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International law on the protection of child refugees and its domestic implementation: A case study of refugee children in South Africa (1994-2005)

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CHAPTER 1 – INTRODUCTION

1.0 BACKGROUND

The Convention on the Rights of the Child defines a child as "a human being below the age of eighteen years."[1] Statistics on refugees are constantly changing, but at the end of 2004, the refugee population worldwide stood at approximately, 22 million.[2] Approximately, half of the world's refugees[3] are children and a breakdown of the figures from some of UNHCR's[4] operations around the world illustrates these: 134,980 of the 241,040 Somalis hosted in Ethiopia (56%) are below the age of 18; Ethiopia also hosts 34,690 Sudanese children of a total population of 57,210 (60%); there are 140,660 Liberian children of the total number of 239,710 refugees (58%) in Guinea Conakry. In South Africa at the end of 2004, the total number of asylum and refugee population stood at 142, 907, out of this 46,635 (33%) were children.[5]

The figures also exemplify another reality. Where men especially soldiers were once the majority victims and targets of war, today's victims, in terms of refugee flows, are overwhelmingly women and children.[6] The 1996 Graca Machel study, a United Nations report of the impact of armed conflict on children, underscored that children are no longer just innocent bystanders caught in the crossfire of armed conflict, but are subject to calculated genocide, forced military recruitment, gender-related violence, torture, and exploitation.[7] Reports indicate that world-wide; some 9 million children have been killed, injured, orphaned or separated from their parents by conflicts in the past decade. In addition, children at times face a form of persecution more particular to them. As an example, military and armed groups increasingly recruit children, either to take direct part in active hostilities, or to carry out a number

[1] The United Nations Convention on the Rights of the Child (CRC), 1989, Article 2
[2] UNHCR 2004 Global Refugee Trends- Overview of refugee populations, new arrivals, durable solutions, asylum seekers, statelessness and other persons of concern to the UNHCR, June 2005 pp 5-8. The statistics can be sourced at:http://www.unhcr.ch/cgibin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS&id=42b2834744.
[3] The 1951 United Nations Geneva Convention. South Africa became a signatory to this convention in January,1996.The Convention in Article1.A[2],describes a refugee as one who: *as a result of events occurring before 1 January 1951,and owing to a well- founded fear of being persecuted for reasons of race, religion ,nationality, membership of a particular social group, or political opinion is outside the country of his nationality and is unable or ,owing to such fear is unwilling to avail himself of the protection of that country ;or who ,not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.* The 1951 Convention was later amended to include events occurring AFTER 1 January 1951, hence the 1967 Protocol.
[4] UNHCR is the UN agency mandated with the primary care of the world's refugees.
[5] UNHCR 2004 Global Refugee Trends, op cit
[6] Tardjbakhsh, Shahrzad: The Protection of Refugee Children, in *Refugee Survey Quarterly*, Vol 18,No.3,1999.p 63
[7] ibid

of different forced activities, such as acting as porters on dangerous territory.[8] Minors used in support functions - such as porters, messengers, spies and mine sweepers - are in many instances just as vulnerable to danger as those who are actual combatants. Examples range from Liberia, Sierra Leone, Northern Uganda, to Sri Lanka and Thailand.[9] Other types of human rights violations more specifically targeting children also exist, such as female genital mutilation and other forms of harmful traditional practices such as arranged early marriages for girls.[10]

These violations of human rights have to be appropriately recognized as persecution and the international community has an important role to play in the protection of refugee children because of the states' responsibility for protecting the human rights of all persons within its territory, including those of refugee children.[11] UNHCR has often commented about the general trend by some States to attempt to move away from a law- or rights-based approach to refugee protection, including protection of refugee children. With this move comes an undefined humanitarian response to such problems, which in the absence of an international law framework, is susceptible to political discretions, both positive and negative.[12] A human rights approach to the protection of refugee children, on the other hand, speaks in broad terms about the fundamental entitlement of all human beings to live in dignity, and in conditions of social justice. This approach justifies legitimate claims, and the conceptualization of the claim as a human right immediately involves the recognition of state and international responsibility if that claim is denied or violated.[13]

Concerns of refugee children, when conceived of as claims of human rights, are elevated from the realm of state and international good faith to a legal entitlement requiring a specific national and international response.[14] Reference to state obligation, therefore, is made against this background. The rights and needs of refugee children are indeed expressions of their human rights, and have been so formulated in the binding international agreement, namely the United Nations

[8] ibid
[9] Ibid p 64
[10] ibid
[11] ibid
[12] Christoph, B.: ' The Protection of Refugee and Asylum seeking Children: Children; The Convention on the Rights of the Child and the work of the Committee on the Rights of the Child', in ,*Refugee Survey Quarterly*, Volume 17,no.15A p.98
[13] Ibid p.99
[14] Ibid p 100

Convention on the Rights of the Child (the CRC). The CRC has been ratified by all countries in the world with the notable exception of two States, Somalia and the United States. All the Articles of the CRC are equally applicable to refugee children, as Article 2 of the CRC requires that State Parties respect and ensure the rights set forth in the Convention to each child within their jurisdiction, without discrimination of any kind. In addition, Article 22 of the CRC requires state parties to:

> *"take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth" in the CRC.*[15]

1.1 AIM

Since April 2004, refugee children including adolescents under the age of eighteen years, of concern to the United Nations High Commissioner for Refugees, (UNHCR), as indicated above, constitute about half of the refugee population worldwide.[16] At the heart or root of their refugee flight is the infringement and violation of their human rights.[17] Refugee children's dependency on adults makes them particularly exposed to abuse, exploitation and marginalization. They therefore have special needs in light of their dependence, vulnerability and developmental stages.[18] However, although under international law persons under the age of 18 years are universally granted particular rights and protection for their care, there has been inadequate implementation of protection activities for refugee children, including limited accountability by states thereby rendering these instruments ineffectual in most cases.[19]

This study is therefore inspired by interest in human rights advocacy and intends to serve as a torch-light once more on the human rights of the most vulnerable members of our society. South Africa has been chosen as a case study because it possesses one of the most comprehensive legal regimes for the protection of individual rights in Africa. Secondly it will serve as an important indicator as to how countries keep up

[15] CRC 1989 Article 22
[16] Refugee Children: Global consultations on International Protection,4th Meeting, *Refugee Survey Quarterly*, Vol 23, No.2, 29,2004,p.206
[17] Apodaca, C.: "Human Rights Abuses: Precursor to Refugee Flight?" *Journal of Refugee Studies* Vol 70,p.80
[18] Tardjbakhsh, Shahrzad: The Protection of Refugee Children, in *Refugee Survey Quarterly*, Vol 18,No.3,1999.p64
[19] Refugee Children., op cit p206

with their international obligations in terms of implementation, and lastly, South Africa in particular has ratified most of the human rights treaties pertaining to children, compared with other countries in Africa and it will be worth noting the progress it has made within this span of time.

This study's aim is therefore to find out how child refugees of concern to the United Nations Office of the High Commissioner for Refugees, (UNHCR), are treated and protected with respect to their human rights, in their country of destination, South Africa. As a result, the study should establish South Africa's compliance or (non-compliance) with the international law pertaining to refugee children and the impact that this has on the people intended to be protected by these laws, and as a corollary, implications of compliance or non-compliance on the human rights legal regime of refugee children itself .

1.2 RATIONALE

Children are at an increased risk of becoming separated from their families and caregivers in the turmoil of conflict and flight. Unaccompanied children, also referred to as 'unaccompanied minors,' are children under the age of eighteen years who are separated from both parents who by custom are responsible for their care.[20] However there are also children who are accompanied by extended family members but have been separated from both parents or from their previous legal or primary caregivers. Those 'separated' children also face the same risks as unaccompanied children and their needs are also of priority. Unaccompanied children are entitled to international protection under international law. This law includes international human rights law, international refugee law, international humanitarian law and other regional instruments[21] for instance the African Charter on the Rights and Welfare of the Child of 11th July, 1990 to which South Africa is a signatory.

Children require protection as they face increased risks of being trafficked; sexual exploitation, abuse and violence; forced labour; irregular adoption; discrimination, both within temporary care arrangements and in the community; and lack of access to

[20] Assistance to unaccompanied Refugee Minors Report of the Secretary General,in, *Refugee Survey Quartely*, Vol 23, No.2, 29,2004,p.167
[21] ibid

education and recreational activities.[22] Global priority issues relating to refugee children as identified by the Office of the United Nations High Commissioner for Refugees include family tracing and reunification; preventing military recruitment; sexual exploitation, abuse and violence; providing education, detention of the children, and the special needs of refugee adolescents and girls.[23]

However, though there exists in South Africa a good legal regime to ensure that all rights pertaining to refugee children are upheld, it has been alluded by some human rights organisations that, 'serious flaws remain in its implementation'.[24] Also, guarantee of these rights even though they are enshrined in the constitution and in International instruments of which South Africa is a signatory, have not been put into practice by those South African institutions responsible for their promotion and protection.[25] Furthermore, children refugees are regarded as an economic burden by the host population with studies revealing that they face language barrier problems not to mention xenophobic attitudes from the police, government officials and even the local population.[26]

It has been over ten years since the democratic elections of 1994 in South Africa and it has therefore become important to revisit the issue of human rights, granted the country's human rights record during the apartheid political dispensation. This is to establish and explore current debates, issues and controversies surrounding children refugee protection in South Africa as set out in international law. Furthermore, children refugees I feel are an important and special group of persons and it is this precise factor of their vulnerability in terms of their age and plight that they have been chosen as part of this study. The way a country treats the most vulnerable among them in my opinion is a good measure of the country's human rights record, hence a good indicator of a state's compliance or non-compliance with international law. Additionally, debates raised by the enforcers of refugee rights (particularly bureaucracies) have critical implications for compliance with the international refugee instruments and their protection in the new democratic South Africa. This is because

[22] Ibid p167
[23] Ibid pp 171-183
[24] Human rights Watch,p.1
[25] Ibid.
[26] Timgun, Desire: Assisting urban refugee children in South Africa: Humanitarian Challenges to state and non-state actors ,Conference Paper, International Studies Association Annual Convention,2002
http://www.isanet.org/noarchive/desire.html

actors within and outside these circles use these debates to determine, undermine or shape immigration policies and practices including refugee legislation governing the right to seek asylum in South Africa.

Basically, therefore, this research will ultimately raise new questions in relation to current debates surrounding child refugee policies and practice in South Africa. Relevant international human rights and refugee protection instruments and mechanisms will be consulted to examine child refugee protection in South Africa. The government policy for implementing these standards will be of prime importance in this study, and the compliance with these standards will be investigated in this research. Issues as mentioned above that are of priority to refugee children as identified by the UNHCR will also be used as benchmarks for compliance or lack thereof with international law by South Africa.

Research Questions

The questions that will guide this research therefore are:

- To what extent has South Africa complied with international law and more specifically with the Convention on the Rights of the Child as they pertain to the child refugee?

Stemming from the above principle question will be:

- What is South Africa's Migration Policy with regards to child refugees and asylum seekers?

1.3 LITERATURE REVIEW

South Africa is a favored destination of most African refugees particularly from Central and West Africa, and some from the East and the South of Africa for instance Rwanda, Angola, the Democratic Republic of Congo (DRC), Somali, Burundi, Congo-Brazaville, Ethiopia, Uganda, Cameroon, Sierre-Leone, Liberia, Sudan and Zimbabwe.[27] This is because of its internationally recognized democracy and freedom, where "many expect to find protection, tolerance and employment opportunities in the country."[28] Refugee issues have therefore attracted significant

[27] Community Agency for Social Enquiry,(CASE),National Baseline Survey, 2003
[28] Ibid

attention in South Africa since 1994, particularly because of the increasing number of refugees present in the country.

In ratifying the Convention on the Rights of the Child, South Africa committed itself to placing the needs of children at the centre of the government's development strategies, policies, programmes and services. In line with this commitment, section 28 of the Bill of Rights of its Constitution, which deals specifically with children irrespective of nationality and origin, states that "[E]very child has the right …to basic nutrition, shelter, basic healthcare services and social services''.[29] Other rights include the right to family care or parental care, or to appropriate alternative care when removed from the family environment and the right not to be detained except as a measure of last resort.[30] Clearly, South Africa as a signatory to the relevant international laws for the protection of refugees possesses one of the most comprehensive legal regimes for the protection of children refugee rights as will also be demonstrated further in proceeding chapters. However, the question remains, do human rights treaties improve respect of human rights pertaining to refugee children?

For realists such as Thomas Hobbes, states can contract treaties with other states to provide a legal basis for their relations, and international law can moderate the international state of nature by providing a framework of agreements and rules that are of advantage to all states.[31] But international law is created by states and it will only be observed if it is in the security and national interests of states to do that, otherwise it will be ignored.[32] The fact that all states must pursue their own national interests means that other countries and governments application of rights can never be relied on completely. All international agreements are provisional and conditional on the willingness of states to observe them. All states must therefore be prepared to sacrifice their international obligations on the altar of their own self-interest if the two come into conflict. That makes treaties and all other agreements, conventions,

[29]Constitution of the Republic of South Africa (1996), Section 28, Bill of Rights.
[30] Ibid. Article 2(2) of the CRC also calls on states to assist in cooperation with UNHCR and non-governmental organizations with the tracing of the family members in order to "obtain information necessary for reunification with his or her family." Furthermore, children seeking asylum in South Africa like all asylum seekers who have obtained the necessary permit, have the rights to work and study under section 22 of South African law.
[31] Jackson R & Sorensen G. op cit p.75
[32] Ibid p.69

customs, rules, laws etc between states merely expedient arrangements which can and will be set aside if they conflict with the vital interests of the state.[33]

In May 1997 for instance, Dr. Wilmot, on behalf of the Task Team on International Migration, presented a report to Mr. Buthelezi, the then South African Minister of Home Affairs. The report called for a model of refugee protection that was rights based and solution oriented, with the intention of "providing temporary protection to persons whose basic human rights were at risk in their country of origin until such a time as they were able to return home in safety".[34] Following the report, the White Paper Task Team was appointed by the Minister to pursue the report further and the result of this was that in March 1998, the Draft White Paper and the Refugee Bill were passed in parliament in July of the same year. The Task Team was unapologetic in declaring that even though South Africa was fulfilling its international obligations with regards to refugee protection, "national priorities and interests however were of utmost importance."[35]

This argument is in line with what some scholars have argued about states' reluctance to protect the rights of refugees when they feel that it is not in their national interest to do so. And so, if states are not convinced that their interests are taken into account by the international refugee law, then in practice, despite whatever formal standards countries proclaim, international law will not govern the way refugees are treated.[36]

After World War Two on the onset of the Cold War, resettlement of refugees from communist countries assumed huge ideological significance, providing a political incentive for the West to accept refugees. There was also a demand for labour in most industrialized states, so despite some concerns about the problem of race relations, Western Europe and America continued to admit large numbers of refugees in the 1950s and 1960s. Outside of Europe, large numbers of refugees from India and Pakistan, Palestine and Korea were considered to fall outside of the scope of the 1951 Convention. They were either dealt with by neighbouring countries, or by specially

[33] Ibid
[34] Wilmot.G.James, Draft Green Paper on International Migration, 1997, http://www.polity.org.za/html/govdocs/green_papers/migration/migrate.html?rebookmark
[35] ibid
[36] Hathaway, J. Can International Refugee Law be made Relevant Again? Kluwer International, Netherland, 1997.p.xxiv

established UN agencies. In many cases there were also political reasons for neighbouring states to protect and assist large number of refugees. [37]

It was only in the early 1970s that international obligations began to be perceived as sharply conflicting with national interests. The expansion of the High Commissioner's "good offices" functions from 1957 onwards and the 1967 Protocol extended the scope of the Convention to cover refugees from all regions. Facing the recession of the 1970s, and a wave of "new refugees" from developing countries, West Europe and North America introduced increasingly restrictionist measures to limit immigration. With the immigration route closed off, large numbers of economic migrants - as well as *bonafide* refugees - began to use the asylum system to seek entry into industrialized states. This led to the overburdening of the asylum system in the 1980s, and various attempts to "streamline" or limit access to the system. In political terms, the end of the Cold War removed the ideological incentive to recognize refugees, and the rise in illegal immigration also led to the perception of refugees as a security threat.[38]

In Africa and Asia, the refugee problem emerged as the continent was divided into sharply demarcated nation states, often without heed to historical and cultural boundaries. Large numbers of refugees were produced in the course of struggles for independence, and in the process of postcolonial state consolidation in the 1950s and 1960s. A Convention that was therefore initially limited to European refugees, and designed to deal with individuals fleeing the communist block, was hardly the best instrument to deal with situations of mass influx in Asia and Africa.[39] The refugee regime was as such ill-equipped to deal with this crisis. Refugees were greeted with mixed responses by receiving states, but the perceived conflict with national interests increased as the numbers rose dramatically in the 1970s.[40] Until the late 1960s they were considered as falling outside of the Convention. In Latin America and the Caribbean, the phenomenon of mass refugee movements emerged in the 1970s, and came to be perceived as a significant problem requiring international cooperation only in the 1980s.[41]

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[37] Salomon,K: Refugees in the Cold War: Towards a New International Refugee Regime in the Early Post-War Era Lund: Lund University Press, 1991
[38] ibid
[39] ibid
[40] See Gaim Kibreab, *African Refugees: Reflections on the African Refugee Problem* Africa World Press, New Jersey,1985

Africa, Asia and Latin America developed different approaches for protecting large numbers of refugees, and Europe defined separate provisions in response to the influx of Bosnian refugees. But these various mechanisms fall outside of the Convention and Protocol, and provisions on temporary protection are as yet *ad hoc*. The central instrument of refugee law remains the 1951 Convention, based on individual status determination and with relatively generous provisions for refugees and a strong bias towards permanent settlement.

