to every child the highest attainable standard of health and rehabilitation facilities, free basic education, an adequate standard of living necessary to satisfy a child’s mental and physical development, and to partake in play and recreational activities is enshrined in articles 24, 28, 27 and 31 of the CRC.¹⁴⁷ Therefore, the detention of all children, including asylum-seeking children that falls short of satisfying the aforementioned rights may constitute inhuman or degrading treatment. Furthermore, article 22 of the CRC obliges state parties to afford asylum-seeking children, whether accompanied or unaccompanied the necessary protection and

¹⁴¹ *ibid.*

¹⁴² African Charter on Human and Peoples’ Rights (1981) *supra* note 114.

¹⁴³ African Charter on the Rights and Welfare of the Child (1990) *supra* note 120.

¹⁴⁴ Convention on the Rights of the Child (1989) *supra* note 3.

¹⁴⁵ International Justice Resource Centre ‘Ten Human Rights Standards Implicated by the U.S Immigration Policy Changes’ (2018) available at <https://ijrcenter.org/2018/06/27/ten-human-rights-standards-implicated-by-u-s-immigration-policy/>, accessed on 10 June 2020.

¹⁴⁶ CRC Committee General Comment No.6 (2005) *op cit* note 125 paragraphs 63 and see also UNHCR Guidelines (2012) *op cit* note 126 Guideline 9.2 paragraphs 56.

¹⁴⁷ Convention on the Rights of the Child (1989) *supra* note 3.

humanitarian assistance.¹⁴⁸ As such, asylum-seeking children in detention are entitled to receive the necessary protection and assistance from a state.

2.7. A move beyond child detention as a measure of last resort

Notwithstanding the aforementioned, in 2012 the CRC Committee moved beyond the concept of depriving children their liberty as a measure of last resort and clarified the position of children with respect to immigration detention.¹⁴⁹ Thus, the current norm is that the detention of children in all situations is an infringement of their rights. This position has been further strengthened by the CRC Committee and the CMW in the Committees' Joint GC No.4 on 'states obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' which provides definitive direction on the interpretation of the provisions of the CRC and the ICRMW.¹⁵⁰

The Committees specifically affirmed that the prospect of detaining children as a measure of last resort does not apply to children in immigration proceedings as it would be contrary to the principle of the best interests of the child and the right to development.¹⁵¹ The Committees also clarified that the detention of any child based on their immigration status or their parents' is a violation of the child's rights and is contrary to the best interests of the child principle. In this view, both Committees have persistently pronounced that children should never be detained for grounds linked to their immigration status or their parents', and urged states to promptly and absolutely end or eliminate children migration detention.¹⁵² The Committees also stressed that children should not be criminalised or exposed to penal measures, such as detention due to the immigration status of their parents, and that illegitimate entry or stay does not necessarily amount to a crime against persons, property or national security. Outlawing such entry surpasses the legitimate interest of state parties to regulate migration and results in arbitrary detention.¹⁵³ Accordingly, the

¹⁴⁸ *ibid.*

¹⁴⁹ Susanna; Tania & Mapulanga-Hulston op cit note 85 and CRC Committee '2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (2012) available http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf, accessed on 7 June 2020 paragraph 32.

¹⁵⁰ End Immigration Detention of Children (2016) op cit note 117.

¹⁵¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23 paragraph 10.

¹⁵² *ibid* paragraph 5.

¹⁵³ *ibid* paragraph 7.

Committees implored states to adopt ATDs that will enable children to stay with their families or guardians in non-custodial community-based conditions while awaiting the resolution of their migration status, in line with the children's best interests, and their right to liberty and family life.¹⁵⁴

Similarly, the UNHCR made it clear that its position is that children should not be detained for immigration related reasons, notwithstanding their migration or legal status or that of their parents and that detention is never in the best interests of the child.¹⁵⁵ The UN Special Rapporteur on Torture has also determined in his thematic report on 'torture and the ill-treatment of children deprived of their liberty', that child immigration detention is never in the best interests of the child and that it may in certain circumstances constitute cruel, inhuman or degrading treatment of migrant children.¹⁵⁶

Nonetheless, regard to the concept of last resort remains in other areas.¹⁵⁷ In the New York Declaration for Migrants and Refugees, the UN General Assembly committed to applying immigration detention 'only as a measure of last resort, in a less limiting environment, for the shortest duration' and 'to work towards ending child immigration detention'.¹⁵⁸ Similarly, the Global Compact for Safe, Orderly and Regular Migration in its objective 13 provides for the use of immigration detention only as a measure of last resort, and working towards ATDs.¹⁵⁹ The HR Committee also considers that children should not be detained, except as a measure of last resort and for the shortest appropriate period of time, taking into consideration their best interests as a paramount determinant with respect to the time period and detention conditions.¹⁶⁰ Accordingly, there is some variance in the international legal position regulating child immigration detention, with increasing advocacy for the perspective that migrant children should never be deprived of their liberty, with a notable body of states preserving commitment to the inferior concept of last resort.¹⁶¹

¹⁵⁴ *ibid* paragraphs 12.

¹⁵⁵ 'UNHCR's position regarding the detention of refugee and migrant children in the migration context' (2017) available at <https://www.unhcr.org/detention.html>, accessed on 9 June 2020.

¹⁵⁶ *ibid*.

¹⁵⁷ Smyth *op cit* note 4 at 438.

¹⁵⁸ New York Declaration for Refugees and Migrants (adopted 3 October 2016) UNGA Res A/R/RES/71/1.

¹⁵⁹ Global Compact for Safe, Orderly and Regular Migration (adopted December 2018) UN Doc A/RES/73/195.

¹⁶⁰ Human Rights Committee General Comment No.35 (2014) *op cit* note 114 paragraphs 18.

¹⁶¹ Smyth *op cit* note 4 at 438.

2.8. Conclusion

In light of the above, it is submitted that despite the clear guidance from the global community on child immigration detention which mostly comprises of soft law which is not in its nature binding, the CRC and other international human rights legislative norms do not outlaw immigration detention nor explicitly articulate the rights of children in immigration detention. Consequently, states continue to detain children and families for migration related reasons and violate their rights in the process. However, as a general rule, international law prohibits arbitrary or unlawful detention of all children without any form of distinction and requires that any form of child detention be exceptional and be consistent with the best interests of the child. International law further requires, that the detention of children in exceptional circumstances be consistent with article 37(b) of the CRC which requires that detention of children be lawful and only be used as a measure of last resort and for the shortest appropriate time, and that detention should be consistent with articles 37(a) and (c) of the CRC which govern the treatment of children in detention, as well as other relevant international standards governing the same. Since it is well established in international human rights law that depriving persons of their right to liberty does not extinguish their other rights, such persons remain entitled to all rights and freedoms under international human rights law, and the same applies to all children in detention, including asylum- seeking children.

CHAPTER 3

A discussion of Botswana laws protecting the right of asylum-seeking children not to be unlawfully detained.

3.1. Introduction

This Chapter will discuss the laws protecting the right of asylum-seeking children not to be unlawfully detained in Botswana with specific focus on the applicable laws as found in the Constitution of Botswana (Constitution),¹⁶² the Refugees (Recognition and Control) Act,¹⁶³ the Immigration Act,¹⁶⁴ and the Children's Act,¹⁶⁵ and also determine whether Botswana in its efforts to provide for the protection of the said right complies with the minimum standards set out in the CRC as the international standard for advancing and safeguarding children's rights and other relevant international and regional standards discussed in Chapter 2 of this study.

3.2. Constitution of the Republic of Botswana, 1966

Relevant to the protection of the right of asylum-seeking children not to be unlawfully detained is the concept of equality and non-discrimination enshrined in section 3 as read with section 15 of the Constitution.¹⁶⁶ Notable is that this concept is universally recognised in article 2 of the CRC and various UN and AU human rights instruments discussed in Chapter 2 of this study.¹⁶⁷ Section 3 guarantees every person in Botswana notwithstanding their race, place of origin, political opinions, colour, creed or sex, the basic rights and freedoms of the individual,¹⁶⁸ and section 15 outlaws the enactment of discriminatory laws, and the treatment of persons in a discriminatory way by any individual acting pursuant to any statute or in the fulfillment of the duties of any government office or government authority.¹⁶⁹ Furthermore, in terms of section 15(3) of the Constitution, a law is discriminatory in the context of section 15 if it distinguishes between different persons primarily on the basis of race, tribe, place of origin, political opinions, colour or creed.

¹⁶² Constitution of the Republic of Botswana, 1966.

¹⁶³ Refugee (Recognition and Control) Act of 1968.

¹⁶⁴ Immigration Act 3 of 2011.

¹⁶⁵ Children's Act supra note 27.

¹⁶⁶ Charles Manga Fombad 'The Constitutional Protection against Discrimination in Botswana' (2004) 53(1) *The International and Comparative Law Quarterly* 141.

¹⁶⁷ Universal Declaration of Human Rights (1948) supra note 113 article 2; International Covenant on Cultural and Political Rights (1966) supra note 112 articles 2 and 26; International Covenant on Economic, Social and Cultural Rights (1966) supra note 128 article 2; and African Charter on Human and Peoples' Rights (1981) supra note 114 articles 2 and 3.

¹⁶⁸ Constitution of the Republic of Botswana supra note 162.

¹⁶⁹ *ibid* section 15(1) and (2).

Thus, sections 3 and 15 of the Constitution outlaw any form of discrimination and laws which are in their nature discriminatory.¹⁷⁰

In the context of migration, the phrase ‘every person’ used in section 3 of the Constitution clearly suggests that all individuals within Botswana have the right to equal protection of the law despite their nationality and migration status.¹⁷¹ Similarly, the inclusion of ‘place of origin’ as a prohibited ground of discrimination under section 15 of the Constitution suggests that all laws must be enacted in support of the same treatment for all individuals including, asylum seekers and their children.¹⁷² Accordingly, section 3 as read with section 15 of the Constitution ensures equal protection under the current laws for all individuals in Botswana despite their nationality and migration status. This notwithstanding, section 15(4)(b) of the Constitution contains a caveat to the non-discrimination provision.¹⁷³ In terms of section 15(4)(b), the non-discrimination provision may not apply to any law to the extent that such law makes provision with regard ‘to persons who are not citizens of Botswana’.¹⁷⁴ Consequently, the Constitution permits the legislature to enact laws that discriminate against non-nationals,¹⁷⁵ and this limitation will probably validate as justifiable laws that permit unequal treatment between national and non-national children.¹⁷⁶

Specifically, relevant to the basic human right to personal liberty and immigration detention is section 5 of the Constitution. It prohibits the deprivation of liberty of a person except in circumstances where such deprivation is permitted by law.¹⁷⁷ Noteworthy is that this provision mirrors article 9(1) of the ICCPR which generally outlaws deprivation of liberty of a person ‘except on such grounds and in accordance with such procedure as are established by law’.¹⁷⁸ Section 5 of the Constitution further provides a list of exceptions which deprivation of personal liberty may be permitted by law, and the exception provided for in section 5(1)(i) effectively refers to immigration detention. It states that a person may be detained,

¹⁷⁰ Fombad op cit note 166 at 142.

