# FAMILY REUNIFICATION WITHIN THE REFUGEE CONTEXT:

## Is South Africa meeting its International, Regional, Constitutional and Legal obligations towards Refugees?

**By**

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**I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

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Introduction:

The refugee experience is such that it is common for family members to be separated from each other before or during their flight from the country of origin. In the face of persecution, families adopt strategies, some of which may necessitate temporary separation: sending a politically active adult into hiding, helping a son escape forcible recruitment by militia forces, sending abroad a woman at risk of attack or abduction[1]. Family members may be forced to take different routes out of the country or to leave at different times as opportunities permit.

It is therefore also common for refugees to be unaware, often for long periods, whether a family member is alive or dead. The commonality of the experience does not in any way detract from the pain and anxiety felt by those separated from close family members.

Refugees commonly go to great lengths to find lost relatives and finding a way to be reunited with them can easily assume paramount importance in a refugee's life. Jastram states that whether the separation is a "chosen strategy or an unintended consequence of the chaos of forcible displacement"[2], the separation of a refugee family is rarely intended to be permanent.

Unfortunately family unity is not considered a right within international refugee documents and as a result the laws and policies of most countries are silent in this regard.

Family unity is however a legal concept which is addressed extensively in various other international law documents and even though there is not a specific provision in the 1951 United Nations Convention and its 1967 protocol, refugee law as a dynamic body of law is informed by these international law documents. It is submitted that since

[1] K Jastram and K Newland , UNHCR working paper on Family Unity and Refugee Protection , 2001 Found At http://www.unhcr.ch, accessed March 2006
[2] ibid

refugee law is informed by these international law documents, refugee law should therefore not be viewed as an isolated body of law and be denied the benefits there from.

Family unity in the refugee context means granting refugee status or a similar secure status to family members accompanying a recognised refugee. The country of asylum must likewise provide for family reunification since the refugee cannot by definition return to the country of origin to enjoy reunification there.

The United Nations High Commissioner for Refugees (hereinafter the UNHCR)[3] and many countries consider family reunification a cornerstone of effective refugee protection. Regrettably, the circumstances of war and persecution that fragment refugee families are often followed by administrative and policy restrictions by countries of asylum that prolong the separation of families. This impedes the successful establishment of those in asylum countries and often diminishes protection for those who are left behind in countries of origin.

Family reunification is therefore necessary as indicated by some of the factors outlined below. These factors are all within the personal experience of refugees assisted by the author.[4]

One such factor is the disruption of family unity: Refugees often leave behind spouses and dependant children, sometimes, in situations of great danger or in a refugee camp in the first country of asylum, and more often than not have great difficulty in communicating with them.

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[3] The Office of the High Commissioner is entrusted, *inter alia*, with the task of promoting international instruments for the protection of refugees, and supervising their application. Under the Convention and the Protocol, contracting states undertake to cooperate with the Office of the UNHCR in the exercise of its functions and, in particular, to facilitate its specific duty of supervising the application of the provisions of these instruments. ( Introductory note to the Convention , Geneva, March 1996)

[4] The Author is the coordinator of the Refugee Law Clinic at the University of Cape Town. The Refugee Rights Project is funded by the UNHCR and is incorporated into the law faculty and provides free legal services to refugees with regard to their status determination as well as a protection of their rights afforded to them in terms of the South African Refugees Act, the 1951 UN Convention and the OAU Convention.

It is the experience of the author that when communication does occur, the dependants left behind do not understand why the reunification process is so lengthy or as in the case of South Africa why there is no reunification process at all.

There are frequently reports of stress in the husband-wife relationship as some spouses cannot believe the process is so long and think that they have been abandoned. Moreover, in the long term, disruption of family unity can destroy the family connection and make family reunification impossible.

Psychological disorders: Refugees separated from their families also experience psychological trauma and often suffer from depression. Family separation increases post-traumatic stress disorders and is often experienced by refugees. Refugees in limbo waiting for family reunification for many years suffer from anxiety and depression.

Financial difficulties: Refugees in general face certain difficulties in finding a job and worries about the family they left behind makes it even harder. Family separation also increases the financial problems faced by refugees as they frequently have to send money abroad to assist the family left behind.

Barriers to integration: The stress caused by family separation and the absence of family support makes it very difficult for refugees to integrate in a society they are not familiar with.

Outline of Paper:

This paper will commence by defining the family. As there is no consensus of what or who constitutes a family it becomes important to consider the definition of the family taking into account cultural discrepancies. The definition of family will be reviewed both from a sociological as well as a legal perspective.

In addition, Section A of this paper offers a general analysis of the right to family unity as a right of protection and considers some of the international law and other sources of this right. In this paper I intend to emphasise that because refugee law is informed by

international human rights law, it can support, reinforce or supplement refugee law. A specific analysis of a child's unqualified right to be united with its family will be undertaken.

The right of family unity is often distinguished from the right to family reunification, which extends protection more specifically to families that have been separated that wish to reunite. Even though few human rights instruments specifically designate a right of family reunification it will be argued that to deny family reunification is to effectively violate the right to family unity.

This is followed (Section B) by a look at how states have dealt with family unity generally and in a resettlement context. A comparison of family unity under Canadian and Australian Law and policy will be undertaken with a view to understanding the dynamics involved in the implementation of a family unity programme. In addition, the durable solution of resettlement as a tool for family reunification will be explored.

Finally, given the increasingly restrictive migration policies of states, family reunification is becoming progressively more difficult; the need for new ideas and approaches is thus more compelling. The concept of family unity and respect for the family unit has been highlighted in South African case-law including that of the Constitutional Court, however the Refugees Act of South Africa[5] is silent on the issue of family unity or family reunification in the refugee context. This paper, in addition, explores South Africa's obligation in terms of its international, regional and constitutional obligations. It concludes with some proposals for solutions for South Africa.

[5] The Refugees Act 130 of 1998

## SECTION A:

## CHAPTER ONE: DEFINITION OF THE FAMILY

### 1.1 The concept and definition of the family:

The family is generally considered to be the basic unit of social structure, the exact definition of which can vary greatly from time to time and from culture to culture. How a society defines family as a primary group, and the functions it asks its family to perform are by no means constant.

A legal dictionary[6] defines family as -

> "A group of individuals related by blood, marriage, or adoption." or a
> "A group of individuals usually related who live together under common a household authority and especially who have reciprocal duties to each other"

Professor van Beuren states that "although international treaty law salutes the family as the basic unit upon which society is organised, the family is still a concept in transition."[7] In fact, there is no definition of 'family' under international law.

The concept of what constitutes a family thus varies from state to state, and in some circumstances, within regions of a state. The absence of an agreed definition has meant that states may define the term according to their own interest, culture and system.[8]

Since there is no universally accepted definition of the family, and international law recognizes a variety of forms.[9] International humanitarian law recognizes that a family consists of those who consider themselves and are considered by each other to be part of

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[6] Merriam-Webster's dictionary of Law 1996 found at ;
[7] G van Beuren, "The International Protection of family members' Rights as the 21st Century approaches' (1995) 17(4) *Human Rights Quarterly* at 733.
[8] A Edwards, "Human Rights, Refugees, and The Right 'to enjoy' Asylum" (2005) 17(2) International Journal of Refugee Law *(IJRL)* at 304.
[9] Human Rights Committee, *General Comment 28*, at para. 27 Found at http://www.ohchr.org/english/bodies/hrc/comments.htm Accessed on December 2005
See also G. van Bueren, op cit note 88

the family, and who wish to live together.[10] In the refugee context, states have shown a willingness to promote 'liberal criteria' with a view toward 'comprehensive reunification' of families.[11]

Given the range of variations on the notion of family, a flexible approach is needed.[12] One useful limiting factor recognized by many states in determining whether more distant family members should be reunited is dependency. This factor is explored below.

1.2 UNHCR's definition : A Question of fact:

The UNHCR position is that the existence of a family is a question of fact and is to be determined on a case-by-case basis. That is not only the basis for UNHCR's own family reunification programmes it is their directives to states as well.

The UNHCR in its "Note on International Protection" in 2001 specifically highlighted the fact that cultural discrepancies in definitions of the family have given rise to problems for family unity.[13]The UNHCR thus supports and promotes a broad definition of the family.[14]

In terms of the 1983 guidelines on family reunification, the UNHCR[15] promotes the reunification of the nuclear family. The "nuclear family" in their interpretation consists of the husband and wife and their dependent children. There is a universal consensus in the international community concerning the need to reunite members of this family

[10] Y. Sandoz, C. Swinarski, and B. Zimmermann, eds., *Commentary on the Additional Protocols* (ICRC, Martinus Nijhoff, Geneva, 1987), para. 2997. Found at www.
[11] UNHCR Executive Committee Conclusion No. 88 (L) 1999 (b)(ii), 'Protection of the Refugee's Family.'
[12] UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-23 June 2001, para. 14.
[13] UNHCR, Note on International Protection', Executive Committee of the High Commissioner's Programme, 52nd Session, Un doc.A/AC.96/951,13 Sept.2001,para.78
[14] UNHCR,Guidelines on Reunification of Refugee families', Geneva, July 1983, Part III.
[15] ibid

nucleus. Hurwitz notes that the 'nuclear' family is the most widely accepted for family unity and reunification purposes by the states.[16]

However the following points are noted by the UNHCR in the 1983 guidelines in this connection: The main points of the guidelines are summarised and commented on below.

With regard to **husband and wife**[17], besides legally married spouses, couples who are actually engaged to be married, who have entered into a customary marriage, or who have lived together as husband and wife for a substantial period can be considered eligible for UNHCR assistance. The same applies in principle to spouses in a polygamous marriage if it was validly contracted in the country of origin. This recognition is particularly useful especially in light of the fact most countries do not recognise subsequent spouse.

On the other hand, estranged spouses who do not intend to live as a family unit in the country of asylum are not normally eligible for UNHCR assistance for reunification with each other, they may however qualify for reunification with their children.

**Parents and children;**[18] Although some countries of asylum make a distinction between minor children and those who have come of age, it is UNHCR policy to promote the reunification of parents with at least those dependent, unmarried children, regardless of age, who were living with the parents in the country of origin.

UNHCR's position is such that the **unaccompanied minor child** should be reunited as promptly as possible with his or her parents or guardians as well as with siblings. If the minor has arrived first in a country of asylum, the principle of family unity requires that the minor's next-of-kin be allowed to join the minor in that country unless it is reasonable under the circumstances for the minor to join them in another country.

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[16] A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment', 11 (4) *International Journal of Refugee Law*, 1999, p. 653.
[17] ibid
[18] ibid

Because of the special needs of children for a stable family environment, the reunification of unaccompanied minors with their families, whenever this is possible, should be treated as a matter of urgency.

Humanitarian and economic considerations militate in favour of reunification of **dependent parents** who originally lived with the refugee or refugee family, or who would otherwise be left alone or destitute.

**In the case of other dependent relatives**,[19] where persons such as single brothers, sisters, aunts, cousins, etc. were living with the family unit as dependents in the country of origin, or where their situation has subsequently changed in such a way (e.g., by the death of a spouse, parent or bread-winner) as to make them dependent upon refugee family members in the country of asylum, UNHCR considers them eligible for family reunification.

The author submits that the UNHCR approach of determining the existence of a family on a case-by-case basis is the better approach especially in light of the fact that families are evolving in a more expansive way. The increasing number of same-sex unions and the growing phenomena of AIDS orphans resulting in child-headed households are just two examples of the ways in which the modern family is evolving.