In summary, the current crisis of protection can be understood as the combination of the evolution of notions of national interests, international politics, the emerging refugee regime and the changing nature and scale of refugee flows. The emergence of a clear conception of state membership and national interests made it a state prerogative to control entry. With growing levels of refugees and the drying up of the demand for labour in the 1970s, refugees were seen as a threat to national interests. More particularly, states' international obligations as defined in the post-World War Two refugee regime appeared to be unfeasible and no longer adequate for dealing with the nature and scale of recent refugee movements.[42]

The enactment of the South Africa Refugee Act in 1998 though, which came into effect in 2000 gave South Africa, at least in theory, the reputation of recognizing and protecting refugees according to international law. According to Sisulu the Refugee Act "gives effect to international legal instruments, principles and standards relating to refugees."[43] She goes further to argue that the Act also provided for the reception of asylum seekers into the Republic, regulates applications for and recognition of refugees status, and provides for the rights and obligations which emanate from such status. This formal recognition "marked an important milestone in the history of refugee protection in South Africa."[44] Legal recognition therefore not only forms an integral part of ensuring the protection of the basic rights of refugees but becomes the basis for the pursuance of other rights entitled to refugees in accordance with international law.

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[42] ibid
[43] Sisulu L.N, op cit p7
[44] Graderen & Jaichand op cit p.5

Some scholars like Eric Neumayer contend that a beneficial effect of ratification of human rights treaties is typically conditional on the extent of democracy and the strength of civil society groups as measured by participation of Non-governmental Organizations (NGOs) with international linkages. He further argues that in the absence of democracy and a strong civil society, treaty ratification has no effect and is possibly even associated with more human rights violations.[45] Some of the NGOs for instance have alleged that despite the fact that the Convention on the Rights of the Child is the most widely ratified international instrument that provides a framework for the responsibilities of state parties to all children within their borders; it is one of the least implemented.[46]

South Africa is one of the most stable democracies in Africa and in the world and has a vibrant civil society such as Lawyers for Human Rights and enjoys the presence of international humanitarian rights organisations including human rights advocacy networks such as Amnesty International, Human Rights Watch amongst a host of others, who are all concerned with the rights of refugee children. The work of NGOs has also become more effective with the use of the internet and the World Wide Web. NGOs now often use their websites to disseminate information quickly and to maximum effect about human rights violations for instance Human Rights Watch.[47] These organisations have played a key role in publicising the issues, including abuses, in putting pressure on states, both offenders and enforcers; and in lobbying international organizations capable of taking concerted action. In the context of refugees, they have been instrumental in bringing to international attention human rights violations pertaining to children and other groups of refugees. They have also added their voices to the debate on child refugee protection in South Africa and debates and issues raised by these organisations are therefore of importance in this study in evaluating the implementation of rights pertaining to refugee children.

During the twentieth century with mass communication and the spread of information about how countries were mistreating their populations, a contending position

[45] Neumayer, E.: "Do International Human Rights Treaties Improve Respect for Human Rights?", in *Journal of Conflict Resolution*, Vol. 19, Issue 6, December 2005.p926
[46] Criswell Rachel & Gow Melanie: Displaced, Uprooted and Refugee Children: Back From the Margins, World Vision Special Report, September, 2004, p.57
[47] Ibid pp.302-303

emerged, based on the realization that how a government treats its own citizens can affect the larger global community. Mistreatment of individuals and minorities can inflame ethnic tensions causing unrest beyond national borders and an influx of refugees and asylums into other countries. Mistreatment of individuals in one country therefore threatens to debase humanity worldwide. It has also been argued that the international community namely, but not exclusively should assume responsibility for the promotion and encouragement of global human rights standards. The international community therefore through the United Nations has been involved in the setting of international human rights standards. Also the U.N has worked to monitor state behavior, establishing procedures for complaints about state practices compiling reports from interested and neutral observers about state behavior and investigating alleged violations.[48] Reports from monitoring mechanisms such as the Committee on the Rights of the Child, which monitors compliance with children's rights including those of refugee children, therefore are also of significance in this study in establishing implementation issues by South Africa.

1.4 THEORETICAL FRAMEWORK

- ***Compliance based theories***

Recalling the research questions, this study will employ compliance-based theories to international law to support its argument. Discussion on human rights tends to fall into a few simple categories namely global idealism, legalism (both idealist and realist), and realism. Even today, the bulk of scholarly literature on human rights is legal and the bulk of it is mainly descriptive or involves technical formal analysis for instance of legal instruments, rules and procedures.

International law (otherwise known as public law or the law of nations), is the system of law which governs relations between states.[49] Akehurst argues that it is true that international law is sometimes broken with impunity, though the same could be said

[48]Nongovernmental organizations also do supplement the activities of IGOs, and have been particularly useful in monitoring state activities. States and the international community however are the primary enforcers of international human rights even though States have always been the main enforcers of human rights and remain so. The United Nations enforcement is also an option though cases in which it can intervene are few, because states are still suspicious of strengthening the U.N' s power to intervene in what they may still regard as their domestic jurisdiction.

[49] Akehurst, Michael: *A Modern Introduction to International Law*, (3rd Ed), George Allen & Unwin Publishers Ltd, London, 1977. p. .9

of national law. He contends further that there are certain ideals which are regarded as desirable but not always practical, for instance, human rights, and the fact that they are not practical they are treated as rules of law because law demands 100% compliance. He further argues that ideals such as human rights bear resemblance to moral ideals such as truthfulness, which even municipal (national) law, does not seek to enforce because violations are too common to make enforcement practicable.[50] In other words, he argues, the enforcement of international law with regards to human rights is not always practical.

It has been suggested that national commitment is the single most important contributor to compliance with international law and also to the presence of a strong human rights regime in South Africa. It is also the source of the oft-mentioned 'political will' that underlies most strong regimes. And so if a state has a good human rights record, then not only will a strong regime appear relatively unthreatening but the additional support it provides for national efforts is likely to be welcomed. As South Africa struggles to be seen as a democratic and legitimate state, and distance itself from the human rights abusive apartheid era, the political will to necessitate compliance with international law pertaining to refugee children (which should be established by this study), will demonstrate its commitment to obligations it has committed itself to with international community.

1.5 RESEARCH METHODOLOGY

In International Relations, there are two main methodological debates, and they are: the traditionalist (classical) approach and the behaviouralist (positivist) approach. The traditional approach in theorizing derives from philosophy, history, and law, and is built on observation or practical experience. The approach is characterised above all by explicit reliance upon the exercise of judgment and by the assumption that if we confine ourselves to strict standards of verification, there is very little that can be said of international relations. Furthermore, general propositions of international relations it argues must derive from a scientifically imperfect process of perception and intuition. This approach produces work that is mainly qualitative.[51] The traditionalist school was predominant until the 1960's when the behaviouralist school was

[50] Ibid pp 10-11.
[51] Finnegan B. Richard. : 'International Relations: The Disputed Search for Method,' in *Review of Politics* ,Vol 34,1972,p.42

introduced by scholars like Karl Deutsch among others, who advocated for a more scientific approach and with a greater concern with methodological issues.

The behaviouralists accused the traditionalists of lacking in rigour, dependant on untested hypotheses and too reliant on subjective interpretations derived from the reading of history. The behaviouralists are seen therefore as more concerned with explanatory rather than normative theory; with recurring patterns rather than the single case; with operational concepts that have measurable empirical reference rather than the reified concepts and a concern also for the techniques of precise data gathering, measurement and presentation.[52] The behaviouralists therefore borrowed from the natural sciences and harder social sciences, thus quantitative data techniques were introduced whereby transactions between states were analysed, controls introduced and variables introduced in order to test hypotheses. Due however to the normative nature of the issue of focus in this study, that is human rights, the study will take on a traditionalist approach, as it allows for the subjective interpretation of issues derived from observance of history and law unlike the behaviouralist approach.

1.6 CHAPTER PLAN

The research report consists of six chapters. The first chapter consists of the background, aim and rationale, literature review, an outline of the chapters and the research methodology.

The second chapter provides a description of International Law. It points out the relevant international human rights instruments, laws and standards pertaining to refugee children.

Chapter three is a discussion on the legal regime pertaining to the protection of refugee children as it exists in South Africa.

Chapter four consists of the findings on the application and implementation of international law pertaining to refugee children in South Africa. It identifies selected

[52] Ibid p.52

rights and their implementation. It essentially draws a picture of the application of chapters two and three in South Africa.

Chapter five is an analysis of the findings and points out debates surrounding implementation and of the factors that influence the application of refugee children's rights, with international law theories as the bedrock of arguments.

Chapter six is the conclusion, providing an overall summary of the study.

CHAPTER 2: INTERNATIONAL REFUGEE LAW AND STANDARDS

2.0 Background

As a result of the Second World War, and following the holocaust there was recognition by the international community of the human rights violations of those fleeing persecution and the suffering that they had endured. They therefore felt the need to save succeeding generations from the same plight, which drove them to cooperate in order to resolve humanitarian crises whilst still upholding the respect and dignity of victims of persecution. Hence the formation of the United Nations (UN), under which the human rights of all human beings are recognized as enshrined in its Charter of the Universal Declaration of Human Rights of 1948.

Political theorists have long been in the business of conceptualizing human rights. Three different kinds of rights have been articulated. The first group of human rights to be formulated is referred to as the first generation human rights.[53] These are the rights possessed by an individual that the state cannot usurp. John Locke (1632-1740), amongst others asserted that individuals are equal and autonomous beings whose natural rights predate both national and international law. Public authority is designed to secure these rights.[54] These rights include civil rights, such as the right to free speech, free assembly, free press, and freedom of religion. Since these are rights that the government cannot take away, they are referred to as negative rights, widely accepted and acknowledged by liberalists and realists alike. The other rights are referred to as second generation rights, developed in a large part by radicalists and social thinkers in the Marxist tradition.[55] In the second generation rights, the duty of the state is to advance the wellbeing of its citizens and the right of the citizens is to benefit from these socio-economic advances. This view emphasises minimum material rights that the government must provide for its citizens. The state thus has the responsibility of providing for the social welfare of individuals, and thus individuals have the right to education, health care, social security, and housing, although the amount guaranteed is unspecified. They are referred to as positive rights. Without their guarantee, though, political and civil rights are rendered largely meaningless.

[53] Mingst, A. K.: *Essentials of International Relations*,(3rd Edition),Norton, New York,2004,p.297.
[54] Ibid
[55] ibid

The last group of rights is referred to as the third generation rights, which are the focus of this study. They are a product of late twentieth century thinking, and specify rights for groups, such as ethnic or indigenous minorities within a polity, or designated special groups such as women and children. Drawing on long religious and philosophic traditions, and the three generations of human rights, The United Nations General Assembly approved the Universal Declaration of Human rights in 1948, which is a statement of human rights aspirations. Thirty principles incorporating both political and economic rights are identified, which were eventually codified in two documents, that is, the International Covenant on Economic, Social and Cultural rights and the International Covenant on Civil and Political rights, approved in 1966 and ratified in 1976. These are altogether known as the International Bill of Rights. These rights have since been expanded to include special conventions for women and refugees and to address all kinds of discrimination.

The rights embodied in the CRC constitute a frame of reference for UNHCR's actions. The provision of general assistance in the first instance can legitimately be described as a form of human rights protection, in the sense that everyone, under the terms of the international human rights instruments, has a right to be free from hunger, and to have adequate shelter. Equally important are measures taken to give effect to Article 28 of the CRC, the right to an education. Primary education programmes in refugee camps around the world ensure that refugee children can continue their education while in exile. It is important to highlight that education for refugee and returnee families is not simply a fundamental right - and necessity - but also serves as a deterrent to protection problems, including possible future child recruitment.[56]

Family reunification, however, has been an area of contention but its importance in the realm of protection of refugee children cannot be under-estimated. This right was the subject of much concern in the Kosovo crisis and in the past conflicts around the Great Lakes region. Children may not necessarily be unaccompanied, but nevertheless are separated from their previous caregivers and may, as a result, be placed in a precarious situation.[57]

[56] Christopher Biersweth, op cit
[57] ibid

2.1 INTERNATIONAL LAW

2.1.1 International Humanitarian Law and the Protection of Refugees

War is the major cause of displacements of populations, the cause of the most significant movement of populations and those that take place in the most dramatic way.[58] Since war is the main cause of population displacement, the question remains on how the law of armed conflicts, which was adopted to limit the evils of war, protects refugees and also, how the law of armed conflict relates to refugee law.

