

**State funded social assistance to refugee children: defining a constitutional
standard for child refugee protection in South Africa**

by

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*A mini-dissertation submitted in partial fulfilment of the requirements for the degree
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ABSTRACT

The problem that this mini-dissertation addresses is whether or not the South African Constitution and legislation extends social assistance rights to refugee children. This study argues that a teleological and purposive interpretation of the Constitution would ensure access by refugee children to social assistance. The main objective of this study is not only to ascertain if the South African Constitution and legislation entrenches the right to social assistance to refugee children but also to assess if there is congruence between the level of protection agreed to at the international level and that implemented at the national level. The findings are meant to alert and assist the government on the policy and legislative deficit in the protection of refugee children, and therefore, enable it to offer better protection in line with its constitutional standards and international obligations.

Key words:

Child, Constitution, international, instruments, law, regional, refugee, human right, social assistance.

DECLARATION

I, Precious Muleya, declare that this min-dissertation contains no other person's work which has been used without due acknowledgment. This dissertation has not been submitted for the award of any degree in any other tertiary institution.

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DEDICATION

I dedicate this work to my father Edward Sibili Muleya. You highly inspired me dad, thank you so much!.



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I am grateful to God and a number of valuable people without whom this mini-dissertation would not have been completed. I wish to acknowledge the efforts of those people who have made this mini-dissertation possible.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Review
ACRWC	African Charter on the Rights and Welfare of the Child
CC	Constitutional Court
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CJDHR	Catholic Journal on Development and Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJCR	International Journal of Children's Rights
ILO	International Labour Organisation
LDD	Law, Democracy and Development
PULP	Pretoria University Law Press
SACR	South African Country Report
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
UNHCR	United Nations High Commissioner for Refugees
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights

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Chapter 1

Introduction to the study

1 Introduction

1.1 Background of the study

The historical approach to social security in South Africa has been one of meeting the needs of the white minority.¹ Its main objective was to protect 'whites' against certain contingencies either by way of social insurance or social assistance.² In the past, the purpose of extending parts of the system to other groups was not to create a comprehensive coverage for the whole population, but was often determined by political, electoral and economic considerations.³ This position changed after South Africa gained its independence in 1994. Social assistance means a social grant including social relief of distress.⁴ A social grant includes child support grant, a care dependency grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid. The right to social security, for its implementation requires that a system be made available to ensure that benefits are provided for the relevant social risks and contingencies.⁵ The South African government provides support referred to as public aid, to those people who cannot afford to support themselves. Eligibility for social assistance is determined for each household by identifying all the income from all sources of all people who live in a household. If this total income is less than the rate which applies to that household, the household is able to receive social assistance.⁶ This means that there is no discrimination in terms of gender, marital

¹ Policy Brief 1 "Inter-Regional Inequality Facility: sharing ideas and policies in Africa, Asia and Latin America" 2006, 1. Available at <http://www.odi.org/sites/odi.org.uk/odi-assets/publications-opinion-files/1688.pdf>. Accessed 09 July 2015.

² Haarmann *Social Assistance in South Africa: Its potential impact on poverty* (LLD-thesis University of the Western Cape, 2000) 1. The author regards racial naming as in itself racist and hence in principle it should be avoided. However, in a study of this nature the author felt compelled to use this terminology in order to briefly describe the different social realities created by the apartheid regime.

³ *Ibid*, 1.

⁴ Section 1 of the Social Assistance Act No. 13 of 2004.

⁵ International Covenant on Economic and Social and Cultural Rights General Comment No. 19 para 11.

⁶ Social Assistance Program, 1. Available at http://www2.gnb.ca/content/gnb/en/services/services_renderer.10295.Social_Assistance_Program.html Accessed 09 July 2015.

status and sexual orientation. The amount of social assistance depends on the amount of household income.⁷

The United Nations Convention on the Rights of the Child (CRC) defines a child as a human being below the age of eighteen years.⁸ The Refugees Act No. 130 of 1998 is the primary national legislation in South Africa which gives effect to binding international instruments as well as the principles and standards relating to refugees. The Refugees Act defines a refugee as a person who-

...due to a well-founded fear of being persecuted by reasons of race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his former habitual residence is unable, owing to such fear, unwilling to return to it.⁹

The Refugees Act came into effect on the 1st of April 2000. Upon enactment of the Refugees Act, the government established machinery for the management of refugee affairs including the establishment of systems and procedures for registration and determination of their refugee status. The Refugees Act adopted the definition of a refugee provided in the United Nations Convention Relating to the Status of Refugees¹⁰ and broadens the definition in the Convention by the Organisation of African Unity to protect individuals who flee from their countries owing to external aggression, occupation or foreign domination.¹¹ Individuals who meet the definitions of a refugee are therefore entitled to be treated in accordance with the Refugees Act.

⁷ Gabrielle Kelly and GroundUP Staff "Everything you need to know about social grants" South African Social Security Agency 2014, 1. Available at http://groundup.org.za/article/everything-you-need-know-about-social-grants-grants_820. Accessed 09 July 2015.

⁸ Convention on the Rights of the Child (1989) UN Doc A/44/49, Article 2.

⁹ Section 3 (a) of the Refugees Act No. 130 of 1998 (Refugees Act). See also section 3 (b) and (c) of the Refugees Act which also applies to people who move away from their country owing to external aggression and to dependents of such people.

¹⁰ Article 1 of the United Nations Convention Relating to the Status of Refugees of 1951 (UN Refugee Convention).

¹¹ Article 1 (2) of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (hereinafter referred to as the OAU Refugee Convention).

South Africa is a democracy founded on the principles of human dignity¹², the achievement of equality and the advancement of human rights and freedoms.¹³ South Africa is also bound by the rule of law and supremacy of the Constitution as such; it is obliged to comply with its human rights obligations in its treatment of refugees.¹⁴ South Africa has ratified almost all the conventions relating to children and refugees, namely the CRC which was ratified in 1995; the United Nations Convention Relating to the Status of Refugees and its 1967 Protocol were ratified in 1996¹⁵, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (1969 OAU Refugee Convention) amongst others.¹⁶

Sections 28 (1)(c) and 29 (1)(a) of the Constitution of South Africa provides for children's basic socio-economic rights, namely the rights to basic nutrition, shelter, basic health care, family life and social services, as well as basic education.¹⁷ Apart from restrictions put on the right to vote and the right to stand for public office, every child enjoys the same protection as his or her adult counterpart.¹⁸

Children are a particularly vulnerable group which requires extra protection and care. In the case of *Government of the Republic of South Africa v Grootboom* (*Grootboom case*)¹⁹ the High Court of the Western Cape Provincial Division addressed children's rights by stating that the state is obliged to provide shelter to children and their parents on demand if parents are unable to shelter their children.²⁰ In the case of *Minister of Health v Treatment Action Campaign*, the obligation of the state to provide socio-economic rights to children without parents was extended to

¹² Section 1 (a) of the Constitution of the Republic of South Africa 1996 (Constitution).

¹³ *Ibid*, s 1 (a).

¹⁴ Section 1 (c) of the Constitution.

¹⁵ Protocol Relating to the Status of Refugees (1967).

¹⁶ Steiner, Alston & Goodman *International Human Rights in Context. Law, Politics, Morals*, 3 ed (2008) 156.

¹⁷ Section 28 (1) (c) & 29 (1) (a) of the Constitution.

¹⁸ Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 600-6001. Restrictions are placed on the right to vote in elections and to stand for public office in that section 19 (3) of the Constitution provides that these rights are reserved for adult citizens.

¹⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

²⁰ *Grootboom case* para 16 & 70; Proudlock "Children's socio-economic rights" in Boezaart T (edition) *Child Law in South Africa* (2005) 300; Stewart "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" 2008 *SAJHR* 476 478.

children whose parents lacked the means to provide for them.²¹ The Court pointed out that the parents of these children are mostly poor and unable to access private health care but fell short of concluding that poor children have an immediate claim to socio-economic rights.²²

Social assistance means a social grant including social relief of distress.²³ A social grant includes child support grant, a care dependency grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid. The Department of Social Development promulgated amendments to the Social Assistance Act No. 13 of 2004 which took effect on 1 April 2012. This came as a result of sustained advocacy work by rights groups, which culminated in Lawyers for Human Rights²⁴ pursuing public interest litigation supporting the recognition of refugee rights.²⁵ These amendments however do not cater for the inclusion of refugees in the social assistance programmes.²⁶ Section 5 of the Social Assistance Act was amended to comply with section 16 of the same Act but not to add refugees as beneficiaries to social assistance.²⁷ This is a problem because refugees remain with no tangible proof of entitlement to the right to social assistance in South Africa.

It remains unclear whether refugee children are included in the social assistance programmes entitled to South African children when considering the above cases because neither the Social Assistance Act²⁸ nor the Constitution elaborates on this aspect although the Refugees Act aims to promote it in its Preamble.²⁹ This mini-

²¹ *Minister of Health v Treatment Action Campaign* 2002 5 SA (CC) (*Treatment Action Campaign* case) para 135 (2) & (3).

²² *Treatment Action Campaign* case para 301.

²³ Social Assistance Act, s 1.

²⁴ Lawyers for Human Rights is a non-governmental and non-profit making organization which started operating in 1979 and whose vision is to be a leading, effective human rights and constitutional watchdog and advocate. It is an international force in the development and delivery of human rights, with a primary focus in Africa; a primary contributor to clear strategic policy on the delivery of socio-economic rights for the disadvantaged.

²⁵ Human Rights Watch Report. Available at <http://www.lhr.org.za/report/2012>. Accessed 04 March 2014.

²⁶ Social Assistance Amendment Act No. 6 of 2008. See also the Social Assistance Amendment Act No.5 of 2010.

²⁷ Social Assistance Amendment Act No. 6 of 2008. See also the Social Assistance Amendment Act No. 5 of 2010.

²⁸ Preamble of the Social Assistance Act No.13 of 2004 (Social Assistance Act).

²⁹ South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

dissertation investigates the issue of whether refugee children are constitutionally obliged to social assistance protection.

Sections 28 (1) (c) and 27 (1) (c) of the Constitution imposes a duty on the state to provide social assistance to those who cannot provide for themselves and their dependants.³⁰ The constitutional standards set out by South Africa regarding refugee child protection will be examined mainly through an analysis of the relevant constitutional and legislative provisions as well as relevant case law. The specific sections of the constitution which apply to refugee children will be scrutinised. In this way, the question whether or not refugee children are entitled to social assistance protection will thus be answered. It will further be determined whether legislation such as the Refugees Act, Social Assistance Act and Children's Act, amongst others are protective of refugee children's rights in general and social assistance rights in particular.



1 2 Statement of the research problem

The central argument in this mini-dissertation is whether or not the South African Constitution and legislation extend social assistance protection to refugee children.³¹

This study argues that refugee children have a constitutional right to social assistance in terms of section 28 (1) (c) of the Constitution which makes it clear that when parents do not fulfil their common law and statutory obligations, the state has a duty to step in and support the children. Reading the section 28 (1) (c) proposed intervention together with the child's right to parental care in section 28 (1) (b) might imply that the state has a duty to provide not only the child but also the child's family with shelter, nutrition and social services.³² The right to family life can hardly be enjoyed if the child is removed from his or her family in order to be provided with such services.

Section 27 of the Refugees Act provides that refugees are entitled to all the rights contained in chapter 2 of the Constitution. The Refugees Act however does not have

³⁰ Section 27 (1) (c) & 28 (1) (c) of the Constitution.

³¹ Section 27 (1) (c) of the Constitution provides 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."

³² Currie & De Waal *The Bill of Rights Handbook* 611.

a specific provision granting social assistance protection. The Social Assistance Amendment Acts of 2008 and 2010 do not carry any such specific provisions which cater for the inclusion of refugees in the social assistance programmes.³³ Section 5 of the Social Assistance Act³⁴ provides that any person shall be entitled to the appropriate social grant if he or she satisfies the Director-General of the Department of Home Affairs that he or she is a resident in the Republic at the time of the application in question,³⁵ is a South African citizen³⁶ and complies with any additional requirements or prescribed conditions.³⁷ Regarding the above, one notes that foreign nationals are totally excluded from social assistance benefits because of the citizenship requirement. This position was changed in the *Khosa* case when permanent residents were held to be entitled to social assistance protection. Regardless of this position, foreign nationals still face difficulties in assimilating themselves in the South African system of social assistance.

This study would however, not only examine the provisions of the South African Constitution and legislation, but also the relevant international and regional human rights instruments that are binding on South Africa.

1 3 Significance of the study

The dependence of refugee children on adults makes the former particularly vulnerable to abuse, exploitation and marginalisation. They therefore need special protection in light of their dependence and vulnerability.³⁸ The CRC sets out the basic rights of all people under the age of 18.³⁹ In addition to their special rights, child refugees have the same basic rights as adult refugees.⁴⁰ Many individual countries also give children additional protection. There is perceived inherent

³³ Social Assistance Amendment Act No. 6 of 2008. See also the Social Assistance Amendment Act No.5 of 2010.

³⁴ Social Assistance Act, s 5.

³⁵ *Ibid*, s 5 (b).

³⁶ *Ibid*, s 5 (c).

³⁷ Social Assistance Act, s 5 (d).

³⁸ Tardjbakhsh "The Protection of Refugee Children" *Refugee Survey Quarterly*, 1999, 64.

³⁹ Myer "Rights of Child Refugees" 2007, 187. Available at

http://www.ehow.com/info_8179308_rights-child-refugees.html. Accessed 29 April 2014.

⁴⁰ *Ibid*.

weakness in protection activities granted by South Africa to refugee children's social assistance rights.⁴¹

This mini-dissertation is to analyse specific constitutional provisions, legislation and case law in order to ascertain the constitutional standard for enhancing social assistance for refugee children in South Africa. The findings will alert and assist the government on the policy and legislative lacunae in the protection of refugee children, and therefore, enable it to offer better protection in line with the constitutional standards and international obligations. South Africa has been chosen as a case study because it has ratified most of the human rights treaties pertaining to children. Significantly, the country hosts a large number of refugees from across the continent and the world at large.



1 4 Research questions

- Does the South African Constitution and legislation offer the right to social assistance in respect of refugee children?
- Is there congruence between the level of protection agreed to at the international level and that implemented at the national level?

1 5 Objectives of the study

- To ascertain whether South African Constitution and national legislation accord refugee children the right to social assistance.
- To analyse international and regional human rights instruments in order to understand the normative socio-economic entitlements of refugee children, in particular the right to social assistance.

1 6 Assumptions underlying the study

It is unclear as to whether or not refugees have a direct claim to social assistance in South Africa. Children require protection as they face increased risks of being discriminated against and abused. The right to social assistance is enshrined in the constitution, regional and international instruments, of which South Africa is a

⁴¹ *Ibid.*

signatory. This right is poorly implemented by governmental institutions because of ignorance as to its existence and as it applies to refugees.

1 7 Limitations of the study

This mini-dissertation does not comprise of any data collection from any individual refugees in South Africa due to the practical challenges of carrying out such empirical investigations given the security considerations. Empirical investigations would have strengthened the findings of this study and the ensuing recommendations. A comprehensive assessment of children's rights would have to examine in detail each and every provision of the Constitution and relevant legislation, analysing their contribution to the promotion and protection of children's socio-economic rights. This study, however, is selective and limits its scope to an examination that underpin children's socio-economic rights and to the implementation mechanisms provided for in the Constitution.

1 8 Delimitation of the study

The focus of this study is on South Africa. This research will be limited to child refugees in South Africa.

1 9 Definition of concepts

1 9 1 Refugee

A refugee is any person who is forced to flee his/her home due to persecution, whether on an individual basis or as part of a mass exodus due to political, religious, military or other problems.⁴²

1 9 1 Child

A child means any person under the age of 18 years.⁴³

⁴² Refugees Act, s 3.

⁴³ CRC, Article 3.

1 9 3 Dependant

A dependant in relation to a refugee includes the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such a refugee.⁴⁴

1 9 4 Social assistance

Social assistance means a social grant including social relief of distress.⁴⁵ A social grant includes child support grant, a care dependency grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.

1 1 0 Literature review

Social assistance in South Africa is made up of the Child Support Grant (CSG); Disability Grant (DG); Foster Care Grants; Care Dependency Grant; State Old Age Pension Grant (SOAP), Grant-in Aid and War Veterans' Grant. These social grants possess unique opportunities and challenges but only a few will be discussed in detail.⁴⁶ All applicants for social grants are subject to a means test which entails that the institution responsible for the administration of the funds evaluates the income and assets of the person applying for assistance in order to decide whether a person's means are below a stipulated minimum.⁴⁷

The CSG is one of the greatest points of contention within the South African assistance system dependency debate.⁴⁸ It was introduced in April 1998 to replace the Child Maintenance Grant, which was conditionally available to other races during apartheid.⁴⁹ The CSG is a non-conditional means tested cash transfer and provides R330.00 per month per child to the head of a household at present and is eligible to caregivers with a monthly income that is reviewed from time to time.⁵⁰ The Care Dependency Grant is designed for children with assessed permanent disability and

⁴⁴ Chapter 1 (ix) of the Refugees Act.

⁴⁵ Social Assistance Act, s 1.

⁴⁶ Potts "Social Welfare in South Africa: curing or Causing Poverty?" 2011, 79. Available at www.psuja.files.wordpress.com/2012/04/social_welfare_final.pdf. Accessed 15 January 2015.

⁴⁷ Strydom *Introduction to Social Security: Essential Social Security Law*, Juta, Cape Town (2001) 6.

⁴⁸ Potts "Social Welfare in South Africa: curing or Causing Poverty?" 2011, 79. Available at www.psuja.files.wordpress.com/2012/04/social_welfare_final.pdf. Accessed 15 January 2015.

⁴⁹ *Ibid.*

⁵⁰ Dianne "Just R10 more for child support grant" 2015, 1. Available at <http://www.enca.com/south-africa/just-r10-more-child-support-grant>. Accessed 08 July 2015.

in need of state assistance.⁵¹ This grant is also subject to the means test unlike the Foster Child Grant.⁵² When it comes to war veterans, the means test is applicable; such person must not be maintained or cared for in a State Institution and should not be a recipient of another social grant.⁵³

The Disability Grant is non-contributory, means tested and is available to people disabled in circumstances other than road and work related accidents, and this is the only social grant program for the working age population.⁵⁴ The purpose of this grant is to compensate individuals for loss of income. Disability grants are available on either temporary or permanent basis; the permanent basis is intended to carry recipients into eligibility age for the SOAP, while temporary assistance is designed for individuals that have a disability that prevents them from working from six months to a year.⁵⁵ The SOAP becomes available at the age of 60 for women and 65 for men.⁵⁶

South Africa's recognised freedom and democracy has made the country a favoured destination of most African refugees particularly from sub-Saharan Africa.⁵⁷ Refugee issues have therefore attracted significant attention in South Africa since 1994. In 2013, Julian Rademeyer argued that the numbers of people seeking asylum in South Africa have declined dramatically over the last two years.⁵⁸ This claim is difficult to ascertain as the data is flawed, inaccurate and sharply contradictory.⁵⁹ This claim was mostly picked up and repeated verbatim by various media outlets.⁶⁰ For example, an SABS television interview with Home Affairs minister Naledi Pandor prior to World Refugee Day on 20 June 2013 was prefaced with an introduction

⁵¹ Social Grants, Available at <http://www.sassa.gov.za/index.php/social-grants>. Accessed 15 January 2015.

⁵² *Ibid.*, 1.

⁵³ See *n* 39 above.

