

**CHILDREN OF ASYLUM SEEKERS AND THE REALISATION OF SOCIAL
SECURITY RIGHTS IN SOUTH AFRICA**

BY

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DECLARATION

I, TIVONELENI EDMOND LUBISI, student number 9906843, hereby declare that the dissertation for the LL.M degree at the University of Venda hereby submitted by me, has not been submitted previously for a degree at this or any other university, and that it is my own work in design and execution, and that all reference materials contained therein have been duly acknowledged.

DEDICATION

I dedicate this work to my late loving and caring mother Meriam Elizabeth Lusiba (Mashele).

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First and foremost, I would like to appreciate God Almighty for the strength and His divine intervention in my life, especially during the course of this study. Indeed, everything works together for good unto those that believe in Him.

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ABSTRACT

The Constitution of the Republic of South Africa shows a clear and unambiguous undertaking by the state to develop a comprehensive social security system. In terms of Section 27 of the Constitution, it is provided that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The section also obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Parts of the social assistance are, *inter alia*, child related social grants in terms of the Social Assistance Act. This research considers the question of statutory exclusion of children of asylum seekers from accessing and exercising their social security rights, in particular, social assistance grants relevant to the needs, assistance and protection of children. Such grants are already provided for by the law to the South African citizen, permanent resident and refugee children.

The question which this study seeks to address is whether South African government is in compliance with its constitutional and international obligations in respect of the social security rights and social assistance for children of asylum seekers in South Africa. This would be carried out by reviewing and exploring relevant International, regional and national human rights instruments relevant and applicable to the social security rights and assistance to the children of asylum seekers.

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LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMC	Migrant Workers and Members of Their Families
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD	Committee on the Rights of Persons with Disabilities
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPED	Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Their Families
OUA	Organization of African Unity
SPT	Subcommittee on Prevention of Torture
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1

INTRODUCTION

1.1 Introduction and background

The majority of refugees and asylum seekers in South Africa have fled the conflict in the Democratic Republic of Congo, the security situation in Somalia or are individuals who claim to have faced persecution in Burundi, Ethiopia, Rwanda and Zimbabwe. There are approximately 65 000 recognised refugees in South Africa, many of them have been in the country for years. According to Department of Home Affairs figures, by the end of 2013, there were 230 000 asylum-seekers awaiting decisions on their applications for refugee status.¹ South Africa continues to be a major destination for asylum-seekers. According to the United Nations (UNHCR) 2015 planning figures for South Africa it has been projected and estimated that by January 2015 there would be 237 500 asylum-seekers and by the end of December 2015 the number would increase to 245 000. This reflects that beyond 2015 there will still be massive presence of asylum seeker adults and children in South Africa.

Approximately half of the world's refugees are children.² The term "refugee child" has been used to include, among others, refugees and asylum-seekers of concern to the United Nations High Commissioner for Refugees (UNHCR), up to the age of 18 years (unless under applicable national law the age of majority is less than 18 years of age).³ While refugee and asylum seekers children share the general need for protection and assistance with adult refugees, they also have additional needs and rights as a result of their dependence, vulnerability and developmental requirements.⁴ The main challenges of refugees and asylum seekers remain access to: documentation; a fair and functioning asylum system; basic social services, provided in national legislation and policy; occasional emergency assistance for the vulnerable, including shelter and food; and social cohesion programs.⁵ For the purposes of this study focus is limited to the right to access to social security and social assistance for the accompanied children of asylum seekers in South Africa. Such children are vulnerable,

¹ UNHCR 2015 country operations profile –South Africa. <http://www.unhcr.org> (accessed 20 January 2015)

² Ibid

³ Y Mokgoro and P Tlakula (eds) Bill of Rights Compendium 3EA-61.

⁴ Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection. "UNHCR Policy on Refugee Children" (6 August 1993) par 10 ("Policy on Refugee Children"). <https://books.google.co.za> (accessed 21 January 2015)

⁵ (Note 1 Supra) 2

both as children and as migrants. They fall within a category of foreign children in need of care and assistance.⁶ The Committee on the Rights of the Child has pointed out that foreign children are vulnerable to exploitation.⁷

The Constitution of the Republic of South Africa⁸ shows a clear and unambiguous undertaking by the state to develop a comprehensive social security system. In terms of Section 27 of the Constitution, it is provided that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.⁹ The section also obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.¹⁰

The International (including regional) standards and obligations relating to refugees and asylum seekers, also in the area of social security, are crucially important for South Africa. This flows from the fact that, firstly, South Africa has ratified and is, therefore, bound by several of the relevant international and regional instruments; and that, secondly, every court, tribunal and forum has to consider international law in a matter involving the entitlement of refugees and asylum-seekers to the constitutional right of access to social security and to appropriate social assistance.¹¹ The relevant international human rights instruments, inter alia, are the Universal Declaration of Human Rights in particular article 25 which is one of the key components of economic and social rights,¹² the United Nations Convention on the Rights of the Child, the African Charter On Human and People's Rights and the African Charter on the Rights and Welfare of the child.¹³

⁶ N Machingambi and SK Ralekwa 'Submission on the Children's Bill: Foreign children' UCT Law Clinic. www.ci.org.za (accessed 09 October 2015)

⁷ Human Rights Committee, Gabon, U.N.Doc.CCPR/CO/70/GAB (2000) at paragraph 18. <https://www1.umn.edu/humanrts/hrcommittee/gabon2000.html> (accessed 03 March 2015)

⁸ The Constitution of the Republic of South Africa Act 108 of 1996.

⁹ S 27(1)(c) of the Constitution.

¹⁰ S 27(2) of the Constitution.

¹¹ M Olivier. 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework' (Part 1) [2011] SADCLJ 6. page 10 <http://www.saflii.org/na/journals/SADCLJ/2011/6.html> (Accessed 20/01/2015)

¹² A Eide .et al, *Universal Declaration of Human Rights: A Commentary*. Scandanavian University Press 1992, 385.

¹³ I Brownlie. 2nd ed *Basic Documents on Human Rights*, Oxford University Press, 1981, 121.

The most relevant statutes in relation to social security in this study are the Social Assistance Act,¹⁴ Children's Act¹⁵ and Refugees Act.¹⁶ In addition, the South African Constitution,¹⁷ which is the supreme law of the country, provides everyone with the right to just administrative action¹⁸ and the right to access to the courts.¹⁹ Any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.²⁰ It follows, therefore, that any provision contained in any of the social security laws may be declared invalid if it is found to be incompatible with the Constitution. There are several legislative provisions and administrative measures forming part of the social security system in South Africa.²¹ The constitutionality of these provisions and measures may be challenged on the ground that they exclude common-law claims to which an applicant would otherwise have been entitled²² or that they exclude individuals²³ or categories of persons.²⁴ In assessing the constitutional validity of legislative provisions and administrative measures, the courts are required to have regard to international law and are permitted to consider foreign constitutional jurisprudence.²⁵

The judicial authority of the Republic is vested in the Courts.²⁶ Section 7(2) of the Constitution places a duty on the state to respect, protect, promote and fulfill the rights in the Bill of Rights, including the right to access to social security. The state also bears the responsibility of progressively realizing certain fundamental rights, among which, the right to access to social security.²⁷ The courts have power to enforce these rights as well as the

¹⁴ Act 13 of 2004.

¹⁵ Act 38 of 2005.

¹⁶ Act 130 of 1998.

¹⁷ Act 108 of 1996 (The Constitution).

¹⁸ S 33 of the Constitution.

¹⁹ S 34 of the Constitution.

²⁰ S 2 of the Constitution.

²¹ This include Social Assistance Act 13 of 2004.

²² *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1106 (CC).

²³ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC).

²⁴ *The Government of the republic of South Africa and Others v Grootboom and others* 2000 11 BCLR 1169 and *Minister of health &Others v Treatment Action Campaign* 2002 BCLR 1033 (CC) .

²⁵ Ss 39(1)(b) and (c) and 233 of the Constitution; *S v Makwanyane & Another* 1995 3 SA 391 (CC) 414

²⁶ S 165 (1) of the Constitution.

²⁷ S 27(2), read with s27(1)(c) of the Constitution.

constitutional obligations imposed on the state,²⁸ even if some would consider the issuing of positive orders by the courts as an interference with the functions of the executive and legislative branches of government.²⁹ It has been submitted³⁰ that courts are empowered when deciding upon an issue involving the interpretation, protection, and enforcement of a fundamental right contained in the Constitution- to make any order that is just and equitable³¹ and to grant “appropriate relief”.³² Specific constitutional remedies include orders of invalidity;³³ the development of the common law in order to give effect to constitutional rights;³⁴ the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights;³⁵ procedural remedies derived from some of the substantive rights;³⁶ as well as both declaratory and mandatory orders.³⁷ Also included is “the power, where it is appropriate, to exercise some form of supervisory jurisdiction to ensure that the order is implemented³⁸”.

The topic of the study is a result of concern on strategic and legislative exclusion of children of asylum seekers from having access to the main stream child social grants system in South Africa. Therefore, such exclusion needs to be weighed in light of the constitutional provisions and the established international standards.

1.2 Problem statement and substantiation

The Refugee Act³⁹ defines an asylum-seeker as a person who is seeking recognition as a refugee in South Africa or whose refugee status has not yet been confirmed, as opposed to

²⁸ Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996; Government of the Republic of South Africa v Grootboom.

²⁹ D Beatty “Constitutional labour rights: pros and cons” 1993 ILJ 1 2. See also Minister of Health & Others v Treatment Action Campaign par 99.

³⁰ W Trengove. “Judicial remedies for violations of socio-economic rights” 1999 1: 4 ESR Review 8.

³¹ Ss 172(b) and 167(7) of the Constitution.

³² S 38 of the Constitution. See also Fose v Minister of Safety and Security 1997 3 SA 786 (CC) par 19 for the description of what is meant by “appropriate relief”.

³³ S 127(1)(a) of the Constitution.

³⁴ Ss 173 and 8(3) of the Constitution.

³⁵ S 173 of the Constitution.

³⁶ Ss 32(10), 33(2) and 34 of the Constitution.

³⁷ Minister of Health & Others v Treatment Action Campaign & others pars 96-114 and the authorities cited there.

³⁸ *Ibid*

³⁹ Act 130 of 1998

a refugee, who has been granted asylum in terms of the Act.⁴⁰ The distinction between refugee and asylum-seeker has important consequences for social protection status. Unlike refugees, asylum-seekers find it difficult to gain access to social protection until the final determination of their status. They receive only a minimum form of protection until such time they become fully recognized refugees, and this makes their situation even more precarious. In South Africa, they are not explicitly legally included in provisions for social security, especially for social assistance.⁴¹ Among others, the common eligibility requirement or condition is that the applicant concerned must be a South African citizen, permanent resident or a refugee.⁴² The applicant concerned in relation to children would be a parent, primary care giver or foster parent of a child who requires and receives care or support services.⁴³ However they are allowed to work and study.⁴⁴ The children of asylum seekers are not in a position to have access to the social assistance system solely because of the asylum seeker status of their parents, primary care giver and foster parents.

It is worth noting there is a glaring gap in the Refugees Act. It makes a distinction between an asylum seeker and refugee, however it fails to adequately address the rights that the former have, while they are in transition before being granted refugee status. There is no social assistance programme for asylum seekers who are in this transition. The fact that an asylum seekers permit is, in practice, constantly renewed before refugee status is actually granted, many asylum seekers and children are caught between this gap and the issue of their right of access to social security right. The fact that the Refugee Act specifically lays down rights of refugees, but not of asylum seekers, it means that this group fall between the cracks before their status is determined.⁴⁵

In principle, refugees in South Africa enjoy full legal protection, which includes the constitutionally entrenched socio-economic rights set out in Chapter 2 of the Constitution, and specifically the right of access to social security, including, if they are unable to support

⁴⁰ Section 1(iv), (v) and (xv), Refugees Act.

⁴¹ (note 11 supra) 10

⁴² Social Assistance Act 13 of 2004 sec 5(1)(c) read with Government Notice R898 as amended by Government Notice R269 in Government Gazette 35205, dated 30 March 2012. Commencement date: 1 April 2012.

⁴³ Ss 6,7 and 8 of Social Assistance Act.

⁴⁴ Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).

⁴⁵ M Nyenti et al 'South Africa Country Report, A Report to the World Bank' 2007, 36.

themselves and their dependants, appropriate social assistance.⁴⁶ The Social Assistance Act⁴⁷ provides for, inter alia, social grants which are of direct relevance to children to wit child support grant, care dependency grant and foster child grant. The common eligibility requirement or condition is that the applicant concerned must be a South African Citizen, permanent resident or refugee.⁴⁸

Two further important qualifications are contained in the Social Assistance Act. In the first place, section 2(1) extends coverage to non-citizens in the event of a bilateral agreement providing for this. However, this provision, read with the power of the Minister to determine groups or categories of persons to be covered, is restricted, as it only covers bilateral agreements, and does not take into account possible obligations on South Africa to extend protection in terms of international instruments, such as the UN Convention on the Rights of the Child and the various refugee conventions ratified by South Africa. In the second place the payment of social assistance benefits will, as a rule, be suspended in the event that a beneficiary is absent from the country for more than 90 days.⁴⁹

South Africa hosts a large number of refugees and asylum seekers from the neighbouring countries due to various problems encountered ranging from armed hostilities, political persecutions and conflicts etc. In South Africa, recognized refugees enjoy certain rights including social security rights. There are also a lot of asylum seekers inclusive of children that are awaiting the decision on their application for recognition as refugees in South Africa. Since asylum seekers application outcomes can take long with more than a prescribed period of three months⁵⁰ to years, the lives of the asylum seekers remain challenged in relation to social security, social assistance, and protection. While refugee children are eligible to apply and receive social assistance grants, the rights of asylum seeker children are not clear. Hence the study's focus will be on the asylum seeker children.

⁴⁶ (note 11 supra) 12. See also S27(1)(c) of the Constitution.

⁴⁷ Act 13 of 2004.

⁴⁸ S5 of the Social Assistance Act.

⁴⁹ (note 43 supra)

⁵⁰ Regulation 3(1), Government Notice R366 in Government Gazette 21075, 6 April 2000.

Amongst recognized asylum-seekers there are asylum seekers children which are a special group that needs special protection in relation to social security and assistance. The main point of concern is the statutory exclusion and non-reference of the asylum seeker children from the relevant child grants regardless of their vulnerability, economic need and the constitutional provisions on the protection of children. The question which this study seeks to address is whether the South African government is in compliance with its constitutional and international law obligations in respect of the social security rights of children of asylum seekers.

1.3 Research aim and objectives

1.3.1 Broad aim

The major aim of the study is to advocate for the realization of the social security rights of asylum seekers' children in relation to access to child social grants in South Africa..

1.3.2 Specific objectives:

- 1.3.2.1 To ascertain the international and regional instruments which guarantee provision and protection of social security rights for children of asylum seekers;
- 1.3.2.2 To analyze and review the national legislative frameworks and case law in respect of children of asylum seekers' rights of access to social security;
- 1.3.2.3 To make appropriate recommendations in ensuring practical realisation of social security rights of children of asylum seekers.

1.4 Research questions

The aim and objectives of this research can be achieved by answering the following questions:

1. Which social security rights relevant to children of asylum seekers are enshrined in the international human rights instruments?
2. What legal framework does South Africa have to realize social security rights, including social assistance, in relation to children of asylum seekers?
3. What is the approach of the South African Judiciary in the protection and enforcement of right to social security for children of asylum seekers?

4. What measures can be employed to realize the social security rights of children of asylum seekers?

1.5 Literature review

Olivier reflects critically on access to South African social security benefits by Southern African Development Community (SADC) citizens.⁵¹ The author discusses this issue by examining relevant SADC migration dimensions, the existing migration law and policy regime in South Africa, and the fragmented nature of the South African social security system. Immigration law and policy does not honour a human rights approach, and fails to encourage and support migration. To a large extent, the failure to encourage and support migration and to concentrate on control is also apparent from the scope and orientation of the labour agreements between South Africa and several SADC countries. Immigration law and policy in South Africa, as is the case in other SADC countries, generally focus on the effects of migration, rather than on the underlying causes thereof. The author refers to non-citizens in general without categorizing them, however, the question of social security for asylum seekers' children has not been addressed, hence this study seek to address the question in relation non-citizens which include the children of asylum seekers.

Goodwin-Gill deals extensively with definitions of Refugee in the context of international and regional legal standards. The author argues that defining 'refugees' may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress.⁵² States have nevertheless insisted on fairly restrictive criteria for identifying those who benefit from refugee status and asylum or local protection. For the victims of natural calamities,⁵³ the very fact of need may be the sufficient indicator, but for the victims of conditions or disasters with a human origin, additional factors are required. The purpose of any definition or description of the class of refugees is thus to facilitate, and to justify, aid and protection; moreover, in practice, satisfying the relevant criteria ought to indicate entitlement to the pertinent rights or benefits. In determining the content in international law of the class of refugees, therefore, the traditional sources –treaties and the practice of states –must be examined, with account taken also of the practice and procedures of the various bodies

⁵¹ (Note 11 supra) 10

⁵² S Guy Goodwin-Gill, *The Refugee In International Law*, 1996, 3.

⁵³ The Office of the Disaster Relief Co-ordinator (UNDRO) which was further established to UNGA res. 2816(XXVI), 14 Dec. 1971.

established by the international community to deal with the problems of refugees.⁵⁴ It is of paramount importance to deal with definitions of refugees and their classifications in terms of their age, socio-economic needs and vulnerability so as to determine the relief measures and the extent of social security and protection they may need. Hence the author's research is relevant to this study and it provides for definition of refugee to include Asylum seekers' children.

Hathaway addresses the question of social security in relation to refugees as referred to in article 9 of the Economic, Social and Cultural Covenant.⁵⁵ The author indicated that while the structure of the Refugees Convention anticipate that refugees lawfully staying in an asylum country will support themselves by undertaking work, the drafters logically took account of the possibility that refugees, like citizens, might sometimes be prevented by circumstances beyond their control from earning their own living.⁵⁶ Refugees in less developed countries not living organized settlements may receive even less public assistance than those who agree to live in organized settlements.⁵⁷ A notable exception is South Africa, where the Constitutional Court struck down as unconstitutional laws which denied destitute Mozambican refugees the full benefit of national assistance programs including child support and old-age dependency grants.⁵⁸ Despite focus being on refugees children in relation to provision of social grants, the study is central to the heart of this research concerning social security rights of asylum-seeking children.

Kats wrote a chapter on refugees and gave a brief background and systematic development of the refugees laws in South Africa.⁵⁹ Once a foreigner has made an application for asylum the Refugee Reception Centre (RRC) must issue to the applicant an asylum seeker, permit allowing the person to sojourn in South Africa temporarily.⁶⁰ Under regulations made by the

⁵⁴ (note 4 supra) 4.

⁵⁵ The states parties to the present covenant recognise the right of everyone to social security, including social insurance.

⁵⁶ J.C Hathaway, *The Rights of Refugees Under International Law*, 2005,733.

⁵⁷ *Ibid*, 802

⁵⁸ The Court determined that the constitutional right of "everyone" to enjoy equality, social security, and the protection of children meant that laws that withheld relevant social benefits from non-citizens should be struck down: *Khosa and Others v Minister of Social Development*, (2004) 6 BCLR 569 CC.

⁵⁹ J Dugard, *International Law 'A South African Perspective'* 351, Chapter 15 titled Refugees written by Anton Katz.

⁶⁰ Refugees Act sec 22

Minister of Home Affairs asylum seekers were prohibited from employment or studying, atleast for the first six months of their time in South Africa.⁶¹ In *Minister of Home affairs v Watchenuka*,⁶² the Supreme Court of Appeal (SCA) held that the blanket prohibition violated asylum-seekers constitutional right to dignity. In so finding the SCA stated that human dignity has no nationality because it is inherent in all people simply because they are human. Asylum seekers are thus authorized in general to work or study in South Africa pending the finalization of their applications for asylum.⁶³ Applications for asylum should be generally adjudicated within 180 days of filing the completed asylum application with the Refugee Reception Officer.⁶⁴ The author provides a background of the asylum legal framework from a pre-democratic era to the new democratic dispensation, thus it is pivotal and profound for this research.

Horsten researched on the social security rights of children in South Africa.⁶⁵ The researcher focused on the concept of social security as it was introduced into the South African Constitutional system. Section 27 (1)(c) of the constitution states that everyone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance and the state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of these rights. The research was further focused on social security rights and social assistance in the form of grants for all categories of children. Ultimately, the researcher made recommendations which, inter alia, included a recommendation that the child support grant should be made more universally accessible, to include child headed households, refugee children, children of non-citizens and all children under the age of 18. The research analysis and recommendations does not refer to asylum seeking children, hence in this research; the focus is specifically on the social security rights and social assistance grant for asylum seekers children.

⁶¹ (note 59 supra) 351

⁶² *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

⁶³ (note 59 supra) 351

⁶⁴ Regulation 3(1), Government Notice R366 in Government Gazzette 21075, 6 April 2000.

⁶⁵ D.A Horsten 'The Social Security Rights of Children in South Africa' published LLM dissertation, Northwest University Potchefstroom campus, 2004, 1.<http://hdl.handle.net/10394/284> (accessed 20 November 2014).

Sterne researched on the access to health care by asylum seekers and refugees in South Africa.⁶⁶ The author posed a question as to whether an asylum seeker in South Africa is entitled to, for example, a kidney transplant in terms of the constitutional obligation to provide health care. The author analyzed the law that deals with protection and general rights of refugees. The study supported the view that by allowing a person into the country, the government accepts the obligation to extend the rights in the Bill of Rights to such a person. The author argued further that discrimination based purely on residency is not justifiable and a blanket policy based on this is discriminatory and unfair. While other non-permanent residents also fall under the term 'everyone', they – unlike asylum seekers and refugees – have a choice to return to their countries of origin, thus providing a rational basis on which the limitation clause can be implemented. Ultimately, the author submits that refugees and asylum seekers are entitled to the same rights as citizens unless specifically excluded in the Constitution. The study was exclusively on the right to access to health care for asylum seekers and refugees. The question of access to social security and social assistance by asylum seekers' children was not addressed, hence this study seek to close the gap.