International Humanitarian Law (IHL) encompasses the body of rules of public international law, whether embodied in treaties or based on custom, which aims at containing the horrors of war by limiting the means and methods of warfare on the one hand, and protecting war victims on the other hand.[59] IHL aims to protect persons who do not, or are no longer taking part in hostilities. Applicable in international conflicts, the Geneva Conventions[60] deal with the treatment of the wounded and the sick in the armed forces in the field,[61] wounded, sick and shipwrecked members of armed forces at sea,[62] prisoners of war,[63] and civilian persons.[64] Civilian persons include internally displaced persons, women, children, refugees, stateless persons, journalists and other categories of individuals.[65] Refugees and displaced persons especially in the post cold wars era are in most cases civilians and as such they are protected by the provisions relating to the protection of civilians in times of war.[66] Should civilians be uprooted in times of war, whether before a conflict or as a result of it, international humanitarian law offers specific protection to refugees and stateless persons. First of all, as long as they take no active part in hostilities, refugees and internally displaced persons are protected by all the provisions of international humanitarian law which protects all civilian persons in times of war. Indiscriminate attacks and attacks directed against civilians or the civilian populations are prohibited.[67] Reprisals directed against the civilian persons[68] as well as acts or threats

[58] Bugnion, Francis: "Humanitarian Law and the Protection of Refugees" in Refugee Survey Quarterly, Vol 24, 4, 2005,p37
[59] Ibid
[60] 1949 Geneva Conventions, I, II, III and IV
[61] 1949Geneva Conventions, Convention I.
[62] Ibid, Convention II
[63] Convention III
[64] Convention IV
[65] Convention IV and Protocol 1
[66] Bugnion Francis, op cit p 37
[67] Protocol 1,Article 51, paragraphs 2,4 and 5;Protocol 11, Article 13, paragraph 3
[68] Protocol 1, Article 51,paragraph 6

of violence, the main purpose of which is to spread terror among the civilian populations are also prohibited.[69]

All four 1949 Geneva Conventions have a common article-common Article 3- which applies to non international armed conflicts. This Article provides that:

> *Persons taking no active part in the hostilities […] shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, wealth or any other similar criteria.*[70]

Furthermore, "[I]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his political opinions or religious beliefs."[71] Thus the principle of non-refoulement[72] was recognised by the 1949 Geneva Convention prior to its incorporation in the 1951 Refugee Convention. International humanitarian law therefore has provisions which protect refugees, stateless persons and internally displaced persons. These persons are protected by the general rules that protect the civilian population against the effects of hostilities and against forcible transfers and deportations. These provisions do not exclude application of the 1951 Convention relating to the Status of Refugees, so that the same person may, according to the circumstances, be protected by international humanitarian law and by refugee law. The two regimes therefore overlap and supplement each other. [73]

However, in case of international or non international armed conflict, international humanitarian law applies essentially on the territory of the parties to the conflict.[74] In general, it does not apply to refugees who have sought asylum in a country at peace. As soon as they reach the territory of a neutral state, refugees are protected by the domestic law of that state, by human rights law and the 1951 Convention relating to the Status of Refugees, as long as they meet the criteria set out in the definition of refugees provided in that Convention. As earlier mentioned, International humanitarian law and refugee law frequently overlap even though they developed as two distinct branches of law, with their specific sources, beneficiaries and

[69]Protocol 1, Article 51, paragraph 2; Protocol 11, Article 13, paragraph 2
[70] Article 3 common to all four 1949 Geneva Conventions
[71] Convention IV, Article 45, paragraph 4
[72] Refoulment is the forcible deportation , transfer or repatriation of refugees to the country from which they are fleeing hostilities or persecution. The Principle of non-refoulment therefore provides against forcible transfer or deportation of any refugee.
[73]Bugnion,Francis, op cit p39
[74] ibid

instruments. However, they both have the same ultimate objective, which is the protection of the life and dignity of human beings. As Sir Hersch Lauterpacht and former judge at the International Court of Justice put it, "[t]he protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international."[75]

2.1.2 International Human Rights Law

International Human Rights Law (IHRL) is a set of international rules, established by treaty or custom, on the basis of which individuals or groups can expect and/ or claim certain behaviour and benefits from governments.[76] Human rights are inherent entitlements which belong to every person as a consequence of being human.[77]

Numerous non-treaty based principles and guidelines ("soft law") also belong to the body of international human rights standards. IHRL main treaty sources are the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), as well as the Conventions on Genocide (1984), Racial Discrimination (1965), Discrimination against Women (1979), Torture (1984), and the Convention on the Rights of the Child (1989). The main regional instruments are: the African Charter on Human and People's Rights (1981); the American Declaration of the Rights and Duties of Man (1984); the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) and Convention on Human Rights (1969).

While IHL and IHRL have historically had a separate development, recent treaties include provisions from both bodies of law as suggested in the earlier section on IHL. Examples are the Convention on the Rights on the Child, its optional Protocol on the Participation of Children in Armed Conflict and the Rome Statute of the International Criminal Court.

[75]Ibid, quoting Sir Hersch Lauterpacht: International Law, Law: Collected Papers, Volume 2, Cambridge University Press, Cambridge, 1975, p 47.
[76] "International Humanitarian Law and International Human Rights Law: Similarities and Differences" ICRC Advisory Service on International Humanitarian Law
http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall
[77] ibid

The duty to implement both IHL and IHRL lies first and foremost with states.[78] States have a duty to take a number of legal and practical measures both in peacetime and in armed conflict situations, aimed at ensuring full compliance with IHL. These include: translating treaties; preventing and punishing war crimes through the enactment of penal legislation; applying fundamental and judicial guarantees; disseminating IHL and training personnel qualified in IHL and appointing legal advisors to the armed forces.[79] IHRL also contains provisions obliging states to implement its rules, whether immediately or progressively. They must adopt a variety of legislative, administrative, judicial and other measures that may be necessary to give effect to the rights provided for in the treaties. This may include enacting criminal legislation to repress and outlaw acts prohibited under IHRL treaties, or providing for a remedy before domestic courts for violations of specific rights and ensuring that the remedy is effective.[80] Regarding implementation, states have a collective responsibility under Article 1 common to the Geneva Conventions to "respect and to ensure respect for the conventions in all circumstances."[81]

The Constitution of South Africa[82] contains many provisions dealing with international law. Section 231 deals with the way treaties become binding on the Republic of South Africa. Section 232 provides that customary international law is law in the Republic of South Africa. Section 233 directs courts to interpret legislation to accord with international law, while Section 39 (1) (b) directs the courts to consider international law when interpreting the Bill of Rights, which are virtually a replica of international human rights conventions. According to Dugard,[83] the insertion of so many provisions on international law in South Africa's constitution was part of a deliberate design to bring South Africa in line with international law, in contrast with the law of apartheid which was in conflict with international law in so many areas particularly human rights.[84] Further still, Section (8) (1) provides that "The Bill of Rights applies to *all* law, and clearly embraces international law.[85]

[78] ibid
[79] ibid
[80] ibid
[81] Geneva Conventions, Article 1
[82] Constitution of South Africa 1996
[83] Dugard, John: "Twenty years of human rights scholarship and ten years of democracy", in *South African Journal on Human Rights,* Volume 20,2004,p.350
[84] Ibid
[85] Ibid

2.1.3 Linkage between International Humanitarian Law, Refugee Law and Human Rights Law

As suggested earlier on, as the scope of applicability of IHL and human rights overlap it is necessary to evaluate the contribution that human rights law can make to the realization of IHL. Dr. Hans Joachim Heintze[86] argues that although IHL is underpinned by common article 3 of the Geneva Conventions which offers a minimum humanitarian standard to be respected under all circumstances, it is often scarcely applied in reality due to the underdeveloped means of implementing IHL, especially in comparison to human rights law.[87] In recent years though, advances have been made in linking together IHL and human rights law. This he argues further is important in the quest to achieve a universal guarantee of elementary human rights in times of war or peace.

The United Nations Sub-Commission on Promotion and Protection of Human Rights has to this end spoken of a convergence between human rights and IHL in its Resolution 1989/26. Scopes of applications and substantive regulations of human rights and IHL often overlap, proving that the classic separation of IHL from the disassociated legal measures in times of peace and war is overcome. This is seen in the fact that the International Covenant on Civil and Political Rights (ICCPR) lists in article 4 these complimentary rights which are in force in peacetime and in states of emergency. Treaties like the Convention on the Rights of the Child of 1989 for instance no longer contain derogability clauses. According to Dr. Heintze, this marks the expansion of human rights which clearly have to be seen as non-derogable including war. [88]

2.2 1951 UN Geneva Convention

In it's resolution 319A (IV)[89] of third December 1949, the United Nations General Assembly decided to establish the Office of the United Nations High Commissioner for Refugees, (UNHCR), as a subsidiary organ of the General Assembly, and its mandate was and still is to provide international protection to refugees and to seek durable solutions for refugees by assisting governments facilitate the voluntary

[86] Heintze, Hans-Joachim: "Human Rights Standards, International Law and Refugee Law: Issues of Implementation," Presentation, University of Bochum, Institute for International Law of Peace and Armed Conflict
[87] ibid
[88] ibid
[89] Fact sheet No.20,*Human Rights and Refugees*-p.4
http://www.ohchr.org/english/about/publications/docs/fs20.htm

repatriation of refugees, or their integration within new national communities. A number of international instruments establish and define basic standards for the treatment of refugees and the most important one is the 1951 United Nations Geneva Convention related to the status of Refugees, and its related 1967 Protocol. The Convention, popularly referred to as the Geneva Convention, named after the place it was drafted, was established as a result of a recommendation by the United Nations Commission on Human Rights, thereby setting a landmark in standards on the treatment of refugees.

The Geneva Convention in it Article1.A [2], describes a refugee as one who

> *as a result of events occurring before 1 January 1951,and owing to a well- founded fear of being persecuted for reasons of race, religion ,nationality, membership of a particular social group, or political opinion is outside the country of his nationality and is unable or ,owing to such fear is unwilling to avail himself of the protection of that country ;or who ,not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.*[90]

The 1951 Convention was later amended to include events occurring AFTER 1 January 1951, hence the 1967 Protocol.

The international protection function of the convention has a legal basis and its exercise is mandatory to the UNHCR and many universally recognized human rights are applicable to the refugees. These include: the right to life; the right to a nationality; the right to freedom of movement; the right to leave any country, including one's own; and the right not to be forcibly returned. The Universal Declaration on Human Rights in article (9) goes on to declare that, "No one shall be subject to arbitrary arrest, detention and exile"; Article, 14; "everyone has the right to seek and to enjoy in other countries asylum from persecution; "the right to a nationality" in article 15; and the "right to freedom of movement and residence within the borders of each state" in article 13. These rights are affirmed among other civil and cultural rights for all persons, including non- citizens, in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights which together form the International Bill of Human

[90] The 1951 Geneva Convention

Rights.[91] *The protection of refugees must therefore be looked at in the broader context of Human Rights.*[92]

2.3 THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

It is worth noting though, that in the case of children (or minors), there are no child specific provisions included in the 1951 or in its related 1967 protocol. Only paragraph 1 of Article [22][93] of the 1951 Convention on Public Education is of particular relevance to refugee children as it requires contracting states to provide refugees with the same treatment as is accorded to nationals with respect to elementary education. Furthermore paragraph 2 of the schedule to the 1951 Convention foresees that "[s]ubject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent, or in exceptional circumstances of another adult refugee."[94] However, all the legal provisions of the 1951 convention and in particular the principle of non-refoulment apply to refugees who are still children.

In November 1989, the United Nations General Assembly by its resolution 44/25 adopted the Convention on the Rights of the Child. Some states had argued that there was a need for a comprehensive statement on children's rights which would be binding under international law. The view had been influenced by reports of grave injustices suffered by children such as limited opportunities for basic education, deficient healthcare including abuses of children in prisons and in other difficult circumstances such as refugee children and victims of armed conflict.[95] Hence the adoption of the CRC.

Of all the human rights instruments, the Convention on the Rights of the Child enjoys the highest accession rate, and as of December 2004, 192 states had ratified or

[91] Universal Declaration of Human Rights; see also Fact Sheet No.20 p 6.

[92] In practical terms the task of international protection includes the prevention of refoulement (repatriation),assistance in processing of asylum seekers , providing legal counsel and aid, promoting arrangements for the physical movement of refugees, promoting and assisting voluntary repatriation ,and helping refugees to resettle.(article 8 of the Office of UNHCR).

[93] Convention on the Rights of the Child, states that: "state parties shall take appropriate measures to ensure that a child...who is considered a refugee in accordance with international and domestic law …shall, whether accompanied or unaccompanied…receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention." Additionally, UNHCR has elaborated guidelines to assist states in realizing appropriate policies and procedures for protecting asylum seeking children whether accompanied or not.

[94] 1951 Geneva Convention :1967 Protocol

[95] Fact sheet No. 10(Rev 1),The rights of the Child.p.2
Office of the United Nations High Commissioner for Human Rights.
http://www.unhchr.ch.html/menu6/2/fsio.htm.

acceded to it, except Somalia and the United States. The unanimous adoption of the Convention by the General Assembly paved the way for ratifications by states and the setting up of a monitoring committee composed of independent experts. The committee, referred to as the Committee on the Rights of the Child, monitors the implementation of the Convention on the Rights of the Child by its state parties. It also monitors the implementation of additional protocols to the Convention on involvement of children in armed conflict. All state parties are obliged to submit regular reports to the committee on how the rights are being implemented. State parties submit reports initially two years after acceding to the convention and then every five years, after which the Committee addresses its concerns and recommendations to the state parties in the form of 'concluding observations.'[96]

In order to cater for the protection of the child refugee therefore, the provisions of the Convention on the Rights of the Child (CRC) are invoked by signatory states, which provide comprehensive legal guidelines on their treatment, and this ensures their optimal protection. The 1951 Convention therefore 'seeks to protect the rights of the child as a refugee whilst the CRC serves to protect the rights of the child as a child'.[97]
In addition, Article 22 of the CRC requires state parties to:

"take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth…"[98]

Some key principles that provide for the rights of the refugee child though are codified in the CRC and include: the best interests of the child principle,[99] principle of non- discrimination[100] and the principle of participation.[101] All these principles apply

[96] These are the reports made by the committee of experts, that is the Committee on the Rights of the Child
[97] Christoph, B.: ' The Protection of Refugee and Asylum seeking Children: Children; The Convention on the Rights of the Child and the work of the Committee on the Rights of the Child', in, Refugee *Survey Quarterly*, Volume 17, no.15A, p.98.
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[98] CRC, Article 22
[99]Ibid p.101.
See also CRC 1989:-Best interests of the child (Art.3):When authorities take decisions which affect children, courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions. This is of course a fundamental message of the convention, the implementation of which is a major challenge.
[100]Non-discrimination :(Art 2):State parties must ensure that all children within their jurisdiction enjoy their rights .No child should suffer discrimination. This applies to the child "irrespective of his or legal guardians race, colour, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status".
[101] Principle of participation, CRC, Art 12(1): "State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

to and must guide the treatment of refugee and asylum seeking children.[102] The best interests of the child must for instance be the starting point for determining protection needs of refugee children and should guide the chronology of measures to be taken in respect to unaccompanied and separated children.[103]

Article 23 of the CRC Charter in dealing with refugees, states that States shall take care of children seeking refugee status- that the child shall receive appropriate protection and humanitarian assistance in the enjoyment of rights set out in the Charter. It further adds that "[E]fforts shall be made to assist children in locating parents, or close relatives of the unaccompanied child."[104] Where no relative or family member is found, the Charter states that the child should be given the same protection as any other child permanently or temporarily deprived of his family environment for any reason. Child refugees can find legal protection from cruel, inhuman or degrading treatment in the CRC (Articles 19, 34, 35 and 36) and the right to health in the CRC (Articles 24.1, 6 and 24.3).

2.4 Other human rights instruments of relevance to refugee children

There are a number of non-binding declarations that provide some protection for refugee children, such as the Declaration on Territorial Asylum.[105] Whilst the Declaration does not specifically refer to children, its broader principles are still applicable. Further Declarations include the Declaration on the Human Rights of Individuals Who are not nationals of the Country in which they live;[106] the Declaration on the Rights of the Child[107] (in particular principle 8, which notes that in times of emergency, children will be among the first to receive protection and relief); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.[108] These non-binding instruments provide an additional framework of protection and sit alongside the binding instruments. A core provision captured in many of these treaties and declarations is the concept of equality before the law and non-discrimination. These concepts form a cornerstone of international human rights

[102] Christoph, B. p.101
[103] ibid
[104] African Charter on the rights and welfare of the child
[105] *Declaration on Territorial Asylum,* UN General Assembly Resolution, 14 December 1967
[106] *Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which they Live*, UN General Assembly, 13 December 1985
[107] *Declaration on the Rights of the Child*, 20 November 1959
[108] *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, UN General Assembly, 14 December 1974

law and are imperative to the protection of child refugees. In addition, rights to life, liberty, health, education, protection from abuse and many other rights granted to children are scattered throughout various human rights conventions, covenants, declarations and treaties.

Article 1, 13, 55 and 76 of the UN Charter, as well as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), recognise these guarantees. In addition, refugee children's right to life is secured in a number of human rights treaties including the UDHR (Article 3), ICCPR (Article 6.1), and CRC (Article 6) and in regional instruments. Besides the CRC, child refugees can find legal protection from cruel, inhuman or degrading treatment in the UDHR (Article 5), the Convention against Torture (Articles 2 and 16) and ICCPR (Article 7). The right to health of refugee children is also secured in the UDHR (Article 25) and ICCPR (Article 12). Also, the right to a nationality and identity is also committed in the CRC Article 7.1 and the ICCPR (Article 24.2).

