

The rights of refugee children in South Africa

by

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ABSTRACT

Refugee children are a specific vulnerable group in the South African society. In terms of the South African Constitution, refugee children are equally entitled to the right to basic nutrition, shelter, basic health care services, and social services in section 28(1)(c) and basic education in section 29(1)(a). It is unclear from jurisprudence whether indigent children under parental or family care have a direct entitlement to these rights. In *Government of the Republic of South Africa v Grootboom* (2001 1 SA 46 (CC)), the Court only indirectly addressed children's rights, whereby it reasoned that the parents and/or family of the child bear the primary duty to care for children and the socio-economic rights contained in section 28(1)(c), in so far as it overlapped with the socio-economic rights of parents, cannot be interpreted as giving children an immediate right on demand. In *Minister of Health v Treatment Action Campaign and Others* (2000 5 SA 703 (CC)), the duty of the state to provide socio-economic rights to children without parents was extended to children not only when they are physically separated from their parents but also when the "implementation of the right to parental or family care is lacking" due to the poverty of the parent. The Court did not conclude that indigent children have a direct, immediate claim to socio-economic rights in terms of section 28(1)(c). In *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005 6 SA 50 (T)), the Court decided that the state has an "active duty" to provide the basic socio-economic rights to foreign unaccompanied children. The question whether indigent refugee children under parental or family care has a direct, immediate claim to socio-economic rights remain unclear and the aim of this study is to determine the nature and scope of the socio-economic rights of refugee children under parental care in South Africa. Related to this question is the further problem presented in the context of refugee children, that although refugee children have constitutional rights and these entitlements has been concretised in legislation and policies, the improper execution of most of these legislation and policies, the continued discrimination and exclusion from education and social assistance grants, remains problematic areas that need urgent attention.

OPSOMMING

Vlugteling kinders is 'n spesifieke kwesbare groep in die Suid-Afrikaanse gemeenskap. In terme van die Suid-Afrikaanse Grondwet, is vlugteling kinders gelykwaardig geregtig tot die reg op basiese voeding, skooling, basiese gesondheidsorgdienste en maatskaplike dienste soos in artikel 28(1)(c) en basiese onderwys soos in artikel 29(1)(a) omskryf. Dit is onduidelik vanuit regspraak of behoeftige kinders wat onder ouerlike of familie sorg 'n direkte aanspraak het tot genoemde regte. In *Government of the Republic of South Africa v Grootboom* (2001 1 SA 46 (KH)) het die hof kinders se regte indirek aangespreek, waarby die hof geredeneer het dat die ouers en/of familie van die kind die primêre verantwoordelikheid dra om vir kinders te sorg, en die sosio-ekonomiese regte soos in artikel 28(1)(c) omskryf te voorsien, in sover dit ooreenstem met die sosio-ekonomiese regte van ouers deurdat dit nie geïnterpreteer kan word as 'n onmiddellike reg op aanvraag deur kinders nie. In *Minister of Health v Treatment Action Campaign and Others* (2000 5 SA 703 (KH)) word die verantwoordelikheid van die staat om sosio-ekonomiese regte aan kinders te voorsien uitgebrei na kinders wat nie net fisies geskei is van hulle ouers nie, maar ook waar die implementering van die reg tot ouerlike of familie sorg ontbreek vanweë die armoede van die ouer. Die hof baseer nie sy gevolgtrekking op die basis dat behoeftige kinders 'n direkte, onmiddellike aanspraak het in terme van artikel 28(1)(c) nie. In *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005 6 SA 50 (T)) het die hof besluit dat die staat 'n aktiewe verpligting het om basiese sosio-ekonomiese regte aan onvergeselde nie-burgerlike kinders te voorsien. Die vraag of behoeftige vlugteling kinders onder ouerlike sorg 'n direkte, onmiddellike aanspraak tot sosio-ekonomiese regte het, bly onduidelik en die oogmerk van hierdie studie is om te bepaal wat die aard en omvang van die sosio-ekonomiese regte van vlugteling kinders in Suid-Afrika is. Verwant aan die gestelde vraag is die verdere probleem wat voorgehou word in die konteks van vlugteling kinders dat alhoewel vlugteling kinders grondwetlike regte het en die aansprake gekonkretiseer is in wetgewing en beleid, die onbehoorlike uitvoering van meeste van hierdie wetgewing en beleide asook die voortdurende diskriminasie en voortdurende uitsluiting van onderwys en maatskaplike bystand problematies bly in areas wat dringende aandag verg.

LIST OF ABBREVIATIONS

ACMS	African Centre for Migration & Society
ACRWC	African Charter on the Rights of the Child
AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
CILSA	Comparative and International Law Journal of Southern Africa
CLC	Community Law Centre
CORMSA	Consortium for Refugees & Migrants in South Africa
CRC	Convention on the Rights of the Child
Gen Not	General Notice
GG	Government Gazette
GN	Government Notice
IJCR	International Journal of Children's Rights
IJED	International Journal of Educational Development
IJRL	International Journal of Refugee Law
Int & Comp LQ	International and Comparative Law Quarterly
IRIN	The Integrated Regional Information Networks
LHR	Lawyers for Human Rights
LDD	Law, Democracy and Development
NCRA	National Consortium for Refugee Affairs
OAU	Organisation of African Unity
PG	Provincial Gazette
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UMR	Unaccompanied Minor Refugee

1 Introduction

The Constitution of the Republic of South Africa, 1996¹ is the supreme law of the Republic and the obligations imposed by the Constitution must be fulfilled.² Children are one of the most vulnerable groups in society and are in need of special care and protection.³ Chapter 2 of the Constitution contains the Bill of Rights and has been internationally hailed as a good example of a constitution, advancing the rights of children and for its protection thereof.⁴ Section 28 is a special section that sets out the rights of children. Children are not only entitled to the rights set out in section 28 they are also entitled to the remainder of the rights contained in the Bill of Rights, except those due to an age limitation.⁵

Sections 28(1)(c) and 29(1)(a) are considered to contain the basic socio-economic rights of children, which include the right to basic nutrition, shelter, basic health care services and social services, as well as basic education.⁶ Brand⁷ describes socio-

1 *Constitution of the Republic of South Africa*, 1996 (hereafter Constitution).

2 S 2 of the Constitution.

3 Stewart 2008 *SAJHR* 480.

4 Skelton "Constitutional protection of children's rights" 265; Sloth-Nielsen 2005 *SAJHR* 401.

5 Skelton "Constitutional protection of children's rights" 265; Currie and De Waal *The Bill of Rights Handbook* 600-601; Restrictions are placed on the right to vote in elections and to stand for public office in that section 19(3) of the Constitution states that these rights are conferred on "every adult citizen"; Section 28 reads:

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

6 Proudlock "Children's socio-economic rights" 291; Section 29 reads:

(1) Everyone has the right- (a) to a basic education, including adult basic education; and (b) further education, which the state, through reasonable measures, must make progressively available and accessible. (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure effective access to, and implementation of, this right, the state must

economic rights as “entitlements to material conditions for human welfare”. The question whether the state has a direct (or shared as opposed to a secondary) responsibility to fulfil these rights has been contested by numerous scholars.

In *Government of the Republic of South Africa v Grootboom*⁸ the Court only indirectly addressed children’s rights and reasoned that the parents and/or family of the child bear the primary duty to care for children and the socio-economic rights contained in section 28(1)(c), in so far as it overlapped with the socio-economic rights of parents, which cannot be interpreted as giving children an immediate right on demand.⁹ The duty is only shifted to the state where there is a lack of parental or family care. The *Grootboom* interpretation of section 28(1)(c) implies that children under parental or family care, have no direct entitlement to socio-economic rights.¹⁰

In *Minister of Health and Others v Treatment Action Campaign and Others*¹¹ the duty of the state to provide socio-economic rights to children without parents was extended to children, not only when they are physically separated from their parents, but also when the “implementation of the right to parental or family care is lacking”.¹² The Court pointed out that the parents of these children are mostly indigent and unable to access private health care but did not conclude that indigent children have a direct, immediate claim to basic socio-economic rights, although the judgement has been understood as a positive adjustment because political questions was raised.¹³

consider all reasonable educational alternatives, including single medium institutions, taking into account- (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices. (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that- (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

7 Brand “Introduction” 3.

8 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

9 *Grootboom* para 70-71; Proudlock “Children’s socio-economic rights” 300; Stewart 2008 SAJHR 476-478.

10 *Grootboom* par 77; Stewart 2008 SAJHR 478.

11 *Minister of Health v Treatment Action Campaign and Others* 2002 5 SA 703 (CC) (hereafter *TAC*).

12 *TAC* par 79; Proudlock “Children’s socio-economic rights” 301; Stewart 2008 SAJHR 477.

13 *TAC* par 79; Stewart 2008 SAJHR 477; Stewart 2011 SAPL 102-103; Skelton 2010 SAJHR 147-148.

In *Centre for Child Law and Another v Minister of Home Affairs and Others*¹⁴ the Court directly addressed the question whether foreign unaccompanied children were entitled to legal representation in terms of section 28(1)(h) and the socio-economic rights contained in section 28(1)(c) of the Constitution. In terms of both of these subsections, the Court referred to the *Grootboom* case and the distinction drawn between children under parental or family care and those children that lack parental or family care. The Court concluded that the state has an “active duty” to provide the basic socio-economic rights to foreign, unaccompanied children and also to realise their rights under section 28(1)(h).¹⁵

It should be noted that since the becoming of a democratic state, South Africa has undergone a shift from being a refugee producing country to one receiving refugees, which guarantees rights and protection in terms of law.¹⁶ Although refugees are guaranteed rights, the reality is that access to these rights “is far from being guaranteed.” By law, refugees are entitled to the rights as contained in the Bill of Rights of the Constitution, which include the right to have access to adequate housing, access to health care services, access to social security and education.¹⁷ The National Consortium for Refugee Affairs¹⁸ stated that for the provision of said rights, government departments must collaborate with each other to develop policies which enable access to these rights. Problems faced by refugees within this context include the exclusion from housing subsidies, the refusal to health care facilities and the struggle of access to educational facilities for children due to discrimination; language barriers; the inability to pay fees and the lack of documentation.¹⁹ All of these problems directly affect children. The uncertainty continues due to recent controversy, where it was established that refugee children in South Africa are denied schooling.²⁰ Reasons for this include that parents are intimidated by the process and the frequent discrimination experienced.²¹

14 *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T) (hereafter *Centre for Child Law-case*).

15 Proudlock “Children’s socio-economic rights” 301.

16 NCRA 2006 <http://www.cormsa.org.za/wp-content/uploads/2008/06/ncra06.pdf>.

17 NCRA 2006 <http://www.cormsa.org.za/wp-content/uploads/2008/06/ncra06.pdf>.

18 NCRA 2006 <http://www.cormsa.org.za/wp-content/uploads/2008/06/ncra06.pdf>.

19 NCRA 2006 <http://www.cormsa.org.za/wp-content/uploads/2008/06/ncra06.pdf>; Motha 2005 <http://erp.org.za>.

20 Nkosi “Refugees barred from schooling” 4/11/2011 *Mail and Guardian Online*.

21 Nkosi “Refugees barred from schooling” 4/11/2011 *Mail and Guardian Online*.

It was added that:

There is a huge gap between policy and the practice of that policy in South Africa. 'Misconceptions and false assumptions' about refugees and migrants are often promoted by or ignored by those in powerful positions who sometimes even violate official policy.²²

The Integrated Regional Information Networks (hereafter IRIN), reporting on humanitarian news and analysis, reported that children, after being confronted on the streets of Johannesburg on weekdays on why they were not attending school, stated that they were denied...due to lack of identity documents and permits as well as their parents' inability to pay for the fees.²³ Refugee children are allowed to access educational facilities even when they lack documentation such as a report card or a birth certificate and their parents are also entitled to apply for fee exemption.²⁴ Only a completed application form, documentation regarding their application to legalise their stay and proof of immunisation of the child is needed.²⁵ On the other hand, Sibongile Kwasi²⁶ identified that there is a lack of classes and stated that:

Schools from disadvantaged communities would never think of taking foreign learners when we're sitting with a class-size problem but excluding foreign nationals will only compound their problems and also perpetuate crime, inequality and poverty.²⁷

The aim of this study is to determine the nature and scope of the socio-economic rights of refugee children under parental care in South Africa which relates to the improper execution of concretised legislation and policies containing constitutional rights and continued discrimination and exclusion from socio-economic services. In the absence of jurisprudence dealing with sections 28(1)(c) and 29(1)(a) in the context of refugee children under parental or family care, the question whether indigent refugee children under parental or family care have a direct, immediate claim to the socio-economic rights remain unclear.

22 Nkosi "Refugees barred from schooling" 4/11/2011 *Mail and Guardian Online*.

23 Siegfried 2012 <http://www.irinnews.org/Report/94766/SOUTH-AFRICA-Refugee-children-miss-out-on-school>.

24 Nkosi "Refugees barred from schooling" 4/11/2011 *Mail and Guardian Online*.

25 Nkosi "Refugees barred from schooling" 4/11/2011 *Mail and Guardian Online*.

26 Deputy Secretary of the South African Democratic Teachers' Union in the Western Cape.

27 Nkosi "Refugees barred from schooling" 4/11/2011 *Mail and Guardian Online*.

In the following sections the socio-economic rights of the refugee child in terms of the Constitution will be analysed. This will include an analysis of binding and relevant international and supra-national measures, to establish the degree of protection and the provision of socio-economic entitlements and to establish the responsibilities of the state and parents for children under parental or family care and especially the situation of refugee children. Thereafter, the constitutional provisions will be analysed in that it is the supreme law of South Africa and provides protection to all within the borders, as well as protects and advances the rights of children. In light of the constitutional provisions, case law will form part of the discussion as it not only adds to the confusion of the matter at hand, but provides interpretation of constitutional provisions which aid in the interpreting process. Lastly, national legislation will be evaluated in that it entrenches socio-economic rights and that of refugees and refugee children. National legislation gives effect to international and supra-national measures, as well as the Constitution as it creates “empowering structures and institutions” and sets in place processes to implement rights.

2 International law and supra-national law

2.1 Introduction

The Constitution contains provisions regarding the status and application of international law in South Africa.²⁸ In terms of international law, it is important to note that there exist two doctrines namely, the monist and dualist doctrines. The first mentioned doctrine entails that international law and municipal law are part of a “single, integral legal order.” If any conflict arises between the two, international law should prevail. The doctrine of incorporation (based on the monist doctrine) holds that international law becomes part of municipal law automatically without the need for a constitutional ratification procedure.²⁹ The latter mentioned doctrine asserts that international law and municipal law exist separately and that they do not affect one another. The doctrine of transformation (based on the dualist doctrine) asserts that the rules of international law must be explicitly adopted into municipal law to be “fully

28 Mahery “The United Nations Convention of the Rights of the Child: Maintaining its Value in International and South African Child Law” 323; Ss 231-233 of the Constitution.

29 Buck *International Child Law* 27-28; Detrick *Commentary* 27-28.

digested.”³⁰ The Constitutional provisions related to this can be found in chapter three in sections 231 to 233. Section 231 states that:

- 1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- 2) An international agreement binds the Republic only after it has been approved by the resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- 3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- 4) Any international agreement becomes law in the Republic when it is enacted into law by the national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- 5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

In terms of section 231(4) it is evident that the dualist or transformation theory is applicable in South Africa.³¹ The *Children’s Act*,³² enacted by parliament, states in its preamble that the Act aims to transform and translate the rights as contained in the Convention on the Rights of the Child,³³ to extend particular care to children and the rights as contained in section 28 of the Constitution into statutory legal entitlements.

In relation to section 39(1) of the Constitution a court, tribunal or forum must:

- (a) promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law and (c) may consider foreign law when interpreting the Bill of Rights.³⁴

In *S v Makwanyane and Another*³⁵ the Constitutional Court held that:

30 Buck *International Child Law* 27-28; Detrick *Commentary* 27-28.

31 In *S v Kwalase* 2002 2 SACR135 (C) which dealt with juvenile offenders, it is stated that the application of the CRC (Convention on the Rights of the Child) are growing in case law. In the judgment referral was made to the ratification of the CRC by South Africa whereby it was stated that there is an international legal obligation to incorporate the provisions into domestic law. The judge pointed out that the Constitutional provisions should be read with the applicable provisions in the CRC pertaining to juvenile justice.

32 *Children’s Act* 38 of 2005 (hereafter *Children’s Act*).

33 The CRC may be considered as binding law in so far as its provisions have been translated into the Act.

34 Sections 39(1)(b) and 233 places an obligation on courts to look at foreign law whilst interpreting socio-economic rights, Skelton 2010 *SAJHR* 146.

35 *S v Makwanyane and Another* 1995 3 SA 391 (CC).

In the context of section 39(1)(b), the phrase 'public international law' refers both to international law that is binding on South Africa and to international law that South Africa is not bound to. In addition, the Court emphasised that both 'hard' and 'soft' international law must be considered by courts in their interpretation of the Bill of Rights.³⁶

In *Mazibuko v The City of Johannesburg*³⁷ the High Court referred to two other socio-economic rights cases to support its reliance on international law. Firstly, mention was made to the High Court case of *Residents of Bon Vista Mansions v Southern Metropolitan Council*,³⁸ where it was stated that international law should be considered and that it is helpful where the language of the Bill of Rights correlates with that of the relevant international document.³⁹ Secondly, mention was made to *Grootboom*, where it was stated that "international law may be a guide to interpretation" and also where South Africa is bound to provisions in international documents, it is directly applicable.⁴⁰ The High Court in *Mazibuko* then came to the conclusion that international law may be instructive and imperative when considered and is also a "valuable source of interpretation".⁴¹ Sections 232 and 233 are also imperative when looking at international law, in that section 232 deals with customary international law⁴² and section 233 deals with the application⁴³ of international law.⁴⁴

The relevant international documents for this discussion are refugee and child-specific international instruments. The South African Government accepted principles regarding the protection and treatment of asylum seekers and refugees with the United Nations High Commissioner for Refugees in 1993 and in 1996 the South African Government signed and ratified both the United Nations Convention

36 Jansen van Rensburg and Lamarche "The right to social security and assistance" 213.

37 *Mazibuko v The City of Johannesburg* 2008 JOL 21829 (W) (hereafter *Mazibuko*).

38 *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 6 BCLR 625 (W).

