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Mulumba, Tshilenge Jean-Paul

2014-06-20
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Is There a Duty Upon the State to Provide Basic Education to the Undocumented Immigrant Child in South Africa?

By:

Jean Paul Mulumba Tshilenge

Student number: 393244

E.mail: christborderfree@hotmail.com

Submitted in partial fulfilment of requirements for the degree of:

Masters of Arts in International Human Rights

Supervisor: Professor Vinodh Jaichand

In Faculty of Humanities

University of the Witwatersrand

2013

A. DECLARATION

I,_____

declare that this dissertation is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Masters in Arts of International Human Rights by course work and dissertation at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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SIGNATURE

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STUDENT NUMBER

_____

DATE

B. ACKNOWLEDGEMENTS AND DEDICATION

During the course of my life, and throughout the hard and testing times, there has been someone alongside. For that, I would like to thank God the Father of our Saviour Jesus Christ who is the source of all life and strength. In his generosity, he made this dream to become a reality. Throughout my graduate education, Professor Vinodh Jaichand has been an excellent mentor and supervisor. He dedicated many hours in teaching, improving and supporting me through this expedition.

I would like to dedicate this thesis and everything I do to my late father Alexis Mulumba, who first placed the corner stone for my education, and, my mother, Melanie Tshita who was my first educator. In addition to them, my Uncle Etienne Tshisekedi and his wife Marthe Kasalu provided me with enough care and support in a very crucial and remarkable time of my life.

I must convey my sincere gratitude to my wife Mado Kabanga, and family who supported me through this long and rocky journey, and ensured I succeed in my knowledge building. My gratitude goes also to friends: Cain Mbatha, Terence Shunmagum, Kalvanda Bosonkie, Gabin Tshimanga and colleagues who generously gave a helping hand when I was financially weary, and supported me spiritually and mentally.

C. ABSTRACT

Children in South Africa have the right to basic education. The 1996 South African Constitution and the 1996 South African Schools Act guarantees this right. Together with the Convention on the Rights of the Child, which South Africa has signed and ratified, both domestic and international statutes require the state to support the educational system, managed and characterised by non-discrimination which considers the right of whoever lives under South African jurisdiction to have access to education. The focal point of this study is to examine the laws and practices concerning access to basic education for undocumented immigrant children in South Africa. It provides an examination of both domestic and international statutes related to the right of the immigrant child to access basic education. The main purpose of the study will be to establish, whether it is the state's duty to provide basic education to undocumented immigrant children. The study offers recommendations for legislative reforms which contribute to the development of the education system in South Africa and elsewhere. In other words, this study will provide an in-depth examination of the legislation and practices relating to immigrants' access to basic education in South Africa, and an analysis of whether the current policies and implementation are in line with domestic and international standards.

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D. TABLE OF ABBREVIATIONS AND ACRONYMS

ABET	:	Adult Basic Education and Training
AIDS	:	Acquired Immunodeficiency Syndrome
ASER	:	Age Specific Enrolment Rate
CEDAW	:	Convention on Elimination of All Forms of Discrimination Against Women
CoRMSA	:	Consortium for Refugees and Migrants in South Africa
CRC	:	Convention on the Right of the Child
DBE	:	Department of Basic Education
DHA	:	Department of Home Affairs
DoE	:	Department of Education
DRC	:	Democratic Republic of Congo
DSD	:	Department of Social Development
EFA	:	Education for All
HE	:	Higher Education
HIV	:	Human Immunodeficiency Virus
HSRC	:	Human Sciences Research Council
ID	:	Identity Document
ICERD	:	Convention on the Elimination of Racial Discrimination
ICESCR	:	International Covenant on Economic Social and Cultural Rights
ICCPR	:	International Covenant on Civil and Political Rights
LHR	:	Lawyer for Human Rights
MDGs	:	Millennium Development Goals
NEPA	:	National Education Policy Act, 1996
NIP	:	National Integrated Plan (NIP)
NGOs	:	Non-Governmental Organisations
NPO	:	Non-profit organisation
NSC	:	National Senior Certificate
OAU	:	Organisation of African Unity
PTSD	:	Post-Traumatic Stress Disorder
RSA	:	Republic of South Africa
RSDO	:	Refugee Status Determination Officer
SAMP	:	Southern African Migration Project
SAQA	:	South African Qualifications Authority
SARE	:	Southern African Review of Education
SASA	:	South African Schools Act, 1996
SGBs	:	School Governing Bodies
STATS SA	:	Statistics South Africa
UDHR	:	Universal Declaration of Human Rights
UN	:	United Nation
UNHCR	:	United Nations Higher Commissioner for Refugees
UNESCO	:	United Nations Educational, Scientific and Cultural Organisation
UNICEF	:	United Nations Children's Fund
USA	:	United States of America

1. INTRODUCTION

On the threshold of the 21st century, the world faces major global challenges characterized by the threat of economic stagnation, decline and widening economic disparities among and within nations.[1] The issue of democratisation and good governance has been at the centre of the South African post-apartheid discourse. The challenges facing the state on the one hand, centre on improving the life of its own citizens and on the other hand, the management and integration of immigrants who choose South Africa as a place to live. Once in the country, the immigrants are divided according to their legal status: asylum seekers, refugees, economic immigrants and illegal immigrants. In some instances, they travel alone and in others they travel as an entire family. Series of questions which arise therefore are that, if it is an obligation for the South Africa government to promote the realisation of specific human rights such as education for these immigrant people? What if basic education is proven to be a constitutionally guaranteed right? Can the government then refuse to implement it? In light of these questions, this research will focus on whether access to basic education for an undocumented immigrant child is a government responsibility or not.

There are several reports concerning topics relevant to children: healthcare, infant mortality, immunisation and malnutrition.[2] Unfortunately, there is little literature explaining challenges faced by undocumented immigrant children.[3] Most countries, including South Africa, have a body of legislation addressing the realisation of human rights; but the common challenge always remain on the clarification, adaptability and implementation. For instance, there is a contradiction between the Constitutional right to education for all and the Immigration Act,[4] particularly, sections 39 and 42 which prohibit the provision of training or instruction to undocumented immigrants ('illegal foreigners'). Another contradiction is evident in the UN Charter of Human Rights, Article 13, which recognizes a universal right to emigrate, but not a corresponding right to be admitted elsewhere.[5]

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[1] Rachel Murray, *Human Rights in Africa*, (2004) at p. 74
[2] "Implementing Child Rights in Early Childhood" – UNICEF, Available at www.unicef.org/spanish/earlychildhood/files/Guide_to_GC7.pdf, [retrieved on the 21st May 2014]
[3] Bernard van Leer Foundation: *'Implementing Child Rights' in Early Childhood*, A Guide to General Comment 7, Nations Committee on the Rights of the Child, United Nations Children's Fund, (2006), at p. vii
[4] Section 13 and 42 of the South African the Immigration Act (2002)
[5] Anthony H. Richmond, *Immigration and Ethnic Conflict*, (1988) at p. 9.

These will be discussed in greater detail throughout this research report. The legitimacy of state sovereignty is increasingly called into question when human rights are integrated.[6]

The main question in any study focused on the human rights of certain groups is whether such rights are unjustly deniable or attributable to individual members of those vulnerable groups.[7] The South African Constitution bestows upon all immigrants, including undocumented immigrant children, the right to basic education.[8] The post-apartheid government of South Africa signed and ratified international instruments, passed legislation, and established institutions and bodies to promote and realize a new culture of human rights subsequent to democracy in 1994. Section 27(g) of the Refugee Act of 1998 guarantees basic education and healthcare to refugees and asylum seekers' children, including undocumented immigrant children.[9]

Like the international instruments, the South African Constitution does not generally distinguish between citizens and non-citizens for most of the rights detailed in the Bill of Rights.[10] There are however some specific rights such as those pertaining to political rights that are distinctly set aside for citizens. Example of right reserved for citizens include the acquisition of a National Identity Document (ID), national passport, the right to vote, to stand for public office and to form a political party.[11] The South African Constitution incorporates and protects most internationally recognized human rights, and places upon the state the obligation to "respect, protect, promote and fulfil the rights as advocated for in the Bill of Rights.[12] The South African Bill of Rights is considered binding on the legislature, the executive, the judiciary and all organs of the state," and involves all laws.[13] Since the advent of democracy, a significant change in the government's attitudes and practices towards migrants has been observed. The hostility toward undocumented immigrants and their children has increased.[14]

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[6] Rhiannon Morgan & Bryan S. Turner, *Interpreting human rights, social science perspectives* (2009) at p. 90

[7] David Weissbrodt and Mary Rumsey, *Vulnerable and Marginalized Groups and Human Rights*, (2011) at p. XII

[8] Sarah Motha, Brian Ramadiro, *Education Rights of Migrants in the Inner City of Johannesburg*, South Africa report by the Wits Education Rights Project & Khanya College December (2005) at pp. 13-4

[9] Section 27 (g) of the Act 130 of 1998 , South African Refugee Act, cited by Sarah supra note 7 at p. 1

[10] Human Rights watch, *"Prohibited Persons" Abuse of Undocumented Migrants, Asylum seekers and refugee in South Africa*, (1998) at p. 156

[11] Sections 19, 20 and 21 of the South African Constitution (1996).

[12] Ibid Section 7 (2).

[13] Chapter 2, section 8 (1) of the South African Constitution (1996).

[14] Sally Peberdy, Selecting *immigrants*: National Identity and South Africa's Immigration Policies 1910-2—8 (Wits University Press, Johannesburg (2009) at 137-69.

In South Africa, visa, asylum and refugee status are permits issued to immigrants by the home affairs. The two domestic statutes dealing with immigrant are on the one hand, the South African Immigration Act No 13 of 2002. This legal instrument guides the country on how to apply and extend visa such as study permits, work permits and permanent or temporary residence. On the other hand, the Refugee Act No 130 of 1998 for asylum seekers and refugees application and extension process. When considering an application, Section 33 of the South African Constitution is a legal guide for immigration officers or the Refugee Status Determination Officer (RSDO).[15] To be granted asylum, a person must be able to demonstrate a "well-founded fear" of being targeted for execution, torture, or any other dehumanisation or degrading treatment.[16] They must demonstrate that they have no protection from their own state – and indeed it is their own government that is threatening to persecute them. For this reason alone, applicants should be granted a permit that allows them to legally sojourn in the country. On application to the Home Affairs Refugee Centre, every asylum seeker is entitled to be issued with a "section 22 permit" which is valid for a period of six months and legalizes the asylum seeker stay in the Republic of South Africa temporarily pending the outcome or final decision on his or her application.[17] The permits for asylum seekers or refugee must contain their fingerprint, signature and photograph. The permit must have a recent photograph and the fingerprints of the applicant as prearranged.[18] The Department of Home Affairs (DHA) should provide renewals for refugee permit before the permit expires. In general, the recommendation is to grant a refugee permit for an undefined period of time. If the situation in the country of origin changes substantially, DHA could then consider applying the cessation clause.[19] A refugee is entitled to be issued with a maroon identity document valid for 2 or 4 years and renewable together with their refugee status. This also entitles him / her to a travel document.[20] When a refugee or asylum seeker gives birth to a child in South Africa, the immigrant parents have the rights and duty to take the child to

[15] Section 24 of Act No 130 of 1998, South African Refugee Act.
[16] David Weissbrodt and Mary Rumsey, supra note 7, at p. 27.
[17] Section 22 (4) of Act No 130 of 1998, South African Refugee Act.
[18] Section 22 (4) of South African Refugee Act No 130 of 1998
[19] 18UNHCR, A Thematic Compilation of Executive Committee Conclusions, Office of the United Nations High Commissioner for Refugees Division of International Protection Services 6th edition, June 2011 at p. 81
[20] Section 21, 22, 24 and 30 of the Act No 130 of 1998, South African Refugee Act.

any regional Home Affairs Office for registration of the child. The child is therefore entitled to a birth certificate, unfortunately different from the child born from a citizen.[21]

The Department of Home Affairs is frequently cited for its systematic exclusion of undocumented children from accessing education as a designated right, including demanding bribes in exchange for services; delaying the provision of study permits, resulting in delays in registration; and demonstrating xenophobic attitudes through derogatory remarks or generally acting in a belligerent manner.[22] There are also case where procedures are deliberately violated by Home Affairs officials who refuse to extend or issue permits.[23] Home Affairs, an official institution representing government, has as its primary duty the issuing permits, identity documents and passports to all people living in South Africa. There are many recorded cases of abuse of power and xenophobic attitude among Home Affairs officers. Examples of such abuse of power by officers have been reported in Johannesburg, Cape-town, Durban in particular, worst cases were recorded in Limpopo and Western Cape Province, where immigrant parents reported being referred to their country of origin by the officials at the Department of Home Affairs to obtain birth certificates or additional documentation, even if their children were born in South Africa.[24]

Against the backdrop of the foregoing discussion, this paper will first examine the definition of the key concepts integral to an understanding of the plight of undocumented immigrant children's access, or lack thereof, to education in South Africa. Second, this paper will critically analyse the actual legal status and social position of undocumented immigrant children in South Africa. Third, this paper will examine the argument for expanding the realisation of the right to basic education to undocumented immigrant children in South Africa. Finally, this paper will conclude with some observations and recommendations regarding how the South African state can fulfil its Constitutional obligations as well as its duties under various international treaties to respect the human rights of undocumented immigrant children by ensuring their access to basic education.

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[21] Ibid Section 21 B. (2).
[22] *Tshambila and Others v Minister of Home Affairs and Others* (20633/10) [2010] ZAWCHC 611 (8th of December 2010)
[23] *Ibid*
[24] Carol Anne Spreen and Salim Vally, *Monitoring the Right to Education for Refugees , Migrants and Asylum Seeker*, (2012) at p. 79

2. BACKGROUND

The history of movements and migration in South Africa began before the arrival of the first white settlers under the leadership of Jan van Riebeck in 1642.[25] Movement of black Africans in the county was noticed before and after the arrival of white settlers.[26]

In the 1800s, the British brought in indentured labourers from India to work on KwaZulu-Natal sugar plantations.[27] In addition to this, another source of migration magnetism was the mining sector. Most miners who migrated to South Africa originated from surrounding countries such as Malawi, Lesotho, Mozambique, Zambia, and Botswana.[28]

In 1948, when the National Party came to power, education became one of the core tools used to sustain and perpetuate apartheid.[29] This was evidenced in the 'Bantu Education Act of 195 '. This Act was formulated with the aim of racial segregation, which encouraged the education system to be 'appropriate' to the black African population. In the meantime, 'Christian National Education' was used for the white population only. This system was aimed to empower the whites, boosting their moral and racial ideology.[30] In other words, apartheid education was an essential political device because of its crucial role in sustaining unfairness and segregation. This was soon noticed and challenged by racial activists. A famous case is "the 19 6 Soweto up-rising", which was ignited by secondary school pupils' opposing the admittance of Afrikaans as the primary language of education.