⁵⁴ Potts "Social Welfare in South Africa: curing or Causing Poverty?" 2011, 83. Available at http://www.psuja.files.wordpress.com/2012/04/social_welfare_final.pdf. Accessed 15 January 2015.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Hunter & May *Ageing in Post Apartheid South Africa: An Analysis of the "Nearly Old"* (2009) 173.

⁵⁸ Community Agency for Social Inquiry, Japan International Cooperation and United States National Baseline Survey, 2003.

⁵⁹ Rademeyer "Is South Africa the largest recipient of asylum-seekers worldwide? The numbers don't add up" 2013, 1. Available at <http://aficacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-don't-add-up>. Accessed 08 July 2015.

⁶⁰ *Ibid.*

⁶⁰ *Ibid.*

stating that South Africa “continues to be the recipient of the highest annual number of asylum applications worldwide”.⁶¹ The minister did not contradict the claim during the interview.⁶² The relevant international documents for this discussion are refugee and child-specific international instruments, as well as relevant legislation and case law.⁶³

Between the periods of 1995 to year 2000, South Africa had signed and ratified a significant number of international and regional human rights instruments. These include, the United Nations Convention Relating to the Status of Refugees; the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the International Covenant on Economic Social and Cultural Rights, after prolonged advocacy and decades of restraint. The significance of the UN Refugee Convention and the OAU Refugee Convention is that both prohibit activities inconsistent with refugee status. The two instruments safeguard refugees against expulsion and promote the practice of burden-sharing and solidarity among states.⁶⁴

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Section 39 (1) (b) of the Constitution provides that international law must be considered when interpreting the Bill of Rights.⁶⁵ This section was given effect through section 231(4) which states, that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.⁶⁶ In terms of section 231(4), it is evident that the dualist theory is applicable in South Africa.⁶⁷ The dualist theory emphasises the difference between national and international law by stating that in order for international law to be recognised in

⁶¹ *Ibid*, 2.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ Recommendation Five of *The Addis Ababa Document on Refugees and Forced Population Displacements in Africa*, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, 8-10 September 1994, Addis Ababa, Ethiopia, UNHCR, Geneva, 1995, 5.

⁶⁵ Mahery “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law”, in Boezaart T (edition) *Child Law in South Africa* Juta, Cape Town (2009) 323. See also section 231-233 of the Constitution.

⁶⁶ Section 231 (4) of the Constitution.

⁶⁷ *S v Kwelase* 2002 2 SACR 135 (C). See also Buck *International Child Law* 27-28; Detrick S, A Commentary on the United Nations Convention on the Rights of the Child (1st ed) 27-28.

South Africa specific international instrument must be approved by the National Assembly and the National Council of Provinces first.⁶⁸ In the case of *S v Kwelese* in which the Constitutional Court dealt with juvenile offenders. The Court indicated that the number of cases in which the CRC is being referred to, is growing. It was pointed out that constitutional provisions should be read together with the applicable provisions in the CRC pertaining to juvenile justice.⁶⁹ This serves to confirm that international law is applicable in South Africa once ratified since by so doing South Africa is bound to fulfil the obligations contained therein.

Section 39 of the Constitution is commonly referred to as the interpretation clause. This section requires an interpretation that promotes the values which underlie an open and democratic society based on human dignity equality and freedom. This section refers to the use of international law and foreign law. These remarks make it clear that the Constitution permits reference for purposes of interpretation to international human rights law in general.⁷⁰ It is not confined to instruments that are binding on South Africa.⁷¹ The fact that South Africa is at present party to relatively few international human rights agreements is therefore not an obstacle in invoking international human rights law for the purposes of section 39 (1).⁷² Section 39 (1) invokes public international law primarily for the purpose of interpretation of rights and for determining their scope, not for proving their existence.⁷³ There is an injunction to consider international law in terms of section 39 but not foreign law.⁷⁴ In *S v Makwanyane* (Makwanyane) the Constitutional Court pointed out that in the context of using international law to interpret the rights in the Bill of Rights, reference may be made to both binding and non-binding international law.⁷⁵ The Constitutional Court held in *Makwanyane* that comparative human rights jurisprudence will be of great importance while an indigenous jurisprudence is developed.⁷⁶

⁶⁸ *Ibid*, 135.

⁶⁹ *Ibid*.

⁷⁰ Currie & De Waal, *The Bill of Rights Handbook*, 160.

⁷¹ *Ibid*.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

⁷⁶ *Ibid*.

Section 39 (2) has little to do with the interpretation of the Constitution, but concerns the interpretation of statutes, development of the common law and customary law. This section is crucial to the application of the Constitution. It should be read together with since it provides an indirect application of the Bill of Rights to the law. Customary international law is part of South African law unless it is inconsistent with the Constitution or an Act of Parliament.⁷⁷ The question whether any socio-economic or cultural right forms part of customary international law is a difficult one.⁷⁸ These rights are included in the Universal Declaration of Human Rights (1948) and a range of international and regional human rights treaties.⁷⁹ However, the question is whether there is sufficient state practice (*usus*) and the opinion on the part of states that a particular socio-economic right is legally binding (*opinio juris*) to support its status as customary international law norm.⁸⁰ These include, for example, the mass forced eviction of groups without basic substantive and procedural safeguards. Section 232 of the Constitution indicates that its provisions trump any conflicting customary international law norm.⁸¹

Nevertheless, the relevant norms remain binding on South Africa as a matter of international law and South Africa will incur state responsibility under international law for breaches of these norms.⁸² In addition, the courts are enjoined by the Constitution to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.⁸³ Thus legislation that affects people's socio-economic rights should be interpreted, as far as possible, to be in conformity with applicable international law.⁸⁴ This provides additional impetus for the courts to interpret social and economic legislation in ways that take into account widely accepted international normative values.⁸⁵

⁷⁷ Dugard, *International Law, a South African Perspective* 56.

⁷⁸ Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 104.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 105.

⁸² *Ibid.*

⁸³ Section 233 of the Constitution.

⁸⁴ *Ibid.*

⁸⁵ Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 105.

According to Dugard, section 39 (1) does not only require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts but also to international custom as evidence of general practice accepted as law.⁸⁶ Dugard argues that such a conclusion follows logically from the use of the term 'public international law' without qualification in section 39 (1) and to give maximum effect to the otherwise incomplete catalogue of rights in the Bill of Rights.⁸⁷

Section 28 of the Constitution protects children irrespective of their nationality and origin by stating that every child has a right to basic nutrition, shelter, basic healthcare services and social services.⁸⁸ Children are also entitled to family care or parental care, or to appropriate alternative care when removed from the family environment.

In *Centre for Child Law v Minister of Home Affairs* (*Centre for Child Law case*)⁸⁹ the Court directly addressed the question whether foreign unaccompanied children were entitled to legal representation in terms of section 28 (1) (h) and the socio-economic rights contained in section 28 (1) (c) of the Constitution.⁹⁰ The Constitutional Court held that, section 28 should be seen in the context of the Bill of Rights as a whole.⁹¹ In respect of the socio-economic rights referred to in sections 26 and 27, the Constitutional Court has said that this section imposes a negative duty on the state and private parties to desist from preventing or impairing the right of access to socio-economic rights.⁹² This duty is, however, limited. In view of the fact that children's socio-economic rights are neither described as a right of access to the relevant rights nor qualified as in sections 26 and 27, one may conclude that these rights impose a duty on the state to ensure that those children who lack basic necessities of life are provided with them.⁹³

⁸⁶ Dugard "The Role of International Law in Interpreting the Bill of Rights" (1994) 101 SAHRJ 208.

⁸⁷ *Ibid.*

⁸⁸ Section 28 (1) (a), (b) and (c) of the Constitution.

⁸⁹ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 17.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.* Also available at www.refugeerights.uct.ac.za/usr/Case_Law_Reader_Centre_for_Child_Law_v_Minister_of_Home_Affairs.pdf.

⁹³ *Ibid.*

In *Grootboom* case, it was decided that the primary duty of fulfilling a child's socio-economic rights rests on the child's parents or family.⁹⁴ Liebenberg suggests that the state is under a direct duty to ensure basic socio-economic provisions for children who lack parental or family care as do unaccompanied or foreign children.⁹⁵ There is thus an active duty on the state to provide those children with the rights and protection set out in section 28.

The key focus of this mini-dissertation is whether refugee children in South Africa are entitled to social assistance. The Children's Act⁹⁶ states in its Preamble that, it aims to effect necessary changes to existing law relating to children. The aim of the Children's Act is to accord children the necessary protection and assistance they need so that they can develop their personality and grow up in a family environment and atmosphere of happiness, love and understanding. This is a concrete example of a piece of legislation that resonates with children's rights in the CRC, and therefore reflective of South Africa's obligation to recognise and protect children's rights in terms of international law.

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The case of *Mazibuko v City of Johannesburg* (*Mazibuko* case) interprets section 27 (1) (b) of the Constitution which provides that everyone has the right to have access to sufficient water.⁹⁷ In essence the case concerned with the constitutionality and invalidity of Regulation 3 (b) which was promulgated in terms of section 9 (1) (a) of the Water Services Act.⁹⁸ Regulation 3 (b) defines the concept of the minimum standard of basic water supply services:

- The provisions of appropriate education in respect of effective water use; and
- A minimum quantity of portable water of 25 litres per person per day or 6 kilolitres per household per month;
- At a minimum flow rate of not less than 10 litres per minute;
- Within 200 metres of a household; and

⁹⁴ *Ibid.*

⁹⁵ Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 102.

⁹⁶ Children's Act No. 38 of 2005 (hereinafter referred to as the Children's Act).

⁹⁷ *Mazibuko v City of Johannesburg* 13865/06 para 32.

⁹⁸ Van Rensburg "The right of access to adequate water [Discussion of *Mazibuko v City of Johannesburg*]" 06/13865] 2008 (19) (3) Stellenbosch Law Review 418.

- Within effectiveness such that no consumer is without a supply for more than seven full days in a year.

The applicants contested regulation 3 (b) on the grounds that the regulation was based on a misconception; it fell short of providing sufficient water as provided for in section 27 (1) of the Constitution; it was irrationally determined; it was irrationally related to the needs of the poorest people; it was arbitrary, inefficient and inequitable; it irrationally failed to distinguish between those with waterborne sanitation and those without, it was inflexible.⁹⁹

The first question the Constitutional Court dealt with was whether Regulation (3) (b) of the National Standard Regulations was based on a misconception. In answering the question, heavy reliance was placed on international law. In terms of section 31 (b) and (c) of the Constitution, the Court must consider international law and may consider foreign law when interpreting the Bill of Rights.

The Constitutional Court referred to two other cases on socio-economic rights to further support its reliance on international law. First, the Constitutional Court referred to the High Court decision in *Residents of Bon Vista Mansions v Southern Metropolitan Council* (Bon Vista Residents case),¹⁰⁰ where Budlender AJ indicated that international law must be applied by the court. In terms of *Bon Vista Residents* case, international law is particularly helpful where the language in the Bill of Rights is the same as in the relevant international instrument.¹⁰¹ Secondly the Constitutional Court referred to the *Grooboom* case in which it was held that international may be a guide in interpretation and that where the provisions bind South Africa, it is directly applicable.¹⁰² The Constitutional Court came to the conclusion that were the language of a provision in the constitution correlates with international instruments, considering international law may be imperative.¹⁰³

⁹⁹ *Ibid.*

¹⁰⁰ *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2006 6 BCLR 625 W.

¹⁰¹ *Mazibuko case*, para 32.

¹⁰² *Ibid*, para 33.

¹⁰³ *Ibid*, para 34.

The Constitutional Court went on to refer to General Comment Number 15 of the Committee on Economic, Social and Cultural Rights¹⁰⁴ which requires that water should be made available and accessible,¹⁰⁵ and which recognises the fact that the state has a duty constantly to realise the right to water in a progressive manner.¹⁰⁶ Consideration was also given to Article 24 of the CRC and Article 14 of the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁰⁷ both of which oblige the state to fully implement the right to health and combat disease through the provision of drinking water.¹⁰⁸ The Court also made reference to Article 16 of the African Charter on Human and Peoples Rights (ACHPR)¹⁰⁹ which provides for the highest attainable standard of health, and the conclusion of the African Commission on Human and Peoples Rights in *Free Legal Assistance Group v Zaire*¹¹⁰ where the quasi-judicial organ interprets the failure to provide for basic services such as water and electricity as a violation of Article 16.¹¹¹ It is laudable that the Court gave consideration to international and foreign legal systems as obliged by section 39 (1) (b) and (c) of the Constitution and suggested by courts in previous cases relating to socio-economic rights.

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The CRC is the most central international instrument relating to the protection of children's rights.¹¹² Article 1 defines a child as any human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.¹¹³ This means that the CRC applies to persons under the age of eighteen years. The CRC provides four fundamental principles for the protection of children's rights:¹¹⁴ non-discrimination;¹¹⁵ the best interests of the child;¹¹⁶ the right to life,

¹⁰⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 15 *The Right to Water* 2002 UN Document/ C 12/2002/11/para1.

¹⁰⁵ *Mazibuko* case, para 36.

¹⁰⁶ *Ibid*, para 37.

¹⁰⁷ African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/leg/24.9/49.

¹⁰⁸ *Mazibuko* case, para 38.

¹⁰⁹ African Charter on Human and Peoples Rights (1981) OAU Doc CAB/LEG/67.

¹¹⁰ *Free Legal Assistance Group v Zaire* 2000 AHRLR 74 (ACPR) 1995 para 18.

¹¹¹ *Mazibuko* case, para 39.

¹¹² *Buck International Child Law* (2005) 41.

¹¹³ *Ibid*, 57. See also Baimu "Children, International Protection" 2011 *Max Planck Encyclopaedia of Public International Law* 1.

¹¹⁴ *Buck International Child Law* (2005) 57.

¹¹⁵ In terms of Article 2 (1) State Parties are obliged to respect and ensure that the rights in the present Convention are made available to each child within their jurisdiction without discrimination of any kind, irrespective of the child's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.(2) State Parties must also take all appropriate measures to ensure that the child is protected against all forms of discrimination

survival and development¹¹⁷ and the right of the child to be heard and express his/her views if he/she is capable of doing so.¹¹⁸ These principles protect children's rights by encouraging member states to incorporate and implement them in their national legislation.¹¹⁹

Refugee children's right to life is secured in a number of human rights treaties including the Universal Declaration of Human Rights of 1948 (hereinafter referred to as UDHR),¹²⁰ International Covenant on Civil and Political Rights of 1966 (hereinafter referred to as the ICCPR),¹²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (hereinafter referred to as the Torture Convention)¹²² and the CRC.¹²³

The Refugees Act gives expression to all the core values of international protection and provides the legal basis for the protection of refugees in South Africa consistent with the principles that are enshrined in international and regional instruments.¹²⁴ The enactment of the Refugees Act in 1998 gave South Africa the reputation of recognising and protecting refugees in terms of international law. This Act creates

or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

¹¹⁶ Article 3 (1) provides that, in all actions concerning children, the best interests of the child shall be primary consideration. (2) State Parties must ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) State Parties must ensure that the institutions, services and facilities responsible for the care or protection of children conform to the standards established by competent authorities, particularly in areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

¹¹⁷ In terms of Article 6 (1) State Parties recognise that every child has the inherent right to life. (2) States Parties must ensure to the maximum extent possible the survival and development of the child.

¹¹⁸ Article 12 (1) of the CRC provides that State Parties must assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given more weight in accordance with the age and maturity of the child. (2) For this purpose, the child in particular must be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹¹⁹ Hammarberg "Justice for children through the UN Convention" 1994 *Justice for Children* 63.

¹²⁰ Article 3 of the UDHR.

¹²¹ Article 6 (1) of the ICCPR.

¹²² Articles 2 & 16 of the Torture Convention.

¹²³ Article 6 (1) of the CRC.

¹²⁴ This was reflected in Government policy position as enumerated by the Home Affairs Director General in the White Paper where he stated that, "The granting of asylum to refugees and their protection South African territory is a matter of securing human rights protection". Draft Refugee White Paper submitted by the White Paper for Refugee Affairs Task Team 1998 p2.

both ethical and legal obligations for South Africa to provide protection to refugees within its territory.¹²⁵

The Refugees Act provides that any unaccompanied child who appears to qualify for refugee status under section 3 must be brought to a children's court and the latter will assist the minor with the application process for refugee status.¹²⁶ It must be noted that in this case refugee status is a key to receiving social assistance, on application only. This is a protection mechanism and a direct implementation of the best interest of the child principle, a clear indication that refugee children are also entitled to receive social assistance. The state is obliged to cooperate with organisations which provide assistance and protection to refugee children. Section 27 of the Refugees Act further states that recognised refugees are entitled to full protection of the law and in essence this includes the rights guaranteed in Chapter 2 of the Constitution, which includes social assistance.¹²⁷

In the matter of *Khosa v Minister of Social Development; Mahlaule v the Minister of Social Development* (Khosa case)¹²⁸ one of the issues in dispute was the constitutionality of sections 4(b)(ii) and 4B(ii) of the Social Assistance Act which reserved child-support grants and care dependency grants for South African citizens only.¹²⁹ The respondents in this matter pointed out that these provisions discriminate against children on the grounds of their parent's nationality.¹³⁰ Moreover the denial of support to children in such circumstances infringes upon their rights under section 28(1)(c) of the constitution.¹³¹ The Constitutional Court held that the sections in dispute must be amended to include permanent residents.¹³²

The limitation of social grants to South African citizens and permanent residents does not, in any way, protect refugee children: in fact it makes them more vulnerable

¹²⁵ The beginning of 1996 saw South Africa finally become a signatory to all three major international instruments pertaining to international migration: the 1951 Refugee Convention, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Refugee Convention.

¹²⁶ Section 32 of the Refugees Act.

¹²⁷ *Ibid*, s 27 (b).

¹²⁸ *Khosa v Minister of Social Development; Mahlaule v the Minister of Social Development* 2004 (6) BCLR 569 CC.

¹²⁹ *Ibid*, para 4.

¹³⁰ *Ibid*, para 78.

¹³¹ *Ibid*.

¹³² *Ibid*, para 96.

and easy to exploit. Exploitation of children include working odd jobs on the streets which include prostitution and selling drugs for other people, working menial jobs for long hours in environments which are hazardous to health and forceful living with abusive families. This is how some children end up being victims of drug trafficking. Existing literature does not clearly indicate that refugee children are entitled to social assistance grants from the state, which is an issue that this mini-dissertation addresses. The objective is to investigate whether refugee children are entitled to social assistance as provided for under the Constitution and the relevant enabling legislation.

1 1 1 Theoretical framework

Social assistance is defined as a social grant which includes social relief of distress. A social grant includes a child support grant, a care dependency grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid. Social assistance is the perception and reality that one is cared for, and that one is part of a supportive social network in a country.¹³³ Government assistance in this case constitutes financial assistance. Social assistance can be measured as the perception that one has assistance available, the actual received assistance, or the degree to which a person is integrated in the social network.¹³⁴ Government provides support referred to as public aid.

Tangible support is the provision of financial assistance, material goods or services.¹³⁵ Instrumental support is another form of social support that encompasses the concrete, direct way people assist others.¹³⁶ Furthermore, social support can be measured in terms of structural support or functional support.¹³⁷ Structural support (also called social integration) refers to the extent to which a recipient is connected within a social network, like the number of social ties or how integrated a person is

¹³³ Scott & Davis *Networks In and Around Organizations* Organizations and Organizing (2003) 1.

¹³⁴ Freeman "The Development of Social Network Analysis: A Study in the Sociology of Science" *Empirical Press* 2004.

¹³⁵ Heaney & Israel "Social networks and social support" in Glanz K & Viswanath K *Health Behaviour and Health Education Theory, Research & Practice* 2008, 4th Edition, San Francisco.