39 Stewart 2008 *Stell LR* 418; *Mazibuko* par 32.

40 Stewart 2008 *Stell LR* 418; *Grootboom* par 75, It was also said that the state obligation must be interpreted whilst taking international law obligations upon South Africa into consideration; Friedman, Pantazis and Skelton "Children's Rights" 15-16; *Mazibuko* par 33.

41 Stewart 2008 *Stell LR* 418; Sloth-Nielsen and Mezmur 2008 *IJCR* 1; Proudlock "Children's socio-economic rights" 292 Proudlock states that the Courts have been criticised for not giving content to the right in question in that there is a lot information available and expert witnesses; *Mazibuko* par 34.

42 Has a binding effect in the Republic unless it is inconsistent with either the Constitution or an Act of Parliament.

43 Every Court must prefer any reasonable interpretation of legislation that is consistent with international law than an interpretation inconsistent therewith when interpreting legislation.

44 Sloth-Nielsen 2002 *IJCR* 139-140.

Relating to the Status of Refugees (hereafter the United Nations Refugee Convention) and the Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (hereafter OAU Refugee Convention) regarding refugees, recognising them within South Africa's borders.⁴⁵ South Africa has also ratified the Convention on the Rights of the Child in 1995 (hereafter the CRC) and the African Charter on the Rights and the Welfare of the Child in 2000 (hereafter the ACRWC).⁴⁶ It is argued that the CRC has an enhanced status in the legal framework of South Africa, in that important features of the CRC have been inserted into the Constitution which can be found in article 28.⁴⁷ In *Grootboom* the above mentioned notion was supported because it was stated that section 28 is a device to meet the obligations as contained in the CRC, however no mention was made of the CRC in the judgement.⁴⁸

It is thus seen that not only are courts compelled to look at international law in the interpretation process as seen in section 39(1)(b), but as stated in *Mazibuko* it may be instructive and imperative when considered and may also serve as a valuable source of interpretation. Also, once a state party has ratified a treaty it agrees to bring national laws in line with the instruments' principles.⁴⁹ Further, international law contains a wealth of information that can provide assistance in the interpretation process⁵⁰ of socio-economic rights and the socio-economic entitlements that refugee children may have in South Africa. All the above mentioned instruments have been transformed into South African legislation or domesticated and will be discussed in

45 The act which was enacted to give recognition to refugees is the *Refugees Act* 130 of 1998 which specifically states that "the Act was enacted to give effect to the relevant international instruments, standards and principles to provide for the reception, regulation of applications, the rights and obligations stemming of said status and the provision of other matters." In the preamble the Act assumes certain obligations in terms of the treatment and receiving of refugees within South Africa in accordance to international law; Kleinsmidt and Manicom 2010 *African Insight* 170-171; Buckland 2011 *IJED* 2.

46 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 323; Viljoen "The African Charter on the Rights and the Welfare of the Child" 349; Rosa and Dutschke 2006 *SAJHR* 224 (child-specific instruments), Skelton 2010 *SAJHR* 143, in both children's socio-economic rights are guaranteed.

47 Sloth-Nielsen 2002 *IJCR* 139; Friedman, Pantazis and Skelton "Children's Rights" 1; Skelton 2010 *SAJHR* 144 Skelton highlights the fact that section 28(1)(c) "was based on an understanding that international law did not envisage progressive realisation in relation to children's socio-economic rights".

48 Sloth Nielsen 2002 *IJCR* 148-149.

49 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 323.

50 Proudlock "Children's socio-economic rights" 292.

the following sections. Accordingly, the relevant international instruments are going to be analysed, the entitlements contained therein, who or what classifies as a refugee and the responsible party or parties to provide these entitlements to refugee children.

2.2 A refugee in terms of international law

According to Goodwin-Gill the term “refugee” is a term of art. In its ordinary sense it has a looser meaning, describing someone in flight and or seeking to escape conditions or personal circumstances that are intolerable. In this ordinary meaning lies the assumption that this person is worthy of assistance and where necessary, protection.⁵¹ The United Nations Refugee Convention and its Protocol defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵²

The United Nations Refugee Convention remains the principal international instrument benefiting refugees, which is aimed at improving the situation of recognised refugees. It also forms the basis for the OAU Refugee Convention which is seen as the effective regional complement to the United Nations Refugee Convention.⁵³ In terms of the OAU Refugee Convention the following is added to the definition:

The term ‘refugee’ shall also apply to every person who, 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, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁵⁴

51 Goodwin-Gill *The refugee in international law* 15.

52 Kleinsmidt and Manicom 2010 *African Insight* 165; Van der Burg 2009 *LDD* 88.

53 Goodwin-Gill *The refugee in international law* 15; Kleinsmidt and Manicom 2010 *African Insight* 165.

54 Kleinsmidt and Manicom 2010 *African Insight* 165; UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 17-18.

According to these definitions a refugee is thus a person, which includes a child, who has a fear of being persecuted for one of the mentioned reasons, and is outside his country and because of fear, is unwilling to return to it. Accordingly, both conventions contain the principal rights, which refugees are entitled to in host countries which are in many ways the same as nationals.⁵⁵

2.3 International refugee documents

According to the United Nations High Commissioner for Refugees,⁵⁶ one of the most complicated issues before the international community today is that of refugees.⁵⁷ Certain groups of refugees, which include children and women, need special protection and care due to their exceptional vulnerability.⁵⁸ The UNHCR estimates that more than half of the world's refugees are children and as refugees they are entitled to all the rights and freedoms contained in international human rights instruments.⁵⁹ They are also entitled to the protection provided in the guidelines and policies which specifically address the problem of refugee children.⁶⁰

The United Nations Refugee Convention and its Protocol set standards that apply to children in the same way as they do to adults, which include:

- A child who has a “well-founded fear of being persecuted” for one of the stated reasons (race, religion, nationality, membership of a particular social group and political opinion) is a “refugee”;
- A child who holds refugee status cannot be forced to return to the country of origin (principle of non-refoulement); and
- No distinction is made between children and adults in social welfare and legal rights.⁶¹

The Convention does not pay specific attention to the needs and special circumstances of refugee children and therefore child applicants must prove that

55 Ndinda and Adebayo 2006 *African Insight* 79.

56 Hereafter the UNHCR.

57 Swart 2009 *AHRLJ* 104.

58 Swart 2009 *AHRLJ* 104.

59 The UNHCR 2005 Global Appeal reported that there are over 4.2 million adults and children in Africa alone which are of concern, Van der Burg 2009 *LDD* 82.

60 Swart 2009 *AHRLJ* 104.

61 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 17-18.

they meet the requirements in the same way as adults.⁶² Van der Burg argues “that this omission is particularly problematic because it ignores the specific needs of children and exposes vulnerable children.”⁶³ One of the articles in the United Nations Refugee Convention sets standards that are of importance to children and states that refugees must receive the “same treatment” as nationals in primary education and must also receive treatment at least as favourable as that given to non-refugee aliens in secondary education.⁶⁴

The OAU Refugee Convention broadens the definition of a refugee by extending the protection to people fleeing war, civil disturbances and general unrest and violence but similar to the UN Convention does not contain specific rights for children that pay specific attention to their needs and circumstances.⁶⁵

As a supra-national or regional document, the OAU Convention is specifically concerned with refugees in Africa and is aimed at alleviating their suffering.⁶⁶ Although both the UN and Africa Conventions apply to children who are forced to flee their countries, neither of these conventions extend to claims based on economic hardships and environmental disasters faced by citizens fleeing their country.⁶⁷

Van der Burg argues that these conventions are inadequate to provide for the needs of refugee children due to its general nature and states that child-specific instruments must be used to provide adequate protection.⁶⁸ Reasons for this argument include the fact that children’s special vulnerabilities are not taken into account, although they are entitled to the protection set out in the conventions whereas the child-specific conventions are focused specifically on the needs and protection of children.⁶⁹ Sloth-Nielsen reaffirms this view by pointing out that the

62 Van Garderen and Winterstein “Refugee Children” 208.

63 Van der Burg 2009 *LDD* 88.

64 S 22 of the United Nations Convention on the Status of Refugees; UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 17-18; Swart 2009 *AHRLJ* 106.

65 Van Garderen and Winterstein “Refugee Children” 208; UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 17-18; Swart 2009 *AHRLJ* 106.

66 Van der Burg 2009 *LDD* 89.

67 Van Garderen and Winterstein “Refugee Children” 208.

68 Van der Burg 2009 *LDD* 89.

69 Van der Burg 2009 *LDD* 88-89.

drafting of a separate convention (CRC) containing rights pertaining only to children is a clear indication that children are vulnerable, and are often denied rights, although all human rights apply to them.⁷⁰ The rights encompassed in the CRC are not reserved for citizens or permanent residents of a country. The rights contained in the CRC cover all children within a specific territory or country which include refugee children and bestowing on them the right to claim socio-economic rights.⁷¹

Numerous guidelines and policies have been issued by the UNHCR concerning refugees which gives acknowledgement to the fact that refugee children have a need for special care, protection and assistance.⁷² Inherent to these guidelines is the recognition given to the fact that children are vulnerable, dependent and developing.⁷³ Children's vulnerability is inherent to the fact that they are "susceptible to disease, malnutrition and physical injury", they are dependent on adults not only for physical survival, but for physiological and social well-being and also children develop in certain developmental stages, which if interrupted can disrupt their entire developmental process.⁷⁴

According to the UNHCR the guidelines are not merely suggestions but tools for reaching policy objectives and ultimately the purpose of the guidelines is to guide the staff of the UNHCR, as well as other organisations and governments.⁷⁵ The guidelines are based on human rights law and were created in terms of the notion of human rights and in light of the CRC.⁷⁶ The guidelines are intended to be universal and cannot be dismissed without proper grounds thereto.⁷⁷ According to Sadako Ogata:

70 Sloth-Nielsen 1995 *SAJHR* 408.

71 Sloth-Nielsen 1995 *SAJHR* 411.

72 UNHCR 'Guidelines on Refugee Children' (Geneva 1988) which was initiated by the 1987 "Note on Refugee Children" which came about drawing a distinction between adult and child refugees. UNHCR 'Policy on Refugee Children' (1993); *UNHCR Guidelines on Protection and Care of Refugee Children*, Geneva (1994).

73 UNHCR 'Guidelines on Protection and Care of Refugee Children' (Geneva 1994) 5-7 (preface); Swart 2009 *AHRLJ* 106.

74 UNHCR 'Guidelines on Protection and Care of Refugee Children' (Geneva 1994) 5-6.

75 UNHCR 'Guidelines on Protection and Care of Refugee Children' (Geneva 1994) 13; Swart 2009 *AHRLJ* 107.

76 UNHCR 'Guidelines on Protection and Care of Refugee Children' (Geneva 1994) 11-14; Swart 2009 *AHRLJ* 107.

77 UNHCR 'Guidelines on Protection and Care of Refugee Children' (Geneva 1994) 13; Swart 2009 *AHRLJ* 107.

Refugee children face far greater dangers to their safety and well being than the average child. The sudden and violent onset of emergencies, the disruption of families and community structures as well as the acute shortage of resources with which most refugees are confronted, deeply affect the physical and psychological well being of refugee children. It is a sad fact that infants and young children are often the earliest and most frequent victims of violence, disease and malnutrition which accompany population displacement and refugee outflows. In the aftermath of emergencies and in the search for solutions, the separation of families and familiar structures continue to affect adversely refugee children of all ages. Thus, helping refugee children to meet their physical and social needs often means providing support to their families and communities.⁷⁸

Not only are these children entitled to social and welfare rights in the same way as adults, section 22 makes specific provision regarding education which applies directly to refugee children. Although nothing is mentioned about parental or state responsibilities in terms of the provision of socio-economic rights, one can at least assume that they are entitled to the rights set out in the Conventions in the same way as their adult counterparts and although the policies and guidelines are not binding, it must be considered as a guide of interpretation as the guidelines and policies are universal and cannot be dismissed without proper grounds. The guidelines must be taken into account as they can be used as tools for reaching policy objectives and most importantly the fact that they acknowledge that refugee children have a need for special care and assistance.⁷⁹

In the discussion on the international child-specific documents, one can clearly distinguish between state and parental responsibilities and also see which socio-economic rights they are entitled to and the extent thereof, after discussing the main principles which is described as the “value system on which the convention is based.”⁸⁰

78 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 5-6.

79 Swart 2009 *AHRLJ* 107.

80 Sloth-Nielsen 1995 *SAJHR* 408.

2.4 *Child-specific instruments and refugee children*

2.4.1 *Convention on the Rights of the Child*

The CRC is a comprehensive rights-based treaty and the central international instrument regarding children's rights and the protection thereof.⁸¹ The CRC covers both civil and political rights⁸² and socio-economic rights⁸³ of children which are a clear indication that the CRC supports the indivisibility, interrelatedness and interdependence of all the rights contained therein.⁸⁴ All these rights apply to persons under the age of 18 as stated in article 1.⁸⁵ Concerning age, article 1 contains a compromise in that it defines a child as a person under the age of 18 but this provision is subject to the provision that if national legislation prescribes age of majority at a younger age that it will not be compromised.⁸⁶ The CRC contains four general principles⁸⁷ which are fundamental to the implementation, interpretation and understanding of the individual rights contained therein.⁸⁸ The Committee emphasises the importance of ensuring that these four principles are reflected in domestic law.⁸⁹ The four principles are non-discrimination,⁹⁰ the best interest of the

81 Buck *International Child Law* 41, 4; Baimu 2011 *Max Planck Encyclopedia of Public International Law* 1.

82 Includes rights related to civil status such as the right to a name, to acquire a nationality, to preserve one's identity, not to be separated from parents. Traditional rights include the right to privacy, access to information, freedom from torture; expression, thought, conscience and religion; association and peaceful assembly; Baimu 2011 *Max Planck Encyclopedia of Public International Law* 2.

83 Economic, social and cultural rights include the right to education, to enjoy the highest attainable standard of health, to benefit from social security and a standard of adequate living; Baimu 2011 *Max Planck Encyclopedia of Public International Law* 2.

84 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 311; Sloth-Nielsen 1995 *SAJHR* 404.

85 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 311.

86 Buck *International Child Law* 57; Baimu 2011 *Max Planck Encyclopedia of Public International Law* 1.

87 The principles have to be reflected in national legislation and in all actions taken by social welfare institutions, administrative authorities and courts; Baimu 2011 *Max Planck Encyclopedia of Public International Law* 2; This is especially important with regards to refugee children.

88 Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution" 203; Buck *International Child Law* 41; Robinson 2002 *Stell LR* 312-316.

89 The CRC Committee (General Comment No 5 (2003 par 22)).

90 In accordance with a 2(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

child,⁹¹ the right to life, survival and development⁹² and respect for the views⁹³ of the child.⁹⁴ Together, these principles form a new attitude towards children which give an ethical and ideological dimension to the CRC.⁹⁵ Although the CRC is not a refugee treaty, refugee children are entitled to the rights set out in the CRC, because as stated above these rights apply to all persons below the age of 18 and without discrimination.

According to Detrick, the principle of non-discrimination applies together with all the substantive rights and does not provide independent rights to “freedom of discrimination.”⁹⁶ Concerning article 2(1), Sloth-Nielsen points out that “the fact that the child should not suffer discrimination on account of any of these traits could be regarded as axiomatic”.⁹⁷ In turn article 2(2) prohibits discrimination of specific traits of the parents and legal guardians.⁹⁸ Sloth-Nielsen and Mezmur reiterate that the principle of non-discrimination plays an exceptional role in the history of South Africa in that the principle is enshrined in the Constitution which prohibits unfair

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

91 In accordance with a 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

92 In accordance with a 6(1) States Parties recognize that every child has the inherent right to life.

(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

93 In accordance with a 12(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

94 Mahery “The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law” 315; Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” 203.

95 Hammarberg “Justice for children through the UN Convention” 63.

96 Detrick *Commentary* 72.

97 Sloth-Nielsen 1995 *SAJHR* 409.

98 Sloth-Nielsen 1995 *SAJHR* 409.

discrimination on the basis of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁹⁹ The Committee on the rights of the child explains the non-discrimination principle as one which requires states to identify individuals and groups of children whose rights demand special measures to be recognised and realised.¹⁰⁰ Further, the Committee refers to a General Comment by the Human rights Committee¹⁰¹ which points out that non-discrimination does not mean identical treatment but that it is important for special measures to be taken in order to eliminate and diminish conditions that cause discrimination.¹⁰² Regarding marginalised and disadvantaged children, specific attention must be given to identify and give priority attention to these children. The non-discrimination principle requires that the rights in the convention should be recognised and afforded to children within the jurisdiction of states.¹⁰³ General Comment 7 of the Committee on the Rights of the Child comments on refugees in this context by adding that these children and their parents are entitled to equal access to all the services which especially include health care and education.¹⁰⁴

The best interest principle considers children where official decisions are taken affecting them, which should be given due weight, reiterating that the interests of parents or the state are not the only factors that needs to taken into account.¹⁰⁵ Therefore, the provisions of the CRC should be applied in conformity with the best interest of the child standard, to determine the best interest of an individual child or children as a group, which includes legislation, administrative acts, judicial pronouncements and all other measures included in the formulation of government

99 A 9(3); Sloth-Nielsen and Mezmur 2008 *IJCR* 5-6.

100 The CRC Committee (Comment No 5 (2003 par 12)); Van Beuren explains that children living in rural communities have less access to socio-economic rights than those living in urban communities which have been criticised by the UN Committee on a report on South-Africa (UN Doc CRC/C/15 Add 122, January 2000). When applying the test for discrimination, equality treatment for children is violated when the distinction has no objective or reasonable justification. Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” 204.

101 The Human Rights Committee (General Comment No 18 (1989)).

102 The CRC Committee (General Comment No 5 (2003 par 12)).

103 The CRC Committee (General Comment No 5 (2003 par 30)).

104 The CRC Committee (General Comment No 7 (2005 par 36)).

105 Sloth-Nielsen 1995 *SAJHR* 408-409.

policy.¹⁰⁶ The Committee on the CRC reiterates that the best interest principle requires active measures by every arm of Government, whereby children's rights must be considered or how it can be affected by decisions or actions.¹⁰⁷ The best interest principle does not create rights or duties, although the principle is transformed in the CRC beyond its original scope and can be seen in numerous articles.¹⁰⁸ Although the best interest principle is not the overriding factor in the CRC, it is of special importance when looking at the facts of each situation.¹⁰⁹

Life, survival and development are interlinked which, according to Mahery, cannot be denied.¹¹⁰ Van Bueren describes this aspect of the CRC as revolutionary because the economic, social and cultural rights are redistributing of nature and create legal claims for children to benefit from the resources in the country in which they are residing.¹¹¹ The right to life forms the framework but the provision goes far beyond the mere continuation of existence.¹¹² The right to life is realised when measures for survival and development are put in place. Survival and development on the other hand create positive obligations which states have to take with the necessary measures.¹¹³ Measures include growth monitoring, oral rehydration, disease control, immunisation and nutrition¹¹⁴ to combat malnutrition, preventable diseases and to further life expectancy.¹¹⁵ Survival rights to life and basic needs for existence include shelter, nutrition, access to medical or health care services and most importantly an adequate living standard.¹¹⁶ The Committee defines development in its broadest sense as:

106 Sloth-Nielsen 1995 *SAJHR* 408-409, Sloth-Nielsen points out that signatory states and observers indicates that "the best interest is meant to be a binding state obligation".