Today there are more than 200 million people worldwide residing outside their country of birth.[31] South Africa has changed significantly during its long history, and is now home to a large international community. Since 1994, the South African Republic has become a place of people fleeing armed conflict and political unrest from countries such as

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[25] Sally Peberdy, *Setting the Scene: Migration and Urbanisation in South Africa*, at p.3 Available at : www.gcro.ac. a sites default files News... Setting the scene.pdf [retrieved on the 4th December 2013]
[26] *Ibid*
[27] R. Ragwan , The narrative of the Baptist Association of South Africa and its significance for the Indian Baptist Church in KwaZulu-Natal (2011) at p.1, available at *uir.unisa.ac.za/bitstream/handle/10500/4627/Ragwan.pdf?sequence=1* [Retrieved on the 4thNovember 2013]
[28] *Ibid*
[29] Sarah Graham-Brown, *Education in the Developing World*, (1991) at p. 155
[30] *Ibid*
[31] Philip Spencer and Howard Wollman, *Nations and Nationalism*, (2005) at p. 304

Ethiopia, Angola, the Democratic Republic of Congo (DRC), Sudan, Burundi, Zimbabwe and Somalia.

According to the Southern African Migration Project (SAMP) estimated, in 2005, "South Africans believe that 25% of the population is foreign. This figure is estimated to be more or less 3 to 5% with around 500,000 undocumented immigrants, for a population of 47 millions.[32] Their status as "undocumented immigrant" has made these people and their families particularly vulnerable to poverty and exploitation. Most refugees and immigrants in general, except the relatively small number of professionals, work in the informal sector.[33] They are often street hawkers or persons employed in the security industries.[34] Their situation is worsened because they often cannot find jobs in the South African formal sector because their identity documents are not adequately accepted by most companies and bank institutions.

The South African state is guided by both domestic and international statutes, which has shaped its commitment to democratise, develop policy and assess its progress on issues such as immigrants' rights to education.[35] Chapter Two of the South African Constitution contains the Bill of Rights, a human rights and legal framework which aims to safeguard, on the one hand, the civil and political rights and on the other, social, economic and cultural rights of everyone who lives in South Africa, including undocumented immigrant children. This right expressed in the Bill of Rights instructs both all legal statutes, including common law provisions. It binds all government processes of the executive, legislative and the judiciary. Provincial governments and municipal councils also have the legal obligation to respect, protect, promote and fulfil all rights for all as contained in the Constitution.[36]

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[32] In Crush, Williams and Peberdy, "Migration in Southern Africa", (2005), at pp. 12-3. See also Landau, "Migration Trends, Management and Governance Challenges", 2005; Waller, "Irregular Migration to South Africa During the First Ten Years of Democracy", 2006; Crush and Williams, "Making up the Numbers: Measuring" "Illegal Immigration to South Africa", 2001. Political and media numbers have often been between 2, 5 and 5 millions, and as high up as 12 millions irregular migrants.
[33] Sarah Graham-Brown, supra note 29, at p. 226
[34] *Ibid*
[35] C. Odora Hoppers, B. Gustavsson, E. Mptala, J. Pampallis, *Democracy and Human Rights in Education and Society, Explorations from South Africa and Sweden*, (2007), at p. 181
[36] Trynie Boezaart, *Child Law in South Africa* (2009), at p. 292

CHAPTER 1: DEFINITION OF CONCEPTS

1 Immigrant

Over 200 million individuals – or the three per cent of people worldwide – currently reside in a country other than the one in which they were born. [37] *'An Immigrant'* is described as an individual who has entered another territory which is not his or her birth place. He or she can have a permanent or temporary permit to sojourn in the country as stipulated in Section 1(1) of the Immigration Act No 13 of 2002.[38] The term "immigration" needs to be defined with a certain amount of care in the present context.[39] The term "immigrant" generally refers to a category of people who depart from their country of origin with the intention to settle in another country permanently. Immigration is a result of: Economics, politics, family re-unification, natural disaster, poverty or the wish to change one's surroundings voluntarily.[40] Generally, the term "immigrant" denotes a person who has travelled to another country, most often for permanent residence purpose.[41] An "immigrant" is assumed to be admitted legally to live in the South Africa with a view to permanent resident. The emphasis in this definition is upon the presumptions that the immigrant followed legal process for residing in the South Africa.[42] There are also "non-immigrants", that is, individuals who enter the country without the intent to remain on a permanent basis.[43] Examples of non-immigrants include foreign workers who have temporary permission to remain, foreign students, business visitors, tourists, and unsuccessful asylum-seekers.[44]

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[37] International Organization for Migration (IOM), "Facts and figures, global estimates and trends", available at: http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/global-estimates-and-trends. [Last visited on 24 June 2013]
[38] Section 1(1) of the Act No 13 of 2002 South African Immigration Act.
[39] A. J. Cropley, *The Education of immigrant children, a psychological introduction*, (1983) at p. 17
[40] *Ibid*
[41] http://www.adversity.net/Terms_Definitions/TERMS/Illegal-Undocumented.htm [retrieved on the 12 November 2013]
[42] *Ibid*
[43] David Weissbrodt supra note 7, at p. 157
[44] *Ibid*

Immigrants can be sub-divided into the following groups: *'refugees*', '*asylum seekers'*, '*economic migrants'*, '*illegal-immigrant'*, and *'undocumented immigrants'*.[45] These related terms have subtle differences, and are often used in a confusing and inconsistent manner. However for the purposes of this study; these words shall be described as follows on the next appearance.

1.2. A Refugee

Refugees and migrants are fundamentally different, and for that reason are treated very differently under modern international law.

1.2.1. A Refugee, under the U.N 1951 Convention

Article 1 of the UN 1951 Convention as amended by the 1967 Protocol[46]provides the definition of a refugee as:

> "A person who 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 events, is unable or, owing to such fear, is unwilling to return to it.."[47]

Under the Basic Agreement reached between the South African government and the UNHCR in 1993, South Africa agreed to abide by the definitions contained in the U.N. 1951 Convention. Under the 1951 UN Convention, one could argue that the eligibility of illegal entrants to qualify as refugees is clear from the absence of any reference in the Convention to legal admission as a criterion of refugee status.[48] In other words, persons who sneak across frontiers or who disguise their true motive when they seek entrance may still be genuine refugees if they otherwise meet the requirements of the Convention definition.[49] The 1951

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[45] Kirsten Holst Petersen & Anna Rutherford, *Displaced Person*, (1988) at p. 18.
[46]It was initially limited to protecting European refugees after World War II, but a 1967 Protocol removed the geographical and time limits, expanding the Convention's scope. (Although, like many international treaties, the Refugee Convention was agreed in Geneva, it is incorrect to refer to it as "the Geneva Convention," because there are four treaties regulating armed conflict known as the Geneva Conventions). The Article 1 of the Convention as amended by the 1967 Protocol provides the definition of a refugee
The Definition of a "Refugee" under the U.N. 1951 Convention, The Convention was approved at a special United Nations conference on 28 July 1951.
[47]Ibid, United Nations High Commission for Refugees, 1951 UN convention
[48] James C. Hathaway, *the Law of Refugee Status*, (1991) at p. 50-51
[49]*Ibid*

UN Convention and protocol relating to the Status of Refugees, in Article 22, explicitly states that, "The contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education". It is this standard that is the yardstick for the national implementation of the right to education for immigrants in South Africa. [50]

1.2.2. Under the Organisation of African Unity (OUA)

A refugee is defined as:

> "Every person, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, and he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[51]

This, too, represents a departure from past practice in which it was generally assumed that a person compelled to flee his or her home should make reasonable efforts to seek protection within a safe part of his or her own country (if one exists) before looking for refuge abroad. Article 3(1) of the 1951 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[52] also stipulated that the prohibition on "*refoulement*" applies to situations in which there are " substantial grounds" for believing that a person (whether or not a refugee) would be subjected to torture if returned to his or her country.[53]

The OAU Convention also provides that "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened; and that the refugee essentially be repatriated against his will."[54] Section 22 permits are issued to foreign national who enter South Africa seeking asylum for political and religious persecution and other detrimental practices perpetrated by the applicant's country. "Section 24 permits" are normally granted to the applicants who have succeeded in their

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[50] Carol Anne Spreen and Salim Vally , supra note 24, at p. 73

[51] OAU Convention, entered into force June 20th 1974 at Art 1 (2).

[52] Adopted by the UN General Assembly, resolution 39/46 of December 10th, 1984; entry into force in June 26th, 1987. The South Africa Government signed the "Convention Against Torture" in 1993, though it has yet ratified the treaty's

[53] Human Rights watch , Supra note 10, at p. 150

[54] The Article 2 (3) and 5 (1) of the 1969 OAU Convention

interview. Regrettably, some applicants are vulnerable to arrest, detention and possibly refoulement before their application outcome. [55]

The obligation of non-refoulement is found in section 2 of the Refugees Act No 130 of 1998. These legal obligations were recognised by the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Other*, [56] where the Court held that "it is unconstitutional for the state to remove a person to another state where he or she has the possibility of facing the death penalty."[57] The cornerstone of this decision was the Court's previous finding in *S v Makwanyana and Another*,[58] that capital punishment is inconsistent with the Constitutional right to life, dignity, and not to be subjected to cruel, inhuman, or degrading punishment. Similarly, in '*Mohamed'* the Court held that the state may not effect the removal of a person – whether by deportation or extradition – to a country where he or she may face such life threatening circumstances highlighted in '*Makwanyana*.'[59]

A recent example is the case of *Tsebe and Another v Minister of Home Affairs and Others*.[60] Both applicants were sought on charges of murder in Botswana. The first applicant had gone through extradition proceedings, and the South African Minister of Justice issued an order of non-surrender due to the Botswana government's refusal to provide an assurance that he would not be subject to the death penalty.[61]

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[55]Press Release, Lawyers for Human Rights, Detention and Deportation of Zimbabweans Costly and Does Not Deter – New Handbook on Alternatives to Detention (July 14, 2011) *available at* http://www.lhr.org.za/news/2011/detention-and-deportation-zimbabweans-costly-and-does-not-deter-new-handbook-alternatives-; Alex Bell, *South Africa: Country Says Zimbabwean Deportations Will Not Resume, Yet* ALLAFRICA.COM (Aug. 2, 2011) http://allafrica.com/stories/201108030029.html.,[retrieved on the 3 December 2014]

[56]*Mohamed and Another v President of the Republic of South Africa and Other* [2001] ZACC 18 (CC) 201 3 SA 893 (CC)

[57]*Ibid, as* quoted by Roanna Tay, "*Caught in a Gap*", An Examination and Human Rights Assessment of Immigration Detention Laws and Practices in South Africa, (2012), at p. 94

[58]*S v Makwanyana and Another* [1995] ZACC 3 (CC) 1995 (3) SA 391 (CC)

[59]*Ibid.*

[60]*Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* [2011] ZA GP JHC 115 (SGHC); 2012 (1) BCLR 77 (SGHC)

[61]Under section 11(b) (iii) of the Extradition Act 67 of 1962, which provides that, the Minister may refuse an extradition if he or she is of the opinion that it would be 'too severe a punishment to surrender the person concerned'.

1.3. An Asylum Seeker

Asylum is one of the earliest features of civilisation.[62] References to it have been found in texts written 3,500 years ago, during the blossoming of the great early empires in the Middle East such as the Hittites, Babylonians, Assyrians and ancient Egyptians.[63] The terms Asylum Seeker and Refugee are often confused but they are different. Asylum seekers are people who have crossed an international border into a second country seeking sanctuary.[64] An asylum seeker is a person who has launched an application of refugee status in the hosting country and is waiting for the outcome of his or her claim.[65] Rights of asylum have been describes as "political asylum", and having it means "ἄσυλον" in Greek. The term 'Asylum' was first used in medieval times, whereby every person owing to a well-founded fear of being persecuted on the basis of political choice or religious way of life in his or her country of origin, could seek protection in a foreign country.[66] For instance, Rene Descartes (1596 – 1650) was a famous French mathematician, scientist and was also heralded as the first modern philosopher but sought asylum in the Netherlands during his lifetime; Thomas Hobbes (1588 –1679), widely regarded as one of a handful of truly great political philosophers, fled in France to seek refuge; finally Voltaire (1694-1778) a French national, Enlightenment writer, historian and philosopher famous for his wit sought asylum in England.[67] These are great men of the history who were immigrants as well.

1.4. Economic migrant

An economic migrant is a person who has come to another country mainly for trade, job or working reasons.[68] In other words, this especially category, compared to other refugees, opt to move in order to improve the future prospects of themselves and their

[62] UNHCR, *Protecting Refugees & The Role of the UNHCR* (2007 to 2008) at p. 5 available at: http://www.unhcr.org/49eecf142.html [retrieved on the 10 January 2014]
[63] *Ibid*
[64] Liam Gearon, *the Human Rights Handbook, a global perspective for education*, (2003) at p. 53
[65] http://www.merriam-webster.com/dictionary/refuge [last visited on the 5th September 2013]
[66] Ibid
[67] Hobbes's Moral and Political Philosophy (Stanford Encyclopedia of ... [last visited on the 5th September 2013]; see also Voltaire Quotes – Brainy Quote
[68] Supra note 64, at p. 51

families. The economic migrant can be defined as a person who voluntarily, leaves his or her country motivated by choice in search for improved life. This category of persons continues to benefit from their governments' protection. In other words, their governments are in most of the cases sympathetic towards them, hence there is no possibility or probability of facing persecution once they decide to return back to their country of origin. Economic migrants differ with the refugee group who are fleeing their country of origin, seeking protection in another country.

The difference between a refugee and an economic migrant is the subject of much debate.[69] Economic migrants relocate voluntarily while Political migrant have no choice in the matter.[70] In comparison, refugees and asylum seekers often arrive in the host country without previous contacts or links to the host society. "Refugees have to move if they are to save their lives or preserve their freedom. Many have left behind family members and friends. Voluntary migrants, however, often follow a pattern of 'chain migration' and migrate to countries where there is a connection which is often based on a colonial past and kinship ties."[71]

1.5. Unaccompanied Immigrant

"*Unaccompanied minor or migrant"* generally refers to immigrants who are under the age of 18 and are not under the care of a parent or legal guardian.[72] In most cases, these are children fleeing violence or unrest, and seeking protection. This category of children is vulnerable to trafficking.[73] About ten years ago, unaccompanied children could not seek refuge in the absence of one or both of their parents.[74] Thus, a child who has been separated from his or her parents either before or during flight from the country of origin, is also in vulnerable position, and requires the same treatment as an unaccompanied child. An

[69] Alice Bloch and Carl Levy, *Refugees, Citizenship and Social Policy in Europe*, (1999) at p. 2
[70] *Ibid* at pp. 2-3.
[71] *Ibid* at pp. 3
[72] http://www.migrationinformation.org/Feature/display.cfm?ID=823 , accessed on the 15th June 2013
[73] Ibid
[74] The best and perhaps only, authoritative scholarly work on separated children published prior to the 1990s is the comprehensive and widely respected volume Everett M. Ressler et al., Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements (1988). This study focuses extensively on the family and child welfare framework for protection, citing multiple examples of differing approaches. Id. at 181–245. By contrast, analysis of the legal basis for an asylum application by a separated child is limited; the discussion is academic and only on U.S. case is cited in the entire text. Id. at 256–61.

unaccompanied child who is found in such condition, undoubtedly assumed to be either an asylum seeker or refugee after investigation.[75] The legal responsibility for unaccompanied or separated refugee children falls onto the South African government. In most of the cases, the United Nation High Commission for Refugee (UNHCR) or the Red Cross often assists the immigrant children for tracing or unifying with family. In the particular case of South Africa, it is the duty of the Department of Social Development (DSD) to ensure that unaccompanied immigrants or separated refugee children receive the protection, education, shelter, basic nutrition and the social services they require. In these circumstances, he or she will be entitled to an asylum seeker permit terms of section 22 of refugee Act, then brought before the Children's Court in the district in which he or she lives in terms of the Children's Act. 2005.[76] On their arrival these children are however, denied access to education because of the lack of documents to produce at school. In front of this reality, educational delays further inhibit their capacity to adapt, resulting in lower reflection capacity, an emotional handicap, and these children are often diagnosed as having post-traumatic stress disorder (PTSD) which most of the time dictates negative behaviour in future.[77]

South Africa has not yet become party to the Statelessness Conventions, the right to a nationality protected in other instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of Child (CRC), and Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).[78] Even if statelessness is a worldwide issue, it has received little attention and recognition, particularly in domestic legal schemes.[79] According to the international human rights law, children form a significant proportion of the global refugee or stateless population.[80] The rights to education is also considered in international instruments regulating the treatment of immigrant undocumented children, such as Stateless Persons.