¹³⁶ Langford, Maloney, Lillis, "Social support a conceptual analysis" *Journal of Advanced Nursing* 1997, 25: 95-100.

¹³⁷ Wills "Social support and interpersonal relationships" in Margaret C, *Prosocial Behavior, Review of Personality and Social Psychology* (1991), 12: 265-289.

within his or her social network.¹³⁸ Family relationships, friends, and membership in clubs and organizations contribute to social integration. Functional support looks at the specific functions that members in this social network can provide, such as emotional, instrumental, informational, and companionship support referred to above.¹³⁹ This mini-dissertation is based on structural support, which is the support that government should provide to refugee children.

1 1 2 Methodology

This study was desktop based research. Information was obtained from primary and secondary sources. The primary sources relevant to this research include international human rights and regional instruments, legislation, declarations, resolutions and decided cases. Secondary sources include text books, journal articles, newspaper articles, working papers, theses by other researchers and many other credible but unpublished materials. Due to the normative nature of the issues central to this study, that is human rights, the traditionalist approach will be followed as it allows for the subjective interpretation of issues derived from observance of court practice and its previous judgments on related issues.

This work will analyse specific articles or sections of international and regional instruments, including national legislation to establish whether refugee children are entitled to the social assistance in the same manner as citizens South Africa. Critique and concluding observations will be drawn from publications and other sources.

1 1 3 Ethical considerations

This was a desktop-based research that will draw knowledge from analysis of relevant international and national instruments, literature and case law. The researcher intends to acknowledge all sources of information and apply this information in a manner that will not undermine the dignity and respect of refugees. The researcher will endeavour to obtain accurate information that is also truthful from widely acknowledged sources. Ethical principles of research of the University of Fort

¹³⁸ *Ibid*, 91.

¹³⁹ *Ibid*.

Hare Research Ethics Policy requiring that all research be guided by the highest standards of integrity, scientific rigour and accountability will be adhered to.

1 1 4 Chapter outline

This study is divided into four chapters. The first chapter is an introduction to the study. It sets out the background of the study, the statement of the problem and rationale of the study, the methodology pursued and ethical considerations.

The second chapter examines the international and regional human rights instruments that have an impact on the legal position of refugee children with regards to socio-economic rights. It assesses the legal obligations that South Africa bound itself to fulfil.

Chapter three explores the South African Bill of Rights, in particular the specific constitutional provisions and reported cases that protect the rights of children in South Africa. It also reviews national legislation, focusing on ways in which it provides protection to refugee children in the areas of education and social assistance services.

The last chapter recommends possible solutions to refugee problems and concludes this research.

Chapter 2

The rights of refugee children under international human rights law and the African system for the protection of human rights

2 1 Introduction

International law is a body of rules and principles which are binding upon states in their relations with one another.¹⁴⁰ International human rights law is a facet of international law established by treaty or custom, on the basis of which, individuals or groups can expect and claim certain behaviour and benefits from governments.¹⁴¹ Traditional international law concerned itself with states only. Now there are other actors on the international stage, namely individuals, multinationals, insurgents and other non-state entities.¹⁴² Since the end of the Second World War numerous treaties have been adopted extending the protection of international law to individuals.¹⁴³ Human rights treaties impose obligations of varying kinds upon signatory states primarily to afford protection to those within their territory or jurisdiction. Individuals benefit from the protection of international law and participate in its processes.¹⁴⁴

The relationship between international law and municipal law troubles both theorists and courts.¹⁴⁵ There are two main approaches to the relationship between international law and domestic law; namely the monist and the dualist doctrines.¹⁴⁶ Monists argue that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature.¹⁴⁷ The dualist doctrine, on the other hand, asserts that international law and municipal law are completely different systems of law each operating in its

¹⁴⁰ Dugard, *International Law, a South African Perspective* 1.

¹⁴¹ International Humanitarian Law and International Human Rights Law: Similarities and Differences, ICRC Advisory Service on International Humanitarian Law. Available at <http://www.icrc.org/Wb/Eng/siteeng0.nsf/htmlall> Accessed 17 October 2013.

¹⁴² *Ibid.*, 47.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Starke "Monism and Dualism in the Theory of International Law" 1936, 17 BYIL 66.

¹⁴⁷ Buck *International Child Law* 27-28.

own sphere. International law may be applied by domestic courts only if adopted by such courts or transformed into local legislation.¹⁴⁸

Monists accept that the internal and international legal systems form a unity.¹⁴⁹ Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determines whether or not certain actions are legal.¹⁵⁰ In a pure monist state, international law does not need to be translated into national law; it is just incorporated and effected automatically in national or domestic laws.¹⁵¹ The act of ratifying an international treaty immediately incorporates such instrument into national law.¹⁵² International law can be directly applied by a national judge and can be directly invoked by citizens just as if it were national law.¹⁵³

International treaties are important to refugee children because they set standards for what rights such children are entitled to. When a state ratifies, it is bound to conduct itself in a manner that is compatible with such treaty provisions.¹⁵⁴ The status of international law under the Constitution of the Republic of South Africa 1996 will be discussed in detail, highlighting what authorities have had to say about social assistance. A refugee will be defined in terms of international law. Specific child related instruments supporting recognition of the right to social assistance will also be examined. The protection of refugee children under the international and regional systems for the protection of human rights will equally be canvassed.

2 2 The status of international law under the South African Constitution

The Constitution recognizes the place of international law in the South African legal order.¹⁵⁵ Consequently it can confidently be stated that, unlike in the past, appeals can be made to international law as a higher law.¹⁵⁶ The Bill of Rights provided in chapter 2 of the Constitution refers directly to international law. Section 39 (1) (a) of

¹⁴⁸ Dugard *International Law, a South African Perspective* 47.

¹⁴⁹ Brindusa "The Dualist and Monist Theories. International Law's Comprehension of these Theories" 2007, 2. Available at, http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf. Accessed 22 September 2014.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ UNHCR Refugee Children: Guidelines on Protection and Care (1998) 4, Available at, http://www.unicef.org/southafrica/SAF_resources_annual2012.pdf.

¹⁵⁵ Dugard *International Law, a South African Perspective* 24.

¹⁵⁶ *Ibid.*, 25.

the South Africa Constitution requires that when interpreting the Bill of Rights, a court 'must consider international law'.¹⁵⁷ This provision signals the Constitution's openness and receptiveness to the norms and values of the international community.¹⁵⁸ It also resonates with the reciprocal way in which international law and institutions supported the struggle against apartheid, and were in turn influenced by this struggle.¹⁵⁹ At the same time, it helps give effect to the constitutional commitment, as reflected in the Preamble, 'to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.¹⁶⁰ This expresses South Africa's aspiration to be part of the international community, to adhere to its normative standards, and to contribute to the development of international law based on our domestic experiences of human rights and democratic transformation.¹⁶¹

The deliberative vision of democracy and human rights supported by the Constitution extends beyond the boundaries of our nation state to incorporate the broader international community.¹⁶² The process of interpreting and giving meaning to human rights norms can be understood as a dialogic process which includes a range of national and international actors.¹⁶³ This may be one of the more positive features of globalisation, where the meaning accorded to fundamental human rights norms can be influenced by a cross cultural dialogue extending across national boundaries.¹⁶⁴ Kent Roach characterises a dialogue conception of rights as involving "an interaction of multiple sources of authority".¹⁶⁵ He contrasts it with a more monological and positive conception of authority and with juridical supremacy in enforcing constitutional rights and remedies.¹⁶⁶ A dialogic conception of the interpretation of human rights is thus receptive to outside influence, and is more

¹⁵⁷ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 101.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Roach "Constitutional, remedial and international dialogues about rights: The Canadian experience" (2004-2005) 40 *Texas ILJ* 537-576 para 538.

¹⁶⁶ *Ibid.*

concerned with the persuasive force of legal arguments than their formal pedigree or binding character.¹⁶⁷

The express openness of the Constitution to international and comparative law in the interpretation of the Bill of Rights supports this deliberative or dialogic conception of human rights.¹⁶⁸ Engagement with both international and comparative law sources in adjudicating the rights in the Bill of Rights can generate new ways of understanding and interpreting these rights thereby support transformative adjudication.¹⁶⁹ It can also promote a great awareness of the reality that South Africa is located in an increasingly interdependent world in which rights are no longer viewed as exclusively matters of domestic concern.¹⁷⁰

In the context of using international law to interpret the rights in the Bill of Rights, the Constitutional Court held in *Makwanyane* that reference may be made to both binding as well as non-binding international law.¹⁷¹ The latter may include treaties to which South Africa is not a party or those it is precluded from ratifying such as the ICESCR, which is the only major treaty that South Africa has not yet ratified.¹⁷² It may even include appropriate 'soft' international law.¹⁷³ The latter are standards which have not yet crystallised into treaty provisions or norms of customary international law.¹⁷⁴ They include resolutions adopted at international conferences organised under the auspices of the United Nations or regional bodies such as the African Union, guidelines adopted by international organisations, or reports and guidelines issued by special rapporteurs, working groups and other non-treaty based international mechanisms.¹⁷⁵

This is a powerful vindication of the notion that, in interpreting the Bill of Rights, the South African courts are to have regard to the persuasive authority of a variety of international instruments on human rights without being limited to formally binding

¹⁶⁷ *Ibid.*

¹⁶⁸ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 102.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Makwanyane* para 35.

¹⁷² Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 102.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, 101.

¹⁷⁵ *Ibid.*, 102.

international law sources.¹⁷⁶ International law that is binding on South Africa includes primarily treaties to which it is a state party as well as norms of customary international law.¹⁷⁷

The use of international law for the purposes of interpreting the Bill of Rights in terms of section 39 (1) (b) must be distinguished from the binding status of international law in domestic law. Section 39 refers to interpretive guides which the Court must consider but is not bound to follow.¹⁷⁸ As has been observed, the Court has adopted a flexible approach to the sources that may be referred to during the process of interpreting the Bill of Rights.¹⁷⁹ In contrast international law becomes binding within South African domestic law through the provisions of section 231 and 232 of the Constitution.¹⁸⁰ In this regard South Africa basically follows a dualist system regarding international treaties, requiring ratified treaties to be enacted into law by national legislation before they acquire binding force in domestic law.¹⁸¹ The only exception is in relation to self executing treaty provisions, which are law in the Republic unless inconsistent with the Constitution or an Act of Parliament.¹⁸² A self executing provision is understood to refer to provisions in treaty that can be directly applied in municipal law without the need for legislative incorporation.¹⁸³

The place of treaties in South African law was summed up by Ngcobo CJ in the case of *Glenister v President of the Republic of South Africa* (Glenister case),¹⁸⁴ where the learned judge said that an international agreement that has been ratified by a resolution of Parliament is binding on South Africa on the international plane.¹⁸⁵ In the *Grootboom* case,¹⁸⁶ the Constitutional Court established that international law is binding on South African courts once integrated into national legislation.¹⁸⁷ Failure to

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, 103.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, 101.

¹⁸¹ *Ibid.*, 103.

¹⁸² Section 231 (4) of the Constitution.

¹⁸³ Dugard *International Law, a South African Perspective* 65-66.

¹⁸⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 92.

¹⁸⁵ Dugard *International Law, a South African Perspective* 56.

¹⁸⁶ *Grootboom* case para 75.

¹⁸⁷ *Ibid.*

adhere to international norms may result in South Africa incurring responsibility towards other signatory states.¹⁸⁸

2 3 The definition of a refugee under international law

South Africa acceded to the UN Refugee Convention and the 1967 Protocol to the Convention Relating to the Status of Refugees in 1996. The UN Refugee Convention defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unable or, owing to such fear, is unwilling to return to it.¹⁸⁹

The UN Refugee Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before the 01st of January 1951 and within Europe.¹⁹⁰ The UN Refugee Convention enabled states parties to make a declaration when becoming a party, according to which the words “events occurring before the 01st of January 1951 were understood to mean events occurring in Europe” prior to that date. This geographical limitation has been maintained by a very limited number of states, and with the adoption of the 1967 Protocol, has lost much of its significance. The 1967 Protocol removed these limitations and thus gave the UN Refugee Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions as well as through the progressive development of international human rights law. An example of such supplement is the Organization for African Unity/ AU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969.¹⁹¹

¹⁸⁸ *Ibid.*

¹⁸⁹ Article 1 A (2) of the UN Refugee Convention. See also Kleinsmidt & Manicom *African Insight* 2010 336-348.

¹⁹⁰ Preamble of the 1967 Protocol Relating to the Status of Refugees.

¹⁹¹ Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969.

The UN Refugee Convention and its 1967 Protocol do not specify what is meant by persecution. From Article 33 of the UN Refugee Convention, it can be inferred that persecution refers to a threat to life or freedom on account of the above-mentioned factors in the definition.¹⁹² An assessment of 'well-founded fear' must be determined on a case-by-case basis, taking into account the notions of individual integrity and human dignity. The manner and degree in which individuals stand to be injured must also be taken into consideration.¹⁹³ Well-founded fear involves both a subjective and an objective component. The former is based on the applicant's reaction to events that impinge upon them personally; but to make it a well-founded fear, there must be other proof or objective facts that lend support to the applicant's subjective fear.¹⁹⁴

Political opinion must be understood in the broad sense to include any opinion on any matter or policy in which the machinery of state may be engaged.¹⁹⁵ Refugee status does not accrue to applicants who commit a politically motivated crime in their own state such as a war crime, crime against humanity or an act of terrorism.¹⁹⁶

Social group includes individuals fearing persecution on such basis as gender, linguistic background, political opinion, nationality, membership of a particular social group and sexual orientation.¹⁹⁷ The United Nations High Commissioner for Refugees Handbook¹⁹⁸ provides that membership of a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because of the political outlook of such group's government's policies.¹⁹⁹

¹⁹² *Handbook on Procedures and Criteria for Determining Refugee Status* Published by UNHCR, HCR/1P/4/Eng/Rev2 (Geneva, January 1992) para 51. Available at http://www.unhcr.org/hk/.../Handbook_on_Procedures_and_Criteria. Accessed 27 October 2014.

¹⁹³ Dugard *International Law, a South African Perspective* 343.

¹⁹⁴ *Ibid* 343. See also *Melendez v United States Dept of Justice* 926 F 211 (2ND Cir 1991).

¹⁹⁵ *Ibid*, 344.

¹⁹⁶ UN Refugee Convention, Article 1.

¹⁹⁷ Dugard *International Law, a South African Perspective* 346.

¹⁹⁸ *Handbook on Procedures and Criteria for Determining Refugee Status* Published by UNHCR, HCR/1P/4/Eng/Rev2 (Geneva, January 1992) para 77-79. Available at http://www.unhcr.org/hk/.../Handbook_on_Procedures_and_Criteria. Accessed 27 October 2014.

¹⁹⁹ Dugard *International Law, a South African Perspective* 345.

2 4 Protection of refugee children under international human rights law

The UN Refugee Convention is a status and rights based instrument which is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and *non-refoulement*.²⁰⁰ Most importantly, it contains safeguards against the expulsion of refugees. International law recognizes the principle of *non-refoulement*, meaning that states are obliged to refrain from forcibly returning a refugee to a state where he or she is likely to suffer persecution or danger to life or freedom.²⁰¹ This principle which is contained in Article 33 of the UN Refugee Convention read together with its 1967 Protocol has crystallized into a rule of customary international law.²⁰²

The UN Refugee Convention and the 1967 Protocol set out standards that apply to children in the same way as they do to adults.²⁰³ These standards include a child who has a “well-founded fear of being persecuted” for the reasons in the definition of a “refugee.” A child who has been granted refugee status cannot be forced to return to his or her country of origin because he or she is protected by the principle of *non-refoulement*.²⁰⁴ No distinction is made between children and adults in social welfare and legal rights. The principle of *non-refoulement* protects asylum seekers who have not yet gained refugee status from deportation and also persons with refugee status from being expelled, to jurisdictions where torture or the death penalty exists.

Article 22 of the UN Refugee Convention lays down basic minimum standards for the treatment of refugees, without prejudice to states granting such favourable treatment. Such rights include access to courts, primary education, the provision for documentation, including a refugee travel document in passport form.²⁰⁵ Article 28 of the UN Refugee Convention, in particular subparagraph (1) (b) when read in conjunction with the principle of non-discrimination, prohibits any form of

²⁰⁰ Article 33 (1) of the 1951 UN Refugees Convention states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

²⁰¹ Dugard *International Law, a South African Perspective* 341.

²⁰² Shearer A *Starke’s International Law* 11th Edition Butterworth (1994) 325-326.

²⁰³ UNHCR *Refugee Children: Guidelines on Protection ad Care* (1998) 4.

²⁰⁴ Manicom “Monitoring the Unknown: Improving adherence to the principle of *non-refoulement* through a proposed monitoring network” 2012 5.

²⁰⁵ Available at <http://www.unhcr.org/3b66c2aa10.pdf>. 1. Accessed 06 August 2014.

discrimination that hinders access of refugee children to education.²⁰⁶ Unlike the South African Constitution,²⁰⁷ the UN Refugee Convention does not have a specific provision which caters for children's rights.²⁰⁸ Van der Burg argues that this omission is problematic because it ignores the specific needs of children and exposes vulnerable children to greater vulnerability.²⁰⁹

The CRC contains four key provisions that are essential to understanding the protection given to children.²¹⁰ The four principles are non-discrimination;²¹¹ best interests of the child;²¹² the right to life, survival and development;²¹³ and respect for the views of the child.²¹⁴ These four principles give content to the CRC as a child-protecting document.²¹⁵ It can, therefore, be argued that refugee children are entitled to the rights set out in the CRC because these rights apply to all persons below the age of eighteen years within the jurisdiction of the member country.

Article 1 of the CRC defines a child as a human being below the age of eighteen years.²¹⁶ The articles in the CRC apply equally to refugee children and require that state parties respect and ensure the rights set forth in the CRC to each child within their jurisdiction, without discrimination of any kind.²¹⁷

Article 2 (2) of the CRC prohibits discrimination based on listed grounds from legal guardians, parents and society as a whole. The Committee on the Rights of the Child (hereafter CRC Committee)²¹⁸ points out that non-discrimination does not mean

²⁰⁶ Article 28 of the CRC.

²⁰⁷ Section 28 of the Constitution.

²⁰⁸ Van Garderen & Winterstein "Refugee Children" *AHRLJ* 2008 120.

²⁰⁹ *Ibid.*

²¹⁰ Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution"

²⁰³ See also Buck *International Child Law* (2005) 41.

²¹¹ See Article 2 (1) of the CRC.

²¹² Article 3 of the CRC provides that "In all actions concerning the children, the best interests of the child shall be a primary consideration".

²¹³ Article 6 (1) provides for the recognition of the inherent right to life of every child. (2) State Parties are also encouraged to ensure the survival and development of the child to the maximum extent available.

²¹⁴ Article 12 provides that State Parties must respect the views of the child considering the level of maturity and age of the child.

²¹⁵ Hammarberg "Justice for children through the UN Convention" 63.

²¹⁶ Article 1 of the CRC. See also Buck T, *International Child Law* (2005) 57.

²¹⁷ Article 2 (1) of the CRC.