It appears that the Human Rights Committee commenting on article three of the ICCPR stated at paragraph 27[20] also took into account the fact the family is a concept in transition and evolving;

> " In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these contexts (see General Comment No. 19, para. 2). Single-parent families frequently consist of a single woman caring for one or more children, and States parties should describe what measures of support are in place to

[19] ibid
[20] op cit note 38

enable her to discharge her parental functions on the basis of equality with a man in a similar position."

1.3 Dependency Principle:

In the case of refugees, there appears to be a will among some states to respect the principle of dependency by recognising de facto family members. There are family members whose dependency may be emotional, economic, cultural, or a combination of these factors. Even though Kate Jastram[21] states that some observers have noted that traditional family patterns characterised by duties of care and concern for elders and members of the extended family are giving way to a more western or nuclear model, it is submitted that these observers have not taken into account the evolving and more expansive nature of the family.

Kate Jastram notes further that sometimes families have taken in and cared for other unattached persons[22], such as friends or foster children, to whom they are not actually related by blood. She suggests that if such persons are in the same situation as the relatives mentioned above, they should also be considered eligible for UNHCR assistance with reunification but care should however be taken to verify beforehand the true situation of such persons.

The Canadian Council for refugees[23] have identified the following persons as de facto dependants:

[21] op cit note 1
[22] ibid
[23] New Developments for family reunification in refugee resettlement to Canada , Canadian Council for refugees – 24 May 2002 – Final,
found at http://www.unhcr.ch/cgi
bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3cfb2bd14&page=home

*"De facto dependants (who may or may not be blood relatives) and certain extended family members may be considered as part of a family unit within the refugee context. To be considered a de facto dependant, the Visa Officer must be satisfied that these persons are dependent on the family unit in which membership is claimed.*

*The dependency may be emotional or economic and will often be a combination of these factors. Such persons would normally, but not exclusively, reside with the principal applicant as members of the same household...*

*Examples of persons who should be found to be members of a family unit:*

- *An unmarried adult daughter in cultures where it is normal for an unmarried adult daughter to remain dependent until she marries;*
- *A widowed sister or sister-in -law in a traditional culture where it is normal that the applicant would take on responsibility for her care and support and who has no other means of support;*
- *Nieces and nephews whose parents have been killed or are missing (Note: In these cases the Visa Officer must take into consideration the best interests of the child and ensure that there are no disputes with respect to custody or guardianship of the child);*
- *Parents of any age living with the principal applicant and who have no other children with whom they could reside or no means of support other than the principal;*
- *Elderly relatives who have resided with the principal applicant for a substantial period of time and/or who are solely or for the most part dependent on the applicant for care, shelter, etc."*

The above identification of de facto dependants appears to reflect the principles of family reunification upheld by the UNHCR. Canada thus appears to be committed to accepting the different ways in which families define themselves.

1.4 No single definition

The definition adopted by most states is however very restrictive, Hathaway at page 536[24] states that some states reject any understanding of family that goes beyond opposite sex spouse and minor, dependent children. He cites a number of examples. Under the European Union[25] for

[24] J C Hathaway 'The Rights of Refugees under International Law' Cambridge University Press at 536
[25] European Union Family Reunification Directive , Art 4(1).

instance a refugee's right to family reunification extends only to his or spouse and minor children, unmarried children. If the refugee is not married it is up to each state to decide for itself whether or not to permit reunification.[26] A second or subsequent spouse cannot be sponsored at all. [27] A very narrow category of family members are thus allowed reunification. Even the discretionary authority is limited only to allowing relatives in the first degree of kinship and only if they are *dependant* on the refugee.[28]

It is submitted that South Africa in its definition of a family have taken into account the fact the family is a concept in transition and that it is evolving in a more expansive way. This will be elaborated upon in section C below.

**CHAPTER TWO:**

[26] Ibid. at Art. 4(3)
[27] Ibid. at Art. 4(4)
[28] Ibid. at Art 4 (2)

## FAMILY UNITY AND INTERNATIONAL LAW:

Introduction:

The right to family unity is entrenched in universal and regional human rights instruments and international humanitarian law. Even though there is no specific provision in the 1951 United Nations Convention Relating to the Status of Refugees[29] (hereinafter "Refugee Convention" ) and its 1967 Protocol[30], refugee law as a dynamic body of law, is informed by international human rights law, and humanitarian law[31]. In addition, several executive committee[32] conclusions reaffirm the state's obligation to take measures which promote and respect the family unity and family reunification.

2.1 Refugee Convention and its Protocol - not an isolated body of law:

James Hathaway[33] endorses the view that the Refugee Convention and its Protocol are part and parcel of international human rights law and not an aspect of immigration or migration. His view is fully in line with the position adopted by the several foreign superior courts internationally which have analysed the object and purpose of the Refugee Convention and its Protocol.

The Supreme Court of Canada in *Canada (Attorney-General) v Ward*[34] expressed the view that;

> "the essential purpose of the Refugee Convention is to identify persons who no longer enjoy the most basic forms of protection states are obliged to provide. In such circumstances refugee law provides a substitute protection

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[29] Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954 Found at http://www.unhcr.ch Accessed September 2005

[30] The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. In the same resolution the General Assembly requested the Secretary-General to transmit the text of the Protocol to the States mentioned in article V thereof, with a view to enabling them to accede to the Protocol *entry into force* 4 October 1967, in accordance with article VIII Found at http://www.unhcr.ch Accessed September 2005

[31] see below

[32] see below

[33] Op cit at 4

[34] *Canada (Attorney-General) v Ward* (1993) 103 DLR 4th 1 (Can SC, June 30, 1993).

of basic human rights."

Similarly, the High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Khawar* has linked refugee law more directly to international human rights law when it stated:

> "[The Refugee Convention's] meaning should be ascertained having regard to its object , bearing in mind that the Convention is one of several important international treaties designed to redress "violation[s] of basic human rights, demonstrative of the failure of state protection '... It is the recognition of the failure of state protection , so often repeated in the history of the past hundred years , that led to the exceptional involvement of international law in matters concerning human rights."[35]

Furthermore, in *Applicant 'A ' and Ano 'r v. Minister for Immigration and Multicultural Affairs,* [36] the Australian court held that:

> "the term refugee is to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights[37] ( especially Articles 3,5 and 16) and the International Covenant on Civil and Political Rights[38] (especially Article 23)."

Despite the foregoing, many governments, including Australia and Canada, are implementing increasingly restrictive asylum policies to deter and prevent asylum seekers from seeking refuge on their territory. Manifestations of this trend includes several measures such as visa control, safe third country arrangements, stricter interpretations of the refugee definition as well as *restricted family reunification*

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[35] *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002]HCA 14 (Aus. HC, April, 11, 2002) , per Kirby J.

[36] *Applicant 'A ' and Ano 'r v. Minister for Immigration and Multicultural Affairs,* (1997) 190 CLR 225 (Aus. HC, Feb. 24 1997) at 296-297 The articles are discussed below.

[37] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10December 1948 Found at http://www.unhcr.ch Accessed September 2005

[38] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49Found at http://www.unhcr.ch Accessed September 2005

*rights.*[39] Governments have tended to justify such policies in light of 1951 Convention provisions, without further reference to other applicable human rights and humanitarian instruments.

According to the general rule of interpretation of treaties (article 31 of the Vienna Convention on the Law of Treaties, 1969)[40] treaties must be interpreted in their context and in light of their object and purpose.

The refugee protection has its origins in general principles of human rights. In the refugee law context, it is generally agreed that norms of protection are framed within a human rights context. The preamble[41] to the Refugee Convention invokes the Universal Declaration of Human Rights[42] as the means by which states "have affirmed the

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[39] A Edwards, " Human Rights, Refugees, and The Right 'to enjoy' Asylum (2005) 17(2) *International Journal of Refugee Law (IJRL)* at 294

[40]

> "Art 13 ( 2.) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[41] (The preamble is a preliminary introduction to a statute or constitution, usually a statement of purpose or explanation that is inserted between the title and the enacting clause). A preamble in an act does not become part of an act, but a court may use it as a tool of statutory construction in ascertaining legislative intent.) The fact that something is cited in the preamble does not minimise its significance.

In the United States Jacobson v. Mass., 197 US 11 (1904), is the only case in which the Supreme Court has directly addressed a claim based on the Preamble. In this case the court examined the Constitutional rights of Jacobson, and rejected his claim to a personal right, derived from then Preamble, to the "blessings of liberty". In rejecting Jacobson's claim, the Court wrote that "the Preamble indicates the general purpose for which the people ordained and established the Constitution" and went on to point out that "[the Preamble] has never been regarded as the source of any substantive power conferred on the Government..." . They made no suggestion, and none should be made, that the Preamble should be accorded less weight, or is in any way less significant, than any other portion of the Constitution, nor did they suggest that the Preamble does not direct the government to pursue the goals that it proclaims.

[42] "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,"

principle that human beings shall enjoy fundamental rights and freedoms without discrimination"

The reference in the Preamble of the 1951 Refugee Convention to the Universal Declaration of Human Rights confirms that international refugee law was not intended to be seen in isolation. The inclusion of the "right to seek and to enjoy asylum from persecution" in Article 14 of the Universal Declaration of Human Rights[43] places international refugee law squarely within the human rights paradigm.[44] This is discussed further under the heading "Intention of the founders"

Furthermore, the European Court of Human Rights in *Golder v United Kingdom,*[45] has noted that the preamble of an international convention may be used to determine its object and purpose.

To be able to determine the applicable standard of the refugee's right to family unity and the concomitant right to family reunification the inter-relationship between international and regional human rights law and refugee law needs to be better explored.
In this regard the following questions will be examined in this paper:

- Which standard to apply in the event of a clash between the different bodies of law?
- Which standard takes precedence where the Convention is either silent as to the appropriate treatment or offers a lower standard than international human rights law?
- Does the higher standard apply?[46]

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[43] Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948 found at http://ccnmtl.columbia.edu/projects/mmt/udhr/Accessed September 2005
[44] E Feller, "International refugee protection 50 years on: The protection challenges of the past, present and future" (2001) 83 (843) Int'l Rev.Red Cross – Humanitarian Debate: Law, Policy, Action 581 at 589 found at http://www.icrc.org/web/ara/sitearа0.nsf/htmlall/5YREK6/$FILE/581-606Feller.pdf Accessed September 2005
[45] *Golder v United Kingdom* (1975) E.H.R.R. 524, at para.34,
[46] op Cit at note 39 at 295

2.2 The right to family life under International Human Rights Law

There are a number of provisions that elaborate the right to family life under international human rights law.

To start with the Article 16(3) of the Universal Declaration of Human Rights provides that; "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"

The right to a family is a fundamental human right and Article 16 of the Universal Declaration of Human Rights clearly establishes this right for all peoples, regardless of status.

The right to family unity is inherent in the right to family life.[47] Because it is so common in the refugee experience for family members to be separated from each other before or during their flight from the country of origin therefore, for refugees, the right to family unity implies a right to family reunification in the country of asylum, the refugee cannot return to their country of origin to enjoy the right to family unity there.

Protection of the family as the natural and fundamental group unit of society is also confirmed in the International Covenant on Civil and Political Rights.[48] Various other

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[47] Hathaway , op cit at note 24 at pg 556

[48] op cit at note 38 see article 23 below

> ***"Article 23***
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
>
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

international law documents including the Convention of the Rights of the Child[49] refers to the right to family unity which will be discussed below.