Whilst the above selection of human rights instruments is just a fraction of the legal protection guaranteed to refugee children, it clearly indicates the level of complexity of rights to which refugee children are entitled. Yet again, it is not the lack of provisions that fail these children, but the lack of implementation and enforcement. Furthermore, while many of these human rights instruments do have quasi-judicial implementing bodies in the form of committees,[109] these are largely ineffective because their decisions are non-binding and unenforceable. The blame for the vulnerable and precarious position in which many refugee children find themselves cannot be attributed to the lack of instruments, but rather to the lack of political will on behalf of states to meet their international obligations.

2.5 UNHCR's mandate and the relevance of human rights

The multifaceted linkages between human rights and displacement have always been acknowledged by the UNHCR, even though it has only stressed the complimentary nature of international refugee and general human rights law in recent years. In its

[109] Examples of such Committees include the Committee on the Rights of the Child, the Committee against Torture and the Human Rights Committee.

protection efforts, UNHCR draws on the work of the UN human rights treaty bodies particularly on their conclusions touching upon the legal status of non-nationals which also affect refugees, stateless persons and other persons of concern to UNHCR. UNHCR's mandate which is to provide international protection is not restricted solely to its supervisory functions under Article 35 of the 1951 Convention. Indeed, it also involves international protection activities on the basis of other legal and policy means including references to general human rights law and the use of the UN human rights machinery mechanisms.

UNHCR's international protection mandate also encompasses efforts to contribute to the development of international law relating to or affecting refugees or other persons of concern to the organization. Such efforts are not only limited to the drafting of new or revised international instruments, soft laws and national laws but also extends to activities to promote more progressive interpretations of existing norms. General human rights norms and standards may become particularly relevant to persons of concern to UNHCR with regard to issues, for example in relation to detention, rights, countries, situations and individuals not explicitly or comprehensively covered by the convention such as those persons fleeing the indiscriminate effects of generalized violence and who therefore only fall under the UNHCR's extended mandate, internally displaced persons who have not crossed an international border, stateless persons and returnees.[110]

As stated in beginning of chapter one, half of the world's refugees are children. For the UNHCR, it exemplifies the need to orient its programmes in a way which best meets the protection and assistance needs of this majority of refugee population. The needs of different groups of refugees be they children, women, elderly or disabled persons, are not well served when refugees are treated as an undifferentiated mass of humanity. Understanding such composition of the refugee population therefore is critical for UNHCR in fulfilling its mandate in protecting refugee children. The rights embodied in the CRC also constitute a frame of reference for UNHCR's actions as well. The provision for general assistance in the first instance can legitimately be described as a form of human rights protection in the sense that everyone under the

[110] Bierswth.Christoph, op cit p 98

terms of the international human rights instruments has the right to be free from hunger and to have adequate shelter. Equally important are measures taken to give effect to Article 28 of the CRC, the right to an education. Primary education programmes in refugee camps around the world ensures that refugee children can continue their education while in exile. Education for refugee children acts as a deterrent to protection problems, including possible future child military recruitment.

The time and place of conflicts are not pre-determined, and families inevitably split as a result of flight. The right to family unity is also an important right for refugee children, and it would be important to recognize that respect for the family unit- recognized in a number of human rights instruments including the Universal Declaration of Human Rights – may be violated when family reunification is not facilitated by states. As a matter of fact, the CRC requires for "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 the state parties in a positive, humane and expeditious manner."[111] Family reunification however has been an area of contention but its importance in the realm of protection of refugee children cannot be underestimated. Children may not necessarily be unaccompanied, but nevertheless are separated from their previous caregivers and as a result, may be placed in a precarious situation. Addressing this concern on the ground on the ground is also a current priority of UNHCR.[112]

2.6 Conclusion

The grounds for special action on behalf of refugee children are well established in national and international law. Refugee children share certain universal rights; have additional rights as children, and particular rights as refugees. Yet despite this, refugee children continue to suffer. Clearly, the problem cannot only be anchored in inadequate legal instruments or national legislation and the protection guaranteed to refugee children in law are far from realised. This chapter has drawn a picture of the international legal protection of refugee children and the next chapter will focus on South Africa and how its legal regime applies to this particular group of individuals.

[111] CRC, Article 10
[112] Tadjbakhsh Shahrzad ,op cit p.67

CHAPTER 3: SOUTH AFRICA AND REFUGEE CHILDREN PROTECTION

3.0 Background

This chapter is a review of the refugee and human rights regime pertaining to refugee children as it exists in South Africa. In the immediate aftermath following the country's emergence from apartheid in 1994, the South African government had neither the policies nor the procedures and infrastructure in place to handle the challenge of dealing responsibly and humanely with the flow of refugees into the country.[113] The need for the South African government to balance the interests of a largely disadvantaged local population with those of the so-called 'migrant' population in South Africa was addressed by an agreement, known as the Basic Agreement, between the South African government and the United Nations High Commissioner for Refugees in 1993.[114] In terms of this agreement, South Africa indicated its willingness to co-operate with the Office of the UNHCR concerning the return of exiles to the country, to institute refugee status determination procedures and to grant asylum to certain refugees.[115]

Following the signing of the Basic Agreement, the state of South Africa had to give practical meaning to its political commitments.[116] The procedures established by the Basic Agreement proved that the procedures that were in place prior to the Agreement, that is, the terms of the Aliens Control Act 96 of 1991,[117] were inadequate in providing the relevant authorities with a comprehensive and clear legal framework for achieving the humanitarian purpose of refugee protection. This was because the Aliens Control Act dealt with refugees and asylum seekers in an ad hoc manner.[118] Without statutory basis for determining refugee status, procedures were instead contained in internal DHA circulars. The procedures could also not be readily challenged in court and there was little recourse to either administrative or judicial

[113] "Refugees", in Human Rights Survey Review, Human Rights Committee, Quarterly Publication, 2000,p.90
[114] Ibid
[115] Ibid. The agreement is known as the Basic Agreement
[116] Burton Joseph, "Asylum or Abuse?The Refugee Regime in South Africa", in Majodina Zonke (ed) *The Challenge of Forced Migration in South Africa*, Africa Institute of South Africa, Pretoria,2001p.140
[117] In terms of this Act, asylum seekers and refugees were defined as "prohibited persons"
[118] Human Rights Watch 1995,op cit ,p6

appeal.[119] A new refugee Act (the Refugees Act No. 130), was therefore promulgated towards the end of 1998 which largely complied with the provisions and aspirations of the 1949 Geneva Convention and OAU Conventions, both of which South Africa acceded to in 1996 and 1995 respectively.[120] The regulations of the Refugee Act later did not come to operation April 2000 when its regulations were published. The Refugees Act and its regulations define the legal standard for refugee status; establish South Africa's asylum procedure, and sets out the rights and obligations of refugees and asylum seekers.[121]

In 1996, South Africa ratified the 1951 Convention relating to the status of refugees, together with its related 1967 protocol. In 1997, the 'Draft Green Paper' on international migration was published and it was seen as an implementation of international obligations separate from immigration concerns. In 1998, the 'Draft Refugee White Paper' was published including a draft refugee bill, which was adopted by Parliament in the same year and became known as the Refugees Act (Refugee Act No.130 of 1998), mentioned above, that was the first legislation dealing specifically with refugees and asylum seekers coming to South Africa and provides for their protection.

Earlier on in June 1995, South Africa had ratified the UN Convention on the Rights of the Child (CRC). The CRC provides comprehensive legal guidelines on their treatment, and this ensures the optimal protection of refugee children as mentioned in chapter two.[122] This international human rights treaty obligates member states to prioritise children as a vulnerable group and to recognize that they desire special treatment, above the normal human rights protection afforded to all persons. Recall also in the second chapter, that in order to cater for the protection of the child refugee, the provisions of the CRC are invoked by signatory states. [123]

[119] ibid
[120] Refugee Act 130 of 1998.
[121] Human Rights Watch, op cit p7
[122]Christoph, B.: ' The Protection of Refugee and Asylum seeking Children: Children; The Convention on the Rights of the Child and the work of the Committee on the Rights of the Child', in ,*Refugee Survey Quarterly*, Volume 17,no.15A,p.98.
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[123] Ibid

3.1 Refugee Legislation in South Africa

The Refugee Act 130 of 1998 was enacted to give effect within South Africa to the relevant international legal instruments and principles relating to refugees and to provide for the reception of asylum seekers.[124] It was also enacted to regulate applications for recognition of refugee status and to provide for the rights and obligations flowing from such status. According to Section 6 of the Constitution, the Act must be interpreted and applied with due regard to the 1951 Convention, its 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights and any other human rights treaty to which South Africa is or becomes a party, such as the Convention on the Rights of the Child[125].

According to the Act, no person may be refused entry to the Republic of South Africa, expelled, extradited or returned to any other country if that person may be subjected to persecution on account of his race, religion, nationality, political opinion membership of a particular social group, or if such person's physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order. [126] The Act in Section 3(a), further provides that a person qualifies for refugee status if she has a well founded fear of being persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group and is unable or unwilling to avail herself of the protection of that country or, not having a nationality and being outside the country of her former habitual residence is unable, or owing to such fear, is unable to return to it.[127]

3.1.1 Acquiring Refugee Status in South Africa

Sections 21-26 of the Refugees Act provides for the refugee determination process, setting out the application procedure, the duties of the Standing Committee for Refugee Affairs, and the Appeal Board with regard to determining and granting refugee status. This comprehensive procedure is aimed at distinguishing genuine refugees from alien migrants, economic migrants, and fugitives from justice and also

[124]Section 21 and Regulation 2(1) (*a*).See also Anton Kantz : "Refugees", in Dugard John: *International Law, A South African Perspective (3rd Ed)*, Juta & Co Ltd, South Africa, 2005p 348
[125] Ibid
[126] Section 2(a)
[127] Section 3(a)

to confer on recognised refugees the essential social rights necessary for their survival in South Africa.

All applications for refugee status and asylum must be made without delay in person to a Refugee Reception Officer at any refugee reception office.[128] The Refugee Reception Officer must ensure the application form is properly completed and if necessary must assist the applicant in completing an application form, and may conduct an enquiry to verify the information contained in the application. The Refugee Reception Officer must then submit applications received by him to a Refugee Status Determination Officer.[129] The confidentiality of asylum applications must be ensured at all times. No proceedings against asylum applicants and those granted asylum may be instituted or continued in respect of their unlawful entry or presence in South Africa.[130] Upon making an application for asylum, the Refugee Reception Officer must issue to the applicant an asylum seeker permit allowing the person to stay in South Africa on a temporary basis.[131] The current South African laws and conventions governing the rights of refugee children clearly states that the Department of Welfare must attend to any unaccompanied refugee minor and necessary arrangements should be made for assistance. Following that, a Refugee Status Determination Officer can attend to the child in making an application for refugee status.[132]

The refugee determination procedure necessarily entails prompt registration by means of an initial interview conducted in an age-appropriate manner by professionally qualified persons. This is done in order to collect bio-data and social history to ascertain the identity of the child including wherever possible the identity of both parents as well as the citizenship of both the child and the parents. It is also a continuation of the registration process and documentation of further information in order to meet the specific needs of the child; commencement of the tracing of the child's family as soon as is practical and prioritising the identification of children who are separated or unaccompanied immediately upon arrival at the ports of entry as soon as their presence in the country becomes known to the authorities. This is done

[128]Ibid,p.351
[129] Section 24
[130] Section 21(4).See also article 31 of the 1951 Convention.
[131] ibid
[132] ibid

because the care and protection of an unaccompanied child minor seeking asylum is of primary concern and also because an unaccompanied child should not bring an application for asylum without assistance.[133] Parents on behalf of accompanied refugee children are required to obtain temporary residence permits on their behalf while awaiting their asylum applications to be processed.[134]

3.1.2 Appeal and review of refugee status determination decisions

The Refugees Act sets up a formal structure for administrative appeals and review of negative asylum decisions (a provision absent in the previous Aliens Control Act with regard to any immigration decision).[135] The Standing Committee for Refugee Affairs reviews decisions by the refugee status determination officers of cases found to be manifestly unfounded, abusive or fraudulent.[136] This body can either set the decision aside or confirm the refugee status determination officer's decision. An applicant is entitled to appeal the decision before the Refugee Appeals Board where a claim for asylum has been rejected because it is simply "unfounded."[137]

Between receiving the initial rejection and formally lodging an appeal, however, DHA retains the asylum seeker's permit. During this period the individual has only the rejection letter to indicate his or her legal status in the country. A notice of appeal must be lodged with the Refugee Appeals Board within thirty days from receipt of the rejection. Upon lodging an appeal, the asylum seeker is reissued his or her original asylum seeker permit.

3.2 South Africa and Child Refugee Law

South Africa ratified CRC in June 1995, obligating it to prioritise children as a vulnerable group and to recognize that they deserve special treatment, above the normal human rights protection afforded to all persons. Also, in ratifying the Convention South Africa committed itself to placing the needs of children at the centre of government's development strategies, policies, programmes and services. Section 28 of the South African Constitution entrenches the rights of all children who

[133] Section 21
[134] 'Children's Rights,Human Rights,' Review Quarterly Publications, Human Rights Committee,p5
[135] Valji, Nahla and Lee Ann de la Hunt, University of Cape Town Legal Aid Clinic, for National Consortium on Refugee Affairs, "Gender Guidelines for Asylum Determination," 1999.
[136] Refugees Act, section 25(1).
[137] Refugees Act, section 24(3) (c).

are in South Africa. Refugee children's rights are set out in the Refugee Act 130 and they are additionally protected under the Child Care Act 74 of 1983. This Act provides the legal framework for the care and protection of all children who are considered in need of care in South Africa. Therefore many of the Acts apply to refugee children, children seeking refugee status and other displaced children who are without a parent or a guardian.

In line with its international and national commitment, section 28 of the Bill of Rights of the Constitution of South Africa, which deals specifically with children irrespective of nationality and origin, states that "Every child has the right…to basic nutrition, shelter, basic healthcare services and social services".[138] Other rights include the right to family care or parental care, or to appropriate alternative healthcare when removed from the family environment and the right not to be detained except as a measure of last resort.[139]

In terms of section 3 of the Refugee Act, any child who has qualified for refugee status under this particular section must be brought to the children's court and the court will assist the minor with the application process for asylum. Further still, current laws and conventions that govern the rights of child refugee minors in South Africa state that the Department of Welfare and the Department of Home Affairs have a joint responsibility in assisting refugee children. Both departments are instrumental in providing humanitarian relief according to the Convention on the Rights of the Child. This is according to Article 22 subsection 1 of the Convention on the Rights of the Child which asserts that:

> *State parties shall take appropriate measures to ensure that a child who is seeking refugee status …whether accompanied or unaccompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance…*[140]

Article 10 of the CRC guarantees the child's rights whether he or she is accompanied or unaccompanied to apply for protection as a refugee. Article 22 of the CRC mentioned above also guarantees the rights of refugee children or children who are

[138]Constitution of the Republic of South Africa (1996), Section 28, Bill of Rights.
[139] Ibid. Article 2(2) of the CRC also calls on states to assist in cooperation with UNHCR and non-governmental organizations with the tracing of the family members in order to "obtain information necessary for reunification with his or her family." Furthermore, children seeking asylum in South Africa like all asylum seekers who have obtained the necessary permit, have the rights to work and study under section 22 of South African law.
[140] CRC, Article 22(1)

seeking refugee status to special protection and requires that the state cooperate with organizations which provide assistance and protection.[141]

Since the legal responsibility for refugee children falls on the shoulders of the government of South Africa, any unaccompanied or separated child seeking refuge in South Africa must as such be protected in the same way as any South African child who is temporarily or permanently deprived of their family. The Constitution of the Republic of South Africa therefore does provide for the protection of all individuals regardless of their age or status. As a matter of fact according to a recent Human rights report,[142] South Africa has a comprehensive legal framework for refugees and asylum seekers, which on paper provides for the protection and rights of those fleeing persecution including the rights to fair and efficient status determination procedures, registration and documentation (for the asylum seekers), rights to freedom from arbitrary detention and from threat of deportation, and to services such as healthcare and education. [143]. In addition, the CRC provides that all state parties: '…shall strive to ensure that no child is deprived of his or her right of access to healthcare'.[144]

3.3 Conclusion

It is evident so far that the necessary legal regime for the protection of refugee children is present in South Africa. Whether this translates into actual implementation will be the focus of the next chapter.