²¹⁸ The Committee on the Rights of the Child is the body of eighteen independent experts which monitors the implementation of the Convention on the Rights of the Child by its State parties.

identical treatment but that it is important that special measures be taken to eliminate and diminish conditions that cause discrimination.²¹⁹ The principle of non-discrimination furthermore prohibits any unfair discrimination against a child based on the child's age and nationality. It is however important to note that the CRC Committee's General Comment No.6 acknowledges the fact that children of different ages will be vulnerable to a different degree and that their need for protection will therefore vary accordingly.²²⁰

The non-discrimination principle requires that the rights in the convention should be recognized and afforded to children within the jurisdiction of states.²²¹ The CRC Committee cements this provision in General Comment 7 stating that refugee children and their parents are entitled to equal access to all services, which include health care and education.²²² According to Sloth-Nielsen and Mezmur, the principle of non-discrimination plays a very important role in the history South Africa which is based on apartheid and discrimination in its various forms.²²³ It must always be kept in mind that the rights in the Bill of Rights are interrelated, interdependent and mutually supportive, and as such, the principle of non-discrimination must not be read in isolation but with other rights in mind such as equality and human dignity.²²⁴

CRC General Comment No.6 gives meaning to the 'best interests' principle as it relates to refugee children. It states that determining what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity. The identity of a child is determined through nationality, upbringing, ethnicity, cultural and linguistic background, particular vulnerabilities and protection needs.²²⁵ The best interest of the child principle is applicable where official decisions affecting a child are taken, which should be given due weight.²²⁶ This principle emphasizes that the interests of parents or the state are not the only factors that should be given primary

²¹⁹ The CRC Committee General Comment No. 5 of 2003 para 12.

²²⁰ *Ibid*, para 5.

²²¹ *Ibid*, para 30.

²²² *Ibid*, para 36.

²²³ Sloth-Nielsen & Mezmur "2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)" 2008 *IJCR* 5-6.

²²⁴ Section 9, 10 & 11 of the Constitution.

²²⁵ The CRC Committee General Comment No. 5 of 2003 para 37.

²²⁶ Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law" 1995 *SAJHR* 408-409.

concern in a state.²²⁷ Therefore, the CRC provisions should be applied in conformity with the 'best interest of the child' principle.²²⁸ This important principle extends beyond care and protection in the application procedure for the determination of refugee status, recognizing that there are a number of important issues concerning refugee children not specifically provided for in international conventions.²²⁹

The CRC's General Comment No. 12 further elaborates on the meaning of article 12 of the CRC, namely that children accompanying their parents into foreign countries are vulnerable and deserve assistance in the form of relevant information in their own language on their entitlements, the services available including means of communication, and the immigration process in order for their voices to be heard and given due weight in the proceedings..²³⁰ For this reason, the full implementation of children's right to freedom of expression on all aspects of immigration should be emphasised.

The CRC is founded on a value system based on the four principles referred to above.²³¹ It can be noted that mere ratification of the CRC is not adequate to demonstrate the protection that a state affords to refugee children, but rather, the CRC specifically imposes positive obligations on states to implement these provisions. The positive obligations require states to make real and effective efforts to protect children in their jurisdictions. The provisions affecting the rights of refugee children to education and social assistance under international law will be discussed in detail in the following section. Given the extensive scope of the CRC, it is useful for explanatory and analytical purposes to classify the rights into categories.

In this regard, Hammaberg suggested that the CRC may be said to be concerned with the four 'P's: the participation of children in decisions affecting them; the protection of children from all forms of discrimination; prevention of children from all

²²⁷ *Ibid.*

²²⁸ *Ibid.*; Sloth-Nielsen points out that signatory states and observers indicate that the 'best interests of the child' principle is meant to be a binding legal obligation.

²²⁹ Myer "Protecting the Most Vulnerable: Using the Existing Policy Framework to Strengthen Protection for Refugee Children" 2007, 201.

²³⁰ The CRC General Comment No. 12 2009 para 123-124.

²³¹ *Ibid.*

forms harm and assistance for their basic needs.²³² All these 'P's are equally important and thus implementation efforts cannot be skewed in favour of one aspect when efforts in the other areas lagging behind.²³³ The Committee on the Rights of the Child, which is tasked with monitoring the implementation of the CRC by state parties has also emphasised the interrelated nature of its provisions.²³⁴ Nevertheless, the Committee has elevated non-discrimination, the child's best interests, survival and development and the principle on participation into general principles.²³⁵ Consequently, any consideration of actions, policies or interventions relating to children must be gauged with reference to those four cross-cutting principles.²³⁶

The four principles as discussed by the CRC Committee, when applied together in an effort to protect, promote and fulfil children's rights, carry more weight than when interpreted and applied individually. This promotes the spirit, purport and objects of the Bill of Rights which in this case includes protecting children's right to social assistance. This interpretation is made possible by section 39 (2) of the Constitution which calls for courts to prefer substantive and purposive protection of rights.

2 5 The right of access to social assistance under international law

Social assistance means a social grant including social relief of distress.²³⁷ A social grant includes a Child Support Grant, Care Dependency Grant, Foster Child Grant, Disability Grant, an Older Person's Grant, a War Veteran's Grant, Social Relief of Distress and a Grant-in-Aid.²³⁸ According to Cohen, article 22 of the CRC²³⁹ indicates that refugee children should not be treated differently from nationals in the country that they reside.²⁴⁰ In terms of articles 3 (2)²⁴¹ and 5²⁴² of the CRC, it is clear

²³² Kaime "The African Charter on the Rights and Welfare of the Child: a socio-legal perspective" 2009, 15.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ Social grants. Available at <http://www.sassa.gov.za/index.php/social-grants/social-relief-of-distress>. Accessed 07 January 2015.

²³⁸ SASSA Available at <http://www.sassa.gov.za/index.php/social-grants>. Accessed 15 January 2015.

²³⁹ Article 22 of the CRC provides protection to children who find themselves in an emergency situation. This article protects children who are considered as refugees.

²⁴⁰ Cohen "The United Nations Convention on the Rights of the Child: Implications for change in the care and protection for refugee children" 1992 *IJRL* 689-690.

that parents or legal guardians bear the primary duty to care for their children. Clark is of the view that the primary responsibility for the upbringing and development of the child rests on parents.²⁴³ It cannot be denied that states parties must intervene where parents fail by implementing the necessary measures in the form of material assistance and support programmes to assist children.²⁴⁴ The CRC requires state parties to provide assistance to families that cannot afford to cater for themselves and ensure that families are adequately supported through community-based and mutual schemes.²⁴⁵ Benefits from such schemes must be adequate, easily accessible to all and provided without discrimination.

Social assistance is the non-contributory part of social security. The universal need for social security has been recognized by the world community as a human right.²⁴⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not restrict the form of scheme to be used by a party, both contributory and non-contributory schemes are permissible.²⁴⁷ Articles 2, 11 and 23 requires states parties to recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the rights enshrined in the Covenant, including the right to social security.²⁴⁸ It encourages states comply with their international obligations. The notion of social security adopted here covers all measures providing benefits whether in cash or in kind to secure protection for vulnerable groups of people. This discussion focuses on the non-contributory part of social security which is social assistance.

There is no universal definition for social security, however, in South Africa the term is understood with reference to the different risks or branches of social security covered by the International Labour Organization: Social Security Minimum

²⁴¹ Article 3 (2) of the CRC indicates that State Parties undertake to ensure protection and care necessary for the child's well-being, but the rights and duties of the parents or others legally responsible for the child must be taken into account; Buck *International Child Law* 66-67.

²⁴² Article 5 provides that State Parties must respect the rights and duties of parents and legal guardians in providing guidance and direction in the evolving capacities of the child.

²⁴³ *Ibid*, Article 18.

²⁴⁴ *Ibid*, Article 19.

²⁴⁵ *Ibid*.

²⁴⁶ Social security for social justice and a fair globalization: Recurrent discussion on social protection (social security) under the ILO Declaration on Social Justice for a fair globalization, International Labour Conference, 100th Session, Report VI, 2011

²⁴⁷ International Covenant on Economic, Social and Cultural Rights adopted in 1966.

²⁴⁸ Article 2 para 1, 11 & 23 of the ICESCR.

Standards (ILO Convention of 1952).²⁴⁹ The ILO Convention of 1952 lists the nine classic risks namely sickness, maternity, unemployment, employment injury, invalidity, old age, death, the provision of medical care and the provision of subsidies for families with children. It compels ratifying countries to establish a minimum of three branches including minimum standards of coverage and benefits. Social assistance falls under subsidies.

This ICESCR is the flag-ship of all ILO social security conventions as it is the only international instrument, based on basic social security principles, which establish worldwide agreed minimum standards for all branches of social security.²⁵⁰ Article 68 of the Convention provides that non-national residents shall have the same rights as national residents provided that special rules concerning non-nationals and nationals born outside the territory of the member state may be prescribed in respect of benefits or portions of benefits which are payable wholly or in part or mainly out of public funds and in respect of transitional schemes.²⁵¹

The right to social security encompasses social assistance and is provided for in article 9 of the ICESCR. This right is interpreted in detail through the United Nations Committee on Economic, Social and Cultural Rights General Comment No. 19.²⁵² The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.²⁵³ While the elements of the right to social security may vary according to different conditions, a number of conditions apply in all circumstances as set out below.²⁵⁴ In interpreting these aspects it should be

²⁴⁹ The International Labour Organization: Social Security Minimum Standards (1952) ILO Doc 102. The ILO Convention of 1952 lists the nine classic risks namely sickness, maternity, unemployment, employment injury, invalidity, old age, death, the provision of medical care and the provision of subsidies for families with children. It compels ratifying countries to establish a minimum of three branches with minimum standards of coverage and benefits.

²⁵⁰ Social Security Minimum Standards Convention Available at http://www.ilo.org/dyn/normlex/nf/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102. Accessed 08 August 2014.

²⁵¹ *Ibid*, 2.

²⁵² The United Nations Committee on Economic, Social and Cultural Rights General Comment No.19 The Right to Social Security (2008) (article 9) UN Doc E/C. 12/GC/19. Available at <http://www.refworld.org/docid/47b17b5b39c.html>. Accessed 7 August 2014.

²⁵³ CESCR General Comment No.19 para 9.

²⁵⁴ *Ibid*.

borne in mind that social security should be treated as a social good and not primarily as a mere instrument of economic or financial policy.

The social security system in a country should be established under domestic law and public authorities and must take responsibility for the effective administration or supervision of the system.²⁵⁵ The social security system should provide for the coverage of nine principal branches of social security as listed by the ILO Convention of 1952 above. Benefits whether in cash or kind must be adequate in amount and duration in order that one may realize his or her rights to family protection and assistance.²⁵⁶ State parties must also pay full respect to the principle of human dignity contained in the Preamble to the ICESCR and the principle of non-discrimination so as to avoid any adverse effects on the level of benefits and the form in which they are provided. Methods applied should ensure the adequacy of benefits.²⁵⁷ The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realise their ICESCR rights.²⁵⁸

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All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups without discrimination on any of the grounds listed in Article 2 paragraph 2 of the ICESCR.²⁵⁹ Qualifying conditions for the benefits must be reasonable, proportionate and transparent.²⁶⁰ The withdrawal, reduction or suspension of social grants should be limited based on grounds that are reasonable, subject to due process and provided for in national law.²⁶¹ Social grants benefits should be provided for in a timely manner and the beneficiaries should have physical access to the social security services in society.²⁶² Particular attention should be paid to people with disabilities, migrants and persons living in remote and disaster prone areas as well as areas experiencing armed conflicts.²⁶³

²⁵⁵ *Ibid*, para 11.

²⁵⁶ *Ibid*, para 22.

²⁵⁷ *Ibid*.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*, para 23.

²⁶⁰ *Ibid*, para 24.

²⁶¹ *Ibid*, para 25.

²⁶² *Ibid*, para 27.

²⁶³ *Ibid*, para 31.

Paragraph 15 of General Comment No. 19 further provides that states parties to the ICESCR must respect the enjoyment of the right to social security by refraining from actions that interfere directly or indirectly with the enjoyment of the right to social security in other countries.²⁶⁴ This is an obligation on all state parties which must be adhered to. State parties should also remove de facto discrimination on prohibited grounds, where individuals are unable to access adequate social security.²⁶⁵ States parties should ensure that legislation, policies, programmes and the allocation of resources facilitate access to social security for all members of society.²⁶⁶ Restrictions on social security schemes should be reviewed to ensure that they do not discriminate in law or in fact.²⁶⁷ While the ICESCR provides for progressive realisation of socio-economic rights and acknowledges the constraints owing to the limits of available resources, it also imposes various obligations on state parties which demand immediate effect.²⁶⁸ State parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind, ensuring the equal rights of men and women, and the obligation to take concrete steps towards the full realisation of Articles 11 (1) and 12.²⁶⁹ State parties also have an obligation to respect, protect and fulfil the individual rights provided for in the ICESCR.

In the implementation of the ICESCR obligations, state parties are obliged to adopt all appropriate measures such as legislation, strategies, and policies to ensure that the specific obligations with regard to social security are implemented.²⁷⁰ Existing legislation and policies should be reviewed to ensure that they are compatible with the right to social security and should be repealed, changed or amended if inconsistent with the ICESCR requirements.²⁷¹ Social security systems should also be regularly monitored to ensure their sustainability. The duty to take steps clearly imposes an obligation to adopt a national strategy and plan of action to realize the

²⁶⁴ *Ibid*, para 15.

²⁶⁵ *Ibid*, para 30.

²⁶⁶ *Ibid*.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*, para 40.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid*, para 67.

²⁷¹ *Ibid*.

right to social security, unless the state party can clearly show that it has a comprehensible social security system in place and that it reviews it regularly to ensure that it is consistent with the right to social security.²⁷² The strategy and action plan should be reasonably conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right to social security; set targets or goals to be achieved and the time-frame for their achievement, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources.²⁷³ When formulating and implementing national strategies on the right to social security, state parties should avail themselves, if necessary, of the technical assistance and cooperation of the United Nations specialized agencies.²⁷⁴

State parties may find it advantageous to adopt framework legislation to implement the right to social security.²⁷⁵ Such legislation might include targets or goals to be attained, set a time frame for the achievement of such goals, devise means by which purposes will be achieved, the intended collaboration with civil society, the private sector and international organisations, institutional responsibility for the process, national mechanisms for monitoring and the remedies and recourse procedures.²⁷⁶

The International Convention on the Protection of all Migrant Workers and Members of their Families of 2003 has also not yet been ratified by South Africa. This Convention is meant to apply to migrant workers only and not refugees whose situation is handled by the Refugee Convention and its 1967 Protocol. The complexity of contemporary migratory flows challenges this distinction.²⁷⁷ Article 28 provides that migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the

²⁷² *Ibid*, para 68.

²⁷³ *Ibid*.

²⁷⁴ *Ibid*.

²⁷⁵ *Ibid*, para 72.

²⁷⁶ *Ibid*.

²⁷⁷ Social Security Minimum Standards Convention Available at http://www.ilo.org/dyn/normlex/nf/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102. Accessed 08 August 2014.

requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties.²⁷⁸ Other crucial conventions related to social security which have not yet been ratified by South Africa are: Equality of Treatment (Social Security) Convention, No. 118 of 1962 and the Maintenance of Social Security Rights Convention, No. 157 of 1982.

From the discussion above it is clear that non-contributory schemes such as social assistance programmes are important since it is most unlikely that every individual can adequately be covered by an insurance based system.²⁷⁹ Child benefits, including cash benefits and social services, should be provided to families without discrimination based on the prohibited grounds and should ordinarily cover food, clothing, housing, water and sanitation or other appropriate rights.²⁸⁰ Refugees should enjoy equal treatment relative to accessing non-contributory social security schemes, including reasonable access to family and health support consistent with international standards.²⁸¹ State parties should give special attention to those individuals and groups that traditionally face difficulties in exercising this right, in particular, refugees. Refugee children's rights are also recognized and given serious cognizance in Africa.²⁸²

2 6 Protection of refugee children's rights under the African system for the protection of human rights

The Preamble to the African Charter on the Rights and Welfare of the Child of 1990 (hereinafter referred to as the ACRWC)²⁸³ makes two important statements regarding the instrument's conception of the rights and welfare of the child. First, it identifies the ACRWC's foundation as the principles of international law on the rights and welfare of the child as contained in the declarations, conventions and other instruments of the Organization of African Unity and United Nations.²⁸⁴ Significantly,

²⁷⁸ *Ibid.*

²⁷⁹ CESCR General Comment No.19 para 4 (b).

²⁸⁰ *Ibid.*, para 18.

²⁸¹ *Ibid.*, para 38.

²⁸² *Ibid.*, para 31.

²⁸³ African Charter on the Rights and Welfare of the Child: OAU Doc. CAB/LEG/24.9/49 (1990) entered into force on 29 November 1999.

²⁸⁴ *Ibid.*, para 49.

the ACRWC specifically mentions the CRC and the Declaration on the Rights and Welfare of the Child.²⁸⁵

Article 5 of the ACRWC provides that every child has an inherent right to life and that this right must be protected by law. Article 5 (2) of the ACRWC complements the recognition of the right of access to social assistance right by obliging states parties to ensure to the maximum extent possible the survival, protection and development of the child. Since the right to life and the right to survival are essential preconditions to the enjoyment of any of the rights protected in the ACRWC, they apply in all considerations relating to the promotion and protection of the rights and welfare of the child.²⁸⁶ In other words, the right to survival and development is a general principle that serves to reinforce each of the rights enshrined in the ACRWC.²⁸⁷

The right to survival is a dynamic concept and incorporates all the necessary steps that a state party must undertake in order to ensure the healthy development of the child.²⁸⁸ Clearly, then, the duty on state parties to ensure the maximum extent possible the survival and development highlights particular aspects of the right to life.²⁸⁹ The codification of the right to survival represents an acknowledgment that rights which protect aspects of a child's survival are interrelated and cannot be protected in isolation.²⁹⁰ The ACRWC achieves this by including within its ambit protections for basic survival needs, such as the right to health, the right to adequate nutrition and safe drinking water.²⁹¹

Article 23 of the ACRWC provides that state parties must ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and

²⁸⁵ Declaration on the Rights and Welfare of the Child AHG/St. 4 (XVI) REV. 11979. Available at http://www.au.int/.../ASSEMBLY_EN_17_20_JULY_1979_ASSEMBLY_HEADS_STATE_GOVERNMENT_SIXTH_ORDINARY_SESSION.pdf Accessed 14 January 2015.

²⁸⁶ Kaime "The African Charter on the Rights and Welfare of the Child: a socio-legal perspective" 2009, 119.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

humanitarian assistance in the enjoyment of the rights set out in the ACRWC and other international human rights and humanitarian instruments to which the states are parties.²⁹² State parties must co-operate with international organizations providing family tracing and reunification services, and if family reunification is not possible,²⁹³ the child should be accorded the “same protection as any other child deprived of his family environment for any reason.”²⁹⁴ Article 23 is an important provision which singles out particular vulnerabilities which refugee children on the African continent face, namely, separation from families, loss of family and fear of persecution.

Article 4 (2) of the ACRWC places an obligation on the state to ensure that in all judicial and administrative proceedings there are mechanisms to ensure that a child’s views are heard and acted upon.²⁹⁵ Participation, in relation to refugee children is particularly important because it assists in discovering their main vulnerabilities and the immediate areas they might be needing protection and assistance.²⁹⁶

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Having regard to the unequivocal obligations that the state has assumed in respect of children’s survival and development rights, one would have assumed that the state would step into the breach and supplement where the family was failing. Refugee children are entitled to the rights set out in the ACRWC found in articles 11 (education) and 14 (health services) on the basis of non-discrimination as was discussed in the CRC on socio-economic rights.²⁹⁷

The OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa²⁹⁸ is an effective regional instrument that compliments the UN Refugee Convention of 1951 and its 1967 Protocol.²⁹⁹ The OAU Refugee Convention’s definition of a refugee takes into account various circumstances which lead to the

²⁹² Article 23 (1) of the ACRWC.

²⁹³ *Ibid*, Article 23 (2).

²⁹⁴ *Ibid*, Article 23 (3).

²⁹⁵ *Ibid*, Article 4 (2).

²⁹⁶ Kaime “From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child” 2004 *International Journal of Refugee Law* 341-342.