107 The CRC Committee (General Comment No 5 (2003 par 12)).

108 Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution" 204.

109 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 318-319.

110 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 320.

111 Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution" 207-208.

112 Sloth-Nielsen 1995 *SAJHR* 410-411.

113 Sloth-Nielsen 1995 *SAJHR* 410-411.

114 Sloth-Nielsen 1995 *SAJHR* 410-411.

115 Sloth-Nielsen and Mezmur 2008 *IJCR* 10.

116 Sloth-Nielsen and Mezmur 2008 *IJCR* 10-11; Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law" 320.

...a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.¹¹⁷

In terms of the right of the child to express views, respect for the views of the child who is capable of forming and expressing his or her own views is required in all administrative and judicial proceedings affecting the child. This gives the child the opportunity to make his or her own decisions if he or she consists of the necessary capabilities.¹¹⁸ General Comment 12 on the right of the child to be heard makes provision for children in immigration and asylum proceedings to be heard. Children accompanying their parents into another country as refugees or searching for work are especially vulnerable and it therefore necessitates the need to fully implement their right in terms of article 12.¹¹⁹

A general rule of international law is that if a state ratifies a document, it obtains an obligation to give effect to the provisions contained therein.¹²⁰ Within this framework South-Africa¹²¹ is obligated to give effect to the four basic principles as contained in the CRC which are described as the "value system" on which the CRC is based upon.¹²² When evaluating non-discrimination all children as defined in section 1 are entitled to the rights contained therein. Detrick points out that non-discrimination applies together with all the substantive rights¹²³ which include socio-economic rights within the borders of a country.¹²⁴ Applying non-discrimination, the best interest standard and life survival and development to the situation of refugees, it is evident that not only are they entitled to the rights but that their best interest must be a paramount consideration.

Children are entitled to share in the resources of the country in which they reside, making refugee children entitled to these resources and if denied of these

117 The CRC Committee (General Comment No 5 (2003 par 12)).

118 Robinson 2002 *Stell LR* 311-313.

119 The CRC Committee (General Comment No12 (2009 para 123-124)).

120 Sloth-Nielsen 2002 *IJCR* 137-138.

121 South Africa ratified the CRC on 16 June 1995; the four principles which are seen in the South African Constitution will be discussed in detail in the following chapter.

122 Sloth-Nielsen 1995 *SAJHR* 409.

123 Detrick *Commentary* 72.

124 The CRC Committee (General Comment No 5 (2003 par 30)).

entitlements, it will be a direct violation when the distinction has no justification.¹²⁵ In the following discussion the socio-economic rights contained in the CRC are going to be analysed. The responsibilities of the parties involved will be discussed, with the intention to establish who bears the primary responsibility to provide for these children.

2.4.1.1 Socio-economic rights

The CRC, reaffirming in its preamble that children should be brought up in the spirit of the CRC, peace, equality, dignity, freedom and tolerance, is an important treaty for refugee children because it covers almost every aspect of a child's life.¹²⁶ In terms of social-welfare rights or socio-economic rights, articles 24 (health and nutrition), 26 (social security), 28 (education) and 27 (adequate standard of living) are important. These social welfare rights are not just abstract goals but require states to give benefits to all children within the confines of its territory.¹²⁷ Socio-economic rights are directly linked with the right of the child to life, survival and development which can be seen in almost all of the General Comments¹²⁸ of the Committee on the CRC.¹²⁹ State parties are reminded of the interconnectedness of the rights in the CRC in that the right to life, survival and development can only be implemented through the enforcement of other provisions in the CRC which include the right to health, adequate nutrition, social security, adequate standard of living, education and respect for family life and the responsibilities of the parents by providing material assistance.¹³⁰

In terms of health and nutrition section 24 emphasises that each child has the right to the “highest attainable standard of health” which includes treatment and

125 Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” 204.

126 Swart 2009 *AHRLJ* 105.

127 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 18-19; Convention on the Rights of the Child General Comment 6 (2005) emphasises the fact that the rights in the CRC are not limited to child citizens but are available to all, Van der Burg *LDD* 85, (Because these social-welfare rights are rights, all children within state territory are entitled to these benefits which include refugees).

128 General Comments interpret and give content to provisions contained in human rights documents which can be read as a commentary. Stoll 2011 *Max Planck Encyclopedia of Public International Law* 6.

129 Own emphasis.

130 The CRC Committee (General Comment No 7 (2005 par 10)).

rehabilitation and that states must take the necessary action to “diminish infant and child mortality,” to develop “primary health care”, “to combat disease and malnutrition” and to teach “child health and nutrition.” Included in this scope are food, water, environmental sanitation, shelter and basic health care services which are the ultimate determinants of a child’s health status. If these services are not properly planned and executed, refugee children will suffer extremely high rates of morbidity and mortality.¹³¹ Regarding the General Comments referring to health, it is evident in terms of General Comment No 3 which comments on HIV/AIDS and the right of the child, that children living in vulnerable situations and in need of protection are most acute. Children should be afforded sustained and equal access to health care in this regard, which includes the necessary medication.¹³² Children living in these conditions are refugee children and those internally displaced, children living in extreme poverty; in armed conflict situations; child soldiers, those sexually exploited, migrant, minority, indigenous and those living on the street. It is added that states should protect the rights of these children even in situations where there is a lack of resources.¹³³

According to section 28 each child has the right to education. The goal is free and compulsory primary education, secondary education (general or vocational) available to all “on the basis of capacity.”¹³⁴ In the Committee’s General Comment No 1 of 2002 on the rights of the child it was said that:

The education to which every child has a right is one designed to provide the child with skills, to strengthen the child’s capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. Education in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.¹³⁵

Article 26 makes provision for children to benefit from social security. Every state party has the duty to take necessary measures to achieve the full realisation of this

131 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 53-58.

132 The CRC Committee (General Comment No 3 (2003 par 28)).

133 The CRC Committee (General Comment No 3 (2003 par 30)).

134 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 109-111.

135 Buck *International Child Law* 69.

right and it must be in accordance with national laws. In terms of article 27 every child has the right to a standard of living adequate for the child's mental, spiritual, moral and social development.¹³⁶

General Comment No 11 on the rights of indigenous children it is stated that:

Indigenous children who have been displaced or become refugees should be given special attention and humanitarian assistance in a culturally sensitive manner.¹³⁷

The Committee has noted after reviewing state reports that state parties have not given the necessary support and attention to indigenous children. It is recommended by the Committee that measures should be taken by states to provide protection.¹³⁸ Regarding basic health and welfare in terms of articles 6, 18(3), 23, 24, 26 and 27 it is noted that indigenous children suffer poor health due to high rates of mortality, disease and the inaccessibility of services. States are recommended to provide equal access and ensure that services are easily accessible especially for those living in rural or remote areas such as migrant workers, refugees or those displaced. State parties thus have a positive obligation to ensure that indigenous children have access, it must be accessible and must inform them on health related issues and preventative care.¹³⁹ Regarding education in terms of articles 28, 29 and 31 the Committee points out the importance of education for children in that it contributes to their own and community development which enables them to enjoy and exercise their civil rights and exercise economic, social and cultural benefits. Education is vital for the achievement of self-empowerment as well as self determination.¹⁴⁰

When looking at the General Comments in terms of education it is evident that education is important for children, not only to learn but to develop in other sectors of their lives. If refugee children are denied this right, they will not develop to their fullest potential. Social security is as important to refugee children as any other child in a country. Social security can enable the refugee child to access other socio-

136 Buck *International Child Law* 66.

137 The CRC Committee (General Comment No 11 (2009 par 68)).

138 The CRC Committee (General Comment No 11 (2009 par 20)).

139 The CRC Committee (General Comment No 11 (2009 para 49-55)).

140 The CRC Committee (General Comment No 11 (2009 para 56-63)).

economic rights to which he or she is entitled, to enable an adequate standard of living.

The CRC makes specific provision for refugee children in article 22 which states that:

- 1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
- 2) For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

In the Commentary of the United Nations Convention on the Rights of the Child with regards to refugee children, it is said that article 22 provides protection for children that find themselves in an emergency situation. Article 22 provides protection for children who are considered as refugees and those seeking asylum and can be accompanied or unaccompanied.¹⁴¹ Firstly article 22(1) makes reference to “applicable international or domestic law and procedures” which refers to the 1951 UN Refugee Convention and its 1967 Protocol as well as the OAU Refugee Convention. Refugee status is determined in terms of a method of procedure which is either “a group determination, a determination based on an adult claim or a determination based on a child’s individual claim.”¹⁴² The last mentioned method of determination is usually when a child is accompanied by parents or other family members who are beneficial to the child in that information, support and advice can be provided, which is lacking when an individual claim is brought by an unaccompanied child.¹⁴³ In terms of “appropriate assistance and protection” in article

141 Detrick *Commentary* 363-364.

142 Detrick *Commentary* 364-366.

143 Detrick *Commentary* 364-366.

22(1) the Committee finds article 7 which establishes certain rights, article 20 which provides protection for separated children if no parents or other family members can be found after family tracing and reunification failed, article 28 on education and 24 on health care, important for refugee and asylum seeking children.¹⁴⁴ According to Cohen, article 22 indicates that refugee children should not be treated differently from nationals in the country where they are residing.¹⁴⁵ The effect of the CRC on the situation of refugee children can be enormous, however, if it is approached from a practical point of view, some states may struggle to carry out all the requirements, even for their own nationals. Cohen pointed out that the problems regarding the delivery of services in “underdeveloped or impoverished countries” were anticipated by the drafters and therefore many articles in the CRC guarantee economic and social rights which calls for international co-operation in response to the needs of developing countries and in some instances technical advice and assistance.¹⁴⁶

In terms of all of the above, one can argue that all children including refugee children are entitled to the rights set out in the CRC as listed and discussed above. The question however remains: “who is responsible to provide refugee children with these entitlements?”

2.4.1.2 State responsibilities and that of parents and others legally obliged

Article 4 of the CRC sets out the obligations placed on state parties which states that:

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

The Committee comments on the second sentence of article 4 by acknowledging that if there is a lack of resources, it can impede in the full realisation of rights, thus introducing the term “progressive realisation” of socio-economic rights. In terms of

144 Detrick *Commentary* 366-369.

145 Cohen 1992 *IJRL* 689-690.

146 Cohen 1992 *IJRL* 689-690.

the above there is an obligation placed on states to show that they have “implemented to the maximum extent of their available resources” and where it necessitates sought international co-operation.¹⁴⁷ The Committee indicates that the second sentence of article 4 is similar to that used in the International Covenant on Economic, Social and Cultural Rights and agrees with the Committee on Economic, Social and Cultural Rights in affirming that:

...even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ...Whatever their economic circumstances, States are required to undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups.¹⁴⁸

According to Mahery, it can be argued that the obligations become more immediate once resources are available.¹⁴⁹ It should be kept in mind that sufficient resources may not always be available, which implies that an adequate budget analysis must be done. The Committee on the rights of the child commented that:

No state can tell whether it is fulfilling children’s economic, social and cultural rights to the maximum extent of...available resources, as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. Some states have claimed it not possible to analyse national budgets in this way. But others have done it and published annual ‘children’s budgets’.¹⁵⁰

From the above it is clear that although state parties may lack available resources, it must prove that all necessary measures was taken within national budgets to realise the rights of the child and special attention must be paid to the most disadvantaged groups of children, it must indicate that steps have been taken to alleviate any harm suffered by children in denying them their rights and also monitoring and developing measures to remedy the current situation.¹⁵¹

147 The CRC Committee (General Comment No 5 (2003 par 7)).

148 The CRC Committee (General Comment No 5 (2003 par 8)).

149 Mahery “The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law” 313-314; Rosa and Dutschke 2006 *SAJHR* 234-238.

150 The CRC Committee (General Comment No 5 (2003 par 51)); Rosa and Dutschke 2006 *SAJHR* 236 (This commentary is not strictly binding under international law but is a valuable material to define the right in question and to give content to it) Stewart 2008 *SAJHR* 485.

151 Stewart 2010 *IJCR* 7.

When looking at the CRC and parental responsibilities, the preamble refers to family life as the “fundamental group of society,” which should be afforded protection and that it is important for children to grow up in a family environment for their full and harmonious development. Article 3(2) indicates that state parties undertake to ensure protection and care necessary for the child’s well-being, but the rights and duties of his or her parents and legal guardians or others legally responsible for the child must be taken into account.¹⁵² Further, article 5 obliges state parties to respect the responsibilities, rights and duties of the parents or others legally responsible for the child to provide direction and guidance in the exercise of the rights by the child as provided in the CRC with regards to the evolving capacities (age and maturity) of the child.¹⁵³ It is pointed out that article 5 of the CRC supports a broader view of the notion family in that it makes reference to “parents, members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child.”¹⁵⁴

The above confirms that parent’s or others legally responsible must also provide for the child but, after close examination of both articles, it is not explicitly stated that these persons are primarily responsible. It is rather an indication that these persons are responsible to provide direction and guidance as seen in article 5. On the other hand, article 27 places the primary responsibility on the parents or others legally responsible for the child to provide a standard of living within their financial capacities and abilities, as well as article 18(1) which states that parents or legal guardians are primarily responsible for the development and upbringing of the child in which the best interest of the child shall be their basic concern. Sloth-Nielsen argues that:

... it is implicit in this formulation that children’s lives are a public and not merely private concern or, to put it more bluntly, parents are not merely given a free hand.”¹⁵⁵

States are obliged to assist parents in meeting their responsibilities which include the provision of material assistance and support programmes, particularly with regard to

152 Buck *International Child Law* 66-67.

153 Hammarberg “Justice for children through the UN Convention” 67.

154 Sloth-Nielsen 1995 *SAJHR* 405.

155 Sloth-Nielsen 1995 *SAJHR* 405.

housing, nutrition and clothing.¹⁵⁶ Hammarberg however states that the CRC as such is not binding on individuals thus not making parents bound by it.¹⁵⁷ Clark indicates that although it seems that the primary responsibility for development and upbringing of children is on the parents, it cannot be denied that state parties must assist by taking the necessary measures to assist parents and others legally responsible in cases where it necessitates the need to be provided with material assistance and support programmes.¹⁵⁸

2.4.2 *African Charter on the Rights and the Welfare of the Child*

The ACRWC focuses on the position and the rights of children in Africa which reflect similar rights as those set out in the CRC. However, some provisions in the ACRWC provide a higher standard of protection of specific rights due to specific vulnerabilities which African children face. It ensures the protection of children's rights in Africa¹⁵⁹ which has taken the lead in setting standards for children's rights at a regional level.¹⁶⁰ Article 2 of the ACRWC defines a child as a person under the age of 18 years.¹⁶¹ The drafters did not include any exceptions to the definition which is a clear indication that there is a stricter standard in terms of age in the African context.¹⁶² There are three fundamental principles underpinning the entire ACRWC which include non-discrimination,¹⁶³ the best interest of the child¹⁶⁴ and the primacy of the ACRWC over cultural practices.¹⁶⁵

156 Rosa and Dutschke 2006 *SAJHR* 239-240.

157 Hammarberg "Justice for children through the UN Convention" 68.

158 Clark 2000 *SALJ* 343.

159 Van der Burg 2009 *LDD* 85; Skelton 2010 *SAJHR* 145.

160 Lloyd 2002 *AHRLJ* 12-13; The ACRWC provides higher protection for children in armed conflict in that it prohibits the use of child soldiers, it outlaws child marriages and in terms of child refugees the ACRWC includes internally displaced children in the ambit of refugee children and further protection is provided for previously disadvantaged, children suffering from African cultural practices etc; Viljoen "The African Charter on the Rights of the Child" 224; Viljoen 1998 *XXXI CILSA* 206.