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[75] Act No. 38 of 2005
[76] Section 21 A & 22 of the South African Refugee Act 130 of 1998
[77] Marcelo M. Suarez- Orozco, Carola Suarez-Orozco, and Desiree Baolian Qin, *The New Immigration* (2005), p. 112-13
[78] Roanna Tay, *supra note 57*, at p. 90
[79] *Ibid*
[80] Javaid Rehman, *International Human Rights Law, a Practical Approach*, (2003) at p. 376

1.6. Undocumented Immigrants

The term 'Undocumented immigrant' is controversial, as discussed below in more detail.[81] In this study the use of the term undocumented immigrant is defined as a person who is not a national of the Republic of South Africa and who (1) has been residing, or is physically present with intention to reside in South Africa for a substantial period of time; and (2) lacks valid immigration documents.[82] In addition, an undocumented immigrant is also described as a person who foreign land is born who either over stayed in the host country or does not have any particular right to legally sojourn in the host country.[83] So defined, the term encompasses those who entered without inspection and thus never obtained valid immigration documents as well as those who were lawfully admitted for temporary periods but later overstayed or otherwise violated the terms of their admission.[84] In addition to this, there are those who are victims of bureaucracy as Home Affairs officers fail to issue or extend certain permits.

1.7. Illegal Alien

An "alien" is generally understood to be a foreigner, and comes from a foreign country. He or she is assumed to be violating the hosting countries' law and customs by residing there.[85] In South Africa, there are individuals who enter or remain without permission. Among this type, some have been subjected to human trafficking and therefore lack the requisite documentation to stay in the country.[86] Distinctions, for instance, between legal and illegal, economic and political, voluntary and forced migration are not only

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[81] Legomsky, Stephen H.*Portraits of the Undocumented Immigrant*: 44 Ga. L. Rev. 65 (2009-2010) p. 66

[82] *Ibid*

[83] http://www.nolo.com/dictionary/undocumented-immigrant-term.html, [last visited on the 20th August 2013]

[84] Supra note 81, at p. 66

[85] http://www.adversity.net/Terms_Definitions/TERMS/Illegal-Undocumented.htm, [last visited on the 10th September 2013]

[86] *Philip Anderson*, "In a Twilight World-Undocumented Migrants in the United Kingdom" available at: http://www.geocities.com/jrsuk/Twilight.html, [last visited on 24th July 2013] M. J . Gibney Outside de protection of the law the situation of irregular migrants in Europe." Oxford University Refugee Studies Centre Working Paper No. 6, 2000, available at: Http://www.rsc.ox.ac.uk/PDF/working-papers.../RSCworkingpaper6.pdf , [retrieved on 24th July 2013); United Nation Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. "The Rights of Non-Citizens: Progress Report of the Special Repporteur", UN Doc. E/CN.4/ Sud.2/2005/25/Add. 3, 3 June 2002. Para. 3.

conceptually problematic, but when used to discriminate, are liable to lead to nation states breaking their own norms.[87] Pertinent here is a lack of documentation and the determination of status as 'legal or illegal'[88] Their rights are questioned and questionable, their status is uncertain and insecure because of the difficulties they appear to pose for an simplistic concept of national identity.[89] In order words, in considering the differences between forced and voluntary migrants, it is surprising that there has been so little work which addresses the situation of a refugee as a separate and distinct category from other migrants.[90]

1.8. Reasons for Immigration

The common ground of all categories of immigrants is the aspect of "voluntary" and "involuntary" movement. The question for immigration is traditionally analysed in terms of two sets of factors, "push" factors, on the one hand, and "pull" factors, on the other.[91] Push factors are conditions in the homeland which encourage people to leave their country of origin.[92] These factors can include social turmoil such as war, economic exploitation, feelings of despair or hopelessness, unemployment, starvation, and similar factors.[93] These may include perceived social and economic advantages; a romantic feeling that the receiving society is a land of opportunity which tempt immigrants to leave their homelands and take up life in the new country.[94]

[87] Noiriel (1993) points out that it is democratic states which have led the way in developing rules for the control of immigration, pointing to the example of France in 1880s and Britain in 1905. Quoted by Philip Spencer & Howard Wollman, *supra note* 31, at p. 214
[88] Carol Anne Spreen and SalimVally, *supra note 24*, at p. 78
[89] *Ibid*
[90] Alice Bloch and Carl Levy, *Refugees, supra note 69* at p. 4.
[91] A. J. Cropley, supra note 39 at p. 21
[92] *Ibid*
[93] *Ibid*
[94] *Ibid*

2. JUSTIFICATION, AIM AND METHODOLOGY OF THE STUDY

2.1. Justification of the Study

Questions have been raised about the role of the South African state in providing undocumented immigrant children with access to economic, social and cultural rights such as, basic education. These have produced two oppositional responses that try to resolve the matter. The first response argues that South Africa has no duty at all to provide basic education to the undocumented immigrant child. This response bases its argument on the fact that South Africa is a developing country. South Africa is a signatory of the Covenant on Economic, Social and Cultural Rights (CESCR), but has not yet ratified it. Consequently, each State Party to the present Covenant on its own or assisted by international communities has to undertake economic and technical steps to the maximum of its available resources on realisation of this rights.[95]

In contrast, the second response affirms basic education for undocumented immigrant children as the state's burden. This response grounds its argument on the fact that South Africa has signed and ratified the Convention on the Rights of the Child (CRC), which binds the state to fulfil its duty to all children irrespective of their status. In addition to this, State law, specially, the South Africa's Bill of Rights, contains important provisions on the interpretation of the Constitution and fundamental human rights as guaranteeing access to basic education.[96] This study will therefore, closely analyse the two tendencies and make recommendations.

"Universal basic education" is considered as a priority for "developing countries" and is the focus of the "Education for All" (EFA) movement led by the United Nations Educational, Scientific and Cultural Organization (UNESCO). It is also the second of the Millennium Development Goals (MDG), based on the ideal of all children accessing primary Education by 2015.[97] However, there are 72 million children still out of school worldwide. Nearly half of these children live in sub-Saharan Africa. Some studies have projected that 56 million

[95]The Article 2(1) of the CESCR, cited by Philip Alston and Gerard, in the Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly, Vol. 9, No. 2 (May, 1987), p.165

[96] Rika Joubert & Sakkie Prinsloo, *the Law of Education in South Africa*, (2009) at p. 36

[97] www.un.org/millenniumgoals/education.shtml, *[Retrieved on the10th July 2013]*

children could still be out of school in 2015.[98] The data collected from Statistics South Africa (STATS SA 2008) indicates that, in 2008, 12% of migrant children of school-going age in South Africa were not in school.[99] A report compiled in 2010 by the Lawyers for Human Rights (LHR) together with the Consortium for Refugees and Migrants in South Africa (CORMSA) indicated that 24% of school going age children of asylum seekers were not attending school.[100] However, every child has the right to an education.[101] Children grow quickly and their right to receive a decent basic education is urgent.[102] The crucial question remains is it the South African state burden to provide basic education to undocumented immigrant children?

South Africa is one of the world's leading migrant destination countries, particularly in terms of irregular and undocumented immigrants and their families. While the numbers of undocumented arrivals are inherently difficult to quantify,[103] the extent of undocumented immigrant children is exemplified, at least in part, by the fact that South Africa receives the largest number of individual asylum applications of any country worldwide.[104] Many of the migrants involved in these movements do not fit neatly into the category of refugees, but nonetheless find themselves vulnerable and in need of protection.[105] Scholars and researchers have both underlined that to date; there is little analysis of the situation regarding the irregular and mixed migration flows and their challenges both, in South Africa and elsewhere.[106]

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[98] United Nations Development Group, Figure 2: Missing the target –projected numbers of out-of-school children to 2015, (June 2010), at p. 1, available at: http://www.undg.org/docs/11382/Thematic-paper-on-MDG2_28-June.pdf [retrieved on the 6th February 2014]

[99] Spreen and Vally , Southern African Review of Education (SARE), *A journal of comparative education, history of education and educational development*, Vol. 18, Number 2, (2012) at p. 74 available at: *www.right-to-**education**.org/sites/r2e.gn.apc.../**sare**18-2_SpreenVally.pdf* [Retrieved on the 6th February 2014]

[100] *Ibid*

[101] Article 28 of the United Nations Convention on the Rights of the Child (CRC) was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, in accordance with article 49

[102] "Equal education is a basic right" by Lisa Draga and Doron Isaacs of 'Equal Education South Africa' statement of 9th May 2013 available at: http://www.iol.co.za/the-star/equal-education-is-a-basic-right-1.1513443[accessed on the 24 June 2013]

[103] Katy Long & Jeff Crisp in harms' way: the Irregular Movements of Migrants to Southern Africa from the Horne and Great Lakes Regions (United Nations High Commissioner for Refugees (UNHCR), Research Paper No 200, January 2011) at 6.

[104] UNHCR Global trends 2010 (UNHCR, Geneva 2011) at 3 and 25. South Africa has received the highest number of asylum claim in the world consistently for the past three years with 207 000 claims in 2008, 222.000 claim in 2009, and 180 600 claims in 2010- over one fifth of the global total.

[105] Katy Long & Jeff Crisp supra note 103, at p.2; see also Alexander Betts, Towards a 'Soft Law' Framework for the Protection of Vulnerable Migrants (UNHCR, Research Paper No 162, August 2008).

[106] Katy Long & Jeff Crisp, supra note 103 at p. 3

2.2. Aim of Study

The study seeks to determine whether the South African state is obliged to provide basic education to the undocumented immigrant children. Thus this study seeks to achieve policy clarification with regard to the undocumented immigrant children access to basic education in South Africa. Another problem that it aims to address is the poor implementation of policy regarding the immigrant's children rights to access basic education.

2.3. Methodology

This project is essentially a desk-based research study of legal instruments, domestic and international statutes, jurisprudence and secondary sources. These sources are offered thematically in order to present the human rights and legal framework and to determine whether the South African state is bound to deliver basic education to undocumented immigrant children living in the country.

CHAPTER 3: RIGHTS TO BASIC EDUCATION FOR UNDOCUMENTED IMMIGRANT CHILDREN IN SOUTH AFRICA

Every child, irrespective of his status, has the right to access a basic education that is free, compulsory and of good quality as a foundation of his development.[107] In spite of his ethnicity, race, gender or origin, no child should denied access to basic education. All children are born free and equal in dignity and rights; therefore, all form of discrimination infringing their rights is prohibited. [108]

3. Child's Legal Regime

According to the Convention on the Rights of the Child ("CRC") a child is every person below the age of 18, unless he or she is legally emancipated. The Convention has been described as having three primary principles: (1) All rights guaranteed by the Convention on the Rights of the Child must be available to all children;(2) The best interests of the child must be the primary consideration in all actions concerning children; (3) The child has a right to be heard, and the child's view must be taken into account in all matters affecting the child.[109] A child, as a human being, is recognized by law as a legal person.[110] State parties may choose to enforce or fail to enforce, the Articles of the CRC at various levels, namely, in their Constitutions, in enacted legislation, in policies, as well as through programmes which affect children.[111]

In terms of South African law a person is also deemed a child until he or she reaches the age of 18.[112] Children under the age of 18 should enjoy all Constitutional rights, as well

[107] Special Session on Children Documents, The Convention on the Rights of the Child Article 7 (5), *A World Fit For Children* Millennium Development Goals, at p. 16
[108] *Ibid*
[109] See Convention, Articles 2, 3 and 12 "discussion in Judith Timms, Children's Representation" (2003) at p. 45, available your shout! a survey of the views of 706 children and young ... - nspcc, available at: www.nspcc.org.uk/inform/publications/.../yourshout_wdf48023.pdf , Retrieved on 20th October 2013
[110] Oliver C. Ruppel, *Children's rights in Namibia,* (2009) at p. 1
[111] *Ibid* at p. 12
[112] Section 28 (3) of the South African Constitution (1996)

as those in Section 28 that apply to children specifically.[113] Furthermore, relevant provisions in the Children's Act of 2005 also need to be considered.[114]

3.1. Education

What is "education"? According to the United Nation Education Scientific and Cultural Organisation (UNESCO),[115] when people speak of education, they mean schooling, even though education is a much more complex matter.[116] The International Standard Classification of Education (ISCE) defines education as comprising of organised and sustained communication designed to bring about learning.[117] "'Learning' is taken to mean any change in behaviour, knowledge, understanding, skills or capabilities which the learner retains and which cannot be ascribed simply to physical growth or to the development of inherited behaviour patterns."[118]

Education takes place in many settings other than a classroom.[119] It occurs through formal and informal processes, in the work place, at cultural events, through the media, and, at community gatherings.[120] Substantially, education is a communication and requires a relationship between two or more people involves the transfer of information.[121] In light of the Universal Declaration of Human Rights, Pentii (1948) stated that, "education shall be directed to the full development of the human personality" and can be understood as:

> *"The development of the entire personality which includes all the dimensions of the human being: physical, intellectual, psychological, and social. The aim is that each individual develop, according to his or her abilities and talents, into a well-balanced person."*[122]

The term "*education*" is to be understood in its widest sense: as any systematic influence on people's knowledge, skills, and attitudes.[123] It may thus, be helpful to define

