



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

**THE RIGHT TO BASIC EDUCATION OF  
IMMIGRANT CHILDREN IN THE SADC  
REGION: A CASE STUDY OF SOUTH AFRICA  
AND  
THE DEMOCRATIC REPUBLIC OF THE  
CONGO**

BY  
**NICE MPALA NYEMBA**

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SUPERVISOR:

**PROFESSOR MICHELO HANSUNGULE**

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## **DEDICATION**

This thesis is dedicated to my beloved late parents, to my children and to all the migrant children in the world.

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## ABBREVIATIONS

|          |  |
|----------|--|
| ACHRP    | : African Charter on Human and Peoples' Rights   |
| ACRWC    | : African Charter on the Rights and Welfare of the Child   |
| CAT      | : Convention against Torture and other Degrading Treatments.   |
| CICR     | : International Committee of the Red Cross.  |
| CRC      | : Convention on the Rights of the Child.   |
| CRPD     | : Convention on the Rights of Persons with Disabilities.   |
| DR Congo | : Democratic Republic of Congo.  |
| CEDAW    | : Convention on the Elimination of all Forms of Discrimination Against Women                                     |
| CESCR    | : International Covenant on Economic, Social and Cultural Rights.  |
| EFA      | : Education for All  |
| GDE      | : Gauteng Department of Education  |
| ICCPR    | : International Covenant on Civil and Political Rights   |
| ICERD    | : Convention on the Elimination of all Forms of Racial Discrimination. Against Women                             |
| ICPRMWMF | : International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. |
| ILO      | : International Labour Organization.   |
| MDG      | : Millennium Development Goals.  |
| NGO      | : Non-Governmental Organisations.  |
| SADC     | : Southern African Development Community.  |
| SDG      | : Sustainable Development Goals.   |
| SADTU    | : South African Democratic Teachers Union.   |
| UDHR     | : Universal Declaration of Human Rights.   |
| UNHCR    | : United Nations High Commissioner for Refugees.   |



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*Kjeldsen, Busk Madsen & Pedersen v Denmark*, ECHR, Application no. 5095/71; 5920/72; 5926/72, (7 December 1976).

*Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* [1997] ZACC 16; 1997 12 BCLR 1655.

*Lawyers for Human Rights v Minister of Home Affairs & Others*, CCT 38/16, [2017] ZACC 22.

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*Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

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*Sefu & Others v The Attorney General of Botswana*, F46 of 2005, Botswana: High Court, 10 June 2005.

*Vélez Loor v. Panama, Inter-Am. Ct. H.R.* (23 November 2010) at [www.corteidh.or.cr](http://www.corteidh.or.cr)

## ABSTRACT

This thesis examines the limitations on migrant children's access to primary education in the Southern African Development Community (SADC) region, with a focus on South Africa and the Democratic Republic of the Congo (DR Congo). It analyses international human rights law and national law to understand the legal protection and barriers faced by immigrant children. The study highlights the right to education as a fundamental human right.

Migrant children encounter various obstacles to accessing education, including language barriers, discrimination, lack of documentation, socioeconomic difficulties, and limited educational facilities. These factors not only deny them the right to basic education but also hinder their integration into society.

The study compares the laws, policies, practices, and outcomes related to immigrant children in South Africa and the DR Congo. It explores topics such as the best interests of the child, the 4 A standard, inclusive education, free and compulsory education, and the role of international financial institutions.

In the DR Congo, all children, including migrants, have the right to education according to the Constitution. However, challenges such as inadequate legal protection, lack of funding, wars, insufficient infrastructure, unqualified teachers, and limited resources hinder the fulfilment of this right for migrant children. Similarly, South African national law recognises the right to education for all children, including immigrants. However, certain provisions in law and policies contradict this right for migrant children. Practical difficulties such as xenophobia, “bureaucratic xenophobia”, language barriers, resource limitations, and overcrowded schools further impede access to education.

To address these challenges and safeguard the right to education for migrant children, actions are needed at national levels. Governments should enact and enforce laws, allocate sufficient funding, promote inclusive education, provide teacher training, language assistance, and combat discrimination.

The study provides policy implications and recommendations for policymakers, school directors, immigration officers, and educators in South Africa, the DR Congo, and other SADC member states. The aim is to improve educational opportunities, create inclusive education systems, and enact laws that uphold the right to basic education for all. Cooperation and coordination among SADC nations is essential to overcome cross-border difficulties and ensure access to quality primary education for migrant children.

By addressing this topic, this study contributes to the existing literature and raises awareness of the challenges faced by immigrant children. The findings and recommendations aim to promote equitable access to education for migrant children in the SADC region and beyond.

**Keywords: children’s rights, basic education, immigrant rights, immigration laws, SADC region**

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## CHAPTER ONE: GENERAL INTRODUCTION

### 1.1 Introduction

The right to education is one of the crucial human rights of the contemporary era. It is a ‘multiplier’ or a vital apparatus for the fulfilment of other rights. Declining the right to education for a child “leads to the denial of other human rights, and the perpetuation of poverty and underdevelopment”.<sup>1</sup> The right to education is also an important instrument for human development and African growth.<sup>2</sup>

When assessing the right to education, some parameters must be considered. A distinction must be established between the right to education (access) and the right in education (equity). The fact that a school place is guaranteed does not mean that the right to education is realised. The provision for a migrant child who speaks a different language, for example, is different from what others receive.<sup>3</sup>

Migration is not a new phenomenon, but it is predominant in the contemporary age. Migration can be defined as the movement of persons away from their place of usual residence, either across an international border or within a State. Individuals decide to leave their homes and homelands, and to migrate, due to many factors. Apart from conflict and traditional persecution, as outlined by the 1951 Refugee Convention,<sup>4</sup> reasons for moving are a combination of many factors, resulting from conditions of uncertainty.

Wars imply a variety of factors, such as food insecurity, negative socioeconomic impacts, damage to livelihoods, and lack of access to key institutions and markets.<sup>5</sup> Conflicts, political instability, insecurity, human rights violations, corruption, poverty, family reunification,

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<sup>1</sup> AC Onuora-Oguno, *Development and the Right to Education in Africa* (2019) vii

<sup>2</sup> Ibid.

<sup>3</sup> F Lani ‘Special or inclusive education: future trends’ (2008) 35 *British Journal of Special Education* 202 at <https://nasenjournals.onlinelibrary.wiley.com/doi/10.1111/j.1467-8578.2008.00402.x> (accessed 31 March 2018).

<sup>4</sup> The article 1 of the Convention Relating to the Status of Refugees, known as the 1951 Refugee Convention or the Geneva Convention of 28 July 1951.

<sup>5</sup> C Guerra ‘Rethinking mass migration beyond the 1951 Geneva convention’ unpublished Master dissertation, LUISS, 2015-2016 11 at [https://tesi.eprints.luiss.it/17475/1/626012\\_GUERRA\\_CAROLINA.pdf](https://tesi.eprints.luiss.it/17475/1/626012_GUERRA_CAROLINA.pdf) (accessed the 31 March 2018).

environmental degradation, and climate change are all reasons compelling people to move to reduce their vulnerability. Reasons are complex and mixed, and they may overlap, resulting in migrants belonging to more than one category and necessitating different kinds of protection.<sup>6</sup>

However, there is a crucial difference in the fact that refugees and asylum seekers fall under the category of a forced migration regime. They need international protection because their own countries of origin are not protecting them or are unwilling to protect them, as stated by the 1951 United Nations refugee Convention, whereas economic and other migrants fall under the category of voluntary migration.<sup>7</sup> Unlike refugees, economic migrants remain under the protection of their own country of origin whenever they choose to return.<sup>8</sup>

The United Nations Convention and Protocol on the Status of Refugees has an internationally recognised definition of refugees stating that refugees are persons fleeing persecution.<sup>9</sup> However, since the 1951 Convention on refugees, the nature of conflict has changed greatly. Nowadays, other factors besides persecution can endanger the security, dignity, and human rights of people. There is no international principle to identify and evaluate the protection necessities for people fleeing widespread civil war, ecological destruction, or economic downfall that endanger human life.<sup>10</sup> Perhaps the United Nations should consider including new factors within the scope of conditions necessary to be considered as refugees.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa enlarged the 1951 definition of refugees to include persons who flee their home countries due to external hostility, occupation, alien domination, or any actions that pose a serious threat to public order in a part of or the entire country.<sup>11</sup> Several decades ago, experts observed that people moved only when their condition and that of their families becomes unbearable; when they no longer perceive any chances to survive. Displacement is, therefore, the torturous result of the collapse or lack of viable society, and the denial of human dignity.<sup>12</sup>

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<sup>6</sup> Guerra (n 5) 11.