## 2.3 The Intentions of the founders:

### 2.3.1 The Refugee Convention and its Protocol

Article 5[50] of the Refugee Convention provides that nothing in the Convention shall impair any right or benefits granted to refugees apart from the Convention. Hence, since the right to family unity and reunification has developed in international law it cannot be limited by provisions or lack thereof in the refugee field. As stated above the right to family unity applies to all human beings, regardless of their status. A broader perspective than that of the 1951 Convention is therefore necessary to understanding the scope of the right to family unity for refugees.[51]

The author submits that the absence from the 1951 Convention of a specific provision relating to family unity does not mean that the drafters failed to see protection of the refugee family as an obligation. According to Hathaway the 1951 Convention does provide protection for the refugee family in a number of Articles.[52]

### 2.3.2 Recommendation B (see annexure "A" attached at pg 98

In addition to the preamble of the Refugee Convention, refugees' *'essential right'* to family unity was also the subject of a recommendation approved unanimously by the

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[49] Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 *entry into force* 2 September 1990, in accordance with article 49 found at http://www.unhchr.ch/html/menu3/b/k2crc.htm

[50] Article 5
RIGHTS GRANTED APART FROM THIS CONVENTION
Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention

[51] Hathaway , op cit at note 10 at pg 569

[52] ibid at 569
The 1951 Convention; Art 4, refers to refugees' freedom as regards the religious education of their children'; Art12(2) provides that the rights to marriage shall be respected; Art22 concerns the public education of children in public schools and Art24 concerns family allowances and other related social security as may be offered to nationals.

Conference of Plenipotentiaries[53] that adopted the full final text of the Convention.It states:

> *"Considering* that the unity of the family, the natural and the fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
>
> *Noting* with satisfaction that, according to the official commentary of the Ad Hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family,
>
> *Recommends* Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> 1. Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
> 2. The protection of refugees who are minor, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

Hathaway[54] states that while the recommendation is non-binding, its characterisation of family unity as an "essential right" is evidence of the drafters' object and purpose in formulating the 1951 Convention. He states further that Executive Committee Conclusions have repeatedly emphasised the importance of State action to maintain or re-establish refugee family unity.[55]

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[53] Final Act of the United National Conference of Plenipotentiaries on the status of Refugees and Stateless Persons, 1951, UN doc.A/CONF.2/108/Rev.1,26Nov.1952Recommendation B. Found at http://www.unhcr.ch Accessed September 2005

[54] op cit at note 10 pg 569

[55] Op cit at note 10 Hathaway quotes the following Executive Committee Conclusions.Executive Committee Conclusions Nos. 1 (XXVI),1975,para.f., Conclusions Nos9(XXVIII),1977;24(XXXII),1981;84(XLVIII),1997;85(XLIX),paras.u-x;88(L),1999.

2.3.3 The Handbook:

The above mentioned recommendation is reproduced and elaborated in the Handbook on Procedures and Criteria for Determining Refugee Status. [56] The Handbook reiterates (at paragraphs 181 to 188) the following points regarding the unity of the family;

At paragraph 181 reference is made to the Universal Declaration of Human Rights article stating that the family is the natural and the fundamental group unit of society and therefore entitled to protection.[57]

Paragraph 182 restates Recommendation B and Paragraph 183 refers to the fact that whether or not States are parties to the Convention or the Protocol the principle of family unity is observed by a majority of states giving it the status of *opinio juris.*

Paragraph 184 refers to the practice by some states that where the head of the family meets the criteria of the refugee definition, his dependants are normally granting refugee status accordingly to the principle of family unity where the minimum requirement to be a dependant would include a spouse and the minor children. Also that the principle of family unity does not operate only when the family members reach the country of asylum at the same time.

Hathaway[58] states further that although an explicit right to family unity in the refugee context is not found in the Refugee Convention itself the Refugee Convention must be understood in light of subsequent developments in international law, including international treaties and agreements, state practice and *opinion juris.*

2.4 International Jurisprudence:

[56] Handbook on procedures and criteria for determining refugee status, Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, reedited , Geneva 1992
[57] ibid
[58] op cit at note 24 at page 569

In many states, party to the Refugee Convention, there is a long standing jurisprudence affirming the principle of family unity.

In Belgium, in the case of *Tshisuaka and Tshilele v. Belgium*,[59] 3rd Chamber, ref. the Belgian *Conseil d'etat* refused to expel the spouse of a Congolese asylum seeker on the grounds of family unity. Several other European Union countries have also accepted the principle of family unity as a fundamental human right for everyone including refugees.

However according to the Australian perspective, [60] the absence of any provision relating to family unity or family reunification in the Convention suggests that the founders were not prepared to accept unconditional obligations relating to the families of refugees. The Convention's founders regarded these issues as ultimately a matter for the judgment of the country of refuge, to be determined mainly by national asylum and immigration law and policies relating to admission criteria within the framework of international law.

The Australian Courts have similarly used this conservative approach. Gummow J of the Australian High Court in *Applicant A v MIEA & Anor*[61] noted that ;

The predominant view, including that of the Supreme Court of the United States in *Sale v Haitian Centers Council*[62] and the House of Lords in *T V Home Secretary*[63] is that decisions to admit persons as refugees to the territory of member states are left to those states. In the preparation of the Refugee Convention only a limited consensus was reached and expressed Recommendation D

International cooperation in the Final Act[64] states that:

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[59] *Tshisuaka and Tshilele v. Belgium*,[59] No. 39227 (Apr.2,1992), reported at (1992) 68 *Revue du droit des estrangers* 66. Found at assets.cambridge.org/052183/4945/frontmatter/0521834945_frontmatter.pdf Accessed September 2005

[60] Interpreting the Refugees Convention – An Australian Perspective at 178 ; Found at http://www.immi.gov.au Accessed December 2005

[61] *Applicant A v MIEA & Anor* (1997) 190 CLR at 225

[62] *Sale v Haitian Centers Council* [(1993) 125 L Ed 2d 128]

[63] *T V Home Secretary* [(1996) AC 742]

[64] op cit at note 31

"governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement."

## 2.5 Regional Instruments: African Standards

Human rights standards in the context of Africa are enshrined in the *1969 African Charter on Human and Peoples Rights*.[65] Of importance is that the Charter covers economic, social and cultural rights as well as civil and political rights. Specific mention is made of the family in article 18 stating that the family is the natural unit of society and as such should be protected by the state.[66]

Also of note is the 1990 *African Charter on the Rights and Welfare of the Child*[67] it extends state obligations to include specific protection for refugee children. Article 23 of this Charter specifically provides for the protection of refugee children. In addition it reaffirms the importance of family unity and obliges states to undertake efforts aimed at family reunification.[68]

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[65] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986: Found at http://www1.umn.edu/humanrts/africa/afchild.htm. Accessed March 2006

[66] ***Article 18***

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

[67] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.Found at http://www1.umn.edu/humanrts/africa/afchild.htm Accessed March 2006

[68] Article 23: Refugee Children

2.5.1 The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter, the "OAU Convention")

Of utmost importance in terms of refugee protection is the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*[69], known as the OAU Convention. This Convention must be viewed in relation to human rights instruments such as the *African Charter on Human and Peoples Rights* mentioned above. The obligation of states to receive and secure refugees may arguably extend to all OAU countries, regardless of whether they are signatories to the 1969 Convention.

The drafters of the OAU Convention sought to complement rather than replace the 1951 Convention. This is reflected in Articles 9 and 10 of the Preamble[70], which stress that

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

2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

4. The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused."

[69] Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, *entered into force* June 20, 1974, Ratification Found at http://www1.umn.edu/humanrts/instree/ratz2arcon.htm Accessed March 2006

[70] Preamble of OAU Convention

Article 9.

Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,

the 1951 Convention constitutes the basic and universal instrument relating to the status of refugees (Article 9 Preamble). Cognizant of the political climate in which the Refugee Convention was drafted, the drafters of the OAU Convention sought to de-politicize the issue of refugee crises as well as the concept of asylum. This is reflected in Article 2(2), which states: The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State. Moreover, Article 2(6) states that for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin. This provision was intended to discourage the setting up of refugee camps on borders, thereby increasing tensions and friction between the sending and receiving states.

In relation to other protective instruments, the OAU Convention is somewhat lacking in some areas, however the same standard of interpretation that applies to the Refugee Convention should apply to the OAU Convention. The OAU Convention is also not an isolated body of law and similarly the higher standard should apply if there is a clash between the OAU and other regional human rights documents. Also, if the OAU Convention is silent then the other regional instruments should operate.

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Article 10

Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa,

## CHAPTER THREE:

## FAMILY REUNIFICATION AND INTERNATIONAL LAW:

### 3.1: Family Unity distinguished from Family reunification

The right to marry and to found a family implies the right to live together as a family.[71] International law, therefore, has established the right to family unity. This is especially relevant with regard to refugees, to the extent that families are often separated during flight. Many refugees are forced to leave family members behind in their country of origin and to then seek reunification once granted refugee status in the asylum state. In the context of International Refugee Law, the right to family reunification may be qualified primarily because it intersects with the right of sovereign states to control the entry of non-nationals into their territory but it is not entirely defined thereby.[72]

The right to marriage and family as established within international human rights law entails contrasting obligations upon states.[73] On the one hand, states are obliged to refrain from taking action that disrupts families and it is now widely recognised that states must take positive steps to reunite families if they have been separated especially if they are unable to reunite elsewhere[74].

Given that the right to family unity is established in International human rights law and international law[75], and therefore applies to all human beings regardless of citizenship or status, provisions, or lack thereof within international refugee law cannot limit its scope[76]. Indeed, the Refugee Convention does not incorporate the principle of family unity. Nevertheless, UNHCR notes that most states respect the principle and that a failure to allow for family reunification and thereby for family unity, is interpreted as a violation of the right as opposed to evidence that the right does not exist.

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[71] op cit note 38 art 23 of the ICCPR
[72] Hathaway at op cit at note 24 at 576
[73] op cit at 48
[74] op cit note 24 at 576
[75] ibid
[76] ibid

It can therefore be strongly argued that the '[r] efusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities of enjoying the right elsewhere.'[77]

The right of unity is thus often distinguished from the right to reunification, which extend protection more specifically to families which have been separated and wish to reunite. [78] Few international human rights instruments specifically deal with the right to family reunification, among these, the Final Act of the Helsinki Conference.[79] Anderfuhren- Wayne, quoting Plender notes that at least among some industrialised states, there is a policy of allowing admission of persons who have been separated from their families("where reasonable") noting that States are under a political and moral obligation to conduct their immigration policies so as to avoid unnecessary disruption to family life.[80] It can be argued that refusal to allow family reunification may be considered an interference to the right to family unity especially where there is no realistic possibility of the family enjoying that right elsewhere. States should facilitate admission to their territories, at least where it would be unreasonable to expect the families to be reunited *elsewhere.*

3.2 The Elsewhere Approach:

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[77] UNHCR, ' Summary Conclusions on family Unity'. Global Consultations on International Protection, Geneva Expert Roundtable 8-9 Nov.2001, organised by the UNHCR and the Graduate Institute of International Studies, para.5. Found at http://www.unhcr.bg/global_consult/family_unity_en.pdf Accessed September 2005

[78] C.S Anderfuhren-Wayne, ' Family Unity in Immigration and refugee matters: United States and European Approaches, *International Journal of Refugee law*, Vol 8, Number 3, July 1996 at 349

[79] The Final Act of the Helsinki Conference (1975 )
found at www.osce.org/item/4046.html Accessed September 2005
*(b) Reunification of Families*
The participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character - such as requests submitted by persons who are ill or old.