¹⁷¹ *ibid* at 150.

¹⁷² Macharia-Mokobi op cit note 41 at 222.

¹⁷³ *ibid*.

¹⁷⁴ Constitution of the Republic of Botswana supra note 162 section 15(4)(b).

¹⁷⁵ Macharia-Mokobi op cit note 41 at 222.

¹⁷⁶ *ibid*.

¹⁷⁷ Constitution of the Republic of Botswana supra note 162 section 5.

¹⁷⁸ International Covenant of Cultural and Political Rights (1966) supra note 112.

‘for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another.’¹⁷⁹

Accordingly, the Constitution allows for immigration detention as one of the limitations on the right to personal liberty. However, there is nothing in section 5(1)(i) suggesting that the Constitution permits indefinite detention.¹⁸⁰ It is therefore safe to assert that based on this interpretation of section 5(1)(i) of the Constitution, any law which supports indefinite immigration detention may be challenged in a court of law and could be revoked on the basis of unconstitutionality. Furthermore, if interpreted in this manner, this provision could be used to protect asylum-seeking children against prolonged immigration detention which often results in unlawful detention.

It is clear from the above that the rights in the Constitution are not absolute.¹⁸¹ Section 3 of the Constitution provides for a general limitation on the realisation of all basic rights provided for under Chapter II including, protection of the right to personal liberty and the right to protection against non-discrimination safeguarded in sections 5 and 15 of the Constitution.¹⁸² It provides that the rights under Chapter II may be subject to such limitations of that protection as contained in the applicable provisions and that such limitations can be justified on two main grounds being, protection of the rights and freedoms of other individuals and protection of public interest.¹⁸³ Noteworthy is that limitations on constitutional rights are not unique to the Botswana Constitution, in fact international human rights instruments and nearly all state constitutions contain similar limitations on rights.¹⁸⁴ For instance, article 29(2) of the UDHR subjects the exercise of rights and freedoms to such restrictions as are recognised by the law and only aimed at advancing respect for the rights and freedoms of other individuals and satisfying the just

¹⁷⁹ *ibid* section 5(1)(i).

¹⁸⁰ *Ngezi* supra note 65 paragraphs 72.

¹⁸¹ Konrad-Adneur Stiftung ‘Medial Law Handbook for Southern Africa 91’ available at https://www.kas.de/c/document_library/get_file?uuid=aeb143b3-2b78-5433-45bf-503b9a4b05f3&groupId=285576, accessed 18 February 2021.

¹⁸² Constitution of the Republic of Botswana supra note 162.

¹⁸³ *ibid*.

¹⁸⁴ Ahmed Dagwood & Bulmer Elliot ‘Limitation Clauses’ available at <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf>, accessed 18 February 2021.

needs of ‘morality, public order and the general well-being in a democratic society.’¹⁸⁵ Accordingly, Botswana complies with minimum international standards and universal state practice in this regard. Furthermore, it is undoubtable that Botswana as a sovereign state has the right to limit the freedom of movement and personal liberty of asylum-seekers by immigration detention for purposes of national security. However, such limitation must be in conformity with the law and not violate their other rights based on the universal human rights perspective which presumes that persons deprived of their personal liberty remain entitled to all other rights and freedoms under international human rights law.¹⁸⁶

3.3. Refugees (Recognition and Control) Act of 1968

The Refugees (Recognition and Control) Act of 1968 (Refugees Act) is the primary national legislation governing asylum in Botswana.¹⁸⁷ Section 6 of the Refugees Act provides for restriction on removal of who may be a refugee and provides for an instance of immigration detention of asylum seekers, particularly at subsection (b). It provides that an asylum seeker may be detained pending resolution of his or her refugee status by the Minister and makes it clear that such detention must be for a period not more than 28 days.¹⁸⁸ Furthermore, section 6(b) states that section 15(1) and (3) of the now repealed Immigration Act of 1966 shall apply to the detention of such asylum seeker as if he or she were detained pursuant to subsection 15(1) of the Immigration Act.¹⁸⁹

Regrettably, section 6(b) of the Refugees Act has not been amended to make reference to the relevant provision in the new Immigration Act of 2011 being, section 45,¹⁹⁰ which will be discussed below. In fact, the Refugees Act has never been amended since its promulgation in 1968, although in 2017 the Government of Botswana indicated its intention to review and amend the Refugees Act in its 29th Universal Periodic Review session.¹⁹¹ Noteworthy is that section 6(b) of the Refugees Act does not distinguish between adults and children asylum seekers or make any provision for special considerations with respect to asylum-seeking families or adults with children, and thus applies similarly to

¹⁸⁵ Universal Declaration of Human Rights (1948) supra note 113.

¹⁸⁶ Liefwaard op cit note 118 at 322.

¹⁸⁷ UNHCR (2018) op cit note 21 at 1.

¹⁸⁸ Refugees (Recognition and Control) Act supra note 163 section 6.

¹⁸⁹ *ibid* section 6(b) pending such determination he may be detained by an immigration officer for a period not exceeding 28 days; if he is so detained the provisions of section 15 (2) and (3) of the Immigration Act shall apply in relation to him as if he were being detained under subsection (1) of that section.

¹⁹⁰ Immigration Act supra note 164.

¹⁹¹ UNHCR (2018) op cit note 21.

both adults and children asylum seekers. This general approach fails to take into account a child's rights perspective and raises concerns with respect to the best interests of asylum-seeking children being considered in the decision to detain them with their asylum-seeking families or caretakers. In fact, this approach prevents any such decision from being made at all. It is therefore asserted that this provision is insufficient to safeguard the right of asylum-seeking children not to be unlawfully detained as it fails to comply with the CRC particularly, article 3(1) which requires that the best interests of the child be a paramount determinant in all actions concerning children and which as will be seen later in this Chapter is domesticated in the Botswana Children's Act.¹⁹² Furthermore, the lack of a best interest of the child approach in section 6(b) and its silence on child specific detention conditions may result in the children being detained in non-child sensitive conditions, and in turn violate their CRC rights including, the right to an adequate standard of living, health, education and recreational opportunities and family unity.¹⁹³ Conditions that violate these rights may as mentioned in Chapter 2 of this study constitute a breach of article 37(c) of the CRC which requires that children in detention be treated 'with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.'¹⁹⁴ It is therefore asserted that section 6(b) of the Refugees Act is inconsistent with article 37(c) of the CRC.

Additionally, section 6(b) does not make reference to ATDs and hence it is asserted that the detention of asylum-seeking children under this provision is not a 'measure of last resort' since there is nothing in the provision suggesting that it allows for any discretion to be exercised as to ATDs. By implication detention under this provision is not the last resort for asylum-seeking children, instead it is the first and sole option available to asylum-seeking children upon arrival in Botswana. Hence it is asserted that the lack of provision for ATDs also makes section 6(b) insufficient to safeguard the right of asylum-seeking children not to be unlawfully detained in Botswana and fails to comply with article 37(b) of the CRC which requires that children be detained as a measure of last resort.¹⁹⁵

¹⁹² Convention of the Rights of the Child (1989) supra note 3 and Children's Act supra note 27.

¹⁹³ Convention on the Rights of the Child (1989) supra note 3 articles 9, 24, 27, 28 and 31.

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

3.4. Immigration Act 3 of 2011

Section 45 of the Immigration Act provides for detention while awaiting expulsion from Botswana.¹⁹⁶ This provision specially applies to failed asylum seekers who are awaiting repatriation to their countries of origin. It provides for the detention of any person who is due to be expelled from Botswana in the closest convenient prison for such time as may be appropriate for the finalisation of arrangements for his or her expulsion,¹⁹⁷ and requires that such person be treated as a person waiting for trial.¹⁹⁸ Like section 6(b) of the Refugees Act discussed above, section 45 does not distinguish between adults and children asylum seekers nor make provision for any special consideration for rejected families or adult asylum seekers with children. It takes a general approach which fails to take into account the best interests of the child in detaining asylum-seeking families or adults with children and thus violates article 3(1) of the CRC. Accordingly, both adults and children due for expulsion are held in prison-like conditions at the FCII until such time as arrangements for their repatriation are completed. For instance, in January 2017 more than 500 failed asylum-seekers out of which 271 were children mostly from the Democratic Republic of Congo (DRC) were detained at the FCII for almost two years while awaiting expulsion.¹⁹⁹ Consequently, section 45 of the Immigration Act like section 6(b) of the Refugees Act fails to adequately safeguard the right of asylum-seeking children not to be unlawfully detained. Furthermore, section 45 is also mute on the conditions of child detention and any options for ATDs and thus like section 6(b) of the Refugees Act is inconsistent with articles 37(c) and 37(b) of the CRC which require that children be detained in age appropriate conditions and that child detention be a measure of last resort, respectively.

It is of more concern that unlike section 6(b) of the Refugees Act, section 45 does not state a period within which rejected adult and child asylum seekers may be detained pending expulsion. It refers to ‘such period as may be necessary for the completion of arrangements for his or her removal’,²⁰⁰ and may therefore be open to potential abuse. Consequently, asylum-seeking children may be detained in prison-like conditions at the FCII for prolonged periods prior to their expulsion, and their human rights may be violated in the process. For instance, 511 rejected asylum-seekers including, children mostly from DRC

¹⁹⁶ Immigration Act supra note 164.

¹⁹⁷ *ibid* section 45(1).

¹⁹⁸ *ibid* section 45(2).

¹⁹⁹ UNHCR (2018) *op cit* note 21 at 1.