Kapindu, conducted a field survey study on Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies.⁶⁷ The author examined how migrants deal with various socio-economic risks and vulnerabilities associated with the status of an immigrant in South Africa. In addition, the author investigated the social protection avenues and strategies that the migrants adopt in the event of social protection exclusions, and whether their migration to South Africa, by itself, is a social protection strategy. The author, weighs up how the migrants and compares their respective experiences in Malawi and South Africa in respect of their living standards and the general level of socio-economic vulnerabilities, risks and attendant protections. Whilst the focus of the study was on Malawians living in various parts of Johannesburg, it is evident that these migrants' experiences largely mirror the experiences of other migrant groups in South Africa. However, the question of exclusion of asylum seekers' children, regardless of their country of origin, has not been addressed in relation to access to social security and assistance in South Africa. Thus this study aims to deal with the question and close the gap.

⁶⁶ A Sterne "Health care for all? Asylum seeker, refugees and health care." De Rebus 42, March 2013. <http://www.saflii.org/za/journals/DEREBUS/2013/42.html> (accessed 20 January 2015)

⁶⁷ R.E Kapindu "Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies." AHRLJ Vol 11 No1 2011.LLB (Malawi), LLM (Human Rights and Democratisation in Africa) (Pretoria). <http://www.ahrlj.up.ac.za> (accessed 20 January 2015)

1.6 Research methodology

The study is purely text-based approach, with the aim of analyzing and clarifying some of the key concepts used in the refugees and asylum seekers laws in the context of human rights. The researcher will do this by means of conceptual and logical analysis of key debates, and tracing the historical and legal developments pertaining to social security rights for asylum seeking children. The researcher shall discuss the main academic debates around social security rights and protection for asylum seeking children in human rights context as reflected in international, continental and South African literatures.

Coupled with the above mentioned approach the researcher will also follow a black-letter-law approach with focus mainly placed on the law itself as an internal self-sustained set of principles and values derived from legislation and decided case law. These will be analyzed and explained in the context of relevant international instruments which are binding on South Africa. This approach is referred to by Murphy and Roberts⁶⁸ as 'doctrinal legal research' encompassing expository⁶⁹ and legal theory research, concerning itself with analyzing existing legal rules. Briefly, doctrinal study of law consists in the interpretation and systematization of valid legal norms. Vibhute opines that doctrinal legal research which basically involves an analysis of legal principles, concepts or doctrines, their logical ordering and systematizing of legal propositions emerging there from, has some practical utility.⁷⁰

1.7 Significance of the study

This study will contribute to a broader understanding of the need to include children of asylum seekers in the main stream of social security rights protection and provision just like all other groups of children that are benefiting from the social security system in South Africa. This study will further resuscitate the debate as to the question of including children of asylum seekers in all relevant children social grants as part of social security system in South Africa within the context of the Constitution, and the relevant international and regional

⁶⁸ W.T.Murphy, *et al* 'Introduction to the special issue of Legal Scholarship', *Modern Law Review* (1987) Vol. 50, No. 6, 677.

⁶⁹ K Vibhute, *et al* "Legal Research Methods: Teaching Material" (2009) 80, Prepared under the sponsorship of the Justice and Legal System Research Institute, available at <http://www.chilot.wordpress.com> (Last accessed on 14 January 2014).

⁷⁰ *ibid*

human rights instruments. Non-governmental organizations, institutions and practitioners involved in education, training, providing advice, advocacy, lobbying and mobilization in areas impacting on the realization of asylum seeking children social security rights, will find this work to be useful.

1.8 Definition of concepts

1.8.1 Child

A child is defined as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.’⁷¹ For the purposes of this study a child is defined as above.

1.8.2 Refugee children

The 1951 Refugee Convention defines ‘refugee children’ as children who have fled from their home countries or are unable to return to it ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Article 1(2) of the Protocol Relating to the Status of Refugees (hereinafter referred to as the 1967 Protocol) provides that the definition of the term ‘refugee’ shall be applied within the meaning of Article 1 of the 1951 Refugee Convention, but the words ‘as a result of events occurring before 1951’ were omitted.⁷² For the purposes of this research the Organisation of African Unity (African Union) Convention’s definition which has broadened the refugee definition will be utilised. The latter defines a refugee according to the criteria outlined in the 1951 UN Refugee Convention, but also assigns the term ‘refugee’ to persons who ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin are compelled to leave their places of habitual residence in order to seek refuge in another place outside their countries of origin or nationality.’ In African countries protection is thus afforded to large groups of people who are living in generally dangerous or unstable conditions, for example, because there is civil war in their home countries.⁷³

1.8.3 Asylum-seeking children

⁷¹ Article 1 of the Convention on the Rights of the Child (herein referred to as CRC) defines a child as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier’

⁷² Protocol Relating to the Status of Refugees, 606 UNTS 150, entered into force 4 October 1967.

⁷³ J Rutter ‘Supporting Refugee Children in 21st Century Britain: A Compendium of essential information’ (2003) 4.

Rutter defines this particular group of vulnerable persons as children below the age of eighteen years who have crossed an international border in search of safety, and refugee status, in another country.⁷⁴ For purposes of this research an asylum-seeking child shall be defined as above and additionally as persons who are seeking recognition as refugees in South Africa.

1.8.4 Asylum seeker

Asylum seeker means a person who is seeking recognition as a refugee in the South Africa.⁷⁵

1.8.5 Social security

The term “social security” does not yet have a universally accepted and precise meaning. This is because social security is elastic and varies from one country to another.⁷⁶ Nevertheless, the most common definition follows the International Labour Organisation’s (ILO) approach, and defines social security on the basis of the so-called classical risks embodied in the Social Security (Minimum) Standards Convention 102 of 1952. For the purpose of this research, social security is perceived as: the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be suffered as a result of stoppage or reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, death, provision of medical care and provision of subsidies for families with children.⁷⁷

1.8.6 Social protection

Social protection embraces social security and entails “policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people’s exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income”,⁷⁸

1.8.7 Social assistance

⁷⁴ Ibid, 4.

⁷⁵ Refugee Act , sec 1

⁷⁶ L.G Mpedi ‘Pertinent social security issues in South Africa’ Socio-Economic Rights Project 4, 2008, 5.

⁷⁷ International Labour Organisation, 2000. World Labour Report 2000: In-come Security and Social Protection in a changing world. <http://www.ilo.org/public/english/protection/socsec/wlrblurb.htm> (accessed 12 January 2015).

⁷⁸ Asian Development Bank. 2008. Social Protection: Reducing risks, increasing opportunities, as last updated on 15 August 2008. <http://www.adb.org/SocialProtection/default.asp> (accessed: 12 January 2015).

For the purpose of this research Social Assistance means a social grant including social relief of distress.⁷⁹

1.8.8 Social grant

Social grant means a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.⁸⁰ Social grant shall be defined as above for the purpose of this research.

1.9 Structure (Overview of chapters)

Chapter one (Introduction) consists of a background and general introduction to the study. It also covers research methodology, research objectives, and research questions, significance of the study, literature review and definition of key concepts.

Chapter two examines relevant international and regional human rights instruments which guarantee provision and protection of social security rights in relation to children of asylum seekers.

Chapter three constitutes regulatory legal framework of social security rights, including social assistance, in relation to children of asylum seekers in South Africa.

Chapter four concentrates on analysis of relevant cases in order to comprehend the approach of the South African Judiciary in relation to social security rights for children of asylum seekers with a view to establishing compliance with international and regional guarantees.

Chapter five focuses on conclusions and recommendations.

1.10 Chapter Conclusion

This chapter has been meant for the introduction of the study as a whole and lays the foundation as well as the basis upon which the study is to be carried out in the subsequent chapters. The introduction and background of the study in relation to social security rights of asylum seekers' children, the research objectives and questions, literature review, research methodology, significance of the study, definition of concepts and overview of chapters are

⁷⁹ Social Assistance Act 13 of 2004, sec1.

⁸⁰ Ibid

well explained. Therefore the next chapter will examine relevant international and regional human rights instruments which guarantee provision and protection of social security rights in relation to children of asylum seekers.

CHAPTER 2

SOCIAL SECURITY RIGHTS OF ASYLUM SEEKERS' CHILDREN IN INTERNATIONAL HUMAN RIGHTS SYSTEM

2.1 Introduction

The previous chapter focused on the introduction of the study and this chapter examines relevant international and regional human rights instruments which guarantee provision and protection of social security rights in relation to children of asylum seekers. The right to social security is recognized as a human right and establishes social assistance for those unable to work due to sickness, disability, maternity, work related injury, unemployment or old age. Social security systems provided for by states consist of social insurance programs, including *earned benefits* for workers and their families by employment contributions, and/or social assistance programs such as provide *non-contributory benefits* designed to provide minimum levels of social security to persons unable to access social insurance.⁸¹

The development of the international regime for the protection of human rights constitutes a most remarkable achievement of the 21st century. Since the end of the Second World War, the international community has adopted a host of general and specialised human rights instruments.⁸² The international human rights movement was strengthened when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. Drafted as 'a common standard of achievement for all peoples and nations', the Declaration for the first time in human history spells out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that states should respect and protect. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the so - called International Bill of Human Rights.⁸³

⁸¹ D Weissbrodt and C de la Vega, (2007). International human rights law: an introduction. University of Pennsylvania. (2007) 130.

⁸² D.M Chirwa, 'Human Rights : International Protection, Monitoring, Enforcement' (2004) Vol 20 , Issue No. 1, South African Journal on Human Rights ,169.

⁸³ Office of the High Commissioner for Human Rights, United Nations Human Rights.<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 19 January 2015)

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.⁸⁴ Regional human rights systems have also been developed to reinforce the protection of international human rights standards.⁸⁵ The African human rights, European human rights and Inter-American human rights protection systems serve as an example for development of human rights enforcement and protection in the regional level. This chapter considers not only the legal framework providing for the promotion and protection of the social security rights of asylum seekers children within the international and African regional human rights systems, but also the manner in which the relevant institutions charged with supervising the implementation of these treaties have interpreted the rights afforded to asylum seekers children. The main purpose of this chapter is, therefore, to establish the international and regional standards set for required guarantees by national states.

2.2 Social security rights of asylum seekers' children under United Nations treaty-based human rights system

The Universal Declaration of Human Rights (UDHR),⁸⁶ adopted in 1948, elaborated upon and systematized for the first time the idea of 'human rights' derived from the United Nations (UN) Charter.⁸⁷ The UDHR enumerated a variety of civil, political, economic, social and cultural rights, which were subsequently separated and incorporated into two binding treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UDHR and the two Covenants together form the minimum standard of international human rights protection, known as the International Bill of Rights. Several other international human rights conventions followed, which focus on more specific thematic concerns (such as racial

⁸⁴ Ibid

⁸⁵ (Note 83 supra) 168

⁸⁶ General Assembly Resolution 217 A (III) of 10 December 1948 - International Bill of Human Rights

⁸⁷ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. <http://www.un.org/en/charter-united-nations/index.html> (accessed on 19 January 2015)

discrimination) or on the protection of vulnerable groups (such as women, children, migrant workers, or disabled persons), and which substantively complement and expand upon particular rights guaranteed in the International Bill of Rights. Some of the international human rights treaties have been expanded upon by the creation of an optional protocol, which may increase protection in a particular area, or contain additional procedures that allow for further monitoring or receipt of individual communications. In order to be bound by an optional protocol, a State must ratify it separately in the same manner that it ratifies a treaty. The main international human rights treaties are sometimes referred to as the 'core' treaties because they take their inspiration from the provisions enshrined in the UDHR. The current eight core international human rights treaties are:⁸⁸

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	YEAR OF ADOPTION
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	21 December 1965
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 December 1966
International Covenant on Civil and Political Rights (ICCPR)	16 December 1966
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 December 1979
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 December 1984
Convention on the Rights of the Child (CRC)	20 November 1989
International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW)	18 December 1990
Convention on the Rights of Persons with Disabilities (CRPD)	30 March 2007
Convention for the Protection of All Persons from Enforced Disappearance (ICPED)	20 December 2006

⁸⁸ Office of the High Commissioner for Human Rights, United Nations Human Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments>. (accessed 19 January 2015)

One new convention is presently open for ratification. It will enter into force after the requisite number of States has ratified it. This new treaty is: „Convention for the Protection of All Persons from Enforced Disappearance (ICPED)⁸⁹

The treaty bodies are created in order to monitor and encourage States to uphold and implement their international obligations under the above-mentioned international human rights treaties. The treaty bodies are international committees of independent experts who monitor State Parties' implementation of each of the eight core human rights treaties and their optional protocols. The implementation of each of the international treaties is monitored by its own Committee based on reports from State Parties and information from non-governmental organisations (NGOs) and other relevant sources. At present, there are nine treaty bodies monitoring the implementation of the eight core international human rights treaties and one optional protocol. They are:⁹⁰

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	TREATY BODY
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ⁹¹	Committee on the Elimination of Racial Discrimination (CERD)
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Committee on Economic, Social and Cultural Rights (CESCR)
International Covenant on Civil and Political Rights (ICCPR)	Human Rights Committee (HRC)
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Committee on the Elimination of Discrimination against Women (CEDAW)

⁸⁹ This Convention will enter into force 30 days after at least 20 States have ratified it (Article 39). Currently, 18 States have ratified the Convention, last updated 4 July 2010.

⁹⁰ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 19 January 2015)

⁹¹ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

entry into force 4 January 1969, in accordance with Article 19. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 19 January 2015)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	Committee Against Torture (CAT) Subcommittee on Prevention of Torture (SPT)
Convention on the Rights of the Child (CRC)	Committee on the Rights of the Child (CRC)
International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW)	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)
Convention on the Rights of Persons with Disabilities (CRPD)	Committee on the Rights of Persons With Disabilities (CRPD)

All the treaty bodies receive secretariat support from the Treaties and Follow-up Unit of the Treaties and Council Branch of the Office of the United Nations High Commissioner for Human Rights (OHCHR).⁹²For the purposes of this study focus will be on the treaties and committees that are relevant to provision and protection of social security and assistance rights to asylum seekers children. Such relevant treaty bodies will be discussed under their own relevant founding treaties discussion.

2.3 United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.⁹³This Convention contains a set of rights and freedoms to be enjoyed by all children. A child as defined in this Convention is any human being under the age of 18, unless a particular nation's laws set an earlier age for the

⁹² Simple Guide to the UN Treaty Bodies International service For Human Rights. www2.ohchr.org/english/bodies/treaty/index.htm. (accessed 19 January 2015)

⁹³ GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990. (South Africa ratified the Convention on 16 June 1995, without entering any reservations.)

attaining of majority status.⁹⁴ Article 23 explicitly states that every child has the right to benefit from social security, including social insurance, and that the state should take the necessary measures to achieve the full realisation of this right in accordance with national law. Social security benefits should be granted, taking into account the resources and the circumstances of the child and those responsible for the maintenance of the child. Article 6 of the Convention places state parties under an obligation to ensure the survival and development of the child to the maximum extent possible⁹⁵. Article 6 is explained by the Committee on the Rights of the Child (CRC) as follows:⁹⁶

“Under this section State Parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; and factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Convention, in respect of: (a) survival and development (Article 6, paragraph 2); (b) disabled children (Article 23); (c) health and health services (Article 24); (d) social security and child care services and facilities (Articles 26 and 18, paragraph 3); (e) standard of living (Article 27, paragraphs 1-3).” These provisions give rise to numerous derivative social security rights, such as the right to health care necessary for survival, and a standard of living that meets the needs for food, clothing, shelter and education.⁹⁷

The overriding principle of the Convention is that all actions concerning children must have the best interests of the child as a primary consideration.⁹⁸ Every child has the right to

⁹⁴ According to the South African Constitution (sec 28(3)), ‘child’ means a person under the age of 18 years. This is also in line with the Social Assistance Act 59 of 1992, Welfare Laws Amendment Act 106 of 1997 and new Social Assistance Bill B57D-2003 that defines child as a person under 18 years.

⁹⁵ 1 States Parties recognise 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.

⁹⁶ CRC/C/5 entitled General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under art 44 para 1(a) of the Convention, which were adopted by the Committee on the Rights of the Child at its 22nd meeting (first session) on 15 October 1991 para 19.

⁹⁷ Department of Social Development Transforming the present – Protecting the future: Report of the Commission of Inquiry into a Comprehensive System of Social Security for South Africa (2002) 41. 50.

⁹⁸ Article 3.

benefit from social security, including social insurance , and the state should take all necessary measures to achieve full realisation of this right in accordance with national law. Social security benefits should be granted, taking available resources and the circumstances of the child, as well as those of the persons responsible for the maintenance of the child, into account.⁹⁹ The above provision can be invoked to protect and enforce social security rights of asylum seekers children in the event where these are threatened or violated by state parties. Linked to the above is the right of every right to a standard of living which is adequate to cater for child`s physical, mental, spiritual, moral and social development. The primary responsibility here lies with the parents or with the other persons responsible for the child. The state`s duty, however, is to assist parents with this responsibility, within the means available , by taking measures which could include material assistance and support programmes, particularly with regard to nutrition, clothing and housing.¹⁰⁰ The state must take all appropriate measures for the implementation of the rights guaranteed in the Convention on the Rights of the child. As most of the rights listed in the Convention are economic and social rights, the state is required to take such measures only to the maximum extent possible in the light of available resources.¹⁰¹The state is, however, obliged to ensure minimum essential levels in the living standards of children and is prohibited from allowing these living standards to decrease.

Article 22 of the Convention on the Rights of the Child specifically protects the rights of children asylum seekers: State Parties shall take appropriate measures to ensure that a child who is seeking refugee status...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.¹⁰² The Committee on the Rights of the Child further recommends that States should not permit children asylum seekers to be subjected to discrimination in the enjoyment of economic, social, and cultural rights, such as access to education, health care, and social services.¹⁰³ The above referred article affirms the protection of social security and social assistance for asylum seekers children whether accompanied or unaccompanied, which

⁹⁹ Article 26.

¹⁰⁰ Article 27.

¹⁰¹ Article 34.

¹⁰² Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, (1989) UN Doc A/44/49, entered into force 2 September 1990, art 3, para 1.

¹⁰³ Committee of the Rights of the Child: Italy' (2003) UN Doc CRC/C/15/Add.198, para 21.

assistance and protection should be provided for by the State parties to the Convention on the Rights of the Child.

The Committee on the Rights of the Child (CRC) is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child by its State Parties. It also monitors implementation of two Optional Protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014.¹⁰⁴

Under normal circumstances, a young child's parents play a crucial role in the achievement of their rights, along with other members of family, extended family or community, including legal guardians, as appropriate. This is fully recognized within the Convention (especially Article 5), along with the obligation on State Parties to provide assistance, including quality childcare services (especially Article 18). The preamble to the Convention refers to the family as "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". The Committee recognizes that "family" here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests.¹⁰⁵ Asylum seekers parents, caregivers and guardians play a crucial role in the upbringing of the child.

The Committee calls on State parties to ensure that all young children (and those with primary responsibility for their well-being) are guaranteed access to appropriate and effective services, including programmes of health, care and education specifically designed to promote their well-being. Particular attention should be paid to the most vulnerable groups of

¹⁰⁴ Office of the High Commissioner for Human Rights, United Nations Human Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 19 January 2015)

¹⁰⁵ Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1. Par 15.

young children and to those who are at risk of discrimination (Article 2). This includes girls, children living in poverty, children with disabilities, children belonging to indigenous or minority groups, children from migrant families, children who are orphaned or lack parental care for other reasons, children living in institutions, children living with mothers in prison, refugee and asylum-seeking children, children infected with or affected by HIV/AIDS, and children of alcohol- or drug-addicted parents.¹⁰⁶

Young children are entitled to a standard of living adequate for their physical, mental, spiritual, moral and social development (Article 27). The Committee notes with concern that even the most basic standard of living is not assured for millions of young children, despite widespread recognition of the adverse consequences of deprivation. Growing up in relative poverty undermines children's well-being, social inclusion and self-esteem and reduces opportunities for learning and development. Growing up in conditions of absolute poverty has even more serious consequences, threatening children's survival and their health, as well as undermining the basic quality of life. States parties are urged to implement systematic strategies to reduce poverty in early childhood as well as combat its negative effects on children's well-being. All possible means should be employed, including "material assistance and support programmes" for children and families (Article. 27), in order to assure to young children a basic standard of living consistent with rights. Implementing children's right to benefit from social security, including social insurance, is an important element of any strategy (Article. 26).¹⁰⁷ This comment shows concern by the Committee for all vulnerable children including asylum seekers children.

2.4 The International Covenant on Economic, Social and Cultural Rights

Universal Declaration of Human Rights (UDHR) sets the stage for the expression of rights in modern international instruments, the ICESCR¹⁰⁸ is the most extensive manifestation of this commitment in the realm of economic, social and cultural rights. The Covenant not only lists the extensive rights which it enacts, but in many instances describes these in great deal.¹⁰⁹ The ICESCR, in its Article 9, entrenches a right to social security, recognising both the public and private components of the right. It enjoins State Parties to 'recognise the right of

¹⁰⁶ Ibid, Par 24.

¹⁰⁷ (Note 105 supra) Par 26.

¹⁰⁸ GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976.