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[113] *Ibid*
[114] Katy Long, *supra note 103*, at p. 169
[115] In 1945 the United Nation Education Scientific and Cultural Organisation (UNESCO), a specialised agency of the United Nations was established with the purpose of contributing 'to peace and security by collaborating among the nations through education, science and culture'. See the UNESCO Constitution 1945 Article 1(1).
[116] Suzanne Grant Lewis, *"Education in Africa"*, Africa : Progress & Problems, (2007) at p. 14
[117] A. R. Thompson, *Education & Development in Africa* (1981) at p. 23
[118] *Ibid*
[119] Suzanne Grant Lewis, *Supra note 116*, at p. 14
[120] *Ibid*.
[121] A. R. Thompson, s*upra note* 117 at p. 23
[122] Arajärvi, Pentii, "Article 26", in *The Universal Declaration of Human Rights, a common standard of Achievement*, Alfredsson and Eide (eds), The Hague, (1999) at p 555.
[123] Emmet John Hughes, *Education in World Perspective*, (1962) at p. 137

education from the perspective of encompassing the following: children have a right to access quality education; they have rights to receive education in a non-discriminatory environment based on respect and the best interest of the child. It is now generally accepted that the first requirement of any education system is to provide "basic education."[124]

3.2. Basic Education

International law on human rights does not provide a clear definition of 'Basic education', but the way this and other related concepts function has been elucidated within the framework of international organizations, and is explained thus: "Basic education relates to the first layer of a formal school-system."[125] Basic education normally begins between the ages of 5 and 7 and lasts approximately six years.[126] Basic education has received the highest levels of attention in the world over the last decade. Basic education may be described as developing a person to a stage of literacy which enables him or her to function efficiently in leisure and work and to be aware of his or her duties and obligations.[127]Basic education is one of the most essential social and economic rights in human society. Basic education refers to the whole range of educational activities taking place in various settings (formal, non-formal and informal), that aim to meet basic learning needs. According to the "ISCED", basic education comprises primary education (first stage of basic education) and lower secondary education (second stage). Basic education within the context of the right to primary education is an element of the core content of the right to education and includes literacy, arithmetic, skills relating to one's health, hygiene and personal care, and social skills such as oral expression and problem solving.[128]

The term "basic education" is often used within the framework of international conferences on education, such as the World Declaration on Education for All (Jomtien,

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[124]Report of the Main Committee of the HSRC Investigation into Education "*Provision of Education in the RSA"* (1981) at p. 29.
[125] See, for example, UNESCO's Statistical Yearbook and the Revised Recommendation concerning the Standardization of Educational Statistics (1978).
[126] See the Preliminary Report of the Special Rapporteur on the Right to Education, U.N. Doc. E/CN.4/1999/49, paras. 75-79 and A. Melchiorre, At what age?... , 2nd ed., 2004, available at www.right-to-education.org .
[127]ANN Skelton, *Children & the Law*, Lawyers for Human Rights (1998) p. 89
[128]Fons Coomans, Identifying *the Key Elements of the Right to Education:* A Focus on Its Core Content (1988) p. 4

Thailand, 1990 and Dakar, 2000).[129] These two events influenced the course of development in basic education in almost all countries.[130] Since that time, successes and failures in education were treated essentially as domestic affairs.[131] The 1990s brought basic education to the international attention.[132] In some countries such as South Africa, basic Education often includes pre-primary education and/or adult literacy programs. Basic education provides compulsory and free formal or informal fundamental training process that all children are entitled to, from preschool to secondary school. Primary education is not regarded as education in its own right, but only as a means of reaching secondary education. In this case secondary school can be considered as the educational passage leading from the primary school, providing general education to tertiary educational institutions, providing specialised vocational education.[133] In calculating the costs of basic education, it is clear that the State makes a direct contribution in terms of food, school uniform, books, school fees, and transport.[134]

3.3. Importance of Basic Education

Education contributes to the development of all peoples in a country, promotes equal opportunities for everyone, economic growth, assisting parents in the education of their children and equal distribution of funds.[135] All people want to earn a decent living and be serve as productive members of society. Parents want to make sure that their children receive the best opportunities possible by accessing education from a young age. Community and states need to have a continuing supply of skilled, trained and intellect reserves. The Supreme Court of India has held the right to (primary) education to be understood as the right to life because of its inherent fundamental importance.[136] Education equips people with the understanding and expertise they need to increase income and expand employment

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[129] *Ibid*, see also The Child Rights Convention in 1989 and the first Global Conference on Basic Education in Jomtien in 1990

[130] M. Mukhopadhyay, R. P. Singhal, T. N. Dhar, Karunana Chanana, Furquan Qumar, Sudesh Mukhopadhyay, *Globalisation and Challenges For Education, Focus on Equity and Equality*, (2006) at p. 2

[131] *Ibid*

[132] *Ibid*

[133] O J Van Schalkwyk, *The Education System Theory and Practice*, (1986) at p. 123

[134] Report of the Main Committee of the HSRC Investigation into Education, supra note 124, at p. 102

[135] Rika Joubert & Sakkie Prinsloo, *Supra note 96* at p. 23

[136] *Unni Krishnan and Others v. State of A.P. and Others*, on the 4th of February 1993; (1993) 1 SCC 645

opportunities.[137] According to the Millennium Development Goals, when education is broadly shared and reaches the poor, women and marginalized groups, it holds out the prospect that economic growth will be broadly shared.[138] Education serves as a social control, reproducing society and reflecting all its inequalities.[139] But education also offers a critique of society and can change or even revolutionise it.[140] Education has the power to liberate individuals; literacy can open the world and help people reach their potential.[141]

Basic education is regarded as a priority for developing countries *and* is the focus of the United Nations Education Scientific and Cultural Organisation (UNESCO).[142] It is also included in the Millennium Development Goals as Goal number 2: Achieve Universal Primary Education by 2015.

Education is highly important because it is required to fulfil several employment functions. Educational requirements must be met before those can be adequately fulfilled. Not only have this, an extensive number of studies proven that education has public health benefits. In other words educating the public assists in lowering the spread of HIV/AIDS, better vaccination, prevention and medication of disease, better nutrition, lower maternal, infant and child mortality.[143] Basic education is intrinsically linked to all development goals, such as supporting gender empowerment, improving child health and maternal health, reducing hunger, fighting poverty, encouraging economic growth and building peace.[144] Every human being needs education to acquire knowledge so that he can reach his / her goals. It is in this context that the Millennium Development Goals firmly place basic education

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[137] "Eradicate extreme poverty and hunger": the first Goal, among eight Millennium Development Goals. Available at: http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/education-and-the-mdgs/goal-5/ [retrieved on the 23rd of August 2013]

[138] *Ibid*

[139] Suzanne Grant Lewis, supra note 116, at p. 14

[140] *Ibid*

[141] *Ibid*

[142] In 1945 the United Nation Education Scientific and Cultural Organisation (UNESCO), a specialised agency of the United Nations was established with the purpose of contributing 'to peace and security by collaborating among the nations through education, science and culture'. See the UNESCO Constitution 1945 Article 1(1).

[143] The fear of being persecuted need not always extend to the whole of the refugee's country of nationality… a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so" [Emphasis added]: United Nations High Commissioner for Refugees, *Handbook on Procedures and criteria for Determining refugee Status*, (1979) at pp. 21-22

[144] Education for All (EFA) South Africa Country Progress Report: (2013) at p. 3 available at: www.education.gov.za/LinkClick.aspx?fileticket...tabid=36 [retrieved on the 20 May 2014]

alongside the goal of poverty reduction for concerted action during the years to come.[145] The effectiveness of education as a critical instrument of poverty alleviation lies in the fact that it directly impacts on the capability of the individual and interrelates with almost every aspect of life, including the freedom to choose and to exercise basic civic rights.[146] Education and training is the key to employment and occupational achievement.[147] In other words, education provides the means for progress. People without an education earn less during their lifetime than those who have one.[148]

In brief, "education is not a miracle cure or a magic formula opening the door to a world in which all ideals will be attained, but one of the principal means available to foster a deeper and more harmonious form of human development and thereby to reduce poverty, exclusion, ignorance, oppression and war."[149] The paramount role for achieving any kind of development belongs to education.[150] To quote the first democratic South African President Nelson Mandela:

> *"Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine; that a child of farm-workers can become the president"*[151]

3.4. Quality Education

The quality of education should also encompass the standards regarding the purposes of education as defined in Article 13 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 29(1) CRC.[152] It can be argued that Article 29 of CRC, by articulating the aims of education, spells out a position, agreed by the international community, on what constitutes a quality education.[153] A learner has a right to receive quality education, but he or she also has an obligation to attend school and to participate actively in

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[145] Fons Coomans, supra note 128 at p. 5
[146] *Ibid at* p. 2
[147] Anthony H. Richmond, supra note 5, at p. 23
[148] *Ibid.*
[149] Fons Coomans, Supra note 128, at p. 1
[150] Snippet, the *Teacher Speaks, 'Education in World Perspective'*, (1974) at p. 137.
[151] Nicholas Spaull, *Primary School Inequality is South Africa*, Department of Basic Education, Poverty and Privilege, Research on Socio-Economic Policy *(2012), p. 30*
[152] Fons Coomans, supra note 128 at p. at 7
[153] Audrey Osler & Hugh Starkey, *Teachers and Human Rights Education*, (2010), at p. 111

the learning process.[154] The fact that the school is basically a place of instruction entails that it is also an appropriate place for learning. Hence, this requires the presence of learners, educators, learning material and objectives.[155] Quality education is often measured by, on the one hand, learners' access to school utensils such as desks, books, computers, libraries, laboratories, quality and quantity of teaching staff, and availability of nurse/doctor.[156] On the other hand, "quality education refers to the school environment and condition of the classroom, such as neatness, the learning process, student and teacher mind-set, school guiding principles, teacher treatment of students, student and school staff gender attitudes, and students conduct and application."[157]

3.5. Free and Compulsory Education

The notion of free and compulsory education has dominated global discussions. The three concepts; compulsory education, free education and primary education are not synonymous. To make a clear distinction among the three it is necessary first to define more closely primary education in the sense of basic education.[158] This has to do with the minimum education which must be provided in order to promote basic literacy.[159]

3.5.1. "Free" Education

Subsection 29 (1) of the South African Constitution determines that everyone has a right to basic education.[160] It is important to note the fact that this right is not unlimited, but that it is restricted to basic education from Grades 1 to 9. In the current dispensation this right is limited to the age of 15. An adult who did not have a basic education has the right to access

[154] Supra note 96, at p. 23
[155] O J Van Schalkwyk, *The Education System Theory and Practice* , (1986) at p. 113
[156] Under Egypt's health insurance system, all schools are required to have a nurse or doctor in residence to provide both preventive and primary health care to students. See Sahar El Tawila, Hind Wassef, Cynthia B. Lloyd, Barbara S. Mensch, and Zeinab Gamal, the School Environment in Egypt: A Situation Analysis of Public Preparatory Schools (Cairo: Population Council, 2000). See also: Cynthia B. Lloyd, Sahar El Tawila, Wesley H. Clark, and Barbara S. Mensch The Impact of Educational Quality on School Exit in Egypt, Comparative Education Review, Vol. 47, No. 4 (November 2003), p. 448
[157] Cynthia B. Lloyd, Sahar El Tawila, Wesley H. Clark, and Barbara S. Mensch, supra note above at p. 448
[158] Report of the main Committee of the HSRC *supra note 124*, at p. 28
[159] *Ibid*
[160] Subsection 29 (1) of the 1996 South African Constitution determines that everyone has a right to basic education. See also the Article 17 of the African charter on human and people's rights.

adult basic education.[161] However, in the South African context, although the right to education does not guarantee free education, a learner's access to basic education may not be refused in those instances where individuals are not able to finance it by themselves (Subsection 5 (3) (a) of the Schools Act).[162] The degree to which basic education is really free is determined by a number of direct and indirect costs, such as school fees, expenses for textbooks, extra lessons, meals at school canteens, school transport, school uniforms, medical expenses, and boarding fees.[163] According to the Special Rapporteur, the rationale for free basic education should be implicit on the basis of entitlement, rather the inability to pay.[164]

According to the Universal Declaration of Human Rights, "Everyone has the right to education; Education shall be free, at least in the elementary and fundamental stages; Elementary education shall be compulsory."[165] The Second Goal among eight Millennium Development Goals furthered that, every child has the right to go to school, but millions are still not doing so.[166] The extent to which the State accepts a defined measure of "free" education as its responsibility determines the State expenditure on each beneficiary of basic education.[167] The State's contribution is therefore taken as the point of departure in determining the meaning of "free" basic education.[168] In the South African context, the provision of "free" education has still not been realised to the same extent for all population groups and will have to receive attention.[169] It will be necessary to determine uniform criteria for education provision.

3.5.2. Compulsory Education

Compulsory education can be reconciled with education as a human right. Making school attendance compulsory is a way of guaranteeing that nobody can withhold children from going to school. Compulsory education is applicable when children are compelled by

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[161] J Oosthuizen J P Rossouw A. Wet, *Introduction to Education Law* (2nd Ed) (2011) at p. 38
[162] *Ibid*
[163] Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, *International Human Rights Law*, (2010) at p. 287
[164] Report submitted by the Special Rapporteur on the right to education, UN Doc. E/CN.4/2004/45, § 8.
[165] Art 26 of the 1948 UDHR
[166] "Achieve Universal Primary Education" Second Goal among eight Millennium Development Goals. Available at: http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/education-and-the-mdgs/goal-5/ [retrieved on the 23rd of August 2013]
[167] Report of the main Committee of the HSRC *supra note 124*, at p.102
[168] *Ibid*
[169] *Ibid* at p. 30

the state to undergo schooling for a certain period. The duration is usually defined in terms of a period between certain ages and is seldom applicable to adults.[170] The duration differs greatly from country to country.[171] The lower limit is usually determined by educational considerations, while the upper limit is in addition determined by factors such as funds, staff and facilities that are available and the general and particular manpower needs of the country.[172]

When education is made both free and compulsory, every member of society, in the appropriate age group, is given the opportunity to develop their capacities.[173] Secondly, this enables the individual to acquire the skills necessary to participate fully in production for the betterment of society.[174] Finally, the right to free and compulsory primary education also implies that no one, for example parents or employers, can withhold a child from attending primary education.[175] Thus, basic education ought to be compulsory and free for child irrespective of his status, including undocumented immigrant children.[176] C. Wringe (1981) argues that:

> "Failure to receive education is not simply to be left with a restricted view and distorted understanding of the universe and our place in it. It is to have no understanding at all. It is also to have no possibility of independent existence among other human beings."[177]

3.6. Basic Education as a Right in South African Context

When the right to a "basic education" was first Constitutionalised in 1994, it was an ambiguous term that was not practically easy to apply in educational research. As a result, the term 'basic education' was practically overlooked in the South African education sector. This explains the slow transformation process in the educational system. The term "basic education" continues to pose challenges in terms of its interpretation in South Africa. According to the section 29(1) (a) of the South African Constitution, the right to "a basic

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[170] Supra note 124, at p.103
[171] *Ibid*
[172] *Ibid*
[173] *Ibid*
[174] *Ibid*
[175] See the CESCR, General Comment 11, HRI/GEN/1/Rev. 9 (Vol. 1) 52.
[176] O J Van Schalkwyk, *supra note 155*, at p. 123
[177] See C. Wringe (1981) p. 145. Cited by Jane Fortin, '*Children are Rights and the Development Law*,' (2003) at p. 163

education" equals to the right to "an adequate education".[178] Like rights, the term "basic education" started gaining popularity all over the world and was supported by legal instruments such as World Declaration of March 1990. Four months later it was followed by the African Charter on the Rights and Welfare of the Child in July 1990.[179] The Charter sets out the obligation on States Parties to "provide free and compulsory basic education."[180] In conclusion, the adoption of the Declaration on Education for All became a theme that dominated the Jomtien Conference of 1990.[181] All these conferences and their outcome have served an inspirational role for the drafters of section 29,[182] which sets out an Constitutional obligation, sustained by these above mentioned international instruments. This has resulted in the notion of basic education expressed as a human right in the South African *Constitution*. According to the South African Constitution, "Basic education" should be provided to all children, youth and adults, including undocumented immigrant children by the simple fact that it is a "right"[183]

3.6.1. Definition of 'Right'

The concept of *"Right"* in English, and the equivalent word in other languages, has two central moral and political senses: rectitude and entitlement.[184] In the sense of rectitude, we talk of right as something being right; in this sense we say of an action that it is right. In the second sense, of entitlement, we talk of someone having a right.[185] It is only in this latter

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[178] This is the position of many of the scholars who have explored s. 29 (1) (a) of the South African Constitution (1996): Berger at 615 *et seq*., Woolman and Fleisch, Woolman and Bishop, Liebenberg, Socio-economic rights (2010)

[179] Article 11(3) (a) of the *African Charter on the Rights and Welfare of the Child*: OAU, Doc. CAB/LEG/24.9/49 (1990).