²⁰⁰ Immigration Act supra note 164 section 45(1).

who entered Botswana in 2015 were held at the FCII for almost two years while awaiting expulsion,²⁰¹ and several asylum-seeking children's rights including, their right to education was violated as they did not attend school during the entire period of the detention.²⁰² Their claims were denied based on the 'first country' or 'third safe country' principles.²⁰³ Notable is that Botswana adopts a strict first country of asylum policy though it is not explicitly provided for in the Refugees Act.²⁰⁴ Furthermore, the said asylum-seekers could not be immediately repatriated due to the conflict which was on-going in DRC at the time because their repatriation would highly likely amount to refoulement, which would be contrary to article 33 of the 1951 Convention.²⁰⁵ Although not sufficiently provided for in the Refugees Act, Botswana is obliged to respect the principle of non-refoulement as party to the 1969 OAU Refugee Convention.²⁰⁶ Consequently, pursuant to section 45 of the Immigration Act, rejected asylum seekers including, children may be detained at the FCII for months or even years until the situation in their countries of origin improves. There is no certainty as to when this will happen or a maximum time limit. Section 45 is therefore insufficient to safeguard the right of asylum-seeking children not to be unlawfully detained since it permits detention for an indefinite period of time. It also violates article 37(b) of the CRC which requires that detention of children be for the shortest appropriate period of time.²⁰⁷

3.5. Children's Act 8 of 2009

Botswana acceded to the CRC²⁰⁸ in March 1995 and ratified the ACRWC²⁰⁹ in June 2001.²¹⁰ In implementing the provisions of the CRC and the ACRWC which as stated in the previous Chapter, relatively contains similar rights as the CRC, Botswana amended its 1981 Children's Act and enacted the new Children's Act of 2009;²¹¹ a decade after acceding to the CRC.²¹² Noteworthy is that due the fact that Botswana is a dualist state, treaty provisions do not become part of its domestic laws except where such provisions are

²⁰¹ UNHCR (2018) op cit note 21 at 2.

²⁰² *ibid* at 3.

²⁰³ *ibid*.

²⁰⁴ Macharia-Mokobi & Pfumrodze op cit note 18 at 175.

²⁰⁵ UNHCR (2018) op cit note 21 at 3.

²⁰⁶ Macharia-Mokobi & Pfumrodze op cit note 18 at 165.

²⁰⁷ Convention on the Rights of the Child (1989) *supra* note 3.

²⁰⁸ *ibid*.

²⁰⁹ African Charter on the Rights and Welfare of the Child (1990) *supra* note 120.

²¹⁰ Julia Sloth-Nielsen 'A New Children Law in Botswana: Reshaping Family Reshaping Relations for Twenty First Century' (2012) *Int'l Surv. Fam. L* 28.

²¹¹ Children's Act *supra* note 27.

²¹² Sloth-Nielsen op cit note 210 at 31.

explicitly included in the laws of Botswana through an act of Parliament.²¹³ Accordingly, only provisions of a treaty incorporated into the laws of Botswana can create enforceable rights and obligations.²¹⁴ The Act incorporates among others, the principles of non-discrimination and the best interests of the child enshrined in articles 2 and 3 and of the CRC, respectively.²¹⁵

The non-discrimination principle is enunciated in section 7, while the best interest of the child is enunciated in sections 5 and 6 of the Children's Act. In terms of section 7(b), no decision or action shall be taken with regards to any child which has the effect or possibility of discriminating against any child based on his or her sex, family, colour, race, ethnicity, place of origin, language, religion, economic status, parents, physical or mental status, or any other status.²¹⁶ The inclusion of place of origin or any other status as prohibited grounds of discrimination suggests that all decisions or actions must be to the advantage of all children including, asylum-seeking children awaiting their parents' status determination or expulsion.²¹⁷ Section 5 of the Children's Act obliges any person or court carrying out a function or exercising power under the Act to consider the best interests of the child as the primary determinant, and section 6 sets out factors to be taken into account in deciding what is in the best interests of the child.²¹⁸ These factors include among others, the need to safeguard the child from harm, the child's spiritual, physical and education needs, and the probable result of change on the child's situation, the significance of stability in the child's living arrangements and the probable result of alteration or disturbance of such arrangements on the child, and any other factors necessary to guarantee the general well-being of the child.²¹⁹ Accordingly, sections 7 and section 5 as read with 6 of the Children's Act uphold the minimum standards set forth in articles 2 and 3 of the CRC, respectively and can therefore be used to safeguard the right of asylum-seeking children not to be unlawfully detained.

Section 64 of the Children's Act to some degree domesticates article 37 of the CRC which as stated in Chapter 2 of this study generally outlaws child detention and obliges states to

²¹³ Macharia-Mokobi op cit note 41 at 219.

²¹⁴ *ibid.*

²¹⁵ Convention on the Rights of the Child (1989) supra note 3 and African Charter on the Rights and Welfare of the Child (1990) supra note 130 articles 3 and 4.

²¹⁶ Children's Act supra note 27 section 7(b).

²¹⁷ Macharia-Mokobi op cit note 41 at 222.

²¹⁸ Children's Act supra note 27 sections 5 and 6.

²¹⁹ *ibid* section 6(1)(a), (c), (f), (g) and (i).

ensure that child detention is used as a measure of last resort, and for the shortest period of time. Section 64 outlaws the detention of children with parents, guardians or relatives convicted under the Act, and requires that a social worker apply for an order to place the child into alternative care within 14 days of such conviction.²²⁰ Section 85(e) as read with section 88 of the Act provides for an instance in which children in conflict with the law may be detained, and restricts such detention to habitual child offenders.²²¹ However, this provision is limited to children in conflict with the law only, and does not make reference to children detained for other reasons such as children detained with their parents or caretakers for immigration related reasons.²²² Consequently, these provisions fail to fully comply with article 37 of the CRC and thus insufficient to safeguard the right of asylum-seeking children not to be unlawfully detained.

Section 53 of the Act also to some degree domesticates article 22 of the CRC which as stated in Chapter 2 of this study, obliges states to afford both accompanied and unaccompanied asylum-seeking children the necessary protection and assistance. It empowers the Minister to make available or cause to be made available to refugee and displaced children, such fundamental social services as are appropriate for their survival and maintenance.²²³ Notwithstanding that this provision does not explicitly make reference to asylum-seeking children, it can be argued that it applies to them since the Children's Act identifies as children in need of care, children who have been displaced due to war, civil disturbance or natural disaster and, are without parental care.²²⁴ It is also noteworthy that the Children's Act does not make a distinction between internally and externally displaced children. It is therefore safe to assume that section 53 applies to both accompanied and unaccompanied asylum-seeking children, who came to Botswana fleeing conflict and civil disturbance in their countries of origin. Accordingly, section 53 to some extent complies with article 22 of the CRC and could be applied to protect the rights of asylum-seeking children in detention.

Additionally, the Children's Act contains several rights consistent with the CRC and other UN and AU standards which could be used to advance the right of asylum-seeking children not to be unlawfully detained especially those geared at ensuring that the conditions of

²²⁰ *ibid* section 64(1).

²²¹ *ibid* sections 85(e) and 88.

²²² Macharia-Mokobi *op cit* note 41 at 224.

²²³ Children's Act *supra* note 27.

²²⁴ *ibid* section 42(j).

detention are child sensitive. These include, section 15 which safeguards the right of every child to the highest attainable standard of health enshrined in article 24 of the CRC, and empowers the Minister to ensure the realisation of this right by children whose caregivers cannot ensure the child's realisation of this right due to among others, financial limitations or any other reasonable cause.²²⁵ There is also section 16 of the Act which guarantees every child in Botswana the right to adequate and safe housing and domesticates article 27 of the CRC,²²⁶ and sections 18 and 19 of the Act which afford every child in Botswana the right to free primary education and the right to leisure, play, and recreation, respectively and domesticate articles 28 and 31 of the CRC, respectively. Furthermore, consistent with article 37(c) of the CRC, section 61 of the Act safeguards the right of every child in Botswana not to be exposed 'to torture or other cruel, inhuman or degrading treatment or punishment'.²²⁷ The right of the child to a family life, enshrined in several provisions of the CRC including articles 16 and 22, is domesticated in section 13 of the Act which guarantees every child within Botswana the right to know and be cared for by his or her parents, and prohibits separation of children from their caregivers unless such separation is in the best interests of the child.²²⁸ Notable is that all the aforementioned provisions of the Act make reference to 'every child in Botswana' and may on this account be interpreted to apply to every child in Botswana without distinction including, asylum-seeking children. This is also premised on the principle of non-discrimination enunciated in section 7 of the Act. It is therefore asserted that put together sections 13, 15 to 19 and 61 of the Act can be used to ensure that asylum-seeking children in immigration detention gain access to basic human rights including, the right to an adequate standard of living, health, education, and a family life, and thus advance their right not to be unlawfully detained.

Generally, all children in Botswana including asylum- seeking children are entitled to all rights contained in the Act, including the ones discussed above. However, the exercise of such rights is not absolute since there is a limitation contained in section 3 of the Children's Act. Section 3 provides that in situations where there is conflict or inconsistency between the provisions of the Act and any other law, the provisions of the Children's Act shall prevail unless the exercise of the right contained in the Act would have the consequence of harming the child's general wellbeing or of compromising the exercise of the rights and

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *ibid* section 13 subsections (1) and (4).

freedoms of others, national security, public interest, public safety, public morality or public health.²²⁹ As such, laws based on the exceptions to the exercise of rights contained in section 3 of the Children's Act, may in certain circumstances prevail over its provisions.

3.6. Conclusion

It is clear from the above discussion that the relevant laws of Botswana fail to sufficiently safeguard the right of asylum-seeking children not to be unlawfully detained. The Constitution may in certain circumstances uphold as lawful laws that permit discrimination against non-national children, or unequal treatment between national and non-national children. The Constitution also permits immigration detention but does not in way suggest that it supports indefinite or indeterminate detention. The relevant provisions of the Refugees Act and the Immigration Act fail to comply with minimum standards set in the CRC particularly, article 3(1) as they take a general approach which fails to take into account the best interests of the child and article 37(b) and (c) as they are mute on ATDs and child specific detention conditions and thus make detention the first and only option for asylum-seeking children arriving in Botswana or due for expulsion, and may expose asylum-seeking children to detention in non-child sensitive conditions. The Children's Act attempts to safeguard the rights of all children in Botswana including, asylum-seeking children consistent with the CRC notwithstanding the inadequacies in domesticating the CRC in some of its provisions, and the caveat to the exercise of such rights contained in section 3 of the Act. Therefore, what remains is for the relevant authorities to give effect to the provisions of the Children's Act in favour of protecting the right of asylum-seeking children not to be unlawfully detained in Botswana.

²²⁹ *ibid* section 3.