¹⁰⁹ (Note 11 supra) 636.

everyone to social security, including social insurance'.¹¹⁰ In addition to the provisions of Article 9, ICESCR, in its Article 11(1), requires that states guarantee an adequate standard of living to everyone.¹¹¹ The right to an adequate standard of living can be interpreted to mean that a state must at the very least provide social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources.¹¹² Article 10(1) and (2) can also be read to refer to social security and assistance in specific contexts. These sections recognise the family as the natural and fundamental group unit of society, worthy of the widest possible protection and assistance.¹¹³ The right to social security in Article 9, and the other social protection-related rights in Articles 10 and 11, like the other rights found in ICESCR, are qualified by Article 2(1), which determines that they need be implemented only *progressively* and *to the maximum of available resources*.¹¹⁴ The enforcement of the rights is entrusted to a reporting system, in terms of which state parties to ICESCR have to report on a regular basis to the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR).¹¹⁵

The ICESCR accords recognition to both the public and private components of the right to social security. The State Parties to the present Covenant recognise the right of everyone to

¹¹⁰ Article 9: 'The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.'

¹¹¹ Article 11(1): 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'

¹¹² L Lamarche 'Social security as a human right' in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 126-127.

¹¹³ Article 10(1) states that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.

¹¹⁴ Article 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

¹¹⁵ See Articles 16 & 17. In the sphere of international human rights law there are two usual methods for the enforcement of state obligations. One is the reporting procedure in which states report periodically on what they have done to give effect to the rights in the relevant instrument. This is the mechanism most common to the major human rights instruments. The other mechanism is the complaint mechanism for either state or individual complaints through which a state or an individual can bring a complaint against a state party alleging a violation of the rights in the relevant instrument. See MK Addo 'Justiciability re-examined' in R Beddard & MH Dilys (eds) *Economic, social and cultural rights. Progress and achievement* (1992) 93-97-98. See also L Jansen van Rensburg 'Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid' ('The adjudication of the fundamental right to access to social security') unpublished LLD thesis, Rand Afrikaans University, 2000 6, where the distinction is drawn between adversarial adjudication (complaint) mechanisms and inquisitorial adjudication (monitoring) mechanisms on international, regional and national level with reference to the right to social security.

social security, including social insurance.¹¹⁶ The right to social security in Article 9 of ICESCR is thus not limited by an “access to” qualifier, but the Covenant’s implementation is limited by means of the fact that the rights are to be progressively implemented and that states have to report on their progress in this regard. In the absence of a complaint mechanism, there is no case law on the implementation of the Covenant.¹¹⁷ The Economic and Social Council to which state parties must report may, however, bring issues to the attention of other UN organs.¹¹⁸ Article 2(3) states that developing countries may decide on the extent to which they will award social and economic rights to non-nationals, taking into account their national economies. State parties are required to award social and economic rights to children of asylum seekers, however, States parties have discretion to determine the extent of the award based on their economic strength and their constraints.

The Committee on Economic, Social and Cultural Rights (CESCR)¹¹⁹ monitors the implementation of the ICESCR. The CESCR is composed of 18 experts, who meet twice a year for three weeks at a time. Unlike the other treaty bodies, ICESCR does not provide for the creation of a committee to oversee its implementation. Instead, the Economic and Social Council (ECOSOC)¹²⁰, the principal organ of the UN dealing with economic and social issues, was given the general mandate to monitor the implementation of the Covenant by State parties through the examination of periodic reports. ECOSOC established a working group in 1985 to assist in the examination of State reports, which subsequently became the Committee on Economic, Social and Cultural Rights in 1987. Other than this main difference, and the fact that the members of CESCR are elected through ECOSOC, there are no major differences between CESCR and the other treaty bodies in terms of their role or function. Nevertheless, there have been some attempts at the Human Rights Council to ‘rectify’ the legal status of CESCR to make it more like the other treaty bodies.¹²¹ On 10 December 2008, the General Assembly unanimously adopted the Optional Protocol to the International

¹¹⁶ Article 9

¹¹⁷ (Note 2. Supra Olivier MP)

¹¹⁸ Arts 19 and 22.

¹¹⁹ For more information: www2.ohchr.org/english/bodies/cescr/index.htm.

¹²⁰ ECOSOC, established under the UN Charter, is the principal organ of the UN which coordinates the economic, social, and related work of the UN and serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to member States and the UN system. In addition to looking at economic and social issues, ECOSOC is also mandated to ‘encourage universal respect for human rights and fundamental freedoms’.

¹²¹ For further information on discussions to rectify the legal status of CESCR, please refer to ISHR’s Daily Update of 10 December 2007, published during the 6th session of the Human Rights Council.

Covenant on Economic, Social and Cultural Rights (OP-ICESCR). This Optional Protocol will allow CESCR to receive and consider communications. It also creates an inquiry procedure. The adoption of OP-ICESCR is a significant victory after decades of campaigning and advocacy by human rights groups and academics. The Optional Protocol to ICESCR opened for signature and ratification in March 2009 and will come into force once ratified by ten States.¹²²

Although the CESCR can assist in the implementation of the Covenant from an international perspective, the ultimate effectiveness of this instrument is contingent on the measures taken by Governments to give actual effect to their international legal obligations. In this regard, the Committee has recognized the essential importance of the adoption by States of appropriate legislative measures and the provision of judicial remedies, indicating the very real legal nature of economic, social and cultural rights.¹²³ The necessity of implementing the provisions of the Covenant through domestic legislation is consistent with Article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Indeed, the Covenant often requires legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.¹²⁴

In its General Comment the Committee¹²⁵ made the following comments in relation to Article 9 of the ICESCR which provides that, 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.¹²⁶ The right to social security plays an important role in supporting the realization of many of the rights in the Covenant, but other measures are necessary to complement the

¹²² Currently, 32 States have signed the Optional Protocol and only one State has ratified it so far. Last updated 4 July 2010.

¹²³ Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights. See Craven, "The domestic application of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Review*, vol. XL (1993), p. 367

¹²⁴ Ibid.

¹²⁵ Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008). <https://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 19 January 2015)

¹²⁶ Ibid, Par 1.

right to social security. For example, “States parties should provide social services for rehabilitation of the injured and persons with disabilities in accordance with article 6 of the Covenant, provide child care and welfare, advice and assistance with family planning and the provision of special facilities for persons with disabilities and older persons (Article 10); take measures to combat poverty and social exclusion and provide supporting social services (Article 11); and adopt measures to prevent disease and improve health facilities, goods and services (Article 12). States parties should also consider schemes that provide social protection to individuals belonging to disadvantaged and marginalized groups, for example crop or natural disaster insurance for small farmers or livelihood protection for self-employed persons in the informal economy. However, the adoption of measures to realize other rights in the Covenant will not in itself act as a substitute for the creation of social security schemes.”¹²⁷ Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.¹²⁸

2.5 International Convention on the Elimination of All Forms of Racial Discrimination

The draft Declaration on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly on 20 November 1963.¹²⁹ The same day the General Assembly called for the Economic and Social Council and the Commission on Human Rights to make the drafting of a Convention on the subject an absolute priority.¹³⁰ The draft was completed by mid-1964 but delays in the General Assembly meant that it could not be adopted that year and it was finally adopted on 21 December 1965.¹³¹

In the Convention,¹³² the term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which

¹²⁷ Ibid, Par 28.

¹²⁸ Ibid, Par 38.

¹²⁹ United Nations General Assembly Resolution 1904 (XVIII), 20 November 1963. https://en.wikipedia.org/wiki/International_Convention_on_the_Elimination_of_All_Forms_of_Racial_Discrimination

¹³⁰ United Nations General Assembly Resolution 1906 (XVIII), 20 November 1963.

¹³¹ United Nations General Assembly Resolution 2106 (XX), 21 December 1965.

¹³² International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into

has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹³³ In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:¹³⁴ among others, social security and social services¹³⁵ This is the Convention which guarantees protection of asylum seekers children against all forms of discrimination from having access and enjoying social security rights and social assistance.

The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties.¹³⁶ All State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”.¹³⁷ In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints. The Committee meets in Geneva and normally holds two sessions per year consisting of three weeks each.¹³⁸ The Committee also publishes its interpretation of the content of human rights provisions, known as general recommendations (or general comments), on thematic issues and organizes thematic discussions.

force 4 January 1969, in accordance with Article 19.
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

¹³³ Art 1 of the Convention (ICERD).

¹³⁴ Art 5 of the Convention (ICERD).

¹³⁵ Art 5(e)(iv) of the Convention (ICERD).

¹³⁶ <http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx>

¹³⁷ Art 9 (1) *States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.*

¹³⁸ <http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx> (accessed 19 January 2015)

In one of the communications relevant to social security rights lodged with CERD, the petitioner claimed¹³⁹ that there was no effective remedy available to him in Australia. He claimed that the Social Security Act (1991), the Higher Education Support Act (2003), and the Australian Citizenship Act (2007) discriminated against him on the basis of his New Zealand nationality, by withdrawing entitlements to social security, and unlawfully restricting his access to education and citizenship, in breach of Articles 5(e)(iv), 5(e)(v) and 5(d)(iii), in connection with Article 2(1)(a) of the Convention. By so doing, the State party committed an act of racial discrimination against him. The State party also failed to offer him effective protection and remedies, and therefore failed to pursue without delay a policy of eliminating racial discrimination, in breach of Articles 6 and 2(1)(a) of the Convention. The Committee on the Elimination of Racial Discrimination, acting under Article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, however views, that the facts as submitted do not disclose a violation of any of the provisions of the Convention.¹⁴⁰

The Committee¹⁴¹ recalls that Article 1 of the Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The Committee also recalls Article 1, paragraph 2, which states that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to the Convention between citizens and non-citizens; as well as paragraph 3 of the same article, which provides that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The Committee underlined the complexity of the issue raised by this case, which highlighted the negative effects of the Swiss “temporary admission” status (“F” permit for foreigners) on some groups of foreigners who can also be distinguished by ethnic or national origin. Nevertheless, the Committee considered that the petitioner in this case had not

¹³⁹ *Communication No. 42/200. D.R. v Australia* opinion adopted on 14 August 2009. Par 3.

¹⁴⁰ *Ibid*, par 8.

¹⁴¹ *Communication No. 50/2012, A.M.M. v. Switzerland*, opinion adopted on 18 February 2014, para. 8.5.

unequivocally established that the discriminatory acts he attributed to the Migrant Reception Office of the Canton of Vaud and to the judicial authorities were based on his ethnic origin. The Committee was therefore not convinced that the facts before it constituted discrimination based “on race, colour, descent, or national or ethnic origin” within the meaning of article 1 of the Convention.¹⁴²

Notwithstanding the conclusion it has reached in this case, the Committee notes that the State party has itself acknowledged the adverse consequences of temporary admission status on essential areas of life for this category of non-nationals, some of whom find themselves permanently in a situation that ought to be temporary. The Committee therefore draws the attention of the State party to its obligations under the Convention and refers to its general recommendation No. 30 (2004) on discrimination against non-citizens in which, among other things, it recalls State parties’ obligation to take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.¹⁴³

2.6 Convention on the Elimination of All Forms of Discrimination against Women

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly.¹⁴⁴ It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions.¹⁴⁵ As of May 2015, 189 States have ratified or acceded to the treaty, most recently South Sudan on April 30, 2015.¹⁴⁶ In its preamble,¹⁴⁷ the Convention explicitly acknowledges that “extensive discrimination against women continues to exist”, and emphasizes that such discrimination “violates the principles of equality of rights and respect for human dignity”. As defined in article 1, discrimination is understood as “any distinction, exclusion or restriction made on the basis of sex...in the political, economic,

¹⁴² Ibid, par 8.6.

¹⁴³ *Ibid*, par 10. See also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18 (A/59/18)*, chap.VIII, para. 33.

¹⁴⁴ GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981. (South Africa ratified the Convention on 15 December 1995, without entering any reservations.)

¹⁴⁵ Introduction to the Convention. . <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

¹⁴⁶https://en.wikipedia.org/wiki/List_of_parties_to_the_Convention_on_the_Elimination_of_All_Forms_of_Discrimination_Against_Women

¹⁴⁷ Introduction to the Convention. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

social, cultural, civil or any other field". The Convention gives positive affirmation to the principle of equality by requiring State parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"(Article 3).

For the purposes of the Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁴⁸ "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:(c) To benefit directly from social security programmes;"¹⁴⁹ Generally, the exclusion of certain categories of children from social security and assistance legislation can be seen as an indirect form of discrimination on the basis of gender and asylum seeker status. These include children of asylum seekers. In this regard, recommendations made by the CEDAW Committee are useful in the process of interpreting and applying CEDAW rights.

The Committee on the Elimination of Discrimination against Women (CEDAW)¹⁵⁰ is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW Committee consists of 23 experts on women's rights from around the world. Countries who have become party to the treaty (States parties) are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form

¹⁴⁸ Article 1 of the Convention (CEDAW).

¹⁴⁹ Article 14(2)(c) of the Convention. (CEDAW).

¹⁵⁰ *Article 17 (1) of the Convention. (CEDAW).* For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a [Committee on the Elimination of Discrimination against Women](#) (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

of concluding observations.¹⁵¹In accordance with the Optional Protocol to the Convention,¹⁵² the Committee is mandated to: (1) receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention to the Committee and (2) initiate inquiries into situations of grave or systematic violations of women's rights. These procedures are optional and are only available where the State concerned has accepted them. The Committee also formulates general recommendations and suggestions. General recommendations are directed to States and concern articles or themes in the Conventions.¹⁵³

In a statement made, the Committee recalls¹⁵⁴ that States parties are bound to uphold the rights of women and girls who are asylum seekers, refugees or stateless so that they have access to food, housing, water, sanitation, health services including sexual and reproductive services, education, economic activities, and can escape poverty as well as gender-based violence including domestic violence. States parties should particularly ensure decent conditions of living for asylum seekers and refugees in camps and other places where they are being hosted. The Committee also calls on States parties to fully respect the rights of women and girls during the entire asylum-seeking process and to fully integrate a gender-sensitive approach in the implementation of national legislation on asylum, in particular regarding the special claims for asylum that women and girls may have due to their exposure to discrimination and/or violence in their country of origin and/or during their flight¹⁵⁵

2.7 Treaties in the area of the protection of refugees and stateless persons

There are several treaties in the area of the protection of refugees. Some of these treaties deal with social security issues. The UNHCR, the principal United Nations agency concerned with refugees,¹⁵⁶ was given responsibility for giving effect to Article 14(1) of the Universal

¹⁵¹ Article 18 of the Convention.

¹⁵² Article 2 of Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁵³ Article 21 of the Convention.

¹⁵⁴ Statement of the Committee on the Elimination of Discrimination against Women (CEDAW) on the refugee crises and the protection of women and girls Adopted on 20 November 2015 during its sixty second session. <http://tbinternet.ohchr.org/Treaties/CEDAW> (accessed 19 January 2015)

¹⁵⁵ Ibid., 2.

¹⁵⁶ United Nations General Assembly Resolution (UNGA) 428 (V); P Mtshaulana *et al*, Documents on International Law (1996) 258.

Declaration of Human Rights,¹⁵⁷ which provides that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’ and the 1967 United Nations Declaration on Territorial Asylum.¹⁵⁸ These are the Convention Relating to the Status of Refugees (Refugees Convention),¹⁵⁹ the Protocol Relating to the Status of Refugees,¹⁶⁰ the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families¹⁶¹ and the Convention Relating to the Status of Stateless Persons (Stateless Persons Convention).¹⁶²

Both the Refugees Convention and the Stateless Persons Convention not only prohibit discrimination against refugees or other non-nationals on the basis of their status, but also require state parties to provide certain positive benefits to refugees on a par with nationals. An example is Article 20 of the Refugees Convention that requires that where a rationing system exists for products in short supply for the population at large, refugees should be accorded the same treatment as nationals.¹⁶³ Under Article 24 of the Refugees Convention, state parties are obliged to provide the same treatment as they provide to their own nationals in respect of social security, subject to stated limitations.¹⁶⁴ In terms of Article 24 of the Refugee Convention the Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of, among others, social security and extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

2.8 Social security rights of asylum seekers’ children under the African human rights system

¹⁵⁷ UNGA Res 217A (III) of 10 December 1948 (1); Mtshaulana *et al* (*note 156 supra*) 172.

¹⁵⁸ UNGA Res 2312 (XXII) of 14 December (1976); Mtshaulana *et al* (*note 156 supra*) 261.

¹⁵⁹ 189 UNTS 150, entered into force 22 April 1954 (South Africa acceded on 12 January 1996).

¹⁶⁰ 606 UNTS 267, entered into force 4 October 1967 (South Africa acceded on 12 January 1996).

¹⁶¹ GA Res 45/158, Annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990), entered into force 1 July 2003. Not yet signed or acceded to.

¹⁶² 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to.

¹⁶³ Article 20: ‘Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.’

¹⁶⁴ Article 24 of the Convention.

The Organisation of African Unity (OAU), created in 1963, had as its primary goal the protection of sovereignty and non-interference in domestic affairs for those states that had already gained independence and the liberation of those yet to gain independence.¹⁶⁵ Given this preoccupation with sovereignty, it is unsurprising that the language of human rights and the potential scrutiny which rights protection entailed were almost entirely absent from the organisation's diction,¹⁶⁶ the only exception in this regard being the use of the language of human rights in the battle against the elimination of racial discrimination and oppression and the fight for self-determination from colonial rule. Equally unsurprising, given the organisation's primary goals, was the blind eye turned to abuses committed by newly-independent African states against their own citizenry, particularly in the period between the 1960s and 1980s.¹⁶⁷

The first proposal for the adoption of an African human rights instrument predated the establishment of the OAU by two years. However, it took two more decades, punctuated by sporadic calls made at a number of conferences and seminars organised primarily under the auspices of the United Nations (UN) and the International Commission of Jurists, for the African human rights system to come into being.¹⁶⁸ Nevertheless, by the mid-1960s, African states began to contemplate the creation of a human rights mechanism for Africa as a means of holding minority regimes in Southern Africa accountable for abuses committed there. However, it was only at the 16th ordinary session of the Assembly of Heads of State and Government of the OAU, held in Monrovia, Liberia from 17-20 July 1979, which a decision on human rights and peoples' rights was adopted. In this decision, the Assembly of Heads of State and Government of the OAU called on the Secretary-General to organise a meeting of qualified experts to prepare a preliminary draft of an African Charter, providing

¹⁶⁵ See in general on the OAU, sovereignty and non-interference in domestic affairs, AB Akinyemi 'The OAU and the concept of non-interference in the internal affairs of member states' (1972-1973) 46 *British Yearbook of International Law* 393; O Okongwu 'The OAU Charter and the principles of domestic jurisdiction in intra-African affairs' (1973) 13 *Indian Journal of International Law* 589; and UO Umozurike 'The domestic jurisdiction clause in the OAU Charter' (1979) 78 *African Affairs* 197.

¹⁶⁶ This position is also reflected in the OAU's founding document, the OAU Charter, 25 May 1963, 479 *UNTS* 39.

¹⁶⁷ Some of the most notorious examples in this regard can be found in relation to Uganda under Idi Amin, Equatorial Guinea under Macias Nguema and Jean Bédél-Bokassa's Central African Republic.

¹⁶⁸ On the background to the adoption of the African Charter, see E Kannyo 'The Banjul Charter on Human and Peoples' Rights: Genesis and background' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 140.

inter alia for the establishment of bodies to promote and protect human rights.¹⁶⁹ Two years and several meetings as well as draft instruments later, the Assembly of Heads of State and Government adopted the African Charter on Human and Peoples' Rights (African Charter), thus ushering in the African human rights system.¹⁷⁰

2.9 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was approved by the Organisation of African Unity in 1981 and came into force in 1986,¹⁷¹ following the growing trend in the international community of states towards the regional development, protection and adjudication of international human rights standards.¹⁷² The African Charter contains many of the basic civil, social, economic and cultural rights¹⁷³ and although inspired by various other international instruments, the Charter retained a distinctive African character. The African Charter recognises socio-economic rights in a unique way by referring to economic development within the context of group solidarity.¹⁷⁴ It must, however, be stressed that compared to other international¹⁷⁵ and regional instruments,¹⁷⁶ little mention is made of and little emphasis is placed on socio-economic rights in the Charter.¹⁷⁷ In this regard, it is argued that the absence of a detailed list and description of socio-economic rights in the Charter is owed to the fact that since many African states were already parties to the Covenant on Economic, Social and Cultural rights, an exhaustive treatment of socio-economic rights at the regional level was hardly necessary.¹⁷⁸ The Charter does not

¹⁶⁹ Decision 115(XXVI) Rev 1 AHG/115(XVI).

¹⁷⁰ As of July 2013, the African Charter had been ratified by 53 of the 54 member states of the AU. Only South Sudan is yet to ratify this instrument.

¹⁷¹ CA Odinkalu and Christensen C "The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures" 1998 Human Rights Quarterly 235-280.

¹⁷² L Lindholt. Questioning the University of Human Rights (Dartmouth 1997)3-10. (as referred to by Olivier MP note 11 supra, page 632.)

¹⁷³ CE Welch "The African Commission on Human and Peoples' Rights: a five year- report and assessment" 1992 Human Rights Quarterly 43 45.

¹⁷⁴ BO Okere "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American System" 1984 Human Rights Quarterly 141.

¹⁷⁵ Such as the ICESCR

¹⁷⁶ Such as the European Social Charter.

¹⁷⁷ Oloka-Onyango "Struggle for Economic and Social Rights" 1995 26 California Western International Law Journal 1-64 35.