[80] Op cit note 55

The Elsewhere Approach was largely developed by the European Court of Human Rights[81]. It is an approach which offers support to the plight of refugee families because more often than not refugees cannot be reunited elsewhere but in the country of reception.

According to the Elsewhere Approach expulsion or exclusion of a family member is legitimate if other family members can follow and if this can be reasonably expected of them. A determination of reasonableness involves weighing the advantages and disadvantages to the concerned individual against the interest of the state served by its immigration policy. The criteria adopted by the European Court for Human Rights include amongst others;

- Consideration of one's ties with the State denying entry
- Links with the foreign country
- The economic consequences of moving to another country

The European Court of Human Rights has decided in two non-refugee cases that a state must allow family reunification if it is the only way for a family to achieve family unity.[82]

Whilst the *Gul* case appears to be a narrowing of the right to family reunification because the applicants could reunite elsewhere they were not allowed to reunite in Switzerland in this case, the decision bodes well for refugee family reunification. The facts of the case were the following. The applicant , Mr Gul, the boy's father, had arrived in Switzerland seeking asylum as he feared political persecution in Turkey due to his membership of a party opposed to the government's actions in South East Turkey. However, once granted a humanitarian permit , he dropped his claim for asylum status. His wife who suffered from epilepsy was allowed to join him three years later for humanitarian reasons. The applicants sought to be reunited with their son on the basis that it was impossible for them to return to their son. The government on the other hand

[81] *Gul v Switzerland,* 19th February 1996, No. 53/1995/559/645 and Ahmed v Netherlands, 28November 1996, No. 73/1995/579/665.
[82] ibid

argued that it was possible for them to return and reunite with their son and therefore no Switzerland had obligation to allow family reunion in Switzerland. The family reunification could take place in Turkey.

Although this elsewhere approached has largely been used in terms of immigration matters in the European Union its applicability and value (as stated above) to refugee matters is enormous. Firstly, the refugee family would only request reunification of a family member if it has established itself in the receiving country. Secondly it would have no where else to go and by its very definition not back to its country of origin unless resettlement is an option.

3.3 The Humanitarian Approach:

There are various resolutions stressing the importance of reunification in connection with the principle of unity.The fourth Geneva Convention of 1949[83] devoted considerable attention to the problems 'of families dispersed owing to war' In addition to provisions aimed at maintaining family unity during evacuation the Fourth Geneva Convention provide for mechanisms such as family messages, tracing of family members , and registration of children to enable family communication and if possible family reunification.

Furthermore, in 1981, the UNHCR Executive Committee[84] concluded, with regard to family reunification and refugees, as follows:

> "In the application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated families. It is hoped that the countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family."

Similarly, the conclusions of the Thirteenth Round Table of the Institute of Humanitarian law[85] have stressed reunification in connection with unity:

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[83] op cit at note

[84] Conclusion No.24 (XXXII) Family Reunification, UNHCR Executive Committee, 32nd Session(1981), 1, 5

> " The humanitarian principle of family reunification is firmly established in international practice... This principle is closely linked to the right of the unity of the family which recognises that the family is the natural and the fundamental group unit of society and is entitled to protection by society and the State... [t]here exists different situations where families need to be reunited ,solutions must be reached in accordance with relevant international law and the requirements of the particular situation ."

Family reunification should therefore be considered as a means of implementing the principle of family unity. If a right should be recognised by states concerning the reunion of the family, it is more a right to enter and live in the country of reception or a right to the protection of the family unit rather than a right to family reunification. From the above it is apparent that there is no lack of international standards regarding the principle of family unity rather their implementation is hampered by administrative restrictions.

3.4 The Red Cross:

For many years, the international Red Cross and Red Crescent Movement has played a major role in preserving family unity and integrity , particularly in facilitating the reunification of families dispersed by war or as a consequence of persecution. Various resolutions of the movement's international conferences encourage national societies, governments and international bodies to facilitate family reunification.

Family reunification often begins with the tracing of separated family members. Recommendations of the XXVIth International Conference of the Red Cross and Red Crescent[86] state that national societies should " maximise their efficiency in carrying out tracing work and family reunification by strengthening their tracing and social welfare activities and maintaining close cooperation with the ICRC and government authorities and other competent organisations such as the UNHCR the international organisation of Migration"

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[85] Conclusions on Family reunification, extract from International Review of the Red Cross, Nov- Dec 1988. (formulated at the thirteenth Round Table of the International Institute for Humanitarian Law, San Remo, 6-10 Sept.1988), Conclusions 1,2 and 3. found at http://www.unhcr.ch

[86]

## CHAPTER FOUR: THE CHILD'S RIGHT TO FAMILY REUNIFICATION IN INTERNATIONAL LAW.

### Introduction

In recent years there has been a recognition that unaccompanied and separated children are particularly vulnerable and that states face various challenges in providing such children access and enjoyment of their rights. A General Comment[87] was issued in 2005 motivated by the Committee of the Rights of the Child's observance of an increasing number of children in such situations. There are varied and numerous reasons for children being unaccompanied[88] or separated[89], ranging from persecution of the child or the parents; to international conflict and civil war to trafficking in various contexts and forms , certainly the number of unaccompanied or separated children are a growing cause of concern within the refugee sphere.

In this chapter the rights of children to be united with their families will be examined not only if the parents are granted refugee status but also the rights of children that are recognised as refugees. Some countries prohibit separated children who are recognised as refugees from applying for family reunification.[90]

### 4.1: Different causes of separation:

Different causes of separation have been outlined in the general comment on the treatment of unaccompanied and separated children outside their country of origin.[91]and these have different implications for the child as well as for potential family reunion and

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[87] General Comment No.6(2005) " Treatment of unaccompanied and separated children outside their country of origin" Found at www.unhcr.ch/doc/ Accessed November 2005

[88] Unaccompanied children are children, as defined in article 1 of the Convention of the Rights of the Child, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. According to the UNHCR the term unaccompanied minor rather than orphan should be used .An child is an orphan only if both parents are dead and this requires a careful verification and must never be assumed. Once a child is labelled an orphan adoptions are encouraged rather than focussing on family tracing, foster placement and community support.

[89] Separated children are children, as defined in article 1 of the Convention , who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may therefore include children accompanied by other adult family members.

[90] Op cit note 87 at 4

[91] ibid

long term solutions. Children may have been accidentally separated from their families, abducted or orphaned. They may have run away, or live independently with their parents consent. Some may have become street children. Some may have been sent to their country of asylum by parents who have remained in the country of origin, while others may have been left in the country of asylum by parents who have returned home or resettled elsewhere. In conflict situations children may have been separated from their parents as a result of military recruitment or parent's imprisonment.

## 4.2 An analysis of the Convention of the Rights of the Child; ARTICLE 10

The right to family reunification for minor children and their parents is codified in the Convention on the Rights of the Child.[92]

> 'In accordance with the obligations of States Parties under article 9, paragraph 1 [a child shall not be separated from his or her parents against their will], applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.'

Several elements of this provision are worthy of note.

- First, the explicit link to Convention of the Rights of the Child in article 9 means that the obligation there imposed to ensure the unity of families within the state also determines the state's action regarding families divided by its borders.
- Second, one of the Convention of the Rights of the Child's achievements is the recognition that reunification may require a state to allow *entry* as well as departure.
- Third, children and parents have equal status in a mutual right; either may be entitled to join the other. It is not sufficient that the child be with only one parent in an otherwise previously intact family; the child has the right to be with both parents, and both parents have the right and responsibility to raise the child.

[92] *Convention on the Rights of the Child,* 1989, art. 10(1):

- Also, the obligation on states to deal with reunification requests in a 'positive' and 'humane' manner means, in most cases, an *affirmative* manner.
- That parties shall cooperate with the United Nations to protect and assist a refugee child and to trace the parents or other members of the family of the refugee child in order to obtain information necessary for reunification with his or her family.

While article 10 does not expressly mandate approval of every family reunification application[93], it clearly contemplates that there is at least a presumption in favour of approval.[94] The formulation of article 10 is considerably strongly worded and does not allow much room for significant state discretion, such as 'consider favourably', 'take appropriate measures', or 'in accordance with national law'. Anderwuhren- Wayne[95] asserts that states enjoy extensive discretion but she does not identify the basis for this discretion. States cannot maintain generally restrictive laws or practices regarding the entry of aliens for reunification purposes without violating the Convention of the Rights of the Child.[96]

Goodwin-Gill asserts that reservations made by a small number of states to the reunification provision provide additional confirmation that the Convention on the Rights of the Child indeed imposes a general duty to allow entry for family reunification

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[93] S Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (Martinus Nijhoff, Dordrecht, 1992), p. 206. Found at http://www.equalityrights.org/ccpi/baker/factum.htm Accessed on December 2005

[94] op cit note 1 Jastram quoting P.J. van Krieken, 'Family Reunification', in *The Migration Acquis Handbook* (ed. P. J. van Krieken, T.M.C. Asser Press, The Hague, 2001) p. 123, who acknowledged that article 10 does not 'leave much room for machination and manipulation.'

[95] op cit note at 56

[96] Abram, E.F., 1995. "The Child's Right to Family Unity in International Immigration Law" 17(4) *Law and Policy*. pp. 423-4: 'A state cannot as a matter of law or policy determine that family reunification for a category of sundered families will take place somewhere else in the world, and that family unity will be respected only by ushering the local child or parent to the airport. There is no true observation of a right if that right cannot be realized except abroad. States do not normally have the power to ensure the realization of a right outside of their own jurisdiction. A policy to reject most requests of any category of persons to enter a country for purposes of family reunification, except under restrictive conditions or exceptional circumstances, violates the Convention.' Found at http://www.migrationinformation.org/Feature/display.cfm?ID=118 Accessed on December 2005

purposes.[97] While it may be argued that state practice is not uniform, outright failures to allow reunification are more properly seen as violations of the right, not as evidence that there is no right.[98]

ARTICLE 9 : Separation through deportation

Protection for families threatened with separation through deportation is found in the Convention on the Rights of the Child , which obliges states to enable all parents and minor children who wish to live together to do so.[99]

> ***Article 9***
>
> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, ***deportation*** or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the

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[97] G.S. Goodwin-Gill, 'Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities', in *Children on the Move: How to Implement Their Right to Family Life* (eds. J. Doek, H. van Loon, P. Vlaardingerbroek, Martinus Nijhoff, The Hague, 1996), p. 103. Found at www3.oup.co.uk/reflaw/hdb/ Volume_16/Issue_03/pdf/160336.pdf – Supplemental Accessed on December 2005

[98] They are certainly treated as such by the Committee on the Rights of the Child, which has used peremptory language in this regard, recommending for example that Australia introduce legislation and policy reform 'to *guarantee* that children of asylum seekers and refugees *are* reunified with their parents in a speedy manner' Concluding observations of the Committee on the Rights of the Child: Australia, UN doc. CRC/C/15/Add.79, para. 30 (10 Oct. 1997).

[99] *Convention on the Rights of the Child,* 1989, art. 9.

> well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

The *only* exception allowed is when separation is necessary for the best interests of the child. In sharp contrast to the International Covenant on Civil and Political Rights, which prohibits only 'arbitrary and unlawful' interference with the family[100], the Convention on the Rights of the Child does not recognize a public interest to be weighed against the involuntary separation of the family. States may thus find themselves in the situation where a deportation may be ordered for a parent for valid reasons but that the deportation may result in the violation of the right of the child to be with the parent.

The Committee on the Rights of the Child has expressed its concern that states must consult the child's best interest before separating a family by deportation[101], and that the principle has attained the status of customary international law.