CHAPTER 4

Implementation of Botswana laws protecting the right of asylum- seeking children not to be unlawfully detained

4.1. Introduction

The CRC establishes the concept of the best interests of the child and in this regard obliges state parties to ensure that in all actions regarding children, including by administrative officials and legislative bodies, the child's best interests shall be a paramount determinant.²³⁰ Furthermore, the Children's Act domesticates the concept of the best interests of the child, obliging any person or court carrying out a function or exercising power under the Act to consider the best interests of the child as the primary determinant, and lists factors to be considered in the best interests determination (BID).²³¹ These include, inter-alia, the need to safeguard the child from harm, the child's physical and educational needs, stable living arrangements and any factors necessary to guarantee the general-wellbeing of the child.²³² Accordingly, the concept of the best interests of the child is the norm against which all measures, policies and legislation that have an impact on children should be assessed.²³³ In view of the above, this Chapter will assess the extent to which immigration authorities and other relevant authorities in immigration procedures and judicial authorities in court proceedings uphold or interfere with the concept of the best interests of the child in implementing the laws relevant to safeguarding the right of asylum-seeking children not to be unlawfully detained discussed in Chapter 3 of this study.

4.2. Immigration procedures

As noted in Chapter 1 of this study, Botswana adopts a restrictive immigration policy requiring that all asylum seekers including, children be held at the FCII while awaiting status determination or expulsion or being transferred to the Dukwi Refugee Camp if granted refugee status.²³⁴ Notwithstanding that the Refugees Act requires that asylum seekers should be detained for a period not exceeding 28 days pending their status determination,²³⁵ in practice asylum seekers usually remain at the FCII for as long as it takes for their status determination to be completed, which can take several months.²³⁶

²³⁰ Convention on the Rights of the Child (1989) supra note 3 at article 3(1).

²³¹ Children's Act supra note 27 sections 5 and 6.

²³² *ibid* section 6(1)(a), (c), (f), (g) and (i).

²³³ ACERWC op cit note 121 at 14.

²³⁴ Ntseane & Mupedziswa op cit note 18 at 1415.

²³⁵ Refugee (Recognition Control) Act supra note 163 section 6(b).

²³⁶ Elizabeth Macharia-Mokobi 'Uganda's Refugee Act of 2006: Lessons for Botswana' (2018) available at

Thus, in contravention of the section 6(b) of the Refugees Act. The situation is even worse for rejected asylum seekers and their children who in practice are detained in prison-like conditions alongside criminals convicted of serious offences such as rape and murder, for as long it takes to repatriate them, which can be several months or even years.²³⁷

Although detaining asylum seekers and their children for as long as their repatriation arrangements are finalised is justified in terms of the Immigration Act,²³⁸ it is asserted that the detention of children in such an environment is not in their best interests considering the effects of prolonged detention on their general well-being and the harm they may be exposed to due to being detained with criminals or adults unrelated to them including, sexual assault. As mentioned in Chapter 1 of this study, a 2017 UNHCR submission on Botswana's UPR revealed that there were reports of a 12 year old male asylum- seeking child who had been sexually assaulted by an adult male inmate at the FCII,²³⁹ and according to a 2018 anecdotal report no action was taken by the relevant authorities despite knowledge of the incident.²⁴⁰ Additionally, there were reports of regular abuse by prison authorities including, physical assault of asylum-seeking children.²⁴¹ These incidents of sexual and physical abuse are an indication of the harm that asylum-seeking children are exposed to at the FCII and failure by the relevant authorities to consider the best interests of the child in deciding to detain them in such conditions. Consequently, such detention fails to advance the concept of the best interests of the child enunciated in sections 5 and 6 of the Act,²⁴² as well as section 42 of the Act which as asserted in Chapter 3 of this study, identifies asylum-seeking children as children in need of protection.²⁴³ This also constitutes inhuman or degrading treatment of asylum- seeking children prohibited under the Act.²⁴⁴

Furthermore, as highlighted in Chapter 1 of this study, a 2017 US Department of State country report on human rights practices in Botswana revealed that in 2015 over 200 asylum- seeking children were accommodated in overcrowded tents that were likely to leak during rains and exposed to harsh and unhygienic conditions which heightened

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/05/Protecting-Refugees-draft3.pdf>, accessed on 29 June 2020.

²³⁷ Macharia- Mokobi op cit note 41 at 226.

²³⁸ Immigration Act supra note 164 section 45.

²³⁹ UN High Commissioner of Refugees (2018) op cit note 21.

²⁴⁰ Ntibinyane Ntibinyane 'Prisoners of Injustice' Mail and Guardian 5 January 2018 available at *<https://mg.co.za/article/2018-01-05-prisoners-of-injustice/>*, accessed 14 May 2020.

²⁴¹ *ibid.*

²⁴² Children's Act supra note 27.

²⁴³ *ibid* section 42(j).

²⁴⁴ *ibid* section 61(1).

vulnerability to contracting contagious diseases.²⁴⁵ Similarly, the 2018 and 2019 US Department of States reports on the same revealed that children at the FCII were detained in tents which provided inadequate protection from harsh weather conditions.²⁴⁶ Consequently, the detention of asylum-seeking children in such poor conditions, violates their right to adequate and safe housing protected in the Children's Act.²⁴⁷ Furthermore, detention in such conditions also compromises the children's right to health also protected under the Act²⁴⁸ as contagious diseases thrive in overcrowded and unhygienic conditions. This indicates failure by the relevant authorities to undertake a BID consistent with the Children's Act since a proper BID would have ensured that children are not detained in such detrimental conditions. Therefore, detaining children in such conditions threatens their survival and thus falls short of the concept of the best interests of the child.

Reports by the US Department of State also revealed that at the FCII families were separated and that there were concerns that asylum-seeking children were separated from their parents at a tender age.²⁴⁹ Thus, in practice asylum-seeking children detained at the FCII are deprived of their right to a family environment and the care of their parents contrary to section 13 of the Children's Act, which prohibits the separation of children from their caregivers except in circumstances where such separation is in the best interests of the child.²⁵⁰ What is clear is that separating asylum-seeking children from their parents or care givers in such detention conditions is not in their best interests, considering several factors including, the risks that may come with detaining children with adults unrelated to them, particularly reports of sexual violence referred to above, and the children's need for parental care which is essential for child survival and development, and their need to be protected from harm. Section 13 also requires that a child deprived of a family environment be placed in alternative care.²⁵¹ However, there is nothing in the aforementioned reports indicating that measures were taken by the relevant authorities to remove children

²⁴⁵ US Department of State (2017) op cit note 20.

²⁴⁶ US Department of State 'Country Reports on Human Rights Practice-Botswana' (2018) available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/botswana/> and US Department of State 'Country Reports on Human Rights Practice-Botswana' (2019) available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/botswana/>, accessed on 7 July 2020.

²⁴⁷ Children's Act supra note 27 section 16.

²⁴⁸ ibid section 15(1).

²⁴⁹ US Department of State (2017) op cit note 20 and US Department of State (2018) and (2019) op cit note 246.

²⁵⁰ Children's Act supra note 27 section 13(1) and (4)

²⁵¹ ibid section 13(1).

separated from their parents or deprived of a family environment from the FCII and place them in alternative care pursuant to this provision.

Additionally, while the Children's Act recognises the right of every child in Botswana to free basic education,²⁵² in practice asylum-seeking children are deprived of this right since there is no school at the FCII or any arrangements for asylum-seeking children to attend school outside the FCII (emphasis added).²⁵³ Accordingly, asylum-seeking children detained at the FCII can go for as long as their parents' status determination or repatriation arrangements are not completed without attending school, which can take months or even years. A 2017 UNHCR submission on Botswana's UPR revealed that as of 2017, 271 asylum-seeking children who had been detained at the FCII for almost two years were deprived access to education the entire period of their detention. Thus, in violation of their right to education and the concept of the best interests of the child safeguarded in the Children's Act.²⁵⁴ A 2018 report by civil society organisations working on children's rights in Botswana also revealed that as of July 2018, almost 70 asylum-seeking children were detained at the FCII for three years without access to a school.²⁵⁵ Moreover, due to lack of access to recreational facilities at the FCII,²⁵⁶ asylum-seeking children are deprived of their right to leisure, play and recreation safeguarded in section 19 of the Children's Act.²⁵⁷

On a positive note, consistent with section 15 of the Children's Act which requires that all children in Botswana including asylum-seeking children be afforded the highest attainable standard of health and medical care,²⁵⁸ the FCII has a clinic run by a nurse who specialises in basic health care and makes provision for the referral of severe cases to the Francistown city hospital.²⁵⁹ Accordingly, asylum-seeking children detained at the FCII have access to basic health. However, the FCII does not offer specialised facilities such as counselling and psychological therapy which some asylum-seeking children traumatised by their flight encounters may need.²⁶⁰ It is therefore submitted that the medical services provided at the

²⁵² *ibid* section 18(1).

²⁵³ US Department of State (2018) and (2019) *op cit* note 246.

²⁵⁴ UN High Commissioner of Refugees (2018) *op cit* note 21.

²⁵⁵ Botswana Civil Society Organisation 'CSO Complementary Report on the Status of the UNCRC in Botswana' (unpublished report, August 2018) at 32.

²⁵⁶ Global Detention Project 'Botswana Immigration Detention Profile' (2009) available at <https://www.globaldetentionproject.org/countries/africa/botswana#gdp-detention-references> accessed on 8 June 2020.

²⁵⁷ Children's Act *supra* note 27.

²⁵⁸ Children's Act *supra* note 27 section 15.

²⁵⁹ US Department of State (2017) *op cit* note 20.

²⁶⁰ Macharia-Mokobi & Pfumorodze *supra* note 18 at 176.

FCII impartially satisfy the provisions of section 15 as they do not extend to mental or psychological health services.

More importantly, the above practices illustrate non-compliance with section 53 of the Children's Act which requires that the Minister make available or cause to be made available to asylum-seeking children such social services as may be appropriate for their survival or sustenance.²⁶¹ Thus in practice, section 53 of the Act is not complied with particularly, with respect to making available to asylum-seeking children in detention at the FCII social services including, appropriate housing and sanitary conditions, access to education and health care facilities necessary for their survival.