¹⁷⁸ (Note 174 supra) 141.

guarantee the right to social security directly.¹⁷⁹ Rather, indirect reference is made to the rights which can be regarded as specific contingencies of social security, such as Articles 16 and 18. Article 16 states that every individual shall have the right to enjoy the best attainable state of physical and mental health and that the state Parties are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.¹⁸⁰ Article 18(1) places a duty on the state-parties to protect the family as the natural unit and basis of society and to protect the physical health and morale of the family. Article 18(3) provides that the State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

It is clear from the above that Africa, as a continent, has a unique way of addressing social rights and specifically social security rights. Great emphasis is placed on the duties imposed on the family and the community in the social protection of the neediest. This is apparent from the obligation placed on the individual to maintain his or her parents, should there be a need to do so.¹⁸¹ Cobbah¹⁸² describes the existence of the individual within the African community as follows: “I am because we are, and because we are therefore I am.”¹⁸³ This implies that the duty to provide social protection is not the duty of the state alone but also the duty of the individual, as a member of society. The three main avenues of enforcing the Charter provisions are state reporting,¹⁸⁴ interstate complaints¹⁸⁵ and individual complaints.¹⁸⁶ State Parties have to submit bi-annual reports to the African Commission on

¹⁷⁹ (Note 172 supra) 217.

¹⁸⁰ Article 16, which guarantees the right to “*the best attainable state of mental and physical health*”, has been considered by the African Commission of Human and Peoples’ Rights in *World Organisation against Torture, Lawyers’ Committee for Human Rights and Others v Zaire Communications* 25/89; 47/90; 100/93 (consolidated suits) (19th Session of the African Commission - April 1996). In its decision, the Commission gave a generous interpretation to the right to health, holding that it places a duty on the government of Zaire to “*provide basic services such as safe drinking water and electricity*”, in addition to its basic obligation to supply adequate medicine.

¹⁸¹ Articles 29(6). See also Benedek Peoples’ Rights and Individuals’ Rights as Special features of the African Charter 86. This is in an indication of the subsidiary nature of social assistance As part of a social security system.

¹⁸² JAM Cobbah “African values and the human rights debate: An African perspective” 1987 Human Rights Quarterly 309.

¹⁸³ In the South African context, this is known as the principle of *ubuntu*.

¹⁸⁴ Articles 62.

¹⁸⁵ Involving complaints by one state party to the Charter that another has violated the Charter provisions.

¹⁸⁶ Article 55 of the African Charter on Human and Peoples’ Rights.

Human and Peoples' Rights (the Commission). In their reports, states must describe the 'legislative and other measures' they have taken to give effect to all the rights in the Charter.

2.10 The Commission

The African Charter lists amongst the activities falling within the Commission's promotional mandate the collection of documents; the undertaking of studies and researches; the organisation of seminars, symposia and conferences; the dissemination of information; encouraging national and local institutions concerned with human and peoples' rights and, should the case arise, making recommendations to governments; the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms; and co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.¹⁸⁷ The Commission's Rules of Procedure augment this list with the inclusion of the function of the examination of state party reports which, in terms of Article 62 of the African Charter, are to be submitted by state parties every two years, detailing 'the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'. In fulfilment of its promotional mandate in respect of asylum seekers and refugees, the African Commission has taken a number of measures with varying levels of success, many of its efforts in this regard being hamstrung by institutional weaknesses.

In February 1994, the African Commission convened a seminar entitled 'The Protection of African Refugees and Internally-Displaced Persons' in Harare, Zimbabwe,¹⁸⁸ which concluded that the 'plight of African refugees and internally-displaced persons is a flagrant violation of human dignity and basic human rights' and further highlighted the threat which their plight poses to 'orderly and peaceful development in African countries'. However, beyond accentuating the plight of refugees on the continent and making a number of recommendations of which only a handful actually came to fruition, nothing more came of this seminar. Nevertheless, it heralded the start of dialogue between various institutions involved in refugee protection on the continent. Thus, in November 1999, discussions were

¹⁸⁷ *Articles 45(1)(a), (b) & (c) African Charter.*

¹⁸⁸ See Conclusions of the Seminar on Protection of African Refugees and Internally-Displaced Persons Held in Harare 16-18 February 1994, as reprinted in 7th Annual Activity Report of the African Commission 1993-1994; also reprinted in (1994) 4 *Review of the African Commission on Human and Peoples' Rights* 168 and C Heyns (ed) *Human rights law in Africa* (1999) 335.

convened between the UNHCR and the African Commission at the Commission's 26th session, as to co-operation between the two institutions, ultimately leading to the signing in May 2003 at the Commission's 33rd ordinary session in Niamey, Niger of a memorandum of understanding. This memorandum had as its aim the more effective promotion and protection of the rights of asylum seekers, returnees and other persons of concern to both institutions.¹⁸⁹ Ten years after the signing of this document, it would, however, appear that little progress has been achieved. Further in fulfilment of its promotional mandate, the African Commission has over the years adopted a number of country-specific as well as thematic resolutions touching specifically on refugees and displaced persons - drawing attention to their plight as well as singling them out within the context of special measures of protection for vulnerable groups.¹⁹⁰ However, without a mechanism to follow up on recommendations made within the context of resolutions adopted by the Commission, their practical effect has been negligible.

With regard to the State Party reporting procedure, the African Commission has in the last nine years highlighted in a relatively small number of its concluding observations that have been made public, areas of concern as well as the need for action in respect of the protection of the rights of asylum seekers and refugees.¹⁹¹ Thus, in respect of the first periodic report by South Africa, the Commission urged the government to 'take appropriate administrative measures to ensure the speedy consideration of the applications for asylum seekers'.¹⁹² In relation to the periodic report of Sudan, a recommendation was made that the government 'ensure that measures are taken for specific protection of the rights of the

¹⁸⁹ Art 1 Memorandum of Understanding.

¹⁹⁰ See eg Resolution on Human and Peoples' Rights Education, *ACHPR/Res.6(XIV)93* ; Resolution on the Human Rights Situation in Africa, *ACHPR/Res.14(XVI)94* ; Resolution on Sudan, *ACHPR/Res.15(XVII)95* ; Resolution on Burundi, *ACHPR/Res.24(XIX)96*; Resolution on the Observance of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugees in Africa (1999), *ACHPR/Res.43(XXVI)99*; Resolution On Darfur, *ACHPR/Res.68(XXXV)04*; Resolution on Migration and Human Rights, *ACHPR/Res.114(XXXII) 07*; Resolution on the Human Rights Situation in Côte d'Ivoire, *ACHPR/Res.182(EXT.OS/IX)2011*; Resolution on the Situation of the North of the Republic of Mali, *ACHPR/Res.217(XXXXXI)2012*; and Resolution on the Right to Nationality, *ACHPR/Res.234(2013)*.

¹⁹¹ The increased prominence accorded to this issue coincides with the appointment by the African Commission of a Rights of Refugees, Asylum Seekers and IDPs (see the discussion in respect of the Special Rapporteur below).

¹⁹² See para 26 of the Concluding Observations, 38th ordinary session of the African Commission, 21 November to 5 December 2005, Banjul, The Gambia.

refugees and displaced persons in Sudan'.¹⁹³ In commenting on a subsequent report submitted by Sudan, the Commission further expressed concern at the failure to integrate as 'full citizens' into Sudanese society, more than 1 million refugees, the vast majority of whom had been in the country since the 1960s.¹⁹⁴ With regard to Ethiopia, the Commission addressed the issue of unaccompanied and separated children, recommending that the authorities 'take all measures to guarantee the protection of minor refugees in line with the provision of the African Charter and international refugee laws'.¹⁹⁵ It further recommended that the Ethiopian government 'take the necessary steps to address through legislative measures concerns regarding ... refugee children ...'.¹⁹⁶ In respect of Mauritius, the Commission expressed concern at the fact that no provision had been made for the 'granting of asylum or refugee status in accordance with the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol' in Mauritian law.¹⁹⁷ To remedy this, the Commission recommended that measures be taken, including the enactment of laws providing for the protection of refugees.¹⁹⁸ With regard to Angola, the Commission recommended the expedition of the 'process to finalise the study and review of the Law on the Status of Refugees by the Inter-Sectoral Commission in order to guarantee the rights of refugees in Angola'.¹⁹⁹ With respect to Rwanda, the Commission noted that measures taken to facilitate the return of refugees and displaced persons to their original places of residence were 'insufficient'.²⁰⁰ In this regard, the Commission recommended that the state take measures to guarantee the effective protection of returning refugees and displaced persons, by according them equal rights in all areas including economic and social rights, without

¹⁹³ The Sudanese report was presented to the 35th ordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 21 May to 4 June 2004 (see para 27).

¹⁹⁴ Para 39 Concluding Observations and Recommendations on the 3rd Periodic Report of the Republic of Sudan (2003-2008), 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

¹⁹⁵ See para 69 of the Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, 47th ordinary session of the African Commission, 12-26 May 2010, Banjul, The Gambia

¹⁹⁶ n 105 above, para 71.

¹⁹⁷ See para 41 of the Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

¹⁹⁸ n 107 above, para 60.

¹⁹⁹ See para 41 XXII of the Concluding Observations and Recommendation on the 2nd, 3rd, 4th and 5th Cumulative Periodic Reports of the Republic of Angola, adopted at the 12th extraordinary session of the African Commission, 30 July- 4 August 2012.

²⁰⁰ Para 24 Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Rwanda, 36th ordinary session, 23 November to 7 December 2004, Dakar, Senegal.

discrimination, thereby allowing their social re-insertion or reintegration which should lead to genuine national reconciliation.²⁰¹

The Commission similarly expressed concern at the insufficiency of measures for the repatriation of refugees, the resettlement of IDPs and secure reception centres for displaced persons in Côte d'Ivoire.²⁰² In relation to the initial report of the Republic of Kenya, the African Commission noted its concern at the closing of the borders with Somalia as well as reports of violations of the principle of non-refoulement.²⁰³ Finally, in a handful of reports, the Commission lamented the absence of information in respect of asylum seekers and refugees.²⁰⁴ These comments represent an important shift in focus on the part of the Commission and would appear to signal a greater willingness to engage with states on the issue of the protection of asylum seekers and refugees. However, there are a number of factors which operate in order to diminish the effectiveness of the Commission's recommendations in respect of state party reports. The first of these is the lack of state compliance with regard to its reporting obligations, with only eight out of 53 states having complied with all its periodic reporting obligations and a further 11 countries having never submitted a report as at October 2012.²⁰⁵

Furthermore, the fact that the Commission's concluding observations have not been well or uniformly publicised means that it is very difficult to ascertain the true extent to which the Commission is prioritising refugee rights. The lack of publication in this regard also makes it difficult for any possible domestic pressure and follow-up to occur in instances where the

²⁰¹ note above, para 32.

²⁰² See para 54 of the Observations Finales sur le Rapport Périodique Initial et Cumulé de la République Côte d'Ivoire, 52nd ordinary session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012.

²⁰³ See para 23 of the Concluding Observations, adopted at the 41st ordinary session of the African Commission, 16-30 May 2007, Accra, Ghana.

²⁰⁴ See, in this regard, para 21 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Report of the Arab Republic of Egypt, 37th ordinary session, 27 April-11 May 2005, Banjul, The Gambia; para 35 of the Concluding Observations of the African Commission on the 3rd Periodic Report of the Republic of Uganda, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia. Also see part V paras (o) and (q) and para 22 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Reports of the Republic of Burkina Faso, adopted at the 35th ordinary session of the African Commission, 21 May-4 June 2004, Banjul, The Gambia.

²⁰⁵ See Combined 32nd and 33rd Activity Reports of the African Commission on Human and Peoples' Rights, para 16.

Commission has made recommendations affecting the rights of asylum seekers and refugees. Finally, the lack of visible follow-up on its own concluding observations, in spite of the rather vague provisions of the Commission's 2010 Rules of Procedure, which stipulates that Commission members are to follow up on concluding observations 'within the framework of their promotion activities to the states parties concerned', means that states are largely able to escape accountability in this regard.²⁰⁶

2.11 The African Commission's Special Rapporteur on the Rights of Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants

Whereas the African Commission has made some headway in respect of its protective as well as promotional mandate with regard to the rights of asylum seekers and refugees, one of the most significant developments has been the appointment in 2004 of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons.²⁰⁷ The Special Rapporteur is mandated to examine the situation of persons falling within its mandate, to 'act upon information', to undertake fact-finding missions to refugee and IDP camps, to assist states in the development of appropriate legal and policy frameworks, to raise awareness about these groups and to promote implementation of both the UN and OAU Refugee Conventions. Activities undertaken by the Special Rapporteur in fulfilment of this mandate to date have been limited, with budgetary constraints frequently cited as a reason for this. Nevertheless, the Special Rapporteur has given greater visibility to issues pertaining to asylum seekers and refugees within the African human rights system. The four Special Rapporteurs who have fulfilled this mandate up to July 2013 have issued press statements condemning violations, written to governments to enquire about specific measures taken or to be taken in respect asylum seekers and refugees, undertaken fact finding missions to Mali, Mauritania and Senegal, participated in a number of seminars and conferences and, in the case of Bahame Tom Nyanduga, the first Special Rapporteur, also

²⁰⁶ Ibid.

²⁰⁷ See Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res.72 (XXXVI). On the extension of the mandate of the Special Rapporteur, see ACHPR/Res.95 (XXXIX)06. On the appointment of Commissioner Mohamed Fayek to the position of Special Rapporteur for a two-year period commencing in November 2009, see ACHPR/Res.160(XLVI)09. On the appointment of Commissioner *Kayitesi Zainabo Sylvie* to the position as of May 2011 for a period of two years, see ACHPR/Res.180 (XLIX) 2011. Finally, on the appointment of Maya Sahli-Fadil for a two-year period as of November 2011, see ACHPR/Res.203 (2011).

participated in the drafting of an AU Convention on the Protection and Assistance of Internally-Displaced Persons in Africa.²⁰⁸

On the occasion of the World Refugee Day celebration, the African Commission on Human and Peoples' Rights, through its Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa (the Special Rapporteur), Ms Maya Sahli Fadel, joined refugees across the world and those in Africa in particular to commemorate the day.²⁰⁹ The Special Rapporteur called on African States that have not yet done so to draft domestic legislation on asylum seekers and establish national institutions to protect refugees living in their respective territories. She further called on African States to implement regional and international legal instruments which they have ratified in order to ensure greater protection of the rights of refugees.²¹⁰ The Special Rapporteur encourages countries that have extended their hospitality and solidarity to refugees living in their territories, and calls on all African States to contribute collectively to the costs relating to the accommodation of

²⁰⁸ See in this regard Report of Activities for the Inter-Session Period June-November 2006 for Commissioner Bahame Tom Nyanduga, presented to the 40th ordinary session of the African Commission on Human and Peoples' Rights, *15-29 November, 2006*, Banjul, The Gambia; Report of Intersession Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers, Migrants and IDPs in Africa to the 41st session of the African Commission on Human and Peoples' Rights, 16-30 May 2007, Accra, Ghana; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2007 to May 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May-November 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2008 to May 2009; and Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May to November 2009. Also see Report of the Activities by Commissioner Mohamed Fayek, Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period between November 2009 and May 2010 and Zainabo Sylvie Kayitesi, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons for the period between the 49th ordinary session in May 2011 and the 50th ordinary session of the African Commission on Human and Peoples' Rights. Finally, see Maya Sahli-Fadel, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons presented at the 51st ordinary session of the African Commission on Human and Peoples' Rights, 18 April to 2 May 2012 and Maya Sahli-Fadel, Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa Since its Creation, presented to the 52nd ordinary session, 9-22 October 2012.

²⁰⁹ Statement by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the Occasion of the 2014 World Refugee Day Celebration. <http://reliefweb.int/report/world/statement-special-rapporteur-refugees-asylum-seekers-internally-displaced-persons-and>

²¹⁰ Ibid.

refugees in accordance with the principle of African solidarity and international cooperation as stipulated in the OAU 1969 Convention.²¹¹ This was a call that state parties should develop legislative mechanisms for the protection and guaranteeing among others social security rights of asylum seekers children.

2.12 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child addresses various contingencies of social security. Rights of the child enjoying protection in terms of this instrument are; the rights to survival, protection and development,²¹² education,²¹³ health and health services ²¹⁴ and then right not to be exploited economically.²¹⁵ The Charter further contains a special provision, regarding the social security right of handicapped children, in Article 13.

In terms of Article 20(2) States Parties in accordance with their means and national conditions should take all appropriate measures:

- (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programme: 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 African Children's Committee, like the African Commission, has a promotional as well as a protective mandate. Whereas the African Commission has developed a relatively substantial body of jurisprudence in respect of its protection functions, the work of the 11-member African Children's Committee had until 2011 been limited to promotional activities which included the issuing of a small number of concluding observations in respect of state

²¹¹ Ibid.

²¹² Article 5

²¹³ Article 11

²¹⁴ Article 14

²¹⁵ Article 15

party reports in which the issue of asylum-seeking and refugee children was addressed. Thus, the Committee recommended in respect of Kenya that 'special measures be taken to protect refugee and displaced children'.²¹⁶ With regard to Rwanda, the African Children's Committee noted the need to improve support and facilities for foreign refugee children in Rwanda as well as returned Rwandan refugee children.²¹⁷ It also recommended that the Rwandan government ensure the best possible conditions for the return of refugee children to their country of origin.²¹⁸ *In relation to Tanzania, the Children's Committee* expressed concern at the fact that family-tracing programmes were being conducted by an NGO as well as the lack of clear and updated information, allowing for family reunification.²¹⁹ The Tanzanian government was also requested to enact legislation and establish mechanisms allowing for the implementation of the National Refugee Policy and further information was requested in relation to the manner in which children's rights were dealt with during the repatriation of Burundian refugees.²²⁰

In March 2011, the African Children's Committee handed down its first decision in *Nubian Children in Kenya v Kenya*,²²¹ a case which, whilst not directly addressing the rights of asylum seekers and refugees, nonetheless provides important guidance on issues of nationality and statelessness. This case was brought as an *actio popularis* on behalf of Nubians in Kenya who, in spite of having lived in the country for more than a century, had effectively been denied Kenyan nationality. The applicants argued that this violated a number of provisions of the African Children's Charter. The African Children's Committee concurred, finding violations of the rights of Nubian children to non-discrimination, nationality and protection against statelessness, as well as consequential violations of the rights to health and education. On the issue of statelessness, the Children's Committee emphasised in particular the negative consequences thereof on children, including the 'difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country'.²²²

²¹⁶ Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child.

²¹⁷ Recommendations par le Comité Africain D'Experts sur les Droits et le Bien Etre De L'Enfant au Gouvernement du Rwanda.

²¹⁸ Ibid

²¹⁹ Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

²²⁰ Ibid

²²¹ Communication 002/2009.

²²² Ibid, par 46.

Furthermore, the Children's Committee also noted the 'devastating' impact of the denial of nationality on the realisation of children's socio-economic rights, such as access to health care and education.²²³

2.13 African Court on Human and Peoples' Rights

As noted at the beginning of this article, the Protocol Establishing an African Court on Human and Peoples' Rights was adopted in 1998 in order to 'complement' the African Commission's protective mandate, addressing in particular the issue of the lack of legally-enforceable judgments.²²⁴ This instrument, as well as the subsequent Protocol on the Statute of the African Court of Justice and Human Rights, merging the African Court with the African Court of Justice,²²⁵ have been criticised for their failure to allow for automatic individual and NGO access - requiring states instead to make a declaration accepting the Court's jurisdiction in terms of Article 34(6). As at July 2013, only six states have made this declaration.²²⁶ As the initial cases before the African Court demonstrate, including the very first case of *Michelot Yogogombaye v The Republic of Senegal*²²⁷ in which the applicant requested amongst its prayers that the Court rule that Senegal violated the African Charter and the OAU Refugee Convention, it is likely that the African Commission will for some time yet be the primary institution through which asylum seekers and refugees will seek to have their rights vindicated.²²⁸ The willingness, however, of the African Commission to bring cases

²²³ Ibid

²²⁴ With regard to the issue of binding judgments, see article 27(1) of the Protocol which explicitly provides that, in the event of finding a violation of human and peoples' rights, the Court may make any order to remedy the violation, including the payment of compensation. Art 30 of the Protocol further provides that the '[s]tate parties ... undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

²²⁵ This instrument was adopted on 1 July 2008 in Sharm El Sheikh, Egypt.

²²⁶ These states are Burkina Faso (declaration signed on 14 July 1998 and deposited on 28 July 1998); Ghana (declaration signed on 9 February 2011 and deposited on 10 March 2011); Malawi (declaration signed on 9 September 2008 and deposited on 9 October 2008); Mali (declaration signed on 5 February 2010 and deposited on 19 February 2010); Tanzania (declaration signed on 9 March 2011 and deposited on 29 March 2010); and Rwanda (declaration signed on 22 January 2013).

²²⁷ Application 001/2008.

²²⁸ See Application 002/2011, *Soufiane Ababou v People's Democratic Republic of Algeria*; Application 005/2011, *Daniel Amare and Mulugeta Amare v Republic of Mozambique*; Application 008/2011, *Ekollo Moundi Alexandre v République du Cameroun et République Fédérale du Nigéria*; Application 012/2011, *National Convention of Teachers Trade Union v the Republic of Gabon*; *Application 002/2012, [Delta International Investments SA, Mr and Mrs AGL de Lange v The Republic of South Africa](#)*; *Application 004/2012, [Emmanuel Joseph Uko & Others v The Republic of South Africa](#)*; and *Application 005/2012, [Amir Adam Timan v The Republic of Sudan](#)*, in which

to the African Court, as illustrated by *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*,²²⁹ may, if this trend is continued, lead to cases dealing with the rights of asylum seekers and refugees to come before the Court. Similarly, the possibility of advisory opinions being sought on the rights of asylum seekers and refugees may also force the Court to confront the issue of refugees in Africa.²³⁰ If such cases were to arise, it is imperative that the Court takes a strong, courageous stance in favour of protecting the rights of some of the most vulnerable members of society.