²⁹⁷ Articles 11 & 14 of the ACRWC.

²⁹⁸ OAU Refugee Convention of 1969.

²⁹⁹ Article 8 para 2 of the OAU Refugee Convention.

displacement of individuals and whole communities in Africa.³⁰⁰ These circumstances include aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country.³⁰¹ Article 4 enjoins member states to apply the provisions of the 1969 OAU Refugee Convention without discrimination as to race, religion, nationality and membership of a particular social group or political opinion.

2 7 Analysis

International human rights law represents the fundamental normative values and commitments of the international community of states.³⁰² Along with internationally recognized civil and political rights, socio-economic rights are regarded as central to protection of human dignity.³⁰³ It is thus fitting that the Constitution imposes a mandatory duty on the courts to consider international law in interpreting the Bill of Rights.³⁰⁴ International human rights law provides a rich source for communities and civil organizations to challenge the erosion of human rights standards in society.³⁰⁵

The major international convention protecting economic, social and cultural rights is the International Covenant on Economic, Social and Cultural rights of 1996. South Africa signed the ICESCR in 1994, ratified it recently after prolonged advocacy and decades of restraint. As noted in the beginning of this chapter, non-binding international law can be used as a guide to interpreting the Bill of Rights in terms of section 39 (1) of the Constitution.³⁰⁶ The main sources for interpreting the provisions of the ICESCR are accordingly the general comments adopted by the United Nations Committee on Economic, Social and Cultural Rights³⁰⁷ and the concluding observations of the Committee's review of States parties' reports under the reporting mechanism of the ICESCR.³⁰⁸ This is due to the fact that the ICESCR has historically lacked an equivalent protocol to the first Optional Protocol to the International Covenant on Civil and Political Rights of 1996 providing for a right to

³⁰⁰ Article 1 para 1-6.

³⁰¹ *Ibid.*

³⁰² Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 117.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*, 131 para 106.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*, 107.

submit individual communications to the treaty body.³⁰⁹ This was rectified by the adoption of the Optional Protocol to the ICESCR by the General Assembly in 2008.³¹⁰

The influence of the ICESCR is evident in the concepts used in the Constitution of South Africa such as 'progressive realization' and 'the limits of available resources'. The ICESCR is of particular relevance to the interpretation of sections 26, 27 and 29 of the Constitution as it was a major source of reference for the drafting of these provisions.³¹¹ The relationship and similarity between the ICESCR and the Constitution was recognized in the case of *Grootboom* case.³¹² International law does address the issue of refugee protection, as it is the role of international law to substitute its own protection for that which the country of origin, or the host country, is unable to provide.³¹³

The CRC has proved to be a uniquely powerful tool in advancing children's rights.³¹⁴ The CRC enjoys nearly universal acceptance and provides a basis for international accountability.³¹⁵ Its monitoring body the Committee on the Rights of the Child has for nearly two decades reviewed states parties' efforts to implement the CRC provisions, checking whether or not national laws, policies and practices protect children's rights.³¹⁶

The ACRWC is a document which prioritizes different situations that children on the African continent come across without undermining the relevance of the CRC.³¹⁷ States are obliged to provide parental care, special protection and assistance to all children in terms of article 20 of the ACRWC. Article 22 of the CRC and article 23 of the ACRWC are the specific provisions which provide for the care and protection of

³⁰⁹ *Ibid.*

³¹⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN doc resolution A/RES/63/117. Available at <http://www.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf>.

³¹¹ *Ibid.*

³¹² Currie & de Waal *The Bill of Rights Handbook* 574.

³¹³ Goodwin-Gill *The refugee in international law* (1996) 257.

³¹⁴ Child Rights International Network. Available at http://www.crin.org/docs/CRC_in_Court_Report.pdf. Accessed 18 August 2014.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ Njungwe "International Protection of Children's Rights: Analysis of The African Attributes in the African Charter on the Rights and Welfare of the Child" 2009 *CJDHR* 23.

refugee children. In terms of the ACRWC, it is evident that states should provide material assistance and support programmes to refugee children in need of such.

This chapter has pointed out that because of children's vulnerability, they, as a special group are entitled to special care and protection.³¹⁸ The United Nations High Commissioner for Refugees has recognized these specific vulnerabilities and recommends that refugees and asylum seekers be dealt with within the framework that understands their particular situations and difficulties. It can be argued that international law recognizes the fact that refugees are entitled to the same rights as the nationals possess in South Africa. This is because South Africa has ratified virtually all key international and regional treaties protecting children and their socio-economic rights. For instance, when it comes to education, the principle of non-discrimination allows the full neutral development of children so that they can participate in all sectors of life. Similarly social assistance enables them to ameliorate their conditions and access other socio-economic rights. South Africa is bound by all the child related instruments which it has ratified and, as such, is obliged to give priority and equal treatment to refugee children regarding social assistance, education and shelter.

The process of considering international law standards promotes the kind of critical self-reflection which should underpin the development of a transformative jurisprudence on socio-economic rights.³¹⁹

2 8 Summary

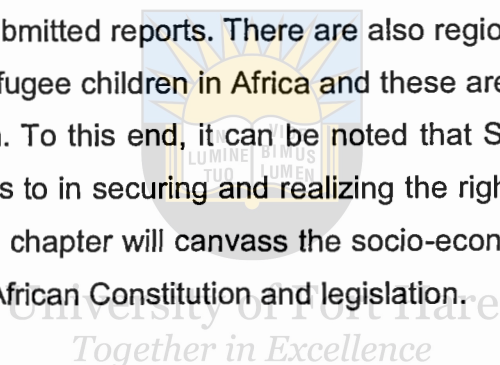
Migration, whether voluntary or forced, is a spontaneous process because the reasons which give rise to this phenomena are diverse, ranging from economic meltdowns, civil unrests, and religious persecutions to political violence, thereby compelling some to seek refuge in neighbouring countries. Children often form the most vulnerable group of such refugees and as such the receiving state is obliged under international law to protect the rights of children. South Africa is a signatory to the UN Refugee Convention, the CRC and the African Charter on the Rights and Welfare of the Child. These treaties protect rights and impose duties on member

³¹⁸ Van Bueren *The International Law on the Rights of the Child* (1995) 363.

³¹⁹ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 117.

states which must be implemented and adhered to. A more dualistic approach was adopted by South Africa when it domesticated international law so as to align the latter with its internal law. The Children's Act of 2005 is an example of how South Africa has domesticated the CRC and ACRWC law rules and principles. It has becomes easy to enforce refugee children's rights.

Refugee children's rights are internationally protected in various international instruments discussed above which include the CRC, UNHCR, ICESCR, UN Refugee Convention and its 1967 Protocol. The Committee on the Rights of the Child monitors the enforcement of children's rights and their recognition by member states through annually submitted reports. There are also regional instruments which offer extra protection to refugee children in Africa and these are the ACRWC and the OAU Refugee Convention. To this end, it can be noted that South Africa has taken considerable positive steps to in securing and realizing the rights of refugee children normatively. The following chapter will canvass the socio-economic rights of refugee children under the South African Constitution and legislation.



Chapter 3

The socio-economic rights of refugee children under the South African Constitution and domestic legislation

3 1 Introduction

The 1996 South African Constitution completes South Africa's constitutional revolution.³²⁰ Whereas the interim Constitution was not the product of a democratically elected body, the 1996 Constitution was drafted and adopted by an elected Constitutional Assembly.³²¹ The Constitutional Assembly was given two years to produce a constitution that conformed to a list of 34 Constitutional Principles that had been agreed on during the 1991-1993 political negotiations.³²² To ensure that the final Constitution conformed to these Principles, the Constitutional Court was required to certify the draft final constitutional text.³²³

The basic principles which underlie the new constitutional order are constitutionalism; the rule of law, democracy and accountability; separation of powers; co-operative governance and devolution of power.³²⁴ These principles are justifiable in the sense that any law or conduct inconsistent with them may be declared invalid.³²⁵ They tie the provisions of the Constitution together and shape them into a framework that defines the new constitutional order.³²⁶ The basic principles therefore influence the interpretation of many other provisions of the Constitution, including provisions of the Bill of Rights which must be interpreted consistently with them.³²⁷ The Constitution in turn, shapes the ordinary law and must inform the way legislation is drafted by the legislatures and interpreted by the courts and the way the courts develop the common law.³²⁸

³²⁰ Currie & De Waal *The Bill of Rights Handbook* 6.

³²¹ In terms of s 68 (1) of the Interim Constitution of South Africa 1994, the Constitutional Assembly consisted of the National Assembly and the Senate, sitting jointly (Interim Constitution).

³²² The Constitutional Principles were contained in schedule 4 and their operation was governed by Chapter 5 of the Interim Constitution, which governed the process of drafting and adopting the final Constitution.

³²³ Section 72 (1) of the Interim Constitution.

³²⁴ Currie & De Waal *The Bill of Rights Handbook* 7.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

The Constitution is the supreme law of the Republic of South Africa which carries obligations that must be fulfilled.³²⁹ In terms of section 1 of the Constitution, South African society is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.³³⁰ Chapter 2 of the Constitution contains a variety of socio-economic rights namely housing,³³¹ health care, food, water and social assistance.³³² Apart from these rights, children³³³ are also entitled to the rights provided by sections 28 (1) (c) and 29 (1) (a) of the Constitution, namely shelter, basic health care services, basic nutrition, social services and basic education.³³⁴ Currie and De Waal argue that the rights of children are not qualified by reference to reasonable measures, progressive realization or resource constraints.³³⁵ Section 28 (1) (c) contains no internal limitation clause but instead uses the word “basic” which is suggested to mean reasonable services needed for a dignified form of survival.³³⁶ Proudlock explains that the realization of these rights is ultimately aimed at the achievement of equality, the improvement of the lives of all citizens and freeing the potential of every person.³³⁷

The provisions in the Bill of Rights protect certain kinds of activities and also demand the fulfilment of certain objectives.³³⁸ Some provisions place negative obligations on the actors while others place positive obligations on those they bind.³³⁹ The duty to respect requires states not to interfere with the enjoyment of existing rights which

³²⁹ Section 2 provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

³³⁰ Section 1 (a) of the Constitution. See also *Grootboom* case para 1.

³³¹ Section 26 of the Constitution provides that everyone has the right to have access to adequate housing and the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of the right.

³³² The difference between social security and social assistance is that the former refers to insurance in the form of pensions and other schemes whereas the latter refers to assistance to those who are in need. See also Currie & De Waal *The Bill of Rights Handbook* 568 which reiterates Section 27 (1) (c) of the Constitution stating that everyone is entitled to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

³³³ A child is defined in section 28(3) of the Constitution as a person under the age of 18 years old, meaning every person under the age of 18 years is entitled to benefit from section 28 of the Constitution.

³³⁴ Currie and De Waal *The Bill of Rights Handbook* 568.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ Proudlock “Children’s socio-economic rights” in Boezaart T(ed) *Child law in South Africa* (2009) 291.

³³⁸ Currie and De Waal *The Bill of Rights Handbook* 145.

³³⁹ *Ibid.*

includes not limiting or taking away such rights from individuals. The duty to protect requires the protection of rights which already exist and are being enjoyed. To promote is generally described as a duty to raise awareness of rights and an obligation on administrative bodies to use the promotion of socio-economic rights as a major consideration in their discretionary decision making.³⁴⁰ Lastly, the duty to fulfil, which requires the adoption of legislative, administrative, budgetary, judicial, promotional and other measures that a state needs to take so that access can be gained or enhanced.³⁴¹ This obligation requires the state to act in order to realize the rights. The duty to fulfil will be breached when there is an invasion of an existing right or when the state does not do enough to realize such rights.³⁴²

Before the advent of the Refugees Act, the procedure regarding refugees was dealt with under the Aliens Control Act of 1991³⁴³ which provided for the control and admission of persons to, their residence in and their departure from South Africa, but did not provide for the provisions of refugee status or any other matters relating to refugees.³⁴⁴ The Aliens Control Act provided that in the first instance, all persons who are not South African citizens are foreigners.³⁴⁵ There was a general prohibition on foreigners entering or remaining in South Africa without the necessary immigration permit or temporary residence permit.³⁴⁶ Those persons who entered or remained in South Africa without the necessary permit were categorized as illegal foreigners.³⁴⁷

The aim of this study is to establish the degree of protection that national legislation provides for refugee children in South Africa. This chapter will explore relevant legislation relating to socio-economic rights and jurisprudence, specifically how it facilitates the realisation of the respective rights that refugee children are entitled to in South Africa.

³⁴⁰ *Ibid.*

³⁴¹ Brand "Introduction" in Brand D & Heynes C (eds) *Socio-economic rights in South Africa* PULP, Pretoria (2005) 9-11.

³⁴² *Ibid.*, 42-43.

³⁴³ Act No. 96 of 1991 as amended by the Aliens Control Amendment Act 76 of 1995.

³⁴⁴ Dugard *International Law: a South African Perspective* 357.

³⁴⁵ Section 1 (1) of the Aliens Control Act.

³⁴⁶ *Ibid.*, s 23, 25 & 26.

³⁴⁷ Section 49 of Act No. 96 of 1991.

3 2 A brief overview of the Refugees Act

The Refugees Act of 1998³⁴⁸ was enacted to give effect to relevant international instruments and principles relating to refugees within South Africa, and to provide for the reception of asylum seekers.³⁴⁹ The Refugees Act came into effect in 2000 by replacing the Aliens Control Act (Aliens Control Act).³⁵⁰ The Refugees Act is the principal Act which provides and regulates the rights of refugees. The Refugees Act consists of the first framework specifically focusing on refugee law in South Africa and the norms and standards set out by the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention.³⁵¹ It was also enacted to regulate applications for recognition of refugee status and to provide for the rights and obligations flowing from such status.³⁵² In terms of the Refugees Act, a person qualifies for refugee status if he or she:

...was forced to flee his or her country, due to a well-founded fear of being persecuted or due to civil war, serious human rights violations and armed conflict and has indicated there is a well-founded fear of persecution on one or more of the different grounds, which include; political opinion, race, gender or ethnic origin, membership of a social group, religious beliefs and nationality; that he or she is outside his or her country of origin and that he or she is unable or unwilling to avail him or herself of the protection of his or her country.³⁵³

A person can also obtain refugee status if he or she was compelled to leave their country due to external aggression, occupation, foreign domination or events seriously disturbing public order.³⁵⁴ Section 4 of the Refugees Act excludes certain categories of people from enjoying the protection of another country. The list includes persons who have committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside South Africa, acts contrary to the objects and principles of the Organization for African Unity and the United Nations as well as those who already enjoy the protection of another country.³⁵⁵

³⁴⁸ Act No.130 of 1998.

³⁴⁹ Dugard *International Law: a South African Perspective* 358.

³⁵⁰ Aliens Control Act No. 96 of 1991.

³⁵¹ Dugard *International Law: A South African Perspective* 359.

³⁵² Kleinsmidt and Manicom "A Policy Analysis of the Refugees Act 180 of 1998" *African Insight* 2010, 172.

³⁵³ Section 3 (a) of the Refugees Act.

³⁵⁴ *Ibid*, s 3 (b).

³⁵⁵ Van Garderen & Winterstein "Refugee Children" 2008 *AHRLJ* 211.

Section 5 of the Refugees Act also provides for the termination of refugee status,³⁵⁶ the application procedure in obtaining refugee status³⁵⁷ and other procedural rules which must be adhered to in order to qualify for refugee status.³⁵⁸ When refugee status is granted, a refugee is entitled to a formal written recognition of refugee status in the prescribed form.³⁵⁹

A refugee can be awarded permanent residence in terms of section 27(d) of the Immigration Act after 5 years of continuance residence in the Republic from the date on which he or she was granted refugee status if the Minister, after considering all the relevant factors and within a reasonable period of time, certifies that he or she would remain a refugee indefinitely.³⁶⁰ An identity document³⁶¹ and travel document are only awarded if a refugee applies in the prescribed manner and the right to seek employment accrues automatically.³⁶² The Refugees Act is the principal Act which provides and regulates the rights of refugees. Full legal protection is awarded to refugees, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, except those rights that only apply to citizens.³⁶³ This means that refugees, including their children are entitled to the rights in chapter 2 of the Constitution as provided by section 27(b) of the Refugees Act, excluding those sections reserved for citizens.³⁶⁴

A child born in the Republic, of a refugee parent must be registered as a dependent in accordance with the Birth and Death Registrations Act.³⁶⁵ The definition of a dependant in relation to a refugee includes the spouse, any unmarried dependent child or destitute, aged or infirm member of the family of such refugee.³⁶⁶ A

³⁵⁶ Section 5 of the Refugees Act gives examples of circumstances which normally lead to the termination of refugee status; these include voluntary acts (done by the refugee) and involuntary acts (events or changes which took place in the country of origin).

³⁵⁷ The determination of refugee status is regulated and administered by the Department of Home Affairs South Africa.

³⁵⁸ Van Garderen & Winterstein "Refugee Children" 2008 *AHRLJ* 210-212.

³⁵⁹ Section 27 (a) of the Refugees Act.

³⁶⁰ *Ibid*, s 27 (c).

³⁶¹ *Ibid*, s 27 (d).

³⁶² *Ibid*, s 27 (f).

³⁶³ *Ibid*, s 27 (b).

³⁶⁴ Kleinsmidt & Manicom "A Policy Analysis of the Refugees Act 180 of 1998" 2011 *African Insight* 167.

³⁶⁵ Birth and Death Registrations Act No. 51 of 1992 defines a dependent as, "any unmarried dependent child or any destitute, aged or infirm member of the immediate family of such refugee who is dependent on him or her".

³⁶⁶ *Ibid*, Preamble of the Birth and Death Registrations Act.

certificate must be submitted after registration to the Refugee Reception office so that the child can be included as a dependant. The provisions in the above Refugees Act only addresses administrative issues in relation to dependants but no mention is made of dependants and care entitlements.

3 3 The right of access to social assistance

The Children's Act³⁶⁷ provides in its long title that it aims to transform and translate the rights as contained in the Convention on the Rights of the Child,³⁶⁸ to extend particular care to children and the rights as contained in section 28 of the Constitution into statutory legal entitlements. All decisions taken in a matter concerning a child must respect, protect, promote and fulfill a child's rights set out in the Bill of Rights, the best interest of the child standard set out in section 7 and the rights and principles set out in the Children's Act, subject to any lawful limitations.³⁶⁹ A child must be treated with dignity, equity and be protected from unfair discrimination on any ground, including a child's health status or disability of the child, or that of a family member of the child.³⁷⁰

The rights which a child has in terms of the Children's Act supplement the rights which a child has in terms of the Bill of Rights.³⁷¹ An organ of state is any department of state or administration in the national, provincial or local.³⁷² All organs of state in any sphere of government, employees and representatives of organs of state must respect, protect and promote the rights of children.³⁷³ A child must not be subjected to social, religious and cultural practices that are detrimental to a child's well-being.³⁷⁴ Every child has the right to have access to information on health promotion and prevention and treatment of ill-health and disease.³⁷⁵ Every child has the right to bring, and to be assisted in bringing a matter to a court, provided the matter falls

³⁶⁷ Children's Act No. 38 of 2005.

³⁶⁸ The CRC may be considered as binding law in so far as its provisions have been translated into the Children's Act.

³⁶⁹ Section 6 (2) (a) of the Children's Act.

³⁷⁰ *Ibid*, s 6 (2) (b), (c) & (d).

³⁷¹ *Ibid*, s 8 (1).

³⁷² Mdumbe *The Meaning of "Organ of State" in South Africa* (LLM-thesis University of South Africa 2003).

³⁷³ Section 8 (2) of the Children's Act.