161 Arts 1992 *AJICL* 145.

162 Lloyd 2002 *AHRLJ* 20.

163 In accordance with a 3(1) Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

164 In accordance with a 4(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

165 Viljoen "The African Charter on the Rights and Welfare of the Child" 336-337.

Non-discrimination guarantees the enjoyment of rights in the ACRWC on an equal basis, which places an obligation on state parties to ensure that children are guaranteed the rights set out in the Charter, within their jurisdiction and without regard to status. Refugee children are thus entitled to all the rights without discrimination of any kind.¹⁶⁶ The basic principles of the best interest of the child are:

...all rights apply to all children without exception, every child has an inherent right to life and the state has the obligation to ensure the child's survival and development; all actions concerning the child should take full account of her best interest and the child has the right to express her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.¹⁶⁷

This provision places an obligation on state parties to make the best interest of the child the primary consideration.¹⁶⁸ It is notable that the ACRWC makes reference to "the primary consideration," whereas the CRC makes reference to "a primary consideration". Viljoen argues that if a state has ratified both the Charter and the Convention but the Charter provides for higher protection, that the Charter will supersede over the Convention.¹⁶⁹ In relation to refugee children one can argue that it would be in their best interest to be provided with socio-economic entitlements so that they can live a healthy life in which they can develop as normal as possible in the situation in which they are in.¹⁷⁰ As seen from the quote from Lloyd, the evolving capacity is implicit within the best interest principle.¹⁷¹ The obligation placed on states in this instance, is to ensure mechanisms that ensure that children's views are heard. The right of the child to be heard¹⁷² in the ACRWC is described as a self-asserting right which provides the child with an opportunity to make his or her views heard.¹⁷³ Kaime states that participation in relation to refugee children should feature

166 Kaime 2004 *IJRL* 339.

167 Lloyd 2002 *AHRLJ* 19.

168 Kaime 2004 *IJRL* 340.

169 Viljoen "The African Charter on the Rights and Welfare of the Child" 224.

170 Kaime 2004 *IJRL* 340.

171 Lloyd 2002 *AHRLJ* 19.

172 In accordance with a 4(2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

173 Viljoen "The African Charter on the Rights and the Welfare of the Child" 338.

in all or any aspects affecting them to take positive steps forward to afford refugee children the necessary protection and assistance.¹⁷⁴

Article 23¹⁷⁵ of the ACRWC is a specific provision regarding refugees. This provision is, according to Lloyd, an “innovative provision showing a great sense of realism about the intricacies of such a problem in Africa” which offers protection not only to refugees but includes children who are internally displaced.¹⁷⁶ In the recent case of *Nubian Minors v Kenya/Nationality and discrimination: The case of Kenyan Nubians* James A Goldstone pointed out in the decision that the ACRWC requires states to “make sure that all necessary measures are taken to prevent a child from having no nationality,” which is an indication that the protection of stateless persons are heightened, in that Kenya was urged to grant citizenship to Nubians which can be seen as a victory against statelessness. The Committee on the ACRWC concluded that there is a violation of article 3, firstly because Nubian children were prevented from enjoying their rights to the “highest attainable standard of health” and education and secondly in that this group is a minority and they were prevented to exercise their rights on a non-discriminatory basis.¹⁷⁷

Under the ACRWC, the provisions that are of importance are articles 11 (education) and 14 (health and health services). It should be noted that in the ACRWC the socio-economic rights are equal to that of the civil and political rights, making them equally

174 Kaime 2004 *IJRL* 341-342.

175 In accordance with a 23.1 States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

176 Lloyd 2002 *AHRLJ* 19; also see Viljoen “The African Charter on the Rights and the Welfare of the Child” 339.

177 Decision: No 002/Com/002/2009; Birchall 2011 <http://www.soros.org>.

enforceable.¹⁷⁸ The right to education is granted in unqualified terms affording every child the right to basic education.¹⁷⁹ The right to health and health services are afforded to every child and must be fully implemented as far as possible by states by way of reducing the infant and mortality rate, provision of medical assistance and nutrition including water, to teach and inform all sectors of society about information that will broaden their knowledge about health and related aspects and support through financial and other means.¹⁸⁰

Refugee children are entitled to these rights, once again as stated in the discussion of the CRC and socio-economic rights on a non-discriminatory basis.

Article 1(1) obliges state parties not only to recognise the rights, freedoms and duties contained in the ACRWC, but also to take the necessary steps in accordance with their constitutional processes and the ACRWC to adopt legislative and other measures to give effect to the rights contained therein.¹⁸¹ This may suggest that there is an immediate responsibility on the state parties, however, this is not without limitations. Due to economic conditions it is for many countries impossible to achieve the rights set out in the Charter.¹⁸² Lloyd points out that progress was made by the ACRWC by not including a provision as seen in article 4 of the CRC, which impedes the implementation process of socio-economic and cultural rights.¹⁸³

The responsibility of parents in terms of article 20(1) places the primary duty of the upbringing and development on the parents or other persons responsible for the child. Responsibilities of the parents or others responsible include ensuring the best interest of the child at all times and to secure living conditions necessary for the child's development within their financial capabilities and also abilities.¹⁸⁴ The second paragraph however obliges state parties to take all appropriate measures to assist parents and other persons responsible for the child in accordance to their means. In case of need, material assistance and support programmes particularly regarding

178 Viljoen "The African Charter on the Rights and the Welfare of the Child" 340.

179 Viljoen "The African Charter on the Rights and the Welfare of the Child" 339.

180 Viljoen "The African Charter on the Rights and the Welfare of the Child" 339.

181 Lloyd "The African Regional System for the Protection of Children's Rights" 36.

182 Stewart 2010 *IJCR* 8-9.

183 Stewart 2010 *IJCR* 8.

184 Viljoen "The African Charter on the Rights and the Welfare of the Child" 340; Rosa and Dutschke 2006 *SAJHR* 239-240; Thompson 1992 *Int & Comp LQ* 437.

nutrition, housing, clothing, health and education must be provided which indicates that if parents cannot provide due to conditions which disable them to have the necessary means, that states should assist the parents.¹⁸⁵ However article 20(2) places further duties on the state, requiring them to:

- States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures;
- a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
 - b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
 - c) to ensure that the children of working parents are provided with care services and facilities.

The parents of the child and others legally responsible clearly bear the primary responsibility in terms of upbringing and development of the child but in case of need the state has the responsibility to assist and support parents and others responsible.

2.5 Conclusion

In terms of the above it is evident that international law may be instructive and imperative when considered and also serves as a valuable source of interpretation. The refugee conventions are aimed at improving the situation of recognised refugees and alleviating their suffering. Providing additional protection for refugee children are the UNHCR guidelines and policies, which recognise that refugee children are in need of special care and assistance.

The CRC and ACRWC as child specific conventions, provide special protection and assistance to children. The CRC is based on four principles as discussed, namely, non-discrimination, the right of the child to be heard, life; survival and development and the best interest principle which must be reflected in national legislation. The ACRWC, which provides a higher standard of protection of specific rights that African children face, is based on three principles, namely, non-discrimination, best interest and primacy of the ACRWC over cultural practices. Accordingly, one can argue that

185 Rosa and Dutschke 2006 *SAJHR* 240.

refugee children, as a specific vulnerable group are equally entitled in terms of international law, may not be discriminated against in the context of life, survival and development and must be heard in all proceedings affecting them while taking the best interest principle into consideration. Refugee children are a specific vulnerable group due to disruption that deeply affects their physical and psychological needs and also in terms of population displacement.

Socio-economic rights are entrenched in the CRC and ACRWC, which includes education, health care, social assistance and adequate standard of living and because refugee children face high rates of mortality and morbidity, one can argue that not only are they equally entitled but require more immediate attention in some instances. This can also be argued when looking at education because education aids in the developmental process which enables children to participate in all sectors of society as well as social assistance because it can enable them to access other socio-economic rights. South Africa is bound by these provisions which require South Africa to give priority and equal treatment to refugee children in terms of education, health care and social assistance whether separated or under parental care.

In terms of Unaccompanied Minor Refugees (hereafter UMR), both the CRC and ACRWC contain specific provisions regarding care and protection.¹⁸⁶ These children are defined as those who “are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so.”¹⁸⁷ It is important to identify these children because they require monitoring, care and tracing of parents or other relatives.¹⁸⁸ In the Committee on the Rights of the Child’s General Comment, the four principles are referred to as important in the context of UMR. The best interest of the child is described as a clear and comprehensive assessment of his or her identity which includes upbringing, nationality, ethnic, cultural and linguistic background and especially their vulnerabilities and other care and protection needs.¹⁸⁹ Non-discrimination on this basis prohibits any discrimination in terms of the

186 A 22 of the CRC and a 23 of the ACRWC.

187 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 120-121.

188 UNHCR ‘Guidelines on Protection and Care of Refugee Children’ (Geneva 1994) 120-121.

189 Van der Burg 2009 *LDD* 85.

child's status as an UMR.¹⁹⁰ Goodwin-Gill argues that the government of the country of asylum is primarily responsible for these children in terms of their identification, registration, the providing of identity documents, tracing of parents or other care givers and special care arrangements on the basis of non-discrimination and in their best interest.¹⁹¹ These arrangements include accommodation and or suitable placement in institutions or foster care. UMR living in these placement facilities are entitled to medical treatment, education, play and legal advice. The ACRWC contains the same standards for UMR in terms of care and protection. The standards set by both of these instruments cover almost every aspect of a child's life which includes socio-economic rights.¹⁹² It is evident that UMR require special protection because of their exceptional vulnerabilities and that the state is primarily responsible for these children in terms of socio-economic and other rights. This is in contrast to refugee children under parental or family care although both are equally vulnerable. In terms of state and parental responsibilities in terms of the CRC, it is evident that the state must make resources available to the maximum extent of their available resources, must include children and allocate a part of the national budget to children, taking into consideration the needs of the most disadvantaged and must provide material assistance and support programmes. In terms of the ACRWC it is evident that states should provide material assistance and support programmes. Parental responsibilities in terms of the CRC includes care, to provide direction and guidance and is primarily responsible for the needs of the children which is also evident from the ACRWC. The conclusion drawn is that parents are primarily responsible, however, states also share responsibility to some extent by providing material assistance and support programmes to parents with children. This is in line with the *Grootboom* interpretation of children under parental care which will be discussed in the following section. However, one can argue that refugee children are more vulnerable due to their situation, accompanied by the fact that parents are willing to support their children but are unable due to their situation. As stated South Africa has ratified the above instruments, making them legally bound and obliged to ensure that the standards therein are upheld. In the following section the South African Constitution is going to be discussed in terms of section 28, which contains

190 Van der Burg 2009 *LDD* 85.

191 Van der Burg 2009 *LDD* 86.

192 Van der Burg 2009 *LDD* 86-87; Swart 2009 *AHRLJ* 105.

children's rights, entitlements, Constitutional case law and refugee children under parental or family care's position and entitlements in light of the Constitution.

3 The South African Constitution

3.1 Introduction

The Preamble of the Constitution *inter alia* reads that:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

The founding values of the South African society are referred to as "human dignity, the achievement of equality and the advancement of human rights and freedoms."¹⁹³

The Constitution is the supreme law which contains obligations that must be fulfilled.¹⁹⁴ The Bill of Rights contains a range of socio-economic rights which includes housing,¹⁹⁵ health care, food, social assistance and water.¹⁹⁶ Children¹⁹⁷ are also entitled to the rights set out in sections 28(1)(c) and 29(1)(a) which includes

193 *Grootboom* par 1.

194 Skelton "Constitutional protection of children's rights" 266; S 2 of the Constitution reiterates that the Constitution is the supreme law, inconsistent law or conduct with it is invalid and the obligations that it imposes must be fulfilled.

195 The obligation is that of an unqualified nature in that it refers to "access to" rather than a right to. It is said that the level of provision differs according to the availability of resources, Currie and De Waal *The Bill of Rights handbook* 586; Section 26 states that:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of the right.

196 The same obligation exists as in the right to have "access to housing" in that it is also qualified. Regarding social security and social assistance the difference lies in that the first mentioned refers to insurance in the form of pensions, unemployment insurance and other schemes whereas the latter refers to assistance to those who are in need. Currie and De Waal *The Bill of Rights handbook* 568, 591; Brand "Introduction" 1. Section 27 states that:

(1) Everyone has the right to have access to-

a) health care services, including reproductive health care;

b) sufficient food and water; and

c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

197 A child is defined by the Constitution as a person under the age of 18 years old, thus making every person under the age of 18 years entitled to benefit from section 28.

basic nutrition, shelter, basic health care services, social services and basic education.¹⁹⁸ Proudlock explains that:

...the realisation of all of these rights is ultimately aimed at the achievement of equality, improving the lives of all citizens and freeing the potential of each person.¹⁹⁹

In what follows, the South African position is going to be analysed in terms of the Constitution and case law. Reasoning behind the analysis is the interpretation given to constitutional provisions by courts and to establish the position of refugee children, in that they are entitled to share in the resources of the country. Although they enjoy constitutional protection and protection by way of legislation which contains international obligations, the position still remains obscure, due to the interpretation given to children's socio-economic rights in case law and external conditions such as discrimination and lack of knowledge about the rights of refugees.

3.2 Case law

3.2.1 Children's socio-economic rights

This section deals with case law that dealt with the socio-economic rights of children in South Africa. It firstly examines the state's responsibility in terms of children's socio-economic rights, secondly, it discusses the limitation of children's socio-economic rights, and finally it evaluates the interpretation of state measures to realise children's socio-economic rights in terms of the threshold of reasonableness and minimum core. The Constitutional Court has already delivered a number of judgements that interpreted the socio-economic rights of "everyone" in the context of the reasonableness of state measures as contained in sections 26 and 27. In *Grootboom*, *TAC* and *Khosa and Others v Minister of Social Development and*

198 Clark 2000 *SALJ* 344 It is said that these rights have a special and heightened status in relation to other rights and must be monitored on a regular basis; Sloth-Nielsen and Mezmur 2008 *IJCR* 1-2; Proudlock "Children's socio-economic rights" 291; Currie and De Waal *The Bill of Rights handbook* 568; Stewart 2008 *SAJHR* 472-473 argues that:

The socio-economic rights of children differ from the socio-economic rights of "everyone" with regard to their textual setting in the Constitution. Section 28(1)(c) contains no internal limitation clause but only refers to the word "basic which is suggested to refer to a basic attenuated level of services needed for a dignified survival.

199 Proudlock "Children's socio-economic rights" 291.

Others the Constitutional Court also indirectly interpreted children's rights in terms of section 28(1)(c).²⁰⁰

The respondents in the *Grootboom* case lived on privately owned land without consent where after an eviction order was obtained by the owner forcing them to leave the property. They applied for an order, to be provided with basic shelter or housing for themselves and their children and for the other rights as contained in section 28(1)(c) for their children.²⁰¹ In the High Court case,²⁰² the right of children to shelter was interpreted as "bestowing an immediate entitlement upon children and their parents to a rudimentary form of protection from the elements". Judge Davis, argued that the parents bear the primary obligation to provide shelter and where they are unable to fulfil their obligation, the state bears the obligation to provide a basic form of shelter. Judge Davis, based its judgment on sections 28(1)(b) which states that "every child has the right to family or parental care", 28(1)(c) and 28(2) which states that "a child's best interests are of paramount importance in every matter concerning the child" in that it was indicated that "an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or parent."²⁰³ The Court ordered that the children in the application are entitled to be provided with shelter and that their parents are entitled to be accommodated with them.²⁰⁴

The Heads of Arguments produced by the Community Law Centre before the Constitutional Court, reiterated that the affected groups in this case are children and the poor, which is described as "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."²⁰⁵ A range of complex interacting interests and considerations was raised by two questions; 1) the budget and 2) the means of giving effect to the rights. Although a detailed discussion was

200 Proudlock "Children's socio-economic rights" 297-298.

201 *Grootboom* par 9,13.

202 *Grootboom v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C) (hereafter *Grootboom HC*).

203 *Grootboom HC* par 289A-289B, 295 I-J.

204 *Grootboom* par 16.

205 Heads of Arguments by the Community Law Centre (acting as *amicus curiae*) before the Constitutional Court in *The Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (Hereafter Heads of Arguments by CLC) par 108-109.

given, the court decided to interpret the constitutional provisions, so that it does not affect political or policy choices regarding children.²⁰⁶

In *Government of the Republic of South Africa v Grootboom*²⁰⁷ the Court interpreted section 28(1)(b) of the Constitution as a subsection which defines those responsible for giving care while section 28(1)(c) lists the various aspects of the care entitlement²⁰⁸ and stated that sections 28(1)(b) and (c) should be read together.²⁰⁹

The Court reasoned that:

It follows from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place and the right to alternative appropriate care only when that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection 1(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents.²¹⁰

The Constitutional Court stated that if parents are provided shelter together with their children, parents will be entitled to housing in terms of section 26 and also shelter in terms of section 28(1)(c) which is exclusively reserved for children.²¹¹ Judge Yacoob, argued that “these children could become stepping stones to housing for their parents instead of being valued for who they are” thus being an overlap between children’s rights and those of everyone.²¹² Judge Yacoob, then proceeded to read sections 28(1)(b) and (c) together, which in turn places the primary obligation to

206 Heads of Arguments by the Community Law Centre (acting as *amicus curiae*) par 113; Stewart 2011 *SAPL (forthcoming)* 100, 102-105.

207 *Grootboom*.

208 *Grootboom* par 76; Proudlock “Children’s socio-economic rights” 300. Friedman, Pantazis and Skelton “Children’s Rights” 9.

209 Proudlock “Children’s socio-economic rights” 300.

210 *Grootboom* par 77.

211 The interpretation given by the High Court lead the Constitutional Court to interpret children’s rights indirectly.

212 *Grootboom* para 71,74; See Stewart 2008 *SAJHR* 472-494 for a discussion on the interpretation and limitation of children’s rights where they overlap with the socio-economic rights of others in, *inter alia*, the cases of *Grootboom* and *TAC* and discusses the possibilities of limitation in terms of the reasonable test and the general limitation in terms of section 36 of the Constitution.

provide shelter primarily on the parents and only alternatively on the state.²¹³ Judge Yacoob, however, pointed out that this does not mean that the state has no duty towards children under parental care and stated that the state must in this instance provide the legal and administrative infrastructure necessary to ensure that children are afforded the protection as set out in section 28.²¹⁴ This entails passing laws and creating enforcement mechanisms, as well as to fulfil its obligations in terms of sections 25, 26 and 27.²¹⁵ Stewart²¹⁶ argues:

This interpretation implied that children under parental or family care have no direct entitlement to socio-economic rights. In fact, instead of engaging in the content of section 28(1)(b) and (c), the Court deliberately side-stepped the issue by interpreting section 28(1)(b) to purport that the family or parents of a child have the primary responsibility to realise the socio-economic rights of children and only where family or parental care is absent does the duty shift to the state.

In the *TAC* case the Constitutional Court afforded the same meaning to section 28(1)(b) and (c). The case was brought before the High Court after the Government devised a programme which aims to deal with mother-to-child transmission of HIV at birth, but restrictions were placed on the availability of the drug in the public health sector.²¹⁷ The applicants contended that these restrictions are unreasonable when sections 7(2) and 8(1) are analysed because in terms of section 27(1), everyone has a right to access public health care services and 28(1)(c) affords children additional and special protection.²¹⁸ The Constitutional Court stressed that the enforcement of socio-economic rights is subject to the limitations imposed in sections 26(2) and 27(2).²¹⁹ In terms of children's rights this case concerned newborn children.²²⁰ Reference was made to *Grootboom* where it was stated that section 28(1)(c) and (b)

213 *Grootboom* par 77; see discussion in Friedman, Pantazis and Skelton "Children's Rights" 15; Stewart 2011 *SAPL* 97-114.

214 According to the Court, the state's obligation in terms of section 28(1)(c) 'is to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28' and to fulfil its obligations to provide families with the rights contained in sections 25, 26 and 27 on a programmatic and coordinated basis, subject to available resources which in the context of social security and social assistance rights would include a social welfare programme providing maintenance grants and other material assistance to families in need. *Grootboom* par 78.

215 *Grootboom* par 78. This is in line with the obligations imposed as contained in section 2 created in terms of supremacy. S 25 is the rights to property, s 26 the right to housing and s 27 the right to health care, food, water and social security.

216 Stewart 2011 *SAPL* 104.

217 *TAC* par 4.

218 *TAC* par 4.

219 *TAC* par 23.