[141] CRC, Article 22
[142] Human Rights Watch, November 2005,Volume 17,No.15(A),p.1
[143] Ibid
[144] CRC, Article 24

Chapter Four: Findings: South Africa and issues with implementing International Law

4.0 Background

Dr. Han-Joachim Heintze has argued that since 1949, the rules of international law of armed conflicts have been more honoured in the breach than in the observance.[145] In International Humanitarian Law (IHL), the core values of humanity are enshrined in article 3 which is common to all four Geneva Conventions of August 12, 1949. The European Convention on Human Rights is argued to be the most effective in the area of human rights because it contains a powerful enforcement mechanism in the European Court of Human Rights.[146]

Different mechanisms of implementation are also known in the field of refugee protection and this task is with the UNHCR. Several attempts to overcome the extremely restricted-even the non-existent possibilities of implementing the IHL by elaboration of "soft" implementing mechanisms like state reporting systems have not been successful yet.[147] One therefore has to look into human rights implementation mechanisms to find out the contribution they can offer for the enforcement of IHL. There is a growing belief in literature that not only do IHL and human rights share a common underlying philosophy, but that human rights norms can compensate for the deficiencies of IHL. However, there is in any case no doubt that situations of gross human rights violations require a larger response than the use of complaint mechanisms under international human rights treaties. Nevertheless, such procedures can have an influence through the impartial establishment of disputed facts and international accountability.[148] Having laid the above background, the rest of the chapter presents issues with implementation in South Africa.

[145] Heintze Hans-Joachim:Human Rights, *International Humanitarian Law and Refugee Law- Issues of Implementation*,Presentation, University of Bochum, Institute for International Law of Peace and Armed Conflict.p.1
[146] ibid
[147] ibid
[148] ibid

4.1 Issues of compliance and implementation with International Law in South Africa

4.1.1 Education

Article 28 of the CRC on a child's right to education as well as other education related rights complement Article 22 of the 1951 Geneva Convention and provides important legal arguments to secure the access of refugee and asylum-seeking children to education.[149] This is important since the years in which the refugee child has been denied education can hardly be recovered. Furthermore, education is pivotal to protection and an essential ingredient for the success of peace and reconciliation efforts and thereby for ultimate repatriation in safety and dignity.[150] This right to education is not qualified in any manner by the residence or other status of the child and therefore the states' obligations under Article 28(a) to make primary education compulsory and free for all applies to refugee and asylum-seeking children irrespective of whether they have been able to regularize their status in their country of asylum.[151] Similar obligations apply to other education related rights codified in the Convention. Therefore, Article 28 and in particular Article 28 paragraph 1 (b) in conjunction with the principle of non-discrimination prohibits any discrimination hindering the access of refugee or asylum-seeking children to higher education. [152]

The Bill of rights of South Africa states that access to education is a basic human right for nationals and non-nationals and refugee and asylum seeking children have the right to study in government schools in South Africa and they cannot be sent away from schools because they cannot pay fees.[153] However, although refugee children are entitled to free education by law and schools are forbidden from excluding pupils who cannot afford to pay fees, it has been alleged by Lawyers for Human Rights[154] that

[149] See also the work of the Commission on Human Rights, Resolution 2004/48 on the rights of the child,(OP17)
[150] Ruud Lubbers, "Commentary," *Refugee Survey Quartely*, Vol, 23,Number 2,2004,p.ii
[151] This right also exists under the UDHR under Article 26(1) which provides "Everyone has the right to education .Education shall be free, at least in the elementary and fundamental stages. Technical and professional education shall be made equally accessible to all on the basis of merit,; Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the activities of the United Nations for the maintenance of peace."
[152] Article 28 paragraph 1 *inter alia* stipulates : " state parties inter alia and recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular (a) make primary education compulsory and available free to all (b) encourage the development of different forms of secondary education including general and vocational education make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need …"
[153] See also Article 8 of the Children's Charter of South Africa
[154] 'Lawyers for Human Rights' are a South African civil society organization.
http://www.lhr.org.za/refugeees/decisions.php

rules are widely flouted in educational institutions.[155] Furthermore, they allege that it is not clear whether the educational needs of refugee children are being met or how they access educational institutions.[156] Refugee children also face problems in a number of areas. A study on the Somali refugee children of school going age (between 7 and 18 years) were reported as not going to school because their parents could not afford to pay fees, and for uniforms and books.[157] A similar study on Cameroonian refugees in South Africa found that their children were not going to school because of the financial situation of their parents.[158] Some educational institutions also require that refugee children pay all the fees upfront before commencement of classes.[159] However, preventing refugee children from going to school because their fees cannot be paid is against South African law. The South African Charter of 1996 for instance, forbids schools from excluding pupils who cannot afford to pay fees. Timngun notes that financial exclusion may be common for refugees as well as South African nationals, which implies that rules are widely flouted by educational institutions. He also observes that attempts to force the law into action makes things worse because it depends on who has to implement the law and at what time and from what location adding further that obstacles in the implementation of the law make it difficult for humanitarian actors to act efficiently. [160]

Another study on refugees in South Africa, the 'National Refugee Baseline Survey,' conducted in 2003 by a Johannesburg based NGO, the Community Agency for Social Enquiry, found that almost 40% of persons surveyed had children who were not attending school mostly because their parents were unable to afford the school fees.[161] Those surveyed also reported that refugee children were turned away from primary schools because the facilities were said to be full, or that the schools were unwilling to accept children with refugee or asylum-seeker permits.[162] In the face of these problems, refugees are often obliged to turn to groups such as the Jesuit Rescue

[155]ibid
[156] ibid
[157] Timnium Desire: "Assisting Urban refugee Children in South Africa: Humanitarian Challenges to State and non-state Actors," International Studies Association Annual Convention http:www.isanet.org/noarchive/desire.htmlAccessed 2006/09/09.See also Perbedy and Majodina 2000 op cit
[158] Timngun Desire, op cit
[159] Ibid
[160] ibid
[161] Belvedere et al: "National Refugee Baseline Survey: Final Report" Johannesburg Community Agency for Social Enquiry (CASE),Japan International Cooperation Agency(JICA)&UNHCR.
http://www.case.org.za
[162]Nduru Mogiya: Refugees: After the Struggle to arrive in South Africa, a struggle for Education," Inter Press Service News Agency ; http//ispnews.net/Africa/nota.asp?idnews=29132-accessed 7/26/2006

Service, an international Catholic NGO which supports unaccompanied minors in schools around Johannesburg and Pretoria. The NGO also supports children who have parents or legal guardians in secondary schools by paying for their school uniforms, textbooks and transport costs.[163] In its concluding observations on South Africa, the Committee on the Rights of the Child noted the efforts of South Africa to improve the situation of education, including the enactment of the Schools Act (1996), the introduction of an integrated National Primary School Nutrition Programme, and the launching of "Curriculum 2005" which was intended, inter alia, to correct the disparities in access to education.[164] However whilst noting that the law provides for compulsory education between the ages of 7 and 15 years, the Committee was "concerned that primary education is not free."[165] Additionally it remained "concerned about the absence of formal legislative and administrative measures to ensure… and to guarantee the right of access to education…for refugee children."[166]

4.1.1.1 Language Barriers and Xenophobia

Most refugee children from West Africa speak French and do not understand local South African languages.[167] The non-availability of language translators in educational institutions means that refugee children are unable to learn and understand anything. This affects the child-teacher relationship in that the both the teacher and child cannot understand each other. This makes it difficult for the refugee children to adjust forcing them to stay away from schools.[168] Although access to educational institutions might be available to refugee children in South Africa the Department of Education and some non-governmental organizations still find it difficult to ensure that refugee children are not sent away from schools.

Xenophobia is described as "the deep dislike of non-nationals by nationals of a recipient state"[169] and its manifestations are a violation of human rights.[170] The xenophobic relationship that exists between the police, the host population and some government officials and refugee children is another dilemma facing humanitarian

[163] ibid
[164] ***CRC/C/15/Add.122.2000 (Concluding Observations/Comments, paragraph 34***
[165] ***ibid***
[166] ibid
[167] Timngum,D,op cit p7
[168] HRC: Access to Justice-Focus on Refugee and Asylum Seekers-Women and their Children'p86-87
[169] Crush, Jonathan: Immigration, Xenophobia and Human Rights in South Africa, in SAMP Migration Policy Series, No.22, 2001.p29
[170]ibid

organisations in South Africa. There is a growing xenophobic sentiment against refugees, asylum seekers and their children by the host population which has been attributed to the fact that the host population sees refugee children as an economic burden to the state. Even in schools, informants at the Jesuit Refugee Service, a local NGO revealed that refugee children face hatred and at times their classmates torture them without any interference from the teachers that are supposed to be protecting them. According to a South African Migration Report, South Africa is a highly xenophobic society which out of fear of foreigners does not naturally value the rights of non-nationals. [171]

Another issue that has been raised by the Committee is on data collection of all groups of children.[172] The Committee was concerned that the current data collection mechanism was insufficient to afford the systematic and comprehensive collection of disaggregated quantitative and qualitative data for all areas covered by the Convention in relation to all groups of children in order to monitor and evaluate progress achieved and assess the impact of policies adopted with respect to children. The Committee recommended that the system of data collection be reviewed with a view to incorporating all the areas covered by the Convention. Such a system should cover all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable, including girls; children living in institutions; children of economically disadvantaged families; and refugee children. [173] For instance it was reported at the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' in Durban that South Africa did not provide enough information on the discrimination against non-citizens ,namely immigrants, asylum-seekers, and refugees who continue to suffer racism, racial discrimination, xenophobia and related intolerances or the measures undertaken to combat such discrimination.[174]

4.1.2 Children and the refugee status determination process

Section 32 of the Refugees Act acknowledges that children may seek asylum in South Africa. However, like any adult asylum seeker in South Africa, they are required to

[171] Dodson,et al, *SAMP Migration* Policy Series, 2002, No 23, 1.
[172] CRC/C/15/Add, op cit
[173] ibid
[174] Dodston et al, op cit

present themselves at the nearest Refugee Reception Office and are expected to queue with adults according to a Human rights report.[175] Under the Refugees Act Section 32(1) though,

> *"Any child who appears to qualify for refugee status…and who is found to under circumstances which clearly indicate that he or she is a child in need of care…must forthwith be brought before the Children's Court…"*

The child is brought before a Children's Court so that the Court may assess the needs of the child and order appropriate arrangements for the child's care and guardianship.

Additionally, Section 32 (2) of the same Act provides that the Children's Court "may order that a child be assisted in applying for asylum". The Refugee Reception Officer should also contact the UNHCR to assist with family tracing. According to the 2005 Human Rights Watch report however, in practice, unaccompanied children are not referred to other agencies such as the UNHCR. Furthermore, some Refugee Reception Officers "do not seem to have guidelines on how to deal with children seeking asylum".[176] Of note also is that the Refugee Act and its regulations both fail to clarify whether an asylum seeker permit should be issued before the referral or whether this will be done once the Court has assessed the needs of the child. Since not all unaccompanied children possess documents indicating their age, it is also not apparent who or how age determinations are made at the refugee reception office. Furthermore, while the provision places the burden of ensuring the best interests of the child on the Department of Welfare and Social Development, it fails to recognize the role of the Department of Home Affairs in protecting child asylum seekers in the confirmation of the legal status of the child in South Africa to obtain social services.

In its *Handbook on Procedures and Criteria for Determining Refugee Status,* the UNHCR states that asylum applicants "should be given the necessary facilities, including the services of a competent interpreter, for submitting [their] case to the authorities concerned."[177] The competency of interpreters is not only a matter of their technical linguistic ability, but also a matter of their impartiality, and training in cultural and child-sensitivity in the context of refugee status interviewing.

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[175] Human Rights Watch,2005,op cit
[176] ibid
[177]UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR), revised 1992, Part Two (A), para. iv.

The Committee on the Rights of the Child while commenting on these issues noted its concern with South Africa about the absence of formal legislative and administrative measures to ensure family reunification and to guarantee the right of access to education and health for refugee children. In its recommendation, it urged South Africa to develop a legislative and administrative framework to guarantee and facilitate family reunification.

4.1.3 Detention of unaccompanied refugee children

As indicated in earlier chapters, Article 37(b) of the CRC provides that children should only be detained as a measure of last resort and for the shortest amount of time. This is also reflected in the Refugees Act of South Africa under Section 29(2). Also the UNHCR's guidelines on refugee children on detention of asylum seekers states unequivocally that "children who are asylum seekers should not be detained."[178] It has been alleged however by some human rights organisations that some children including asylum seekers have been detained at a certain local deportation center. In November 2003 at the Lindela detention center, for instance, ten unaccompanied children between the ages of ten and fifteen were detained. These children, who were mostly boys, shared facilities with adult men and the few girls shared quarters with women. [179] In 2004, Lawyers for Human Rights challenged the unlawful detention of fourteen unaccompanied children being held with adults at Lindela for the purposes of deportation. During the legal action, the children were instead held at a "place of safety" in Dyambo located next to the deportation facility. On September the 13th 2004, the Pretoria High Court ordered the Department of Home Affairs not to admit unaccompanied non-national children at Lindela and held that the detentions were unlawful, invalid and should cease immediately.[180]

In 2000, it was also reported that there were no segregated facilities available at Lindela for women with children, but adults and children slept in the same room, ate the same food and received the same treatment from the staff. Dyambu, the corporation that runs the Lindela Detention Centre, supplies women who arrive with

[178] Guidelines on the detention of asylum seekers, Guideline 6
[179] Human Rights Watch visit to Lindela on November 19, 2003
[180] Lawyers for Human Rights, press release, "Pretoria High Court Orders the Protection and Care for Unaccompanied Foreign Children.

small children with diapers, but women often have to ask their families to bring food and clothing for their children to the facility.[181]

There are some however who dispute the detention of asylum seekers, claiming that their detention is discretionary and the majority of asylum seekers are not detained and are able to move freely within the country.[182] However, it has been reported by others that those who are detained may be subjected to sub-standard treatment or even abuse, as evidenced by the beating to death of a detainee alleged to have escaped from the Lindela Detention Center in early 2002. Proposals routinely to detain asylum seekers in government-run reception centers have received stiff opposition from South African civil society, according to a 2001 report.[183] Successful NGO lobbying efforts led to the inclusion in the Immigration Act 13 of 2002 of a requirement that detained illegal foreigners are held in compliance with minimum prescribed standards protecting dignity and relevant human rights.[184]

According to a 1999 report, in practice, there have been widespread allegations that the South African Police Services destroy valid permits on the assumption that such documents are fraudulent. Further, there have been numerous assertions that police elicit bribes from apprehended persons (documented and undocumented) in exchange for freedom.[185] A late 2000 study indicates that asylum seekers are reportedly arrested and detained for failure to carry identity documents, on the basis of a particular physical appearance, for inability to speak any of the main national languages or for fitting a certain "profile" of an undocumented migrant. In practice, the burden of proof is on the asylum seekers to establish their legal status in the country. There have been allegations that neither the police nor the DHA permits persons to retrieve identification documents from their homes or allows free phone calls to contact friends or family.[186] Asylum seekers, refugees or South African citizens may be detained for days while their right to remain in the country is confirmed[187].