[180] the article 11(3) (a) of the *African Charter on the Rights and Welfare of the Child*,

[181] The March 1990 Jomtien, Thailand Conference resulted in the *World Declaration on Education For All* which used the term
"Basic education" throughout the document, available at:
http://www.unesco.org/education/pdf/JOMTIE_E.PDF, [Retrieved on the 6th February 2014]

[182] The Department of Education's *White Paper on Education and Training* ("*White Paper I*", March 1995) characterizes the *Declaration* as "authoritative" (para. 13). See also, "The right to education: Lessons from *Grootboom*", Mandla Seleoane (2006) at pp. 6-7.

[183] In line with international standards, the section 29 (1) (a) of the South African Constitution (1996) provides for the right to education to all children, irrespective of their status. The right to education is entrenched in the South African Constitution of 1996 (South Africa, 1996a) and subsequently enacted through a number of pieces of legislation.

[184] Jack Donnelly, *Universal Human Rights in Theory & Practice*, (1989) at p. 9.

[185] *Ibid*

sense that we typically talk of rights, (in the plural).[186] The legal term, "rights", connote an entitlement conferred by a system of law. It indicates what the system of law permits us to do and will support us in doing.[187] McMillan argues that we need to acknowledge our variations in understanding (both 'education' and 'rights') since this will frame the way we interpret the right to education.[188] This will enable us to interpret the right to education, not only in terms of access to educational institutions, but also in terms of access to meaningful learning.[189] Given this, we need to ask whether we are in fact living up to the idea of an education for all, as suggested by the human right to education.[190]

3.6.2. The Right to Education

The right to education has received considerable attention in literature both in South Africa and abroad.[191] The right to education is often referred to as a "multiplier right" because its enjoyment enhances other human rights.[192] "Education is a prerequisite for the exercise of Human Rights."[193] This right is not only important to individuals, but also to families, communities and whole societies or nations. In other words, this right embodies the indivisibility and interdependence of all human rights.[194] "This right to education incorporates the right to receive education, the choice of education, equal access to and enjoyment of educational facilities, the freedom to establish and direct educational institutions, and the protection of learners against inhuman disciplinary measures."[195] The right to education is alleged to be an economic, social and cultural right.[196] Education is a fundamental human right and essential for the exercise of all other human rights. In contrast

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[186] *Ibid, at p. 9*.
[187] A. V. Kelly, *Education & Democracy*, Principles & Practices (1995), at p 31
[188] Cornelia Roux, *safe Spaces, Human Rights Education in Diverse Contexts*, (2012) , at p. 53
[189] *Ibid*
[190] *Ibid* at p. 54
[191] Cornelia Roux, *safe Spaces, Human Rights Education in Diverse Contexts*, (2012) , at p. 52
[192] Sital Kalantry, Jocelyn Getgen, Steven A. Koh, *Measuring State Compliance with the Right to Education Using Indicators*: a Case Study of Colombia's Obligations Under the ICESCR, (3rd April, 2009) at p.2
[193] Manfred Nowak, *the Right to Education, in Economic, Social and Cultural Rights:* A Book 198 (Asbjorn Eide et al. eds., 1995) at 198-211
[194] Plans of Action for Primary Education (Art. 14): General Comment 11, U.N. ESCOR, Econ., Soc., & Cultural Rights; Comm., 20th Sess., Para. 2, U.N. Doc. E/C. 12 /1999/10, (1999); [hereinafter General Comment 13]
[195] Listing and discussing Nowark's delineation of the secondary rights stemming from the core right to education. See Manfred Nowak, *supra note 194* at 198-211
[196] Klaus Dieter Beiter, The Protection of the Right to Education by International Law, (2006) at p.. 37

to this as Bhabha (1951) pointed out that, "the experience of serious human rights violations is closely linked to the act of migration".[197] The essence of the right to education is the right to access available educational facilities.[198]

The concept of a fundamental right originated with the philosophers of ancient civilisations, who described a system of values that was based on the principles of natural law (or "law of nature").[199] Yet millions of children and adults remain deprived of educational opportunities, many as a result of poverty and mismanagement.[200] Ensuring *access to education* is a precondition for full realization of the right to education. Without access, it is not possible to guarantee the right to education.[201] The right to education does not limit education to the primary or the first stage of basic education, or among children of a particular age bracket. The right to education is also not an end in itself, but an important tool in improving the quality of life.[202] Katerina Tomasevski (1953 – 2006), former 'United Nations Special Rapporteur' on the right to education, pointed out:

> "There are a large number of human rights problems, which cannot be solved unless the right to education is addressed as the key to unlock other human rights. Education operates as multiplier, enhancing the enjoyment of all individual rights, freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated."[203]

For education to be a meaningful right it must be "available, accessible, acceptable and adaptable" as furthered by Katarina Tomasevski in her conceptualisation described as "4 As" Framework.[204] The 4As propose that governments, as the prime duty-bearer, have to

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[197] Jacqueline Bhabha, Internationalist *Gatekeepers*? The Tension between Asylum Advocacy and Human Rights, *When a Child Is Not a Child—The Challenge of Asylum Protection for Separated Children available at:* http://immigrantchildren.org/Articles/law_review_articles/Document.2004-07-21.6133469683. See also , David Weissbrodt and Mary Rumsey, supra note 7, at p. xiv

[198] *Supra note 163*, at p. 285

[199] Rika Joubert & Sakkie Prinsloo, *supra note 96*, at p. 20

[200] http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/

[201] Human Rights Association Definition of human rights, available at : http://www.hrea.org/index.php?doc_id=402, [retrieved on 8th July 2013]

[202] Warnock Committee, The right to education is also not an end to itself, but also a means to an end, Cited by Jane Fortin, *Children's Rights and the Development Law*, (2003) p. 161, see also Human Rights Association Definition of human rights, available at : http://www.hrea.org/index.php?doc_id=402, [retrieve on 8th July 2013]

[203] Human Rights Association Definition of human rights, supra note 203.

[204] *Supra note 163*, at p. 284; see also "Right to education – What is it? Education and the 4 As" : the 'Right to Education' Project, [retrieved on the 21th of July 2013]; see also The Convention on the Rights of the Children (CRC), established by UNICEF in 1989, protects children's inalienable rights by setting standards for multiple

respect, protect and fulfil the right to education by making education available, accessible, acceptable and adaptable for all children,[205] including undocumented immigrant children. The framework also places duties on other stakeholders in the education process: the child, which as the privileged subject of the right to education has the duty to comply with compulsory education requirements, the parents as the 'first educators', and professional educators, namely teachers.[206] The right to education is probably one of the most important of children's moral and legal rights; without it they may be unable to develop their 'personality, talents and mental and physical abilities to their fullest potential'.[207] So denying basic education to undocumented immigrant children is similar to the shift of more burden to the state in future, because the same child denied the access to basic education can easily become a criminal and cause more problems of safety to the government.

3.6.3. The Right to "Equality" on accessing Basic Education

Equality is the starting point of all liberties.[208] The right to equality is not restricted on grounds of belief, ethnics, race, gender or origin, but through the acknowledgment of and respect for the similar right of others.[209] The right to education contains all the domestic and international legal text that supports the right to equality. Accordingly, international human rights law requires the equal treatment of citizens and non-citizens.[210] The claim to equality "is in a substantial sense the most fundamental of rights of man.[211] It occupies the first place in most written Constitutions.[212] The right to equality implies that in principle all people can claim equal treatment and equal opportunities.[213] In law it is said that, generally, every right has a corresponding duty (also called obligation or responsibility).[214] With regard to this matter, parents for example, have duties and obligation to educate their children.[215] The principle of equality sometimes requires States parties to take affirmative action in order to

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aspects, one of which is education. Error, available at : http://www.right-to-education.org/node/226[retrieved on the 11th of June 2013]

[205] *Ibid*

[206] *Ibid*

[207] Phrasing used in art 29 (1) (a) of the CRC.

[208] H. Lauterpacht, *an International Bill of Rights of Man* (New York, Colombia University Press) (1945), p. 115.

[209] *Supra note 96* at p. 23

[210] See for example, International Covenant on Civil and Political Rights (ICCPR) 4 UNGA res.: 2200A (XXI), 21 GAOR Supp. (No. 16) 52. UN Doc. A / 6316 (1966) 999 UNTS 171, of 16th December, 1966; (entry into force. 23 Mer. 1976) Art, 2(1).

[211] *Supra note 80* at p. 269

[212] *Ibid*

[213] *Supra note 96*, at p. 23

[214] *Ibid*

[215] *Ibid*

diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by Covenant and treaties as we will explore in detail bellow.[216]

An increasing number of States have ratified human rights agreements that do not distinguish between citizens and non-citizens.[217] The Declaration of Human Rights of 1948 states quite clearly that "parents have prior rights to choose the kind of education that shall be given to their children".[218] The right to equality on accessing education is therefore protected by the ICCPR and the ICESCR which together formed the international bill of right. In addition the right to education encompasses the obligation to rule out discrimination at all levels of the educational system, to set minimum standards and to improve quality and equality in education.[219] It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.[220] In conclusion, the right to equality in accessing basic education requires that in principle all people can claim equal treatment and equal opportunities.[221] Therefore, the excellent scheme to promote equality is to make education free and compulsory until a certain age.[222]

[216] General Comment 18 (37), 1 Report of the Human Rights Committe, 1990, U.N . Doc. A/45/40, Annex IX. E.
[217] David Weissbrodt and Mary Rumsey, supra note 7 at p. 178
[218] Article 26, section (3) of the United Nations Human Rights Declaration (UDHR)
[219] 'A Human Rights-Based Approach to Education for All': 'UNESCO and UNICEF' 2007 at p. 7.
[220] ICESCR General Comment 11, Plans of Action for Primary Education (Article 14) General Comment No. 11 (10/05/99) (E/C.12/1999/4), Para 6.
[221] Human Rights watch, supra note 10, at p. 23
[222] Asbjorn Eide & Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights* (1995) at p. 190

CHAPTER 4: UNDOCUMENTED IMMIGRANT CHILD RIGHTS TO ACCESS EDUCATION

4. Immigrant Child

Officially, 'immigrants' children' are those born abroad or those born in South Africa, and of parents who are not citizens but are settled in the country.[223] Most immigrants who come to South Africa want their children to attend school. However, many parents or guardians cannot afford the cost of education, or their children are denied admission to school.[224] Access to education is significantly impeded by the ability to furnish school administrators with documentation. When the children are admitted in school, they often face different kinds of discriminatory practices.[225]

4.1. Barriers Faced by Immigrant Children to Access Basic Education

4.1.1. School Fees as Barrier

Some undocumented immigrant children have been denied admission into schools because they cannot afford school fees or owe fees from previous years of schooling.[226] According to Sarah & Brian, the main barrier to access basic education in South Africa is the cost of schooling (including school fees, uniforms, transport, meals, books and stationery).[227] This means that continued advocacy is needed among schools and parents concerning access to fee exemptions. With the expansion of fee waivers around the country, this access barrier is likely to be reduced in future.[228] However, even once fees are addressed, the financial burden of transport and uniforms remains a barrier to education for foreign children, similarly

[223] A. J. Cropley, supra note 39, at p. 29
[224] *Supra note 8*, at p. 1
[225] *Supra note 24*, at p. 78
[226] *Supra note 8*, at p. 1
[227] *Ibid. at* p. 5.
[228] The no-fees schools programme has already been extended in the Western Cape, Free State and Gauteng. In a recent speech to the ANC Youth League, ANC President Jacob Zuma furthermore 'resolved to progressively Introduce free education for the poor until undergraduate level.' (3 April 2008)

for poor South African children.[229] In some instances principals are not aware that foreign children are eligible for fee exemptions. In others they choose not to grant exemptions to foreign children. Sometimes foreign parents are not aware that they can apply for exemptions or have difficulties managing the application process due to language differences. Even though schools are not allowed to discriminate against non-citizens in allocating fee exemptions, this is often the case in practice.[230]

4.1.2. Refusal of Admission for Birth Certificate, Passport, or Identity

To register a child at a public school in South Africa parents have to produce a birth certificate, immunisation card and transfer card or last school report card.[231] The policy also makes provision for a child to be registered provisionally if the documents are not available.[232] However, a number of schools do not understand or ignore this aspect of the policy. A result undocumented immigrant children suffer the consequences.[233] The immigrant born child receives an A4 format birth certificate, while children who are born from citizen receive the yellow birth certificate. This lead to argue that, the South African birth certificate for instance is the starting point for discrimination of undocumented immigrant children.