220 *TAC* par 74.

should be read together and contended that the primary obligation rests on the parents to provide their children with basic health care services. The Court added that the state is obliged to ensure that children are provided with the protection contained in section 28 when “the implementation of the right to parental or family care is lacking.” These parents are for the most part indigent and unable to provide for their children, thus making child and parent dependent on the state for the provision of services.²²¹ Stewart argues correctly by stating that:

... although this judgement has been perceived as a positive adjustment in the sense that the Court engaged in political questions and did not limit the obligation of the state to legal mechanisms to force parents to comply with their duties, it remains unfortunate that the Court did not conclude that indigent children have a direct, immediate claim to basic health care services. The Court followed the approach used in the *Grootboom* case and inquired into the reasonableness of the policy, relying on the right of children to basic health care in section 28(1)(c) to sustain its verdict that the policy was unreasonable and to an extent, the Constitutional Court is still side-stepping the need to address the difficult political, social and policy questions posed by children’s rights.²²²

There are two main factors in terms of *Grootboom* and *TAC* which need to be addressed. The first of these is the fact that neither child nor their adult counterparts have a direct entitlement to socio-economic rights in South Africa and secondly that the primary responsibility to protect and provide rests primarily on the parents.

Interpretation, narrowly defined, can be described as a process where the meaning of a constitutional provision is established.²²³ In this context there are two applicable principles, which can be found in sections 7(2) and 39(1).²²⁴ The Constitution states that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights.”²²⁵ When looking at these duties, it is apparent that there are positive and negative obligations placed on the state.²²⁶ The duty to respect requires states not to interfere with existing enjoyment of rights which includes not limiting or taking away but, when interference is unavoidable, steps must be taken to mitigate the interference or alternative solutions need to be found. Protect requires the protection of rights which already exist and are being enjoyed. Promote is described as “a duty

221 *TAC* par 75.

222 Stewart 2011 *SAPL* 105-106.

223 Currie and De Waal *The Bill of Rights handbook* 145.

224 Currie and De Waal *The Bill of Rights handbook* 145.

225 Brand “Introduction” 9; Stewart 2008 *SAJHR* 475-476.

226 Proudlock “Children’s socio-economic rights” 291; Stewart 2008 *SAJHR* 475-476.

to raise awareness of rights and a duty on administrative bodies to use the promotion of socio-economic rights as a primary consideration in their discretionary decision making.” Lastly and most importantly, is the duty to fulfil, which requires the adoption of legislative, administrative, budgetary, judicial, promotional and other measures that a state needs to take so that either access can be gained or enhanced.²²⁷ This obligation requires the state to act in order to realise the rights. The duty to fulfil will be breached when there is an invasion of an existing right or when the state does not do enough to realise these rights.²²⁸ This duty also requires that socio-economic rights must be fulfilled within available resources. Liebenberg points out that:

...this phrase both provides an excuse to and imposes a duty on the state: it allows the state to attribute its failure to realise a socio-economic right to budgetary constraints and requires the state in fact to make resources available with which to realise the right.²²⁹

These socio-economic rights of “everyone” in sections 26(1), 27(1) and 29(1)(b) are qualified in terms of the internal limitation clause, however, on the other hand no such limitation can be found in section 28(1)(c) and the right of everyone to basic education in section 29(1)(a).²³⁰ It has been argued that these rights should be regarded as directly and immediately enforceable and that it should be seen as the minimum core of sections 26 and 27, in that section 28(1)(c) is qualified by referring to the word “basic”.²³¹ De Vos describes these duties in accordance to children

... that the state should refrain from infringing children’s rights (negative duty), must prevent the infringement by individuals or organisations and must be actively involved to fulfil these rights (positive duties).²³²

The principle found in section 39(1)(b) includes the role and importance of international law as discussed in the previous section. Although the provision entails courts to look at international law in the interpretation process, international law has rarely been used for this purpose in South Africa’s Constitutional litigation, even

227 Brand “Introduction” 9-11.

228 Brand “Introduction” 42-43.

229 Brand “Introduction” 42-43,52; Liebenberg as quoted in Brand.

230 Clark 2000 *SALJ* 344; Proudlock “Children’s socio-economic rights” 292.

231 Stewart 2008 *SAJHR* 473; Pieterse 2003 *TSAR* 5.

232 De Vos 1997 *SAJHR* 67, 87; Pieterse 2003 *TSAR* 5-6.

though it provides an opportunity to interpret the provisions within a broader context of the applicable child-centred instruments.²³³ The importance of international law cannot be over emphasised in that it can assist in giving content to the right in question and because the provisions of ratified instruments bind South Africa.²³⁴

Even though these cases only indirectly addressed children's socio-economic rights, it is clear that the courts avoided interpreting children's socio-economic rights where it overlapped with other rights.²³⁵ In *Grootboom* and *TAC*, the Court interpreted children's rights within the scope of sections 26 and 27 and used the internal qualifications as provided for in sections 26(2) and 27(2) to assess whether the state has taken "reasonable, legislative and other measures progressively, within available resources to achieve realisation," although it is argued by commentators that these rights are directly and immediately enforceable. In terms of this, children's rights are also qualified in terms of the rights of "everyone".

Pieterse makes a good argument by stating that:

Viewing section 28(1)(c) as subject to the resource and other constraints in section 26 and 27 would seem completely unsupported by the text of the constitution....if the court's interpretation is to be preferred, the separate inclusion of section 28(1)(c) in the bill of rights would be rendered almost entirely without purpose.²³⁶

Stewart further argues that the right in question should be given content in the first instance which includes looking at international law and then should be investigated whether this right can be qualified or limited.²³⁷ In terms of giving the rights in question content, the court was more concerned with the obligations placed on the state rather than giving children's rights meaning.²³⁸ In line with the arguments presented by Pieterse and Proudlock, Stewart also argues that some kind of priority

233 Proudlock "Children's socio-economic rights" 292.

234 Currie and De Waal *The Bill of Rights Handbook* 160-161.

235 Reasons given for the Courts reluctance are that the remedies would require time and resources. Stewart 2008 *SAJHR* 478; Sloth-Nielsen and Mezmur 2008 *IJCR* 4.

236 Pieterse 2003 *TSAR* 11.

237 Stewart 2008 *SAJHR* 478.

238 Stewart 2008 *SAJHR* 479.

must be given to the socio-economic rights of children due to the separate provision thereof.²³⁹ In turn Alston and Scott argue that

.. the specific wording of section 28(1)(c) makes certain that the core entitlements of children are not lost in the interpretive evolution of the Bill of Rights.²⁴⁰

The limitation of rights comes into play where there has been an infringement of rights and where it needs to be established whether the infringement is reasonable and justifiable.²⁴¹ The Constitution contains a general limitation clause which sets out the test to determine if the limitation can be justified and if it is reasonable. The criteria are set out in section 36²⁴² which contains a two stage approach. Firstly, the question is asked if there has been an infringement and secondly, the question of reasonableness and justifiability is asked.²⁴³ When children's rights are being limited, section 36 should be used to question if the right was reasonably and justifiably limited, however this is not that easy when the rights of everyone and that of children overlap as seen in *Grootboom* and *TAC* where children's rights were limited in terms of reasonableness as seen in sections 26(2) and 27(2), rendering them without any direct entitlement. Stewart suggests that with the interpretation and limitation of children's rights when they overlap with the rights of everyone, in the stage of giving content to a specific right, children's rights should not be read with the internal limitations.²⁴⁴ During the second stage, the general limitation clause should be used due to the fact that it calls for a "full-blown proportionality test" which will render the limitation more difficult to justify.²⁴⁵ The reality, however, remains that the Court will prefer to use the internal limitation when rights overlap.

239 Stewart 2008 *SAJHR* 480.

240 Stewart 2008 *SAJHR* 480.

241 Currie and De Waal *The Bill of Rights Handbook* 164; Skelton "Constitutional protection of children's rights" 273-274.

242 In accordance with s 36(1) The rights in the Bill of Rights may be limited only in terms of 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 (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

243 Skelton "Constitutional protection of children's rights" 273-274.

244 Stewart 2008 *SAJHR* 493-494.

245 Stewart 2008 *SAJHR* 493-494.

Minimum core obligations are introduced by the Committee of the CESCR²⁴⁶ as follows:

The Committee is of the view that the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.²⁴⁷

South Africa has not yet ratified the Covenant on Economic, Social and Cultural rights. Although it is not binding and the Constitutional Court has consistently declined to adopt the notion of minimum core,²⁴⁸ “commentators generally agree that, within these parameters, the section 28(1)(c) rights should in principle be regarded as directly and immediately enforceable against the state and as such may be seen as a ‘minimum core’ of sections 26 and 27 as far as children are concerned.”²⁴⁹ It should be noted that the drafting of section 28(1)(c) was based on the provisions of the CRC which in turn was based on the understanding that children’s socio-economic rights did not envisage ‘progressive realisation’.²⁵⁰ It can be inferred from the ‘Memorandum of the Panel of Constitutional experts’ which motivated the difference between the rights contained in section 28(1)(c) and sections 26 and 27 which *inter alia* states that:

The international instruments dealing with children’s rights do not limit the rights of children by requiring reasonable and progressive steps. The view taken is that it is inappropriate to qualify children’s rights due to their vulnerability, lack of maturity and comparative innocence that render them deserving of protection. Also children cannot be expected to participate actively in human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do.²⁵¹

However, in 2003 the Committee on the CRC drafted a general comment on “General measures of implementation”, where the committee introduces the concept of progressive realisation placing an obligation on states to show that they have

246 The Human Rights Committee (General Comment No 3 (1990)).

247 Wesson 2004 *SAJHR* 297.

248 Wesson 2004 *SAJHR* 299-300.

249 Stewart 2008 *SAJHR* 473; Pieterse 2003 *TSAR* 1,5.

250 Skelton 2010 *SAJHR* 144.

251 Proudlock “Children’s socio-economic rights” 294; Stewart 2011 *SAPL* 102-103; Panel of Constitutional Experts *Memorandum on Children* (5 February 1996) 2.

implemented their available resources to the maximum extent. The latter is motivated by the drafting of national budgets to allocate a proportion towards the realisation of children's rights.²⁵² Stewart argues that the guidelines clearly mandate courts to address budgetary questions which, as seen in *Grootboom* and *TAC*, the courts avoided to do.²⁵³

According to the *Grootboom*²⁵⁴ and *TAC* judgements, both established that the primary responsibility rests on the parents, although acknowledging that the state also incurs some kind of responsibility.²⁵⁵ This notion has been criticised for being too conservative.²⁵⁶ It is pointed out that the support that parents are able to provide according to the child's needs is limited to the extent to which they can provide.²⁵⁷ Factors that contribute to parents limitations include "the dire poverty of much of the South African population,²⁵⁸ the adverse socio-economic impact of HIV,²⁵⁹ the degradation of the nuclear family and the associated crumbling of extended family support structures, the ineffectiveness of mechanisms aimed at enforcing maintenance obligations, the high number of maintenance defaulters and the increasing financial cost of raising children."²⁶⁰ Bonthuys argues that those children in dire need of desperately poor parents or those without any parents should be provided with a basic form of assistance in the form of welfare grants.²⁶¹ When looking at the scope of family life and the right thereto in terms of section 28(1)(b) of

252 The CRC Committee (General Comment No 5 (2003 par 7.8).

253 Stewart 2011 *SAPL* 112.

254 It is said that by placing the responsibility on parents or others legally responsible the state eludes their responsibilities when it comes to maintaining children. The children which suffers the most in this process is those who are of the poorest in the country, those living on the street etc which is an indication that those who really need it is suffering the most, Bonthuys 2008 *International Journal of Law, Policy and the Family* 345-347.

255 Bonthuys 2008 *International Journal of Law, Policy and the Family* 334; This is in line with international law (a 3(2) and a 27 of the CRC and a 20 of the ACRWC).

256 Bonthuys 2008 *International Journal of Law, Policy and the Family* 334-338.

257 Pieterse 2003 *TSAR* 8.

258 In the 2009 research report written for the socio-economics' rights project of the community law centre, the statistics rated poverty in South Africa at 45%. It is stated that the children forms 44.2% of the population and refers to the issue of child poverty as "alarming". The effect of poverty on children in poor families cannot be ignored. Mirugi-Mukundi 2009 Research report written for the Socio-Economics' Rights Project of the Community Law Centre 3; Clark 2000 *SAJL* 344.

259 HIV is described as one of the greatest threats in the realisation of children's rights. Children of HIV affected parents run the risk of not getting proper education due to lack of attendance. This can be because they have to care for sick parents and some have to work to earn an income to provide for family members. Mirugi-Mukundi 2009 Research report written for the Socio-Economics' Rights Project of the Community Law Centre 6.

260 Pieterse 2003 *TSAR* 8.

261 Bonthuys 2008 *International Journal of Law, Policy and the Family* 339.

the Constitution it aims at protecting against separation from parents and others legally responsible as well as to ensure that children are cared for.²⁶²

Section 28 seems to place an immediate duty on the state, in that it does not provide for the progressive realisation of the rights contained therein.²⁶³ Children under family or parental care in need, who are dependent on the states' support structures, who's delivery record is described as "inadequate, rudimentary and way behind of ensuring full access to all children," still does not get the necessary support, in that their parents still bear the primary responsibility to fulfil the welfare needs of the child.²⁶⁴

It is suggested that:

... where parents' fulfilment of socio-economic responsibilities is impossible due to their own limited socio-economic status, the state should be expected to carry the economic burden of care, whether or not parents indirectly benefit from this. If the best interests of the children²⁶⁵ are viewed as ancillary to the rights of their parents, they should be viewed also where the socio-economic position of parents impacts negatively on those of their children.²⁶⁶

3.2.2 Children's rights in terms of equality

The term "equality" has a special meaning in South Africa due to discrimination of the past.²⁶⁷ Discrimination of the past included "segregation and discrimination on a personal level" whereby legislation was passed to provide for discrimination on areas such as the provision of services and facilities, education, movement, marriages and labour which was of an inferior quality to people of Coloured, Black or Indian origin and "territorial segregation", whereby legislation was passed for the "spatial

262 Skelton "Constitutional protection of children's rights" 285-286, Regarding protection from separation there are two cases to illustrate the importance of family life is *S v M* 2008 3 SA 232, 2007 (2) SACR 539 (CC) where it was said that if sections 28(1)(b) and 28(2) are read together that "the law should as far as possible avoid the breakdown of family life or parental care that may put children at risk." The second case is *Patel and Another v Minister of Home Affairs* 2002 2 SA 343 (D) where the decision of deportation was being considered of parent and the High Court held that the rights of the children in the matter also needs to be taken into account.

263 Clark 2000 SAJL 344.

264 Pieterse 2003 TSAR 8-9.

265 Skelton "Constitutional protection of children's rights" 280 Skelton states that this is not merely a principle but a right in itself which aids in the interpretation of other rights.

266 Pieterse 2003 TSAR 18.

267 Currie and De Waal *The Bill of Rights Handbook* 230.

reservation of land” for different racial groups.²⁶⁸ Since the transition to a constitutional democracy, everyone is equal before law and the Constitution promotes the attainment of equality.²⁶⁹ Currie and De Waal describe equality as

... a formal idea of which people who are similarly situated should be treated similarly or substantively where the law tolerates disparity of treatment to achieve the goal of equality.²⁷⁰

Section 9²⁷¹ of the Constitution makes specific provision for non-discrimination, as to eliminate previous discrimination and to prevent future discrimination.

The applicants in the *Khosa and Mahlaule* case who have obtained permanent residence, challenged the constitutionality of section 3(c) and 4(b)(ii) and 4B(b)(ii) which excluded them from having access to old age grants and child support grants, in that it was reserved for South-African citizens only in terms of the *Social Assistance Act*.²⁷² The Constitutional Court declared both sections inconsistent with the Constitution and stated that the words “or permanent resident” must appear after the word “citizen”.²⁷³ The judgement was based on equality in that it excluded a vulnerable group from accessing government services, which was not justifiable under the general limitation clause.²⁷⁴ Socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom.²⁷⁵ It

268 Krüger *Racism and law: Implementing the right to equality in selected South African equality Courts* 1, 2, 49-52.

269 Krüger *Racism and law: Implementing the right to equality in selected South African equality Courts* 1, 2, 49-52.

270 Currie and De Waal *The Bill of Rights Handbook* 230.

271 Section 9 reads:

(1) Everyone is equal before the law and has the right to equal protection and benefit from the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

272 *Social Assistance Act* 59 of 1992; 2004 6 SA 505 (CC) para 2,4.

273 *Khosa* par 98.

274 *Khosa* par 80; Proudlock “Children’s socio-economic rights” 299.

275 *Khosa* par 40.

was argued that equality and access to socio-economic rights can be drawn to section 27, which refers to “everyone” being entitled to have access to these entitlements, and there is no indication that these rights are reserved for or restricted to citizens only.²⁷⁶ It was indicated that children mandate protection and any denial thereof is an infringement.²⁷⁷

3.2.3 *The Constitution and refugee children*

The Constitution acknowledges that South Africa “belongs to all who live in it, united in diversity” and equality is guaranteed.²⁷⁸ These rights apply to everyone, except where indicated otherwise, within the borders. Equality further guarantees that everyone is equal before the law and deserves equal protection and assistance. The entitlements contained in sections 26, 27, 28 and 29(1)(b) are available to all which includes non-South African children.²⁷⁹ In the matter of *Access and Minister of Social Development*,²⁸⁰ together with lawyers for human rights, the lawyers for human rights as *amicus curiae* referred to *Khosa* in their heads of arguments where it was clearly worded that the Rights in the Bill of Rights, extends to non-South African citizens in the Republic, making refugee children equally entitled to the resources of South Africa. Van Garderen and Winterstein notes that despite the fact that refugee children are entitled to the rights set out in the Constitution, there is no coherent government policy dealing with welfare service and health provision for refugee children, making them dependant on non-governmental organisations for assistance.²⁸¹ Arguments for not providing these welfare and health rights are bureaucracy and social obstacles.²⁸² In the 2004 international refugee day speech, it was noted by the deputy-director of Refugee Affairs, that the South African government needs to find ways to provide the necessary support to children because they are vulnerable and stated that “it is the duty of the government to ensure that

276 *Khosa* par 47.

277 *Khosa* par 86; Sloth Nielsen and Mezmur 2008 *IJCR* 6-7.

278 Preamble.

279 This is seen in national legislation which will be discussed in the following section.

280 *Access and Minister of Social Development, together with Lawyers for Human Rights, amicus curiae* heads of arguments case no 5251/2005 4.