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[181] South African Human Rights Commission and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd., case no. 28367/99 (Witwatersrand High Court

[182] South African Human Rights Commission' Report On The Arrest And Detention Of Persons In Terms Of The Aliens Control Act 23-25 (2000)

[183] ibid

[184] Lawyers for Human Rights, op cit

[185] Ibid

[186] South African. Human Rights. Commission Lindela: At The Crossroads For Detention And Repatriation 11-12 (Dec. 2000), *Available At* http://www.gov.za/reports/2000/lindela2.pdf

[187] ibid

Many of the asylum seekers at the Lindela Detention Centre are reported to have failed to apply for asylum in South Africa prior to their arrest because they did not understand the application procedures or were afraid of being arrested. Asylum seekers are regularly arrested by the DHA while applying for asylum or renewing asylum permits, for applying or renewing too late or at the wrong office, or under the charges that documents have been forged. The stated policy of the DHA as of May 1999 was that detained immigrants who affirmatively claim refugee status should be taken to an asylum application office. It has been reported that, in practice, this directive is seldom followed at the Lindela Detention Centre, as the staff does not have sufficient training to process asylum applications, and detainees are rarely allowed to apply at the nearest Refugee Reception Office in Braamfontein.[188] Furthermore, according to a 2000 report, the DHA does not routinely ask persons who have been arrested under the Aliens Control Act whether they want to apply for asylum.[189]

Under the Refugees Act, any detention over 30 days must be automatically reviewed by a judge of the High Court. However, this provision is rarely followed in practice, despite a case won by the Law Clinic of the University of the Witwatersrand and the South Africa Human Rights Commission (SAHRC) in November 1999, challenging the Department's repeated failure to provide such review to detainees at the Lindela Detention Centre.[190] The court required that Lindela officials report the names of detainees to the SAHRC each month for compliance monitoring, but Lindela and the DHA failed to provide such reports. The SAHRC noted on September 13, 2000 that 37 persons had been held in excess of the thirty-day limit.[191] Within 48 hours of detention, the asylum seeker must be brought before an immigration officer for an investigation.[192] The burden of proof is on the asylum seeker to establish his/her eligibility to be freed from detention. If the asylum seeker fails to produce a permit to be in the country, he or she will be declared a "prohibited person."[193] In cases of doubt, the asylum seeker may be granted a temporary permit to give her/him time to

[188]South Africa Human Rights Commission, op cit
[189] ibid
[190] *South African. Human. Rights. Commission and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, case no. 28367/99 (Witwatersrand High Court)
[191] Lawywers for human rights
[192]Section 55(1) of Act No. 96 of 2001 (Aliens Control Act); See also the South Africa Constitution Section 28(g)(i) which also provides that [e]very child has the right to…be kept separately from detained persons over the age of 18 years; and (ii)treated in a manner, and kept in conditions, that takes account of the child's age.
[193] Aliens Control Act, Sections 7and 9.

provide necessary documents. The investigation procedure has been criticized as unconstitutional because it places the burden of proof on the presumed prohibited person and is an administrative rather than a court procedure.[194]

The Refugees Act provides that no person may be detained for a period longer than is "reasonable and justifiable."[195] As noted above, any detention over 30 days is automatically reviewable by a judge of the High Court. Legislation provides that any detention over thirty days must immediately be reviewed by a judge of the High Court. Detention must be reviewed every thirty days thereafter.[196] As noted above however, these laws are rarely followed in practice. The SAHRC reported in December 2000 that only one detainee with whom they met at Lindela had been informed of the judicial review of her case, and she was not given the opportunity to make a written submission to the court.[197]

One NGO reported in 2001 that in the Cape of Good Hope High Court division, review beyond 30 days under the Refugees Act is heard by a judge in chambers rather than in open court. No records of such review are kept, and detainees and their legal counsel are not provided with effective notice of the application to extend the detention. While the bench is displeased with this practice, which leads to rubber-stamping of the detention decision, they continue to extend detention.[198] Further, the Witwatersrand High Court division found that failure to give effective notice of an application to extend detention rendered such application unlawful. In that case, the detainee received notice of the application to extend on the same day that the case was heard. Nonetheless, the court did not render a decision improving judicial of administrative detention.[199]

There is limited access to government funded legal aid. As a result of efforts in 2001 led by the South African NGO Lawyers for Human Rights, the state-funded Legal Aid Board now funds representation for certain asylum cases.[200] Asylum seekers may now

[194] Dugard,J op cit
[195] Refugees Act of 1998, Section 29(1).
[196] ibid
[197] SAHRC Report, 2001
[198] ibid
[199] *Fei Lui v. Commanding Officer*, 1999 (3) SALR 996 (W) (concerning Section 55(5) of the Aliens Control Act, the predecessor to Section 29(1) of the Refugees Act of 1998)
[200] Lawyers for human rights, op cit

apply anywhere in the country for legal aid relating to applications for asylum, and in Pretoria, Johannesburg, Cape Town, Port Elizabeth, or Durban for legal aid relating to decisions by refugee status determination officers, reviews by the standing committee or appeals to the appeal board. Informants from the Human Rights Committee, Lawyers for Human Rights and Wits Law Clinic also revealed that they find it exceptionally humiliating that the police and some government officials also mastermind attacks on refugee children. They revealed that refugee children are arbitrarily arrested and tortured and most of them who find themselves in such situations never come out to complain for fear that they will be arrested again.[201]

In its concluding observations, the Committee on the Rights of the Child noted the following concerns with the juvenile justice system in South Africa: [202]

(a) The lack of an efficient and effective administration of juvenile justice and in particular its lack of compatibility with the CRC, as well as other relevant United Nations standards;

(b) The length of time taken before juvenile cases can be heard and the apparent lack of confidentiality accorded to such cases;

(c) The use of detention as other than a last resort;

(d) The overcrowding in detention facilities;

(e) The holding of minors in adult detention and prison facilities, the lack of adequate facilities for children in conflict with the law, and the limited numbers of trained personnel to work with children in this regard;

(f) The lack of reliable statistical data on the number of children in the juvenile justice system;

(g) The inadequacy of regulations to ensure that children remain in contact with their families while in the juvenile justice system; and

(h) The insufficiency of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles.

It is clear to observe why and how the rights of refugee children concerning detention can be and are flouted given the observations of the Committee on the Rights of the Child, providing further credence to claims by human rights organisations and civil

[201] ibid
[202] See South Africa: *CRC/C/15/Add.122.*

society groups, whose claims have been cited above, about refugee children's rights violations when it comes to detention.

4.1.4 Access to social services and assistance

Jonathan Klaaren and Abeda Bhamjee[203] acknowledge that even when issued with an asylum seeker permit, children do not necessarily receive the assistance the Department of Social Development is supposed to provide to children in their care, regardless of their status.[204] In a paper presented at a workshop in 2001, it was alleged that unaccompanied asylum-seeking children in particular experience difficulties in access to protection and social services, due to their lack of well recognized documents.[205] Furthermore, instead of being cared for by the Department of Social Development, unaccompanied children seeking asylum are taken in by or are informally placed with guardians, who are normally refugees or asylum seekers who speak the same language or who are from the same country that can assist them with the application. However these informal arrangements may not always provide a stable home for a child, particularly where living arrangements are precarious and the guardian's status has not been confirmed by the Department of Home Affairs. [206]

While commenting on the principle of non-discrimination, the Committee on the Rights of the Child in its observations noted that while the principle of non-discrimination (article 2) is reflected in South Africa's constitution as well as in domestic legislation, it was still concerned that insufficient measures had been adopted to ensure that all children are guaranteed access to education, health and other social services.[207] The committee noted that of particular concern were certain vulnerable groups of children, including black children; girls; children with disabilities, especially those with learning disabilities; child labourers; children living in rural areas; children working and/or living on the streets; children in the juvenile justice system; and refugee children. The Committee went on to recommend that the South Africa government increase its efforts to ensure implementation of the principle of non-discrimination and full compliance with article 2 of the Convention,

[203] Lawyers for Human Rights, op cit
[204] ibid
[205] Lofell Jackie: "Access to Services: Legal and related issues", Johannesburg Child Welfare Society, Paper presented at Workshop on Unaccompanied Minors, Pretoria, August 3, 2001.
[206] ibid
[207] ibid

particularly as it relates to the vulnerable groups.[208] Additionally, the committee urged South Africa to implement policies and programmes to guarantee adequate access to all social services for refugee and asylum-seeking children. [209]

4.1.5 Child exploitation and child labour

The next dilemma that confronts refugee children and the humanitarian organizations in South Africa is the smuggling, trafficking and exploitation of children for labour. In South Africa it may be practiced in urban and rural areas.[210] Child labour is said to be growing despite Conventions 138 and 182 instituted by the International Labour Organisation, to eliminate all forms of child labour signed and ratified by South Africa since March and June 2000 respectively.[211] The constitution of South Africa also prohibits children under the age of 18 years from being involved in forced labour or risky forms of labour and exploitative practices. Furthermore, Article 9 of the Children's Charter of South Africa states that:

1. All children have the right to be protected from child labour and any other economic exploitation which endangers a child's mental, physical, or psychological health and which interferes with his/her education so that he/ she can develop properly and enjoy childhood.
2. All children, especially in rural areas, should be protected from hard labour including farm, domestic or manual labour or any other type of labour.
3. There should be a minimum age of employment and no child should be forced to leave school prior to the completion of matric for the purposes of employment.
4. There should be regulations and restrictions on the hours and types of work and penalties for those who violate these regulations.

5. All children have the right to be protected from child slavery and from the inheritance of labour or employment from their parent or family

[208] UHCR *Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000* CRC/C/15/Add.122. (Concluding Observations/Comments)
[209] Timngum Desire, op cit
[210] ibid
[211] South Africa had been readmitted to the International Labour Organization (ILO) after years of isolation and had played an important role in negotiating the text of the ILO Worst Forms of Child Labour Convention (No. 182) and Minimum Age Convention (No. 138). Parliament had approved the Basic Conditions of Employment Act, which prohibited the employment of children less than 15 years and protected 15-18-year-old children in employment.

Although these legal provisions may protect refugee children from forced labour or any harmful duties, the implementation is a problem. State and non-state actors in South Africa find it difficult to locate coordinated syndicates involved in child trafficking and slavery.[212] Making the law effective and also sustain refugee children who appear to be vulnerable and exposed to hard labour is also difficult.[213] As a result refugee children from Central Africa continue to be involved in child labour mainly as hawkers, domestic workers and as child prostitutes. Children who are found to be prostituting are mostly unaccompanied refugee children as young as twelve years.[214] According to some NGO's such as the Jesuit Refugee Service, most children are involved in child labour because there is no other way they have to obtain basic necessities.[215] The government has been accused of being slow in taking active decisions such as keeping the refugee children in safe and secured accommodation. Other reports however reveal that child labour is difficult to stop because there are no alternative economic and social services for refugee children since most of them are not going to school but on the other hand need to make a living.[216]

Commenting on the issue of child labour in South Africa, the Committee on the Rights of the Child voiced its concern that over 200,000 children between the ages of 10 and 14 years are currently engaged in work, mainly commercial agriculture and domestic service. To this end, the Committee encouraged South Africa "to improve its monitoring mechanisms to ensure the enforcement of labour laws and protect children from economic exploitation."[217]

4.1.6 Sexual exploitation and adolescent health

Sexual exploitation, abuse and violence, including specific concerns of adolescents are a policy priority of the UNHCR. Refugee girls have to be protected from sexual exploitation, abuse and violence as well as HIV/AIDS, teenage pregnancies and harmful traditional practices. This is the responsibility of the host community and humanitarian organizations. Abuse can be prevented through awareness raising,

[212] Timgum op cit
[213] ibid
[214] ibid
[215] ibid
[216] ibid
[217] ***CRC/C/15/Add.122.2000 (Concluding Observations/Comments, paragraph 37***

ensuring improved access to assistance and education as well as safe living conditions and school environments. Response mechanisms include healthcare, psycho-social support, measures to ensure safety of the victim/ survivor and legal redress.[218] UNHCR established a Task Force on sexual and gender-based violence (SGBV) in 2002 and after undertaking a risk analysis, a plan of action was developed to respond to SGBV.[219] Article 9 of the Children's Charter of South Africa provides that "all children have the right to be protected from prostitution and sexual exploitation such as pornography."[220]

In a survey conducted by Desire Timngum, some refugee children were found to be prostituting saying that they needed the money for food and clothes. These were some of their statements: [221]

I do not have a place to stay and anyone who can offer me a house a night I go. At first I use to be afraid of men but now it is normal

I started night work because my family leave me in the street and go away. I do not know where they go. The man take me to their house saying that they gonna help me. At night he start to force me.

I need money to buy my panties and food to eat

The Committee on the Rights of the Child while noting the efforts of South Africa to implement legislation, policies and programmes to prevent and combat the sexual exploitation of children, it remained concerned with the high incidence of commercial sexual exploitation of children. In the light of article 34 and other related articles of the CRC, the Committee recommended that "the State party undertake studies with a view to designing and implementing appropriate policies and measures, including care and rehabilitation, to prevent and combat the sexual exploitation of children."[222]

The specific concerns of adolescent refugees are another priority issue of the UNHCR. In refugee situations, younger children are often cared for while their communities and organizations tend to overlook the needs of adolescents who may also be heading households. Based on participatory processes with adolescent boys

[218] 5 priorities for Girls and Boys of Concern to UNHCR; http:www. unhcr.org
[219] ibid
[220] Children's Charter 9(3)
[221] Timngum, Desire, op cit
[222] ***CRC/C/15/Add.122. 2000 (Concluding Observations/Comments, paragraph 39***

and girls, the UNHCR encourages the creation by host countries of opportunities for formal and non-formal education, skills training, and income generating activities, employment, participation in decision-making processes, recreational activities and life- skills education for the particular group of refugee children[223]. The Ted Turner Project is an example of an NGO aimed at increasing access to reproductive health care services and increasing HIV/AIDS awareness.[224] Despite these however, the Committee on the Rights of the Child, has expressed its concern with South Africa regarding the limited availability of programmes and services and the lack of adequate data in the area of adolescent health, including teenage pregnancies; abortions; drugs and substance abuse, including alcohol and tobacco use; accidents; violence; and suicide. [225]

While the Committee noted that South Africa had launched a Partnership Against HIV/AIDS Programme (1998) which aimed, *inter alia*, to establish counselling and treatment centres for people living with HIV/AIDS and sexually transmitted diseases (STDs), it remained concerned about the high and increasing incidence of HIV/AIDS and STDs. The Committee recommended that South Africa "take effective measures to ensure that legislation is fully implemented and enforced… that the State party undertake a study to assess the situation of children with mental health concerns and introduce programmes to guarantee adequate care and protection for them."[226] Additionally, it recommended that the State party undertake further measures, including the allocation of adequate human and financial resources, to develop youth-friendly counselling, care and rehabilitation facilities for adolescents that would be accessible, without parental consent where this is in the best interests of the child. The Committee further recommended the reinforcement of training programmes for youth on reproductive health, HIV/AIDS and STDs. These programmes it urged should be based not only on gaining knowledge, but also on the acquisition of competencies and life skills that are essential to the development of the youth.[227]

Since a refugee child ought to be accorded the same rights as any South African child, the adolescent and reproductive health needs of refugee children ought to be accorded

[223] UNHCR's Priorities for Girls and Boys of concern to UNHCR,op cit
[224] Follow-up to the 1996 Graca Machel Report
[225] ***CRC/C/15/Add.122paragraph 31***
[226] ***ibid***
[227] Ibid

the same weight as those of South African adolescents. The fact that the provision of services to meet the reproductive and sexual health needs of South African adolescents has been put to question by the Committee on the Rights of the Child, it does beg the question on whether those similar needs are met for refugee children. Given the evidence provided above, it is possible to infer that these needs are not adequately met. This is because the ability of refugees and asylum seekers to secure such social and economic rights is particularly complex in countries like South Africa that face challenges in providing these rights to their own nationals.[228]

4.1.7 Birth Registration, the Right to Acquire Nationality, and Family reunification

Statelessness is a risk for refugee children as they may have difficulty in establishing their identity and nationality. As article 7 of the Convention on the Rights of the Child provides, all children should be registered and receive citizenship at birth. In the case of refugee children, only the host State is in a position to register the child. It is particularly important for a refugee child, especially if unaccompanied, to be provided with clear documentation concerning the identity of parents and place of birth.Article 7 of the CRC on birth registration, name, nationality and the right to know and be cared for by parents is therefore an essential protection tool in relation to UNHCR's mandate in relation to the prevention and reduction of statelessness.[229] However, as the provision states that a child has a right to acquire "nationality" without clarifying which nationality is to be acquired; this provision is not of a self-executing character and hence does not entail a clear right to be granted a particular citizenship. The Committee on the Rights of the Child is aware of this shortcoming has nevertheless traditionally used its monitoring competence to address issues such as the existence of different categories of citizenship.