2.14 Chapter Conclusion

In this chapter the focus was on promotion and protection of the social security rights of asylum seekers children within the international and African regional human rights systems, and the manner in which the relevant institutions charged with supervising the implementation of these treaties have interpreted the rights afforded to asylum seekers children. The treaties and committees that are relevant for provision and protection of social security and assistance rights to asylum seekers children were discussed. Such relevant committees were discussed under their own relevant founding treaties discussion.

Every child has the right to benefit from social security, including social insurance, and the state should take all necessary measures to achieve full realisation of this right in accordance with national law. Social security benefits should be granted, taking available resources and the circumstances of the child, as well as those of the persons responsible for the maintenance of the child, into account.²³¹ The above provision can be invoked to protect and enforce social security rights of asylum seekers children in the event where these are

the Court held that it did not have jurisdiction due to the fact that the respondent states in question had not made a declaration recognising the right to individual petition provided for in art 34(6) of the African Court Protocol . Similarly, the request for provisional measures in Application 007/2012, [Baghdadi Ali Mahmoudi v The Republic of Tunisia](#), was also rejected for failure on the part of the Tunisian authorities to have made the declaration in terms of art 34(6).

²²⁹ Application 004/2011. This case was brought by the African Commission to the African Court after 'successive complaints' had been submitted to it alleging serious and widespread violations of human rights by the government of Libya.

²³⁰ As of July 2013, four advisory opinions had been sought by Libya (Request 002/2012); Mali (Request 003/2012); the Socio-Economic Rights and Accountability Project (SERAP) (Request 001/2012); the Pan-African [Lawyers Union \(PALU\)](#); and the Southern Africa Litigation Centre (SALC).

²³¹ Article 26.

threatened or violated by state parties. The Committee on the Rights of the Child shows concern for all vulnerable children including asylum seekers children and therefore call upon state parties to protect asylum seekers children.²³²

In the African Charter on Human and Peoples' Rights indirect reference is made to the rights which can be regarded as specific contingencies of social security, such as Articles 16 and 18. The African Charter on the Rights and Welfare of the Child dealt with various contingencies of social security. This included the rights to survival, protection and development,²³³ The social security rights of asylum seekers children are guaranteed by the both international and regional instruments, what is required is compliance by the state parties towards realisation of these rights. The main purpose of this chapter has, therefore, been to establish the international and regional standards set for required guarantees by national states. The next chapter examines what legal framework exists in South Africa to realize social security rights, including social assistance, in relation to children of asylum seekers.

CHAPTER 3

REGULATORY FRAMEWORKS OF SOCIAL SECURITY AND ASYLUM SYSTEMS IN SOUTH AFRICA: AN ASSESSMENT OF SOUTH AFRICA'S LEGISLATIVE COMPLIANCE WITH ESTABLISHED INTERNATIONAL STANDARDS

3.1 Introduction

The previous chapter focused on an overview of the extent to and manner in which the rights to social security and assistance for asylum seekers' children are entrenched in international and regional instruments, and explored the treaty based bodies that monitor the enforcement and realization of such rights within the international human rights system. This chapter is intended to provide an assessment as to what legal framework does South Africa have to realize social security rights, including social assistance, in relation to children of asylum seekers. The main argument in this chapter is the legal exclusion of asylum seekers' children from social assistance benefits and in particular, children social grants, due to the status of their parents as asylum seekers in South Africa. The chapter presents a historical background and development of social security and asylum systems, and then gives an

²³² Article 22

²³³ Article 5

overview of the legislative environment on social security and assistance in relation to asylum seekers' children in South Africa.

3.2 Historical development of social security and asylum systems

During Apartheid, the Act relating to the entry of foreigners into South Africa was the Aliens Control Act.²³⁴ The very name itself "Control Act" informs that the primary aim of government at the time was to control the entry of aliens into the country.²³⁵ It was however very evident that the South African Government's policy before 1994 was largely race-based. Its immigration policy was a blatant and unashamed instrument of white racial domination or supremacy²³⁶. Section 4 (1) of the Aliens Control Act stated unambiguously that a person could only immigrate to South Africa if that person's habit of life is suited to the requirements of South Africa. The official definition of an immigrant was therefore that he or she had to be able to be assimilated into the white population. By definition therefore Africans were not considered for immigration. This did not mean that other Africans from neighbouring countries were not allowed into South Africa. However, their entry was highly restricted and they were solely allowed to enter as migrants labourers²³⁷.

Before 1994 these foreign workers were recruited under agreements²³⁸ between the employing organisation, which in most cases were the big mining conglomerates, and the governments of the supplying countries. Contracts were usually of a limited duration (two years) and upon completion thereof the migrants were transported back to their countries of origin as a group. Foreign workers were not allowed to bring in their families while in South Africa and their movement was restricted to the area of work. (Farms or mines) Most of the neighbouring countries were suppliers of labour to South Africa.²³⁹ These workers were

²³⁴ Aliens Control Act 96 of 1991 as amended.

²³⁵ Fatima Khan 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' Paper drafted for discussion on Patterns on policies of migration Loreto, Italy 3rd October 2007, page 2.

²³⁶ Jonathan Crush: South Africa: New Nation, New Migration Policy? <http://www.queensu.ca/samp>

²³⁷ Kenneth Christie: Security and forced migration concerns in South Africa: African Security Review Volume 6, No1, 1997 at <http://www.iss.co.za> (accessed on 19 January 2015)

²³⁸ Jonny Steinberg: A mixed reception; Mozambican and Congolese Refugees in South Africa : Monograph No 117, June 2005. <http://www.iss.co.za> (accessed 19 January 2015)

²³⁹ Hania Zlotnik : Migrants' Rights, Forced Migration and Migration Policy in Africa. Paper prepared for African Migration in Comparative Perspective, Johannesburg South Africa , June 2003.

undocumented migrants and severely restricted and without a doubt a source of cheap labour for the mines and farms. Most African countries discontinued this labour supply upon independence.²⁴⁰ The approximately 350 000 Mozambicans displaced by civil war were allowed to enter South Africa in the 1980's, but they never received formal recognition as refugees from the South African government.²⁴¹ In terms of the Aliens Control Act, there was no provision that catered reception of asylum seekers and refugees in South Africa.

The movement of persons into the Southern African region, and specifically South Africa, is also nothing new. Persons have sought a home in South Africa as a result of religious and political persecution, war, famine and economic hardship for many years. As South Africa moved out of its international isolation in 1990, it became apparent that the steady flow of persons across Mozambique's borders into South Africa would have to be dealt with.²⁴² South Africa entered into an agreement with Countries whose populations seek asylum in South Africa and the UNHCR to deal with the issue of the voluntary repatriations of Mozambicans from South Africa. In 1995, South Africa became a party to the 1951 Convention, the 1967 Protocol, and the 1969 Organization of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa ('the 1969 OAU Convention').²⁴³ At this time, South Africa had no specific legislation giving effect to the obligations contained in these conventions. It was only in 1998 that provisions were made for these obligations in the Refugees Act 130 of 1998 ('the Refugees Act'), which came into force on 1 April 2000. Before this statute was enacted, persons seeking asylum and refugee status in South Africa were dealt with under the Aliens Control Act 96 of 1991, which was repealed by the Immigration Act 13 of 2002 ('the Immigration Act').²⁴⁴

The Refugees Act and the Immigration Act are the main Acts in South Africa regulating, among other things, the entry, the stay and the documentation of non-nationals in the Republic. These two pieces of legislation, however, differ in scope. Immigration law is ruled by the principles of sovereignty, where every state is free to design and implement its own immigration policies, while refugee law is characterised by various international obligations

²⁴⁰ Note 238 supra)

²⁴¹ Ibid

²⁴² Murray C. 'Mozambican refugees: South Africa's responsibility' (1986) 2 SAJHR 154; Faris JA 'Angolan refugees and South Africa' (1976) 2 SAYIL 176 at 185.

²⁴³ Ibid, 186

²⁴⁴ Ibid.

based on international human rights law.²⁴⁵ The Refugees Act is the primary piece of legislation that ensures the safety, well-being and dignity of asylum seekers and refugees. It provides for the reception into the country of asylum and regulates the application for and recognition of refugee status.²⁴⁶ In matters concerning asylum seekers and refugees, immigration laws and policies should not be given priority over the rights of asylum seekers and refugees. The integrity of the legal regime underpinning refugee protection would be at risk if asylum policies were considered a sub-set of migration management strategies that are governed by security concern.²⁴⁷ In South Africa, an asylum seeker is a person who has lodged or intends to lodge an asylum application with the Department of Home Affairs and who is awaiting a decision on his or her asylum claim that will either be granted or denied.²⁴⁸ A further requirement is that the applicant must not be disqualified in terms of Section 4 of the Refugees Act or the 1951 Convention.²⁴⁹ Asylum seekers are protected under the umbrella concept of a refugee even though they are not expressly included in the definition. Therefore, the term refugee also covers asylum seekers as long as their application for asylum has not been rejected.²⁵⁰ Asylum seekers and refugees may be protected by the law, but the legal position or status of asylum seekers is more unsteady than that of recognised refugees. The main goal of asylum seekers is to be granted asylum.²⁵¹ The concepts of refugee and asylum are complementary, that is, the one does not exist without the other.²⁵² It must be noted that refugees are not stateless persons, they have nationality. The only thing refugees lack is the protection of their country of nationality or origin. Amongst asylum seekers are children and some of these children are born in South Africa in the process of sojourning while awaiting the outcome of their parents' application for recognition as refugees in South Africa.

The current formal South African social security system developed mainly as a result of Western European influence imported through Colonialism and as a result of the influx of

²⁴⁵ Nathwani Refugee and Human Rights: Rethinking Refugee Law 2.

²⁴⁶ Refugees Act, sec 1

²⁴⁷ Van der Klaauw 2009 Refugee Survey Quarterly 60.

²⁴⁸ Refugees Act, sec 1

²⁴⁹ S 4 of the Refugees Act as amended by s 5 of the Refugees Amendment Act 2008 and s 2 of the Refugees Amendment Act 2011.

²⁵⁰ Council of Europe: Parliamentary Assembly "The Rights of Asylum: Issues and Problems" in Jeleff (ed) *Asylum* 95.

²⁵¹ Joshi *Protecting Human Rights of Refugees: Issues and International Intervention* 47.

²⁵² Chakrabarty *Human Rights and Refugees: Problems, Laws and Practice* 4.

foreigners during the early twentieth century with the Gold and Diamonds Rush.²⁵³The influence of the Western European social security model also influenced the social security system dramatically. The “transferability” of legal rules and institutions is always a controversial topic.²⁵⁴Nowhere is this more clearly illustrated than in the “transplanting” of the traditional Western European social security model on South African soil almost a century ago.²⁵⁵ The model as such was sufficient for the development of better social protection in Western Europe, but failed to provide adequate social protection in South Africa owing to the specific political and social climate within which it was transplanted.²⁵⁶A foreign legal system or rules can be successfully transplanted only if there is an appropriate understanding of the social and political context of the country within which it is transplanted.²⁵⁷ The traditional Western European social security model, when transplanted onto South African soil, served only a limited portion of the population and left the majority without social protection.²⁵⁸In the traditional Western European social security model, social assistance is seen as a temporary aid for assisting people until they find formal employment and receive social insurance protection.²⁵⁹ The underlying assumption of the traditional Western European model took on a different emphasis in South Africa, since social assistance benefits have become the very means of survival for a large number of people.²⁶⁰ Social assistance benefits are no longer a temporary support mechanism until people get back into the social insurance system, or until they are protected under the guise of formal employment.²⁶¹

3.3 Ratification of international treaties applicable to social-security rights and asylum seekers children in South Africa

²⁵³ Dekker, A.H. *Informal Social Security: A Legal Analysis*, LLD Thesis, University of South Africa, Published, 2005, 2. at <https://word-view.officeapps.live.com/wv/wordviewframe> (accessed 27/07/2015)

²⁵⁴ Kahn-Freund O “On Uses and Misuses of Comparative Law” *The Modern Law Review* Vol 37, No.1 (1974) 1-27.

²⁵⁵ (Note 253 supra) 2

²⁵⁶ Ibid

²⁵⁷ (Note 254 supra) 3

²⁵⁸ Ibid

²⁵⁹ W Van Ginneken *Social Security for the Excluded majority- Case Studies for Developing Countries* (1999) at 3.

²⁶⁰ International Labour Organisation (ILO) *World Labour Report* (2000) at 179. Also Van Der Merwe D “Social Welfare Law in the South African social security system” *Centre for International and Comparative Labour Law (CICLA)* Publication Series 1/99 (1999) at 4-5.

²⁶¹ (Note 253 supra) 4

Section 39(1)(b) of the Constitution of the Republic of South Africa 108 of 1996²⁶² can be considered to be the most valuable point of departure when discussing the role and influence of international law on South African human rights law and, consequently, on the right to access to social security.²⁶³ Section 39(1)(b) compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law.²⁶⁴ This “international law-friendly approach” has been followed in several constitutional and other court cases²⁶⁵ and is also in accordance with the requirements of the Constitution.²⁶⁶

A ‘treaty’, ‘convention’ or a ‘covenant’ is an international legal instrument. A treaty imposes binding legal obligations upon a State who is a party to that treaty. A State can become party to a treaty by ratifying it, which means that the State voluntarily decides to be bound by the provisions of the relevant treaty. When a State becomes party to a treaty, it is obligated under international law to uphold and implement the provisions of the relevant treaty.²⁶⁷ This implies that the domestic legislation of the State party must be in conformity with the provisions of the treaty and cannot contradict them in any way. In some cases, a State may declare a reservation to a particular article of a treaty that it has ratified. If the reservation to the relevant article is deemed admissible, then the State is no longer considered bound to fulfil that particular provision. If the reservation is found to be contrary to the spirit of the relevant treaty, however, it will be deemed inadmissible and the State will be considered bound by that particular provision.²⁶⁸

There are several reasons as to why international human rights law must be taken into account when the right to access to social security – as contained in the South African

²⁶² Hereafter referred to as the Constitution.

²⁶³ MP Olivier, *et al*, *Social Security: A legal Analysis*, 2003, 620.

²⁶⁴ The Constitution.

²⁶⁵ The following constitutional cases are some examples where the South African Constitutional Court considered binding as well as non-binding international law, when interpreting the Bill of Rights: *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin* NO 1996 1 SA 984 (CC); *S v Rens* 1996 1 SA 1218 (CC); *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC); *In re Gauteng School Education Bill* 1995 1996 3 SA 165 (CC); *The Government of the Republic of South Africa and others v Grootboom and others* 2000 11 BCLR 1169 (CC) par 26.

²⁶⁶ (Note 263 supra) 621

²⁶⁷ Simple Guide to the UN Treaty Bodies International service For Human Rights. www2.ohchr.org/english/bodies/treaty/index.htm. (accessed 19 January 2015)

²⁶⁸ *Ibid*.

Constitution – is interpreted. Among others, South Africa has indicated its intention to become a party to, and to be legally bound by, the obligations imposed by relevant international treaties.²⁶⁹ Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.²⁷⁰ The international Conventions applicable to social security rights that have been ratified by South Africa are: the United Nations Convention on the Rights of the Child;²⁷¹ the Convention on the Elimination of all forms of Discrimination Against Women;²⁷² and the African Charter on Human and Peoples' Rights;²⁷³ and the African Charter on the Rights and Welfare of the Child.²⁷⁴ On 12 January 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁷⁵ The provisions of these instruments in relation to asylum seekers and children thus form part of the part of the South African Law, and enforceable in the domestic courts.

3.4 Social security rights and asylum seekers children under the South African Constitution

The Constitution²⁷⁶ of the Republic of South Africa provides that everyone has the right to have access to social security including, appropriate social assistance for those who are unable to support themselves and their dependants.²⁷⁷ The State has a further obligation to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right.²⁷⁸ Children, like adults have the right of access to social

²⁶⁹ (Note 263 supra) 621

²⁷⁰ Office of the High Commissioner for Human Rights, United Nations Human Rights. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw> (accessed 19 January 2015)

²⁷¹ Adopted by General Assembly Resolution 44/25 of 20 November 1989; entered into force on 2 September 1990. South Africa signed the document on 29 January 1993 and ratified it on 15 December 1995.

²⁷² Entered into force on 18 December 1979. South Africa signed the document on 29 January 1993 and ratified it on 16 December 1995.

²⁷³ Adopted on 27 June 1981 and entered into force on 21 October 1986. South Africa acceded on 9 July 1996.

²⁷⁴ South Africa signed the document on 10 October 1997 and ratified it on 7 January 2000.

²⁷⁵ ESR Review Vol 16 No. 1 2015

²⁷⁶ The Constitution of the Republic of South Africa, Act 108 of 1996.

²⁷⁷ S 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

²⁷⁸ S 27(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

security. The Constitution²⁷⁹ also affords children the right to social services. The right is entrenched in a cluster of other child economic and social rights found in section 28(1)(c) of the Constitution. This section provides that, every child has the right to basic nutrition, basic healthcare services and social services.

Section 28 of the Constitution²⁸⁰ deals specifically with the fundamental rights of children. Section 28 defines “child”, for purposes of section 28, as a person under the age of 18 years. Whereas a “right of access” if granted to other socio-economic rights,²⁸¹ subject to progressive realization by the state within its available resources, the rights pertaining to children do not have any such limitations. This regulation confirms and accepts that children are a particularly vulnerable group, which requires special protection and a different approach.²⁸² The above provision refers to anyone under the age of 18 years as a child regardless of birth or nationality. Therefore, the definition of a child includes children of asylum seekers in South Africa. Asylum seeking children are defined as a particular group of vulnerable persons as children below the age of eighteen years who have crossed an international border in search of safety, and refugee status, in another country.²⁸³ Due to the age and vulnerability of this group South Africa has international and constitutional obligations to provide special protection and consideration to such children as asylum seekers. Section 28(2) of the constitution confirms that a child’s best interests are of paramount importance in every matter concerning the child. The following core rights are granted to children in terms of constitution:

- a) The right to family care or parental care, or to appropriate alternative care when removed from the family environment;²⁸⁴
- b) The right to basic nutrition, shelter. Basic health care services and social services;

²⁷⁹ The Constitution of the Republic of South Africa Act 108 of 1996.

²⁸⁰ Constitution of the Republic of SA 108 of 1996

²⁸¹ Contained in s 27, and subject to the “internal limitation” that the state must take reasonable legislative and other measures, within its available resources, to progressively achieve the realization of these rights. See eg, Cockrell in Mokgoro and Tlakula (eds) Bill of Rights Compendium 3E16.

²⁸² Cassiem and Streak Budgeting for Child Socio Economic Rights: Government’s Obligations and the Child’s Right to Social Security and Education 31 conclude that the child specific socio-economic rights found in s 28 thus entail that: “The state has the duty to allocate resources so that child socio-economic rights can be realized immediately and not progressively... The allocation of scarce resources to poor children should be prioritized over allocations to all categories of poor people”. See also Malherbe in Olivier, Smit and Kalula (eds) Social Security: A Legal Analysis 380.

²⁸³ (Note 73 supra) 4.

²⁸⁴ In *Jooste v Botha* 2000 2 SA 199(T)

- c) The right to be protected from maltreatment, neglect, abuse or degradation;²⁸⁵ and
- d) The right to be protected from exploitive labor practices.²⁸⁶

With the exception of the right to “social services”, all of the children’s rights referred to in section 28(1)(b) find corresponding provisions in sections 26 and 27 of the Constitution.²⁸⁷ While the term “social services” may be narrowly construed to refer to basic social welfare services delivered by the Department of Social Development (DSD), social workers and non-governmental organizations, a broader interpretation is preferable.²⁸⁸ This is consistent with international human rights law and the constitutional provision that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.²⁸⁹ Such an understanding includes all categories of social services usually provided by the state (such as health care, water delivery, sanitation, child care, social security and education) in order to ensure children’s survival and physical, mental, emotional and moral development.²⁹⁰

That the entitlement in section 28(1)(b) are “basic” (with the exception of the right to shelter and, possibly, social services), suggest that children “are to be guaranteed essential levels of health care services, food, and other social services necessary for their survival and proper development”.²⁹¹ Such provision must be delivered to all children immediately and effectively, subject only to the possibility that children’s constitution rights may be limited by a law of general application, if the limitation is considered to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁹² The rights

²⁸⁵ Socio-economic entitlements may be derived from s 28(1)(d) of the Constitution which requires children “to be protected from maltreatment, neglect, abuse or degradation”: Sloth Nielsen (2001) 17 SAJHR 210 230-231

²⁸⁶ S 28(1). See also Makiwane et al Report into the Various Social Security Aspects of Children in South Africa 1.

²⁸⁷ Liebenberg Socio-economic Rights Adjudication under a Transformative Constitution 232; Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC)(Grootboom) par 74.

²⁸⁸ S Liebenberg and B Goldblatt ‘The Interrelationship between equality and socioeconomic rights under South Africa’s transformative constitution’ (2007) 23 SAJHR 355.

²⁸⁹ S 233 of the Constitution.

²⁹⁰ (Note 287 supra) 233

²⁹¹ S 28(2). In Grootboom, the Constitutional Court disagreed that “shelter” in s 28(1) (C) represented a rudimentary form of housing, holding that it “embraces shelter in all its manifestations”: par 73.

²⁹² (Note 287 supra) 233. As a basic form of housing, Liebenberg suggests that “shelter” also fits this interpretation, although the Constitution Court in Grootboom disagreed with this notion (par 73).

accrued to children in terms of section 27 and 28 referred to above also accrue to asylum seekers children in their capacity as children.