<sup>7</sup> PA Taran 'Human rights of migrants: challenges of the new decade' (2002) 38 *International Migration* 7 at <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2435.00141> (accessed 31 March 2018).

<sup>8</sup> Taran (n 7) 7.

<sup>9</sup> The article 1 A. 2 of the Convention Relating to the Status of Refugees, known as the 1951 Refugee Convention or the Geneva Convention of 28 July 1951.

<sup>10</sup> Taran (n 7) 11.

<sup>11</sup> Article 1 of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, also called the OAU Refugee Convention, or the 1969 Refugee Convention.

<sup>12</sup> Taran (n 7) 11.

When addressing the reality of migration, it is proper to find some multidisciplinary mechanism that can be legal, political, social, and economic to guarantee mutual respect and to arbitrate relations between divergences.<sup>13</sup> The rule of law and the respect for human rights are the essential basics for any democratic society and for long lasting social harmony. These basics offer a vital, accountable, and adequate basis for tackling and solving the divergences, conflicts, and prospective conflicts that relations among different persons and groups of persons with various concerns can create.<sup>14</sup>

In many countries, there is still a significant gap between the international human rights norms ensured to migrants and the reality they face when they have to enjoy these rights, particularly when it comes to those who are in an irregular situation or are undocumented.<sup>15</sup> Children often find themselves with an irregular status because they are linked to their parents; when they are born to irregular or undocumented migrant parents in the host countries, they often inherit their parents' irregular status.<sup>16</sup>

Currently, there is a pervasive and extensive hostility against, abuse of, and aggression towards migrants. Migrants are vulnerable and they have been victims of xenophobic attacks.<sup>17</sup> It is however important to note that migrants are human and are entitled to the basic human rights enshrined in the Universal Declaration of Human Rights.<sup>18</sup> Migrants continue to suffer and many times they are not granted the protections guaranteed by the international laws. However, studies, documents, and analysis of the human rights abuses encountered by migrants as well as solutions for the issue remain insignificant.<sup>19</sup>

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<sup>13</sup> Taran (n 7) 9.

<sup>14</sup> R Perruchoud 'The Human Rights of Migrants– A Shared Responsibility' in IOM (eds) *Migrants rights: a special issue* (2008) 3 available at <https://reliefweb.int/report/myanmar/iom-migration-july-2008-migrants-rights-special-issue> (accessed 31 March 2022).

<sup>15</sup> Perruchoud (n 14) 3.

<sup>16</sup> United Nations Human Rights 'The economic, social and cultural rights of migrants in an irregular situation' (2014) United Nations Publications 9 available at [https://www.ohchr.org/Documents/Publications/HR-PUB-14-1\\_en.pdf](https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf) (accessed 31 March 2018)

<sup>17</sup> Taran (n 7) 11.

<sup>18</sup> Universal Declaration of Human Rights (UDHR).

<sup>19</sup> Taran (n 7) 11.



Discussions on migrants' human rights have gained more visibility over the past years at the international, regional, and sub-regional level. Since 1990, migrants have benefitted from the basic human rights norms developed in the Universal Declaration of Human Rights with the adoption of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICPRMWMF). Moreover, the United Nations (UN) has renewed these norms by starting a worldwide action for ratification of this Convention.<sup>20</sup> Unfortunately, at the sub-regional level, out of 15 states parties to the Southern African Development Community (SADC), only three have ratified the convention, namely Lesotho (16 September 2005), Mozambique (19 August 2013) and Madagascar (13 May 2015).<sup>21</sup> This shows how SADC countries lag behind in terms of the protection of migrant workers, especially given the fact that Southern Africa has high levels of migration.

Today, with Non-Governmental Organisations (NGO) and human rights organisations' activity, migrants' rights have appeared as a classic subject on the platform of several immigration-related meetings and debates.<sup>22</sup> Migrants have been at the centre of discussions across the globe due to the continued abuses to which they have been subjected. Even when not in their home country migrants still need to be protected, as all individuals deserve a right to basic social services including health and education, hence the need to address the anomaly surrounding migrants' rights.<sup>23</sup>

However, international, and national attempts to protect migrants' human rights and to stop xenophobia remain disseminated, shattered, and with curbed effect. While several active migrant and refugee Non-Governmental Organisations (NGOs) have developed in Asia, America, and Europe, there is still not much international consistency in African civil societies.<sup>24</sup> Governments are required by international and national law to protect, promote, and fulfil human rights, and thus African governments are under obligation to eliminate all challenges denying every African child the right to basic education.<sup>25</sup>

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<sup>20</sup> United Nations Human Rights (n 16) 13.

<sup>21</sup> The ratification of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICPRMWMF) at <http://indicators.ohchr.org/> (accessed 5 February 2020).

<sup>22</sup> Taran (n 7) 9.

<sup>23</sup> Taran (n 7) 9.

<sup>24</sup> Taran (n 7) 11.

<sup>25</sup> Onuora-Oguno (n 1) 6.

Media coverage and politicians with xenophobic ideologies incite discrimination and violence against migrants by associating them with unlawful activities, smuggling, drugs, diseases, and other social evils, resulting in resistance to acknowledging human rights norms for migrants.<sup>26</sup> Likewise, the fact that irregular migrants are designated as “illegals” misrepresents them and positions them outside the scope of legal protection. Moreover, many characterise migration as threatening national identity and security.<sup>27</sup>

Africa is regularly presented as a region of huge displacement and migration triggered by poverty and war.<sup>28</sup> Academics and political discourses tend to give more attention to migration from Africa to Europe or America, whereas the reality is that most Africans move around within Africa. Therefore, the human rights situation of migrants is parlous in Africa, a continent where masses of people strive against poverty, internal displacement, war, xenophobia, and civil strife.<sup>29</sup>

One of the principals aims of the SADC treaty is to “achieve development, economic growth, fight poverty, enhance the standard and quality of life of the inhabitants of Southern Africa and to support the disadvantaged through integration”.<sup>30</sup> However, it is important to highlight that one of the most important provisions of the SADC treaty for migrant children is non-discrimination. It protects migrant children against all forms of discrimination in any part of the SADC territory.<sup>31</sup>

Chapter 3 of the SADC protocol on education and training aims to operate in the direction of the reduction and eventual eradication of immigration rules to ease the unrestricted movement of students within the region for study. Article 5, point 4 of the protocol adds that disadvantaged groups (in this category, I include migrant children) shall receive special support in admission

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<sup>26</sup> United Nations Human Rights ( n 16) 11.

<sup>27</sup> United Nations Human Rights ( n 16) 15.

<sup>28</sup> ML Flahaux & H De Haas ‘African migration: trends, patterns, drivers’ (2016) 4 *Comparative Migration Studies* at <https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-015-0015-6#citeas> (accessed 31 March 2018).

<sup>29</sup> A Namukasa ‘demystifying human rights: a socio-legal approach to the political framing of migrant workers’ rights in Africa’ in Viljoen F (eds) *Beyond the law: multi-disciplinary perspectives on human rights* (PULP: 2012) 118.

<sup>30</sup> Article 4(c) of the Treaty of the Southern African Development Community adopted at Windhoek, Namibia on 17 August 1992. The member states of SADC are as follow: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>31</sup> The Treaty of the Southern African Development Community adopted at Windhoek, Namibia on 17 August 1992.

to basic education to balance access to education.<sup>32</sup> With these commitments, it is essential to enquire whether and to what extent SADC member states act in accordance with their human rights commitments regarding the rights of migrant children.<sup>33</sup>

Education is a vital human right for every child, including the migrant child and children living with disability. It has the dual dimension of being a human right and an essential conduit for fulfilling other rights. Basic education, which concerns this thesis, is one component that makes up the pillar of the right to education. Basic education is compulsory and free. This means that states are compelled by international law to ensure that primary education is accessible to and free for all children (including migrants).<sup>34</sup>

The International Covenant on Economic, Social and Cultural Rights (CESCR), the UN Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Convention on the Rights of Persons with Disabilities (CRPD) guarantee this right. This thesis will seek to explore the conformity of South Africa and DR Congo vis-à-vis the international human rights laws to realise migrants' right to basic education. It will seek to realise this by examining, for instance, the 4As paradigm of education through the prism of various challenges that inhibit migrant children's access to education.