The Committee in its concluding observations was concerned that many children are still not registered in South Africa and encouraged the country in light with articles 7 and 8 of the CRC, to continue its efforts through, *inter alia,* mobile clinics and hospitals, to ensure that birth registration is made accessible to all parents within the

[228] Human Rights Watch ,op cit
[229] **"**Refugees and internally displaced children**"** http://www.un.org/special-rep/children-armed conflict/KeyDocuments/Report/A-51-306-Add-1English.html#Index6

country. The Committee also recommended that efforts be made to raise awareness among government officers, community leaders and parents to ensure that *all* children are registered at birth.[230] The Committee also pronounced strong views on family reunification and quite frequently took up related challenges in its concluding observations and recommendations. It has often recommended to state parties to facilitate or ease family reunification, be it in relation to the country of asylum or to the country of origin in the context of repatriation. For example in relation to South Africa, the Committee noted with concern the absence of formal and administrative measures and recommended that "the state party develop a legislative and administrative framework to guarantee and facilitate family reunification."[231]

4.2 Conclusion

It is apparent from the selected issues that there are gaps with implementing international law in South Africa. The next chapter will provide an analysis of these outcomes and the reasons why the gap exists between refugee rights and implementation.

[230] Ibid paragraph 20
[231] ***CRC/C/15/Add.122.2000 (Concluding Observations/Comments, paragraph 35***

Chapter 5

Chapter Five: Analysis

5.0 Introduction

It is widely acknowledged that there is a crisis in refugee protection which has been attributed to an increased reluctance by states to admit or provide asylum to large numbers of refugees.[232] This reluctance often translates into an inability or unwillingness by states to admit or provide asylum to large numbers of refugees in camps, ensuring access to asylum systems or a fair refugee determination procedure. Whether these obligations take the form of protecting large numbers of refugees in camps, ensuring access to asylum systems or a fair procedure for determining status, there has been a general erosion of standards of protection.[233] Until recently an international pariah, South Africa is today a migrant-attracting country grappling with the problem of how to safeguard its national interests whilst still meeting its international obligations towards refugees.

The refugee community and states tend to share the same diagnosis of the refugee problem and it is defined as the conflict between national interests and refugee rights, especially in situations of mass influx of refugees. The common perception is that there is a trade-off between states' economic, social and political concerns on the one hand and the requirements of refugee law on the other.[234] There are a number of divergent views on the appropriate response to this conflict, and a lack of systematic analysis of the possible strategies for reconciling the two sets of interests. One aim of this report has been to contribute towards pointing out this gap.

5.1 The conflict between Refugee Rights and National Interests

National interests are shaped by a number of different factors, which Christina Boswell has broadly divided into external (international and regional), and internal (domestic) considerations.[235] External considerations would include factors such as

[232] Boswell, C, op cit
[233] See De la Hunt Anne: 'Refugees and Immigration Law in South Africa,' in Crush Jonathan (Ed): *Beyond Control: Immigration and Human Rights in South Africa*,SAMP,Capetown,1998.p123-129; See Voluntary Repatriation: A Critical Analysis, UNHCR Centre for Documentation and Research(CDR), January 1997
[234] Boswell,C op cit
[235] ibid

good relations with other states or regional security, while internal considerations might include social cohesion or a high rate of unemployment. Refugee issues can impinge on both external and internal components of national interests. In terms of external considerations, refugee flows can have an impact on regional and international security and protecting refugees can affect relations between states.[236] The admission of refugees and asylum seekers clearly affects internal considerations usually through the economic and social burden it imposes on host countries.[237] There are financial costs incurred by the South Africa government in hosting a refugee population for instance in the training of DHA staff competent and sensitized to deal with the unique needs and legal entitlements of refugee children.[238]

Refugees are also perceived to impose a significant burden in terms of the internal component of national interests. Some African states have expressed concerns about the financial, environmental and social "costs" of refugees and asylum seekers.[239] The perceived economic cost of hosting refugees and processing claims is the most tangible example of a trade-off between refugee rights and national interests. In the past, refugees were seen as less of a burden in the past because of labour shortages. In the current economic environment, high rates of unemployment in both industrialized and developing countries have created the impression that refugees are diverting scarce resources from local populations. This may be in terms of jobs, social services and welfare benefits, or through the financial and administrative resources invested in processing claims.[240]

To provide an illustration: according to a 1997 public opinion survey of citizen and non-citizen attitudes towards immigration and migration conducted by the South African Migration Project, majority of South Africans believe that immigration and migration impact unfavourably on the country, with nearly 60% believing that they "weaken" society and the economy and over 60% believing that they put a strain on

[236] Ibid; See also Solomon Hussein: 'Emigration Dynamics in Southern Africa: Forced Migrants and the African Renaissance,' in Majodina Zonke (Ed): *The Challenge of Forced Migration in Southern Africa*, Africa Institute of South Africa,Pretoria,2001pp112-114.He suggests that as countries come closer together economically, the propensity for emigration becomes greater which is the case in the SADC region.
[237] ibid
[238]Ibid
[239] Ibid; See also
[240] ibid

South African resources. Fear of crime, threats to jobs and the economy and disease were cited as the leading reasons given for opposition to immigration.[241]

The South African constitution guarantees basic rights and freedoms to everyone living within the boundaries of the nation-state, however according to the survey, many South Africans were found to be clearly in disagreement with the rights afforded to the immigrant population. Around 40% were opposed to Africans from elsewhere enjoying the same access to health and educational services as South Africans. Rather, more than 54% opposed giving the same right of access to housing.[242] When asked whether they would personally support the South African government in paying for the cost of sheltering refugees, the response was lukewarm with only 17% in favour.[243]

There is also a general concern at the financial cost of administering asylum procedures and providing social benefits during often lengthy determination and review processes. Some states are concerned that they lack sufficient resources for providing assistance for asylum seekers.[244] It has been acknowledged that asylum procedures need to be streamlined and perhaps simplified, especially in situations of mass influx which can lead to delays in the status determination procedures which then result in asylum application backlogs. In South Africa, it has been argued that there is a greater need for training on status determination.[245] As of late 2004 for instance, DHA with assistance from the UNHCR, embarked on its second project in four years to deal with the backlog of applications at the Johannesburg refugee reception office.[246] In addition, UNHCR and DHA acknowledged that the staffing at the Johannesburg office was barely adequate to process the large numbers of asylum seekers, and that computer equipment was insufficient and unreliable for processing applications efficiently.[247] As of November 2004, the number of refugee reception officers in the Johannesburg office increased from five to twenty three, and refugee

[241] Crush, Jonathan: *Immigration, Xenophobia and Human Rights in South Africa*, in SAMP Migration Policy Series, No.22, 2001p3
[242] Ibidp4
[243] Ibid p5
[244] Ibid; See also Gutto Shadrack : 'International Law, the African State and the Refugee Phenomenon,' in Majodina Zonke (Ed): *The Challenge of Forced Migration in Southern Africa*, Africa Institute of South Africa,Pretoria,2001.p68-71
[245] Burton, Joseph, op cit p143
[246] Human Rights Watch op cit p22; The first 'Backlog Project' that the UNHCR assisted the DHA was in 2000-2001,aimed at reducing the tens of thousands of asylum applications then pending—many for years—in the system
[247]Ibid ; See also UNHCR ExCom Conclusion No. 30, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum," 1983, which calls on countries to "allocate sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously."

status determination officers from six to eight.[248] However, as of November 2005, despite these increases, the continued backlog of applications and an inefficient system of admitting new applicants indicated that neither human resources nor equipment were as yet adequate in meeting the need.

Changing concepts of security have also led to a shift in the political significance of refugee flows. Not only is there less political motivation to admit refugees than during the Cold War era, but refugees are themselves often perceived as a security threat.[249] Faced with increasingly restrictive admissions policies for instance, many displaced people have resorted to illegal entry and residence. States have expressed concern about the links between migrant trafficking and other forms of trans-national crime, including fraud, drugs and arms trading and prostitution.

In South Africa, economic assistance to refugees is seen to conflict directly with development, and refugees are associated with unemployment, disease, criminality and ethnic unrest as seen in chapter four. To cite an example, in 1999 for instance, the DHA in conjunction with the National Intelligence Agency (NIA) raided a "hair salon" in Johannesburg and uncovered a fraud network pertaining to asylum seeker permits, work permits, late registration of births and certificates of exemption among foreign nationals. Through the use of sophisticated equipment, these documents were manufactured and were used to confer refugee status and citizenship on persons who never made such applications.[250] In March of 2000, an anti-crime blitz conducted by the South African Police Service in the high crime areas of Berea, Hillbrow and Joubert Park in Gauteng Province discovered major criminal activities. These included drug trafficking, prostitution, dealing in stolen property and counterfeit goods, rape, theft of vehicles, possession and sale of unlicensed firearms, unlicensed discotheques and pawn shops as well as exploitation and much harbouring of undocumented migrants and other crimes.[251] Criminal activity involving migrants therefore is a contributing factor to the wariness by states of admitting refugees for

[248] Human Rights Watch,op cit p22; see also the 'Refugee Backlog Project' :South Africa Department of Home Affairs.http://home-affairs.pwv.gov.za/refugee_project.asp.accessed on 7/20/2006.The department acknowledges that lack of capacity and inadequate availability of resources to facilitate the registration of asylum seekers has created a backlog of asylum applications of over 100 000. This has resulted in unlawful arrests, detention and deportation of legitimate applicants.
[249] ibid
[250] Burton Joseph, "Asylum or Abuse?The Refugee Regime in South Africa", in Majodina Zonke (ed) *The Challenge of Forced Migration in South Africa*, Africa Institute of South Africa, Pretoria,2001p 150
[251] ibid

security reasons. And where displacement is caused by ethnic conflict, there is often a fear that refugee influx will spread insecurity to neighbouring states with similar ethnic tensions. These security problems all translate into reluctance to admit refugees, and a general *malaise* about the impact of displacement on national and regional security.

5.2 The efficacy and enforcement of international Law

As earlier established, international law includes norms of permissible and impermissible behaviour, and sets a body of expectations, provides order, protects the status quo, and legitimates the use of force by a government to maintain order. It also provides a mechanism for settling disputes and protecting states from each other and also serves a moral and ethical function, aiming in most cases to be fair and equitable and delineating what is socially and culturally undesirable. These norms demand obedience and compel behaviour.

At the state level, law is hierarchical with established structures existing for both making law (legislatures and executives), and enforcing law (executives and judiciaries).[252] Individuals and groups within the state are bound by law and because of a general consensus within the state on the particulars of the law; there is widespread compliance with it. It is in the interest of everyone that order and predictability be maintained, but if law is violated, the state authorities can compel violators to judgement and use the instruments of state authority to punish wrongdoers. [253]

At the international level, while the notion and functions of law are comparable with those at the state level, the characteristics of the system are different. At this level, authoritative structures are absent. There is no international executive, no international legislature and no judiciary with compulsory jurisdiction. For the realist, that is the fundamental point: the state of anarchy. Liberals while admitting that law in the international system is different from that in the domestic systems, see more order in the international system and to most of them, international law not only exists but has an effect on daily life. [254]

[252] ibid
[253] ibid
[254] Mingst, A.K op cit p 186

What bearing then has international law on the actual behaviour of states? According to Hedley Bull, rules by themselves are mere intellectual constructs.[255] Inorder to establish the efficacy of international law, it is not necessary to establish an identity as between actual and prescribed behaviour; that is, that there are no cases in which the rules are disregarded.[256] It is not true of any system of legal rules that it is never disregarded and indeed in cases where conformity between actual and prescribed behaviour can be regarded as a forgone conclusion, there can be no point in having rules at all.[257] It is for this reason that that societies do not develop rules requiring their members to breathe, eat and sleep, which they may be relied upon to do, but do develop rules requiring them not to kill, steal or lie, which some of them are likely to do, whether there are rules prohibiting this kind of behaviour or not.

The question to appropriately ask therefore is whether the rules of international law are observed to a sufficient degree (it is not possible to specify precisely to what degree), to justify our treating them as a substantial factor at work in international politics, and in particular in maintaining international order.[258]

In this particular case study, there is no doubt that there exists some degree of disparity between South Africa's actual behaviour and the behaviour prescribed by the rule of international law as evidenced in the chapter on findings. If it were possible or meaningful to conduct a quantitative study of obedience to all the rules of international law though, it might be expected to show that South Africa obeys most agreed rules of international law most of the time. In this particular case study however, evidence of violation of the rights of refugee children by South Africa such as lack of access to education for refugee children that is on par with South African children, detention of unaccompanied minors, inefficient and delayed refugee status determination procedures, hindrances in accessing social services such as healthcare, and child labour all contribute to the violation of the human rights of refugee children thereby contravening rules of international law.

[255] Bull, H.: *The Anarchical Society: A Study of Order in World Politics,* Macmillan Press Ltd, London,1977 p.136.
[256] ibid
[257] Ibidp137
[258] ibid

Scholars like Dugard contend that one of the major problems facing the international community is how to effect compliance with international law by states. He states that international law is "essentially made up of treaties reflecting the express agreement of states and custom, which comprise those rules of international conduct to which states have given their tacit consent."[259] He contends that states acting through their governments recognize and comply with international law for a wide range of reasons. These include: an interest, either selfish or altruistic, in the maintenance of peace and good order; an acceptance of the legitimacy of the rule of international law and a country's reputation both at home and abroad and the realization for the need for co-existence and fear of economic, political, cultural and sport isolation. Finally, he maintains that states comply with international law for reasons unrelated to sanction. In this respect, John Dugard argues that "international law is not binding because it is enforced, but that it is enforced because it is already binding"[260]In complying with international law with respect to refugee children for instance, there is no enforcement agency, however, the fact that South Africa has ratified relevant conventions such as the CRC implicitly means that it is duty-bound to comply with its standards.

Some scholars maintain that, compliance with international law "in practice continues to fall short of reasonable expectations, and the law itself is less developed with respect to the promotion of compliance,"[261] maintaining that non-compliance with the standards of international law brings the law into disrepute. To prevent this disrepute for instance, the United Nations recognizes the importance of compliance with the rules of international laws and respect for human rights as a prerequisite for maintaining international peace and security, and towards this end, it has always called on states to work individually and cooperatively for greater compliance with the standards of international laws. Some like Gurowitz use neo-liberal and rationalist approaches of international law to interpret compliance with it. He argues that an examination of international refugee laws on the protection of the rights of refugees "illustrates some shortcomings of the rationalist perspective of international law and

[259] Dugard John.*: International Law: A South African Perspective*, JUTA, South Africa.2000. p47
[260] Ibid. p10
[261] Aldrich, G. A. : 'Compliance with the Law: Problems and Prospects', in Hazel Fox et al (ed)*Effecting Compliance : Armed Conflict and the New Law*, volume 11, 1993p3

domestic politics."[262] This is because states recognize relevant international laws for refugees and reconcile it with their national interest with regard to the traditional notion of state sovereignty.

Akehurst maintains that, the fact that international law largely reflects the interests of states does not justify the conclusion that states would act in the same way if there were no international law, still less does it justify the cynical view that states only obey international law when it is in their interests to do so. This is because firstly, the mere fact that a rule is a rule of international law provides states with reasons for obeying it even when there appears to be short term gains to be derived from breaking it. Furthermore, he adds, "a rule acquires a life of its own when it becomes a rule of international law. Out of habit therefore, states obey the rule even when it goes against their interest to do so." [263] He therefore concludes that contrary to widespread opinion, compliance with international law by states is the norm rather than the exception.