3.5 Social security rights under relevant legislation in South Africa

3.5.1 Refugees Act 130 of 1998

Section 32 of Refugees Act²⁹³(the Refugees Act) deals with the position of unaccompanied children and mentally disabled persons. It provides that any child, who appears to qualify for refugee status, but who is found under circumstances which clearly indicated that he or she is a child in need of care, must be brought before a children's court.²⁹⁴ The court may order that such a child be assisted in applying for asylum in terms of the Refugees Act.²⁹⁵ Refugees, including children, who are within the country in accordance with an asylum-seeker permit, or who have been granted asylum in terms of the Refugees Act may continue to remain in the country (in accordance with the provisions of the Act), should they cease to be dependent due to marriage, age or cessation of dependence upon the recognized refugee. Their status would appear to be dependent upon the status they held immediately prior, for example, to marrying or becoming a major (they would either be asylum-seeker or refugees). The same position applies in the event of the death of the recognized refugee.²⁹⁶ Nothing in the Refugees Act prevents a dependent of a recognized refugee, or a person permitted to continue to remain in the country in terms of the above-mentioned provisions, from applying for recognition as a refugee in terms of the Act.²⁹⁷ The Refugee Act is silent on children of asylum seekers. However, it makes consideration for unaccompanied children and disabled persons. In the absence of any other legislation dealing with the social security rights and social assistance of asylum seekers children, the silence in respect of such in the Refugee Act means that they are systematically excluded from having access to social security and assistance in South Africa. Therefore, such exclusion is inconsistent with South African International and constitutional obligations.

²⁹³ Act 130 of 1998.

²⁹⁴ S 32(1).

²⁹⁵ S 32 (2).

²⁹⁶ S 33(2) (3).

²⁹⁷ S 33(4).Reg 16(6) of the Regulations issued in terms of s 38 of the Refugees Act deals with the formalities associated with such matter. It provides, e.g., that the withdrawal of an asylum-seekers permit of a principal applicant will not preclude the dependent from applying for asylum independently.

3.5.2 The Children's Act 38 of 2005

The Children's Act²⁹⁸ (the Children's Act) provides a number of details regarding a constitutionally acceptable manner of treating children in South Africa. It provides for partial care of children and focuses on early childhood development. It deals with children in alternative care, provides for partial care, foster care and for child and youth care Centre's and drop-in Centre's, amongst other matters. The Children's Act also confirms the paramount nature of the "best interest of the child" standard.²⁹⁹ The Children's Act states that organs of state in the national, provincial and, where applicable, local spheres of government must, in the implementation of the Act, take reasonable measures to the maximum extent of their available resources to achieve the realization of the objects of this Act.³⁰⁰ Significantly, this is a different qualification to that contained in section 27(2) of the Constitution³⁰¹ (in relation to the rights to health care, food, water and social security), which provides that states must take reasonable and other measures, within their available resources, to achieve progressive realization of the rights concerned. The implication is clear, namely that the states obligation with respect to children's entitlements (including social security-related entitlements) is even more onerous than the general obligation of the state with respect to certain socio-economic rights, particularly to social security.

The Children's Act is a far-reaching, progressive piece of legislation. In accordance with international law, it includes some specific protection for particularly vulnerable individuals and groups of children. For example, children regarded as in need of protection and care (including unaccompanied, abandoned or orphaned children)³⁰² should be brought to the attention of the relevant authorities.³⁰³ This is a step towards the child being linked to a

²⁹⁸ Act 38 of 2005.

²⁹⁹ For a practical application of the best interest of the child standard in the context of payment of death benefits to the guardian of a minor, see *Kowa v Corporate Selection Retirement Fund* unreported, case no PFA/GA/1451/2007/SM par 18 25, cited in *Mhango and Dyani* 2009 PER 10. The pension Funds Adjudicator held, in this case, that the payment of the minor child's benefit to his or her legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the guardian of the duty to take charge of his or her minor financial affairs, and the right to decide how the benefit due to the minor should be utilized in the best interests of the minor child. The adjudicator also indicates that what is actually in the best interest of a child is a question of fact in each case. See par 304 post.

³⁰⁰ S 1

³⁰¹ S 4(2). For a similar formulation, see the Older Persons Act 13 of 2006 sec 3(2).

³⁰² Constitution of the Republic of SA 108 of 1996.

³⁰³ Children's Act 38 of 2005 sec 150(1).

social worker and placed in temporary safe care (either with or without a court order).³⁰⁴ The Children's Act therefore governs the way in which unaccompanied children in need of protection and care should be treated.³⁰⁵ It also provides special protection for disabled children and those suffering from chronic illness.³⁰⁶

It appears as if the provisions of the Children's Act will similarly be significant for consideration of the provision of social security benefits to non-citizen children. No distinction is made in the Act between citizen and non-citizen categories of children and, in fact, one of the general principles of the Act promises that children will be protected from unfair discrimination of any ground.³⁰⁷ The implication of this is that every child living in South Africa, irrespective of nationality, origin or status, should enjoy protection (and be treated equally with citizen children) in the South African setting. It is equally important that the various sub-categories of non-citizen children are not, as a general rule, treated differently when compared with one another.³⁰⁸ Children of asylum seekers are treated differently and sidelined from having access to child social grants due to the 'asylum seeker status' of their parents or care givers in South Africa. The gap in the social security law in South Africa is the fact that children of asylum seekers are excluded in the mainstream of benefiting from social security system in particular child social grants.

3.5.3 The Social Assistance Act 13 of 2004

The South African social assistance system comprises important components which are the social assistance grants. Social grants were regulated in terms of the former Social

³⁰⁴ S 151. On the relationship between this provision and the awarding of a foster care grant, and on foster care in general, see par 302 post.

³⁰⁵ Secs 151 152. In terms of s 1, "temporary safe care" involves placing the child in an approved child and youth centre, shelter or private home or any place where the child can safely be accommodated pending a decision or court order concerning the placement of the child. It excludes care of a child in a prison or police cell.

³⁰⁶ The approach adopted in this regard appears to be consistent with the Convention on the Rights of the child article 20(1). Article 20(1) states that a child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state. In terms of Article 20(2) and (3), state parties must, in accordance with their national laws, ensure alternative care of such child, including necessary placement in suitable institutions for the care of children.

³⁰⁷ Children's Act 38 of 2005 sec 11.

³⁰⁸ S 6(2)(d).

Assistance Act, 59 of 1992.³⁰⁹A new Social assistance Act³¹⁰was enacted in 2004, which It provides for the payment of a child support grant;³¹¹ care dependency grant;³¹² foster child grant;³¹³ disability grant;³¹⁴ older person's grant;³¹⁵ war veterans grant³¹⁶ and a grant-in – aid³¹⁷and social relief of distress.³¹⁸The most important part of social assistance is probably the payment of social grants.³¹⁹The payment of social grants is administered by the South African Social Security Agency.³²⁰In terms of the Social Assistance Act, the Minister of Social Development makes various grants available, with the concurrence of the Minister of Finance, from moneys appropriated by parliament.³²¹ The grants which are directly relevant to children are the child support grant,³²² care dependency grant³²³ and foster child grant.³²⁴ Various eligibility conditions are applicable in this regard. In addition to specific requirements pertaining to each of the three grants mentioned, a person is generally eligible for social assistance if he or she:³²⁵

- a) Is resident in the country;
- b) Is a South African citizen, permanent resident or refugee;
- c) Complies with any additional requirements or conditions prescribed(such as means testing and identity verification); and
- d) Applies for social assistance in the proper form.

³⁰⁹ In terms of s 2 of the Social Assistance Act, 59 of 1992, social grants were made to aged and disabled persons and to war veterans (s 2(a)). These categories could also qualify for a grant-in-aid (s 2b), while war veterans could also qualify for supplementary grants (s 2(c)).

³¹⁰ 13 of 2004.

³¹¹ S 6

³¹² S 7

³¹³ S 8

³¹⁴ S 9

³¹⁵ S10

³¹⁶ S11

³¹⁷ S12

³¹⁸ S13

³¹⁹ (Note 253 supra) 64.

³²⁰ South African Social Security Agency Act 9 of 2004.

³²¹ Social Assistant Act 13 of 2004 (the Social Assistance Act) s 4.

³²² S 6

³²³ S 7

³²⁴ S 8

³²⁵ S 5 read with the Regulations relating to the Application for and payment of Social Assistance and the Requirements or Condition in respect of Eligibility for Social Assistance (GN R898 Government Gazette 31356, 22 August 2008) as amended by GN R269 Government Gazette 35205, 30 March 2012.

In consideration of an application for social assistance, the South African Social Assistance Agency (SASSA) may conduct an investigation and request additional information.³²⁶ Any social grant lapses if the beneficiary has not claimed the social grant for a period of three consecutive months, provided that, where the beneficiary applies for the restoration of the grant within 90 days, SASSA must direct that the grant be restored if it is satisfied that failure to claim was due to circumstances beyond the control of the beneficiary.³²⁷

Interestingly, population growth is slowing in South Africa (unlike many developed economies, the effects of population ageing will not begin to fully exert pressure on the South African economy for several decades). The growth rates of key demographic groupings, such as those eligible for child support grants, are in fact moderating or declining.³²⁸ This implies reduced pressure on the financial constraint from social grants over the next two decades.³²⁹ The total number of social assistance beneficiary is, however, expected to increase from 16, 2 million in 2012/2013 to 17, 3 million over the next three years, with annual growth slowing to 2 percent in 2015/2016.³³⁰

3.6 Assessment of the adequacy existing legislation in light of international standards on social security rights in relation to asylum seekers children: Evidence of non-compliance by South Africa

The South African social assistance system consists of the payment of social grants and the provision of various kinds of social services. However, the system is category-based and means-tested, as benefits are provided only to certain defined categories of persons who are deemed to be in need. In terms of the Social Assistance Act, a key condition that excludes asylum seekers children from benefiting from the social assistance system, is the requirement that a parent or care giver must be a South African citizen, permanent resident or refugee. Asylum seekers and their children are not provided for by this Act or the system itself. Therefore, it means that the social security rights of asylum seekers' children are

³²⁶ S 14.

³²⁷ Reg 28(5).

³²⁸ Nation Treasury Medium Term Budget Policy Statement accessed on www.treasury.gov.za/document/mtbps/2012/mtbps/MTBPS%201012%20FULL%20DOCUMENT.PDF 27.

³²⁹ Ibid. It is nevertheless foreseen that allocations to social assistance will be maintained. It has also been acknowledged that there is considerable scope for improved financial management and more cost-effective programmes relating to health, social assistance, education and free basic services: National Treasury 34.

³³⁰ National Treasury 42.

systematically infringed, despite the constitutional provision that everyone has the right to have access to social security including, appropriate social assistance for those who unable to support themselves and their dependants.³³¹ The provisions of the Social Assistance Act, in relation to asylum seekers children, is against the spirit of the Charter of the Organization of African Unity that recognizes the paramountcy of Human Rights and the African Charter on Human and Peoples' Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;..”³³²

Having learned from the Khosa case, the arguments that are likely to be raised by the Government of the Republic of South Africa as grounds for excluding asylum seekers children from Social Assistance Act and Refugee Act respectively could be some of the following: the financial burden, Immigration considerations, asylum seekers have no legitimate claim of access to social security and that such exclusion is temporary in that asylum seekers may have access to social security when they attain refugee status. The above mentioned arguments are militated against by the international treaties ratified by South Africa and the constitutional obligations.

Benefits for families are crucial for realizing the rights of children and adult dependents to protection under articles 9 and 10 of the Covenant. In providing the benefits, the State party should take into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child or adult dependent, as well as any other consideration relevant to an application for benefits made by or on behalf of the child or adult dependent.³³³ Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.³³⁴ Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-

³³¹Section 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

³³²Preamble of the African Charter on the Rights and Welfare of the Child, Paragraph 2.

³³³ See Convention on the Rights of the Child, article 26.

³³⁴ Committee on Economic, Social and Cultural Rights, General Comment NO. 191, The right to social security (art. 9) Adopted on 23 November 2007. Par18. <http://socialprotection-humanrights.org/wp-content/uploads/2015/06/CESCR-General-Comment-19.pdf>

contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.³³⁵ The Committee acknowledges that the realization of the right to social security carries significant financial implications for States parties, but notes that the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level. If necessary, they should avail themselves of international cooperation and technical assistance in line with article 2, paragraph 1, of the Covenant.³³⁶

3.7 Chapter Conclusion

The main argument in this chapter is that there is a gap in the existing social security law in that there is exclusion of asylum seekers' children from social assistance benefits and in particular, children social grants, due to the status of their parents as asylum seekers in South Africa. Section 39(1)(b) compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law.³³⁷ This "international law-friendly approach" has been followed in several constitutional and other court cases³³⁸ and is also in accordance with the requirements of the Constitution.³³⁹ South Africa ratified the following international Conventions which are applicable to social security rights: the United Nations Convention on the Rights of the Child;³⁴⁰ the Convention on the Elimination of all forms of Discrimination

³³⁵ Ibid, Par 38.

³³⁶ Ibid, Par 40.

³³⁷The Constitution.

³³⁸ The following constitutional cases are some examples where the South African Constitutional Court considered binding as well as non-binding international law, when interpreting the Bill of Rights: *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin* NO 1996 1 SA 984 (CC); *S v Rens* 1996 1 SA 1218 (CC); *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC); *In re Gauteng School Education Bill* 1995 1996 3 SA 165 (CC); *The Government of the Republic of South Africa and others v Grootboom and others* 2000 11 BCLR 1169 (CC) par 26.

³³⁹ (Note 263 supra) 621

³⁴⁰ Adopted by General Assembly Resolution 44/25 of 20 November 1989; entered into force on 2 September 1990. South Africa signed the document on 29 January 1993 and ratified it on 15 December 1995.

Against Women;³⁴¹ and the African Charter on Human and Peoples' Rights;³⁴² and the African Charter on the Rights and Welfare of the Child.³⁴³ On 12 January 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁴⁴

The Constitution³⁴⁵ of the Republic of South Africa provides that everyone has the right to have access to social security including, appropriate social assistance for those who are unable to support themselves and their dependants.³⁴⁶ Section 32 of Refugees Act³⁴⁷ (the Refugees Act) deals with the position of unaccompanied children and mentally disabled persons, but it is silent on asylum seekers children. The Social Assistance Act³⁴⁸ is also silent on asylum seekers' children concerning access to social assistance in the form of child social grants. In the final analysis in this chapter, the exclusion of asylum seekers children from social security and assistance system is contrary to South African international and constitutional obligations. The next chapter analyses relevant case law in relation to realization of social security rights and explores the interpretive rule the court can use to protect social security rights for asylum seekers' children.

³⁴¹ Entered into force on 18 December 1979. South Africa signed the document on 29 January 1993 and ratified it on 16 December 1995.

³⁴² Adopted on 27 June 1981 and entered into force on 21 October 1986. South Africa acceded on 9 July 1996.

³⁴³ South Africa signed the document on 10 October 1997 and ratified it on 7 January 2000.

³⁴⁴ ESR Review Vol 16 No. 1 2015

³⁴⁵ The Constitution of the Republic of South Africa, Act 108 of 1996.

³⁴⁶ S 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

³⁴⁷ Act 130 of 1998.

³⁴⁸ Act 13 of 2004.

CHAPTER 4

ANALYSIS OF CASE LAW IN RELATION TO SOCIAL SECURITY RIGHTS FOR ASYLUM SEEKERS CHILDREN: AN ASSESSMENT OF COURTS DECISIONS ON ENFORCEMENT STANDARDS

4.1 Introduction

The previous chapter has provided an assessment of the South African legal framework for the social security rights, including social assistance, in relation to children of asylum seekers. It has also presented a historical background and development of social security and asylum systems, and expounded an overview of the legislative environment on social security and assistance in relation to asylum seekers' children in South Africa. This chapter explores judicial interpretive approaches towards realization of social security rights for children of asylum seekers. The focus is on analysis of relevant case law in relation to realization of social security rights and exploring the interpretive rule the courts can use to protect social security rights for asylum seekers' children. Various interpretive approaches and the relevancy thereof in relation to social security rights of asylum seekers are explored.

4.2 Interpretive approaches of the court toward human rights protection

Various approaches to the litigation and adjudication of economic, social and cultural rights have been developed and advanced in the practices of judicial and quasi-judicial organs and scholarly writings.³⁴⁹ They may be broadly categorized as direct and indirect approaches. Direct approaches are based on the argument that economic, social and cultural rights are directly enforceable by adjudicatory organs and they apply in systems where the rights are expressly protected as justiciable substantive norms. Indirect or interdependence approaches, rely on the indivisibility, interdependence and interrelatedness of all human rights, they are typically employed in systems where economic, social and cultural rights are not clearly or sufficiently protected in applicable legal instruments. In systems where judicial or quasi-judicial organ has subject matter jurisdiction over clearly protected economic, social and cultural rights, direct approaches have been advocated and applied in the enforcement of negative (non-interference) as well as positive (action-oriented and resource-dependent) duties of states. Two such approaches are as follows: one that relies on the identification of

³⁴⁹ T first by the protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims (2002) 193-357.

the minimum essential elements of rights, and another that enquires into the reasonableness of a state's action or inaction.

4.2.1 Minimum core model

Adopted first by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR), the minimum core model is a model for the 'assessment' of a state's action in the discharge of its obligation relating to economic, social and cultural rights based on whether it meets minimum essential levels of the right.³⁵⁰ The model has since been a subject of doctrinal debate as a standard for monitoring and enforcement of economic, social and cultural rights. Young summarizes the various approaches to the minimum core as those that identify an essential minimum or absolute foundation for economic, social and cultural rights, those that seek minimum consensus surrounding these rights, and those that correlate the minimum core with minimum obligations.³⁵¹ Core is defined as the intrinsic and fundamental elements of rights, a normative understanding that identifies minimum entitlements and duties is the prevailing sense in which the minimum core model has been referred to.³⁵² Much as it has the advantage of giving normative content to the seemingly crude obligation of 'progressive realization' and serving as a standard against retrogressive measures, the minimum core model, especially as defined by the ESCR Committee, has limitations in terms of providing clear, simple, consistent and common standards of monitoring or adjudication.³⁵³ The contents of the core have been expanding from 'immediately realizable' negative duties to positive obligations, including the provision of essential drugs and access to education and water facilities.³⁵⁴ The definition of core obligations does not provide a clear mechanism or methodology for the identification of minimum duties. There is also a question as to whether the minimum core model is suitable

³⁵⁰ United Nations Committee on Economic Social and Cultural RIGHTS (escr Committee) General Comment 3 The nature of states parties' obligations (1990) paras 4 & 10.

³⁵¹ K Young 'Conceptualising minimalism in socio-economic rights' (2008) 9 ESR Review 6 7-9

³⁵² F Coomans 'In search of the core content of the right to education' in D Brand & s Russel (eds Exploring the core content of economic and social rights: South African and international perspectives (2002) 166-167.

³⁵³ For example, while the Committee makes failure to meet the core minimum exceptionally justifiable under General Comment 3 para 10, it says that the minimum core is non-derogable in General Comment 14, the right to the highest attainable standard of health (2000 para 47 and General Comments 15, the right to water 20030 para 40).

³⁵⁴ See General Comment 13, the right to education (1999) para 57; General Comment 14 para 43, General Comment 15 para 37.

for individual or group claims of economic, social and cultural rights.³⁵⁵ Nonetheless, while the determination of minimum core entitlements and duties should be contextualized, the following may be considered common denominators of the various definitions: the negative obligations of non-interference and non-discrimination; the duty to lay down a legal and policy framework for the realization of rights, at least part of the duty to protect from the breach of rights by third parties; and duty to prioritise those in urgent and desperate need. There is no reason why definition of such core obligation cannot apply in relation to individual as well as group claims of economic, social and cultural rights.³⁵⁶

While adjudicatory organs in various systems have recognized and applied basic and fundamental elements of rights without necessarily using the minimum core concept,³⁵⁷ the South Africa Constitutional Court considered the model as a competing approach of adjudication. The Court consistently rejected the idea of directly justiciable minimum core obligations based mainly on a lack of sufficient information, the diversity of needs and opportunities for the enjoyment of the core and the competence of courts to determine the minimum core standard.³⁵⁸ Although the difficulty of fully defining the core minimum that applies in all circumstances may be recognized, the Constitutional Court's insistence that it starts from the obligation of states in the application of rights and that it does not do rights analysis which is difficult to understand.³⁵⁹ The court may make a context-based incremental determination of the minimum core by starting with analysis of rights provisions and the identification of their basic or fundamental elements. Nevertheless, the court does not reject the minimum core model out of hand as it said it may take it into account in determining whether measures adopted by the state are reasonable, rather than as a self-standing right conferred on everyone.³⁶⁰

³⁵⁵ *Government of the Republic of South Africa & Other v Grootboom & Others* 2000 11 BCLR 1169 (CC) para 33.

³⁵⁶ Ibid

³⁵⁷ M Langford 'Judging resource and availability' In J Squires et al (eds) *the road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 99-100.

³⁵⁸ (Note 355 supra) paras 29-33; *Minister of Health & Other v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (TAC) paras 26-39. See also *Lindiwe Mazibuko & others v City of Johannesburg & others* 2009 ZACC 28 paras 52-58.

³⁵⁹ D Bilchitz 'towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 South African Journal on Human Rights 1.

³⁶⁰ (Note 355 supra) par 33 and (Note 358 supra) para 34.

The minimum core obligation as it was explained by the South African Constitutional Court in the Grootboom case³⁶¹ refers to the needs of the most vulnerable group of people. The Court observed that the needs and opportunities for the enjoyment of a social and economic right vary to a great extent according to income, (un)employment, availability of land and poverty. The most vulnerable group of people in this context will include children of asylum seekers, because of their position as non-citizens and non-permanent residents, but mere asylum seekers who do not have access to social security and assistance in South Africa, in particular, child social grants. In Grootboom case, the Court acknowledged that there may be cases, where “it may be possible and appropriate to have regard to the content of a minimum core obligation” to determine whether the measures taken by the state were reasonable. Use of the minimum core approach was thus not completely ruled out for future cases, provided that sufficient detailed information is available to determine the minimum core in a given context.³⁶² Therefore, in relation to social security rights of asylum seekers children and with relevant information as may be required by the Court, the core minimum approach may be relevant and applicable towards realisation of these rights.