It is clear from the above discussion that despite reports on the aforementioned practices and criticism by the UNHCR in its 2017 submission on Botswana's UPR as well as recommendations by the same body on measures to be taken by Botswana in order to remedy the situation,²⁶² the government of Botswana continued to hold asylum-seeking children in the same conditions. This is evident from the 2018 and 2019 reports by the US Department of State discussed above which like the UNHCR reported on more or less similar issues relating to the conditions of child immigration detention at the FCII.²⁶³ In its 2017 UPR submission on Botswana the UNHCR recommended among others, that all failed asylum-seeking children be released from the FCII to the Dukwi Refugee Camp, that long-term solutions in the best interests of the child be guaranteed and that asylum-seeking children be granted access to basic education despite their status.²⁶⁴ A 2018 position paper on detention of children seeking asylum at the FCII by the Botswana Civil Society Organisation (BCSO), addressed to Government, detailed similar issues and proposed similar recommendations as the UNHCR and, further called upon government to address the situation of the asylum-seeking children at the FCII, as a matter of urgency.²⁶⁵

However, it appears from the UN Committee on the Rights of the Child's 2019 Concluding Observations on Botswana's combined second and third reports that the above stated recommendations by UNHCR and BCSO were never implemented. The Committee expressed concerns that asylum-seeking children will continue to be subjected to

²⁶¹ Children's Act supra note 28.

²⁶² UN High Commissioner for Refugees (2018) op cit note 21.

²⁶³ US Department of State (2018) and (2019) op cit note 246.

²⁶⁴ UN High Commissioner for Refugees (2018) op cit note 21.

²⁶⁵ Olebile Machete et al (2018) op cit note 31.

compulsory and protracted detention.²⁶⁶ Furthermore, the Committee called upon Botswana to outlaw the detention of asylum-seeking children and proposed that ATDs be adopted so as to permit the children to remain with their families or care takers in community based settings consistent with the best interests of the children, and to ensure among others, access to education for all asylum-seeking children.²⁶⁷ These requests by the Committee suggest that notwithstanding the 2017 and 2018 recommendations by UNHCR and BCSO, respectively, in 2019 the Government of Botswana continued to hold asylum-seeking children at the FCII, separated from their families and deprived of their right to access to education instead of being moved to the Dukwi Refugee Camp where they would have remained with their families in a community based setting and have access to education consistent with recommendations by the UNHCR and most importantly the best interests of the child and other rights explicitly guaranteed by the Act. This illustrates Botswana's reluctance or rather failure to implement recommendations by UN bodies though not binding, which if implemented would guarantee protection of the rights of asylum-seeking children especially, their right not to be unlawfully detained.

Noteworthy is that UNICEF has had a presence in Botswana since 1966,²⁶⁸ and works to protect the rights of all children in Botswana.²⁶⁹ One would therefore expect UNICEF to protect the rights of all children in Botswana without distinction since its mandate makes reference to 'every child in Botswana'²⁷⁰ and does not exclude any class of children. However, there are no published records or report(s) by UNICEF condemning or criticising government for the conditions of child immigration detention at the FCII, which conditions not only contravene the rights of asylum-seeking children as recognised by the Children's Act but also international standards particularly, the CRC which Botswana has domesticated.²⁷¹ Also noteworthy is that there is miniscule advocacy and reporting by the Botswana civil society on the situation of asylum-seeking children detained at the FCII. The aforementioned paper by BCSO revealed that asylum-seeking children at the FCII are unknown and continue to be invisible and not accounted for, hence it is hard for civil

²⁶⁶ UN Committee of the Rights of the Child (2019) op cit note 29 paragraphs 60.

²⁶⁷ *ibid* paragraph 61(b).

²⁶⁸ UNICEF Botswana available at <https://www.unicef.org/botswana/about-used>, accessed on 29 December 2020.

²⁶⁹ UNICEF Botswana available at <https://www.unicef.org/botswana/what-we-do>, accessed on 29 December 2020.

²⁷⁰ *ibid*.

²⁷¹ Sloth-Nielsen op cit note 210 at 28.

society or any other interested group(s) to access these children and offer them the necessary assistance.²⁷² The paper further revealed that information relating to the situation of asylum-seeking children at the FCII only came to light in 2017 as a result of a baseline study by Childline Botswana on the status of protection of migrant children.²⁷³ This therefore suggests that there is little or no public knowledge of the existence of asylum-seeking children in Botswana and the conditions in which they are held. Perhaps this explains why the government of Botswana continues to hold asylum-seeking children at the FCII for prolonged periods and in the process violating their children's rights as safeguarded by the Children's Act as well as the CRC and other relevant international laws with less or no criticism.

4.3. The Courts

There is no case law on the rights of asylum-seeking children in Botswana. However, in 2017, though children were not the primary applicants, some of the failed adult asylum seekers who had been detained at the FCII with their children indefinitely, approached the High Court of Botswana with applications of Habeas Corpus on behalf of themselves and their children challenging the lawfulness of their detention.²⁷⁴ The first case involved three Congolese women Marie Iragi, Theresa Butoyi and Sophia Laheri and their minor children.²⁷⁵ The second case involved 165 adults and 195 children filed under Egama Ngezi.²⁷⁶ In both cases the applicants sought an immediate end to their lengthy and indefinite detention and an order that they be temporarily placed at the Dukwi Refugee Camp pending their repatriation.²⁷⁷ The High Court held in favour of the applicants in both cases, and determined that the detention of the applicants and their children was unlawful. Government was therefore ordered to move the applicants and their children to the Dukwi Refugee Camp.²⁷⁸ Even so, in the same year, Government succeeded in an appeal to overturn the decision of the High Court in both cases, in a consolidated appeal.²⁷⁹ In its judgment the Court of Appeal ordered that the applicants and their children be returned to

²⁷² Olebile Machete et al (2018) op cit note 31.

²⁷³ *ibid.*

²⁷⁴ Macharia-Mokobi op cit note 41 at 225-226.

²⁷⁵ *Iragi* supra note 66 paragraph 10.

²⁷⁶ *Ngezi* supra note 65 paragraph 9.

²⁷⁷ *Iragi* supra note 66 paragraphs 75 and *Ngezi* supra note 65 paragraphs 75-75.

²⁷⁸ *ibid.*

²⁷⁹ *The Attorney General v Marie Iragi and 2 Others and The Attorney General v Egama Ngezi and 163 Others* unreported case no UAHFT 000003-17 (16 October 2017).

the FCII and that government address the petitioners with efforts to repatriate them in 60 days.²⁸⁰

Notable is that the court in both the High Court decisions and Court of Appeal decision did not discuss the issue of detention of the asylum-seeking children though at the time of the cases, the children had been detained for over 2 years nor mention the best interests of the child notwithstanding the fact that children constituted a significant number of persons affected by the decisions.²⁸¹ Only on one occasion did the Court of Appeal in its judgment refer to the children of the asylum seekers by a cautionary remark that one of the prices to be paid by adults seeking asylum accompanied by their children, is that the children will be detained with them.²⁸² This remark has been rightfully criticised for failure to recognise the unique status of asylum-seeking children under international and domestic law.²⁸³ The Court of Appeal has also been criticised for making no further mention of the asylum-seeking children or the protective provisions of the CRC in its judgment.²⁸⁴ In addition, it has been asserted that the High Court and the Court of Appeal in these decisions missed an opportunity to adopt a rights-based approach to the treatment of the detained asylum-seeking children.²⁸⁵ Even so, it would be wrong or rather premature to conclude that should similar applications be brought before the courts of Botswana on behalf of asylum-seeking children as the primary applicants, a similar approach will be taken. It is therefore hoped that should such an application be brought before the courts of Botswana, the right of asylum-seeking children to have their interests taken as paramount consideration as expressly recognised in the Act will be given careful consideration.

It is however important to note that despite the lack of case law on the rights of asylum-seeking children in Botswana, there is a considerable number of High Court judgments in which the right of the child to have his or her interests taken as a primary consideration has been positively applied, though mostly divorce and child custody cases.²⁸⁶ In *Ndlovu v Macheme*,²⁸⁷ the applicant an unmarried father made an application for access to his minor

²⁸⁰ *ibid* paragraphs 99.

²⁸¹ Macharia-Mokobi *op cit* note 41 at 227.

²⁸² *ibid* at 228 and *Ngezi* *supra* note 65 paragraphs 85.

²⁸³ Macharia- Mokobi *op cit* note 41 at 228.

²⁸⁴ *ibid* at 228-229.

²⁸⁵ *ibid*.

²⁸⁶ *ibid* at 221-222.

²⁸⁷ *Ndlovu v Macheme* 2003 (3) BLR 230 HC.

child. In its ruling, the court made reference to the case of *Modisanyane v Modisanyane*²⁸⁸ wherein the court endorsed the primary test of the best interests of the child stating that, ‘a child has a right to have access or to be spared access and so access is granted or denied depending on where the best interests of the child lie. Access is a two-way process. In one sense it is a right granted in the interest of the non-custodian parent and in another and more decisive sense, it is a right granted in the best interests of the child.’²⁸⁹

The court also highlighted that the best interests of the child standard has attained primacy, and that the jurisprudence that supports the best interests of the child principle, usually referred to as the welfare of the child standard, recognises that no parental right, or claim relating to access is meaningful if it is contrary to the best interests of the child.²⁹⁰ On this account the court cited among others, *Mazile v Mazile*.²⁹¹ The court granted the applicant access to his minor child stating that the best interests of the child standard should be applied to issues of parental custody and parent-child contact.²⁹² The court also considered Botswana’s international obligations and in this regard noted that provisions of international treaties particularly the CRC, are of importance for Botswana law even when they have not been incorporated into domestic law as they are of strong persuasive value on the decisions of the court.²⁹³ The Court also noted that Botswana is party to the CRC and the ACRWC which both stress on the principle of the best interests of the child and that these treaties are persuasive material for the courts of Botswana determining cases involving minor children where issues concerning the welfare of a child are in dispute.²⁹⁴

Similarly, the High Court of Botswana in the case of *Mokoti v Okatswa*²⁹⁵ which concerned a father’s application for access of his two children born out of wedlock, made reference to the CRC which Botswana is party to particularly article 3 which provides that, ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies, the best interests of the child shall be the paramount consideration.’²⁹⁶ Moreover, the court highlighted that the principle of the best

²⁸⁸ *Modisanyane v Modisanyane* 2006 (2) BLR 65 HC.

²⁸⁹ *Macheme* supra note 287.

²⁹⁰ *ibid.*

²⁹¹ *Mazile v Mazile* 2001(1) BLR 175.

²⁹² *Macheme* supra note 287.

²⁹³ *ibid.*

²⁹⁴ *ibid.*

²⁹⁵ *Mokoti v Okatswa* 2011(2) BLR 1021 HC.