In the findings, rules of international law are violated or disregarded but these cases do not in themselves provide evidence that international law is without efficacy in South Africa. In the first place, violation of a particular rule usually takes place against the background of conformity to other rules of international law, and indeed of conformity even to the rule that is being violated in instances other than the present one. In the second place, the violation is sometimes in itself of such a nature as to embody some element of conformity to the rule that is being violated. The distinction between violation of a rule and conformity to it is not always a sharp one; the decision of an authority as to whether or not a violation has occurred is always in the end yes or nay, but the processes of argument whereby this decision is arrived at may contain uncertain and arbitrary elements, both in interpretation of the rule and in the construction of the facts. In reality, the behaviour of a state in relation to the particular rule of international law is best thought of as finding its place in a spectrum of positions stretching from clear-cut conformity at one extreme to a clear-cut violation at the other. The violation of an agreement may be a measured response to some

[262] Gurowitz, A : "International Law, and Migrant Rights" in Reus-Smit : *The Politics of International Law*(ed) Cambridge University Press, South Africa,2004.p132
[263] Akehurst, Michael, op cit p.16

action of another party, designed to preserve some part of the agreement or to keep alive the possibility of restoring it.[264]

Thirdly, where a violation takes place, the offending state usually goes out of its way to demonstrate that it still considers itself (and other states) bound by the rule in question. For instance, when Lawyers for Human Rights challenged the South African state in court for the detention of refugee minors, the Pretoria High Court ruled against the state and ruled that the detentions were unlawful and invalid.[265] Subsequently, the state removed the children from detention and transferred them to another facility as earlier cited in the previous chapter. What is a clearer sign of the inefficacy of a set of rules however is the case where there is not merely a lack of conformity as between actual and prescribed behaviour, but a failure to accept the validity or binding quality of the obligations themselves as indicated by a reasoned appeal to different and conflicting principles or by an unreasoning disregard of the rules. [266]

The denigrators of international law, however while they are wrong when they claim that international law is without efficacy are right to insist that respect for the law is not in itself the principle motive that accounts for conformity to law. International law is a social reality to the extent that there is a very substantial degree of conformity to its rules; but it does not follow from this that international law is a powerful agent or motive force in world politics. [267] It has been argued for instance that states obey international law in part because of habit or inertia; that they are as it were, programmed to operate within the framework of established principles.[268]

In so far as their conformity to law derives from deliberation or calculation, it results from motives of three sorts. First, obedience may be the consequence of the fact the action enjoined by the law is thought to be valuable either as an end in itself or as part of, or a means to, some wider set of values. Rules that are carried out primarily for this sort of reason are spoken of as "the international law of community." Second, obedience may result from coercion or the threat of it, by some superior power bent

[264] Bull,H op cit
[265] Human Rights Watch, op cit
[266] An unreasoning disregard of the rules, which is the failure to respond to them because of lack of knowledge of what they are, lack of understanding of them or lack of acceptance of the premises from which they derive.
[267] ibid
[268] Bull,op cit p 140

on enforcing the agreement. Agreements that are observed chiefly for reasons of this sort are sometimes spoken of as 'the international law of power,' and are exemplified by the acceptance of peace treaties by vanquished states at the time of their defeat and for as long a period thereafter as they remain too weak to challenge the verdict of war.[269]

Third, obedience may result from the interest a state perceives in reciprocal action by another state or states. Agreements and principles resting on this sense of mutual interest are sometimes called 'the international law of reciprocity'. These are exemplified by the most central principles of international law, such as mutual respect for sovereignty, the keeping of promises and the laws of war. The argument that states obey the law only for ulterior motives or that they can do so only when they consider it is in their interests to do so is not always acceptable according to Bull, who advances, finally, that international law does not rest on the willingness of states to abide by its principles to the detriment of their interests, but in the fact that they so often judge it in their interests to conform to it.[270]

5.3 Conclusion

One of the most important achievements in the international accountability of states in matters concerning the treatment of individuals within state territory has been the establishment of a treaty based system for the protection of human rights.[271] The adoption of a pattern of treaties establishing bodies with the competence to determine the legality of the conduct of states by reference to human rights standards as well as to monitor and supervise their compliance with such standards is one such reason. Even though this is not an entirely adequate process, it is hard to deny the fact of its impact when seen in the light of those human rights treaties which do not establish comparable protection mechanisms with the competence to entertain the right of individual petition and to receive formal periodic reports on the performance of state parties with regard to treaty obligations.[272]

[269] ibid
[270] Bull, H. op cit p. 140
[271] Beyani, Chaloka : "Human rights and the International Protection of Refugees" Majodina Zonke (ed) *The Challenge of Forced Migration in South Africa*, Africa Institute of South Africa, Pretoria,2001p.159
[272] ibid

The Convention Relating to Status of Refugees mentioned in preceding chapters, under which the UNHCR exercises a diplomatic supervisory mandate in the international protection of refugees, is an example of such a treaty. Beyani,[273] contends that the absence of a treaty body with the competence to examine the legality of state conduct and to hold states accountable for the non-implementation of their obligations under the 1951 Convention, has contributed to the inadequate legal protection of the rights of refugees as human beings. It has also led to the fragmentation of the application of those obligations by subjective processes determined chiefly by domestic legal systems instead of the international legal system. This was acknowledged by South Africa during its initial report presentation to the Committee on the Rights of the Child where it maintained that that the Constitution of South Africa remained the supreme law of South Africa.[274]

As a consequence of this approach, refugee protection has been construed narrowly by reference to the process of status determination under domestic legal procedures and case laws.[275] In states such as South Africa, this is of course unavoidable to a large extent given the predominance of domestic law in the field of refugee protection and entry into state territory. However it has had the undesirable effect of subjecting the application of an international standard to domestic interpretations, thus isolating the wide potential for refugee protection from human rights at the international level.

Other reasons for the inadequate legal protection of the rights of refugees are conceptual and structural problems. The protection of refugees has not hitherto been regarded by states to be within the province of international obligations concerning the protection of human rights, despite the obvious connection that refugee flows result from the violation of human rights and give rise to the need for international protection. [276] Apart from that, the structure of international mechanisms for the protection of human rights is compartmentalised firmly into specific vertical treaty regimes in which the competence of the treaty bodies is predicated. In principle, these bodies have no competence to examine the quantum of protection afforded to refugees under the 1951 Convention, and conversely, UNHCR has no legal standing before

[273] Ibid p160
[274] Summary record of the 609th meeting : South Africa. 01/02/2000. CRC/C/SR.609. (Summary Record of the 23rd Session)
[275] Beyani, Chaloka op cit p160
[276] ibid

these bodies. [277] Because of these reasons, the system of refugee protection has in the past been divorced from the work of treaty bodies, and an unhealthy chasm has grown between refugee protection on one hand, and the protection of human rights on the other, with the consequence that the conceptual basis for the protection of refugees has been detached from the fabric of human rights which altogether underlies the 1951 Convention.

In this regard, there has appeared an important directional and substantive change. With the passing of Resolution 1998/49, the Commission on Human Rights recognised that the human rights machinery of the United Nations, including the mechanisms of the Commission on human rights treaty bodies has important capabilities to address human right violations which cause movement of refugees and displaced persons and to present durable solutions to their plight. As a result, the Resolution requests all United Nations bodies including the Special Rapporteurs, Special representatives and Working Groups of the Commission, the United Nations treaty bodies acting within their mandates, the specialised agencies, governmental and non-governmental organisations to provide the High Commissioner for Human Rights with all relevant information in their possession on human rights situations that create or affect refugees and displaced persons for appropriate action in fulfilment of her mandate in consultation with the UNHCR. Notably, the Human Rights Commission fully endorses the participation of the UNHCR in the deliberations of the treaty bodies and has also granted it the standing to address the Commission in all its sessions.

This means that the protection of the human rights of refugees has been placed more clearly than before at the door of the Human Rights Commission, the treaty bodies and other agents of protection. Although there are acknowledged constraints concerning the competence of human rights treaty bodies over refugee claims in general, evidence shows that they have begun to address refugee claims in the context of protecting human rights. Refugee theory and practice must follow this trend if the protection of refugees is to be strengthened at international and national levels.[278]

[277] Ibid p 163
[278] Ibid p177

CHAPTER 6: CONCLUSION

6.0 Summary of findings

Beyond the problems associated with access to refugee status determination procedures and the inadequate protection such individuals often receive, refugees and asylum seekers in South Africa also have difficulties gaining access to work, education, basic health care services, public relief and assistance, education beyond the primary levels, housing, and permission to practice their professions.

The ability of children refugees and asylum seekers to secure such social and economic rights is particularly complex in countries like South Africa that face challenges in providing these rights to their own nationals. The insecure legal status of asylum seekers (and occasionally, due to administrative failures), the lack of recognition of refugee and asylum seeker documentation by some of those charged with granting access to benefits and rights, as well as racial or ethnic discrimination and xenophobia, place this group in an especially vulnerable position that results in the loss of their human dignity.

As an asylum seeker told a local NGO "They [South Africans] call us *chakarumbas* [a local derogatory term referring to other African nationals]. Other similar terms are "amakwerekwere" and "amagrigamba." [279] Moreover, unlike many poor nationals, refugees and asylum seekers often continue to experience the effects of the trauma of their flight from countries of origin. They may suffer from language barriers and are often without any supportive family or social networks. UNHCR has recognized these specific vulnerabilities and recommends that refugees and asylum seekers be dealt with within a framework that understands their "particular difficulties."[280]

South African and international laws recognize that asylum seekers are entitled to a limited range of social and economic rights. Once their status is recognized, refugees

[279] CASE, *National Refugee Baseline Survey: Final Report t*p 133

[280] UNHCR *Handbook*, op. cit., Part 2(A), para. 190 states in part that "it should be recalled that an applicant for refugees status is normally in a particularly vulnerable position. He find himself in an alien environment and many experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."

are entitled to a wider range of such rights in accordance with the South African Refugees Act and the Refugee Convention. With regard to asylum-seekers, section 22 of the Refugees Act grants individuals (adults and children) in possession of the asylum seeker permit the right to work and study. Though not binding law, UNHCR's ExCom, in recognizing an obligation on states to safeguard the welfare of the asylum seekers, explicitly concludes that, "asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met."[281]

Once they have been recognized as such, all refugees in South Africa are entitled to the right to seek employment and to the same basic health services and primary education that inhabitants of South Africa receive.[282] In accordance with South Africa's obligations under the 1951 Refugee Convention, recognized refugees must also have access comparable to other foreign nationals to public relief and social security.[283] In sum, under South Africa's domestic and international legal framework the minimum social and economic rights that must be afforded to asylum seekers and refugees are the following: refugees and asylum seekers in possession of a valid permit must enjoy the rights to work and study;[284] recognized refugees (who are by definition lawfully present in South Africa) must enjoy the right to work and must enjoy the right to basic health services and basic primary education on a par with other South African inhabitants;[285] recognized refugees must also enjoy the same rights as nationals to public relief and social security;[286] recognized refugees must also enjoy the same access as other lawfully present non-citizens in South Africa to education beyond the primary levels, to housing, and to practice their professions.[287] The study has established that these rights are not always realized by refugee children.

Determination of an asylum claim is the right and duty of the national government in which asylum is being sought in line with international law. It is also the role of the

[281] UNHCR ExCom Conclusion No. 93,paragraph (b) (ii)
[282] Refugees Act, Art. 27 (g).
[283] 1951 Refugee Convention, articles 17, 23, and 24
[284] Refugees Act, section 22.
[285] Refugees Act and Refugee Convention, Articles 17 and 22.
[286] Refugee Convention, Article 23.
[287] See Refugee Convention, Articles 19, 21, and 22. It should be noted that in the terminology of the Convention, these rights are to be provided to "lawfully present" refugees. Under South African law, these are those refugees who are "recognized" as such by the proper authorities.

government to decide, based on national legislation and international regional instruments, what services the individual and family will be entitled to and often the role of humanitarian organisations to implement those services. Because it has the most direct effect on applicants, national law is the most impacting layer of law for children seeking asylum seekers. Generally, protocols of South Africa comply with existing international and regional instruments. Despite the legal recognition of these rights, the government of South Africa has been found wanting in meeting these rights in some instances as evidenced in the fourth chapter. As many human rights activists, refugee rights activists and lobbying NGOs have observed, securing refugee rights remains one of the greatest challenges in South Africa.[288] When government's revenue base weakens and social fibre disintegrates, it becomes easier to manipulate the issue of foreigners, including refugees, depicting them as competitors for limited jobs, housing and social services, and creating a convenient outlet for social rejection. They find themselves at the mercy of other individuals and structures as a result of being uprooted from their communities of origin due to war. These circumstances usually lead to the violation of refugees' right to human dignity.

The success of the determination procedure will largely depend on the creation of an administrative body that can provide reasonable guarantees of independence from the political branch of the government. There is a concern about the independence of refugee status determination officers, the Standing Committee and the Appeal Board. The fact that the Minister retains discretion regarding the salaries of the Standing Committee and the Appeal Board members is potentially problematic.[289] Also the lack involvement in any stage in the determination process by the judiciary and non-governmental organisations coupled with the fact that words like 'persecution' have no statutory definition leaves much to discretion and potential abuse.

Whilst states do have obligations to refugee children, all of us have responsibilities. An aspect of states obligations is to enable people to realise those responsibilities. Communities can be hindered from protecting refugee children if the state does not provide a supportive environment. Access to good quality education, economic security and a peaceful and healthy society is a fundamental basis for protecting

[288] Human Rights Quarterly, op cit p89
[289] South Africa Constitution, Section 19

refugee children. Given the frustrations in the acquisition of rights by refugee children, tighter enforcement strategies for the CRC are imperative.

Under the current arrangement, states report to an 18-member expert committee every five years. This has had some impact on states' compliance, but the committee is under-resourced and its recommendations to states are non-enforceable. Commenting on South Africa's initial report for instance, the Committee was impressed with South Africa considering the suffering experienced under apartheid and its continuing effects on the country's development, and added that it was indeed a miracle that the committee should be receiving a delegation from a democratic South Africa. While commenting on the general implementation of the CRC particularly on legislation, the Committee noted the efforts of the State party to bring about legal reform and to introduce measures to ensure greater conformity between domestic legislation and the Convention. However, the Committee remained concerned that the national law, and in particular customary law, still did not fully reflect the principles and provisions of the Convention. The Committee encouraged South Africa to continue its efforts in the area of legal reform and to ensure that its domestic legislation conforms fully to the principles and provisions of the Convention. The Committee further expressed concern at the insufficient efforts made to involve community-based organizations in the promotion and implementation of the Convention and was also concerned about the lack of coordination between those ministries responsible for the implementation of the Convention.[290] This includes for instance the Departments of Social Development, Education and Home Affairs in the case of refugee children.[291]

Measures to strengthen the implementation and enforcement of the CRC at the local, national and international levels are needed. As a starting point, greater training on the CRC should be undertaken by states including South Africa most especially amongst those responsible for the care of refugee children, including parents, teachers, welfare offices and law enforcement agents. The CRC should be incorporated into the domestic laws of South Africa and children should be actively engaged in monitoring compliance with the CRC through their own networks.

[290] Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000. CRC/C/15/Add.122.(Concluding Observations/Comments)
[291] See also Human Rights Watch, 2OO5 op cit

The study has established that South Africa has been found wanting in some instances with implementing international law pertaining to the protecting of the rights of refugee children. The jury is still out though as to whether this is as a result of the conflict that exists between refugee rights and national interests or whether it is as a result of a lack of political will to fully comply with international law because there exists no enforcement agency to ensure that countries such as South Africa do not contravene the tenets of the CRC. One cannot discount however that a combination of all the above factors is indeed the reason why South Africa has failed in this particular case study with the obligations outlined in the CRC. The CRC however remains an essential document providing the best legal protection for refugee children.

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