## 1.2 Problem statement

Migrant children face numerous challenges getting access to basic education. Governments in Africa have failed to implement the international Conventions and regional frameworks and incorporate them into national laws. This has affected the way migrant children are treated in host countries.

Over 150 million persons in the world are residing outside their home countries as refugees, temporary immigrants, or permanent immigrants. There is however slight information, assistance, or persistent commitment on the subject as it relates to their access to education. Today, there is much practical and circumstantial evidence to prove that abuse of migrants'

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<sup>32</sup> The SADC protocol on education and training adopted on 8 September 1997 in Blantyre, Malawi and entered into force on 31 July 2000

<sup>33</sup> OSISA Policy Brief 'Inequality in Southern Africa: Options for redress' (November 2013) *Open Society Initiative of Southern Africa* 1 at [https://www.ilo.org/actrav/WCMS\\_230181/lang--en/index.htm](https://www.ilo.org/actrav/WCMS_230181/lang--en/index.htm) (accessed 31 March 2018).

<sup>34</sup> EMD Chilemba 'The right to primary education of children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' (2013) *African Disability Rights Yearbook* 4 at <http://www.saflii.org/za/journals/ADRY/2013/1.html> (accessed 31 March 2018).

human rights is so generalised, numerous, and frequent that they are a significant characteristic of international migration.<sup>35</sup> Of the human rights that exist, access to health and education services can be deemed to be of utmost importance. While nationals receive these services for free, migrant children struggle to attain these basic services.

In too many countries, there are established and prevalent difficulties challenging migrants, where all groups face official and informal discrimination. Although in certain countries there are legal safety measures for the equivalent treatment and respect of migrants that acknowledges their importance in accomplishing economic wealth, migrants nonetheless encounter hostile social realities reinforced by legal and policy frameworks. They have challenges in realising their socio-economic and cultural rights, and in this instance, the right to education.<sup>36</sup>

Many states implement laws and policies that restrict migrants' rights, justifying this by the need to "manage migration". However, the way sovereign states may handle the migration policy to protect legally recognised national interests remains debatable.<sup>37</sup> The State through its institutions and departments has the right and the power to implement policies. These institutions are "rights providers" as they determine which category of human beings may enjoy human rights and which category may be excluded.<sup>38</sup>

When the state is the only master to decide which rights to grant to migrants, without international barriers, this may result in the state's abuse of migrants' rights, forgetting that once migrants are in the host country, states have an obligation to protect them from human rights abuses, even if they are undocumented.<sup>39</sup>

Undocumented migrants who are victims of human rights abuses cannot access legal redress for fear of revealing their immigration status; undocumented parents cannot claim the right of their children to basic education as guaranteed by international law for the same reason. Some immigration laws force primary school principals to act as immigration officers and compel

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<sup>35</sup> Taran (n 7) 9.

<sup>36</sup> Taran (n 7) 11.

<sup>37</sup> Namukasa (n 29) 123.

<sup>38</sup> Namukasa (n 29) 122.

<sup>39</sup> Namukasa (n 29) 119.

them to not register undocumented children; some immigration officers visit primary schools to check the immigration status of migrant children admitted to the schools.

In the pursuit of guaranteeing migrant children's best interests, education remains crucial despite a plethora of challenges migrants experience in accessing this right. The most prominent challenge in the DR Congo and South Africa is xenophobia, and lack of documentation. The obligation to present documents to access education or to prove their identity leaves children exposed to future apprehension, arrest, and expulsion once they leave the care system; also, immigrant children who do not have the necessary documents risk becoming stateless if they cannot claim their nationality from their country of origin.

Apart from the absence of documents and their designation as “illegal”, and the persistent xenophobic attacks in South Africa, migrants' children have other general issues that hinder access to basic education such as the shortage of psychological and systemic support to deal with trauma after being exposed to immigration hardship and xenophobic violence. This is aggravated by the lack of social conditions favourable to stimulate healing and empathy, and to achieving the capability of the refugee child.<sup>40</sup>

Registration of migrant learners at school can also be challenging in a situation where houses and schools are destroyed due to war and civil strife (for refugees coming from the Central African Republic) where such conditions create a situation where it is impossible for them to produce their school report and their school transfer forms.<sup>41</sup>

School overcrowding affects both migrant and national learners living in the DR Congo and in South Africa. In July 2011, the Gauteng Department of Education recounted that the varying demographics in Gauteng, influenced by the migration of people to Gauteng, has “led to substantial pressure on the education system, resulting in overcrowding in many of our schools” According to Mnikelo Nhlalo of the South African Democratic Teachers Union (SADTU) “The situation is so serious that in many schools, teachers cannot teach but are managing and controlling crowds”.<sup>42</sup>

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<sup>40</sup> Taran (n 7) 11.

<sup>41</sup> <https://www.refworld.org/country,COI,UNHCR,,COD,,52f38eae4,0.html> (accessed 18 February 2023).

<sup>42</sup> M Hlatshwayo & S Vally ‘Violence, resilience and solidarity: The right to education for child migrants in South Africa’ (2013) *School Psychology International* 6 at

In the DR Congo lack of school equipment, long distances, lack of books, and schoolteachers not being paid their salaries affect access to education for migrant learners. In addition, some schools have been burnt down, along with school equipment. In South Africa, there is a similar problem, as Nhlalo further argues: “We have a real problem with a shortage of desks. The teachers in Maitland High also noted that the classrooms were originally built to accommodate 20 to 30 learners; now they are cramped”.<sup>43</sup>

The Convention on the Rights of the Child (CRC) and other international treaties acknowledge the notion of compulsory and free primary education for all children based on equal opportunity. Compulsory education realises the best interests of the child.<sup>44</sup> Article 28 of the CRC specifies that every child has the right to basic education, and that this should be free. The Convention set a preeminent importance on education where children are nurtured to reach the highest level of education.

The African Charter on the Rights and Welfare of the Child (ACRWC) in its Article 11 also emphasised that the right to basic education should not only be free but compulsory as well.<sup>45</sup> Additionally, the Congolese Constitution in its Article 43 states that primary education is compulsory and free.<sup>46</sup> The South African constitution does not state that education is free, however its Point 29 confirms that the state, through rational methods, must make it progressively available and accessible.<sup>47</sup> In all the cases, states bear the responsibility of implementing free primary education.

Free primary education entails that education is accessible without cost to the parent, the guardian, and the child. This means that there are no school fees and no direct charges for education, including obligatory taxes and other indirect expenditures, such as compulsory and

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[https://www.researchgate.net/publication/273588325\\_Violence\\_resilience\\_and\\_solidarity\\_The\\_right\\_to\\_education\\_for\\_child\\_migrants\\_in\\_South\\_Africa](https://www.researchgate.net/publication/273588325_Violence_resilience_and_solidarity_The_right_to_education_for_child_migrants_in_South_Africa) (accessed 15 April 2018).

<sup>43</sup> Hlatshwayo & Vally (n 42) 6.

<sup>44</sup> Chilemba (n 34) 8

<sup>45</sup> The African Charter on the Rights and Welfare of the Child.

<sup>46</sup> The Congolese Constitution / la Constitution de la République Démocratique du Congo telle que Modifiée par la Loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la République Démocratique du Congo du 18 février 2006.

<sup>47</sup> The Constitution of the Republic of South Africa as adopted on 8 May 1996 and amended on 11 October 1996.

expensive school uniforms. This also involves other charges associated with writing materials, transport, books, and other impediments to education.<sup>48</sup>

Education is not free in South Africa. In the DR Congo, the Congolese government of newly elected president, Felix Tshilombo Tshisekedi, decided that from September 2019, basic education in public schools is free.<sup>49</sup> It is a judicious decision, but several public schools' infrastructures are in a state of decay and many teachers need to be trained.

In South Africa, children whose parents cannot afford school fees can still be in school, but the school can hand over the debt files to attorneys to force parents to pay the school fees. In the DR Congo, before 2019, school directors used to expel children whose parents were in arrears with school fees. The problem of school fees affects everybody, nationals, and migrants, but migrants may be more affected if the employment opportunities are discriminatory towards them.