281 Van Garderen and Winterstein “Refugee children” 219.

282 Swart 2009 *AHRLJ* 121.

the rights of refugees and the responsibilities of the government departments are fulfilled.”²⁸³

The provisions of ratified international instruments bind South Africa. The most important refugee document is the United Nations Refugee Convention which states in article 23 that “refugees must be given the same treatment as nationals when accessing public relief and assistance.”²⁸⁴ The question however remains, who is primarily responsible to provide for these children in South Africa. In *Centre for Child Law and Another v Minister of Home Affairs and Others*,²⁸⁵ the Court was concerned with the care and protection of detained foreign children. The judge concluded that the state was under a “direct duty” to ensure the basic socio-economic provisions for unaccompanied minor foreign children.²⁸⁶

Judge Murphy adds by stating that:

... our Constitution recognises, particularly in relation to children’s rights that budgetary implications ought not to compromise the justifiability of the rights and that in this case the minimal costs or budgetary allocation problems are far outweighed by the urgent need to advance the children’s interests in accordance with our Constitutional values.²⁸⁷

3.3 Conclusion

In light of the interpretation given, the limitation, reasonableness and minimum core, one can argue that children’s rights are not given the necessary interpretation and acknowledgement. Stewart argues that a reason for the lack of interpretation includes that the Constitutional Court “is side stepping the need to address the difficult political, social and policy questions posed by children’s rights.”²⁸⁸ If the commentator’s arguments and suggestions are taken into account, there is clearly uniformity amongst them. They argue that the rights of children should to some

283 Swart 2009 *AHJR* 121.

284 See section 2.2-2.3 above.

285 *Centre for Child Law v Minister of Home Affairs and Others* 2005 6 SA 50 (T).

286 *Centre for Child Law* par 17.

287 *Centre for Child Law and Others v MEC for Education and Others* 2008 1 SA 223 (T) 228B; see further Panel of Constitutional Experts ‘Memorandum on children’ (1996-02-05) 2 as referred to by Proudlock “Children’s socio-economic rights” 249-259; Stewart 2011 *SAPL* 102-103.

288 Stewart 2011 *SAPL* 105-106.

extent be directly and immediately enforceable, irrespective of resource constraints because children are vulnerable, due to the separate inclusion of children's socio-economic rights in the Constitution and the absence of an internal limitation clause as seen in the socio-economic clauses of "everyone". The limitation placed on children's rights in terms of the reasonableness test by the internal limitation of "reasonable legislative and other measures, within available resources and to achieve progressive realisation of each of these rights" is criticised by Pieterse, who makes the argument that the children's socio-economic clause is without purpose if children's rights are also qualified or limited in terms of the rights of everyone. Regarding the arguments made, one can argue that children's rights are indeed directly and immediately enforceable against the state where the parents are indigent and unable to provide, even if the parents indirectly benefits from this.

The argument made by the Court in both *Grootboom* and *TAC* which read sections 28(1)(b) and (c) together which was interpreted to mean that parents are primarily responsible, can be criticised in the sense that it denies children who are in desperate need but under parental care, a direct entitlement to socio-economic rights. It is important to note that both the CRC and the ACRWC implies that parents are primarily responsible but in the South African context and due to extreme poverty, it can be argued that children in South Africa necessitate a higher degree of support. Another factor than needs to be addressed is the best interest of the child principle as seen in section 28(2). Skelton describes this principle as a "right in itself" which should not be regarded as just a tool that aids in the interpretation process. Although the right can be limited, it aids in the interpretation process by determining if something is in the best interest of the child.²⁸⁹ If applying this principle to the discussion, it would indicate that denying children under parental care a socio-economic right would not be in their best interest.

Refugee children under parental care, if treated equally, will be in the same position as provided for in *Grootboom* and *TAC*, making their parents primarily responsible to provide for their socio-economic needs. However, refugees face greater barriers in accessing services due to the exclusion from housing subsidies, the denial and

289 Skelton "Constitutional protection of children's rights" 280-281.

exclusion to access health care facilities and educational facilities. The latter is especially a problem due to lack of documentation and the inability of refugee parents to pay the school fees. Although it is said that they cannot be denied and a fee free policy exists if certain criteria are met, these children are still excluded.²⁹⁰ As a vulnerable group one can argue that, although a lot of time and resources would be required, refugee children should be entitled to be provided socio-economic rights in a direct and immediate way to some extent. These children are exceptionally vulnerable due to the situation they find themselves in, so even if their parents indirectly benefits from this, the special needs of these children weighs far more.

In the following section, the national legislation regarding refugee children and those containing socio-economic entitlements is going to be discussed and evaluated to establish the rights to which they are entitled according to legislation and to what extent they are entitled to them.

4 National legislation

The socio-economic rights entrenched in the Bill of Rights are not only contained in the Constitution but also in national legislation, which plays a crucial role in the realisation of socio-economic rights.²⁹¹ Socio-economic rights can be translated²⁹² either through executive and administrative action,²⁹³ adjudication²⁹⁴ or through national legislation. Executive and administrative action, adjudication and national legislation which provide protection and the enforcement of socio-economic rights, fall within the state's ambit of fulfilment.²⁹⁵

290 See NCRA 2006 <http://www.cormsa.org.za/wp-content/uploads/2008/06/ncra06.pdf>; Motha 2005 <http://erp.org.za>; Nkosi "Refugees barred from schooling" 4/11/2011 *Mail and Guardian Online*.

291 Brand "Introduction" 12; Proudlock "Children's socio-economic rights" 295.

292 This is described as the process where socio-economic rights are translated into enforceable rights by way of law making processes and institutions, Brand "Introduction" 12.

293 The executive and administrative can through the adoption of policies or through decisions, interpret the socio-economic rights as contained in the Bill of Rights.

294 In terms of adjudication, courts can enforce socio-economic rights when breached and translated Constitutional rights into enforceable legal claims. When Constitutional socio-economic rights are interpreted, the courts interpret "these rights and give concrete expression to the duties they impose and entitlements they create in much the same way that the legislature does when giving effect to them through legislation."

295 Proudlock "Children's socio-economic rights" 295; S 7(2) of the Constitution which states that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

This section focuses on the rights as contained in national legislation, which assist in realising the respective rights of refugees, which includes socio-economic rights. It also includes case law relevant to this. The following legislation was enacted as part of the state's duty to realise the socio-economic rights in the Constitution. The primary law for education is found in the *South African Schools Act*,²⁹⁶ for housing and shelter in the *Housing Act*,²⁹⁷ social assistance in the *Social Assistance Act*,²⁹⁸ water in the *Water Services Act*,²⁹⁹ health care services and basic health care services in the *National Health Act*³⁰⁰ and social services in the *Children's Act*.³⁰¹ The right of access to sufficient food and basic nutrition, unlike the other socio-economic rights of children does not have a primary legislative framework.³⁰²

The primary legislation dealing with the rights of refugees are the *Refugees Act*³⁰³ and the *Immigration Act*.³⁰⁴ The *Refugees Act* and the *Immigration Act* should be read in conjunction with the above mentioned legislation, as the aim of this study is to establish the nature and scope of the socio-economic rights of refugee children under parental care in South Africa.

4.1 Refugees Act

The *Refugees Act*³⁰⁵ is the primary national legislation in South Africa which gives effect to binding international instruments as well as the principles and standards relating to refugees.³⁰⁶ The Act also provides mechanisms for the reception of

296 *South African Schools Act* 84 of 1996 (hereafter the *South African Schools Act*).

297 *Housing Act* 107 of 1997 (hereafter the *Housing Act*).

298 *Social Assistance Act* 13 of 2004 (hereafter the *Social Assistance Act*).

299 *Water Services Act* 108 of 1997 (hereafter the *Water Services Act*).

300 *National Health Act* 61 of 2003 (hereafter the *National Health Act*).

301 *Children's Act* 38 of 2005 (hereafter the *Children's Act*); Proudlock "Children's socio-economic rights" 296.

302 Proudlock "Children's socio-economic rights" 296-297.

303 *Refugees Act* 130 of 1998 (hereafter the *Refugees Act*).

304 *Immigration Act* 19 of 2004; see *Otshudi v Minister of Home Affairs and Others* (12/05018) [2012] ZAGPJHC 15 for recent controversy regarding deportation and the *Immigration and Refugees Act*.

305 *Refugees Act* as amended by the *Refugees Amendment Act* 33 of 2008 and *Refugees Amendment Act* 12 of 2011.

306 This Act must be interpreted and applied in a manner that is consistent with—

(a) the 1951 United Nations Convention Relating to the Status of Refugees;

(b) the 1967 United Nations Protocol Relating to the Status of Refugees;

(c) the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa;

refugees, regulates the application and recognition of refugee status and the rights and obligations arising from said status.³⁰⁷ The Act comprises of five chapters which include; the interpretation, application and administration of the Act;³⁰⁸ issues relating to the refugee reception offices, the standing committee for refugee affairs and refugee appeal boards;³⁰⁹ the application procedure for asylum;³¹⁰ reviews and appeals;³¹¹ rights and obligations of refugees and supplementary and general provisions.³¹²

In terms of the Act³¹³ a person can qualify for refugee status if he or she:

...was forced to flee his or her country, due to a well-founded fear of being persecuted or due to civil war, serious human rights violations and armed conflict and has indicated there is a well-founded fear of persecution on one or more of the different grounds, which include; political opinion, race, gender or ethnic origin, membership of a social group, religious beliefs and nationality; that they are outside their country of origin and that they are unable or unwilling to avail themselves to the protection of their country.³¹⁴

Secondly, a person can obtain refugee status if he or she was compelled to leave their country due to or as a result of “external aggression, occupation, foreign denomination, or events seriously disturbing public order”.³¹⁵ In terms of this, the Act

(d) the 1948 United Nations Universal Declaration of Human Rights; and
(e) any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.

307 Kleinsmidt and Manicom 2011 *African Insight* 172.

308 Ss 1-7.

309 Ss 8-20.

310 Ss 21-24.

311 Ss 25-26

312 Ss 35-41.

313 S 3 reads:

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

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

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

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

314 S 3(a) of the *Refugees Act*; Van Garderen and Winterstein “Refugee children” 210.

315 S 3(b) of the *Refugees Act*; Van Garderen and Winterstein “Refugee children” 210.

also refers to certain categories of people who will not qualify for refugee status,³¹⁶ when refugee status comes to an end,³¹⁷ the application procedure in obtaining refugee status³¹⁸ and other procedural rules.³¹⁹

When refugee status is granted, the refugee is entitled to:

- a) a formal written recognition of refugee status in the prescribed form;
- b) full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, except those rights that only apply to citizens;
- c) permanent residence in terms of section 27(d) of the Immigration Act after five years of continuous residence in the Republic from the date on which he or she was granted asylum, if the Minister, after considering all the relevant factors and within a reasonable period of time, certifies that he or she would remain a refugee indefinitely'
- d) an identity document;
- e) a travel document if he or she applies in the prescribed manner and
- f) to seek employment.³²⁰

The Constitution makes it clear that everybody in the country enjoys some entitlements or rights.³²¹ The *Refugees Act* is an Act which prominently provides these rights to refugees and asylum seekers. Refugees and asylum seekers, which include children, are entitled to the rights in chapter 2 the Constitution as seen in section 27(b) of the Act except those sections exclusively reserved for citizens.³²² Unaccompanied minor refugees are given special prominence and protection in terms of section 21A of the principle Act which states that:

- (1) Any unaccompanied child who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care contemplated in the Children's Act, 2005 (Act No. 38 of 2005), must -
- a) be issued with an asylum seeker permit in terms of section 22; and

316 S 4 of the Act excludes a person who has committed "a crime against peace, war crimes, crimes against humanity, serious non-political crimes outside South Africa, Acts contrary to the objects and principles of the OAU and UN as well as those whom already enjoy the protection of another Country." Van Garderen and Winterstein "Refugee children" 211.

317 S 5 contains the circumstances under which refugee status will come to an end which is called cessation. It includes voluntary acts (done by the refugee) and involuntary acts (events or changes which has taken place in the Country of origin-refugee can return).

318 Refugee Status determination procedure which is regulated and administered by the Department of Home Affairs.

319 Van Garderen and Winterstein "Refugee children" 210-212.

320 S 27.

321 Kleinsmidt and Manicom 2011 *African Insight* 172.

322 *The South African Immigration Act* 13 of 2002 as amended in 2004 and 2011 also accords full legal protection to refugees which include the rights set out in chapter 2 of the Constitution; Kleinsmidt and Manicom 2011 *African Insight* 167.

b) in the prescribed manner, be brought before the Children's Court in the district in which he or she was found, to be dealt with in terms of the Children's Act, 2005.

In the *Centre for Child Law*³²³ case, as discussed above,³²⁴ the question of whether these children were entitled to the rights as contained in sections 28(1)(c) and (h) was addressed, where upon the Court added that, the state had a direct duty to meet these foreign unaccompanied children's socio-economic needs and that they had the right to be assigned legal representation at state expense.³²⁵ The court held that the state has "an active duty" to provide children who lack family care and unaccompanied minor children with the rights and protections as contained in section 28 of the Constitution.³²⁶ It is still unclear who is responsible for children under parental care, where parents lack the necessary means to provide the child with certain basic socio-economic needs due to the interpretation given to children's rights in the *Grootboom* case where the court read sections 28(1)(b) and (c) together and stated that, if read together it means that parents are primarily responsible to provide socio-economic needs to their children.

The *Refugees Act* defines a dependant in relation to an asylum seeker or refugee, as:

...any unmarried dependent child or any destitute, aged or infirm member of the immediate family of such asylum seeker or refugee who is dependent on him or her.³²⁷

Section 21B of the principle Act contains additional provisions regarding dependants and procedures. In terms of the above-said section the main applicant applying for refugee status, which would like one of his or her dependants, as mentioned in the definition, to also be granted refugee status, must produce the relevant information regarding the dependant in the application. A child born in the Republic of a refugee or asylum seeker must be registered as a dependant, in accordance with *Birth and*

323 *Centre for Child Law* par 17.

324 See sections 1 and 3 above.

325 Section 28(1)(h) states that:

Every child has the right to- have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if a substantial injustice would otherwise result.

326 Proudlock "Children's socio-economic rights" 301.

327 S 1.

Deaths Registration Act.³²⁸ The certificate must be submitted after registration to the Refugee Reception office so that the child can be included as a dependant. A dependant of a recognised refugee, who ceases to be a dependant due to marriage or cessation, may apply to be allowed to remain in the Republic in terms of this Act and may also, after permission, remain in the Republic if granted, and apply for recognition as a refugee in terms of the provisions of the *Refugees Act*. These provisions only address administrative issues in relation to dependants but no mention is made to dependants and care entitlements. Accordingly, one can argue that the main applicant of the dependants is responsible for the dependants. In the following discussion the relevant socio-economic rights and legislation will be discussed to see what rights refugees are entitled to, to what extent and their position.

4.2 Education

The right to education is described as:

...one of the most essential rights for the upbringing and development of children to reach their full potential and take their rightful place in society.³²⁹

One of the obstacles that hinder children from accessing education is poverty.³³⁰ In this context, if children are denied access due to poverty, disease or neglect, their access to education suffers which creates a vicious cycle.³³¹ If they cannot obtain access to education, they will not obtain all the necessary tools to develop, which in turn affects access to employment, housing, health care and other benefits.³³²

328 *Birth and Deaths Registration Act* 51 of 1992.

329 Malherbe "Educational Rights" 399; Bray "Law, Education and the learner" 456.

330 In the research report written by Mirugi-Mukundi of 2009 (Research report written for the Socio-Economic rights project of the Community Law Centre), a poor child is described as "a person below the age of 18 years who lacks access to what is essential to fulfil their basic human needs. Poverty denies children their fundamental human rights."

331 In South Africa access is influenced by the HIV and AIDS pandemic. Children are at risk of missing school because they need to care for their parents or work and there is also an increase of child-headed households in South Africa; Mirugi-Mukundi 2009 *Research report written for the Socio-Economic Rights Project of the Community Law Centre* 6.

332 Bray "Law, Education and the learner" 456.

Section 29(1)(a) of the Constitution states that “everyone has the right “to a basic education, including adult basic education.”³³³ If referring to section 7(2) of the Constitution, this means that the state is to at least provide the necessary facilities and to eliminate factors which will preclude a person from enjoying this right.³³⁴

4.2.1 *The South African Schools Act*

In terms of the *South African Schools Act* a learner is referred to as “any person receiving education or obliged to receive education in terms of this act.”³³⁵ The parent/s of the child bears the primary responsibility to see to it that their children, the learners, attend school. The school can be public or independent of nature and the child is obliged to attend from “the first day of the year in which he or she reaches the age of seven years until the last school day of the year in which he or she reaches the age of 15, or grade nine, whichever comes first”.³³⁶ On the other hand the act makes provision for each Member of the Executive Council (hereafter MEC) responsible for education in a specific province to make sure that there is enough schools to attend in the province, so that every child has a rightful place in a school and if the MEC struggles to comply with the above said formality due to lack of capacity, steps must be taken to remedy it as soon as possible.³³⁷ Formalities regarding attendance include non-discrimination, that the public schooling system must accommodate all learners subject to compulsory education and implement a language policy in which no racial discrimination may be practiced in the implementation thereof.³³⁸ The states obligation in terms of education is recognised as “the basic provider of education in South-Africa”.³³⁹

333 As discussed in sections 1 and 3, the right to education in section 29(1)(a) is an unqualified socio-economic right similar to section 28(1)(c). Veriava and Coomans “The right to education” 62 Veriava and Coomans argues that due to the unqualified nature of the right to education in terms of section 29(1)(a), it necessitates a higher standard of review.

334 Malherbe “Educational Rights” 407; Bray “Law, Education and the learner” 469. Section 7(2) read with 29(1)(a) which is a fundamental right indicates that there is an obligation on the state to provide.