Another area of common concern is eligibility of immigrant children for the National Senior Certificate (NSC) (formerly 'Matric') at the end of high school. While a child may not be prevented from writing the NSC because of the lack of a birth certificate, the exam certificate cannot be printed without one—in effect leaving the learner without proof of their achievement. The DHA is in charge for issuing foreign children with birth certificates, but many asylum seekers and refugees are not able to access these documents on time.[234] The lack of clear information on how, where and when can parents apply for a birth Certificate for their children are among the main reasons driving immigrant children to be undocumented.[235]

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[229] Consortium for Refugees and Migrants in South Africa (CoRMSA) Report , Protecting Refugees, Asylum Seekers and Immigrants in South Africa Johannesburg, (2008) p. 44-46
[230] *Ibid*
[231] Supra note 8, at pp. 13-4
[232] Supra note 24, at p. 78
[233] *Ibid*
[234] Supra note 8, at pp. 13-4
[235] *Ibid*

Information should be provided to foreign parents about the need for their children to apply for birth from the DHA, so that they can complete their education.[236]

4.1.3. Language Barriers

This study is based on the perception that language is a fundamental constitutive element of personal identity.[237] The mounting awareness in linguistic rights has been accompanied by an increasing debate as to the nature and theoretical underpinning of such rights as human rights.[238] Indeed, the language matter forms part of a broader debate on the rights of ethnic and cultural minorities including undocumented immigrant children.[239] The choice of the language for a child's education relies on the parent, but unfortunately this right seems to not be respected in all schools. Consequently undocumented immigrant children face language barriers in education. However, language may not be used as a "smoke screen" to keep learners such as undocumented immigrant children and others out of school on the basis of their status or origin.[240] Given that new migrants arrive in South Africa every year and at any time during the school year, this is an on-going challenge for NGOs and refugee community organisations.[241]

Another controversial question is of a language as a key component of the right to education.[242] This means that it is the state that determines whether a specific language is to be one of the official languages as a medium of instruction.[243] It is in this sense that the right to be educated in the language of one's own choice belongs to the key components of the right to education.[244] Education access for immigrant children especially in general remains haphazard in areas where there are fewer NGOs to facilitate access and where teachers and

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[236] Supra note 229, at p. 44-46
[237] David Weissbrodt and Mary Rumsey, supra note 7, at p. 302
[238] See for example, Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgood Hall Law Journal 639, Denise G. Reaume, "The Constitutional Protection of Language: Survival or Security?, and C. MacMillan, "Linking Theory To Practice: Comments on "The Constitutional Protection of Language", both in David Schneiderman, (ed.) Language and the State: *The Law and Politics of Identity* (Montreal: Les Editions Yvon Balis, 1989) at 37 and 59.
[239] See, in Particular, Perry Keller's "Re-thinking Ethnic and Cultural Rights in Europe" (1998) 18 Oxford Journal of Legal Studies 29, and "Justice and Ethnicity" (1996) 59 M.L.R. 903.
[240] *Supra note* 96, at p. 45
[241] *Supra note 229*, at p. 44-46
[242] *Supra note 163*, at p. 288
[243] *Ibid*
[244] *Ibid*

school administrators may be less aware of immigrant rights.[245] The Constitution and the South African Schools Act have set out the right to universal basic education. The implementation of these policies is, however, inadequate.[246]

5. Undocumented Immigrant Children legal Regime to Access Basic Education

5.1. International Statutes

The principles of equality and non-discrimination represent the twin pillars upon which the whole edifice of the modern international law of human rights is based.[247] An increasing number of States including South Africa have ratified human rights agreements that do not discriminate between citizens and non-citizens.[248] Nonetheless, Non-citizens and their dependants in various parts of the world are subject to discrimination.[249] The theme of non-discrimination has been most forcefully asserted by the United Nations in its more recent Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. Today, the challenge that human rights scholars, practitioners, and intergovernmental organizations all face is how to fulfil the promises of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as economic and social rights grow in importance.[250] It forms the critical mass of international statutes such as the UDHR[251], the Convention on the Rights of the Child (CRC)[252], the ICESCR[253], the International Covenant on Civil and Political Rights (ICCPR)[254], and the CEDAW,[255] all of which will be explored in the following paragraphs.

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[245] *Supra note 229*, at p. 44-46
[246] *Ibid*.
[247] *Supra note 80*, at p. 269
[248] David Weissbrodt & Mary Rumsey, supra note 7, at p. 178
[249] *Ibid*
[250] Sital Kalantry, Jocelyn Getgen, Steven A. Koh, supra note 192, at p.4
[251] The Universal Declaration of Human Rights adopted on 10 December 1948, UN GA Res. 217 A (III), UN Doc. A / 810 at 71 (1948).
[252] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, available, at : www.unicef-crc.org/php/Thesaurus/Glossary_Display.php?GLOSS_ID=77&PoPuP=No

5.2. The UDHR

The Universal Declaration of Human Rights (UDHR) of 1948 contains important provisions for children, although the emphasis is upon protection and non-discrimination, rather than granting specific, independent rights to a child as a person.[256] Article 26 instructs for compulsory and free education at elementary level. Furthermore, the same article has been the basis for further guarantees of the right to education in later human rights instruments, which are discussed in the section below.[257] The UDHR is a non-binding instrument, meaning that countries are not, on the strict way of speaking, legally bound to recognize the rights in the Declaration.[258] However, the UDHR was transformed into legally binding form through two provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), [259]and The International Covenant on Civil and Political Rights (ICCPR).[260] This gives the Declaration considerable political and moral force, creating the basis for it to become binding international law.[261] It is the only provision in the UDHR and the ICESCR in which the exercise of a right is linked to meeting an obligation, namely to attend primary education.[262]

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[252] Art 49 of the CRC of 1989 [retrieved 18 October 2013]
[253] 'International Covenant on Economic, Social and Cultural Rights', adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.
[254]'International Covenant on Civil and Political Rights' , adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.
[255]The Convention on the Elimination of all Forms of Discrimination against Women (the CEDAW Convention) The UN General Assembly adopted the CEDAW Convention on 19th December 1979. It came into force as a treaty on 3rd September 1981.
[256] Adopted 10th December 1948, GA Res. 217, U.N. Doc. A/810, 71; See above Chapter 3.
[257] Article 26 of the UDHR
[258]See John H. Currie Et Al., *International Law 40*, (2007) (quoting) 1945 I.C.J. Acts & Docs. Art. 38) General principles of law, decisions of courts and tribunals, and the writings of authorities are other major sources of international law. 1 OPPENHEIM'S INTERNATIONAL LAW 24-52 (Robert Jennings Arthur Watts, eds., 9th Ed. 1996)
[259]Supra note 163, at p. 281
[260]The ICCPR, signed by South African government on 3rd of October 1994 and ratified on 10th December 1998
[261]Franklin and Eleanor Roosevelt Institute, What Makes the Universal Declaration of Human Rights So Important?, http://www.udhr.org/Itroduction/question6.htm [last visited 30th August 2013] (explaining that the Universal Declaration of Human Rights paved the way for two binding treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).
[262]Supra note 163, at p. 287

Referring to international human rights mechanisms, the article 2 of the UDHR, prohibits discrimination in the extension of the rights of the UDHR, including that based on the "other status."[263] It also provides for parents to have a prior right to choose the kind of education that shall be given to their children.[264] The UDHR provides for the three basic characteristics of the right to education, namely, recognition of the right to receive an education, a guarantee for the exercise of parental rights in matters of education, and a reference to the aims of education as an obligation to attend an educational institution.[265] The UDHR provides for the three basic characteristics of the right to education, namely, recognition of the right to receive an education, a guarantee for the exercise of parental rights in matters of education, and a reference to the aims of education as an obligation to attend an educational institution.[266] In conclusion of this section, the UDHR supports that every child has the right to access basic education, including the undocumented immigrant child, because everyone has the right to access education without discrimination, and, furthermore, this must be realised urgently.

5.3. The CRC

The Convention on the Rights of the Child (CRC)[267] is the most universally accepted human right instrument in history of the Child.[268] The CRC was adopted and opened for signature, ratification and accession by the United Nations' GeneralAssemblyResolution 44/25 of 20 November 1989.[269] It entered into force on the 2nd of September 1990, in accordance with article 49.[270] The CRC was signed on the 29th of January 1993 and ractified by the South African state on June the 16th of 1995. The CRC has now been ratified by

[263] Art 2 of the UDHR , provides, Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status." Id (emphasis added).
[264] Article 26 (3) of the UDHR.
[265] *Supra note 163*, at p. 281.
[266] *Ibid*.
[267] General Assembly Resolution A /RES /44/25. For text of the convention see the Office of the High Commissioner for Human Rights webpage at ,www.unhcr.ch/html/menu2/6crc/treties/crc.htm> [visited on 20 November 2013]
[268] UNICEF, Convention on the Convention on the Rights of the Child , Introduction at www.unicef.org/crc/crc.htm [visted on 26 November 2013]
[269] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accessionby GeneralAssembly resolution 44/25 of 20 November 1989, available at:www.unicef-crc.org/php/Thesaurus/Glossary_Display.php?GLOSS_ID=77&PoPuP=No
[270] Art 49 of the CRC of 1989 [retrieved 18 October 2013]

approximately 192 States, which constitutes the majority of the international community.[271] The CRC is almost signed by all countries of the world, except the United States and Somalia.[272] The CRC primary focus is to give singular attention to young people, it remains the most single ratified of all such UN Conventions.[273] The basic primary thrust of the Convention is that the Child has independent rights and another emphasis of the Convention is to operate in 'the best interests of the child'.[274]

The CRC Convention was envisioned to increment and to develop the provisions of the UDHR. However, the UDHR does not have a legally binding effect. The CRC, on the other hand, is a legally binding legal instrument. The CRC is the first legally binding international instrument to incorporate the full range of human righs.[275] The CRC protects Civil and Political Rights (CPR) on the one hand, and on the other, the Economic Social Cultural Rights (ESCR). The CRC protects the right to education in two provisions, explicitly, articles 28 and 29. The articles of the CRC and other human rights treaties are detailed in their specification of rights, but much less so in matters of the promotion and protection of these rights within the particular circumstances of different societies, communities and legal systems.[276] In the Article 28 (1) of the United Nations Convention on the Rights of the Child provides as follows:

> "*States Parties recognise 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; (c) Make higher education (H.E) accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all*

[271] For ratifications of the CRC see Office of the High Commissioner for Human Rights webpage at <www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm> [visited 10August 2013].
[272] However, both the United States and Somalia have signalled their intention to ratify the CRC by formally signing the convention: UNICEF, Convention on the Right of the Child, Introduction at www.unicef.org/crc/crc.htm [visted on 26 November 2013].
[273] Supra note 64 , at p. 128
[274] Article 3 (1) of the CRC
[275] UNICEF, Convention on the Convention on the Rights of the Child , Introduction at: www.unicef.org/crc/crc.htm [visted on 26 November 2013].
[276] Bernard van Leer Foundation, supra note 3, at p. 2

children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates."[277]

The CRC stresses the principles of equality, quality and relevance in education.[278] In defining the aims of education,[279] the Convention relates, among others, to "…the development of the child's personality, talents and mental and physical abilities to their fullest potential" and to the "preparation of the child for responsible life in a free society".[280] To summarise, the CRC supports the idea that the undocumented immigrant children has the right to access basic education in South Africa. The wording of the covenant does not distinguish between children's status. Secondly, South Africa has signed and ratified the CRC, which gives a legal obligation to fulfil its obligation by providing basic education to undocumented immigrant children.

5.4. The ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[281]; was acceded by the South African government in October, 2012, but not yet ratified. The South African government is not allowed to act contrary to the spirit of the ICESR.[282] The ICESCR are known as "second generation human rights" (SGHRs), while the ICCPR are Known as "first generation human rights" (FGHRs).[283] The term "generation" does not imply

[277] Art 28 (1) of the United Nations Convention on the Rights of the Child, South Africa ratified the Convention on 16th June 1995

[278] For a comprehensive review of the right to education see the Committee's General comment no. 1 on the Aims of Education adopted in February 2001 (HRI / GEN/1/Rev. 5, pp. 255-262).

[279] Art 29 para 1 of the CRC: "States Parties agree that the education of the child shall be directed to:
(a) The development of the child 's personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child 's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment."

[280] Ya'ir Ronen, Charles W. Greenbaum, and The Case for the child: towards a new agenda, (2008) p. 107.

[281] 'International Covenant on Economic, Social and Cultural Rights', adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

[282] *Ibid*

[283] H. Victor Cond, *A Handbook of International Human Rights Terminology*, (2004) at p. 236

any chronological difference or hierarchy of human rights.[284] The practice of distinguishing between the "first", second and third generation rights is, however, widely unused.[285] In comparison to other such guidelines, there are rather detailed instrument in particular: Article 13, emphasis that the right to education is a universal right, granted to every person, regardless of age, language, social or ethnic origin, or other status.[286] The universal validity and universal acceptance of the right to education will be taken into consideration. The issue of the universal validity of the right to education concerns the question whether the right to education, once recognised, applies to each and every person.[287] The ICESCR contains "some of the most significant international legal provisions establishing economic, social and cultural rights."[288] As Shareen Hertel and Lanse Minkler pointed out, "economic rights remain less well articulated than civil and political rights, less accurately measured, and less consistently implemented in public policy."[289] In other words, The ICESCR contains Articles regarding education and health, issues most intimately connected to children. Under Article 2 (3) (ICESCR), developing countries are permitted to determine the extent to which they guarantee 'economic rights to non-nationals, taking into account human rights and their national economy'.[290]

Although the ICESCR acknowledges the limits of available resources and provides for progressive (as opposed to immediate) realisation of the right to basic education, state parties have an immediate obligation to take deliberate and concrete steps towards the full realisation of Article 12, and to guarantee that the right to education is exercised without discrimination of any kind.[291] While recognizing the reality that the extent to which the rights are realised depends on the financial position of the States, the latter is responsible for demonstration that it has done their utmost within the constraints of their available resources

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[284] *Ibid*

[285] *See* Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. Int'l L. & Pol. 171, 173 (2006) ("The judicial enforceability of economic, social, and cultural rights has received increasing attention worldwide over the last decade.")

[286] Art 13 of the ICESCR

[287] The discussion of Coomans, 1992, Pp. 259-260 cited by Klaus Dieter Beiter, supra note 197, at p. 32

[288] Fact Sheet No 16 (Rev.1), the Committee on Economic, Social and Cultural Rights. <http://www.unhchr.ch/html/menu6/2/fs16.htm> (accessed, on 19 October 2013).

[289] Shareen Hertel and Lanse Minkler, *Chapter 1, Economic Rights:* The Terrain, in Economic Rights: Conceptual, Measurement and Policy Issues (Cambridge University Press 2007), at p. 1

[290] Article 2 (3) International Covenant on Economic, Social and Cultural Rights (ICESCR)

[291] Hans V Hogerzeil, Melanie Samson, Jaume Vidal Casanovas, Ladan Rahmani-Ocora, Is access to essential medicines as part of the fulfilment of the right to health enforceable through the courts? (Vol. 368 July, 2006) at p. 306

to realise prescribed rights. Whereas certain rights, by their nature, may be more apt to be implemented in terms of the progressive obligation rule, many obligations under the ICESCR are clearly required to be implemented immediately.[292] "Where resources are demonstrably inadequate to attain the desired standard, the State is enjoined to monitor the extent of non-realisation and to devise appropriate remedial measure."[293] In conclusion, the ICESCR places the burden on the state signatory to provide basic education to the undocumented immigrant child. South Africa has signed, but not yet ratified this Covenant nonetheless it cannot act contrary to the spirit of the ICESCR.