Language skill is a difficult task not only for migrant learners but also for indigenous South African and Congolese learners. In the DR Congo, French remains the language of instruction, meaning that refugees or migrants coming from non-Francophone countries where French is not spoken, have difficulty integrating at school. The same applies to South Africa, where English is the main language of instruction. Moreover, migrant children have to choose also between Sepedi or Afrikaans. For migrants coming from countries that speak different languages to the host countries, language is a barrier that blocks gaining access to education.

In both the DR Congo and South Africa, there is a lack of continuous school development, teaching, programmes and trainings on xenophobia, and the rights of migrants, that are necessary to be presented to teachers and school administrators. School experts, school

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<sup>48</sup> Chilemba (n 34) 7.

<sup>49</sup> Radiokapi, 'RDC : le gouvernement supprime les frais de scolarité de l'enseignement primaire dans les écoles publiques' 21 August 2019 <https://www.radiokapi.net/2019/08/22/actualite/education/rdc-le-gouvernement-supprime-les-frais-de-scolarite-de-l-enseignement#:~:text=RDC%20%3A%20le%20gouvernement%20supprime%20les%20frais%20de%20scolarite%20%3A%20de%20l,primaire%20dans%20les%20%20C%20%3A%20coles%20publiques&text=%20%20Le%20gouvernement%20de%20la%20R%20%3A%20publique,%20%20BB%20%20a%20pr%20%3A%20cis%20%20Emer%20Okundji>. (accessed 23 June 2021).



headmasters, and school governing bodies may consider utilising their platform to make sure that migrants have a say in schools.

Bullying and impunity also prevail for those who mistreat migrant learners; this causes trauma to and stigmatisation of migrant learners. Schools should take punitive and corrective actions against teachers and learners who disregard the rights of migrant learners. Migrant children perceive a culture of impunity in schools and interpret this to mean that they are less important or less human.

There is an acute lack of a support systems for migrant learners and refugees in the DR Congo. For example, interventions by school psychologists are critical to guarantee that migrant learners who are victims of mistreatment obtain therapy so they can recover their self-esteem and self-confidence and improve their resistance ability. The school atmosphere should allow migrant learners to feel confident about contacting school psychologists, teachers, and school managers about the human rights abuses they endure. Migrants living in South Africa and the DR Congo have faced several challenges pertaining to the right to education. It is important to note that these barriers are not particular to migrants only; they also affect nationals to some extent.

Aside from the challenges described above, unaccompanied migrant learners and learners who joined the child protection system through the Children's Court and who are placed in care also experience unique challenges that are barriers to their right to education.

Another challenge is that the DR Congo does not have a proper immigration law, but instead several acts regulating different aspects of immigration. Since its independence in 1960, the DR Congo has not had a distinct migration policy. Nowadays, its legal framework on this issue is inadequate and needs clarity. The acts in question are sometimes confusing, contradictory and revoke each other as new laws and acts are published. Even officials in charge of enforcing these laws find them difficult to understand.<sup>50</sup>

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<sup>50</sup> G Ngoie & D Lelu Migration en République Démocratique du Congo : Profil National 2009 (2010) 79 available at [https://publications.iom.int/system/files/pdf/drc\\_profile\\_2009.pdf](https://publications.iom.int/system/files/pdf/drc_profile_2009.pdf) (accessed 15 April 2018).



The research purpose of this thesis is primarily to examine whether South African and Congolese laws dealing with immigrants consider the best interests of migrant children and their right to basic education. The reason for doing so is because both countries experience a high volume of migration.<sup>51</sup> This thesis will also investigate the need to examine from a rights-based perspective how the various national laws limiting the operation of migrants (legal) affects the best interests of the child.

### 1.3 Research question

States are the main actors creating international law. Human rights are the rights of individuals, and the obligation for respecting them on the international level lies with states.<sup>52</sup> However, there is a huge inconsistency between the rights that international human rights law ensures to migrant children and the realities on the ground. This thesis considers the following subsidiary research questions:

1. Does international human rights law protect the right to education of migrant children?
2. What are the obstacles that stand in the way of migrant children accessing primary education in the SADC region (especially DR Congo and South Africa)?
3. What is the position of South African and Congolese national laws concerning the rights of migrant children?

### 1.4 Methodology

De Vos, Fouché & Delpont note that a research methodology refers to the strategies that are applied to address the problem for which research is conducted.<sup>53</sup> Thomas Peck claims that legal research increasingly intersects with other fields therefore there is need to give more consideration to research methodology. This need is particularly pronounced in human rights studies, where the exploration often delves into the real-life experiences of individuals.<sup>54</sup>

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<sup>51</sup> Data available at <https://www.iom.int/southern-africa> (accessed 3 March 2018).

<sup>52</sup> L Muftić 'Protection of human rights in the case of immigration related detention in the EU: Between international law and international relations' (Master's Dissertation Malmö University 2014)16 at <https://www.semanticscholar.org/paper/Protection-of-human-rights-in-the-case-of-related-Mufti%20C4%87/398f49a36ff74385872aa06894b5faee933db484> (accessed 15 April 2018).

<sup>53</sup> AS De Vos et al *Research at grass roots: for the social sciences and human services professions* (2011) 333-359.

<sup>54</sup> T Peck 'Interdisciplinary Methodological Approaches to Desk-Based Socio-legal Human Rights Research' (2023) *Law And Method* available at <https://www.lawandmethod.nl/tijdschrift/lawandmethod/2023/01/lawandmethod-D-22-00001> (accessed 21 April 2024).

The socio-legal dimension of human rights frequently demands an interdisciplinary approach in legal studies to effectively interact with external elements and actors that operate beyond the confines of legal rights and obligations.<sup>55</sup> Socio-legal human rights research operates within a theoretical and analytical framework that integrates legal knowledge and inquiry into the social context of the research. While it may be considered distinct due to its fusion of legal and social disciplines, the practical aspect of this research aligns closely with other qualitative-based research and studies.<sup>56</sup>

There are two primary components to socio-legal research. The first involves a doctrinal approach, which entails identifying legal sources and analysing their content. These methods often involve document and content analysis, albeit with a focus on legal sources and analytical tools. The second component involves a sociological perspective, where the law is examined and interpreted within the context and theoretical framework of the research topic.<sup>57</sup>

The predominant methods in legal research often revolve around desktop approaches, involving primarily textual and legal analysis of documents and secondary sources. These methods typically do not involve direct interaction with participants.<sup>58</sup> To attain its objectives, this study applies mainly qualitative research as it relies on a desktop approach and uses the content analysis to unpack critical issues before highlighting the findings and proposing some recommendations.

The researcher gathered, analysed, and evaluated information to ensure the relevance and applicability of the data for this study. With exercised patience, the researcher conducted thorough investigations from multiple perspectives to understand the root causes of vulnerability and propose effective remedies. To be able to achieve this, a deep understanding of the research topic is essential, supported by a theoretical framework that guides the identification of necessary data and its classification. This systematic approach aids in comprehensively studying the progressive nature of human rights issues.

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<sup>55</sup> Peck (n 54).

<sup>56</sup> Peck (n 54).

<sup>57</sup> Peck (n 54).

<sup>58</sup> Peck (n 54).

For instance, human rights to education goes beyond the mere examination of documents and literature. It involves delving into various facets such as the rights of affected groups, the legal landscape, and other contextual factors to gather accurate research data applicable to the problem at hand. Often, seemingly straightforward issues can reveal layers of complexity, particularly when changes in legal policies or societal behaviours affect certain groups or communities' vulnerability.<sup>59</sup>

The design of the study is of a descriptive and analytical nature involving a review of a variety of sources to analyse the extent to which the right to basic education has been promoted within the SADC region. Therefore, the researcher uses the descriptive method to present a factual account of the living circumstances of the people in the SADC region. The thesis also uses the analytical method to illustrate how and to what extent national laws within the agenda of the CRC contribute to improving the well-being of children.