335 S 1.

336 S 3(1).

337 Ss 3(3) and 4.

338 SS 3, 4, 6 and specifically 6(3).

339 Bray “The South African Schools Act” 488.

4.2.2 Refugees and education

Although the *Refugees Act* explicitly provides that a refugee is entitled to all the rights in the Bill of Rights and explicitly mentions the right to education and health care services, nothing is explicitly said about the right to education or to take up employment by asylum seekers with a permit while awaiting to hear a decision on their refugee status.³⁴⁰ In *The Minister of Home Affairs and Others v Watchenuka and Another*³⁴¹ the Court addressed the question whether someone who has been issued an asylum seeker permit can work or study while awaiting a decision on their refugee status.³⁴² The first respondent, a mother and her disabled son, came to South Africa from Zimbabwe in fear of persecution due to political reasons. The respondent applied for her son to study at a college after applying for asylum. She also needed to secure employment to support herself and her son.³⁴³ A permit was obtained but she was prohibited from undertaking employment and her son was prohibited from studying.³⁴⁴ The second respondent, a voluntary association, supported the application, not only for the mother and son but for asylum applicants in general.³⁴⁵ The Supreme Court of Appeal held that freedom to work and study were “an important component of human dignity”³⁴⁶ which is guaranteed by the Constitution where after it was concluded that the prohibition is unlawful and in conflict with the Bill of Rights which constitutes the prohibition to be set aside.³⁴⁷ The Court further remarked that each case must be evaluated on its own merits to determine whether the right can be limited or not.³⁴⁸ Although, *Watchenuka* brought about a victory for asylum seekers, IRIN reported in 2011 that asylum seekers in South Africa may lose their right to study or take up employment after indications that the Government is planning to amend current legislation governing those rights.

340 ACMS 2011 <http://www.migration.org.za/publication/newspaper-article/2011/harsher-regime-asylum-seekers>.

341 *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA) (hereafter *Watchenuka*).

342 The application was made to declare the prohibition on asylum applicants from seeking employment and education to be unconstitutional. *Watchenuka* par 13.

343 *Watchenuka* par 11.

344 *Watchenuka* par 12.

345 *Watchenuka* par 12.

346 Section 10 of the Constitution protects the right to human dignity. In *Watchenuka* it was said that “human dignity has not nationality” and that the freedom to undertake employment classifies under this category. *Watchenuka* par 25, 27.

347 *Watchenuka* par 24, 36.

348 *Watchenuka* par 34.

The decision was brought about due to allegations “that the asylum seeker system was being abused.”³⁴⁹ Kerfoot commented that this is “further evidence of an overall harsher regime toward asylum seekers which is unconstitutional.”³⁵⁰

In South Africa, refugee and disadvantaged children face various barriers to educational opportunities. These barriers include a lack of physical access,³⁵¹ economic barriers,³⁵² regulatory barriers and enrolment barriers including admission and age.³⁵³ The Centre for Education Rights and Transformation, found that children are often denied access to educational facilities in South Africa because of documents demanded that are not required and fees demanded at designated no-fee schools.³⁵⁴

Admission or enrolment which may not be discriminatory³⁵⁵ is referred to in sections 15-18 of the *National Education Policy Act*,³⁵⁶ where it said that certain documentation is needed to be admitted which include a completed application form, either a South African birth certificate or a refugee identity document; asylum permit or letter of recognition, proof of immunisation and transfer document or something equivalent. However section 5 of the *Admissions of Learners to Public Schools General Notice*³⁵⁷ (4138 of 2001) states that where there is a lack of documentation, the child must be admitted conditionally so that it can be obtained. If documentation is not provided within the prescribed three month period, the matter must be attended to by the School Governing Body and District Officials. Similarly section 21 of the *National Education Policy Act*, states that a child can still be admitted if a parent does not have legal status, provided that proof must be produced that an application was made to obtain legal status. Regarding non-citizens, section 6 of the

349 ACMS 2011 <http://www.migration.org.za/publication/newspaper-article/2011/harsher-regime-asylum-seekers>.

350 ACMS 2011 <http://www.migration.org.za/publication/newspaper-article/2011/harsher-regime-asylum-seekers>.

351 Lack of buildings or structure to provide education in, transport and other issues concerning infrastructure.

352 The inability of parents or others legally responsible to pay schooling fees.

353 Lack of documentation; Motha 2005 <http://erp.org.za>; Buckland 2011 *International Journal of Educational Development* 1.

354 Anon 2012 <http://www.soschildrensvillages.ca/News/News/child-poverty-news/Pages/Refugee-children-South-Africa-Unable-Access-Public-Schools-136.aspx>.

355 Buckland 2011 *International Journal of Educational Development* 3.

356 *National Education Policy Act* 27 of 1996 (hereafter *National Education Policy Act*).

357 Gen Not 4138 in PG 129 of 13 July 2001.

*Admission of Learners to Public Schools General Notice*³⁵⁸ adds that the framework relevant to citizens applies equally to non-citizens if their parents possess a residency permit, whether it is temporary or permanent, issued by the Department of Home Affairs or documents, proving that these persons applied to legalise their stay.³⁵⁹

The age of the child can also be a barrier, however section 10(1) of the *Admission of Learners to Public Schools General Notice*, provides that learners who's learning opportunities have been impaired due to non-attendance over a period of time, those who have never attended school or received no formal schooling and those who are three years or more above the age-norm grade, should be accommodated by the district senior manager to establish fast track programmes. Language issues are addressed in sections C and D of the *Norms and Standards for Language in Public Schools*, whereby it aims to support the learning and teaching of all other languages required, which includes those important for international trade and communication and affirms that languages other than the official languages can be offered as school subjects.³⁶⁰

The issue regarding fees is addressed in section 10 of the *National Policy Act* which states that no child shall be denied education by way of being suspended from class or denied participation in school events such as sporting events or denied documentation such as report or transfer cards when fees aren't or cannot be paid by parents. Further, the *South African Schools Act* provides that parents should be informed of their right to be exempted, should be assisted by the principal while doing so and should be exempted if parents or others legally responsible cannot afford to pay school fees.³⁶¹

The Minister of Education said on 28 August 2007, that refugee children are allowed access to education in terms of section 5(1) of the *South African Schools Act* in a non-discriminatory basis and the learner as defined in the Act includes a refugee.³⁶²

358 Gen Not 4138 in PG 129 of 13 July 2001.

359 Motha 2005 <http://erp.org.za>.

360 Motha 2005 <http://erp.org.za>.

361 Buckland 2011 *International Journal of Educational Development* 3; Motha 2005 <http://erp.org.za>.

362 Viviers 2008 *UNICEF* 3.

Additionally paragraph 18 of the *Admission Policy of Ordinary Public Schools*³⁶³ (Government Gazette no. 19377 of 19 October 1998) adds that principals are allowed to admit learners without a transfer card.

4.2.3 *Refugees Act and education*

In terms of education and the *Refugees Act*, section 27(g) specifically states that:

...a refugee is entitled to the same basic health care services and basic primary education which the inhabitants of the Republic receive from time to time.

Accordingly, one can conclude that section 29(1)(a) of the Constitution, which is not subjected to “progressive realisation”, creates an immediate obligation on the state if read with section 7(2) to provide children with basic education. When looking at the provisions regarding non-discrimination, conditional admission when there is lack of documentation, language provision and exemption from paying fees, one can argue that the state is primarily responsible for the provision of education. This can also be supported by the case *Ex parte Gauteng Provincial Legislature: In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, where it was said that not only should the state avoid interfering in the enjoyment of education but should provide basic education.³⁶⁴ It seems that the legislation is written in such a manner as to prevent the denial of education, not only for citizens but for refugees, in that refugees falls within the definition of a learner and is equally entitled as seen in above mentioned legislation. Although the above pieces of legislation clearly stipulate the rights of refugee children and the documents needed, these children are being denied access on a daily basis due to discrimination and favouritism towards South African children, lack of knowledge about the rights of refugees and applicable policies and most importantly because they are asked to produce documents that are not needed as discussed in section 1 above, age and the parents inability to pay school fees. It is evident that although the legislation exists, what happens in reality is far from what refugee children are entitled to. CORMSA stated that:

363 GN R2432 in GG 19377 of 19 October 1998.

364 Veriava and Coomans “The right to education” 61.

Although there is well developed legal policy framework for securing the rights of migrant children in South Africa regardless of their documentation, the framework is poorly implemented and significant abuses of migrant children's rights continue.³⁶⁵

4.3 Health care

In South Africa, the Constitution makes provision for rights concerning health. As mentioned above, the right of everyone to have access to health care services is found in section 27 and children are entitled to basic health care services in terms of section 28(1)(c). The Human Rights Committee defines health as a right:

...that should not be understood as a right to be healthy but as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.³⁶⁶

In addition to the above, the World Health Organisation together with the Office of the United Nations High Commissioner for Human Rights defined the right to health in 2008 to include the following:

- The right to health is an inclusive right which includes safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health related education and information and gender equality.
- The right to be free from non consensual medical treatments.
- Entitlements such as equal opportunity for everyone to enjoy the highest attainable standard of health, access to essential medicines, the right to prevention, treatment and control of diseases, maternal; child and reproductive health, equal and timely access to basic health services, the provision of health related education and information, participation of the population in health related decision making at the national and community levels.
- Must be provided without any discrimination.³⁶⁷

The act giving effect to the rights as contained in the Constitution and securing the entitlements as seen in the definition, is the *National Health Act*. The preamble of the act takes cognisance of the duties imposed in terms of sections 24(a),³⁶⁸ 27, 28(1)(c)

365 CORMSA 2010 <http://www.ihr.org.za/policy/lhrcormsa-submission-portfolio-committee-basic-education>.

366 The Human Rights Committee (General Comment No 14 (2000 para 8-9)).

367 UNHCR and World Health Organisation 2008 *The right to health: Factsheet no.31* <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

368 Everyone has a right to an environment that is not harmful to their health or well-being.

and 7(2)³⁶⁹ of the Constitution upon the state. In terms of the act, sections 4(3)(b) and 5 necessitates further discussion. Section 3(b) sets out the possibility for free health services in public health establishments and states that:

Subject to any condition prescribed by the Minister, the State and clinics and community health centres funded by the State must provide all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services.

Further, section 5 dealing with emergency treatment states that:

A health care provider, health worker or health establishment may not refuse a person emergency medical treatment.

In a briefing paper by Doctors without Borders,³⁷⁰ they identified the main diagnosis's made by asylum seekers and refugees as tuberculosis, HIV/AIDS including other sexually transmitted diseases, respiratory tract infections, gastro-intestinal infections and diarrhoea which is mostly related to unhygienic and overcrowded living conditions such as very poor or non-existent sanitation, lack of waste management and difficulties in accessing water. Asylum seekers and refugees also fall victim to violent crimes such as the robbing of their personal belongings and sexual violence which consequently leads to HIV or other sexually transmitted diseases.³⁷¹ In the findings from the migrants rights monitoring project survey dated 5 May 2008, the main barriers experienced by migrants when trying to access public health care were language, bad treatment by a doctor, clerk or nurse, denial because of documentation or lack thereof and denial because of being a foreigner.³⁷²

The majority of children living in South Africa live in extreme poverty. South Africa has a high infant mortality rate and those who survive suffer from malnutrition. These

369 The state must 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

370 Doctors without Borders: Médecins Sans Frontières is an organisation responding to the health needs of refugees. They run two clinics, one in Musina and one in Johannesburg which provides primary health care.

371 Médecins Sans Frontières 2010 <http://www.lrc.org.za/resources/1228-2010-05-12-lives-of-survival-migrants-and-refugees-in-south-africa>; women and men fall victim to sexual violence when crossing the border irregularly. Reasons for crossing the border irregularly include the lack of financial resource to obtain a passport or other valid documentation accompanied with the need to flee due to fear of persecution and the dire circumstances they are living in.

372 University of Witwatersrand: Forced Migration studies Programme "Migrant Rights Monitoring Project survey – findings from the Migrant Rights Monitoring Project Survey" (5 May 2008) compiled by Tara Polzer.

children include those infected by HIV/AIDS, those with disabilities, those with chronic illnesses, those living on the streets and in informal settlements and refugees.³⁷³ It should be noted that refugee children are more vulnerable due to stress, extreme living conditions and maltreatment, which makes them more susceptible to disease. It can be derived from the above that many asylum seekers and refugees including children are in need of primary health care and although it is guaranteed in legislation and the policies indicated hereafter, they are still not getting the assistance they require and are still excluded from accessing primary health care due to poor implementation and abuse of the system which impacts negatively on refugee children.

Policies providing additional protection specifically for refugees include:³⁷⁴

- The HIV and Aids and STI National Strategic Plan for South Africa (NSP) which includes non-citizens to benefit from HIV services and the National Strategic Plan for HIV and Aids, STIs and TB which aim is “to remove structural and functional barriers to services for migrants and refugees with health care needs;”³⁷⁵
- The Memo by the National Department of Health of 2007 regarding access to comprehensive HIV and Aids care including anti-retroviral treatment whereby it was pointed out that the comprehensive HIV and Aids, Care, Management and Treatment Operational Plan approved in 2003 and implemented in 2004 brought about challenges in all provinces for people not possessing a South African identity document. It was mandated that anti-retroviral treatment should not be denied to patients not possessing a South African identity document;³⁷⁶
- The National Department of Health Revenue Directive dated 19 September 2007 regarding Hospital fees: Assessment of refugee/asylum seekers (with or without a permit). The directive refers to section 27(g) of the Refugee Act which states that a refugee is “entitled to the same basic health care services...which the inhabitants receive from time to time,” whereby it is stated that a refugee or an asylum seeker with or without a permit shall be assessed in terms of the means test when accessing public health care and shall be exempted from paying for anti-retroviral

373 ACCESS 2002 <http://www.ci.org.za/depts/ci/pubs/pdf/poverty/polsub/socsec4ch.pdf>.

374 Report to Dr Patrick Maduna, Chief of services: Gauteng Department of Health, 3 June 2008, Challenges to the successful implementation of policy to protect the right of access to health for all in South Africa.

375 The HIV and Aids and STI Strategic Plan for South Africa 2007-2011 10, 16. To view full document go to www.doh.gov.za. The National Strategic Plan for HIV and Aids, STIs and TB, 2012-2016 57. To view full document go to www.sanac.org.za.

376 Kalambo 2007 *Memo: Access to comprehensive HIV and AIDS care including antiretroviral treatment*. Pretoria: Department of Health.

services “irrespective of the site or level of institution where these services are rendered.”³⁷⁷

- The Memo from the Gauteng Department of Health dated 4 April 2008 regarding access to the comprehensive HIV and Aids care including antiretroviral treatment whereby additional clarification was given regarding the issue surrounding the South African Identity Document. It was stated that no person may be denied access to health care services or anti-retroviral treatment if they do not possess a South African Identity Document.³⁷⁸

Refugees are equally entitled to the rights set out in the *National Health Act* which makes provision for free health care services and not to be denied emergency medical treatment. It can be derived from the act that refugees and their dependants have a direct entitlement to health care services which are substantiated by the policies which provide additional protection, stating that refugees are entitled to access health care services without a South African identity document and may also receive anti-retroviral treatment. From the above it is evident that refugees and their dependent children may not be denied health care services. Although the framework protecting and providing for refugees is in place, refugees still face numerous barriers in accessing medical treatment and have to rely on other organisations providing primary health care services due to the improper execution of legislation and policies. So, although refugees have the right to education and health care services as provided for in legislation, the reality is that they do not enjoy access to schools and health care facilities.

4.4 Social assistance and services

Mirugi-Mukundi explains the necessity of access to social assistance and social services in the following statement:

... for children from poor families, such assistance in the form of child support grants is not only imperative but is often a matter of basic survival in order for children to enjoy other rights such as education, adequate standard of living and to be protected from exploitative labour practices.³⁷⁹

377 National Department of Health Directive September 2007 (refugees and asylum seekers with or without a permit) Ref: BI 4/29 REFUG/ASYL 8 2007.

378 Memo 4 April 2008: *Access to the Comprehensive HIV and Aids care including antiretroviral treatment*, Gauteng Department of Health.

379 Mirugi-Mukundi 2009 Research report written for the Socio-Economics' Rights Project of the Community Law Centre 2.

The South African Constitution bestows upon everyone the right “to have access to social security and if they are unable to support themselves and their dependents, appropriate social assistance” and section 28(1)(c) bestows upon children the right to social services.³⁸⁰

Social security can be described as a form of protection whereby contributions are paid and contingencies are earned,³⁸¹ for instance, the Occupational Injuries Compensation Fund³⁸² which compensates workers injured or those who contract diseases as a result of employment; the Road Accident Fund³⁸³ which compensates death or injury due to motor vehicle accidents; the Unemployment Insurance Fund³⁸⁴ which provides financial assistance on a temporary basis during unemployment and other protection which is referred to as private savings that covers instances of disability, health care, invalidity, maternity, old age, life insurance, funeral costs and other.³⁸⁵

On the other hand, social assistance is described as assistance from public funds to those in need, primarily targeted at poor people, those with disabilities, poor elderly people, children and women.³⁸⁶ Social assistance is mainly in the form of a social grant such as the child support grant, care dependency grant, foster child grant, old age grant, war veteran’s grant, a grant in aid and also the social relief from distress grant.³⁸⁷ The *Social Assistance Act*³⁸⁸ provides the framework regarding eligibility,³⁸⁹

380 Section 27(1)(c).

381 Jansen van Rensburg and Lamarche “The right to social security and assistance” 210.

382 Regulated by the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 as amended.

383 Regulated by the *Road Accident Fund Act* 56 of 1996 as amended.

384 Regulated by the *Unemployment Insurance Act* 63 of 2001 as amended.

385 Mirugi-Mukundi 2009 Research report written for the Socio-Economics’ Rights Project of the Community Law Centre 14; Anon 2010 <http://www.actuarialsociety.org.za>.

386 Jansen van Rensburg and Lamarche “The right to social security and assistance” 211; Mirugi-Mukundi 2009 Research report written for the Socio-Economics’ Rights Project of the Community Law Centre 13.