²⁹⁶ *ibid* at 1026.

interests of the child was domesticated through the enactment of the Children's Act particularly, section 5 which obliges any person or court executing a function or exercising authority under the Act to give paramount consideration to the best interests of the child.²⁹⁷ The court noted that the principle of the best interests of the child is the key and central consideration in all custody cases for all children notwithstanding their parents' marital status at the time of their birth.²⁹⁸ Consequently, the court restated that the traditional Roman Dutch law concepts on custody and access are considered less significant compared to the now predominant all-encompassing principle of the best interest of the child and in this regard cited *Mazile* and *Modisenyane*.²⁹⁹

It seems from the courts' interpretation and application of the best interest of the child principle in the aforementioned custody cases that there is a general consensus by the courts that the said principle should be given supremacy in all actions or proceedings concerning children. The courts in their interpretation do not limit the application of the principle to custody cases or cases involving citizen children, and hence it is asserted that the principle of the best interests of the child also applies to any other case(s) involving the wellbeing of children notwithstanding their status including, those involving asylum-seeking children. It is therefore safe to assume that should a case involving the well-being of asylum-seeking children be presented before the courts of Botswana, an approach similar to that adopted in custody cases will be adopted with regards to interpretation and application of the principle of the best interests of the child in order to safeguard the rights of asylum-seeking children.

4.4. Conclusion

It is clear from the above contraventions of the provisions of the law relevant to safeguarding the rights of asylum-seeking children that there is an implementation gap between the law and practice. In practice the relevant authorities fail to protect the right of asylum-seeking children as guaranteed by the Children's Act. It is also apparent from repetitive reports on the same issues affecting asylum-seeking children detained at the FCII and recommendations by UN bodies on measures relevant for the preservation of the rights of asylum-seeking children that Botswana fails to implement such recommendations. Furthermore, it is yet to be seen how the Botswana courts will interpret and apply the

²⁹⁷ *ibid.*

²⁹⁸ *ibid* at 1027.

²⁹⁹ *ibid.*

provisions of the Children's Act especially, the principle of the best interest of the child in cases relating to the protection of the right of asylum-seeking children not to be unlawfully detained.

CHAPTER 5

International and regional best practices on the protection of the right of asylum-seeking children not to be unlawfully detained

5.1. Introduction

This Chapter will explore international and regional best practices on the protection of the right of asylum-seeking children not to be unlawfully detained, with specific focus on best practices in two countries being, Sweden, a developed country and South Africa, which like Botswana is a developing country. Noteworthy is that these countries were selected based on the Commitment to Development Index (CDI) 2020 country rankings established by the Center for Global Development.³⁰⁰ The CDI rates countries' policy efforts based on their size to enable comparability on how such policies strengthen development in other countries and it stresses the significance of policies 'beyond aid' in several areas including, migration.³⁰¹ To reach the index on migration for each country, the Center for Global Development considers three aspects being, the country's willingness to host migrants, the extent to which such migrants are integrated and the country's involvement in a myriad of international treaties on migration.³⁰²

In terms of the CDI 2020, Sweden a high income country, is an international leader in its commitment to development and ranks first globally on migration as a result of its soaring immigration influx, the multitudes of refugees it receives, and its outstanding national migration integration policies.³⁰³ Overall, South Africa ranks highest among the middle income countries,³⁰⁴ and ranks 30 on migration globally in terms of the CDI 2020.³⁰⁵ Most importantly, apart from its CDI ranking, South Africa was selected for this section of the study because it holds one of the most progressive constitutions in the world,³⁰⁶ and has a

³⁰⁰Center for Global Development 'Introducing the Commitment to Index 2020' available at <https://www.cgdev.org/blog/introducing-commitment-development-index-2020>, accessed on 24 July 2020.

³⁰¹ *ibid.*

³⁰²Center for Global Development 'Which countries have the best migration policies?' (2016) available at <https://www.cgdev.org/blog/which-countries-have-best-migration-policies>, accessed on 23 July 2020.

³⁰³ Centre for Global Development (2020) *op cit* note 300.

³⁰⁴ *ibid.*

³⁰⁵Center for Global Development 'Migration' (2020) available at https://www.cgdev.org/cdi#/raw_migration, accessed on 28 July 2020.

³⁰⁶ Anisa Mahmoudi & Tshgofatso Tracy Mothapo 'Reception of Children on the Move in South Africa' (2018) available at <https://bettercarenetwork.org/sites/default/files/KE-Country-Report-South-Africa.pdf>, accessed on 27 July 2020.

common legal heritage with Botswana in that its common law and that of Botswana is based on Roman Dutch Law.³⁰⁷ Furthermore, South African legal practice has had a significant influence in moulding the development of the Botswana legal system, and reference to South African case law and academic literature on South African law is abundant in Botswana Law Reports.³⁰⁸ This Chapter will focus on the right of asylum-seeking children not to be unlawfully detained in the two countries with specific emphasis on the best practices in terms of reception and detention conditions as well as ATDs in so far as asylum-seeking children are concerned.

5.2. Sweden

Although the Swedish Aliens Act³⁰⁹ allows for the detention of asylum seeking adults and children, whether in families or accompanied in the course of asylum procedures, in practice most asylum seekers are seldom detained for such procedures.³¹⁰ The Law on the Reception of Asylum Seekers (LMA), amended in 2016,³¹¹ entitles all asylum seekers including, children within Sweden, whether accompanied or unaccompanied to material reception conditions including, accommodation and an allowance from the time the application for asylum is initiated to the time a resident permit is issued or asylum is granted, or until an expulsion order is issued in the event that asylum was not granted.³¹² The provision of such material conditions is however limited to those who do not have their own resources, and the determination of such lack is made by the Swedish Migration Agency (SMA) at the asylum seekers first interview conducted upon institution of application for asylum.³¹³ Even so, in terms of the amendment introduced to the LMA in 2016, people who have been refused asylum and have surpassed the set time for voluntary return set out in the expulsion order, are excluded from reception conditions except for

³⁰⁷ Gardiol J van Niekerk 'The Application of South African law in the courts of Botswana' (2004) 37(3) *The Comparative and International Law Journal of Southern Africa* 312 and 320.

³⁰⁸ *ibid* at 312.

³⁰⁹ Aliens Act of 2005.

³¹⁰ *ibid*.

³¹¹ Law on Reception of Asylum Seekers and Others of 1994.

³¹² Soner Barthoma et al 'Global Migration: Consequences and Responses. Reception Policies, Practices and Responses Sweden Country Report' (2020) available at https://www.researchgate.net/publication/339478601_RESPOND_-_Working_Papers_series_Global_Migration_Consequences_and_Responses_Reception_PoliciesPractices_and_Responses_Sweden_Country_Report, accessed on 20 July 2020.

³¹³ Asylum Information Database (AIDA) 'Country Report: Sweden' (2015) available at <https://www.refworld.org/pdfid/569c963b4.pdf>, accessed on 27 July 2020.

families or adults with children.³¹⁴ Accordingly, asylum seeking families or adults with children continue to enjoy reception conditions even after they have been refused asylum and are awaiting expulsion.

Other reception conditions which asylum-seeking children are entitled to in Sweden include, access to medical care, including dental care in the same manner as Swedish children, as per the Health Care Act and the Act on Health Care for asylum seekers, as well as the Special Act on Care for Asylum Seekers which governs dental care.³¹⁵ They are also entitled to full access to basic and secondary education in conventional schools under similar conditions as Swedish children.³¹⁶ Furthermore, there are entitled to be instructed in their native language where practicable.³¹⁷ Noteworthy is that the same right to access schools extends to asylum-seeking children whose families have been rejected and are awaiting expulsion.³¹⁸

As already stated above, the Aliens Act provides for circumstances in which both adults and child asylum seekers may be detained. In terms of Chapter 10, Section 2, paragraphs 1 to 2 of the Aliens Act,³¹⁹ a child may be detained if first, there is a possibility that he or she will be denied entry or has already been given a deportation order, second, if the child is a flight risk, and third, if supervision is regarded as inadequate for the execution of a deportation order.³²⁰ Persons who have reached the age of 18 (adults) may also be detained for purposes of execution of an expulsion order if there is reason to believe that they will abscond if they are not detained.³²¹ In essence, in Sweden, detention of asylum seekers, whether children or adults may only be used in the process of expulsion.³²² Furthermore, the Aliens Act provides that in the event that a child is detained, the detention should not exceed 72 hours, and allows for the detention of a child for a further 72 hours only in

³¹⁴ CEAR ‘The challenges and opportunities of the asylum system in Sweden’ (2019) available at https://www.cear.es/wp-content/uploads/2019/04/SWEDEN-REPORT_-CEAR.pdf, accessed on 29 July 2020.

³¹⁵ Library of Congress Law ‘Refugee Law and Policy: Sweden (2016) available at <https://www.loc.gov/law/help/refugee-law.php> accessed on 26 June 2020.

³¹⁶ CEAR (2019) op cit note 16 at 314.

³¹⁷ *ibid.*

³¹⁸ *ibid.*

³¹⁹ Aliens Act *supra* note 309.

³²⁰ *ibid* Chapter 10, Section 2.

³²¹ *ibid.*

³²² International Detention Coalition (IDC) ‘There are alternatives’ (2015) available at <https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf>, accessed on 19 July 2020.

exceptional circumstances.³²³ Consequently, the longest a child may be detained for immigration related reasons in Sweden is 6 days, and as aforementioned they are only detained for purposes of executing a deportation order. The Aliens Act also prohibits the separation of children from their parents or caretakers as a result of detention of either the parent or the child.³²⁴ In the exceptional circumstances that a child is detained pursuant to provisions of the Aliens Act, the law requires that the child be treated humanely and his or her dignity be respected,³²⁵ and Sweden stands out globally with its overarching provision of services for foreign detainees.³²⁶ Children as well as adults in this situation may be held in remand centres or prison facilities,³²⁷ and conditions in such facilities are usually similar to those at reception centres operated by SMA.³²⁸ Accordingly, all children in remand centres and prisons awaiting expulsion with their families are in law entitled to access health care in a similar way as applicants for residence permits,³²⁹ and to this effect they receive regular medical attention from nurses and doctors.³³⁰ Asylum-seeking children in detention also receive a daily allowance similar to that given to asylum seekers in reception centres managed by the SMA,³³¹ which they can spend as they wish.³³²

In addition, children awaiting expulsion in remand centres or prisons with their families may continue attending school.³³³ The Aliens Act also requires that all aliens, children or adults in detention be afforded recreational opportunities, physical training, and time outdoors,³³⁴ and in practice such opportunities are made available to detainees since, daily activities aimed at enhancing their physical and mental health are organised.³³⁵ They also have access to a library, computers with internet, a gym facility and an outdoor area for sports activities, and are expected to assist with activities of daily living, such as cleaning

³²³ Aliens Act supra note 309 Chapter 10, Section 5.

³²⁴ *ibid* Chapter 10, Section 3.