Conducting mapping exercises can be a valuable approach in human rights research. This involves a three-pronged approach: documenting a human rights violation, evaluating the existing capacities within the national justice system to address the violation and developing proposals to address the consequences of the violation in terms of truth, justice, reparation, and reform.<sup>60</sup>

To begin such an exercise, the researcher typically started by searching for relevant documents. In today's digital age, the internet provides access to a vast amount of information. Academic institutions, publishing houses, governments, UN agencies, and non-governmental organizations have developed comprehensive databases and resources covering various aspects of human rights and their educational processes and procedures.

One advantage of utilising these electronic resources is the ease and convenience they offer. They often provide organised links and resources, making it simpler for the researcher to navigate and access the information needed. This accessibility enhances the efficiency of the research process and enables the researcher to gather a wealth of data from diverse sources.

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<sup>59</sup> T Sastry 'the significance of research methodology in human rights: a bird's eye view (2013) 32 *Delhi Law Review* 105-114 available at [https://www.researchgate.net/publication/291975546\\_THE\\_SIGNIFICANCE\\_OF\\_RESEARCH\\_METHODOLOGY\\_IN\\_HUMAN\\_RIGHTS\\_A\\_BIRD'S\\_EYE\\_VIEW/citation/download](https://www.researchgate.net/publication/291975546_THE_SIGNIFICANCE_OF_RESEARCH_METHODOLOGY_IN_HUMAN_RIGHTS_A_BIRD'S_EYE_VIEW/citation/download) (accessed 21 April 2024).

<sup>60</sup> Sastry (n 60) 113.

The primary sources considered in this study comprise global law, general comments, concluding observations, adjudications by the United Nations Committees, different reports of the United Nations Commission, statutes, case law, and national laws (constitutions, immigration laws and regulations). The secondary sources comprise books, journal articles, and internet sources on migrant children's rights.

Despite the absence of direct human contact in desktop research, researchers still bear the responsibility of considering their own positionality, particularly in the realm of human rights. Within this context, the researcher encounters the lives of individuals who have often endured significant suffering, albeit indirectly through legal sources, written narratives, and other secondary materials.<sup>61</sup>

It's important to recognise that these accounts originate from real-life experiences. Therefore, when the researcher aims to utilise these experiences to support or shape a legal argument, the researcher remains mindful of her own positionality in relation to those individuals' experiences. This ensures ethical, respectful, and appropriate utilisation of these narratives.<sup>62</sup>

The content analysis supplemented with additional information collected through informal discussions with relevant stakeholders using personal interactions and experiences have assisted the researcher in having a broader view about discourse and suggested recommendations that are holistic in addressing the problem at hand. Important to note is the fact that interactions with major stakeholders took place via emails and phone calls, in an informal manner due to the prevalence of the COVID-19 pandemic, to ascertain perceptions as to the reasons why the challenges persist, and to explore possible solutions. However, the approach used in this study has the value of situating the context in which the right to basic education is a legitimate entitlement with the potential to contribute meaningfully to the lives of migrant children.

### **1.5 Significance of the study and motivation**

The significance of this study is premised on the importance of education and the impact it has on the whole livelihood of every individual. In addition, the importance is further reinforced by

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<sup>61</sup> Sastry (n 60) 113.

<sup>62</sup> Sastry (n 60) 113.

the reality of the growing movement of persons from one country or region to another, either intentional or forced. Consequently, this study provides a framework and suggestions on how to ensure that no rights are violated, and no child is left behind within a particular territory irrespective of status.

The motivation to carry out this study draws from the fact that respect for human rights towards migrants poses a problem in many African states. This thesis concentrates on the human rights of migrants' children in South Africa and the DR Congo. South Africa and the DR Congo were chosen as the research nations for the investigation of immigrant children's rights to a basic education in the SADC region based on several different considerations:

**Human Rights Perspective:** Both countries have significant migrant populations, including refugees, asylum seekers, and economic migrants, though South Africa's number is greater than the Congolese. Ensuring the right to education for these migrant children is a fundamental human rights issue. By exploring the challenges and successes in these countries, the researcher can contribute to advancing human rights discourse and practices globally.

**Legal Frameworks:** The DR Congo and South Africa have distinct legal frameworks regarding migration and education. Examining these frameworks provides insights into how national laws align with international human rights standards and how effectively they are implemented in practice. Regardless of their immigration status, all children in South Africa and the DR Congo are guaranteed the right to a basic education under their respective legal systems. We can learn more about how national laws and policies affect immigrant children's educational rights in the larger SADC area by looking at the implementation and difficulties encountered in these two countries. This comparative analysis can inform policy recommendations and advocacy efforts.

**Regional Context:** As prominent countries in the Southern African Development Community (SADC), the DR Congo and South Africa's experiences can shed light on broader regional trends and challenges regarding migrant children's access to education. Understanding these dynamics is crucial for regional cooperation and the development of harmonized policies.

**Diverse Contexts:** The DR Congo and South Africa represent diverse socio-political and economic contexts within Africa. The DR Congo grapples with conflict challenges, while South Africa faces issues related to migration, xenophobia, and socio-economic disparities. Studying

these contexts provides valuable insights into the intersectionality of migration, education, and human rights.

**Impact on Development:** Access to education is a key determinant of social and economic development. By examining the educational rights of migrant children in the DR Congo and South Africa, researchers can assess the impact on individual well-being, social cohesion, and national development agendas. As SADC members, South Africa and the DR Congo can have a substantial impact on other nations in the area through their experiences and policies. By examining these two nations, we can pinpoint common challenges and potential solutions that may be implemented in other SADC nations to guarantee the right to a foundational education for immigrant children.

**Relevance:** In terms of population and economic power, South Africa and the DR Congo are two important nations within the SADC area. Their experiences addressing the educational rights of immigrant children can offer insightful information about the potential and problems available in the larger SADC environment.

**Contextual diversity:** Within the SADC area, South Africa and the DR Congo reflect a variety of circumstances. There are many immigrants who choose South Africa as their destination, including refugees, economic migrants, and asylum seekers. It struggles with difficult integration, linguistic, and socioeconomic inequality difficulties. The education of both Congolese and immigrant children is impacted by internal displacement and regional wars in the DR Congo, which is both a source and a destination country for migration.

Choosing these two countries allows for a comprehensive exploration of the complexities surrounding the right to education for migrant children in different contexts, thereby contributing to informed policymaking, advocacy efforts, and scholarly discourse on human rights and migration.

Moreover, my personal experience as a Congolese migrant in South Africa, who had faced challenges in placing my children in school, highlights the importance of understanding and addressing the educational barriers encountered by migrants in host countries. My journey from the DR Congo to South Africa and the challenges faced underscore the interconnectedness of migration, education, and human rights. As I seek to understand if migrants face similar

challenges in the DR Congo, my inquiry reflects a desire for equity and fairness in educational access regardless of one's migration status or location.

My personal experience adds a subjective and empathetic dimension to the research, allowing for a deeper exploration of the lived realities of migrant families navigating educational systems. By investigating the parallels between my experiences in South Africa and the challenges faced by migrants in the DR Congo, I contribute to a more nuanced understanding of the systemic barriers and injustices inherent in both contexts. Furthermore, my perspective provides valuable insights into the complexities of migration, identity, and belonging. My inquiry into the educational experiences of migrants reflects a commitment to advocating for the rights of marginalised communities and promoting inclusive educational policies both domestically and internationally.

While concentrating on South Africa and the DR Congo offers a specific case study, it is important to recognise that the problems related to immigrant children's access to a basic education are not limited to these nations. Due to common regional issues including migrant patterns, socioeconomic inequality, and access to education, the choice of these two nations can be generalised to the larger SADC area. The case study's findings can offer insightful analysis and practical suggestions that other SADC nations facing comparable challenges with immigrant children's education might adopt and implement.

Additionally, most scholars that have written on migrant human rights topics are more concerned about migrant children's rights in South Africa than in the DR Congo. My intention is to assess the Congolese case, compare both countries and assess similarities and differences. This study intends to contribute to the academic discourse on the realisation of the rights to basic education of migrant children in the two SADC states studied.

This thesis aims to explore the extent to which these states abide by international human rights law provisions regarding the basic education of immigrant children. The reasons for choosing this aim are the historical context considerations of international human rights law and the current context in the SADC region.

This study attempts to investigate and analyse how much access immigrant children in various nations have to fundamental education. The goal of the study is to examine the legal frameworks, obstacles, and difficulties that immigrant children encounter in South Africa and the DR Congo when attempting to enrol in primary school. By concentrating on these two nations, the study hopes to offer insights into the larger SADC region and to find potential answers and suggestions to guarantee the fulfilment of the right to education for immigrant children throughout the region.