387 Ss 6-13 of the *Social Assistance Act*.

388 As amended.

389 S 5 reads:

(1) A person is entitled to the appropriate social assistance if he or she (a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13; (b) subject to section 16, is resident in the Republic; (c) is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette ; (d) complies with any additional requirements or conditions prescribed in terms of subsection (2); and (e) applies for social assistance in accordance with section 14 (1).

application³⁹⁰ and other procedural rules to obtain access to one of the above mentioned grants. The child support grant, the care dependency grant and the foster child grant are relevant to this discussion on the rights of refugee children. Section 6 of the act prescribes that a person is eligible for the child support grant if he or she is the primary care giver³⁹¹ of the child and complies with the application requirements.³⁹² The child support grant is a grant with the purpose of helping children to obtain basic sustenance. However, a primary care giver is only eligible to apply for the child support grant if “he or she is a South African Citizen or a permanent resident”.³⁹³ This excludes refugee primary care givers to apply for the child support grant. Unlike the child support grant, a refugee care giver is however eligible to apply for the care dependency grant.³⁹⁴ In terms of section 7 of the act, a person is eligible for the care dependency grant “if he or she is a parent, primary care giver or foster parent of a child that requires and receives care or support services due to physical or mental disability and complies with the application

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- (2) The Minister may prescribe additional requirements or conditions in respect of (a) income thresholds; (b) means testing; (c) age limits, disabilities and care dependency; (d) proof of and measures to establish or verify identity, gender, age, citizenship, family relationships, care dependency, disabilities, foster child and war veterans' status; (e) forms, procedures and processes for applications and payments; (f) measures to prevent fraud and abuse.
- 390 S 14 reads:
- (1) Any person who wishes to apply for social assistance contemplated in sections 6 to 13 must do so in the prescribed manner.
- (2) In considering an application made in terms of subsection (1), the Agency may conduct an investigation and request additional information.
- (3) (a) If the applicant qualifies for social assistance in terms of this Act, the Agency must render the relevant social assistance; (b) If the applicant does not qualify for social assistance in terms of this Act, the Agency must in writing at the applicant's address or other point of contact stated in the application, inform the applicant- (i) that he or she does not qualify for social assistance in terms of this Act; (ii) the reasons why he or she does not qualify; and (iii) of his or her right to request reconsideration and his or her right of appeal contemplated in section 18 and of the mechanism and procedure to invoke any such right.
- (4) No person may divulge any personal information of an applicant furnished in respect of an application except- (a) to a person who requires it in order to perform a function in terms of this Act; (b) when required to do so by law or by an order of court; or (c) with the consent of the applicant.
- (5) If any information supplied by a beneficiary to the Agency in an application for a grant materially changes after that beneficiary has submitted that application, he or she must as soon as is reasonably possible after that change occurs, inform the Agency thereof.
- 391 The primary care giver includes a biological parent and relatives or a non relative mainly responsible for the child.
- 392 See ss 5 and 14.
- 393 GN R898 in GG 31356 of 22 August 2008; see regulation 6 of the regulations for additional requirements and amendments; The grant was extended to permanent residents in the Constitutional case *Khosa* as discussed above, see section 3.
- 394 A care dependent child is defined by s1 the act as ‘a child who requires and receives permanent care due to his or her severe mental or physical disability’.

requirements”.³⁹⁵ The parent, primary care giver or foster parent has to be a “South African Citizen, a permanent resident or a refugee”.³⁹⁶ In terms of section 8 of the act, a person is eligible for a foster child grant if the foster child is in need of care.³⁹⁷ A foster parent is also eligible if “the foster parent is a South African Citizen, a permanent resident or a refugee”.³⁹⁸ One of the required documents for the application is a South African identity document or a birth certificate of the child or a birth certificate of a child if the child is of another country.³⁹⁹ In terms of this, one can argue that this includes a refugee child. However, a parent of his or her own child cannot apply for the foster care grant, leaving a child under parental care without the ability to benefit from this specific grant.

When looking at education, although a fee free policy exists, many poor children are still unable to attend because of costs related to transport, uniforms, books and other expenses. Social assistance can guarantee an adequate standard of living which includes transport and other mentioned expenses, shelter, nutrition, water and sanitation. It is noteworthy to refer to the case of *Scalabrini Centre of Cape Town and Five Others v the Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*,⁴⁰⁰ where the High Court decided to include refugees as persons eligible to apply for the disability grant and social relief of distress grant. Refugee children under parental care are excluded from the child support grant and the foster care grant because they are not under foster care but parental care. When referring to the quotation of Mirugi-Mukundi, social services can provide for basic survival and an adequate standard of living. The exclusion of refugee children has a negative impact on the lives of these children because most

395 See regulation 8 of regulations in the GN R898 in GG 31356 of 22 August 2008 and the amendments for additional requirements.

396 GN R566 in GG 34529 of 15 August 2011.

397 A foster child is defined in section 1 of the act as ‘a child who has been placed in the custody of a foster parent’ and a foster parent is defined as ‘a person, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law, or a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the *Administration of Estates Act* 66 of 1965.

398 GN R898 in GG 31356 of 22 August 2008; see regulation 7 of the regulations for additional requirements and amendments.

399 Government site: *Foster child grant* <http://www.services.gov.za>.

400 *Scalabrini Centre of Cape Town and Five Others v the Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another* case no 32056/2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

of them live in extreme poverty and do not have the means to access services such as shelter and food.

Dutschke and Monson argues that social services refers to a narrower set of services, which implies the provision of services related to the welfare and development of children including the provision of social workers.⁴⁰¹ The *Children's Act* provides the framework to give effect to children's right to social services to ensure services are provided and by whom these services must be provided. It is said that the services to give effect to the right to social services comprises of services to prevent abuse and neglect, protect from further abuse and neglect if already suffered and to intervene when a child is at risk of abuse and neglect,⁴⁰² alternative care due to abandonment or orphaning as well as children not able to live with their families due to abuse and neglect⁴⁰³ and services for children with special needs.⁴⁰⁴

The *Children's Act* places the responsibility of providing and funding prevention and early intervention as well as for the provision of child protection services on the MEC for social development from money appropriated by the relevant provincial legislature.⁴⁰⁵ Refugee children, as a vulnerable group, necessitates the need for social services and because refugees are entitled to full legal protection including the rights set out in chapter 2 of the Constitution they are entitled to protection, development and to other social welfare services.⁴⁰⁶

4.5 Housing and shelter

The *Refugee Act* explicitly mentions the right to basic health care services and basic primary education and the rights as contained in chapter 2 of the Constitution. It is noteworthy that nothing is explicitly said in the Act about the right to other basic

401 Dutschke and Monson "Children's Constitutional right to social services" 23, 25-26.

402 Chapters 7 and 8 of the *Children's Act*.

403 Chapter 11 of the *Children's Act*.

404 Dutschke and Monson "Children's Constitutional right to social services" 23; Proudlock and Jamieson "The Children's Act: Providing legislative foundation for a developmental approach to child care and protection" 36.

405 Ss105 and 144 of the *Children's Act*.

406 S 27(b) of the *Refugee Act*.

services such as water, food or nutrition and housing.⁴⁰⁷ The right to housing in South Africa can be regarded as problematic due to the severe shortage thereof.⁴⁰⁸ When looking at housing, the right to housing is seen in section 26 and the right to shelter in section 28(1)(c). Section 28(1)(c) is textually different than section 26 in that it makes reference to shelter and it is not qualified by the word “access”.⁴⁰⁹

The preamble of the Act refers to section 26 of the Constitution and recognises that housing, as adequate shelter, not only fulfils a basic human need but that it is vital to the socio-economic well-being of a nation. The Act consists of definitions; general principles which are applicable to housing development; functions of the national, provincial government and local government; financing of the housing development, the termination thereof and general provisions. When looking at section 1 of the Act the following definitions are of importance:

‘Housing development’ the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to –

- a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- b) potable water, adequate sanitary facilities and domestic energy supply.

‘Housing development project’ any plan to undertake housing development as contemplated in any national housing programme.

Section 2(1) contains the general principles which are binding on all spheres of government. All spheres of government must *inter alia*:

- a) give priority to the needs of the poor in respect of housing development;
- b) consult meaningfully with individuals and communities affected by housing development
- c) ensure that housing development –
 - i. provides as wide a choice of housing and tenure options as is reasonably possible;
 - ii. is economically, fiscally, socially and financially affordable and sustainable ;

407 Palmary Research Report written for the CSVR on Refugees, Safety and Xenophobia in South African Cities: The role of Local Government 1.

408 De Vos “The right to housing” 86.

409 De Vos “The right to housing” 104.

- iii. is based on integrated development planning; and
- iv. is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance;
- v. in the administration of any matter relating to housing development-respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution...

The general principles read together with the rest of the Act, provides a framework which in turn strides towards the provision of access to permanent residential structures with secure tenure and on the other hand access to educational and health facilities as well as other economic opportunities.⁴¹⁰ It is however disappointing that refugees are excluded from housing development in that it refers to citizens and permanent residents only. The general principles of this Act specifically states that all spheres of the government must give priority to the needs of the poor, must promote measures to prohibit unfair discrimination by all factors in the housing development process and must fulfil the obligations imposed by the Constitution.

Ndinda and Adebayo points out that:

...although South Africa recognise individuals as refugees, the support it provides is limited, mainly focused on issuing these individuals with asylum documents or temporary permits... although this permit allows them to seek employment and education opportunities, it is not clear how their social welfare needs, such as access to housing, are addressed, or by whom.⁴¹¹

Access to, location, quality and affordability of housing are all factors that need to taken into account.⁴¹² The position of South Africa regarding the provision of housing and shelter is, as pointed out in section 3, one of the most complicated situations due to the extreme poverty in South Africa and lack of resources. Although refugees are entitled to housing as derived from the *Refugees Act* due to their vulnerabilities and their classification as disadvantaged and the explicit reference to chapter 2 of the Constitution, the reality is that the state cannot provide housing or shelter on demand to refugees and especially refugee children because in *Grootboom* it was stated that parents are primarily responsible and the state cannot even afford to provide for its own citizens. Access to housing or shelter by refugees is also

410 *Grootboom* par 51.

411 Ndinda and Adebayo 2006 *African Insight* 79.

412 Ndinda and Adebayo 2006 *African Insight* 80.

compromised by political and other social factors as well as lack of documentation.⁴¹³ One can thus argue that although refugees are entitled the parents will be responsible to provide a form of shelter.

4.6 Conclusion

National legislation not only gives effect to binding international obligations but also those contained in the Bill of Rights which plays a crucial role in the realisation of socio-economic rights. The *Refugees Act* prominently states that refugees are entitled to the rights as contained in the Bill of Rights and explicitly makes reference to education and health care services. Although the court in the *Centre for Child Law* case stated that the state has an “active duty” to provide for unaccompanied minor children, it is still not clear, if and to what extent refugee children under parental care can claim socio-economic rights from the state. Education in terms of section 29(1)(a) of the Constitution implies that the state is to at least provide the necessary facilities and eliminate factors which will preclude enjoyment of this right. Refugees are equally entitled to access educational facilities in terms of legislation such as the *Refugees Act*, *National Policy Act* and the *South African Schools Act* but the reality is that refugees are denied due to lack of documentation, inability to pay fees, discrimination, age and favouritism towards South African children. Regarding health care, refugees are entitled to access health care services in terms of legislation and policies, but once again as in the case of education, refugees are denied on the above mentioned grounds and due to improper execution of legislation and policies. Social assistance in the form of a grant paid through public funds to those in need is especially important to refugees to gain access to other socio-economic rights. Although refugees are explicitly entitled to the rights set out in the Bill of Rights which includes social assistance, refugee children are excluded from the child support grant which is of utmost importance to children in need. It is also the case in terms of housing and shelter in that refugees are excluded from housing development and subsidies.

413 See Palmary Research Report written for the CSVR on Refugees, Safety and Xenophobia in South African Cities: The role of Local Government for issues relating to social and political issues experienced by refugees.

If all is taken into consideration it is evident that, although South Africa has international obligations towards refugees which is transformed in national legislation and refugees are entitled to the rights set out in the Bill of Rights, the reality is that refugees and especially refugee children do not enjoy the rights to which they are entitled to.

5 Conclusion and recommendations

When taking all of the above in to consideration, it is evident that South Africa follows the dualist method by which international obligations must be transformed in to national legislation, as well as the importance of taking international obligations into consideration when interpreting rights in that international law may be instructive and imperative when considered and also serves as a valuable source of interpretation. South Africa has ratified numerous international instruments, which include the United Nations Convention Relating to the Status of Refugees and the Organisation of African Unity Convention Governing Specific aspects of Refugee Problems in Africa pertaining to refugees which are aimed at improving the situation of recognised refugees. South Africa also ratified the Convention on the Rights of the Child and the African Charter on the Rights and the Welfare of the Child which specifically provide protection and assistance for children. Refugee children also enjoy additional protection and assistance by way of the UNHCR guidelines and policies, which although are not binding, cannot be dismissed without proper grounds.

The CRC is applicable to all children under the age of 18, which includes four principles which can be regarded as the cornerstone of the convention. The four principles include non-discrimination, best interest of the child, live; survival and development and the right of the child to express views. All of the principles are applicable to refugee children within the borders of the country in which they reside. Refugee children also enjoy additional protection in terms of section 22 as discussed. The question of state responsibility can be found in section 4 where the state has to provide to the maximum extent of its available resources, must include children and allocate a part of the national budget to prove that all necessary measures were taken, special attention must be given to vulnerable children which

includes refugees and must provide material assistance and support programmes. The question of parental responsibility can be found in sections 3(2) and 5 which require parents to provide direction and guidance and sections 18(1) and 27 which imply that parents bear the primary responsibility but that the state must assist in meeting their responsibilities.

The ACRWC is applicable to children under the age of 18 and provides special protection for children who face specific problems in Africa. The ACRWC contains three principles which include non-discrimination, best interest of the child and primacy of the charter over cultural practices. All of the principles are applicable to refugee children within the borders of the country in which they reside. Refugee children also enjoy additional protection in terms of section 23 as discussed. The question of parental responsibility is clear, in that they bear the primary responsibility. Although most parents are willing to provide for their children it is not always possible due to lack of financial means and extreme poverty. Accordingly, one can argue that refugee children, as specific vulnerable group due to disruption that deeply affects their physical and physiological needs and due to population displacement, are equally entitled in terms of international law, may not be discriminated against in the context of life, survival and development and must be heard in all procedures affecting them while taking the best interest principle in to consideration.

Socio-economic rights are entrenched in the CRC and ACRWC which respectively include education, health care, social assistance and adequate standard of living. Refugee children face greater obstacles due to the situation which they are in. Due to the exceptional vulnerability of refugee children, one can argue that not only are they equally entitled to share in the resources of the country, some instances necessitate more immediate attention. South Africa is bound to these provisions which require South Africa to give priority and equal treatment to refugee children in terms of education, health care and social assistance whether separated or under parental care.

The South African Constitution is the supreme law in the country which provides a range of socio-economic rights to everyone and especially children. These socio-

economic rights were interpreted and limited in the cases of *Grootboom* and *TAC* where the court indirectly addressed the rights of children. In both *Grootboom* and *TAC*, the court limited children's rights in terms of the rights of "everyone" subject to "reasonable, legislative and other measures, within available resources to achieve progressive realisation", as seen in sections 26 and 27 although no internal limitation can be found in section 28(1)(c). Commentators argue and suggest that the separate inclusion of a socio-economic clause for children imply that the fulfilment of children's socio-economic rights necessitates more immediate attention and that the separate inclusion of a children's socio-economic clause would be without purpose if interpreted and limited in terms of the rights of "everyone".

In both *Grootboom* and *TAC* the court read sections 28(1)(b) and (c) together and stated that it means that parents are primarily responsible to provide socio-economic rights to their children. This is in line with the CRC and the ACRWC although nothing was mentioned about international law in the judgement of both cases. Although the court in *TAC* extended socio-economic rights to children "where the implementation of parental care is lacking", the court did not specifically state that indigent children under parental care have a direct and immediate right. Although it is argued that parents are primarily responsible, it should be kept in mind that South Africa has a high poverty rate and most parents with children are not able to provide for their children.

The interpretation and limitation of children's rights as in *Grootboom* and *TAC* has been criticised as being too conservative and that the state has a shared responsibility towards children because children are one of the most vulnerable groups in society. Refugee children under parental care, if treated equally, will be in the same position as provided for in *Grootboom and TAC*, making parents primarily responsible to provide the basic socio-economic needs to their children. Refugees face greater barriers in accessing socio-economic services due to discrimination faced, denial of access due to lack of documentation, lack of knowledge about the rights of refugees by facilities being approached by refugees and more. Due to these factors they are excluded even though they are entitled to these entitlements in terms of the Constitution. Refugee children under parental care thus find themselves in an even worse situation although they are exceptionally vulnerable.

The preamble of the Constitution recognises that South Africa belongs to all who live in it, united in diversity, which makes everyone equal before law and equal to protection and assistance. The *Khosa* case dealt *inter alia* with the equal treatment of non-citizens under the Constitution and held that it is unconstitutional to exclude permanent residents from accessing social assistance grants. The equality argument used in *Khosa* can be used to challenge the exclusion of refugee children from the child support grant in that the total exclusion of a vulnerable group amounts to unfair discrimination because it prevents them from enjoying other rights and it is unconstitutional to deny a vulnerable group a constitutionally guaranteed right.

National legislation contains socio-economic rights to give effect to the Constitution as well as binding international obligations. The *Refugees Act* makes specific reference to the Constitution whereby stating that refugees are entitled to the rights set out in the Bill of Rights, specifically education and health care and the enjoyment of full legal protection. In the *Centre for child law* case the court concluded that the state has an “active duty” to provide unaccompanied minor children with the rights as contained in section 28(1)(c) and (h). It is however still not clear what rights refugee children under parental care have due to the interpretation given to children’s socio-economic rights.

It is evident from legislation and policies that refugees and especially refugee children are entitled to access all services which includes education, health care, social assistance and services and housing or shelter. Educations in terms of the Constitution imply that the state should at the very least provide the necessary facilities and eliminate factors which will preclude the enjoyment of education. In terms of health care, refugees are entitled to access public facilities on a fee free basis for basic health care. The reality remains that they do not have access to these rights, for instance education where children are denied due to lack of documentation, inability to pay fees, discrimination and improper execution of legislation and policies; health care due to lack of knowledge by health care providers about the rights of refugees, lack of resources, discrimination, language barriers and improper execution of legislation and policies; social assistance where refugee children are excluded from accessing the child support grant which is important for refugee children to gain access to some of life’s basic needs such as

food, clothing and especially shelter or housing due to the *Housing Act* excluding refugees from accessing housing subsidies and discrimination.

Although the Constitution, legislation containing international obligations and policies explicitly makes provision for the rights of refugees, it is not the situation in real life in that they do not enjoy the access to the socio-economic services they deserve. Although, UMR enjoy a direct entitlement as seen in the *Centre for child law* case, the position of refugee children under family or parental care differs in that their parents are primarily responsible to provide and protect but are unable to do so due to poverty related matters, the exclusion from services and discrimination faced which ultimately leaves them without a remedy.

Refugee children, as a vulnerable group of society, in need of survival and development, necessitate a direct entitlement to combat disease and malnutrition and to develop into members of society who can participate in all sectors. Even if the parents of refugee children would benefit indirectly, it is recommended that the above entitlements be provided to refugee children under parental care or others legally responsible due to their extreme vulnerability.

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