In the United States case of *Beharry v Reno*[102] the Federal District Court ruled that the government must take into account customary international law principles regarding the best interests of the child in the case of an immigrant man slated for deportation for a criminal offence, who is also the father of a 7 year old US citizen daughter.

The Canadian Court have similarly concluded that a state's interest in deporting a parent must be far more compelling and outweigh the child's right not to be separated.

> "If article 9(1)'s necessity test were fully applicable to deportation, the child's best interests would be the sole consideration for separation. However, the Committee's phrasing of the state's duty to avoid deportation is such that some room must be left for the state to invoke the public interest despite the fact that deportation would not accord with the citizen child's best interests. However, to justify deportation of a parent, a

[100]International Covenant on Civil and Political Rights Art. 17(1).
[101]UN doc. CRC/C/15/Add. 126 (28 June 2000), paras. 30-31. Found at http://www.Unhcr.ch Accessed December 2005
[102] *Beharry v. Reno*, US Dist. Ct., EDNY, 8 Jan 2002, 2002 US Dist. LEXIS 757, (The United States is not a state party to the *Convention on the Rights of the Child*)

state's interests in deporting the parent must be far more compelling than the rights of the child and parent not to be separated."[103]

4.3 A Child's right to family reunification

Finally, as with the right to family unity, experts are almost universally in agreement that there is at present a right under international law to family reunification.[104] It has been characterized as a self-evident corollary to the right to family unity[105] and the right to found a family[106] and has been linked to freedom of movement

There are, in addition, other family reunification principles pertaining specifically to those in need of international protection that have been codified in the Convention of the Rights of the Child[107], and in regional instruments in Africa, Europe and Central America.[108]

In sum, it is now widely recognized that a state is obliged to reunite close family members of a non-citizen on its territory if they are unable to enjoy the right to family unity in their own country, or elsewhere. In addition to near-universal adherence to the binding provisions of the Convention of the Rights of the Child, state practice with respect to family unity is regularly confirmed by the Commission on Human Rights.[109]

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[103] *Baker v Minister of Immigration and Employment* [ S.C.C no 25832]

[104] Summary Conclusions on Family Unity, UNHCR Global Consultations on International Protection Expert Roundtable, para. 1 (8-9 Nov. 2001), found at www.UNHCR.CH.

[105] Executive Committee Conclusion No. 24 (XXXII) 1981, para.1: 'In application of the principle of family unity and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.'

[106] Human Rights Committee, 39th Session, 1990, *General Comment 19*para. 5. Conclusions on Family Reunification, XIIIth Round Table on Current Problems in International Humanitarian Law (1988), International Institute of Humanitarian Law, para. 2.

[107] *Convention on the Rights of the Child*, 1989, art. 22(2).

[108] *African Charter on the Rights and Welfare of the Child*, 1990, art. XXIII(2). European Union *Council Directive* 2001/55/EC, 20 July 2001, on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, art. 15 *Cartagena Declaration on Refugees*, 1984, Conclusion III (13).

[109] Commission on Human Rights resolutions 2001/75 on the Rights of the child, UN doc. E/CN.4/2001/75, para. 11 (c ), Found at http:// www.unhcr.chAccessed on December 2005

**SECTION B:**

## CHAPTER FIVE: A COMPARATIVE ANALYSIS OF FAMILY REUNIFICATION UNDER THE DOMESTIC LAW OF CANADA AND AUSTRALIA:

**Introduction:**

The author submits that it is necessary to undertake a comparative study not only so that the existing legislation may be interpreted with an understanding of existing international jurisprudence on the matter but also so that the implementation programmes can be used to inform a South African model.

South Africa's Constitution[110] provides in Section 39:

> "When interpreting the Bill of Rights, a court . . . must consider international law; and may consider foreign law."

This approach is evident in the jurisprudence of the Constitutional Court as Justice O'Regan put it, writing separately in *Kaunda v. President of the Republic of South Africa*:[111]

> "[O]ur Constitution recognizes and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law." Even more so than when the United States was a new nation, the USA today, no less than South Africa, is subject to the scrutiny of "a candid World."

Furthermore, Section 233[112] of the Constitution instructs us to:

> "When interpreting . . . legislation, every court must prefer any reasonable interpretation . . . consistent with international law over any alternative interpretation . . . inconsistent with international law."

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[110] Act 108 of 1996
[111] *Kaunda v. President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC) at 222
[112] Op cit 111

Professor Jackson[113] from Georgetown University in the United States usefully identified three responses to transnational sources: resistance, convergence, and engagement. According to him South Africa's apartheid regime fit the "Resistance Model," an approach that "relishes resistance . . . to outside influence." Professor Jackson suggested that South Africa's 1996 Constitution fits the "Convergence Model," in that it "explicitly incorporate[s] international law as a controlling legal norm." But, states Justice Ginsburg from the United States Supreme Court, that perhaps the South African Constitutional Court's jurisprudence comes closer to the third approach, the "Engagement Model." That Model comprehends transnational sources as a means to test "understanding of one's own traditions and possibilities by examining them in the [reflected light cast by other legal systems]."[114]

In light of the above the author submits that it is necessary to undertake a comparative study so that it may inform implementation of family reunification of refugees in South Africa. Furthermore that Canada and Australia were selected as countries to compare because of the fact that both countries in there interpretation of the law are bound by precedent and hence the development of the law via case-law.

## 5.1 FAMILY UNITY AS A CONCEPT IN CANADIAN LAW:

Introduction:

The principle of family unity currently occupies a very ambiguous position in Canadian law. Family unity is not explicitly stated in the Immigration and Refugee Protection Act (2001, c27)[115] and many applicants have brought the matter before the court proposing that the principle of family unity exists even though it is not expressly stated in the Act.

### 5.1.1 An analysis of the Case-Law

[113] Harvard law Review , November 2005
[114]Ruth Bader Ginsburg Associate Justice "A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication Constitutional Court of South Africa February 7, 2006 Found At http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html Accessed April 2006
[115]Immigration and Refugee Protection Act(2001, c27) Found at http://www.cic.gc.ca/english/irpa/index.htmlAccessed on September 2005

The case of *Cheung v Canada (Minister of Employment and Immigration)*[116], is frequently cited as authority for the proposition that family unity is an entrenched and accepted principle in Canadian Refugee law. However the Court considered the minor child to be eligible for refugee status in her own right as a member of a particular social group, that is, *second children* rather than by virtue of the family unity principle[117]. The Cheung case could therefore not be held to lay down the principle for family unity in Canadian refugee law.

> The definition to which Canada subscribes by virtue of it being a signatory to the United Nations Convention Relating to the Status of Refugees ( Geneva, July 28,1951),
>
> "Convention refugee" means any person who
>
> (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (i) is outside the country of the person's nationality and is unable or by reason of fear, is unwilling to avail himself of the protection of that country, or
>
> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and
>
> (b) has not ceased to be a convention refugee by virtue of subsection (2)[118]

No mention is made of the principle of family unity in the current definition and the Federal Court in *Castellanos v Canada*[119] held that to include the principle would be to extend the definition which it was not prepared to do.

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[116] *Cheung v Canada (Minister of Employment and Immigration)*[116], [1993] 2 F.C. 314 (C.A) at page 325

[117] 'The main issue in this appeal is whether a well-founded fear of forced sterilization under China's one-child policy may constitute a well-founded fear of persecution for reasons of membership in a particular social group. Also at issue is whether a second child, born in contravention of the one-child policy, may qualify for refugee status.'

[118] Op cit note 10

The facts in the Castellanos case are as follows;

Mrs. Natalia Monsievich and her two daughters, Irina and Natalia, aged 19 and 6, respectively, arrived in Canada on September 3, 1992 along with her husband and their father, Mr. Amador Pena Castellanos. They were returning from a vacation in the wife's country of origin, the Ukraine, when they elected to disembark the plane during a routine refueling stop on their way to Cuba and make a refugee claim before the Canadian authorities.

Mr. Castellanos was granted refugee status under the *Immigration Act*, R.S.C., 1985, c. I-2 (the Act). He had Cuban citizenship as did his daughters, applicants in this matter. His ground for claiming such status was a fear of persecution by reason of his political opinion, which was at odds with that of the Cuban government. Apparently, following the reawakening of the Union of Soviet Socialist Republics (U.S.S.R.) under the impetus of *glasnost*, Mr. Castellanos had attempted to propagate these principles to his co-workers at the Cuban Ministry of Transport. Following these actions, he was demoted from his job and two suspicious automobile accidents occurred that led him to believe that attempts were being made on his life by government agents.

With respect to Mrs. Monsievich and her two daughters, the situation was not as straightforward because there was no evidence that they were ever the subject of persecution by the Cuban authorities or otherwise.

Mrs. Monsievich was born in the Ukraine in 1951, and moved permanently to Cuba after she married Mr. Castellanos in 1974. There she obtained a special permit which allowed her to stay in Cuba (renewable every five years), but never actually obtained citizenship.

Throughout this period, she retained her U.S.S.R. passport. She has never been a citizen of the Ukraine, as this was impossible under the political organization of the now-defunct U.S.S.R. Once Mrs. Monsievich arrived in Canada, she did not pursue

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[119] *Castellanos v. Canada (Solicitor General) (T.D.)*
[1995] 2 F.C. 190, IMM-6067-93, Date: 1994-12-15

Ukrainian citizenship with much enthusiasm, but she did make several inquiries that led to negative responses from the Ukrainian General Consulate in Toronto.

The applicants in *Castellanos* argued that paragraphs 182 to 185 of the UN Handbook on procedures and criteria for determining refugee status[120] imports the concept of family unity into Canadian Law. The Handbook, while not formally binding on signatory states which are members of the executive committee of the UNHCR, including Canada, has been relied on by the Courts.

However the Court in *Castellanos* held that Paragraphs 182 to 185[121] has only persuasive value in establishing family unity as a concept in Canadian law and that it is not mandatory and that the onus is on the person seeking to be recognised as a convention refugee to prove that he or she is a person falling within the scope of the definition.

Since *Castellanos* has generally rejected the principle of family unity in the context of refugee status determination it has resulted in rather distressing decisions. There are cases where one spouse and a dependant child were granted status but the other parent was not[122], and even where a parent was granted refugee status while the dependent children were not[123]

It is submitted that such decisions are not within the spirit of international human rights law and hence should not be followed. It not only violates the best interest of the child which is already part of International Customary Law but also principle of family unity which is a well-established principle in International Law as argued above.

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[120] op cit at note 33
[121] See annexure 1 below
[122] Y.S.C.(Re) (1998) CRDD No. 26 (Quicklaw)
[123] I.P.A.(Re) 1999) CRDD No.286 (Quicklaw)

### 5.1.2 Family as a Social Group

It has also been argued that since the family is a natural social group members of this group should be given derivative refugee status on the basis that they are *members of a particular social group.*[124] It is submitted that derivative status supports the principle of family unity.

Even though *social group* is not defined by the Refugee Convention or any other related refugee document there is sufficient jurisprudence in Canadian law to establish the family as a social group.

The Supreme Court of Canada decision in *Canada (Attorney General) v Ward*[125] is cited as the leading Canadian Case on this issue . The new test for social group is defined in this case:

The three possible categories are identified as definition for membership of a social group.

- Groups defined by an innate or unchangeable characteristic;
- Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should be forced to forsake the association; and
- Groups associated by a former voluntary status, unalterable due to its historical permanence.