4.2.2 Reasonableness model

Judicial and quasi-judicial organs in national as well as international jurisdiction have to enquire into the compatibility, justifiability or reasonableness of states` conduct in the light of their obligations relating to socio-economic rights.³⁶³ The reasonableness model developed by the South Africa Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programs for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.³⁶⁴ The government would be required to take steps where it has taken none, and revise adopted measures to meet constitutional

³⁶¹ (Note 355 supra) par 31-33.

³⁶² Fons Coomans ‘Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court’ p182. <http://www.zaoerv>. (accessed 10 December 2015).

³⁶³ See M Langford ‘the justifiability of social rights: from practice to theory’ in M Langford(Ed) Social rights jurisprudence: Emerging trends in international and comparative law (2008) 3 43.

³⁶⁴ D Brand ‘Socio-economic rights and courts in South Africa: Justifiability on a sliding scale’ in F Coomans (Ed) Justifiability of economic and social rights: Experiences from domestic systems (2006) 227; CR Sunstein Designing democracy: What constitution do? (2001) 222-23.

standards where they are found to be unreasonable.³⁶⁵ From the South African Constitutional Court judgments in the relevant cases, a `reasonable` programme must be comprehensive, coherent, coordinated, balanced and flexible; should not exclude provision for short, medium and long long-term needs; should not exclude a significant sector of society, and take account of those who cannot pay for the services; have appropriate human and financial resources; be both reasonably conceived and implemented; be transparent and involve realistic and practical engagement with concerned communities; and provide relatively poorer households.³⁶⁶

Some of the above have also been applied by the United States Supreme Court in connection with a state`s treatment programme for persons with mental disability³⁶⁷ and by the European Committee of Social Rights in evaluating the compatibility of the conduct of state`s with positive obligations under the European Social Charter.³⁶⁸ Taking these jurisprudential developments into account that the recent Optional Protocol to the International Covenant on Economic, social and cultural Rights (ICESCR) incorporate reasonableness as a predefined model of review for communications to be submitted to the ESCR Committee.³⁶⁹

The reasonableness model best exemplifies the adoption of an appropriate model of review as the ultimate response to the justiciability of economic, social and cultural rights. While association with policies is seen as an impediment to the justiciability of the rights, the reasonableness model shows that the state policies meant to implement the rights can be reviewed by adjudicatory organs. Nevertheless, the reasonableness model, especially as

³⁶⁵ *Lindiwe Mazibuko & others v City of Johannesburg & others* 2009 ZACC 28, para 67.

³⁶⁶ Ibid. see also S Liebenberg Socio-economic rights: Adjudication under a transformative constitution (2010) 151-157.

³⁶⁷ *Olmstead v LC* 527 US 581 (1999) part III B 18-22 (whether the state had a comprehensive and effectively working plan and a waiting list that moved at a reasonable pace).

³⁶⁸ Eg, see Complaint 39/2006, European Federation of NATIONAL Organisations Working With the Homeless (FEANTSA) v France (5 December 2007) paras 56-58; and Complaint 41/2001, mental Disability Advocacy Centre (MDAC) v Bulgaria (3 June 2008) para 39 (applying such criteria as reasonable timeframe, measureable progress, meaningful statistics on needs, resources and results. Regular reviews of the impact of the strategies adopted and special attention to vulnerable groups).

³⁶⁹ B porter `The reasonableness of article 8(4) – Adjudication claims from the margins` (2009) 27 Nordic Journal of Human Rights 39 46-50.

developed by the South African Constitution Court, has limitations in terms of responding to claims for direct socio-economic benefits for individual or a class of individuals, throwing the burden of proof of the unreasonableness of the state's programme on the litigants and failing to link the reasonableness standard with more detailed elaboration of the content of specific rights.³⁷⁰ It is in connection with its failure to do 'rights analyses' that the Constitutional Court has been urged to integrate the minimum core model-an argument which it openly rejected.³⁷¹

The reasonableness approach is essential and very much relevant when dealing with the social security rights of asylum seekers children. The fact that the Social Assistance Act of 2004 provides child social grants to citizens, permanent residents and refugees only creates a systematic exclusion of asylum seekers children from benefiting from such facility. Thus, a question of reasonability of such exclusion arises, considering the constitutional and international obligations of the Government of Republic of South Africa in relation to social security rights for asylum seekers children. In order to resolve this question, the Court may need to follow this approach as it did in other cases. Final cases, known as the *Khosa* case, decided in March 2004, were initiated by a number of Mozambican citizens with permanent residence status in South Africa. They were disqualified for social assistance under the Social Assistance Act of 1992 and the Welfare Laws Amendment Act because they are not South African citizens. The applicants contended that the exclusion of all non-citizens from the social assistance scheme was inconsistent with the obligations of the state under Section 27(1)(c) of the Constitution to provide social security to everyone. In addition they argued that their exclusion limited their right to equality under Section 9 of the Constitution and was unfair under that provision. Finally, they contended that their exclusion was unjustifiable under Section 36, which is the general limitations clause of the Bill of Rights.

*Khosa v Minister of Social Development*³⁷² concerned a number of Mozambican citizens ('the applicants') who had acquired the status of permanent residents in South Africa after

³⁷⁰ Ogoni case, Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria, par 52. <http://www.cesr.org/ESCR/africancommission.htm> (accessed 23 January 2015)

³⁷¹ F Coomans 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' p182. <http://www.zaerv.org> (accessed 10 December 2015).

³⁷² 2004(6) SA 505 (CC) ('khosa').

living in the country since 1980. All of these people were destitute and thus would have been entitled to pension grants as well as other social assistance grants- such as child-support grants-but for the fact that they were not South African citizens.³⁷³The applicants challenged the constitutionality of prevailing legislation (the Social Assistance Act 59 of 1992) that limited social assistance grants to South African citizens. They argued that section 27 of the Constitution guaranteed the right to social security for 'everyone'. This, they argued, included permanent residents and thus the legislation excluding this group was unconstitutional. After confirming the approach towards the content of rights in *Grootboom* and *TAC*, Mokgoro J, writing for the majority, went on to consider the beneficiaries of the right to have access to social security. The Court reasoned that certain rights such as political rights (section 19 of the Constitution) and the right to have access to land have been expressly limited to citizens (section 25(5) of the Constitution). However, section 27 does not contain such a limitation, it applies to 'every one'. Since there was no indication that section 27 was limited only to citizens, Mokgoro J held that the word 'everyone' could not be construed as referring only to citizens.³⁷⁴

The Court then raised the question whether the exclusion of permanent residents from having access to social assistance grants was reasonable. In reaching conclusion on this matter the Court considered a number of factors: 'these include, the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose'.³⁷⁵Mokgoro J held that the reason for the inclusion of a right to social security was that 'as a society we value human beings and we want to ensure that people are afforded their basic needs'.³⁷⁶ Such a purpose included within its ambit the needs of non-citizens. Consequently, the Court concluded that 'the exclusion of permanent residents is inconsistent with section 27 of the Constitution'.³⁷⁷ In light of this, the Court ordered that the words 'or permanent residents' be read into the legislation (after the citizenship requirement) so as to allow for benefits to be available to permanent residents. The implication of the *Khosa* case on the question of asylum seekers children is that it affirms the constitutional provisions that the right to social security is for everyone without limitation on the basis of nationality just like asylum seekers children. Another implication is

³⁷³ Ibid, par 3-4

³⁷⁴ Ibid, 47

³⁷⁵ Ibid, 49

³⁷⁶ Ibid, 52

³⁷⁷ Ibid, 85

that the reasonableness approach as applied by the Constitutional Court has opened a room for interpreting section 27 of the Constitution in favour of children of asylum seekers.

The Government of the Republic of South Africa v Grootboom ('Grootboom')³⁷⁸ concerned a group of extremely poor people (the respondents) who felt compelled by the desperation of their living conditions in the informal settlement of Wallacedene³⁷⁹ to move onto a vacant land that was privately owned and that had been earmarked for formal low-cost housing. Eviction proceedings were successfully instituted against these people, and the resulting court order was implemented in a manner 'reminiscent of apartheid-style eviction',³⁸⁰ destroying their possessions and materials in the process.

The respondent landed up on the Wallacedene sports field, with nothing other than plastic sheeting to protect them against the elements. They instituted legal action against the government, demanding that the municipality fulfil its constitutional obligations towards them, which they claimed would involve the provision of at least basic shelter. The high court granted relief to some of the respondents. The government then appealed against this decision to the constitutional court. In arriving at his decision, Yacoob J (in whose judgement all the justices concurred) engaged in an analysis of two constitutional rights: section 26 and section 28(1)(c). Focus will be on his approach to section 26. That section reads as follows:

26. (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 realization of this rights.
- (3.) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit

³⁷⁸ 2001(1)SA 46 (CC)

³⁷⁹ Yacoob J describes the conditions faced by the residents of wallacedene as 'lamentable'. He out-lines their circumstances at [7] as follows: 'A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than ZAR500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thorough fare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty matters square.'

³⁸⁰ (Note 355 supra) 10

arbitrary evictions.

In considering how this right should be interpreted, it was argued before the Court that guidance should be taken from the interpretations given to socio-economic rights under the International Covenant on Economic, Social and Cultural Rights ('the Covenant').³⁸¹ The committee responsible for the interpretation and application of the Covenant ('the UN Committee') has released a number of general comments that attempt to give content to the rights recognized in the Covenant.³⁸² The UN Committee has held that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties. Such an obligation requires every state party to fulfil certain minimum essential levels of the rights in question, and a failure to do so constitutes *prima facie* failure to discharge its obligations under the Covenant.³⁸³ In the judgement, Yacoob J refers to the approach adopted by the UN Committee. The Court does not reject the minimum core approach outright (and thus leaves room for its adoption in future); however, the Court levels several criticisms against this approach and concludes that it is not 'necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right'.³⁸⁴

Instead, he holds that 'the real question in terms of our constitution is whether the measures taken by the state to realize the right afforded by section 26 are reasonable'.³⁸⁵ Reasonable measures involve the establishment and implementation by the state of the coherent, well-coordinated, and comprehensive programme directed towards the progressive realization of the right of access to adequate housing. Moreover, '[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations.'³⁸⁶ In order to comply with its obligation, the state will be required not merely to legislate but also to act in a way that is designed to achieve the intended result. Furthermore, a reasonable programme must be balanced and flexible and 'make appropriate

³⁸¹ Ibid, par 26

³⁸² The general comments that are of particular importance in this context are general comments 3 and 4. They are required in Eide, Krause, and Rosas, 1995: 442ff.

³⁸³ Ibid, 10

³⁸⁴ (Note 355 supra) par 33.

³⁸⁵ Ibid.

³⁸⁶ Ibid, par 41

provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.

³⁸⁷

Yacoob J went on to consider whether the housing programme that had been adopted by the state was reasonable. He found that the state had instituted an integrated housing development policy whose 'medium and long term objectives cannot be criticised'.³⁸⁸ However, the housing programme lacked any components providing for those in desperate need. Yacoob J found that the absence of such a component was unreasonable and thus concluded that '[t]he nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need'.³⁸⁹

The issue in the *Minister of Health v Treatment action campaign* ('TAC')³⁹⁰ arose as a result of South African government's policy towards the provision of nevirapine, an antiretroviral drug that considerably reduces the likelihood of HIV transmission from mother to child at birth.³⁹¹ Newborn children often become infected with the virus at birth when it is transmitted from the mother to her child (referred to as vertical transmission). It was estimated that in 2005 alone vertical transmission was responsible worldwide for about 700,000 children becoming infected with the virus.³⁹² In July 2000, the manufacturers of nevirapine offered to make it available to the South African government free of charge for a period of five years in order to reduce the risk of the vertical transmission of HIV.³⁹³

Despite the offer, until May 2001 people could not gain access to nevirapine in the public sector. Thereafter, a shift in government policy made nevirapine available at a small number

³⁸⁷ Ibid, par 43

³⁸⁸ Ibid, par 64

³⁸⁹ Ibid, par 66

³⁹⁰ 2002(5) SA 721 (CC).

³⁹¹ The United Nations estimates that 5.5 Million people are infected with HIV/Aids in South Africa, with the number growing steadily; 29.5 per cent of pregnant South African women are infected with the virus. This statistic is based on the most recent estimate from UNAIDS: see <[http: data.unaids.org/pub/globalreport/2006/200605-FS_SubSaharanAfrica_en.pdf](http://data.unaids.org/pub/globalreport/2006/200605-FS_SubSaharanAfrica_en.pdf)>.

³⁹² Nevirapine is administered by giving a single tablet to the mother at the onset of labour and a few drops to the baby within 72 hours after birth. [http: //www.avert.org/motherchild.html](http://www.avert.org/motherchild.html) (accessed 20 January 2015).

³⁹³ [http: //www.avert.org/motherchild.html](http://www.avert.org/motherchild.html). (accessed 23 January 2015)

of research and training sites throughout the country. The purpose of this restricted access was to evaluate the possible effectiveness of a future nationwide programme to combat mother-to-child transmission of HIV by studying the results of a comprehensive programme instituted at these sites. At the sites, the government offered a package of testing and counselling, dispensing nevirapine, and follow-up services to pregnant women. Two research sites were to be established in each of South Africa's nine provinces over a period of two years.³⁹⁴ The Treatment Action Campaign, a non-governmental organization lobbying for universal access to antiretroviral drugs, pressed the government to accelerate the programme to provide nevirapine beyond these research and training sites. The government, however, maintained its position that nevirapine would be made available only at the research sites. This entailed that 'for a protracted period nevirapine would not be supplied at any public health institution other than one designated as part of a research site'.³⁹⁵

The first issue in this case concerned whether the restriction of nevirapine to research sites constituted a violation of certain rights in the Constitution. The relevant rights are section 27(1)(a) read with section 27(2), and section 28(1)(c).³⁹⁶ The second issue concerned whether these rights obliged the government to 'plan and implement an effective, comprehensive and progressive programme for the prevention of mother- to- child transmission of HIV throughout the country'.³⁹⁷ In a unanimous decision, the Court confirmed its approach in *Grootboom* that the question in terms of the Constitution was whether the measures taken by the state to realize socio-economic rights were reasonable. In this particular case, it had to be determined whether the policy to confine nevirapine to the research and training sites was reasonable in the circumstances.³⁹⁸ The Court having applied the reasonable approach concluded that the policy of confining nevirapine to the research sites was unreasonable and in contravention of the state's obligations under the Constitution. The second issue was whether the programme instituted by the government to prevent mother-to-child transmission of HIV represented a reasonable attempt to realize its obligations in terms of the Constitution. The Court found that , since it was not reasonable to restrict nevirapine to the research sites, the policy as a whole had to be reviewed.

³⁹⁴ (Note 390 supra) par 16

³⁹⁵ Ibid, par 17

³⁹⁶ Ibid,

³⁹⁷ Ibid, par 5

³⁹⁸ Ibid, par 81

4.2.3 Model of review combining minimum core and reasonableness standards

The previous sections that are both minimum core and reasonableness model are possible approaches to the direct justiciability of economic, social and cultural rights. While the minimum core model seems to be best suited to the justiciability of negative and basic level positive obligations, the reasonableness model provides more advanced standards for the review of positive obligations. Whereas the former more or less concentrates on the content of rights to identify minimum entitlements and duties, the latter focuses on the obligations of states or measures to realize rights. They respectively use normative and more of `empirical or sociological` standards of review. Both models also provide well for those in urgent need or vulnerable groups. These characteristics of the two models make it logical to conceive a model of review that combines elements or features of both.³⁹⁹ Without an intention to exclude other possibly effective models, an approach that carefully combines the analysis of rights and obligation provisions and the evaluation of measures taken by a state against standards derived from such analysis could work well in practice in dealing with the situation of asylum seekers.

There is no good practical example of a case where the `combined approach` has been applied so far, but the ESCR Committee indicated in a statement issued in mid-2007 that it would apply standards that may broadly fall within such an approach. In elaborating the standards that it will apply in considering communications concerning an alleged failure of a state party to take steps to the maximum of available resources, the ESCR Committee stated that it would examine the adequacy or reasonableness of measures taken by the state based on a list of criteria that effectively encapsulated minimum core and reasonableness standards.⁴⁰⁰ The `combined model` appears to provide promising standards of review of positive as well as negative obligations. It should, however, pay attention to the legitimacy and competence objections to the adjudicatory enforcement of

³⁹⁹ D Bilchitz `towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence` (2003) 19 South African Journal on Human Rights 1.

⁴⁰⁰ Statement `an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant` (10 may 2007). The criteria include that the measures taken towards the fulfilment of economic, social and cultural rights be deliberate, concrete and targeted, non-discriminatory and non-arbitrary, recognise the precarious situation of disadvantaged and marginalised individuals, and follow transparent and participative decision-making process. Elements of core obligations are also made part of the criteria in the examination of failure to take steps and retrogressive measures.

economic, social and cultural rights and also to the limitations of the minimum core and reasonableness model. It should, for example, rein in the expanding definition of the minimum core and also allow provision for individual claimants at least in some circumstances.

Some of the ESCR Committees standards of the `combined model` were identified by the African Commission as measurements of the positive obligations relating to the right to health in the Gambian mental health case.⁴⁰¹ Although it has not expressly identified its reasoning with the minimum core or the reasonableness model in that case, its criteria of `taking concrete and targeted steps and avoiding discrimination` may be applied in the evaluation of state`s obligations relating to other economic, social and cultural rights. It is also interesting to see in this case that the Commission made `rights analysis` in defining the contents of the right to health in general and the right to mental health in particular.⁴⁰² It finally concluded that the impugned Lunatic Detention Act `is lacking in terms of the therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities` and found the state in violation of the right to health.⁴⁰³ This is the result of an evaluation of propriety or reasonableness of the legislative measure taken by the state to realize the right to (mental) health based on criteria derived through `rights analysis`. Even though it lacks articulation as a proper model of review, the reasoning in the case shows an attempt at normative analysis and evaluation of the states conduct against specific duties derived from application legal provisions.

In the jurisprudence of cases where variants of either or both of the minimum core and reasonableness models have been applied, the cases may be used as a good starting point for the development of a `combined model` to interpret social security rights in favour of asylum seekers children.

4.2.4 Interdependence approach

The interdependent approach is a method of judicial or quasi-judicial enforcement of economic, social and cultural rights that relies on process and procedural rights that are

⁴⁰¹ Purohit and Moore v. The Gambia. Communication No. 241/2001 Par 80. <http://www.achpr.org> (accessed 14 January 2016)

⁴⁰² Ibid, par 82

⁴⁰³ Ibid, par 83.

common to all groups of rights (including the rights to equality and non-discrimination), and the overlapping components of substantive rights normally placed in different categories. It is based on the intertwinement of human rights and seeks to undermine their artificial categories and create a coherent human rights norm system. The integrated protection of different groups of rights which are clearly stated to be indivisible and interdependent in the African Charter provides a solid basis for the approach.⁴⁰⁴ It is probably for this reason that the African Commission declared in one of its economic, social and cultural rights decisions that it is 'more than willing to accept legal arguments' that take into account the principle that 'all human rights are universal, indivisible, interdependent and interrelated'.⁴⁰⁵ The requirement that the Commission draw inspiration from other international human rights instruments and the African Courts broad subject matter of jurisdiction widen the substantive basis for their interdependence approach as they allow the cross-fertilization of human rights norms or contents across treaties.⁴⁰⁶

The interdependence approach has been put to creative use in systems where there are substantive and procedural gaps in the protection of economic, social and cultural rights. The UN Human Rights Committee and the European Court of Human Rights gave socio-economic rights dimensions to the cross-cutting rights to non-discrimination and a fair trial, respectively, especially in cases concerning social security.⁴⁰⁷ The two organs have also shown some interest in making use of the interdependence between substantive rights. The European Court, for example, protected the right to work by reading together provisions on non-discrimination and the right to respect for private life, and also indicated that the right to life covers aspects of the right of health.⁴⁰⁸ The Human Rights Committee read socio-economic aspects into the right of members of minorities to enjoy their own culture in community with others.⁴⁰⁹ The inter-American Court of Human Rights has also affirmed the justiciability of indigenous land and resource rights through the right to property and the right to judicial protection.⁴¹⁰ The right to property, which is often enshrined in instruments

⁴⁰⁴ Preamble, par 7 African Charter.

⁴⁰⁵ (Note 401 supra) par 48.

⁴⁰⁶ Articles 60-61 African Charter

⁴⁰⁷ M Scheinin 'Economic and social rights as legal rights' in A Eide et al (eds) *Economic, social and cultural rights: A textbook* (2001) 32-38.

⁴⁰⁸ *Sidabras & Dziautas v Lithuania* (2004) 42 EHRR 104 paras 50 & 62 and *Zdzislaw Nitecki v Poland, application 65653/01, decision, ECHR (2002) para 1.*

⁴⁰⁹ (Note 407 supra)

⁴¹⁰ *Mayanga (Sumo) AwasTingni Community v Nicaragua IACHR (2001) Ser C 79 paras 137-139 & 148-155.*

devoted to civil and political rights, has also been used for the protection of components of such economic, social and cultural rights as the rights to housing and social security.⁴¹¹

The most robust utilization of the approach based on the interdependence of substantive rights is to be found in the jurisprudence of the Indian Supreme Court where the right to life has been interpreted as including the right to a livelihood, the right to health care, the right to shelter, the right to the basic necessities of life, such as adequate nutrition, clothing and reading facilities, the right to education, and the right to just and human conditions of work.⁴¹² While the understanding of the interdependence among substantive right is good, care should be taken with regard to the extent to which the right to life or any other right may be expanded.⁴¹³ Interpretations should be able to show a genius substantive interrelationship between the rights in question or their components.