The thesis has three objectives. First, it aims to examine the enjoyment of the right to basic education in the two SADC states studied. Second, it seeks to determine the challenges faced in those states, and third, it sets out to excite a regional discussion to which SADC states should be devoted to ensuring the rules of international conventions and regulations on child protection.<sup>63</sup>

The socioeconomic rights, in which category falls the right to education, are defined as “empowerment rights” in the sense that their realisation has the potential to improve human well-being and therefore they should play a bigger part in enhancing people’s possibilities in life.<sup>64</sup> This study will aim to build on that knowledge to determine how and to what extent national laws and regulations could contribute to improving the fulfilment of the right to basic education and the well-being of children in the SADC region.

Owing to the dearth of knowledge and lack of a comprehensive understanding about the right to basic education of immigrant children within the SADC region, the proposed study intends to improve the knowledge on the right to basic education of migrant children within the SADC region and to extend the existing body of knowledge on the subject. The critical analytical approach is not intended to present a pessimistic view of the subject, but to point out the gaps and lapses. The researcher will, therefore, recommend how these shortcomings could be eased to ensure that these rights become a contributing factor to the amelioration of the welfare of children within the SADC region.

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<sup>63</sup> J Klaaren & B Rutinwa ‘Towards the harmonization in SADC’ (2004) *Southern African Migration Project 2* at <https://samponline.org/wp-content/uploads/2016/10/midsa1.pdf> (accessed 15 April 2018).

<sup>64</sup> J Nakuta ‘The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations’ in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (Macmillan Education Namibia 2008) 98 at [https://www.kas.de/c/document\\_library/get\\_file?uuid=21592709-3d71-5a57-aa24-c0c1010a175e&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=21592709-3d71-5a57-aa24-c0c1010a175e&groupId=252038) (accessed 15 April 2018).



## 1.6 Objectives

States have sovereignty in making their immigration laws, but these laws cannot be in breach of the international treaties that they have ratified. The main objective of this thesis is to emphasise all the diverse sources of international, regional, and national laws, as well as emerging international standards protecting the rights of immigrant children in South Africa and the DR Congo.

The study aims to pursue specific objectives:

1. To analyse the situation of migrant children's right to basic education within the SADC region, in South Africa and the DR Congo.
2. To identify the legal framework applicable to migrant children in South Africa and the DR Congo.
3. To make concrete recommendations on how the identified limitations could be addressed to ensure that every child, national, or immigrant, has access to basic education. This will contribute meaningfully to the lives of every child in the SADC region, including in South Africa and the DR Congo.

To achieve these objectives, it is important to explore the array of literature and commentaries on the subject to examine the views of other scholars.

## 1.7 Literature review

The literature reviewed for this thesis is broadly categorised in three main streams. One deals with the situation of migrants, the second with international law as it pertains to the right to education and the third concerns factors that inhibit access to education. A summary of the literature engaged highlights the dearth of studies on challenges related to migrant children's access to education generally and, of specific interest to this research, in the SADC region. This consequently provides the main thrust of the research's addition to knowledge.

According to Germain Ngoie and David Lelu,<sup>65</sup> it is hard to obtain reliable figures and data concerning migration in the DR Congo, with regards to the chaotic situation of the country and the decaying condition of state structures and public services. It is noted that the mining boom attracts foreign labour and Asian investors since the Congolese government has signed a cooperation agreement with Chinese companies to support five major projects. Nationals of other African countries with a long history in the DR Congo such as Senegalese, Malians and

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<sup>65</sup> Ngoie & Lelu (n 50) 37.

Nigerians are present; there is also an increased presence of immigrants from other countries, such as Indians, Pakistanis, and Lebanese. The wealth of the country attracts migrants. Moreover, business activities, mining and building projects attract migrant workers. But there is no recent information available on foreign students in the Congolese universities.<sup>66</sup> The work of Ngoie and Lelu does not focus on the right to basic education of migrant children in the DR Congo, as occasioned by the pull of wealth within the country, and this falls within the ambit of this research.

Klaareen and Rutinwa argue that the plight of migrants in the SADC region raises important concerns. Even though all SADC states have ratified the international instruments on refugees, not all national laws have integrated all the fundamental values of international instruments on refugee protection. Hence, these laws are more about controlling refugees than of protecting them. They add that international human rights laws that pertain to all human beings' protection, including children, are ratified by many states but there is very little progress to improve the situation of children. One may ask if states are committed to fighting human rights abuses or if instruments are ratified to deflect criticism and to appear committed to the cause. There is a need for the world to enact national laws and policies that provide real protection to immigrant children.<sup>67</sup>

Cristiano D'Orsi believes that African governments should conform to international legal instruments more than they do or have done in past years. They may perhaps conform to the international instruments by establishing stipulations in their corresponding national legislations that effectively shows their will to do away with refoulement practices.<sup>68</sup>

Ingrid Palmary also affirms that the legal and policy framework is being extremely poorly implemented and that there are considerable violations of migrant children's rights, particularly, the right of migrant children to access basic education. Their right to education is compromised and there is evidence of extensive abuse and violence against them, often perpetrated by the state representatives whose responsibility it is to protect.<sup>69</sup>

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<sup>66</sup> Ngoie & Lelu (n 50) 24.

<sup>67</sup> Klaareen & Rutinwa (n 63) 92.

<sup>68</sup> C D'Orsi 'Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?' (2007) *Journal of Refugee Law* 1060 at [https://www.zaoerv.de/68\\_2008/68\\_2008\\_4\\_b\\_1057\\_1082.pdf](https://www.zaoerv.de/68_2008/68_2008_4_b_1057_1082.pdf) (accessed 15 April 2018).

<sup>69</sup> I Palmary 'For Better Implementation of Migrant Children's Rights in South Africa' (2009) *Forced Migration Studies Programme* 3 at <http://www.migration.org.za/wp-content/uploads/2017/08/For-Better-Implementation-of-Migrant-Children%E2%80%99s-Rights-in-South-Africa.pdf> (accessed 15 April 2018).

Belinda Dodson and Jonathan Crush think migration in the SADC region is increasing, including economic, political, and varied migration traffic. Besides the fact that there are activities amongst countries in the region, many migrants also derive from the rest of the African continent and beyond. When it was founded in 1992, the SADC vision was to free intraregional movement, but until today, this has not yet been implemented. On the contrary, there have been noticeable anti-migrant reinforcement approaches, predominantly in the main country of destination of South Africa, causing grave violations of migrants' rights. Even though there was recent progress at national and regional levels that foretell some assurance, many efforts initiated at the regional coordination and harmonisation of migration governance level have not produced much improvement and the migration harmonisation continues to face alarming difficulties.<sup>70</sup>

Klaaren and Rutinwa add that SADC states have committed to enhanced regional cooperation and integration through being signatories to a series of protocols. However, the Protocol dealing with persons' migration within the SADC region wanted to copy and paste the European Schengen protocol and did not consider the economic and political characteristics of the region. Consequently, some states rejected the Protocol, resulting in the shelving of the Protocol by the SADC in 2000.<sup>71</sup>

Michelo Hansungule emphasises that the SADC Tribunal was an improvement for SADC leaders in the sense that they have not only accepted to obligate themselves to regional integration but also to comply with the human rights of their nationals. The SADC Treaty places SADC member states under the obligation to show consideration for human rights, the rule of law and good governance, which are three important urgencies in nearly all countries. The Treaty creates the SADC Tribunal along with its bodies with the objective of implementing the treaty commitments between member states.<sup>72</sup>

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<sup>70</sup> B Dodson & J Crush 'Migration Governance and Migrant Rights in the Southern African Development Community (SADC): Attempts at Harmonization in a Disharmonious Region' (2015) *United Nations Research Institute for Social Development* research paper 5 at [https://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/0CDF578939EEC5ACC1257EE300393CF1/\\$file/Dodson%20and%20Crush.pdf](https://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/0CDF578939EEC5ACC1257EE300393CF1/$file/Dodson%20and%20Crush.pdf) (accessed 15 April 2018).

<sup>71</sup> Klaaren & Rutinwan (n 63) 68.