"The Court in *Castellanos* held that when considering such associations or social groups,

> "one cannot imagine a closer knit or easier unit to conform than the family. This is especially true with respect to immediate family, being a person's sons, daughter, parents and any other blood relative they permanently reside with. There can be absolutely no doubt that the family unit forms a social group which is protected against persecution by the Act."

[124] op cit note 110
[125] Ward at 689

However the applicants in Castellanos even though they may be defined as members of a particular social group, in this case family, must be able to show they have a fear of persecution on the basis of their membership to the family group before they will be granted status. In my opinion this violates the principle of family unity. Even if the family members cannot show a fear of persecution, the recognised refugee who finds himself in the country of asylum (in this case Canada) will not be able to unite with his family unless they are able to so in Canada or another third country.

### 5.1.3 Family Unity nexus to grounds for persecution

#### 5.1.3.1 Indirect Persecution and Family Unity

The concept of "indirect persecution" was also explored by the Canadian Courts as a basis for refugee status and simultaneously to maintain the unity of the family. The applicants hoped to use this concept as strategy to realise family unity.

It was described by Mr. Justice Jerome in the *Bhatti*[126] judgment as follows:

> "The concept of indirect persecution is premised on the assumption that family members are likely to suffer great harm when their close relatives are persecuted. This harm may manifest itself in many ways ranging from the loss of the victim's economic and social support to the psychological trauma associated with witnessing the suffering of loved ones".

The theory is based on a recognition of the broader harm caused by persecutory acts. By recognizing that family members of persecuted persons may themselves be victims of persecution, the theory allows the granting of status to those who might otherwise be unable to individually prove a well-founded fear of persecution.

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[126] *Bhatti v Canada* (Secretary of State)(1994), 25Imm.L.R (2d) 275(F.C.T.D.) at 278-279

Jerome A.C.J. also concluded that the scope of the principle was such that it could extend beyond traditional grounds of persecution to emotional support or economic considerations.

However, in the *Pour-Shariati*[127] matter, Mr. Justice Rothstein said that "the *Bhatti* approach to indirect persecution unjustifiably broadens the Convention refugee basis for admission to Canada, to include persons who do not have a well-founded fear of persecution in their own right."

He held further that such an extension of the so-called principle of indirect persecution is unacceptable as lack of economic, monetary or emotional support do not constitute a ground for being found a Convention refugee. It would therefore be surprising if the principle of indirect persecution could subsume such a concept.

He therefore went on to hold that "indirect persecution does not constitute persecution within the meaning of the definition of Convention refugee."

The Court of Appeal thus dealt with and dismissed the appeal in *Pour-Shariati*, and in so doing it has squarely rejected the concept of indirect persecution that was articulated in *Bhatti*: "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed."[128]

A claim based on indirect persecution may be distinguished from one based on the principle of "family unity". That principle is discussed in paragraphs 182 to 185 of the UNHCR *Handbook*. The family-unity claimant does not attempt to satisfy the definition's persecution requirement by pointing to side-effects. Instead, he or she takes the position that if the directly-attacked individual meets all criteria of the Convention refugee definition, a family member may be recognized as a Convention refugee regardless of whether the family member meets the definition's criteria (i.e., has a well-founded fear of

[127] *Pour-Shariati v. Canada* (Minister of Employment and Immigration)[1995] 1F.C. at 772
[128] ibid

persecution). This is a position which has been rejected as being without foundation in Canadian law.

Canada has clearly not extended the Refugee Convention to incorporate derivative status for family members of recognised refugees. It has evidently not incorporated recommendation B or the handbook which status they have described as persuasive and not obligatory.

Canada does however approach refugee family reunification through two distinct programs, the family class of the Immigration Program and the Refugee resettlement program. Individuals may only sponsor their close family through the Immigration Program but must demonstrate sufficient levels of income and meet certain other criteria.[129] The refugee must for example first obtain permanent residence status, one requirement of which is a valid passport which many refugees do not have and cannot obtain. Family members who are in the host country with the refugee but were not recognised in their own right have no legal status during the administrative processing period, so for example children are not entitled to attend school and if the deadline for refugee family unity processing is missed the only recourse is to the regular immigration procedures which are restrictive. Medical conditions may be imposed, and security checks must be conducted.

The cumulative effect of these onerous bureaucratic procedures and in some cases unrealistic requirements are that refugees wait many years for families reunification, or even for secure status for family members with them. Another consequence is that children "age out"[130] and are thus no longer eligible, thus creating further obstacles to family reunification.

The resettlement program has two streams, one where the Canadian government is assisted by UNHCR and the other private sponsorship through the voluntary sector.

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[129] op cit at note 109
[130] Jastram (UNHCR Working paper)

Under the refugee resettlement programme, there is a mechanism to bring fragmented families together, even when their whereabouts may be still uncertain at the time the refugee is resettled. This "one-year" window period allows for non-accompanying immediate family members to reunite with the principle applicant. The one-year window period only allows for the nuclear family and not de facto dependants.

Under the Immigration and Refugee Protection Act the definition of family has been extended to include de facto family members.[131]

For the resettlement program Canada no longer excludes members on the basis of medical conditions that would be demanding in terms of health and social services.

## 5.2 THE AUSTRALIAN APPROACH TO REFUGEE FAMILY UNITY;

### 5.2.1 Family unity and family reunification – not an obligation

The Australian view is that family unity and family reunification are not obligations imposed by the Refugee Convention on state parties, but are rather matters for states to decide at their discretion in accordance with international law. The Australian view is that 'right' to family unity, that whilst important, permits careful and flexible interpretation by the states in accordance with their overall responsibilities.[132]
French J,[133] in *Ruddock v Vardalis* stated that;

> " The power to determine who may come to Australia is so central to its sovereignty that it is not supposed that the government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community , from entering."

[131] op cit note 109
[132] Interpreting the Refugee Convention – An Australian perspective; Department of Immigration and Multicultural Affairs, Canberra; published 2002. pg 177.
[133] [2001] FCA 1329 at 193

International law does not define a family, at minimum, it consist of the 'nuclear family' of husband and wife, and their dependant children. Australia's criteria is more generous. The criteria for defining the family groups, are set out in the migration regulations[134]

Until 1997 refugees ( who entered with authorisation) wishing to sponsor family members were required to be settled in Australia for at least two years, since 1997 and the introduction of the 'split family'[135]( a family who did not all enter Australia at the same time) provision a person granted refugee status is provided access to family reunification. They may propose immediate family members for entry under the Humanitarian program and immediate family is set to include spouses, dependent children, or parents where the child proposing the parent's entry is not yet eighteen.[136]

Australia however bars family reunification for a period of two and a half years, even with spouses and minor children, for a recognised refugee who entered Australia without authorisation. If these refugees visit a third country during this period they can lose their right to re-enter Australia. This policy is an infringement of International Treaty obligations and only debatably effective.

Resource constraints also had an impact on Australia's family unity policy. Australia is clearly concerned at the prospect of additional cost posed by arriving family members. In

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[134] Regulation 1.12
a family unit is;
(a) a spouse of the head of the family; or
(b) a dependent child of the family head or spouse of the family head; or
( c) a dependant child of a dependant child of the head of the family or a spouse of the family head; or
(d) a relative of the head of the family or of a spouse of the head of the family:
(i) does not have a surviving spouse or any other relative ( other than the family head) able to take care for that relative in the relevant country; and
(ii) is usually resident in the family head's household; and
(iii) is dependant on the family head; or
(e) a relative of the family head or spouse of family head who;
(i) has never married or is widowed, divorced or separated; and
(ii) is usually resident in the family head's household; and
(iii) is dependant on the family head.

[135] Migration regulations

[136] op cit at note 105 at page 195.

addition Australia has placed a bar on entry of all persons unless they have met the health criteria. The health criteria are said to be designed to protect the Australian community from public health risks and from significant drains on the state's health budget.[137]

With regard to unaccompanied minors Australia[138] endorses the position the family reunification that the primary aim for unaccompanied minors should be family reunification and that formal refugee status determination should not be the automatic response when dealing with children. The application of the principle of best interest may even facilitate an unaccompanied minor's return to his country of origin or country of first asylum.

Australia's view is thus that the Refugee Convention does not contain provisions relating to the unity of the family or family reunification and since in their opinion International law does not recognise a substantive right to family reunification refugees do not have an express right to family reunification in the country of refuge.

5.2.2 The Refugee Council of Australia;[139]

The refugee Council of Australia is however concerned that the current policies and practices are inconsistent with the protection of family unity and the promotion of family reunification.[140] These are

- Exclusion on health grounds[141]

The case of the Pakistani man who set himself alight outside Parliament House in Canberra and then died of multiple injuries drew stark attention to the issue of medical testing and family reunion. For many years this man had been trying to bring his family to Australia but the application was rejected because one of his children was mentally impaired. For refugees, the decision to exclude a close family member on health grounds

[137] Op cit at note 105 at pg 195
[138] Op cit at note 105 at pg 199
[139] Status of RCOA
[140] RCOA discussion paper on family unity and family reunification obligations in relation to family unity. August 2001 found at http:// www.refugeecouncil.org.au/html/position_papers
[141] The Sydney Morning Herald, 3/4/01 Found at ; http://www.wsws.org/articles/2001/apr2001/imm-a18.shtml

can mean a lifetime of separation for that family. The Minister of Immigration refused permission "on the grounds of substantial health costs to the Australian Community"

- Narrow interpretation of family[142]

An Ethiopian man who resettled in Australia only made reference to his children of the current wife omitting daughters from a previous union. When his former wife died he sought to bring his daughters to join him. Because of his original omission the paternity was challenged. DNA established that one of the girls was his but not the other. The daughter who came to Australia grieves for her sibling and they the other in Ethiopia cannot understand why she was abandoned by the man she believes to be her father.

- Proof of relationship
- Restrictions on family unions for holders of temporary protection visas.

It is clear from the above that Australia has not balanced its right to sovereignty with that of the unity of the family. It appears further that Australia has deliberately introduced various onerous requirements to keep "foreigners" out of their country regardless of the hardships suffered by individuals or the fact that it had violated international law . A case in point would be the Pakistani child who was able to reunite with her father because of her illness. Even though Australia cited limited resources as their reason for exclusion without having explored whether the father would have been able to bear the burden of his daughter's health costs himself.

Similarly Canada's family reunification policy is particularly onerous to refugees and it is suggested that South Africa should follow neither country. Instead South Africa should independently consider its obligations under international law as well as decisions already reached by the Constitutional Court. This will be elaborated on in the next section.

[142] ibid

## 5.3 FAMILY REUNIFICATION WITHIN THE RESETTLEMENT CONTEXT

Introduction

Family reunification within the resettlement context is explored in this section particularly because it is not an option available to South Africa. Currently, there are eighteen countries that cooperate with UNHCR[143] in its resettlement programme. Resettlement is a durable solution in situations where the country of refuge is unable or unwilling to provide effective protection to the refugee. The resettlement programme has proved at the same time to be an effective, albeit expensive, solution in the reunification of families dispersed not only because of war but also because of restrictive policies adopted by states in terms of their family reunification programmes.

### 5.3.1 Cooperation with UNHCR

Resettlement is a powerful tool for family reunification, in some cases bringing together family members who have been stranded in different countries of transit or asylum, or have been unable to leave the country of origin. Most of the eighteen countries that cooperate with UNHCR through resettlement programs for refugees will accept an entire household unit together from a country of first asylum or, in limited cases directly from countries of origin[144]. Some resettlement countries are more flexible than others about accepting non-traditional or complex family structures, going beyond the nuclear family.