³²⁵ *ibid* Chapter 11, Section 1 and AIDA (2015) op cit note 313 at 50.

³²⁶ Admir Skodo 'How Immigration Detention Compares Around the World' (2017) available at <https://theconversation.com/how-immigration-detention-compares-around-the-world-76067>, accessed on 17 July 2020.

³²⁷ Aliens Act supra note 309 Chapter 11, Section 2.

³²⁸ AIDA (2015) op cit note 313 at 50.

³²⁹ Aliens Act supra note 309 Chapter 11, Section 5.

³³⁰ AIDA (2015) op cit note 313 at 53.

³³¹ Aliens Act supra note 309 Chapter 11, Section 13.

³³² Skodo op cit note 326.

³³³ Barthoma et al op cit note 312 at 23.

³³⁴ Aliens Act supra note 309 Chapter 5, Section 3.

³³⁵ AIDA (2015) op cit note 313 at 51.

their rooms and assisting in the kitchen depending on their age.³³⁶ The only difference is that asylum seekers detained pursuant to the Aliens Act, including children may have certain limitations to their freedom of movement,³³⁷ and such restrictions are recognised by the law.³³⁸ It is important to note that the Aliens Act requires that a detention order be regularly re-assessed within the same intervals and that such order be withdrawn immediately if the reason for which it was initially granted no longer exists.³³⁹ On that account, detention of asylum seekers including children in families, in Sweden is subject to periodic reviews to avoid prolonged periods of detention, which may ultimately result in the detention being deemed as arbitrary.³⁴⁰

Noteworthy is that the Aliens Act recognises supervision as a non-custodial alternative to detention for children and obliges the relevant authorities to consider supervision before taking a decision to detain children.³⁴¹ In this regard, the Aliens Act explicitly states that children may be detained if supervision is proven to be inadequate as an alternative to detention for the purpose of executing an expulsion order.³⁴² Children under supervision are required to routinely present themselves to the police or the SMA, based on which of the two authorities is responsible or granted the order, and may also involve surrendering of identity documents including passports.³⁴³ Supervision orders are re-assessed within six months of the order to detain, and may be discontinued if the reasons for which the detention was ordered no longer exist.³⁴⁴

It is clear from the aforementioned, that in practice asylum-seeking children in Sweden, whether alone or in families are generally not detained and that both in law and practice such children are afforded basic needs such as free accommodation, a monthly or daily allowance, access to free basic education and medical care during asylum procedures. Furthermore, similar services extend to asylum-seeking children awaiting expulsion and

³³⁶ *ibid.*

³³⁷ AIDA (2015) *op cit* note 313 at 50.

³³⁸ Aliens Act *supra* note 309 Chapter 11, Section 6.

³³⁹ *ibid* Chapter 9 paragraph 4.

³⁴⁰ International Detention Coalition (IDC) 'Alternatives to Immigration Detention in Africa. A summary of member findings from six countries 2015-2016' available at <https://www.refworld.org/pdfid/5a5f55e04.pdf>, accessed on 16 July 2020.

³⁴¹ Aliens Act *supra* note 309 Chapter 10, Section 2, paragraph 1(3) and paragraph 2(2) and AIDA (2015) *op cit* note 313 at 48.

³⁴² Aliens Act *supra* note 309 Chapter 10, Section 2 paragraph 2.

³⁴³ *ibid* Chapter 10, Section 8 and AIDA (2015) *op cit* note 313 at 49.

³⁴⁴ *ibid* Chapter 10, Section 9 paragraph 2.

detained in remand centres or prisons, both in law and in practice. Most importantly, there is a set period within which asylum-seeking children may be detained for purposes of expulsion, and such period is subject to periodic reviews, and hence it is asserted that it is highly unlikely that asylum seeking-children in Sweden are detained for prolonged periods.

5.3. South Africa

Like in Sweden, asylum seekers are generally not detained for asylum procedures in South Africa.³⁴⁵ In fact, South Africa has an urban refugee policy that does not encamp refugees, which makes it a desirable place to seek asylum.³⁴⁶ Accordingly, asylum seekers in South Africa, like in Sweden, are not subject to automatic detention,³⁴⁷ they are entitled to lawfully remain and move freely across the country provided they are in possession of valid documentation legalising their stay in the country.³⁴⁸ This suggests that they can choose where they live, take part in economic activities as well as social and cultural activities in local communities.³⁴⁹ Although asylum-seeking children are entitled to the same constitutional human rights as all other children in South Africa, including, the right to education and health care, unlike Sweden, the South African Government does not provide any form of accommodation to asylum seeking families with children, and neither does it afford them any form of social or financial assistance.³⁵⁰ There is therefore not much social and financial assistance afforded to asylum seekers and their children, but refugees benefit from such assistance.³⁵¹

Access to education is a basic human right for all children in South Africa notwithstanding their nationality or legal status.³⁵² Section 29 of the Constitution³⁵³ ensures every person

³⁴⁵ International Detention Coalition (IDC) Data Base available at https://database.idcoalition.org/?s=&sub_cap=Respect%20of%20fundamental%20rights, accessed on 20 July 2020.

³⁴⁶ Kaajal Ramjathan-Keogh 'Basic Education Rights Handbook-Education Rights in South Africa-Chapter 6: The Rights of Refugees and Migrant Learners' available at <http://section27.org.za/wp-content/uploads/2016/04/S27-BE-2017-ch6new.pdf>, accessed on 3 August 2020.

³⁴⁷ *ibid* at 133.

³⁴⁸ Legal Resource Centre 'Guide 3. Rights and Duties of Asylum Seekers and Refugees in South Africa' (2015) available at http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Rights_and_Duties_of_asylum_seekers.pdf, accessed 27 July 2020.

³⁴⁹ *ibid*.

³⁵⁰ *ibid*.

³⁵¹ Global Next Gen Index 'South Africa' available at <http://next-gen-index.org/wp/en/scorecards/south-africa/>, accessed on 27 July 2020.

³⁵² Legal Resource Centre (2015) *op cit* 348 at 2.

³⁵³ Constitution of the Republic of South Africa Act No.108 of 1996.

in South Africa the right to basic education, and as such asylum-seeking children have access to elementary education at the same level as South African children.³⁵⁴ The Schools Act³⁵⁵ states that all parents have an obligation to ensure that every child attends school from the age of seven to fifteen,³⁵⁶ and prohibits schools from unfairly discriminating against students in acceptance processes.³⁵⁷ The Admissions Policy for Ordinary Schools (Admission Policy)³⁵⁸ extends the application of the Schools Act and the Admission Policy to foreign nationals with proof of documentation indicating that they have applied for normalisation of stay in South Africa, and this would include asylum-seeking children.³⁵⁹ Asylum-seeking children whose parents do not have the requisite documentation are allowed to attend public schools provided that their parents or caregivers have instituted an application with the relevant Department to normalise their stay.³⁶⁰ In the event that such documentation is not obtained within three months, the school has the responsibility to contact the relevant authorities and the child's parents in order to obtain documentation validating the child's stay in South Africa.³⁶¹ Regrettably, despite the provisions of the law, asylum-seeking children in South Africa are often rejected by schools for lack of documentation.³⁶² Furthermore, asylum-seeking parents or care takers who cannot afford their children's school fees, are allowed to apply for exemption from paying school fees in the same way as citizens in the same position.³⁶³

Noteworthy is that the South African Government is not obliged to provide children with education beyond primary school since the Constitution, particularly section 29(2) only obliges it to progressively make higher education available and accessible.³⁶⁴ As a result, an asylum-seeking child who at the time of completion of their primary education has not been granted refugee status may not be able to continue with further education if his or her parents or caretakers do not have the necessary means.³⁶⁵ In terms of medium of teaching,

³⁵⁴ Mahmoudi & Mothapo op cit note 306 at 55.

³⁵⁵ School Act No.94 of 1996.

³⁵⁶ *ibid* section 3(1).

³⁵⁷ *ibid* section 5(1)

³⁵⁸ Department of Basic Education 'Admission Policy for Ordinary Public Schools', 1998.

³⁵⁹ Mahmoudi & Mothapo op cit note 306 at 55.

³⁶⁰ Legal Resource Centre (2015) op cit note 348 at 3.

³⁶¹ *ibid*.

³⁶² Mahmoudi & Mothapo op cit note 306 at 55.

³⁶³ Legal Resource Centre (2015) op cit note 348 at 3.

³⁶⁴ Constitution of the Republic of South Africa Act supra note 353 and Mahmoudi & Mothapo op cit note 306 at 56.

³⁶⁵ Mahmoudi & Mothapo op cit note 306 at 56.

the Constitution requires that learners in public institutions be taught in a language of their choice, where practically possible.³⁶⁶ Accordingly, asylum-seeking children may face barriers in public schools if they cannot speak a South African language, and it is not practically possible for them to be taught in a language of their choice. Even so, the Department of Education has a responsibility to find a school suitable for the child, preferably a school that offers a bridging module, and such modules are offered by a few schools in South Africa, and are also not provided for in the official school policy.³⁶⁷ Alternatively, such children may be placed in an environment that enables them to learn a national school language before attending a formal school.³⁶⁸

With regard to health care, section 27 of the Constitution guarantees every person in South Africa the right to ‘access health care services including reproductive health care,’ and obliges the state to adopt ‘reasonable and other legislative measures’ towards the progressive realisation of the right to health based on its available resources.³⁶⁹ However, of specific relevance to children is section 28(1)(c) of the Constitution which explicitly guarantees all children in South Africa the right to basic health.³⁷⁰ Asylum-seeking children in South Africa are therefore entitled to access basic healthcare services at the same level as national children, and this was confirmed by the South African Constitutional Court in *Khosa and others v Minister of Social Development and others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).³⁷¹ In addition, the National Health Act³⁷² permits access to free medical services for children below 6 years and pregnant or nursing mothers notwithstanding their nationality or legal status.³⁷³ Accordingly, asylum-seeking children without the requisite documentation under the age of 6 may not be refused treatment on account of their lack of legal documentation.³⁷⁴ It is however, important to note that access to public health care is not free for all persons, the South African Public health care regime applies a means based system in terms of which persons in certain categories are required to pay the whole amount, and asylum seekers are

³⁶⁶ Constitution of the Republic of South Africa supra note 353 section 29(2).

³⁶⁷ Ramjathan-Keogh op cit note 387 at 138.

³⁶⁸ *ibid.*

³⁶⁹ Constitution of the Republic of South Africa Act supra note 353.

³⁷⁰ *ibid.*

³⁷¹ Mahmoudi & Mothapo op cit note 306 at 57.