³⁷⁴ *Ibid*, s 12.

³⁷⁵ *Ibid*, s 13 (1) (a).

within the jurisdiction of that.³⁷⁶ A child, whether male or female, becomes a major upon reaching the age of 18.³⁷⁷ The parental responsibilities and rights in respect of a child include care and contributing to the maintenance of the child.³⁷⁸

Neither, the Social Assistance Amendment Act No. 6 of 2008 nor the Social Assistance Amendment Act, No. 5 of 2010 solves the problem that the Social Assistance Act excludes foreign nationals from receiving social assistance benefits from the state. The only concrete source that refugees can use to enforce their right to access social assistance is Government Notice No. 35205 of 2012 which was issued by the Department of Social Development and is now operational.³⁷⁹ The amendment of Regulations 2 and 6 in the Social Assistance Act now reads to include the word 'refugees' after the words 'citizens and permanent residents'.³⁸⁰ The following section discusses specific case law dealing with socio-economic related issues and the Constitutional Court's approach in settling those disputes.

3 4 Jurisprudence on children's socio-economic rights

3 4 1 *Grootboom* case

The *Grootboom* case concerned a group of adults and children who had moved onto private land from an informal settlement owing to the horrendous conditions in which they were living.³⁸¹ Following eviction from the private land, the claimants camped on a sports field in the area. The claimants found themselves in a precarious position where they had neither security of tenure, nor adequate shelter from the elements.³⁸² The group launched an application to the Western Cape High Court on an urgent basis for an order against all three spheres of government, requiring them to provide temporary shelter or housing until they obtained permanent accommodation. The High Court held that there was no violation of section 26 (the right of everyone to have access to housing), but found a violation of section 28 (1) (c) which protects the

³⁷⁶ *Ibid*, s 14.

³⁷⁷ *Ibid*, s 17.

³⁷⁸ *Ibid*, s 18 (2).

³⁷⁹ Government Notice No. R. 269 of 2012. Available at

<http://www.gov.za/documents/download.php?i=162809>. Accessed 29 October 2014.

³⁸⁰ *Grootboom* case para 3 & 4.

³⁸¹ *Ibid*, para 3.

³⁸² *Ibid*, para 9-11.

right of children to shelter. On appeal, the Court declared that the State's housing programme fell short of compliance with section 26 (1) and (2) (the qualified right of everyone to have access to adequate housing). However, the Court found no violation of the right of children to shelter protected under section 28 (1) (c) of the Constitution.

In the *Grootboom* case, the Court was faced with a failure by the State to take any steps to assist those in desperate and immediate housing need. The Court analysed the State's failure to take steps by reference to the reasonableness approach as a model of review. The Court rejected the contention that the right to housing provided for in section 26 (1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26 (2).³⁸³ Notably, the Court rejected an interpretive approach urged by the *amicus curiae*, based on the idea that socio-economic rights had a minimum core content to which all rights bearers are entitled. This approach was based on the CESCR's General Comment 3 (1990) on the nature of states parties' obligations, under the ICESCR.³⁸⁴ The Court rejected the minimum core approach on the basis that it had inadequate information before it to determine the minimum core of the right to adequate housing.

The Court ruled in the *Grootboom* case that the State's positive obligation under section 26 of the Constitution was primarily to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time. The bulk of the *Grootboom* case judgment is devoted to defining the concept of reasonableness. The Court held that, to qualify as "reasonable", State housing policy must:

- be comprehensive, coherent and effective;³⁸⁵
- have sufficient regard for the social economic and historical context of widespread deprivation;³⁸⁶
- have sufficient regard for the availability of the State's resources;³⁸⁷
- make short, medium and long term provision for housing needs;³⁸⁸

³⁸³ *Ibid*, para 34-46.

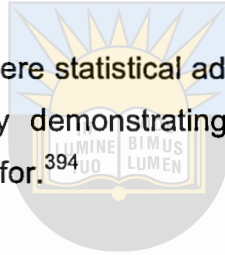
³⁸⁴ CESCR *General Comment No 3 on the Nature of States Parties' Obligations* (Fifth Session, 1991), U.N. Doc E/1991/23. The Court considered and rejected the approach again in *TAC* at paras 26-39.

³⁸⁵ *Grootboom* case, para 40.

³⁸⁶ *Ibid*, para 43.

³⁸⁷ *Ibid*, para 46.

- give special attention to the needs of the poorest and most vulnerable;³⁸⁹
- be aimed at lowering administrative, operational and financial barriers over time;³⁹⁰
- allocate responsibilities and tasks clearly to all three spheres of government;³⁹¹
- be implemented reasonably, adequately resourced and free of bureaucratic
- inefficiency or onerous regulations;³⁹²
- respond with care and concern to the needs of the most desperate;³⁹³ and
- achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for.³⁹⁴



The *Grootboom* case judgment obliged the State, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and cannot find alternative shelter with their own resources. Although the Court had shied away from the idea that section 26 could give rise to a right to housing on demand, its focus on the need for the State to alleviate the plight of those in a desperate situation, according to Liebenberg, suggests that, in certain situations, section 26 of the Constitution could ground a fairly immediate claim for shelter.³⁹⁵ Liebenberg goes on to note that the *Grootboom* case is arguably the most far-reaching of the Court's socio-economic rights jurisprudence.³⁹⁶ This is because the decision resulted in the adoption of a national emergency housing policy.³⁹⁷ The *Grootboom* case has also led to a line of decisions in which poor people have

³⁸⁸ *Ibid*, para 43.

³⁸⁹ *Ibid*, para 42.

³⁹⁰ *Ibid*, para 45.

³⁹¹ *Ibid*, para 39.

³⁹² *Ibid*, para 42.

³⁹³ *Ibid*, para 44

³⁹⁴ *Ibid*.

³⁹⁵ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 151-153.

³⁹⁶ *Ibid*, 171.

³⁹⁷ See volume 4, part 2 of the South African National Housing Code (2009).

successfully resisted evictions potentially leading to their homelessness and consequently claimed alternative shelter from State organs.³⁹⁸

The *Grootboom* case judgment has, undisputedly, had a marked impact on the development of South African constitutional jurisprudence particularly on the enforcement of socio-economic rights.³⁹⁹ In this regard the judgment has been hailed as a “positive precedent for the judicial enforcement of economic and social rights” and as a meaningful step forward for socio-economic rights.⁴⁰⁰ In the *Grootboom* case, Yacoob J held that, while the justiciability of socio-economic rights was beyond question, the issue to be grappled with was how to enforce these rights in any given context.⁴⁰¹ On a practical level, the case has the potential to significantly impact on housing policy at national, provincial and local government level.⁴⁰² The judgment is an indication from the Constitutional Court of what the term “reasonable”, used in section 26, requires of the state in formulating and implementing its housing policy.⁴⁰³ It is a directive to the state that, in order to pass constitutional muster, housing policies and programmes must cater for people who are in desperate and crisis situations.⁴⁰⁴ Finally, and most importantly, the judgment impacts on the lives of persons other than the *Grootboom* community, who are now able to scrutinise and challenge national, provincial or local housing policy on the basis that it does not cater for people in desperate and crisis situations.⁴⁰⁵ It also emphasises on the priority that children must be given in all matters that affect them.

3 4 2 *Khosa* case

The *Khosa* case involved an application for an order confirming the constitutional invalidity of certain provisions of the social assistance legislation that limited eligibility for non-contributory social assistance grants to South African citizens. The applicants were a group of destitute South African permanent residents of Mozambican origin. This group was ineligible to access the various social assistance

³⁹⁸ Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 171.

³⁹⁹ Pillay “Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights” 2002 *LDD* 256.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, 257.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

grants due to the citizenship requirement. The applicants argued that the relevant provisions in the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997 infringed both the right of everyone to have access to social assistance provided for in 27 (1) (c) read with (2) and the right against unfair discrimination provided in section 9 (3).

The Court considered the reasonableness of the exclusion of permanent residents from the Social Assistance Act in terms of the right of access to social security entrenched under section 27 (1) (c) read with (2) of the Constitution. The Constitutional Court noted that the Constitution confers the right of access to social security on everyone.⁴⁰⁶ The Court identified the following factors as being relevant to the assessment of the reasonableness of the exclusion:

- the purpose served by social security;
- the impact of the exclusion on permanent residents and;
- the relevance of the citizenship requirement to that purpose;⁴⁰⁷
- the impact that this has on other intersecting rights – for example, the equality rights protected in section 9 of the Constitution.⁴⁰⁸

The Court, after examining the claim through the lens of equality rights, inquired whether the exclusion of permanent residents from social grants amounted to unfair discrimination in terms of section 9 (3) of the constitutionally protected equality clause. The test for unfair discrimination involves the consideration of a number of factors, particularly its impact on the group discriminated against. The Court ruled the exclusion of South African permanent residents from state social assistance programmes as irrational.⁴⁰⁹ The Court in that case was guided by the impact of the exclusion on the applicants' right to equality. The right to social security, the Court held, vests in everyone. According to the Court, the exclusion of permanent residents from the State's social security programme affected the applicants' rights to dignity and equality. The Court held that without sufficient reason being established to justify such an impairment of the applicants' equality rights, the

⁴⁰⁶ Section 27 (1) of the Constitution. See *Khosa* case para 53–57.

⁴⁰⁷ *Khosa* case, para 49.

⁴⁰⁸ *Ibid*, para 45.

⁴⁰⁹ *Ibid*, para 53 & 85.

exclusion was irrational and unconstitutional. According to the Court, the purpose of the right of access to social assistance for those unable to support themselves and their dependants is to ensure that the basic necessities of life are accessible to all.⁴¹⁰ Given these purposes and the *prima facie* entitlement of “everyone” to have access to social security, the Court held that differentiating on the basis of citizenship in relation to social grants “must not be arbitrary or irrational nor must it manifest a naked preference”.⁴¹¹ The Court held that a differentiating law which did not meet the basic requirement of rationality constituted a violation of both sections 9 (1) and sections 27 (2) of the Constitution.⁴¹² It relegated the applicants “to the margins of society” and deprived them “of what may be essential to enable them to enjoy other rights vested in them under the Constitution”.⁴¹³

The Court’s assessment of the reasonableness of the exclusion of permanent residents in the *Khosa* case incorporates a proportionality analysis. There were other less drastic methods for reducing the risk of permanent residents becoming a burden to the fiscus than excluding them from gaining access to social assistance. Ultimately, the impact of the exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations on which the State relied.⁴¹⁴ The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group, and the intersecting breaches of a socio-economic right and the right against unfair discrimination.⁴¹⁵

The Court found that the purpose of the right of access to social security is its centrality to the achievement of the constitutionally ideal society based on human dignity, equality and freedom. This society cannot be achieved unless “everyone” is afforded the “basic necessities of life”.⁴¹⁶ This is an important consideration in the section 36 assessment because of the need to justify a limitation in respect of the achievement of the foundational values.⁴¹⁷ Makgoro J, goes on to discuss which

⁴¹⁰ *Ibid*, para 52.

⁴¹¹ *Ibid*, para 53.

⁴¹² *Ibid*.

⁴¹³ *Ibid*, para 77 & 81.

⁴¹⁴ *Ibid*, para 82.

⁴¹⁵ *Ibid*, para 44.

⁴¹⁶ *Ibid*, para 52.

⁴¹⁷ James “The Constitutional Court’s Approach to the Limitations Analyses in the Socio-Economic Rights Cases” 2012 *Inkundla* 30.

categories of foreigners would be entitled to receive social assistance in South Africa and effectively concludes that foreigners with non-permanent ties to the country are not eligible for access to the social security system, saying that "it may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link to this country."⁴¹⁸

The Court appears to attack the criteria of differentiation used by the state and says that citizenship criteria could be reasonable as long as it did not exclude permanent residents.⁴¹⁹ The differentiation on the basis of citizenship was found to be too stark as it failed to differentiate between those non-citizens who had nevertheless made their home in South Africa and those whose sojourns were merely temporary.⁴²⁰ Because permanent residents are in almost the same position as citizens, they have similar responsibilities as citizens and so should receive essentially the same benefits.⁴²¹ Access to social assistance is one of the benefits and comes from their connection and degree of loyalty that they owe to the country. Although by couching it in "financial viability" terms the court actually elevates the non-citizens degree of allegiance to South Africa as the most important consideration in determining who should be entitled to social grants.⁴²²

Despite the positive result for the applicants in this case, the reasoning should serve as a warning to future non-citizen litigants claiming social assistance, as well as access to other socio-economic rights.⁴²³ The Court seems to provide two justifications for excluding temporary residents from the social security scheme.⁴²⁴ First, in its discussions around self-sufficiency of foreigners as well as in its acceptance of the concern that foreigners may be a financial drain on the country, the Court demonstrates that financial considerations could play a leading role in future cases brought by non-citizens with less tenuous links to the country.⁴²⁵ Secondly, the question of permanent residence status to that of citizenship, and the

⁴¹⁸ *Ibid.*

⁴¹⁹ *Khosa case*, para 59

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ James "The Constitutional Court's Approach to the Limitations Analyses in the Socio-Economic Rights Cases" 2012 *Inkundla*.31.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

fact that the Court appears to have limited the right of access to social assistance to this enlarged group of “citizens” could be seen as an indication of what categories of non-citizens the court may accept as deserving of access to socio-economic rights.⁴²⁶

Rigorous application of section 36 of the Constitution is required to ensure that the court does not become overly deferential to the executive’s policies in relation to socio-economic rights.⁴²⁷ The Court, in the *Khosa* case appears to have accepted the state’s financial and policy reasons not to extend social protection to those foreigners whose immigration status appears to indicate a weak degree of allegiance to the country.⁴²⁸ Unfortunately this could prove detrimental to temporary residents such as permit holders or refugees and their hopes of social assistance and access to other socio-economic rights.⁴²⁹ We cannot forget that the constitutional drafters conferred the socio-economic rights on “everyone” therefore limitations of the rights must be subjected to the full scrutiny as envisaged by the constitutional method of limitation analysis.⁴³⁰

In order to avoid the situation where access to socio-economic rights is restricted by means of financial and policy considerations it is imperative for the court to undertake a section 36 analysis in all socio-economic cases.⁴³¹ Doing so would ensure that the infringements of those rights are examined according to the standards of the foundational values and ensure respect for a transformed society the Constitution requires that we aim towards.⁴³²

3 4 3 *Treatment Action Campaign (TAC case)*

The decision in the *Treatment Action Campaign* case was handed down almost two years after the *Grootboom* case judgment. The case involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission of HIV. The Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² *Ibid.*

to child transmission of HIV. The applicants argued that the State unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites.⁴³³ This drug was of proven efficacy in reducing mother-to-child transmission of HIV. The applicants further argued that the State had failed to produce and implement a comprehensive national programme for the prevention of mother-to-child transmission of HIV. According to the applicants, the aforementioned conduct and omissions of the State constituted violations of the right of everyone to have access to health care services protected under section 27 of the Constitution, as well as children's right to have access to basic health care services, protected under section 28 (1) (c).

The Court held that the State's programme to prevent mother-to-child transmission of HIV did not comply with its obligations in terms of sections 27 (1) and (2) of the Constitution.⁴³⁴ The Court ruled that the decision to limit access to antiretroviral treatment to a few test sites was irrational because there was no compelling reason not to provide treatment where it was medically indicated outside a limited number of research and testing sites. The Court made both declaratory and mandatory orders against the government. The government was ordered to remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother to child transmission of HIV at public hospitals and clinics that are not research and training sites.⁴³⁵ The government was further ordered to permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother to child transmission of HIV and to make it available for the purpose at hospitals and clinics.⁴³⁶

The case started as an application in the High Court in Pretoria when a number of associations and members of civil society were concerned with the treatment of people with HIV and AIDS and with the prevention of new infections.⁴³⁷ The respondents were the national Minister of Health and the respective members of the

⁴³³ *Ibid*, para 10–11.

⁴³⁴ Section 27 (2) of the Constitution provides for the qualified right of everyone to have access to health care services.

⁴³⁵ *Treatment Action Campaign* case para 135.

⁴³⁶ *Ibid*.

⁴³⁷ *Ibid*, para 3.

executive councils responsible for health in all provinces save the Western Cape. The government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother to child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose. The programme imposed restrictions on the availability of nevirapine in the public health sector.

This is where the issues arose. The applicants contended that these restrictions were unreasonable when measured against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights.⁴³⁸ This duty is imposed by sections 7 (1) and 8 (1) of the Constitution. At issue here is the right given to everyone to have access to public health care services and the right of children to be afforded special protection as expressed in sections 27 (1) and 28 (1) (c) of the Constitution.⁴³⁹ The second issue also arose out of the provisions of section 27 and 28 of the Constitution, whether government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother to child transmission of HIV throughout the country.⁴⁴⁰

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The Court had to consider claims for the enforcement of socio-economic rights on two occasions.⁴⁴¹ On both occasions it was recognised that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution.⁴⁴² It was stressed, however, that the obligations are subject to the qualifications expressed in sections 26 (2) and 27 (2).⁴⁴³ On the first occasion in *Soobramoney*, the claim was dismissed because the applicant failed to establish that the state was in breach of its obligations under section 26 in so far as the provision of renal dialysis to chronically ill patients was concerned.⁴⁴⁴ In the *Grootboom* case, the claim was upheld because the state's housing policy in the area of the Cape Metropolitan Council failed to make reasonable provision within

⁴³⁸ *Ibid*, para 4.

⁴³⁹ *Ibid*.

⁴⁴⁰ *Ibid*, para 5.

⁴⁴¹ *Ibid*, para 23.

⁴⁴² *Ibid*.

⁴⁴³ *Ibid*.

⁴⁴⁴ *Ibid*.

available resources for people in that area who had no access to land, no roof over their heads and were living in intolerable conditions.⁴⁴⁵

In both cases the socio-economic rights, and corresponding obligations of the state, were interpreted in their social and historical context.⁴⁴⁶ The difficulty confronting the state in the light of our history in addressing issues concerned with the basic needs of people was stressed.⁴⁴⁷ It was the applicants' case that the measures adopted by government to provide access to health care services to HIV positive pregnant women were deficient in two material respects: first, because they prohibited the administration of nevaripine at public hospitals and clinics outside the research and training sites; and second, because they failed to implement a comprehensive programme for the prevention of mother to child transmission.⁴⁴⁸ The applicants' contentions raised two questions, namely, is the policy of confining the supply of nevaripine reasonable in the circumstances; and does government have a comprehensive policy for the prevention of mother to child transmission of HIV.⁴⁴⁹

It was clear from the evidence that the provision of nevaripine was going to save the lives of a significant number of infants even if administered without the full package and support services that are available at the research and training sites.⁴⁵⁰ While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services,⁴⁵¹ the state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking.⁴⁵² Here we are concerned with children who are born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment beyond their means.⁴⁵³ They and their children are in the main dependent upon the state to make health services available to them.⁴⁵⁴

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*, para 24.

⁴⁴⁸ *Ibid.*, para 44.

⁴⁴⁹ *Ibid.*, para 47.

⁴⁵⁰ *Ibid.*, para 57.

⁴⁵¹ *Ibid.*, para 77.

⁴⁵² *Ibid.*, para 79.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

The primary duty of the courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.⁴⁵⁵ Where the state's policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations.⁴⁵⁶ A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and give judgment on whether or not it is inconsistent with the Constitution.⁴⁵⁷ If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172 (1) (a) to make a declaration to that effect.⁴⁵⁸ Section 38 the Constitution contemplates that where it is established that a right in the Bill of Right has been infringed a court will grant 'appropriate relief'.⁴⁵⁹

The Court held that, sections 27 (1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother to child transmission of HIV.⁴⁶⁰ The government was ordered to remove the restrictions that prevent nevaripine from being made available for the purpose of reducing the risk of mother to child transmission of HIV at public hospitals and clinics that are not research and training sites.⁴⁶¹ Permit and facilitate the use of nevaripine for the purpose of reducing the risk of mother to child transmission of HIV and to make it available for the purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with a medical superintendant of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.⁴⁶²

The significant aspect of the *Treatment Action Campaign* case decision is its implications on the separation of powers between government branches, since

⁴⁵⁵ *Ibid*, para 99.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid*, para 101.