5.5. The ICCPR

The International Covenant on Civil and Political Rights (ICCPR) was signed by the South African government on 3rd of October 1994 and ratified on 10th December 1998.[294] Although not explicitly protected under the ICCPR, the right to an education is necessary for the exercise of enumerated rights such as the right to self-determination contained in Article 1, and the right to political participation contained in Article 25.[295] The right to an equal educational opportunity is also protected by procedural rights under the ICCPR, including Article 2 and Article 26.[296] The International Covenant on Civil and Political Rights (ICCPR) explained in its General Comment 15 that almost all rights protected by the Covenant must be guaranteed without discrimination between citizens and non-citizens.[297] Thus, the South African government is not allowed to act contrary to the spirit of the ICCPR.[298] The ICCPR Article 2(1) also encloses a prohibition of discrimination grounded on "other status."[299] The ICCPR mandated in its General Comment 15 that all rights protected by the Covenant must be guaranteed without discrimination between citizens and non-

[292] E.g. Non-discrimination provisions and the obligation of State Parties to refrain from actively violating economic, social and cultural rights or withdrawing legal or other protection relating to those rights.
[293] General Comment No 3 (n 7 above) para 11 as read with General Comment No 1 (Third session, 1989) "Reporting by State Parties" UN Doc E/1989/22 paras 4 and 6.
[294] The ICCPR, signed by South African government on 3rd of October 1994 and ratified on 10th December 1998
[295] Education Rights in America and the ICCPRHere - Poverty & Race Research Action Council Available at : www.prrac.org/pdf/ICCPR_and_Education.pdf retrieved 3 January 2014]
[296] *Ibid*
[297] Human Rights Committee, "General Comment 15 on the position of aliens under the Covenant", 11 Apt 1986.
[298] The ICCPR supra note 292
[299] Supra note, 6 at p. 397

citizens.[300] There are rights reserved for citizens such as the right to vote.[301] Beside this type of rights, the other rights are not restricted to citizens and non-citizens should equally benefit from their realisation.[302] The ICCPR protects the rights to education of minorities, including; undocumented immigrant children.[303]

5.6. The CEDAW

South Africa is party to the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and to the Convention on the Rights of the Child, both of which it ratified in 1995.[304] The CEDAW Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life including the right to access basic education for girls undocumented immigrant children, with often the prevalence of vulnerable girls than boys.[305] Again, CEDAWs and the other priviously mentioned Declaration; Conventions make no distinction between citizens and non-citizens in the rights they establish. There are also other specific provisions in the International Convention on the Elimination of all Forms of Racial Discrimination,[306] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[307]and the International Covenent on the Protection of the Rights of All Migrant Workers and Members of their famillies.[308] These common aims, laid down in a number of international instruments, reflect a 'broad universal consensus on the major aims

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[300]Supra note 297 above.
[301]*Ibid*.
[302] David Weissbrodt and Mary Rumsey, supra note 7, at p. 152
[303] Either course of action results in violations of fundamental civil rights protected by the ICCPR, and the negative Impacts of these violations affect entire communities and touch all aspects of people's lives. Denial of Driver's Licenses to Undocumented Immigrants as a Barrier to Human Rights in the United States , at p. 2 available at tbinternet.ohchr.org/Treaties/.../INT_CCPR_NGO_USA_14556_E.pdf [retrieved on the12 December 13]
[304] Convention on the Elimination of All forms of Discrimination Against Women (CERAW), adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of December 18, 1979, entered into force September 3, 1981, and ratified by South Africa on the December 15, 1995. The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, the CRC was ractified by the South African state on June 16, 1995.
[305]Asha Bajpai, *Legislative Reform in Support of Children's Rights Curriculum Framework (UNICEF),* 2012 at P. 6
[306]Adopted on the 21st of December 1965, entered into force, on the 4th January 1969, 660 U.N.T.S. 195, 5 I,L,M. (1966) 352
[307] Adopted and opened for signature, ratification and accession on 10th December 1984 by G A Res. 39/46. 39 UN Doc A/39/51, at 197 (1984), entered into force 26 June 1087, 1465 U.N.T.S. 85; 23 (2) and 28.
[308]Adopted on the 18th of December 1990, GA Res. 45/158 reprinted 30 I.L.M. (1991) 517. See Articles 30 and 43.

and objectives of the right to education'.[309] They also constitute the foundation for education about human rights in schools worldwide.[310]

In the context of this study, the term discrimination is understood as a prohibition of disadvantaging another, based on race, sex, religion or nationality.[311] The CEDAW supports the view that undocumented immigrant children should be discriminated against with regard to realising their right to basic education.

6. Domestic Statutes

6.1. The South African Constitution (1996)

Paragraph 29 (1) of the South African Constitution (RSA, 1996) refers to the right to education in very simple and clear terms:

Everyone has the right:

a. To a basic education, including, basic adult education; and
b. To further education, which the state must take reasonable measure to make progressively available and accessible.

It is this declaration that has guided educational policies, formulated in order to facilitate educational provision in all sectors of South African society since the attainment of freedom and democracy.[312] It is, therefore, evident that the South African Constitution does indeed cover the general principles of democracy.[313] However, this does not in itself mean that delivery can be taken for granted. It should be noted that what really gives values to sound constitutionalism is implementation.[314] The actual implementation of the right to basic education in South Africa is a final guarantor of the undocumented immigrants' children' right to basic education. Others have argued that while South Africa has good education

[309]Nawak, "The Right to Education" in Eide, Krause, and Rosas (eds), Economic Social and Cultural Rights (Marinus Nijhoff, 2001) at p. 251.
[310] See UNESCO/OHCHR, Plan of Action : world programme for Human Rights Education (2006)
[311]H. M. Phillips, *Basic Education*, (1975) at p.127
[312]Supra note 35, at pp. 250-51
[313]*Ibid*.
[314]*Ibid*.

policies, but implementation has been inadequate.[315] The section 29 of the Constitution put forward only the right to "basic education" and not a right to a "free" education.[316]

Chapter 2 of the Constitution contains the Bill of Rights in which the state guarantees the protection of individuals' fundamental rights, including the undocumented immigrant children living within the South African jurisdiction.[317] "The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (c) less restrictive means to achieve the purpose." No right exist absolutely.[318] Not only does section 36 makes provision for the limitation of the rights entrenched in the Constitution for fair and reasonable reasons, the rights entrenched in the Constitution have built in limitations.[319] Can the government use this limitation clause to excuse justifying unfulfilled right. The answer to this question is that the state cannot avoid obligations on the grounds of lack of necessary resources.[320] There are two key principles in economic, social and cultural rights: "progressive realisation" and "maximum available resources". These are pragmatic obligations, recognising that full implementation of economic, social and cultural rights (ESCR), requires positive action by states through Governments.[321] There is nevertheless an identifiable standard of progressive realisation. In situations where a state lacks the necessary resources, there is also an obligation on the international community to provide support.[322]

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[315] *Ibid* at p. 16
[316] Rika Joubert & Sakkie Prinsloo, Supra note 96, at p. 51
[317] Chapter 2 of the South African Constitution (1996)
[318] Rika Joubert & Sakkie Prinsloo, Supra note 96, at p. 34
[319] *Ibid*
[320] Supra note 80, at p.122
[321] Duncan Wilson, *A Human Rights Contribution to Defining Quality Education*, Background paper prepared for the Education for All Global Monitoring Report 2005, (2004), p. 6
[322] ICESCR General Comment 11, Plans of Action for Primary Education (Article 14) General Comment No. 11 (10/05/99) (E/C.12/1999/4), Para 9.

6.2. The South African Schools Act 84 of 1996 (SASA) and Related Legislation

The South African Schools Act (SASA) 84 of 1996 was designed to abolish the previous racially based education system. It creates a uniform system of organisation, administration and funding of public schools (government schools). A number of national and provincial regulations have already been enacted in terms of the Act.[323] These regulations address topics such as admission requirements, the establishment of governing bodies, and the establishment and composition of representative council of learners. They are aimed mainly at achieving democracy in education and outlawing the discriminatory practices which were followed before the present Constitution was adopted in 1994.[324] The SASA states that "no child may be prevented from going to school because their fees cannot be paid' (Section 5(3) (a)) and that school admission cannot unfairly discriminate in anyway.[325] Unfair discrimination in admitting undocumented immigrant children to public schools is also forbidden by the South African Schools Act.[326] Section 19 of the South African Schools Act explicitly states that the Act also applies to learners who are not citizens of South Africa or whose parents hold temporary or permanent residence permits.[327]

SASA recognises that the right to admission without the concomitant right to fee abatement is no right at all.[328] The SASA further stated that the governing body may choose the language to be used for teaching and learning in a school. In deciding on the language policy, the governing body must comply with the Constitution.[329] The SASA also clearly states that the governing body of a school may not administer any test related to admission of a learner.[330] The SASA enables every public school's governing body to ensure protection of learners' right to basic education by drafting their school internal policies incorporating mechanism for protecting learners' rights.[331] The SASA in it section 3 and 6 protect the right to basic education. The section 3 deals with compulsory attendance of children in schools

[323] ANN Skelton, supra note 127, at p. 88
[324] Ibid
[325] The South African schools Act 84 of 1996
[326] ANN Skelton, *supra note 127*, at p. 90
[327] *Supra note 229*, at p. 44-46
[328] Stu Woolman Brahm Fleisch, *The Constitution in the Classroom*, Law and Education in South Africa 1994-2008, (2009) at p. 30
[329] Rika Joubert & Sakkie Prinsloo, *Supra note 96* at p. 45
[330] Section 5 (2) of SASA, cited by Rika Joubert & Sakkie Prinloo, supra note 96, at p. 53
[331] Rika Joubert & Sakkie Prinloo, *supra note 96*, at p. 45

while the section 6 deals with the language policy in public schools.[332] The importance of this provision is to establish a disciplined and purposeful school environment including upholding learners' basic rights.[333] The SASA provides for compulsory education, which can be taken to imply "Basic education". This is not a straight forward rule, thus, there may be stipulation where compulsory education as given in the SASA and "Basic" education and in the Constitution does not have the same meaning. [334]

SASA and the regulations issued in terms of the Act make provision for mean-based fee exceptions.[335] Finally, the SASA says nothing about the learner's right to education. This is logical since the matter is treated in section 29 (1) of the Constitution. Based on the fact that the Constitution remains the supreme legal document, consequently the provision in the Constitution in a straight line applies to all other laws of the county. In light of this, the SASA supports the access to basic education, including the undocumented immigrant children.

7. Cases Studies

The school's admission policy has to be free from any unfair discriminatory criteria: no prospective learner may be refused admission to a public school on the grounds of race, language, or ethnicity, as illustrated in the case of *Matuku and Others v Laerskool Potgietersrus* 1996 (Transvaal Supreme Court, case number 2436/96). It transpired, amongst other things, that in terms of the primary school's admission policy, provision was only made for the admission of white learners.[336] Judge Spoelstra held that such a provision in the admission policy would be regarded as unconstitutional since it discriminated unfairly on the grounds of race.[337] The principle of equality must not be confused with the concept of differentiation. Equality does not imply that all persons must be the same or that everybody should have the same talents and capabilities.[338] Nor does it mean that everybody should be

[332] Section 5 (2) of SASA, cited by Rika Joubert & Sakkie Prinloo, supra note 96, at p. 53
[333] *Ibid*
[334] Rika Joubert & Sakkie Prinsloo, *supra note 96*, at p. 37
[335] Stu Woolman Brahm Fleisch, *The Constitution in the Classroom,* Law and Education in South Africa 1994-2008, (2009) at p. 30
[336] *Ibid*
[337] *Ibid*
[338] *Ibid*

treated identically. In a decision before the Constitutional Court: *President of the Republic of South Africa v Hugo 1997 (1997 (6) BCLR 708 (CC))*, the Court summarizes this Point as follows:

> "*We need therefore to develop a concept of unfair discrimination which recognizes that although society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved*."[339]

In the case of *Larbi Odam and Others v Member of the Executive Council for North West Province and Another 1997 (12) BCLR 1655 (CC),* the appellants (a certain Larbi Odam and a few other educators) made a case against the education department of North West Province. [340] This group of well-qualified educators (none of whom had South Africa citizenship) argued that the national education regulation that stipulates that only South African citizens qualify for permanent appointments in education, was unconstitutional because it discriminated against them in an unfair manner. [341] The Education Department opposed the claim by calling on regulation 2 (2) of the Regulations Regarding the Appointment and Service Conditions of South Africa. [342] This would make more positions available to educators who had South African citizenship. [343] Having heard the case, the Constitutional Court unanimously found the regulation in question to be unconstitutional and that it indeed amounted to unfair discrimination against the appellants.[344]

In *Minister of Home affairs and Others v Watchenuka and others*, the reasoning of the Supreme Court of Appeal was that lack of freedom to work or access education by immigrants often threaten to positively degrade and, therefore, violate a right to human dignity.[345] As stated by the court, "[h]uman dignity has no nationality."[346] It is inherent in all people-citizens and non-citizens alike-simply because they are human. And while that person older or younger happens to be in this country for whatever reason, his or her legal status

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[339] *Ibid*
[340] *Larbi Odam and Others v Member of the Executive Council for North West Province and Another 1997 (12) BCLR 1655 (CC),*
[341] *Ibid*
[342] P. Botha, PJ Mentz., M.C. Poos, PC Van der Westhuizen, ET Van Kerkeen, *Aspects of education law*, 3rd ed. Education (2003), at p. 23.
[343] *Ibid*
[344] *Ibid*
[345] *Minister of Home Affairs and Others v Watchenuka and others* [ZACSCA 142 (SCA); [2004] 1 All SA 21 (SDA). Cited by Roanna Tay, *supra note 57,* at p. 90
[346] *Ibid*

must be respected as protected, in accordance with section 10 of the Bill of Rights.[347] Past and present experience shows that many violations of the social and economic rights of individuals take place because one group feels it is superior to another.[348] This often results in unfair discrimination: the decision to treat or classify people based on race, colour, belief, sex, physical handicap or characteristics other than individual merit.[349] Because of the absence of a General Comment on the right to education and scarce national or international case law, there are hardly any concrete criteria to assess the State's performance in this field.[350]

7.1. Basic Education as Human Rights for Undocumented Immigrants Children

The fact that these rights are referred to as "human rights makes clear that they are general rights, in some sense equally possessed by all humans."[351] This raises the question, is basic education human right an entitlement for undocumented immigrants children? Human rights are held by all persons equally, universally, and indefinitely.[352] Education is one of the few human rights for which it is universally agreed that the individual has a corresponding duty to exercise the right.[353] Human rights are *inalienable*; it means someone cannot lose his or her rights.[354]

Human rights are the fundamental rights of every human being, irrespective of his status or societal norms.[355] One does not have to be a national of a state in order to be able to

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[347] *Ibid*
[348] Andy Mason, Tracy Brownlee, Grant Cresswell, Trueman Myaka, *Human Rights for All*, (1991) at p. 62
[349] *Ibid*
[350] The UNESCO Complaints Procedure established in 1978 deals, inter alia, with alleged violations of the right to education. Due to the confidential nature of this procedure, and consequently the lack of information about the substance of complaints, it is, unfortunately, of little help for the purpose of the present study. See about this procedure, D. Weissbrodt and R. Farley, `The UNESCO Human Rights Procedure: An Evaluation', Human Rights Quarterly, Vol. 16, 1994, pp. 391-415.
[351] J. Roland Pennock& John W. Chapman: *Human Rights* (1981) at p. 5.
[352] Publication of the Human Rights Educators' Network of Amnesty International USA, Human Rights USA, and the Stanley Foundation '*Human rights here and now'* Celebrating Universal declaration of Human Rights, (1998) at p. 3
[353] Supra note 222, at p. 197
[354] Publication of the Human Rights Educators' Network of Amnesty International USA, Human Rights USA, and the Stanley Foundation '*Human rights here and now'* Celebrating Universal declaration of Human Rights, (1998) at p. 3
[355] David Weissbrodt and Mary Rumsey, supra note 7, at p. 292

claim human rights against that state.[356] Once more, these Human rights are both inspirational and practical. They stand for a free, just, and peaceful world and set minimum standards for how individuals and institutions including South African government among similar should treat people. As a consequence, Human Rights empower people with a framework for action when those minimum standards are not met, for people still have human rights even if the laws or those in power do not recognise or protect them.