³⁷² National Health Act No. 61 of 2003

³⁷³ Legal Resource Centre (2015) op cit note 348 at 4.

³⁷⁴ *ibid.*

not exempted from this system.³⁷⁵ Consequently, free medical health services for asylum-seeking children above the age of 6 is only accessible to children in that position whose parents' annual earnings are below a certain amount.

This notwithstanding, asylum seekers including, children in South Africa like those in Sweden may be detained for purposes of expulsion pursuant to the provisions of section 28(4) of the Refugee Act,³⁷⁶ and if such detention exceeds 30 days, the Refugee Act requires that the detention be subjected to regular reviews after every 30 days by a High Court judge in the jurisdiction within which the asylum seeker is detained.³⁷⁷ Consequently, asylum seekers are required to appear before a judge of the High Court after every 30 days of review of such detention.³⁷⁸ Asylum seekers can also be detained pending finalisation of their application for asylum pursuant to section 23 of the Refugee Act as read with section 22(6) if, they violate conditions of their asylum permit including, failure to appear; failure to renew their permit within the prescribed time period; or if their claim is ascertained to be 'manifestly unfounded or fraudulent'.³⁷⁹

Even so, the Refugee Act explicitly requires that children be detained only as a measure of last resort and for the shortest time period.³⁸⁰ The right of the child to be detained only as a measure of last resort and for the shortest period of time is further affirmed by section 28(1)(g) of the Constitution, which safeguards the right of all children in South Africa not to be detained.³⁸¹ Furthermore, the Constitution incorporates the best interests of the child principle, and states that 'the best interests of the child are of paramount importance in every matter concerning the child,'³⁸² and this principle is also enshrined in section 7 of the Children's Act.³⁸³ Consequently, the relevant authorities are obliged to give the best interests of asylum-seeking children primacy in deciding detention.

In the exceptional circumstances that asylum-seeking children are detained, the Immigration Regulations (Regulations),³⁸⁴ provide for minimum standards to be met in

³⁷⁵ *ibid.*

³⁷⁶ Refugee Act 130 of 1998.

³⁷⁷ *ibid* section 29(1).

³⁷⁸ IDC Data Base *op cit* note 345.

³⁷⁹ Refugee Act *supra* note 376.

³⁸⁰ *ibid* section 28(2).

³⁸¹ Constitution of the Republic of South Africa Act *supra* note 353.

³⁸² *ibid* section 28(2).

³⁸³ Children's Act No. 38 of 2005.

³⁸⁴ Immigration Regulations available at

terms of detention conditions, and requires that the detention facility have sufficient space and lighting, a bed or mattress and at minimum one blanket, that detainees be provided with daily balanced meals, which cater for the specific dietary needs of children, potable water, toiletries and other items necessary for hygiene and cleanliness.³⁸⁵ This is affirmed by section 35 of the Constitution, which requires that conditions of detention respect human dignity, and at least detainees be given an opportunity to exercise, be provided with sufficient accommodation, reading material, nutrition and medical care at the state's expense.³⁸⁶ Section 28 of the Constitution specifically guarantees all children detained in South Africa, the right not to be detained with adults, and to be treated in a way and held in conditions that are appropriate for their age.³⁸⁷ Furthermore, as a universal principle, children should not be separated from their parents in such detention, although separated from other adults, they are kept with their parents.³⁸⁸ However, unlike in Sweden, there is no express provision in South African law ensuring access to education for asylum-seeking children in pre-removal detention.

Overall, South Africa like Sweden, generally does not detain asylum-seeking children and their families save in exceptional circumstances. Furthermore, South African law like Swedish law guarantees asylum-seeking children basic human rights including, the right to education and health care at the same level as nationals, although in practice asylum-seeking-children in South Africa face challenges in accessing the public education system. South Africa can therefore learn a lot from Sweden in terms of ensuring that in practice asylum-seeking children access the education system. There is also a lot of lessons to be learnt by South Africa from Sweden in terms of provision of accommodation, and social and financial assistance to children in asylum seeking families or children with care takers who are in need.

5.5. Conclusion

In light of the aforementioned, it is submitted that Sweden and South Africa have made great strides in their efforts to safeguard the right of asylum-seeking children not to be

<https://www.vfsglobal.com/dha/southafrica/pdf/final-Immigration-Regulations-2014-1.pdf>, accessed on 2 August 2020.

³⁸⁵ Mahmoudi & Mothapo op cit note 306 at 54.

³⁸⁶ Constitution of the Republic of South Africa supra note 353 section 35(1)(e).

³⁸⁷ *ibid* section 28 (1)(g)(i)-(ii).

³⁸⁸ Mahmoudi & Mothapo op cit note 306 at 46.

unlawfully detained both in law and in practice, notwithstanding challenges in implementation of some of the relevant laws. It is therefore asserted that there is a lot of valuable lessons to be learnt by Botswana from the laws and practices of these two countries, especially with respect to ATDs and detention conditions of asylum-seeking children if Botswana is to continue adopting a strict immigration detention policy for asylum seekers including, children.

CHAPTER 6

Conclusion and Recommendations

6.1. Conclusion

The relevant laws of Botswana fail to adequately safeguard the right of asylum-seeking children not to be unlawfully detained and are mostly inconsistent with the CRC, which is the core international standard on children's rights. The Constitution permits immigration detention as one of the exceptions to the right to personal liberty but does not in any way suggest that it supports indefinite detention. The Refugees Act and the Immigration Act take a general approach that fails to take into account the best interests of the child and accordingly fail to comply with article 3(1) of the CRC. Moreover, contrary to the concept of child detention as a 'measure of last resort' enshrined in article 37(b) of the CRC, both Acts make detention the first and sole option for asylum-seeking children arriving in Botswana or due for expulsion as they are mute on any discretion concerning ATDs. Both Acts are also mute on the conditions of child detention contrary to article 37(c) of the CRC and as such, they are inadequate to safeguard asylum-seeking children from being detained in conditions that are not child-appropriate. While the Refugees Act specifies the maximum period of detention for purposes of status determination, the Immigration Act does not provide a determinate period within which asylum seekers including, children may be detained pending expulsion contrary to article 37(b) of the CRC which requires that child detention be for the 'shortest appropriate period of time'. Consequently, failed asylum-seeking children in Botswana may be detained for lengthy periods in conditions that violate most of their rights including, the right to an adequate standard of living, family unity, the highest attainable standard of health, and basic education, and ultimately resulting in unlawful detention.

Notable is that the Children's Act is the only applicable law that attempts to protect the right of asylum-seeking children not to be unlawfully detained. However, section 64 of the Children's Act, which attempts to domesticate the provision of the CRC specifically relevant to the right of children not to be unlawfully detained being, article 37 is limited to children in conflict with the law and does not refer to children detained for other reasons such as immigration detention. The laws of Botswana are therefore weak in this area and need to be strengthened so that they adequately safeguard the right of asylum-seeking children not to be unlawfully detained.

Furthermore, in practice, there is a gap between the laws that attempt to protect the right of asylum-seeking children not to be unlawfully detained and implementation of such laws by immigration authorities and other relevant authorities in immigration procedures especially, the principle of the best interest of the child enshrined in the Children's Act and both the CRC and the ACRWC which Botswana has domesticated. Accordingly, the principle of the best interests of the child is not given paramount consideration in immigration procedures. Regrettably, there is no case law on the right of asylum-seeking children not to be unlawfully detained in Botswana. It is therefore yet to be seen how the courts of Botswana will interpret the existing laws especially, the principle of the best interest of the child enunciated in the Children's Act should a case relating to the immigration detention of asylum-seeking children be brought before them. It also follows from the above discussion of best international and regional practices on the laws protecting the right of asylum-seeking children not to be unlawfully detained in Sweden and South Africa that these countries are more advanced in this area of law and hence it is asserted that the laws in these countries are good practice that Botswana can use to reform its laws and policies.

6.2. Recommendations

It is evident from the findings of this study that there are no laws explicitly safeguarding the right of asylum-seeking children not to be unlawfully detained in Botswana. The current laws are inadequate. There is, therefore, a need for Botswana to reform its laws and policies to explicitly and adequately safeguard this right. It is therefore recommended that:

- a) the Immigration Act particularly section 45, be amended to stipulate the maximum period within which asylum seekers, including asylum-seeking children, can be detained pending deportation;
- b) the Immigration Act be amended to include a provision on regular reviews of detention orders in order to prevent unlawful detention in cases where continued detention of asylum seekers including, asylum-seeking children is no longer deemed appropriate;
- c) both the Refugees (Recognition and Control) Act and the Immigration Act be amended to stipulate the minimum standards to be met in terms of detention conditions for asylum-seeking children awaiting refugee determination status or failed asylum-seeking children awaiting expulsion particularly, access to basic

- needs such as sufficient accommodation, access to basic education, physical and mental healthcare and age-appropriate recreational facilities;
- d) the Children's Act be amended to fully domesticate article 37 of the CRC so that it contains a general prohibition on the unlawful detention of all children in Botswana including asylum-seeking children; and requiring that in the event that there are detained, such detention be a measure of last resort and for the shortest appropriate period of time and also be consistent with the law. Also, that such children be treated with humanity and respect for dignity and integrity of a person in a manner that considers their child age-specific needs;
 - e) both the Refugees (Recognition and Control) Act and the Immigration Act be amended to incorporate the best interests of the child principle and the concepts of 'measure of last resort' and 'shortest appropriate period of time' be applied in all cases of immigration detention affecting to children;
 - f) both the Refugees (Recognition and Control) Act and the Immigration Act be amended to provide for ATDs including, foster care for children in whose best interests cannot be detained with their parents or guardians and supervised community placement for families and adults with children, and that such ATDs be explored before asylum-seeking children are detained;
 - g) the best interest of the child principle be adopted as the paramount consideration in all matters affecting children including, immigration procedures concerning asylum-seeking children consistent with sections 5 and 6 of the Children's Act;
 - h) asylum-seeking families or adults with children be detained at the Dukwi Refugee Camp instead of the FCII while they await their application for status determination or expulsion and asylum-seeking children be entitled to the same rights as refugee children in the Refugee Camp;
 - i) the Government of Botswana enact laws explicitly prohibiting child and family immigration detention and its elimination be ensured in policy and practice;
 - j) the Government of Botswana establish national programmes to eliminate child and family immigration detention with explicit milestones on the establishment and implementation of ATDs drawing on a variety of options including, foster care and supervised community placement; and
 - k) implementation of the reformed laws and policies be monitored by both government and non-governmental organisations.

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