<sup>72</sup> M Hansungule 'The suspension of the SADC tribunal' (2013) 35 *Strategic Review for Southern Africa* 136 at [https://upjournals.up.ac.za/index.php/strategic\\_review/issue/view/21](https://upjournals.up.ac.za/index.php/strategic_review/issue/view/21) (accessed 15 April 2018).

The above literature is important to this research as it looks at the implementation of already existing laws while suggesting a means of ensuring that they are adaptable to national situations. This research intends to fill the gap here as it suggests the way this adaptation can be embarked on and engaged with to increase the access of the right to education of migrant children.

Nicholas Blake and Raza Husain argue that human rights abuses do not just occur when the state uses its powers to interfere in domestic law, but also when powers are granted in domestic law in a manner that intrudes on the rights of those whose political power does not ensure respect for their rights.<sup>73</sup> Consequently, the implications of state approaches towards policy implementation are important to this research.

Closely related to this is the work of Toko Kaime, who opines that the African Charter on the Rights and Welfare of the Child offers an agenda for tackling the human rights challenges of African children. It not only lines up with existing improvements in international law, but it is also concerned with the African situation. Although the African Children's Charter is not a solution for the numerous challenges that African children encounter, it provides the possibility to establish advanced resolutions that could alleviate a significant number of those problems.

The challenge for African authorities, national establishments, and civil society organisations participating in child labour is to reveal the Charter's capability and to make happen its many profits to African children and their families by operating on its current authority and by increasing such authority. The cooperation, involvement, and improvement of all persons engaged in child work, as well as children themselves, are the solution to improving a context for the rights and welfare of the child that is efficient and appropriate. Children's rights need to be brought into the homes of every African child, or else they will continue being paper rights, with no considerable impact in ensuring African children's dignity.<sup>74</sup> Flowing from this, this research engages the adaptation aspect of the 4As to proffer possible means through which migrants can be inclusively involved in the interpretation of education curriculum and policies.

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<sup>73</sup> N Blake & R Husain *Immigration, asylum, and human rights* (Oxford University Press: 2003) 5

<sup>74</sup> T Kaime African Charter on the rights and welfare of the child: A socio-legal perspective (2009) *Pretoria University Law Press* 185 available at <https://www.pulp.up.ac.za/monographs/the-african-charter-on-the-rights-and-welfare-of-the-child-a-socio-legal-perspective> (accessed 25 April 2018).

Aishah Namukasa highlights this issue by stating that the illustrations obtained from African countries show that there is a necessity to go beyond the legal method and apply a multi-disciplinary method to implement the rights of migrants. Migrants can only enjoy their rights if nationals in host countries recognise these rights and enable a favourable environment for the realisation of those rights.<sup>75</sup> This position is also echoed by Onuora-Oguno, when the concept of ensuring that other non-legal institutions be involved in the management of education and implementation of legal policies as they relate to education.<sup>76</sup>

In the same vein, Onuora-Oguno and Hansungule argue the worth of seeing education as a human right and not just as human capital. This, in the view of the researcher, would assist the socio-legal approach to education law and policy interpretation and implementation.<sup>77</sup> The gap identified in the existing research is primarily because they do not focus on migrant children. Therefore, this research fills this gap by making specific references to these writings and how they could be applicable to migrant children.

According to Julius Mutugi Gathogo, Africans consider a cultural concept that is hard to represent in English: Ubuntu, which can be seen as the essence of being human. It speaks about humaneness, kindness, and generosity, acting to protect others who are weak. It includes sympathy and strength. It recognises that my humankind is tied up with yours, because we can only be human together.<sup>78</sup> Every member of the same family group has the obligation to give food and shelter to whosoever is in need in the community. Nevertheless, it is also an African tradition to offer hospitality even to outsiders (migrants). Hospitality is recognised and performed by Africans as generous, natural and the most spontaneous act in the world.<sup>79</sup> Therefore, in traditional African culture, a migrant was considered as kith and kin.

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<sup>75</sup> Namukasa (n 29) 117.

<sup>76</sup> See generally M Hansungule and A Onuora-Oguno 'Education as Human Capital or Human Rights in Africa' in AC Onuora-Oguno *Development and the Right to Education in Africa* (Palgrave: 2018).

<sup>77</sup> Ibid.

<sup>78</sup> JM Gathogo 'African Hospitality: Is it Compatible with the Ideal of Christ's Hospitality? Part1' (2006) churchman at [https://churchsociety.org/docs/churchman/120/Cman\\_120\\_1\\_Gathogo.pdf](https://churchsociety.org/docs/churchman/120/Cman_120_1_Gathogo.pdf) (accessed 15 April 2018).

<sup>79</sup> Ibid 40.

Ifeanyi A Menkiti adds that in the African view, a person is defined in reference to the surrounding community. The African idea that one's identity is conferred by the group can be summed up in this statement: "I am because we are, and since we are, therefore I am".<sup>80</sup>

Tiburcio emphasises that in the United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985), an immigrant is defined as "any individual who is not a national of a State in which he or she is living". In this context, the immigrant definition is a definition by exclusion.<sup>81</sup>

Roger Sanjek pinpoints that most people claiming to be nationals of a country today come from ancestors who had immigrated to that country previously. It is the case with many Americans, white and black alike, white South Africans (even blacks and Indians) and many African nationals.<sup>82</sup> Today, people tend to claim their nationalities and exclude modern migrants for theoretical national identity and security reasons.

Chilemba thinks that education has numerous approved meanings. It can be generally identified as an action, method, or practice that analytically stimulates understanding, experience, and progress. Nevertheless, in the limited perception, education is recognised as a prescribed teaching of skill within a well-known and well-organised approach of institutions and programmes.<sup>83</sup>

Viljoen considers the right to education as an empowering right since education empowers people to wield more influence on the direction of their existence and to have influence over the state's actions as they impact on them.<sup>84</sup> It is the primary tool that can be used by those who are economically and socially excluded to defeat poverty and develop the capacity to entirely take part in various activities in the societies in which they reside.<sup>85</sup>

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<sup>80</sup> I Menkiti 'Person and Community in African Traditional Thought' in R Wright (Eds) *African Philosophy* (1984) 171 at <http://www2.southeastern.edu/Academics/Faculty/mrossano/gradseminar/evo%20of%20ritual/african%20tradition%20thought.pdf> (accessed 15 April 2018).

<sup>81</sup> C Tiburcio 'The human rights of aliens under international and comparative law' (2001) 65 *international studies in human rights* at 1 available at <https://searchworks.stanford.edu/view/12911037> (accessed 15 April 2018).

<sup>82</sup> R Sanjek 'Rethinking migration, ancient to future' (2003) 3 *Global Networks* 315 available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/1471-0374.00064> (accessed 15 April 2018).

<sup>83</sup> Chilemba (n 34) 7.

<sup>84</sup> Read generally F Viljoen 'International human rights law in Africa' (Oxford University Press: 2012)

<sup>85</sup> C Chitupila 'The right to education as a basis for human rights education: an interface between human rights and education' in Viljoen (eds) *beyond the law multi-disciplinary perspectives on human rights* (PULP: 2012) 167.

This research attempts to define education in relation to the impact it could have on migrant children and therefore provide a link between existing laws and policies to ensure that migrant children access education without hinderances.

### **1.8 Scope and delineation**

It is important to recognise that this study is limited to desktop research without any fieldwork involved, or minimal fieldwork at best. It is also essential to recognise that the traditional generalisation about the region is quite confusing; although the SADC region is similar in some characteristics, it is a combination of states with various attributes. Significant extremes are the examples of Mauritius, South Africa, and Botswana, which are relatively reliable democracies and have mixed economic development with the gradual realisation of their communities' basic socioeconomic and cultural rights. Other countries such as the DR Congo and Zimbabwe still struggle to exist as sustainable states.

At the same time, countries such as Mozambique and Zambia, though not ideals of democracy, continue to be somewhat stable and are making attempts to develop in the correct direction. Still, these classifications do not adequately describe the complete multiplicity of the region. Even the geographical characteristics of the region could understandably be perceived as an example of its multiplicity. When examining the question of human rights in the region in its globality, it is vital to keep in mind that the core changing aspects of each country are essential to comprehending the global human rights situation. The innumerable social, economic, cultural, religious, political, and distinctive differences between the countries of the region must be considered. Hence, producing comprehensive projections and representing broad conclusions about a region as varied and multifaceted as Southern Africa can be a futile assignment.<sup>86</sup>

An empirical study through a visit to different SADC member states might be necessary to conduct a proper assessment of the right to basic education of migrant children in each of the states. However, due to time and financial constraints, such an empirical study is not possible.