Provided that all the members are included on the resettlement application form ( whether or not they are then present in the same country as the principal applicant for resettlement), UNHCR finds that there are not normally any difficulties with family members joining resettled relatives, even at later stages.

[143] op cit
[144] ibid

UNHCR has outlined five guiding principles to protect family unity and identified some of the key areas in improving family reunification opportunities for refugees which are to be resettled.[145]

- The family is the natural and fundamental group unit of society, and is entitled to protection by the states.
- The refugee family is essential to ensure the protection and well-being of its individual members, and as such its protection is within the mandate of the Office.
- The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific.
- Humanitarian considerations support family reunification efforts.
- The refugee family is essential to the successful integration of resettled refugees.

It is understandable why the UNHCR resettlement program is the preferred durable solution for refugees, as opposed to voluntary repatriation and local integration being favoured by UNHCR. The resettlement program has been able to effectively step in situations where resettlement countries have overly restrictive reunification procedures. One such example is the case of an Iraqi man now resident in Australia. He was a high profile military engineer, who because of his opposition to the Hussein regime was forced to flee. He arrived in Australia where he was granted protection but a temporary protection visa only because he arrived in Australia in an unauthorised fashion. This made him ineligible to sponsor his family. His wife and children were in Jordan and continuously pursued by Iraqi officials. UNHCR identified the family as in immediate danger and therefore an immediate need for resettlement. Not only was the wife and children removed from immediate danger, the family was also reunited , however only by means of the resettlement program.. [146]

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[145] Family Reunification in the context of resettlement and integration; Annual Tripartite Consultations on resettlement Geneva, 20-21 June 2001 found at www.
[146] op cit at note 27 above.

5.3.2 Benefits:

The paper[147] delivered at the Annual Tripartite consultations on resettlement has reinforced the principles expressed at the International Conference on the Reception and Integration of Resettled Refugees (ICRIRR).[148] It describes the benefits of family reunification, not only for the refugees themselves but also for the resettlement countries that draw on their successful establishment.

The principles at the ICRIRR expresses the view that refugees who are separated from close family members may be prevented by their distress and preoccupation from devoting themselves fully to building a new life in the country of resettlement. " The positive corollary is that a unified family is the strongest and most effective support system for a refugee. It enhances integration prospects and lowers social cost in the long term."[149]

[147] Ibid
[148] John Fredericksen, 'Protecting the family:Challenges in implementing policy in the resettlement context', background paper prepared for the (ICRIRR)2001
[149] ibid

## SECTION C: PROPOSALS FOR SA

## CHAPTER SIX : South African Refugee law

Introduction

The Refugees Act of South Africa [150] reflects the principles contained in various international instruments dealing with refugees.[151] The 1951 United Nations Convention specifically obliges states parties to grant refugees either the same treatment as nationals of that state or, as a minimum, "the most favourable treatment accorded to nationals of a foreign country in the same circumstances"[152] in respect of a variety of different rights.

The 1969 OAU Convention is less specific, but does commit member states to;

> "use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."[153]

Both conventions state that their provisions shall be applied without discrimination. The Refugee Convention at Article 3 states the "the contracting state shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. The OAU Convention at Article IV states that member States "shall undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions."

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[150] The Refugee Act 130 of 1998

[151] According to the preamble, the Act is meant to give effect to the following international instruments to which South Africa has acceded: the Convention relating to the status of refugees (1951) ; The Protocol relating to the status of refugees (1967) ; The OAU Convention governing the specific aspects of the refugee problems in Africa(1969)

[152] Art 7

"EXEMPTION FROM RECIPROCITY

Except where this convention contains more favourable provisions, a Contracting state shall accord to refugees the same treatment as is accorded to aliens generally."

[153] ArticleII

## 6.1 The Principle of Family Unity and South African Law

Except for section 28 of the South African Constitution[154] which describes a child's right to family care, there is no specific right to family in the Constitution or any other statute in South Africa.

However, in a ground breaking judgment, *Dawood v Minister of Home Affairs*[155] the Cape High Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage and family life. The Constitutional Court confirmed the approach and held that the Constitution indeed protected the rights of persons to freely marry and raise a family.

> "further, that s 25(9)(b) of the Act also fell foul of the right to human dignity protected in s 10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also of such alien spouses. The practical effect of s 25(9)(b) was that, although an alien spouse married to a South African permanent resident was in fact living in South Africa with her or his spouse, the alien spouse could be compelled to leave South Africa and to remain outside the country while her or his application for an immigration permit was being submitted to and considered by the relevant regional committee. *This would result in a violation of the core element of the alien spouse's right to family life and thus a violation of her or his right to human dignity. (my emphasis)* Accordingly, s 25(9)(b) also constituted an infringement or a threatened infringement of the South African permanent resident spouse's right to human dignity.[156]

## 6.2 An analysis of the Refugees Act 130 of 1998

Even though the Refugee Act is silent with regards to family reunification as are the Regulations that accompany it, it is submitted it may not be necessary for refugees to invoke international instruments [157]for the reason that in terms of the South African Bill

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[154] Children
28 (1) Every child has the right –
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

[155] *Dawood v Minister of Home Affairs* 2000(1) SA 997 ( C)

[156] *Dawood v Minister of Home Affairs Constitutional Court Case* (At 1040B - E and G - I.)

[157] J De Waal ; The Bill of Rights handbook ; Juta and Company 2001 at 372

of Rights[158], once inside South Africa, aliens are entitled to the same rights available to *'everyone'*. [159]

Unlike the Immigration and Refugee Protection Act of Canada, the South African Refugees Act includes dependants of recognized refugees as being refugees themselves in section 3(c).[160] South Africa thus affords derivative status to the dependants and immediate family of the recognised refugee. It is submitted that this approach is the preferred approach especially in the light of the fact that the granting of refugee status was always meant to be a form of surrogate protection. The host country should strive to provide protection to the refugee not just by physically protecting them from their persecutors, that would be minimum protection, but also so that they may live in dignity.

The definition of *dependant*[161] in section1 of the Refugees Act does not stipulate that he or she must be present in South Africa at the time of status determination. There is therefore nothing in the Act which bars a claimant to seek derivative status even if the claimant arrives at a date later than the principal refugee.

The Act refers as well, in section 33, to dependants of recognized refugees and their rights and obligations *in the Republic.* It does not, however, proscribe a method for bringing dependants of refugees across South Africa's borders. There is no existing

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[158] Chapter Two of the South African Constitution : Act 108 of 1996

[159] op cit at 157 (Dawood at 1044 C) and *Johnson v The Minister of Home Affairs* 1997 (2) SA 432 (C )

[160] 3 Refugee status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).

[161] 'dependant', in relation to an asylum seeker or a refugee, includes the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee;

policy or implementation procedure developed by the government even though arguably the right to family unity and the concomitant right to family reunification exist in principle for refugees.

The Act does in its preamble[162] also refer to South Africa's acceptance of its obligations under international law and the "other human rights instruments" to which it is a party. The Act refers specifically to South Africa acceding to the 1951 United Nations Convention and the 1967 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa:

6.3 The 1951 Convention Relating to Status of Refugees:

The Convention was originally adopted as a response to the serious violations of human rights during and after the Second World War with regards to the status of Refugees created by that conflict.[163] It has become the standard international instrument relating to the obligations of states when dealing with refugees in their territories. It is through Article 1 of this convention that the South African Refugees Act takes its definition of a refugee as reflected in section 3(a).

As outlined above, the Final Act of the U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons which adopted the 1951 U.N. Convention states that the conference

> "Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

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[162] Preamble

WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law,

[163] Op cit Hathaway at note 10

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

As an adherent to this Convention and its related documents, it is submitted that the South African government has also accepted this principle as a pillar of its refugee programme.

6.4 The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa:

South Africa is also a party to the 1969 OAU Convention on Refugees. It is from this convention that the definition of a *refugee* in s. 3(b) of the Refugee Act was derived. This convention also reiterates the importance and use of the 1951 Convention of Refugees as well as the 1967 Protocol which modified it.

6.5 South Africa's Obligations under International Human Rights Law

All persons in South Africa share a certain set of basic human rights under international law, regardless of their immigration status. Refugees have, in addition, rights based on international refugee law and the principle[164] that persons should not be returned to a country where they fear persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion, or which they were compelled to leave owing to external aggression, occupation, foreign domination or events seriously disturbing public order. This together with the importance of family unity places an obligation on South to allow for the reunification of refugee families within South Africa.

[164] S33 Refoulement

It is submitted that the definition of a dependant of a refugee as per s. 3(c) of the Refugees Act 130 of 1998 as well as the principle of Unity of the Family in the preamble to the 1951 Convention of Refugees puts an obligation under domestic and international law on the government of South Africa to assist refugees abroad to be reunited with their families who have been granted Recognized Refugee Status in South Africa.

6.6 The Problem:

Family unity / reunification in Immigration law

In South Africa family unity concerns more commonly arise in relation to reunification, rather than refusal to enter at the border. This is because when it comes to immigration rights deriving from the principle of family unity, the situation is unclear. A specific right to enter is not explicitly stated either in the Refugees Act or the Immigration Act.

The nature of a legitimate refugee's flight from persecution or conflict in their country of origin often means that families are often divided. This happens for a number of reasons: Persons seeking asylum often do not have the choice of making sure that the entire family is seeking asylum at the same time. This is often the case with conflict in Africa. (most refugees in South Africa are from other African countries) Factions may attack a village or region without warning causing people to flee. In the confusion, families will often lose track of each other. It is only when they are in safe situations (i.e. countries of refuge, in UNHCR camps, etc.), that they are able to access the services or communicate through friends and family to find where their family has fled to.

However at times families choose to leave their country of origin at different times;

- One member may choose to leave due to the danger to their own family and thus protect them from persecution. Once they reach their country of refuge, they may then decide to bring their family to stay with them. This is often the case when it is the breadwinner who had to leave but still needs to support his or her family.

- Parents may leave their children behind in the country of origin because they are fearful that the voyage to the country of refuge is fraught with dangers (i.e. smuggling across borders, corrupt officials, dangerous people in camps and in city streets). It is when they arrive in the country of refuge that they feel that they can access a government programme (or UNHCR programme) to have their children safely brought to join them.
- Refugees may leave their families behind under the protection of other people, but those situations may change. Children are often left with other relatives or neighbours. If something were to happen to those people, the child is then left without any support. This may lead to a situation where it is imperative to have the children join their parents.

These are only an example of situations where families are divided and need to be reunited.

In South Africa, in the author's experience as practicing refugee rights attorneys, dependants of refugees already recognised as such by the Government of South Africa, do not have entry problems at the borders of South Africa. Once they present themselves at the borders and are able to demonstrate that their family members are recognised refugees in South Africa they are allowed to enter the South Africa and will be given the 14day permit in terms section 23 of the Immigration Act[165] to reach a refugee reception office. The refugee reception office will in turn recognise them as dependants of the recognised refugee and formalise their status as refugees in South Africa.

The problem however arises when dependants who find themselves in third countries or in countries of origin requests to join their dependants in South Africa. Those refugees will then search for legitimate means to bring their families to join them legally. It is in the absence of legal means that people turn to clandestine ways of having their families

[165] s13 of the Immigration Act ... of 2002

join them. This creates the problem of dangerous border crossings, corrupt payments of border officials, and fears of large-scale smuggling cloaked as family reunification.

6.7 Current practice:[166]

In countries like South Africa where no legislation exists UNHCR attempts to establish procedures with the local authorities to find solutions to such issues on a case by case basis. In South Africa, for example, the current practice is to request family reunification via one of UNHCR's implementing partners by detailing the whereabouts as well as proof of family membership of the family members to be reunited with the refugee in South Africa.