⁴⁵⁸ *Ibid*.

⁴⁵⁹ *Ibid*, para 57.

⁴⁶⁰ *Ibid*, para 135.

⁴⁶¹ *Ibid*.

⁴⁶² *Ibid*.

South African courts are empowered to interfere, within the bounds of such a theory to make a finding on the constitutionality of government policies.⁴⁶³ The court does not follow a traditional interpretation theory of separation of powers, where it is clear that the government has violated its constitutional obligations, since socio-economic rights give people the possibility of receiving help from the government.⁴⁶⁴ The government is bound by the Constitution. Thus, where government policies are declared unconstitutional by courts, they should be adjusted to comply with the requirements of the Constitution.⁴⁶⁵ The *Treatment Action Campaign* case has the potential to impact on HIV/AIDS policy at all levels of government, since the reasonableness of government policy requires each level of government to accept responsibility for its implementation.⁴⁶⁶ This case is an important result of activist pressure. Without this case the government would never have seen the need of aligning its policies with constitutional principles.⁴⁶⁷ Despite the fact that the TAC case pertains to the right to health, the same principles could be used in similar challenges seeking protection of socio-economic rights.⁴⁶⁸

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3 4 4 *Centre for Child Law* case

On 03 March 2004, the Centre for Child Law⁴⁶⁹ brought an urgent application on behalf of a number of unaccompanied foreign children who were detained for lengthy periods of time at *Lindela*.⁴⁷⁰ At the time of the application, the detained children were not given separate accommodation from the adults also detained at *Lindela*.⁴⁷¹ They were also facing imminent and unlawful deportation.⁴⁷² It transpired that children who are deported from *Lindela* back to their country of origin are loaded into

⁴⁶³ Sebenzile *The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa, and Cameroon* (LLM-thesis, Catholic University of Central Africa, 2005) 26.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Centre for Child Law v Minister of Home Affairs (Centre for Child Law case)* 2005 6 SA 50 (T).

⁴⁷⁰ *Lindela* is a repatriation facility in Krugersdorp, South Africa, where illegal foreigners are detained while awaiting their deportations; Schreier "Critical challenges to protecting unaccompanied and separated foreign children in the Western Cape: Lessons Learned at the UCT Refugee Rights" 20114 *Working Paper Series* 12.

⁴⁷¹ *Centre for Child Law case* para 4.

⁴⁷² *Ibid.*, para 4.

trucks and taken to the train station.⁴⁷³ There, they are transferred onto a train, transported to their country's boarder, loaded onto a truck, and taken to the nearest police station within that country.⁴⁷⁴

The Transvaal Provincial Division granted an interdict preventing the Minister of Home Affairs, the Director-General Home Affairs and *Busasa* from proceeding with the deportation of the children and also appointed Advocate Ellis as *curator ad litem* for the children.⁴⁷⁵ The curator's powers and duties included, amongst other things, to investigate the circumstances of the children in detention, to make recommendations to the Court regarding their future treatment and to institute legal proceedings in the enforcements of their rights.⁴⁷⁶

The curator compiled a report that recommended the Department of Social Development to remove children from *Lindela*, with immediate effect and place them as a group in a place of safety, pending finalisation of the children's court's inquiries in respect of each child.⁴⁷⁷ The Department of Social Development failed to facilitate the children being brought before the Krugersdorp Children's Court in order to afford the children's court commissioner the opportunity to conduct and finalise children's court inquiries in respect of each child.⁴⁷⁸ It was alleged that the application was urgent due to the fact that 12 unaccompanied children had been in detention for nearly six months.⁴⁷⁹ Due to such prolonged detention, their state of mind had deteriorated to the extent that there had been incidents of attempted escape, threats of suicide and a stabbing.⁴⁸⁰ For these reasons it was imperative that the children's court inquiries be finalised in respect of each child in order to resolve the children's predicament.⁴⁸¹

The main issue dealt with was the Department of Social Development's failure to bring a group of 123 unaccompanied foreign children before the Krugersdorp

⁴⁷³ *Ibid*, para 5.

⁴⁷⁴ *Ibid*.

⁴⁷⁵ *Ibid*, para 6.

⁴⁷⁶ *Ibid*.

⁴⁷⁷ *Ibid*, para 7.1.

⁴⁷⁸ *Ibid*, para 9.

⁴⁷⁹ *Ibid*, para 10.

⁴⁸⁰ *Ibid*.

⁴⁸¹ *Ibid*.

children's court in order for inquiries to be opened for them in terms of the provisions of section 12 (2) (c) of the Child Care Act.⁴⁸² The failure by the South African Police Service, the Departments of Social Development and Home Affairs and Busasa to give effect to section 12 (2) of the Child Care Act and their own stated policies to bring unaccompanied foreign children to a children's court in the districts where they have been found.⁴⁸³

The Court held that persons within South African territorial boundaries have the protection of our courts and the Constitution.⁴⁸⁴ Section 28 (2) (a) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.⁴⁸⁵ Although the phrase "best interests of the child" is well known in South African law, as it has historically provided the standard in terms of which the court exercises its inherent jurisdiction as upper guardian of all minors, on a wide interpretation, section 28 (2) goes considerably further than the original concept.⁴⁸⁶

Section 28 should be seen in the context of the Bill of Rights as a whole. In respect of the socio-economic rights referred to in sections 26 and 27, the Constitutional Court has said that this section imposes a negative duty on the state and private parties to desist from preventing or impairing the right of access to socio-economic rights and also positive duties to extend access to socio-economic rights.⁴⁸⁷ This duty, is however limited. In view of the fact that children's socio-economic rights are neither described as a right of access to the relevant rights nor qualified, as in sections 26 and 27, one may conclude that these rights impose a direct duty on the State to ensure that those children who lack basic necessities of life are provided with them.⁴⁸⁸ However, in *Grootboom* it was decided that the primary duty to fulfilling a child's socio-economic rights rests on the child's parents or family. Liebenberg suggests that the State is under a direct duty to ensure the basic socio-economic

⁴⁸² *Ibid*, para 21.1.

⁴⁸³ *Ibid*, para 12.2.

⁴⁸⁴ *Ibid*, para 15.

⁴⁸⁵ *Ibid*, para 16.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Ibid*, para 17.

⁴⁸⁸ *Ibid*.

provision for children who lack family care, as do unaccompanied foreign children.⁴⁸⁹ There is thus an active duty on the state to provide those children with the rights and protection set out in section 28.⁴⁹⁰

Section 13 of the Child Care Act, amongst others, provides that any child who appears to have no parent or guardian or, if the parent or guardian cannot be traced or the child has been abandoned or is without visible means of support or lives in circumstances likely to cause or be conducive for his or her seduction, abduction or sexual exploitation; or who lives in or exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, must be brought before a children's court for an inquiry to determine whether the child is a child in need of care, and whether that child should be removed to a place of safety.⁴⁹¹ Section 12 (2) (c) of the Child Care Act provides that any policeman, social worker or authorised officer may remove a child from any place to a place of safety without a warrant if the policeman, social worker or authorised officer has reason to believe that such child's circumstances are described as in the above paragraphs.⁴⁹²

The Court held that the respondents' behaviour constituted a serious infringement of the children's fundamental rights in terms of sections 12, 28 (1) (c), 28 (1) (g), 28 (2), 33, 34 and 35 of the Constitution, whilst it also infringes their statutory rights in sections 12 and 14 of the Child Care Act.⁴⁹³ That the detention was unlawful, invalid and should cease immediately, that the government's failure to act in the best interests of the children was shameful.⁴⁹⁴ South Africa is a signatory to the CRC which affords everyone the right to health, social security and education; the ACRWC which similarly affirms every child's right to education and healthcare; the Refugees Convention which requires states to provide compulsory primary education to refugee children of a standard equivalent to that provided to its own nationals.⁴⁹⁵ The Court directed the respondents to meet the socio-economic needs of children

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*, para 20.

⁴⁹² *Ibid.*, para 21.

⁴⁹³ *Ibid.*, para 20.

⁴⁹⁴ *Ibid.*, para 23.

⁴⁹⁵ *Ibid.*, para 24.

who lacked family care through the assistance and involvement of various relevant governmental departments.⁴⁹⁶

What is very clear is that the state's failure to protect children before, during and after asylum determination procedure places these children at considerable risk.⁴⁹⁷ Children are usually detained with their mothers, but in the case of *Lindela* are in areas that can be accessed by adult males, in violation of the United Nations Standard Minimum Rules of Detention. Their detention also appears to be in violation of section 28 (g) of the Constitution which provides that "children should not be detained except as a measure of last resort".⁴⁹⁸ The detention of refugee children has one of the severest impacts on unaccompanied children.⁴⁹⁹ With often limited justification, and in some instances even defying expert opinion, authorities have detained children simply because they believe them to be adults.⁵⁰⁰

3 5 Children's socio-economic rights and equality under the South African Constitution

South Africa's commitment to equality and the advancement of human rights for all was achieved to transform society, eradicate barriers and obstacles that unfairly discriminate, and to develop positive measures that promote equality.⁵⁰¹ Section 9 of the Constitution commits South Africa to achieve equality.⁵⁰² The centrality of equality to our Constitutional value system and its enforceability was emphasized by the Constitutional Court in *Minister of Finance v Van Heerden*,⁵⁰³ as follows:

⁴⁹⁶ *Ibid*, para 31.

⁴⁹⁷ Nyenti, Apon, Plessis "Access to social services for non-citizens and the portability of social benefits within the South African Development Community" 2007 SACR 41.

⁴⁹⁸ *Ibid*.

⁴⁹⁹ *Ibid*.

⁵⁰⁰ *Ibid*.

⁵⁰¹ De Jager "Litigating the Rights of Refugees in the Equality Courts" 2011 University of Cape Town Refugee Unit 3. Available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_3_of_2011.pdf. Accessed 28 October 2014.

⁵⁰² Section 9 (1) of the Constitution; section 9 (3) provides that "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

⁵⁰³ *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC).

The achievement of equality goes to the foundation of our Constitution building....The achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance.⁵⁰⁴

Before analyzing the equality clause, a distinction must be drawn between formal and substantive equality.⁵⁰⁵ Formal equality means sameness of treatment: the law must treat individuals in life circumstances alike.⁵⁰⁶ Formal equality simply requires that all persons are equal bearers of rights.⁵⁰⁷ On this view inequality is an aberration that can be eliminated by extending the same rights and entitlements or in accordance with the same "neutral" norm or standard of measurement.⁵⁰⁸ Formal equality does not take actual social and economic disparities between groups and individuals into account.⁵⁰⁹

Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.⁵¹⁰ Substantive equality requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is upheld.⁵¹¹ In assessing these two approaches in the context of the principles and purposes of the constitution and the historical burden of inequality that it seeks to overcome, it is clear that a purely formal understanding of equality risks neglecting the deepest commitments of the Constitution.⁵¹² A substantive conception of equality, on the other hand, is supportive of less fundamental values.⁵¹³ A purposive approach to constitutional interpretation means that section 9 must be read as grounded on a substantive conception of equality.⁵¹⁴ The right to equality applies to everyone, except where it is indicated otherwise.⁵¹⁵ This means that constitutional

⁵⁰⁴ *Ibid*, para 22.

⁵⁰⁵ Currie & De Waal *The Bill of Rights Handbook* 232.

⁵⁰⁶ *Ibid*.

⁵⁰⁷ *Ibid*, 233.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ *Ibid*.

⁵¹⁰ *Ibid*.

⁵¹¹ *Ibid*.

⁵¹² *Ibid*.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*.

⁵¹⁵ A good example is section 19 and 20 of the Constitution which are reserved for South African Citizens only.

entitlements in sections 26, 27, 28 and 29 (1) (b) are available to all, including refugee children. In the matter of *Access and Minister of Social Development*,⁵¹⁶ reference was made to the *Khosa* case where it was clearly indicated that the rights in the Bill of Rights equally extend to non-South African citizens in the Republic, making refugee children entitled to the enjoyment of resources.⁵¹⁷

Van Garderen and Winterstein have argued that despite the fact that refugee children are entitled to the rights set out in the Constitution, there is no sound government policy dealing with welfare service and health provision for refugee children, making them dependant on non-state actors for assistance.⁵¹⁸ The reasons advanced for not providing these welfare and health rights are due to bureaucracy and social obstacles.⁵¹⁹ In the *Khosa* case, the Constitutional Court adopted a purposive approach to the interpretation of rights.⁵²⁰ Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in South Africa” and in the absence of any indication that the right granted in section 27 (1) is to be restricted to citizens as in other provisions in the Bill of Rights, the word “everyone” in this section cannot be construed as referring only to “citizens”.⁵²¹

While assessing the impact of the exclusion from social assistance benefits of permanent residents the Constitutional Court looked at the relationships of dependency the applicants and similarly placed permanent residents would find themselves in.⁵²² The state advocated that social grants should not be extended to non-citizens because foreigners in South Africa are encouraged to become self-sufficient.⁵²³ The Constitutional Court rejected this argument on the basis that the circumstances of the applicants meant that they were simply not able to care for

⁵¹⁶ Heads of arguments by the Lawyers for Human Rights *together with Access and Minister of Social Development* 2005 5251 4 in Baalen, “The rights of refugee children in South Africa” (LLM-thesis, North-West University 2012) 49.

⁵¹⁷ *Ibid.*

⁵¹⁸ Van Garderen & Winterstein “Refugee children” 2008 *AHRLJ* 219.

⁵¹⁹ Stewart “Unaccompanied minor refugee children protection of their socio-economic rights under human rights law” 2009 *AHRLJ* 121, in Baalen *The rights of refugee children in South Africa* (LLM-thesis, North-West University, 2012) 49.

⁵²⁰ *Khosa* case para 47.

⁵²¹ *Ibid.*

⁵²² The Constitutional Court's approach to the limitations analyses in socio-economic rights cases. Available at www.inkundla.org/inkundla/2012-inkundla, accessed 23 January 2015.

⁵²³ *Khosa* case, para 47

themselves because they were either old or children.⁵²⁴ The Court said that those in the position of the applicants were therefore forced to rely on others for financial and other support and that placing them in these dependent relationships seriously impacted on their dignity.⁵²⁵

In *Harksen v Lane*⁵²⁶ (Harksen) the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause along the following lines:

- Does the challenged law or conduct differentiate between people or categories of people?⁵²⁷ If so, does the differentiation bear a rational connection to legitimate government purpose?⁵²⁸ If it does not, then there is a violation of section 9 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.⁵²⁹
- Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (i) First, does the discrimination amount to “discrimination”?⁵³⁰ If it is on a specified ground then discrimination would have been established.⁵³¹ If it is not on a specified ground then whether or not there is discrimination would depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁵³²
 - (ii) If the differentiation amounts to “discrimination”, does it answer to “unfair discrimination”?⁵³³ If it has been found to have been on a specified ground then unfairness would be presumed.⁵³⁴ If on an unspecified ground, unfairness will have to be established by the complainant.⁵³⁵ The test of unfairness focuses primarily on the impact

⁵²⁴ *Ibid* para 76.

⁵²⁵ *Ibid*.

⁵²⁶ *Harksen vs Lane* 1998 1 SA 300 (CC).

⁵²⁷ *Ibid*, para 53.

⁵²⁸ *Ibid*.

⁵²⁹ *Ibid*.

⁵³⁰ *Ibid*.

⁵³¹ *Ibid*.

⁵³² *Ibid*.

⁵³³ *Ibid*.

⁵³⁴ *Ibid*.

⁵³⁵ *Ibid*.

of the discrimination on the complainant and others in his or her situation.⁵³⁶ If, at the end of this stage of the inquiry, the differentiation is found not to be unfair, then there will be no violation of section 9 (3) and (4) of Constitution.⁵³⁷

- If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.⁵³⁸

Section 27 of the Constitution provides for a “right to have access” to health care, food, water and social security.⁵³⁹ The nature of the obligations imposed by section 27 on the state is the same by those imposed by section 26 (1) and (2).⁵⁴⁰ Although reasonable legislative and implementation measures to achieve the progressive realisation of the right are allowed, the right of access to social assistance may not be infringed by retrogressive measures.⁵⁴¹ The Constitutional Court’s treatment of the content of the right to health care in the *Treatment Action Campaign* case is minimal.⁵⁴² This is because the Court’s general approach to positive dimensions of the socio-economic rights is to avoid giving content to those rights in favour of an adjudication of the reasonableness of the measures taken by the state to implement the right.⁵⁴³

In the *Grootboom* and in the *Treatment Action Campaign* cases, the Constitutional Court made no reference to the limitation clause.⁵⁴⁴ In the *Grootboom* case, despite finding that the state’s housing programme fell short of the obligations imposed by section 26 (2), the possibility of justifying these shortcomings in terms of section 36 was not canvassed.⁵⁴⁵ Similarly, no attempt was made in the *Treatment Action Campaign* case to justify the deficiencies in the state’s programme for the prevention of mother-to-child transmission of HIV as legitimate limitations of the right to health

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ Currie & De Waal *The Bill of Rights Handbook* 591.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

are.⁵⁴⁶ The reason why the limitation clause was inapplicable in these cases is that, neither case involved the use of a law of general application to infringe rights.⁵⁴⁷ The problem with the state's programme in *Grootboom* was precisely the absence of legislative or other measures providing for emergence relief.⁵⁴⁸ Similarly, in the *Treatment Action Campaign* case the violation of section 27 (2) was caused by a failure to develop a comprehensive programme to combat mother-to-child prevention of HIV.⁵⁴⁹ Since most socio-economic rights litigation is likely to be concerned with the positive obligations imposed by the rights, violations of the right are likely to take the form of omissions.⁵⁵⁰

The law of general application requirement means that the limitation clause can feasibly only be engaged by a negative violation of the socio-economic right by a law of general application.⁵⁵¹ However, it is unlikely that there could be any possibility of justifying an infringement of the positive dimensions of the socio-economic rights by law.⁵⁵² This is because it will be extremely difficult to apply the "two stage" analysis of a right and justifications for the limitation of that right to sections 25 (5), 26 and 27 of the Constitution.⁵⁵³ One of the principal criteria justifying the limitation of rights in the general limitation clause (reasonableness) has been included in the demarcation of these particular rights.⁵⁵⁴ Applying the limitation clause to an infringement of the positive aspects of socio-economic rights would therefore put a court in the self-defeating position of arguing the reasonableness of a measure that has already been found to lack reasonableness.⁵⁵⁵

The High Court's order in the *Grootboom* case is the most extensive use of conditions of the structural interdict to enforce a positive obligation.⁵⁵⁶ The Court found that the conditions under which the squatters were living were a violation of

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*, 594.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*, 595.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

the right of children to shelter in terms of section 28 (1) (c).⁵⁵⁷ According to the Court, section 38 and section 172 of the Constitution permit the issuing of “an order which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible state agency the opportunity to choose the means of compliance”.⁵⁵⁸

On appeal, the Constitutional Court held that the High Court’s interpretation of section 28 (1) (c) of the Constitution was incorrect.⁵⁵⁹ The subsection did not impose an obligation on the state to provide shelter to those of the respondents who were children, and through them, their parents.⁵⁶⁰ The right to housing on the other hand, which had been infringed by the state, did not give the applicants the right to claim housing immediately on demand.⁵⁶¹ The remedy for the infringement could not, moreover, put the applicants into a preferential position *vis-a-vis* similarly situated people who are not party to the litigation.⁵⁶² The court order in the *Grootboom* case, set out the shortcomings in the state’s housing policy, declared that the state must take steps to remedy these shortcomings, and suggested a means of achieving the result.⁵⁶³ In addition, the Human Rights Commission was appointed to monitor the implementation of this order.⁵⁶⁴ The Court emphasised the state’s duty regarding the realization of socio-economic rights as one that should be effective.⁵⁶⁵ It further stated that the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.⁵⁶⁶

3 6 Analysis

While there have been many discussion points surrounding these rights since the adoption of the Constitution, a fundamental one has been around the structure of these rights. The socio-economic rights include what has been termed internal modifiers which limit the extent to which the right can be enforced and so the rights

⁵⁵⁷ *Ibid*, 596.