Do human rights principles provide a universal standard to be applied uniformly, or are they contingent on social context? The Universalist argument is the normative claim that human rights such as access to basic education and should provide a universal standard because rights belong to every human person simply by virtue of being human.[357] Rights flow from the inherent dignity of every human person.[358] They are not given by the sovereign and therefore cannot be taken away by a sovereign. Nor are rights pegged to status based on age, gender, race, nationality or cast.[359] "To advocate human rights is to demand that human dignity of all people be respected. In claiming these human rights, everyone else accepts the responsibility not to infringe on the rights of others and to support those whose rights are abused or denied as in the case of undocumented immigrant children denied the rights to access basic education in South Africa."[360]

According to Donnelley (2003), Working (1978), Freeman (2002), Sweet (2003) and Ward (2004), the foundations of contemporary human rights can be traced back to the "natural rights" theory advanced by Hobbes (1588-1679) and Locke (1632-1704) argued that:

> "Every human being has a set of rights that were derived from nature and not from their government or its laws, and the legitimacy of governments rested on the respect that it accorded to these rights."[361]

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[356]Supra note 163, at p. 151.
[357]Naila Kabeer, *Inclusive Citizenship*, (2005) at p. 32
[358]*Ibid*
[359]*Ibid*
[360]Publication of the Human Rights Educators' Network of Amnesty International USA, Human Rights USA, and the Stanley Foundation '*Human rights here and now'* Celebrating Universal declaration of Human Rights, (1998) at p. 3
[361]Supra note 35, at pp. 182-83

The Rights were seen as entitlements that were God-given, independent of any political processes, and therefore not necessarily constituted through recognition by state. [362] Thus, education about human rights is closely related to the right to education.[363] Education is a precondition for the exercise of human rights.[364] Education aims at strengthening human rights.[365] International and regional human rights noted in various documents (declarations, resolutions, and conventions) affirm that the knowledge of human rights should be a priority in education policies.[366] That a state recognises "the right to an education" is not different, legally, from the statement "everyone shall have access to basic education."[367] Both create a legal claim against the state for failure to provide what was promised or for not ensuring it against interruption.[368]

7.2. South African State's Legal Obligation to Provide Basic Education

The Section 7 (2) of the Bill of Rights[369]obliges the state to respect, protect, promote and fulfil all rights.[370] Children's socio-economic rights in section 28 (1) (c)[371] and the rights of everyone to basic education in section 29 (1) (a) do not have this built limitation.[372] As signatories to the CRC, the South African State has an obligation to undertake all appropriate legislative, administrative and other measures to supply basic education as a right for both documented and undocumented immigrants,[373] and States have duties under human rights treaties as they are party to them. No human rights treaty directly binds an entity other than a state.[374] With respect to the right to education, we think prematurely of the right of a child or

[362] *Ibid*
[363] Human Rights Association definition of human rights, available at : http://www.hrea.org/index.php?doc_id=402 [retrieved on the 8th July 2013]
[364] Supra note 222, at p. 189
[365] *Ibid*
[366] Human Rights Association definition of human rights, available at : http://www.hrea.org/index.php?doc_id=402 [retrieved on 8th July 2013]
[367] J. Roland Pennock & John W. Chapman, supra note 353, at p. 266.
[368] *Ibid*.
[369] Section 7 (2) of the Bill of Rights (the 1996 Constitution)
[370] Supra note 36, at p. 292
[371] Section 28 (1) (c) of the 1996 Constitution as cited by Trynie Boezaart, supra note 36 at p. 292
[372] Section 29 (1) (a) cited by Trynie Boezaart, supra note 36, at p. 292
[373] CRC, Article 4.
[374] Supra note 163, at p. 151

young person to receive education provided by the State, but this right also implies a number of rights and duties which may lead to complex legal relationships.[375]

Most often the word duty is confused with obligation. Practically, "duties" refer to the corresponding obligations one has to perform when claiming certain rights. The word "duty" refers to what rights create obligations and this late, can be seen as a more binding agreement, one which can be enforced under legal penalty.[376] Rights create obligations and the obligation fails on the Educational Ministry to deliver at least minimum chance to all children without any discrimination to access basic education under its jurisdiction and competence.[377] A State is clearly responsible under international human rights law for the actions of its organs, such as its executive, legislature, judiciary, and its bureaucracy.[378] The right to education like other human rights implies specific duties of States to implement them without discrimination and to combat existing, inequalities in the access to enjoyment of education by legislative and other means.[379] Thus, breaches of human rights law may arise from actions taken by leaders, ministers, police officers, army, judges, administrative officers, home affairs officers, traffic cops and so on.[380] With respect to the right to education in the European Convention, the Strasbourg Court held that a State cannot absolve itself from responsibility by delegating its obligations to private school bodies.[381] United Nations Children's Fund (UNICEF) has emphasized that "only the State can pull together all the components into a coherent but flexible education system."[382] States remain responsible for the actions of their agents even when they act beyond their authority, as long as they are purportedly acting in an official capacity.[383]

> *"The human rights obligation of Governments to adequately fund education exists so that children would not have to pay for their schooling or remain deprived of it when they cannot afford the cost. Children cannot wait to grow, hence their prioritized right to education in international human rights law. The damage of those denied education while they are growing up cannot be retroactively remedied."*

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[375] Supra note 222, at p. 190
[376] Rika Joubert & Sakkie Prinsloo, *supra note 96*, at p. 69
[377] *Supra note 311at* p.129
[378] HRC, General Comment 31 HRI /GEN / 1 / Rev.9 (Vol. 1) 243, para 17 & para 4; see Also International Law Commission (ILC), Draft Articles on Responsibility of states for international wrongful Acts. A/ 65/10, ch. IV.E.I, Art 4
[379] *Supra note 222*, at p. 196
[380] Supra note 163, at p. 154
[381] Case of Costello-Roberts v. UK, Judgment of 25 March 1993, Publ. Court Series A, Vol. 247-C, § 27.
[382] UNICEF, 'The State of the World's Children', (1999) at p. 63
[383] See eg. *Sarma v Sri Lnka*; see also CCPR / C / 50 / D / 488 / 1992, (4th April 1994). Cited by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, supra note 163, at p. 154

It is important to remember that, according to section 8 of the Constitution of 1996, the chapter on fundamental rights is binding on all organs of state, that is the legislative, the executive and judiciary at all levels of government.[384] All laws and the bodies that make them, like parliament, are subject to the Bill of Rights.[385] This means that the Bill of Rights applies vertically between state and subject (the people). A government cannot shift it responsibility by giving more responsibilities to the private sector, or by stimulating public-private partnerships for financing the educational infrastructure.[386] The burden lies on the State Party on the limit of their resources available to demonstrate that every effort has been made to satisfy these minimum obligations as a priority.[387] The term "available resources" includes both domestic resources and any international economic or technical assistance or cooperation available to a State Party.[388] Additionally, a State Party is obliged to fulfil "minimum core obligations" so as to satisfy at least the essential levels of the rights such as basic nutrition, primary health care, shelter and basic education. Failure to satisfy these basic needs constitutes a prima facie violation of the ICESCR.[389] The last requirement is the obligation to ensure the enjoyment of these rights "without discrimination. "This obliges State Parties to desist from discriminatory behaviour and to alter laws and practices which allow discrimination. In more concrete terms, this means the right of access to existing public educational institutions on a non-discriminatory basis."[390] States have an obligation to protect this right from encroachments by third persons.[391]

A very important convention regarding minorities and educations is the 1960 UNESCO's Convention. The Article 1 is against discrimination in education and lays down a definition of the notion of discrimination within the perspective of education:

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[384]Rika Joubert & Sakkie Prinsloo, *Supra note 96*, at p. 21

[385]*Ibid*

[386] In a number of African countries, state monopoly on education is coming to an end. In addition, there is a tendency to involve the private (business) sector in the funding and building of schools. The privatization of education is supported, and sometimes even imposed, by the IMF and the World Bank within the framework of structural adjustment programs. See about this development, UNESCO Sources, no. 102, June 1998, p.12-13. See also K. Tomasevski, Education Denied – Costs and Remedies, Zed Books, London & New York, chapter 5.

[387]The precise scope of these obligations has been canvassed in General Comment No 3 (Fifth session, 1990) "The nature of State Parties' obligations (art 2(1) of the Covenant)" UN Doc E/1991/23. Para 10

[388]General Comment No 3, paras 13 and 14; General Comment No 2 (Fourth session, 1990) "International technical assistance measures (article 22 of the Covenant)" UN Doc E/1990/23.

[389]International Covenant on Economic, Social and Cultural Rights, available at: www.ohchr.org [accessed on the 17th October 2013]

[390]Arts 2 (2) and 3 of the ICESCR; see also the art 2 of the ICCPR.

[391]Supra note 163, at p. 287

> " It includes any distinction, exclusion, limitation or preference, which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education, in particular: (a) of depriving any person or group of persons of access to education of any type or at any level; (b) of limiting any person or group of persons to education of an inferior standard."[392]

In compliance with the fundamental obligations laid down in article 2 of International Convention on the Elimination of Racial Discrimination (ICERD) 1965, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to equality before the law to all, including undocumented immigrants. The right to equality before the law includes the access to basic education. ICERD also obliges State Parties to prohibit private persons and bodies from practicing discrimination in any field in public life.[393]

[392] ILO Convention 111 Discrimination In respect of Employment and Occupation, available at : http://www.oas.org/dil/1958%20Convention%20concerning%20Discrimination%20in%20Respect%20of%20Employment%20and%20Occupation%20(ILO%20Convention%20No.%20111).pdf, cited by Klaus Dieter Beiter supra note 197, Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights (2006) at p. 246

[393]The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17. Annex (1987), reprinted in (1987) 9 *Human Rights Quarterly* 122 (Limburg Principles). para. 38.

8. Conclusion

Section 29 of the Constitution provides, inter alia, that "everyone has the rights to a basic education".[394] This implies that free basic education has to be provided to everyone, including undocumented immigrant child.[395] Section 9 of the Constitution determines, inter alia, that the state (or a person) may not unfairly discriminate directly against anyone on the grounds of race, gender, sex, colour, pregnancy, marital status, ethnic or social origin, religion, sexual orientation, age, disability, conscience, belief, culture and language or birth. [396] Many authorities regard section 9 as the cornerstone of the South African Constitution.[397] Discrimination relating to access to schools based on any of the factors mentioned above is forbidden. This means that admission requirements which are discriminatory are illegal. The Bill of Rights led to a unanimous affirmation of constitutional principles, including their applicability to immigration statutes and all non-citizens within the territory of the Republic of South Africa.[398]

The South African Constitution and national education legislation, including the refugee Act, consistent with international conventions, covenants and treaties, guarantees the right to basic education of undocumented immigrants.[399] Everyone is entitled to all the rights and freedoms set forth in these instruments without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[400] The rights to education have been included in many Constitutions and international treaties.[401] States have agreed that illiteracy must be eliminated and that all children, irrespective of their status must attend school. However, there is a big gap between theory and reality. Worldwide, South Africa included, there are still 100 million children of primary school age who do not have access to education.[402] There is an urgent need to

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[394]Section 29 of the South African Constitution (1996)
[395] P. Botha, PJ Mentz., M.C. Poos, PC Van der Westhuizen, ET Van Kerkeen, *Aspects of education law*, 3rd ed. Education (2003), at p. 21.
[396] Section 9 of the 1996 South African Constitution as cited by ANN Skelton, *supra note 127*, at p. 89
[397] P. Botha, PJ Mentz., M.C. Poos, PC Van der Westhuizen, ET Van Kerkeen, *Aspects of education law*, 3rd ed. Education (2003), at p. 22.
[398]David A. Martin & Peter H.Schuck, *Immigration Stories*, (2005) at p. 31
[399]Carol Anne Spreen and Salim Vally, supra note 24, at p. 73
[400] Article 2 of the Universal Declaration of Human Rights (1948)
[401]Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, *International Human Rights Law*, (2010) at p. 281
[402]*Ibid*

address the situation and make education accessible to all children in South Africa, irrespective of their status.

Sparta realized the full logical conclusion of the compulsory system; absolute State control over the "whole child"; uniformity and education in passive obedience to State orders.[403] In this particular study, the South African government is legally responsible for ensuring adherence to national and international human rights standards and the Constitution.[404] Despite these constitutional guarantees as well as policies and programmes that have been put in place to ensure those rights, it is well acknowledged that the right to education has not been fully met in South Africa.[405] In light of this, negligence, abuse, or infringement of human rights of undocumented immigrant children, such as rights the access to basic education can be advanced that the South African State has not sufficiently carried out its obligations or responsibilities.

[403]Murray N. Rothbard, *Education Free and Compulsory* (1999) at p. 19
[404]Constitution of the Republic of South Africa, Act 108, 1996
[405]Carol Anne Spreen and Salim Vally, supra note 24, at p. 73

9. Recommendations

Implement special strategies to ensure that schooling is readily accessible to all children and adolescents, and that basic education is available, accessible, acceptable and adaptable for all families, including undocumented Children.[406]

Develop special strategies for improving the quality of education and meeting the learning needs of all undocumented immigrant children. Advocate for the Department of Social Development and the Department of Home Affairs to establish a working agreement on the procedures for dealing with child migrants.

Clarify, the policy that dictate rights of undocumented immigrant children to access basic education in domestic statute such as South African School Acts, School Governing Bodies (SGBs) Act, National Education Policy Act (NEPA), National Integrated Plan (NIP) and others. Advocate for the Department of Education to issue a memorandum clarifying that no child, regardless of documentation status, should be excluded from education; Make information about child's right to access basic education available to all beneficiaries, including undocumented immigrant parents and their children.

Promote innovative programmes that encourage schools and communities to search more actively for children who have dropped out or are excluded from school and from learning, especially undocumented immigrant children. Facilitate the development of community based care and support structures for unaccompanied minors.

Implement programmes that specially aim to eliminate xenophobic attitude and stereotypes in education systems, curricula and materials, whether derived from discriminatory practices, social or cultural attitudes or legal and economic circumstances regarding undocumented immigrant children.

[406] Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, supra note 163, at p. 284 see also "Right to education – What is it? Education and the 4 As" : the 'Right to Education' Project, retrieved on the 21th of July 2013; see also The Convention on the Rights of the Children (CRC), established by UNICEF in 1989, protects children's inalienable rights by setting standards for multiple aspects, one of which is education. available at : http://www.right-to-education.org/node/226 [retrieved on the 11th of June 2013]

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