As indicated earlier, the application of the interdependence approach is not limited to system where there are substantive and/or procedural gaps in the protection of economic, social and cultural rights. In the African system, the approach can be used to bridge gaps and strengthen the protection of economic, social and cultural rights.⁴¹⁴ The African Charter enshrines rights that are not commonly categorized under economic, social and cultural rights but may serve as bases for the enforcement of the latter. These rights include the cross-cutting rights to non-discrimination or equality, equal protection of the law, and a fair trial; the highly permeable substantive rights to life and dignity; the instrumental right to freedom of movement, including the rights of non-nationals; the right to equal access to public property and services; and the multi-faceted right to property and development-related rights. In its practice, the African Commission is inclined to see all human rights as interconnected set of values and used some of the aforementioned rights for its

⁴¹¹ Akdivar & Others v Turkey application 21893/93, ECHR 1998-II 69 (1998) (Finding forced evictions and destruction of housing in violation of the right to property); Gaygusuz v Austria, application 17371/90, ECHR 1996-IV 14 (1996) para 41 (social benefits as pecuniary rights covered by the right to property); and case of the `five pensioners` v Peru IACHR (2003) Ser C 98 paras 102, 103 & 121 (finding arbitrary changes in the amount of pensions to be in violation of the right to property).

⁴¹² Tellis & Others v Bombay Municipal Corp & Others (1987) LRC (Const) 351.

⁴¹³ T Melish `rethinking the "less as more" thesis: Supranational litigation of economic, social and cultural rights in the Americas` (2006) 39 New York University Journal of International Law and Politics 326-327.

⁴¹⁴ Articles 2, 3, 4, 5, 7, 12, 13(2) & (3), 14, 19, & 20-22 African Charter.

interdependence approach. It has also utilized the approach to protect economic, social and cultural rights that are not expressly incorporated in the African Charter.

4.3 Realizing the social security rights of asylum seekers children: Appropriate interpretive approach

In realising social security rights of asylum seekers children in South Africa, the most appropriate interpretive approach will be the Reasonableness approach as well applied in the Khosa Judgement. The *Khosa* case⁴¹⁵ is the first case before the Constitutional Court where the right to social security and social assistance as guaranteed in section 27(1)(c) of the Constitution was alleged to have been infringed. What makes the case particularly interesting is the fact that the Court dealt with a particular vulnerable group (Non-nationals who are permanent residents in South Africa) and the unequal treatment of this group by the state.⁴¹⁶ In line with the *Grootboom* judgment the Constitutional Court will give priority to the most vulnerable when deciding whether policies of the government are reasonable or not.⁴¹⁷ The purpose of the child support grant is mainly to alleviate child poverty, indirectly to enable a child to live with human dignity and to ensure that society values human beings (and in this instance children) by providing their basic needs.⁴¹⁸ As already indicated, children are a particularly vulnerable group in South Africa. One may even go so far to say that children are the most vulnerable members of society. They are not in a position to fend for themselves and they are dependent on parents, family members and other people in society to provide them with food, shelter and to see to their most basic needs.⁴¹⁹ The reasonableness model developed by the South Africa Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems.

Interdependence approach can be useful in interpreting the social security rights of asylum seekers children because as children in the category of vulnerable group that need special treatment, their social security rights are linked to other rights such as the right to dignity and equality. Hence the reason that the African Commission declared in one of its economic, social and cultural rights decisions that it is `more than willing to accept legal arguments` that

⁴¹⁵ 2004(6) SA 505 (CC) ('Khosa Case').

⁴¹⁶ Linda, Jansen van Rensburg '[The Khosa case - opening the door for the inclusion of all children in the child support grant?](#)' Journal Title: SA Publikereg = SA Public Law, Vol 20, Issue 1 Published: 2005 Pages: 102-127.

⁴¹⁷ Ibid, 102

⁴¹⁸ Ibid,

⁴¹⁹ (Note 355 supra) par 20.

take into account the principle that `all human rights are universal, indivisible, interdependent and interrelated`.⁴²⁰It is based on the intertwinement of human rights and seeks to undermine their artificial categories and create a coherent human rights norm system. The integrated protection of different groups of rights which are clearly stated to be indivisible and interdependent in the African Charter provides a solid basis for the approach.⁴²¹ In the *Government of the Republic of South Africa and Others v Grootboom and Others*, the court emphasised the importance to be attached to group protection in the fight against poverty and deprivation. In fact, upon analysing the recent judgment and comparing it to previous judgments of the Constitutional Court⁴²² on the justiciability of socio-economic rights, one is left with the clear impression that whenever the position of historically deprived and disadvantaged groups warrants judicial intervention, the courts will more readily intervene than in cases of individuals claiming assistance. This is in line with the so-called “dignitarian approach,” where the court uses the value of human dignity to come to the rescue of particularly vulnerable groups.⁴²³ This approach also found favour with the Constitutional Court in the *Grootboom* case,⁴²⁴ particularly as far as the family context is concerned. The Court remarked that the primary responsibility to provide housing for children rests with the parents. Only when it is clear that the parents do not or cannot provide, may the state be called upon to provide support. The duty to pay taxes in the interest of society further implies that the state has a duty to focus its budgets on social expenditure in order to ensure social inclusion.

In *Van der Burg v National Director of Public Prosecutions* (Centre for Child Law as Amicus Curiae),⁴²⁵ the Constitution Court reinforced the principles laid down in *S v M* to the effect that law enforcement must always be child-sensitive, courts must all times show due regard for children’s rights and children cannot be treated as mere extensions of their parents. To the extent that children may be affected by a forfeiture order, the Court confirmed that their interest ought to be considered and that this interest could differ from those of their parents.⁴²⁶ The Court concluded that “in exceptional circumstances-where there is insufficient information about the children or where the information before the Court leaves some doubt regarding the children’s well-being-the Court may need to appoint a curator to

⁴²⁰ (Note 401 supra) par 48.

⁴²¹ Preamble, para 7 African Charter.

⁴²² Such as the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

⁴²³ (Note 263 supra) 633.

⁴²⁴ 2000 11 BCLR 1169 (CC).

⁴²⁵ 2012 8 BCLR 881 (CC).

⁴²⁶ *Ibid*, Par 63.

conduct an independent assessment of the children's interests."⁴²⁷The Constitutional Court handed down an important judgement concerning the removal of children in need of care and protection from their parents, guardians or care giver in *C v Department of Health and Social Development, Gauteng*.⁴²⁸ The Court held that decisions to remove children must be automatically reviewed by the Children's Court on the first court day following their removal, thereby providing children and their families with a proper opportunity to explain their version to the Children's Court. This also facilitates the process (on the part of the reviewing Court) of cancelling incorrect decisions to remove children.

In *Centre for Child Law v Minister of Home Affairs*,⁴²⁹ unaccompanied foreign children were being detained at the Lindela Repatriation Centre. They were being detained with adults and were facing imminent deportation. The High Court granted an interdict preventing the deportations and the curator was empowered to investigate the children's circumstances and to make recommendations to the Court. The curator recommended that the children be removed from the repatriation centre to a place of safety while the children's court instruction was being carried out. The Commissioner of Child Welfare, however, refused to do this, believing that foreign children did not fall under the protection of the legislation in operation at the time. A court challenge was launched and the Court held that the state had a duty to protect and provide for foreign children who have no one to care for them, in the same way as national children. The judgement confirmed that they must be accommodated in the welfare system. The judgement confirmed that unaccompanied foreign children are protected by the Constitution and laws relating to children, who cannot be deported without first undertaking a children's court enquiry.⁴³⁰ The principle which emerges is that such children should be protected in terms of the child welfare system, pending any decision regarding their future.

In *Centre for Child Law v MEC for Education, Gauteng*,⁴³¹ the Court upheld children's Constitutional rights in the context of alarming conditions in existence at a school of industry which fell under the care system for children provided by the state. The Court held that the rights of children, as set out in Section 28 of the Constitution, were not subject to the

⁴²⁷ Ibid, Par 72.

⁴²⁸ 2012 4 BCLR 329 (CC); 2012 2 SA 208 (CC).

⁴²⁹ 2005 6 SA 50 (T).

⁴³⁰ Centre for Child Law Report on Selected Cases 2004-2011 15.

⁴³¹ 2008 1 SA 223 (T).

availability of resources and legislative measures for their progressive realization. Children's socio-economic rights are unqualified and immediate, according to the Court, and schools of industry were required to provide the children in their care with a higher standard of care than what they receive in their parents or caregivers care.⁴³²The Constitutional Court of South Africa ('the court) outlined its theoretical approach to constitutional interpretation in two of the early cases it decided. In *S v Zuma*,⁴³³Kentridge AJ explained that the judges would be adopting a purposive and generous approach to interpreting the Bill of Rights. He cautioned, however, that:"[w]hilst we must always be conscious of the values underlying the constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor it is easy to avoid the influence of one's personal intellectual and moral preconceptions. Yet, it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean".⁴³⁴

In *S v Makwanyane*,⁴³⁵ Chaskalson P continued to explicate the Court's approach to constitutional interpretation which whilst paying due regard to the language that has been used , is "generous", and "purposive" and giving to the underlying values of the constitution'.⁴³⁶He went on to say that provisions of the Constitution must be construed in their context which, in *Makwanyane*, included "the history and background to the adoption of the constitution, other provisions of the provision itself and, in particular, the provisions of chapter three of which it is part".⁴³⁷ The judgement goes on to recognise that the social context of the case- such as, in that case, the high level of criminal activity in South African society- also has to be taken into account. Judge Chaskalson emphasized the fact that the Constitution must be interpreted 'in the light of our own history and conditions with due regard to the aspirations articulated in it'.⁴³⁸

How then should one determine the context in which a provision of the Constitution is to be viewed and its purpose? It is often argued today that contextual interpretation is desirable

⁴³² Centre for child Law 16.

⁴³³ 1995(2) SA642(CC)

⁴³⁴ Ibid, par17

⁴³⁵ 1995(3)SA 391 (CC)

⁴³⁶ Ibid, par 9

⁴³⁷ Chapter Three was the Bill of Rights in the interim constitutions of South Africa Act 200 of 1993.

⁴³⁸ This particular stamen of approach to constitutional interpretation appears in Chaskalson, 1998:7.

without much thought being given as to how one ascertains the context in which to view a provision. There has, for instance, been some criticism of how the Constitutional Court has interpreted the historical context in which to interpret the Constitution.⁴³⁹ In determining context, what is required is an ability to distinguish relevant to irrelevant considerations. Relevance must to some extent be determined in relation to the values at stake in a particular case. Similarly regarding the purposes of a constitutional provision, these must be derived from a consideration of the deeper values underlying a constitution. A constitution itself usually explains which value is of central importance. It is with reference to these values that the particular purpose of provisions is to be determined. The constitution identifies human dignity, equality, and freedom as the central values underlying the Bill of rights.⁴⁴⁰ In light of the *Zuma and Makwanyane* cases referred to above based on human dignity, equality and freedoms enshrined in the Constitution, the constitutional provisions may be interpreted to include children of asylum seekers to benefit from the mainstream of social security just like the other groups of children that benefit from child social grants in South Africa.

4.4 Chapter Conclusion

This chapter focused on analysis of relevant case law in relation to realization of social security rights and exploring the interpretive rule the courts can use to protect social security rights for asylum seekers' children. Various interpretive approaches and the relevancy thereof in relation to social security rights of asylum seekers were explored. The minimum core model as was adopted first by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR) and defined as a model for the 'assessment' of a state's action in the discharge of its obligation relating to economic, social and cultural rights based on whether it meets minimum essential levels of the right,⁴⁴¹ was discussed at length. The minimum core obligation as it was explained by the South African Constitutional Court in the *Grootboom* case⁴⁴² refers to the needs of the most vulnerable group of people. In the context of this study the vulnerable group refers to asylum seekers children.

⁴³⁹ De Vos, 2001.

⁴⁴⁰ Section 7(1) reads as follows: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' See also secs 1,9,10 and 36(1) of the constitution.

⁴⁴¹ United Nations Committee on Economic Social and Cultural RIGHTS (escr Committee) General Comment 3 The nature of states parties' obligations (1990) paras 4 & 10.

⁴⁴² (Note 355 supra) pars 31-33.

Reasonable model is the most applied approach by the South African Constitutional Court to interpret socio-economic rights which include social security rights as witnessed in Grootboom case and others. The reasonableness model developed by the South Africa Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programs for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.⁴⁴³ This is a model in which the Court tests the reasonableness of the action or non-action of the state. In this study the exclusion of asylum seekers children from social assistance system in South Africa should be tested in light of reasonable approach. Various cases have been explored to read the mind and approach of the court in relation to interpretation of social security rights of asylum seekers children. The most remarkable cases include the Grootboom, Khosa and TAC cases where in all of them the Constitutional Court applied reasonable test approach to deal with rights similar to social security. The other approaches, namely, Minimum core model, Model of review combining minimum core and reasonableness standards, interdependence approach, In essence, all the approaches discussed in this chapter are useful tools to be employed by the Court to realize social security rights of asylum seekers children. By so doing South African courts have, through case law, introduced and established a new model of interpretive rule to protect social security rights for asylum seekers' children for which South African statutes had not fully provided for as discussed in the previous chapter.

⁴⁴³ D Brand `Socio-economic rights and courts in South Africa: Justifiability on a sliding scale` in F Coomans (Ed) Justifiability of economic and social rights: Experiences from domestic systems (2006) 227; CR Sunstein Designing democracy: What constitution do? (2001) 222-23.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The previous chapter focused on analysis of relevant case law in relation to realization of social security rights and exploring the interpretive rule the courts can use to protect social security rights for asylum seekers' children. In this chapter the focus will be on conclusions consisting of findings and recommendations based on the entire study from chapter one to four. There are research questions that were stipulated for which this study sought to provide answers in order to achieve the aim and objectives of the study. Thus the findings for each question are hereunder stipulated.

5.2 Conclusions

5.2.1 Social security rights relevant to children of asylum seekers as enshrined in the international human rights instruments

The international human rights instruments make provision for protection of social security rights for asylum seekers children in South Africa. The following are some of the human rights provisions as enshrined in various international human rights instruments:

Article 22 of the Convention on the Rights of the Child⁴⁴⁴ specifically protects the rights of children asylum seekers in the process of seeking refugee status, whether unaccompanied or accompanied by parents or by any other person. Such children should 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.⁴⁴⁵ Children of asylum seekers should not be subjected to discrimination in the enjoyment of social security rights, such as access to social services.⁴⁴⁶ It is very clear based on this article that this Convention guarantees protection of asylum seekers children's social security rights and South Africa as a party to this Convention

⁴⁴⁴ Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, (1989) UN Doc A/44/49, entered into force 2 September 1990, art 3, para 1.

⁴⁴⁵ Ibid

⁴⁴⁶ 'Concluding Observations of the Committee of the Rights of the Child: Italy' (2003) UN Doc CRC/C/15/Add.198, para 21.

should honour its obligations. In the same breath The ICESCR accords recognition to both the public and private components of the right to social security. It enjoins: “the State-Parties to the present Covenant [to] recognise the right of everyone to social security, including social insurance.”⁴⁴⁷ This is a right of everyone including asylum seekers children in South Africa.

The International Convention on the Elimination of All Forms of Racial Discrimination provides in article 2 that States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:⁴⁴⁸ among others, social security and social services⁴⁴⁹ This is the Convention which guarantees protection of asylum seekers children against all forms of discrimination from having access and enjoying social security rights and social assistance in South Africa. In the similar spirit and purport, the Convention on the Elimination of All Forms of Discrimination against Women provides for elimination of discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, to benefit directly from social security programmes;⁴⁵⁰ Generally, the exclusion of certain categories of children from social security and assistance legislation can be seen as an indirect form of discrimination on the basis of gender and asylum seeker status.

The African Charter on Human and Peoples’ Rights does not guarantee the right to social security directly.⁴⁵¹ Rather, indirect reference is made to the rights which can be regarded as specific to social security, such as articles 16 and 18.⁴⁵² The African Charter also provides

⁴⁴⁷ Article 9 Of the Convention (ICESCR)

⁴⁴⁸ Article 5 of the Convention (ICERD).

⁴⁴⁹ Article 5(e)(iv) of the Convention (ICERD).

⁴⁵⁰ Article 14(2)(c) of the Convention. (CEDAW).

⁴⁵¹ L Lindholt ‘*Questioning the Universality of Human Rights*’ 217. It has been observed by Oloka-Onyango that “the content of the articles is a significant letdown from the promise of the Preamble,” especially in its avowed commitment to the inter-connection of socio-economic and political rights. Oloka-Onyango *Struggle for Economic and Social Rights* 42.

⁴⁵² Article 16, which guarantees the right to “*the best attainable state of mental and physical health*”, has been considered by the African Commission of Human and Peoples’ Rights in *World Organisation against Torture, Lawyers’ Committee for Human Rights and Others v Zaire Communications* 25/89; 47/90; 100/93 (consolidated suits) (19th Session of the African Commission - April 1996). In its decision, the Commission gave a generous interpretation to the right to health, holding that it places a duty on the government of Zaire to “*provide basic*

and affirms social security rights of asylum seekers children. Their exclusion from social assistance system is a violation of the above provisions. In the similar vein, the African Charter on the Rights and Welfare of the Child addresses various contingencies of social security. Rights of the child enjoying protection in terms of this instrument are; the rights to survival, protection and development.⁴⁵³ These provisions are applicable to asylum seekers children in their capacity as children regardless of the national origin. South Africa has ratified this charter and therefore it is bound by these provisions.

5.2.2 The Legal framework South Africa has to realize social security rights, including social assistance, in relation to children of asylum seekers

It is the finding of this study that South Africa has a legal framework to realize social security rights in South Africa. However, despite the constitutional provisions, the other legislations relevant to social security rights as mentioned here under do not provide for realization of social security rights for asylum seekers children in South Africa. In a nutshell, the legal framework for social security rights which includes social assistance commences with the constitutional provisions. The Constitution⁴⁵⁴ provides that everyone has the right to have access to social security including, appropriate social assistance for those who unable to support themselves and their dependants.⁴⁵⁵ Asylum seekers children are included on the word 'everyone' therefore they should be entitled to have access to social security and assistance. Section 32 of Refugees Act⁴⁵⁶ (the Refugees Act) deals with the position of unaccompanied children and mentally disabled persons.⁴⁵⁷ This Act is silent on asylum seekers children and creates a distinction of treatment in relation to access to social security and social assistance. Therefore it is contrary to South African international and constitutional obligations. A new Social assistance Act⁴⁵⁸ was enacted in 2004, which provides for the payment of a child support grant;⁴⁵⁹ and foster child grant.⁴⁶⁰ However, this Act also excludes asylum seekers children benefiting from child social grants in South Africa

services such as safe drinking water and electricity", in addition to its basic obligation to supply adequate medicine.

⁴⁵³ Article 5

⁴⁵⁴ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁴⁵⁵ S 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴⁵⁶ Act 130 of 1998.

⁴⁵⁷ S 32(1).

⁴⁵⁸ Act 13 of 2004.

⁴⁵⁹ S 6

⁴⁶⁰ S 8

because it is silent in relation to asylum seekers. Therefore it is inconsistent with the international and constitutional obligations.

5.2.3 Findings on the approach of the South African Judiciary in the protection and enforcement of right to social security for children of asylum seekers.

In the process of this study, it became apparent that the South African judiciary has never been seized with the issue or question of law that requires the courts to determine the position of asylum seekers children in relation to their right to have access to social security and social assistance; in particular, child related grants. However, in light of the most remarkable cases to wit Grootboom, Khosa and TAC, the Constitutional Court shared much light as to the reasonable test approach as applied by the court to interpret socio-economic rights which include social security rights. Few interpretive approaches were explored in chapter 4 of the study which are Minimum core model, Model of review combining minimum core and reasonableness standards, interdependence approach and Reasonableness model as applied by the Constitutional Court in the afore mentioned cases. The reasonableness model developed by the South Africa Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programs for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.⁴⁶¹ This is a model in which the Court tests the reasonableness of the action or non-action of the state. Therefore, the judiciary is in a better position explore all or any of the above models to ensure that the social security rights of asylum seekers children are realized in South Africa. Currently, asylum seekers children are systematically excluded from having access to social security and social assistance which exclusion is contrary to South Africa's constitutional and international obligations.

5.3 Recommendations

The following recommendations would serve as measures that can be employed to realize the social security rights for children asylum seekers in South Africa.

⁴⁶¹ (Note 443 supra) 222.

5.3.1 South Africa should adhere to and comply with constitutional provisions and ratified international instruments.

5.3.2 The state should eradicate any form of differential treatment of asylum seekers children from other categories of children in South Africa.

5.3.3 The child support grant need to be extended to all the children regardless of their immigration status and that of their parent, caregiver or guardian in South Africa.

5.3.4 Asylum seekers children in all situations and circumstances should have access to all forms of social assistance afforded to children.

5.3.5 The Refugees Act 130 of 1998 should be amended to include asylum seekers children.

5.3.6 The Social Assistance Act 13 of 2004 should be amended to include asylum seekers children and to provide for their access to social assistance, in particular child social grants.

5.3.7 The Department of Home Affairs should be easily accessible and within reach to enable asylum seekers to have access to birth certificates and Identity documents.

5.3.8 There is a need for government to institute policies and programs to ease the plight and hardships faced by children of asylum seekers.

5.4 Concluding remarks on the entire study

Human rights are universal and applicable to all human beings. Children of asylum seekers present in South Africa are also bearers of human rights in particular social security and social assistance rights as provided for in the Constitution. This study has revealed that asylum seekers' children do not have access to child related social grants in South Africa solely because the social security legislative framework is silent on their access to child social grants. Therefore the findings and recommendations in the study may be useful in ensuring that the social security rights of asylum seekers' children in South Africa are realized.

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