⁵⁵⁸ *Ibid*.

⁵⁵⁹ *Ibid*.

⁵⁶⁰ *Ibid*.

⁵⁶¹ *Ibid*.

⁵⁶² *Ibid*.

⁵⁶³ *Ibid*, 597

⁵⁶⁴ *Ibid*, 594.

⁵⁶⁵ *Ibid*, 597.

⁵⁶⁶ *Ibid*, 594.

appear to be subject to two limitation clauses because the general limitations clause in section 36 applies to all rights in the Bill of Rights. The Constitutional Court has not applied section 36 in most socio-economic rights cases, however, and has instead relied solely on the internal modifiers set out in section 26 (2) and section 27 (2) of the Constitution.

Even though the abovementioned cases indirectly addressed children's socio-economic rights, it is clear that the courts avoided interpreting children's socio-economic rights where they overlapped with other rights.⁵⁶⁷ The reasons given for the Constitutional Court's reluctance are that the remedies would require time and resources. Pieterse makes a good argument by stating that if section 28 (1) (c) is viewed as subject to the resource and other constraints in section 26 and 27, it would seem completely unsupported by the text of the constitution.⁵⁶⁸

If a court's interpretation is to be preferred, the separate inclusion of section 28 (1) (c) in the Bill of Rights would be rendered almost entirely without a purpose.⁵⁶⁹ Stewart further argues that the right in question should be given content in the first instance which includes looking at international law and then investigate whether this right can be qualified or limited.⁵⁷⁰ In terms of giving content to the rights in question, the Constitutional Court was more concerned with the obligations placed on the state rather than giving meaning to children's rights.⁵⁷¹ In line with the arguments presented by Pieterse and Proudlock, Stewart also argues that some kind of priority must be given to the socio-economic rights of children due to the separate provision, thereof.⁵⁷²

The Constitution allows a right to be infringed only if certain criterion is met in terms of section 36.⁵⁷³ Where an infringement can be justified in accordance with the

⁵⁶⁷ Stewart "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" 2008 *SAJHR* 478.

⁵⁶⁸ Pieterse "Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements" 2003 *TSAR* 11.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ Stewart "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" 2008 *SAJHR* 479.

⁵⁷² *Ibid.*, 480.

⁵⁷³ Currie & De Waal, *The Bill of Rights Handbook* 164.

criteria in section 36 of the Constitution, it will be constitutionally valid. Where children's rights are limited, there must be reasonable and justifiable reasons and the limitation must serve a purpose that most people would regard as compelling and important.⁵⁷⁴ The reasons for limiting a right need to be exceptionally strong.⁵⁷⁵

The limitation of rights in the Bill of Rights comes in two stages. The first stage is through a general limitation clause which applies to all the rights in the Bill of Rights. However, this is not easy when the rights of everyone overlap with those of children. As it has been seen in the *Grootboom* and *Treatment Action Campaign* cases, children's rights were limited in terms of reasonableness in sections 26 (2) and 27 (2), rendering them without any direct entitlement.⁵⁷⁶ In the second stage, the general limitation clause is used due to the fact that it calls for a proportionality test which will render the limitation more difficult to justify.⁵⁷⁷ In reality, courts prefer to use the internal limitation especially in cases where children's rights overlap with those of everyone.

In *First National Bank of South Africa v Commissioner, South African Revenue Services* the Constitutional Court acknowledged the difficulties of applying the limitation clause to a violation of section 25 (1) of the Constitution but found it unnecessary to decide on the question of whether the right to property could be justifiably limited.⁵⁷⁸ The positive aspects of the socio-economic rights in sections 26 and 27 (rights to reasonable measures to achieve progressive realization of the listed goals) are also inappropriate for limitation analysis.

The CRC does not limit children's rights by requiring that reasonable and progressive steps be taken. It is of the view that, it is inappropriate to qualify children's rights due to their vulnerability, lack of maturity and comparative innocence

⁵⁷⁴ Meyerson *Rights Limited* (1997) 36-43 in Currie & De Waal (eds) *The Bill of Rights Handbook* 164.

⁵⁷⁵ Section 36(1) of the Constitution provides that when a right is being limited certain factors such as the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve the purpose, need to be considered.

⁵⁷⁶ Baalen "The rights of refugee children in South Africa" 44; See also the *Khosa* case which tested legislation restricting a social welfare benefit to citizens, against the criterion of reasonableness in section 27 (2) and not against the limitation section.

⁵⁷⁷ *Khosa* case para 493-494.

⁵⁷⁸ *First National Bank of South Africa v Commissioner, South African Revenue Services* 2002 4 SA 768 (CC).

that render them to deserve of protection. Furthermore, children cannot be expected to participate actively in the human rights dialogue in the same way as adults.⁵⁷⁹ However, in 2003 the CRC Committee drafted a general comment on “General measures of implementation”, where it introduced the concept of progressive realization of rights, placing an obligation on states to show that they have implemented their available resources to the maximum extent.⁵⁸⁰ The obligations are fulfilled by way of creating national budgets to allocate a percentage towards the realization of children’s rights.⁵⁸¹ Stewart argues that the guidelines clearly mandate courts to address budgetary questions which, as seen in the *Grootboom* and *Treatment Action Campaign* cases, the courts avoided to do.⁵⁸²

After considerable interpretations of limitations and minimum standards set out in the South Africa Constitution, it can be argued that children’s rights are not given the necessary interpretation and acknowledgement. Stewart argues that the reasons for the lack of interpretation include the fact that the Constitutional Court “is side stepping the need to address the difficult political, social and policy questions posed by children’s rights.”⁵⁸³ Commentators argue that the rights of children need to be directly and immediately enforceable, irrespective of resources constraints because children are vulnerable.

Children’s socio-economic rights in section 28 of the Constitution are devoid of substance if children’s rights are also limited in terms of the rights of everyone. Concerning the arguments made, one takes note that children’s rights need direct and immediate enforcement by the state where the responsible parents are poor and unable to provide for their children, even if the parents end up indirectly benefiting unjustly.

Another factor than needs to be addressed is the best interest of the child principle as seen in section 28 (2) of the Constitution. Skelton describes this principle as a “right in itself” which courts should regard as a tool when interpreting children’s

⁵⁷⁹ Proudlock “Children’s socio-economic rights” 294. See also Stewart 2011 *SAPL* 102-103.

⁵⁸⁰ Baalen “The rights of refugee children in South Africa” 46.

⁵⁸¹ The CRC Committee General Comment No 5 2003 para 7.8.

⁵⁸² Stewart “The Grootboom Judgment Interpretative Maneuvouring and Depoliticizing Children’s Rights” 2011 *SAPL* 112.

⁵⁸³ *Ibid*, 105-106.

rights.⁵⁸⁴ Refugee children if treated equally would be in the same position as provided for in *Grootboom* and *Treatment Action Campaign*, making their parents primarily responsible to provide for their socio-economic needs.⁵⁸⁵ However, refugees face greater barriers in accessing services due to the exclusion from housing subsidies, the denial and exclusion to access health care facilities, and educational facilities.⁵⁸⁶ This makes the execution of parental responsibility even more difficult.

It can be argued that, although there are resource constraints most of the time, refugee children are entitled to the provision of socio-economic rights in a direct and immediate way.⁵⁸⁷ Refugee children are extremely vulnerable due to the circumstances they find themselves in, so even if their parents indirectly benefit from state assistance, the special needs of these children weigh far more.⁵⁸⁸ All the above mentioned reasons oblige South Africa to facilitate the reasonable accommodation and integration of refugee children.

3 7 Summary

Section 9 of the Constitution carries the equality and non-discrimination clause. When purposively and contextually interpreted means that everyone in South Africa is entitled to the full protection and benefit of the law. This means that refugee children may not be unfairly discriminated against in the provision of access to socio-economic rights by the State solely because of nationality, nationality being one of the forbidden grounds for discrimination as provided by section 9 of the Constitution. As decided in *Centre for Child Law*, refugee children should be treated fairly and with dignity since these children are vulnerable to abuse, neglect and ill-treatment.

A duty of care for these children is placed on the state where parents or guardians cannot afford to protect children. In as much as other socio-economic rights in the Constitution are subject to internal qualifications, in the *Grootboom* case, it was held that children's rights cannot be subject to such limitations and qualifications because

⁵⁸⁴ Skelton "Constitutional Protection of Children's Rights" in Boezaart T (ed) *Child Law in South Africa* (2009) 40.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Stewart "Unaccompanied minor refugee children protection of their socio-economic rights under human rights law" 2009 *AHRLJ* 121 in Baalen C, "The rights of refugee children in South Africa" 49.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

children cannot stand for themselves in defending their own rights. Children are voiceless save for instances where adults stand up on their behalf to defend their rights. The result of this form of constitutional interpretation is that the State bears a positive obligation to immediately realize the rights of children as opposed to progressive realization on everyone's socio-economic rights.

Section 28 of the Constitution of South Africa was specifically designed to address children's rights by further providing for the paramountcy of the best interests of the child. Although it is naturally the responsibility of a parent to provide for their children, the state has an obligation to immediately realise these rights where the parents are economically disadvantaged.



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Chapter 4

Conclusion and recommendations

4 1 Conclusion

The apartheid regime catered for the needs of white South Africans and protected them against contingencies by way of social insurance and where it failed by means of social assistance and black people were excluded from social security.⁵⁸⁹ This position changed when the Constitution came into effect and then afforded everyone the right to have access to social security including if they are unable to support themselves and their dependants' appropriate social assistance in section 27.⁵⁹⁰ The fundamental right to human dignity, equality and freedom underpins this right.⁵⁹¹ The right to equality provides that everyone is equal before the law and has the right to equal protection and benefit of the law.⁵⁹² The right to social security in section 27 appears to be comprehensive with regard to the scope of social protection; however social legislation is limited in its application.⁵⁹³ This resulted in the Child Care Act being repealed by the Children's Act, which was redrafted to include provisions of social security for children.

It is apparent that the process of economic and social change creates new prospects and challenges for every generation. This requires constant adjustment on the part of social services. Political considerations and levels of resources largely determine how social services are organized and how responsibility is apportioned between the statutory, voluntary and private sectors. Even in prosperous societies the scale and diversity of needs is such that the formal social services are obliged to utilize and support informal systems of social care and mutual aid.

South Africa has taken considerable strides in the recognition and realization of refugee rights, especially child refugees. This is evident through the statutory instruments that

⁵⁸⁹ Olivia; Okpaluba; Smith & Thompson *Social Security Law, General Principles* Butterworths (1999) 21.

⁵⁹⁰ Section 27 of the Constitution.

⁵⁹¹ Right to Social Security, Social Assistance (2000-2002) 230.

⁵⁹² Section 9 (1) of the Constitution.

⁵⁹³ Right to Social Security, Social Assistance (2000- 2002) 231.

have been enacted by the legislature for the promotion and protection of people with refugee status. The Refugees Act was enacted to give effect to the provisions of international law and to regulate state obligations in addressing refugee problems. Section 27(b) of the Refugees Act provides that everyone with refugee status is entitled to the rights contained in the Bill of Rights.⁵⁹⁴ For example, everyone has the right to social assistance in South Africa as provided by the section 27 (1) (c) of the Constitution. Furthermore, the Immigration Act allows refugees to be granted permanent residence in South Africa subject to a formal application and also if due process is followed. The Social Assistance Act was primarily designed to regulate access to social security. In the *Khosa* case, it was held that section 5 of the Act should be amended so as to include non-South African citizens in receiving social grants. The Children's Act was specifically enacted to address issues affecting minors and as such does not discriminate on the ground of nationality hence every child has to be treated equally.

The White Paper on Social Security provides that every member of society who finds him or herself in need of care will have access to support; however, not everybody in need of social assistance is afforded social assistance. It can be concluded that South Africa has managed to domesticate international law with regards to refugee children. Issues still remain in the sphere of implementation of social assistance rules and norms in the domestic arena, which issues after discussion above, the given recommendations are meant to assist government in upgrading its social assistance policies to completely protect refugee children.

The purpose of this research was to investigate whether the South African Constitution and national legislation offer social assistance to refugee children. International and regional instruments protecting refugee children's right to social assistance were where examined. Normally, children are dependent on adults with whom they migrate together, to foreign countries. In some cases these children end up abandoned or forced to lead

⁵⁹⁴ South African government. Available at <http://www.gov.za/documents/download.php?f=70666>. Accessed 15 October 2014.

indecent lives due to the difficulties associated with integrating in a foreign country and failure on the State's part to assist children found in those circumstances.

This research was motivated by the worldwide concern for children arising from their vulnerability as minors who cannot act in their own accord without adult persons' assistance. Refugee children are more likely to be vulnerable in foreign countries, as was indicated in various case studies, due to different reasons. The principle underlying this study is that children's rights should be prioritised and society must be encouraged to defend and protect children regardless of nationality.

International and regional human rights instruments that have an impact on the legal position of refugee children's right to social assistance were discussed in this research. Literature aimed at protecting children was reviewed. It was discovered that South Africa is a party to almost all the international and regional instruments dealing with children's socio-economic rights. These instruments are the CRC, Refugee Convention and its 1967 Protocol, ICESCR, 1969 OAU Refugee Convention and ACRWC. This study also assessed the legal obligations that South Africa bound itself to fulfil under international law and concluded that South Africa has managed to integrate most of the international rules and principles meant to protect refugee children in its domestic laws. It was further concluded that South Africa has an obligation to meet the socio-economic needs of refugee children.

The South African Bill of Rights, in particular the specific constitutional provisions and reported cases that protect the rights of children in South Africa were explored. It illustrated that a duty of care for children is placed on the state where parents or guardians cannot afford to protect children. Chapter three further demonstrated that section 28 of the Constitution of South Africa was specifically designed to address children's rights by further providing for the paramountcy of the best interests of the child. Although it is naturally the burden of a parent to provide for their children, the state has an obligation to immediately realize these rights where the parents are economically disadvantaged. Supporting cases namely *Treatment Action Campaign*,

Khosa and *Grootboom* were discussed in detail. It was concluded that children's rights enjoy universal recognition in the international sphere and same should be practised in South Africa when applying section 28, 39, 165, 172, 231 and 233 of the Constitution. Further, it was emphasised that that the rights in the Bill of Rights should not be read in isolation but collectively to get a proper meaning and content of a specific right.

This study further reviewed national legislation operationalising South Africa's international obligations. It was showed that refugee children's rights are mainly protected by the Refugees Act, the Children's Act and the Social Assistance Act. Interdependence of all human rights constitutes a key theoretical underpinning for the recognition of the right to social assistance and this is a major theoretical perspective drawn in chapter three.⁵⁹⁵ The Children's Act is a reflection of the norms entrenched in the CRC. Its preamble explains that it aims to transform and translate children's rights as contained in the CRC. Having presented a summary of the study, the recommendations drawn from the entire study will be addressed.

The non-contributory security system should provide a transparent platform for the creation of a single concrete document in the form of a Social Assistance Amendment Act that will serve as evidence that refugees are entitled to social assistance by law. The legislative framework of the present social security system denies the most vulnerable members of our society access to social security. People who are excluded from social assistance need some form of social security. As it stands, lay refugees who are supposed to be the sole beneficiaries of state assistance might not even be aware of the amendment to the regulations of the Social Assistance Act hence they fail to claim such rights from the government. There must be a specific amendment dealing with section 5 of the Social Assistance Act of 2004 and necessary attitudinal changes to make the acceptance of diversity easier.

⁵⁹⁵ See section 3.5, Chapter 3 for further discussion on jurisprudence relating to children's socio-economic rights.

4 2 Recommendations

It is recommended that the State introduces a Basic Income Grant or any other measure, which will enable the poorest of the poor and refugees, who are excluded from social assistance to escape poverty and have some form of income. This income to refugees will enable them to meet their basic needs for subsistence and enable them to lead dignified lives. South Africa has a high rate of poverty and inequality.⁵⁹⁶ Most people within South Africa live in poverty stricken areas and do not have access to basic social services and social assistance.⁵⁹⁷ Poverty is one of the serious challenges facing South Africa and this, to a large extent was caused by past discriminatory and racial policies.⁵⁹⁸ The low wages earned by those employed deprives them of a decent standard of living in the midst of rampant unemployment.⁵⁹⁹ It is against this background a Basic Income Grant was recommended by the Taylor Committee in 2004 as a measure to reduce poverty and afford human beings a decent standard of living.⁶⁰⁰ The proposed implementation of the Basic Income Grant was motivated by an observed gap in assistance for working-age individuals and recognition that not only children, the disabled and retirees need social protection, but also working-age individuals who are vulnerable to unemployment, resulting in impoverishment. The overarching aim of the Basic Income Grant system is to reduce poverty and raise living standards.

The Basic Income Grant sets out that a sum be paid to everyone in the country including children who are not in recipient of another grant like the Child Support Grant. The grant would thus be universal and avoid the costs and administrative burden associated with means testing. The grant would be received from the tax system targeting middle and higher income earners.

The state should adhere to and comply with constitutional provisions as well as international instruments such as the CRC, ICESCR amongst others. Policies and

⁵⁹⁶ Right to Social Security, Social Assistance- Period: April 2000-March 2002, 229.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Social Grants, Available at <http://www.sassa.gov.za/index.php/social-grants>. Accessed 15 January 2015.

programmes especially those meant to alleviate poverty and advance children's rights should be implemented effectively and diligently. There should be mechanisms to address current problems which make the realisation of children's rights difficult. Budgetary constraints leading to the limitation of children's socio-economic rights as was discussed in the *Grootboom* case should be addressed by the national treasury, national and provincial departments and local government. Children in all situations and circumstances should have access to all forms of social assistance afforded to children. Refugees should be afforded the right of access to social security and social assistance. There should be cooperation amongst the various government departments especially the Department of Home Affairs and Department of Social Development. It would be helpful to have officials of the Department of Home Affairs at each pay point station to issue temporary identity documents and birth certificates that will enable grant applicants to benefit from the social grants.

Measures aimed at providing specific support to individuals with special needs should be and implemented.⁶⁰¹ The case of *Grootboom* and *Khosa* are good examples. The United Nations High Commissioner for Refugees also supports the adoption of Standard Operating Procedures for the referral of the different categories of vulnerable persons to the relevant reception facilities, so as to ensure adequate care and follow-up by qualified services.⁶⁰²

The need for ongoing training in the area of social services provision is critical due to the continued infringements of the rights of foreign children in South Africa, many of which occur as a result of a genuine lack of understanding and effective protection of children's rights.⁶⁰³

⁶⁰¹ UN Refugee Agency UNHCR Recommendations on Important Aspects of Refugee Protection in Italy July 2012 13. Available at http://unhcr.org.uk/fileadmin/user_upload/pdf/Italy_Advocacy_paper.pdf. Accessed on 14 October 2014.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

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