The applicant therefore has to be a recognised refugee in terms of UNHCR standards, that is, an individual refugee claim and not an OAU Convention prima facie refugee. (It is submitted that the UNHCR position to assist only recognised refugees in terms of the narrower definition of the Convention cannot be acceptable in South Africa. South Africa has undertaken to recognise refugees in terms of an extended definition and therefore cannot discriminate on that basis.) All documents of proof relation etc has to be forwarded to UNHCR and only once the UNHCR family reunification officer is satisfied that there is a need for family reunification will be application be directed to the Director of Refugee Affairs in South Africa . The Director once satisfied that the application is proper in its entirety will instruct the embassy in the country where the family member to be reunited currently finds him/herself to issue a visa allowing entry into South Africa.

Clearly this is not a sustainable solution , there is no way that the Director of Refugee Affairs can process all family reunification applications or that she can even process it timeously so that the family's concerned do not suffer the separation for longer than needs be. Furthermore, it is impossible to ascertain embassies are aware of refugee law and their rights within South Africa .

[166] This procedure is within the experience of the author as a practising refugee attorney in South Africa

## CHAPTER SEVEN :
## IMPLEMEMTING A HYBRID MODEL

Introduction:

The author therefore proposes a model of implementation for a speedy and humane Family Reunification Programme. The implementation model will require cooperation with the various international and national organisations working with the refugee community in South Africa.

The model would see a procedure set up between the government and international organizations in which the international organizations would support the government's family reunification policy. This model may resemble the way in which UNHCR supports the Department of Home Affairs in the processing of travel documents. In addition to outlining an application procedure the model also outlines various recommendations on all the issues in the context of refugee family reunification as outlined above. Such issues would include identifying the beneficiaries and defining the family.

This model may function in the following way:

- ***Who may apply?***

Only persons granted recognized refugee status in terms of section 3(a) or 3(b)[167] of the Refugee Act may file an application for family members to reunite with them. Applicant's who were granted derivative status in terms of section 3(c)[168] of the Refugee Act therefore may not apply. There is an assumption that a person granted derivative status would not be faced with persecution and therefore may be able to return to join the family members in the country of origin. It is further suggested that the application

[167] op cit at
[168] op cit at note

should be filed within the first two years of the refugee being granted status however the limitation could be waived on humanitarian reasons.[169]

- ***Who is considered a family member***

It is submitted that since aliens, in this case refugees are afforded the same rights as South Africans[170] a broader definition of who is family should be considered. South Africa in terms of its Customary Marriages Act[171] has already accepted a broader definition of family than the nuclear family as espoused above. Certainly polygamous marriages and their offspring are already considered legitimate in terms of the law.

The Constitution also gives effect to customary law, which allows for a broader definition of family.

> "These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality but also freedom of religion and belief. What is more, s 15(3) 100 of the Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages.
>
> As matters stand, the underlying restrictive common-law conception of marriage and the intertwined constitutive formalities of the Marriage Act are not the target of the present constitutional claim. This Court was not urged, nor is it appropriate, to develop the applicable common law or to scrutinise the Marriage Act for constitutional compliance in this case. In any event that was not the basis of the applicant's case.[172]"

South Africa's broader definition of a family is by far a more realistic and more inclusive way of defining a family than either the Canadian or Australian definitions and it is

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[169] such reasons could include the fact that the refugee was unaware that the family was alive and had just recently heard of the whereabouts of the family member

[170] op cit at note 157

[171] Customary Marriages Act 120 of 1998

[172] *Daniels V Campbell No And Others* 2004 (5) SA 331 (CC)

submitted that since it takes account of the diversity of peoples and the evolving nature of the family it should be adopted in a family reunification programme for South Africa.

It is further recommended that the principle of dependency should be employed but that this should be done with the discretion of the government and it should be a factual matter. The discretion should be exercised in line with the 1983 UNHCR Guidelines for family reunification as outlined above. Dependent family members could include; any grandparent, parent, brother, sister, child, grandchild, ward or guardian, who is dependent or suffering from a mental or physical disability to such an extent that it is not reasonable to maintain himself or herself fully.[173]

The dependant relationship between the applicant and the relative must have existed on the date that he refugee was admitted to the Republic of South Africa and the relationship must continue to exist. South Africa should thus adopt a "*broad and flexible interpretation*"[174] of the family, recognizing economic and emotional dependency factors, as well as cultural variations.

It is further noted that it will not be constitutional to put a limit on the number of family members reunited in South Africa. As it stands, it does not appear that the current definition of "dependant" or s. 3(c) refugees in the Refugees Act would allow the Department of Home Affairs to limit the number of children or other dependants coming to South Africa. Nor does it appear that an inability on the part of the Refugee in South Africa to support their family once they arrive could be used as a criteria for denial of reunification.

- ***Where to make the application***

**1) When the family member is present in the receiving State:**

[173] "dependant" as already defined in the Refugee Act 130 of 1998
[174] Jastram and Newland Paper Commissioned by UNHCR as cited above

This has not proved to be problematic in South Africa, in fact this aspect has already been functioning very well and operates on the following basis at the Cape Town refugee reception office.

An application for derivative refugee status is made in terms of Section 3c of the Refugee Act. The refugee presents him or herself to the refugee reception office and requests family reunification with a specific member or members of their family seeking asylum on a derivative basis. The application process includes all information about the family members such as: name, date of birth, relationship etc.

The refugee would generally also have to supply documentary evidence of their relationship with the family member (birth certificates, marriage certificates, etc.) as well as information regarding others which may have legal rights over the family (other parent / guardian). A refugee reception officer would then verify that the family members had been declared on the original intake form.

It is submitted that the application for family reunification should be made at the Refugee Reception Office rather than the Department of Home Affairs Head Office in Pretoria in order to speed up the verification process. Once the information has been verified and the refugee reception officer is satisfied as to the documentary evidence provided, derivative refugee status is generally issued to family members.

What documents need to be submitted?
It will be necessary to submit certain documents for the refugee to show that he or she is eligible to apply for family reunification and that a relationship exists between the refugee and the relative.

- Proof of recognition as a refugee in South Africa

- If petitioning for a spousal reunification, then a marriage certificate should be submitted. If previously married then evidence of termination of the previous marriage.
- If petitioning for a child then proof that the you are the parent, whether married in or out of wedlock, the child's birth certificate
- Any documentary evidence to prove a relationship issued by the relevant authority of the country of origin such as identity documents, evidence of dependency; if applying for a person other than an unmarried child or spouse
- Evidence of cohabitation

If the documents described above are not available from the civil authorities, secondary evidence such as religious instruction records, school records or census records could be used.

If such secondary evidence is not available, the refugee may depend on Regulation 16(3)[175] of the *Refugee Regulations (Forms and Procedures) 2000* which allows affidavits in lieu of such documentation. However such affidavits should overcome the absence of secondary and primary evidence and this could be done by providing sworn statements affirmed by others having personal knowledge of the event.

➢ ***When the family member is present in the country of origin or a third country?***

Applications should be directed to the Standing Committee[176] established in terms of the Refugees Act. All applications should include a cover letter .Once the information has been confirmed and the officer is satisfied as to the documentary evidence provided, the Refugee would then be requested to approach an international organization for family tracking. Family tracking and communication is available through a number of different

[175] *Refugee Regulations (Forms and Procedures) 2000 regulation 16(3)*
[176] The Standing Committee is an independent body established in terms of the Refugees Act section...

international organizations such as the International Committee of the Red Cross, the International Organization on Migration as well as the UNHCR.

The International Organization would be tasked to locate the family members and corroborate their relationship with the refugee. This will require an agreement with that organization to create standards upon which both the government and the international organization agree to work. In order, however for such a programme to be sustainable, it is necessary to work with international organisations such as the International Red Cross (as elaborated above) that already work in the field of family tracking and communication. It is submitted that South Africa for its family reunification programme should adopt the already existing standards and programmes of family tracking as espoused by the International Red Cross.

Once the substantiation process is complete entry visas should be provided to those persons recognised as family of the recognised refugee.

Amendment to Legislation :

For South Africa to be able to adopt the implementation model outlined above South Africa needs to lay a firm foundation for family unity and family reunification in its domestic legislation. Kate Jastram[177] notes that such provisions are an important method of implementing international standards and represent the best practice in a rights-based approach to protection of the refugee family.

In both Canada and Australia where derivative status is not allowed administrative procedures have been designed to ensure family unity. These administrative procedures are however particularly cumbersome as outlined above causing much pain and hardship to these refugee families seeking reunification. It is submitted that South Africa should

[177] op cit note 1 at 23

incorporate family unity and family reunification into its existing refugee legislation as simply and as elegantly included by Bosnia-Herzegovina:

> "Refugee status shall in principle be extended to the souse and minor children as well as other dependants, if they are living in the same household. Entry visas shall be provided to such persons to whom asylum has been granted."[178]

The Refugee Act of Iraq is even more succinct:

> "The person who has been accepted as a refugee in Iraq shall be allowed to bring his/her family members legally recognised as dependants."[179]

**Conclusion:**

The Implementation model outlined above includes many of the realities of refugees in the South African context. It also incorporates South Africa's obligations under International Law and under International Humanitarian Law as well as the Refugee documents outlined above. It is submitted that South Africa being a country on the African Continent is placed to be forerunner in adopting a humane and a realistic programme of Family reunification for refugees. It is further submitted that should South Africa adopt the above model it would have met its International, Regional, Constitutional and Legal obligations with regard to family reunification for refugees. South Africa's obligations in law require that it set up a system so that otherwise law-abiding people will turn to clandestine ways of reuniting with their families. South Africa's obligations in law require that it set up a system so that people are not forced to turn to these methods which can result in violence, suffering and people smuggling.

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[178] ibid
Bosnia and Herzegovina Law on Immigration and Asylum, article 54.
[179] Ibid
The Refugee Act of Iraq, No 51-1971, article 11.3

The 1951 UN Convention remains the central document in terms of international refugee law, but at the same time there is a universal acknowledgement that the document does not cover or deal with the range of issues facing refugees today. This paper has demonstrated how Refugee Law is informed by International Human Rights Law and how it can be used to supplement Refugee law In addition this paper has demonstrated how many academics and courts have very skilfully used International Human Rights Law to broaden the scope of the Convention and also used it to strengthen and enhance existing standards. Despite the many interpretations of international human rights law it has been effectively used to bolster the rights of refugees.

The right to family life is a clear example of protection afforded to refugees that are inadequate under the 1951 Convention. However case-law, treaties, give credence to the family as an essential institution and indicate a clear concern both for its preservation as well as its promotion. Despite the lack of a unified approach in Canada, France Australia or south Africa there is a clear understanding of the right to family unity

Refugee law is without a doubt a compromise between the sovereignty of a state and the humanitarian needs of a group of people perhaps a group more vulnerable than any other in society. Australia and Canada are however implementing this right more so from a sovereignty point than a protection right for families. Even though the right to the reunification of refugee families cannot escape the competing interest of the individual and the state it is submitted that the actual family situation should be the ultimate determining factor if the family life is to be protected. It is submitted that the question of family unity should be looked at from a positive obligation angle rather than a sovereignty position and the humanistic quality in this area of law must be encouraged.

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*CHAPTER VI – THE PRINCIPLE OF FAMILY UNITY*

181. Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

182. The Final Act of the Conference that adopted the 1951 Convention:

> "Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."26

183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a

refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.

186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

187. Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.

188. If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him.