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<sup>86</sup> UE Effeh 'Sub-Saharan Africa: A Case Study on How Not to Realize Economic, Social and Cultural Rights, and a Proposal for Change' (2005) 3 *Northwest Journal of International Human Rights* 2 at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1013&context=njihr> (accessed 15 April 2018).



This notwithstanding, the quality of the study has not been diminished, as there is sufficient secondary material available from the library and internet sources from which a comprehensive analysis of the different countries can be drawn. The researcher studied the state that attracts the most refugees and migrants: South Africa, and a state that is unstable because of war but which attracts individuals due to its natural resources: DR Congo.

This thesis concentrates on the human rights of migrants' children in South Africa and DR Congo because the researcher has lived in both countries and can research in both French and English. Furthermore, there is little written on migrants' right to basic education in the DR Congo. If there is, it is not on the internet. However, there are various writings on the topic in South Africa. This imbalance needs to be noted to motivate research on the topic in the DR Congo and to make it available. This study intends to contribute to the academic discourse on the realisation of the rights to basic education of migrant children in the two SADC countries. This study will assist the community when immigration laws in the SADC region are harmonised. It will aim to build on that knowledge to determine how and to what extent national laws and regulations could contribute to improving the fulfilment of the right to basic education and the well-being of children in the SADC region.

Although there are different types of migrants, namely permanent residents, diplomats, asylum seekers, refugees, economic migrants, foreign students and temporary visitors, this study will be limited to asylum seekers, refugees, and economic migrants.

## **1.9 Structure – Outline of chapters**

The study will be structured in six chapters involving an introductory chapter, four substantive chapters, and a concluding chapter.

**Chapter one** is the introduction that sets out the problem and methodology of study and introduces the thesis.

**Chapter two** will examine the historical development and context of migrant rights and challenges in the world and Southern Africa. Human rights arose from experiences; hence, the historical development is important to explore the evolution of the situation of immigrants that has created the changed paradigm of international relations and political situation in Southern Africa today.



**Chapter three** discusses from a general perspective the notion of education. It draws interpretations to establish the perspective of various international law treaties in giving ambit to the question of compulsory education, the 4A's theory of education, and inclusive education as it could be linked to migrant children.

**Chapter four** will examine the situation of migrant children and will discuss the right to education as it relates to migrant people. It will further seek to underscore the importance of education as a means of building the capabilities of migrants towards self-actualisation and contributing to the host state and to humanity.

**Chapter five** will explore the situation of migrant children in South African and the DR Congo to establish adherence to the provisions of law and reasons for non-adherence. Through the national laws and policies in South Africa and the DR Congo, it will investigate the conformity to international law in these countries and examine the nexus between state sovereignty and international human rights law.

**Chapter six** will consist of a summary of the findings as well as recommendations on the necessary actions that need to be taken to promote the implementation and protection of the right to basic education of migrant children within the SADC region.

## CHAPTER TWO: MIGRANT RIGHTS AND CHALLENGES IN THE WORLD AT LARGE AND SOUTHERN AFRICA IN PARTICULAR

### 2.1 Introduction

This chapter traces the historical evolution and context of migrant children. It also examines the challenges that confront migrant children generally and has a specific focus on migrant children in Southern Africa. The theoretical framework relied on for this chapter speaks to the need to ensure that freedom of movement is unrestricted for all individuals, as well as the need to ensure the protection of the human rights of victims. Historically, human migration in search of better life is a common occurrence. This movement could be for reuniting with family members, escaping human rights abuses such as armed conflict, persecution, and torture, or even to seek better economic opportunities.<sup>87</sup> While on the move migrants should be entitled to the very same human rights protections as are all other humans.

While migrants are recognised as humans and are consequently afforded protection from rights abuses, it is noted that these rights are not absolute as states, according to their discretion, limit the rights. As will be argued later in the thesis, most of the rights accepted for limitation fall within civil and political rights particularly as it pertains to voting and political participation.<sup>88</sup> It is however noted that restrictions are not placed on the enjoyment of other rights of any individual migrant. When people undertake this journey, they either move within the territory of a particular country or move across the border of their country of nationality. As this movement continues, they become vulnerable, and this has prompted the need to make provisions at international, regional, and national levels to protect their rights basically as humans and distinctly as migrants.<sup>89</sup>

Many human rights treaties<sup>90</sup> make express provision prohibiting discrimination based on nationality and therefore require states to ensure that the human rights of migrants are equally

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<sup>87</sup> Amnesty International Refugees 'Asylum Seekers and Migrants' at <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (accessed 2 May 2020).

<sup>88</sup> L Thompson 'Protection of Migrants' Rights and State Sovereignty' (2013) *United Nations Chronicle* 8 at <https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty> accessed 15 May 2020.

<sup>89</sup> Thompson (n 88) 8.

<sup>90</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1965).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

protected.<sup>91</sup> The vulnerability of migrants occasioned by the reason of their displacement from their countries of origin is noted to be the basis for the specific need for protection by international law.<sup>92</sup> The requirement of international law to specifically protect migrants' rights is consequently focused on areas of dire need especially as it relates to their access to education, workplace and correctional services.<sup>93</sup> The existence of these special protections, such as having access to social security granted by the international law in a country, would largely depend on any of the international or regional instruments ratified by the country.<sup>94</sup>

In Southern Africa, countries such as South Africa have committed to recognising the human rights of migrants even though the implementation of these rights at the various national levels requires an extra form and level of commitment on the part of states.<sup>95</sup> Article 2 and 12 of the African Charter are core provisions which should bind member states to the Charter. In addition, Articles 2 and 23 of the African Charter and Welfare of the Child are also applicable in most member states.

Consequently, this chapter is structured in such manner as to examine the historical evolution of the rights of migrants, firstly from an international perspective by considering some international instruments that recognise and provide for the human rights of migrants. Secondly, this chapter will narrow the historical analysis of the human rights of migrants to the Southern African experience. This research will further identify some of these rights as are enjoyed by migrants and will further identify any limitations and challenges attached to the effective recognition of these rights and will explore solutions to the identified challenges.

## **2.2 Historical evolution of migrant rights and motivations behind human migration.**

As long as humans will continue to migrate from one place to another, the fundamental link between rights and human well-being will persist. The need to recognise migrants' rights either

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Convention relating to the Status of Refugees (1951) and its Protocol (1967). Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000).

<sup>91</sup> Thompson (n 88) 9.

<sup>92</sup> Thompson (n 88) 9.

<sup>93</sup> Thompson (n 88) 9.

<sup>94</sup> International Commission of Jurists 'Migration and International Human Rights Law A Practitioners' Guide' (2014) *Migration and International Human Rights Law* 54 at <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf> (accessed 15 May 2020).

<sup>95</sup> Admission policy for ordinary public schools, National education policy Act (Act no. 27 of 1996). Department of education and the South African Schools Act (1996).

at the regional or international level is the premise on which the rights must be enforced. This debate is reflected in the controversies that surround the recognition of laws labelled as either soft or hard laws.<sup>96</sup> This part of this research will therefore examine the historical recognition of the rights applicable to migrants by virtue of the jurisdiction they find themselves in and whatever status they are adjudged to have.

This chapter of the research will delve into the historical origins of human rights for migrants both internationally and regionally, focusing on Southern Africa as a case study. It will highlight various factors driving human movement, such as natural or manmade calamities, conflicts, and the pursuit of better livelihoods.<sup>97</sup> Many migrants to Southern Africa, especially to South Africa, are economic migrants, though some still move for safety from war torn regions of the continent. For instance, migrants from the DR Congo region are primarily fleeing the severe violence that has come to be identified with the region. Many other migrants from places like Eritrea and Rwanda are fleeing political persecution and most West African migrants are economic migrants in pursuit of a better life.<sup>98</sup>

### *2.2.1 The global perspective*

The concept of human rights stretches back to antiquity. The doctrines that are the basis of all human rights are found as theological dogmas in many religions and traditional practices.<sup>99</sup> Some rights,<sup>100</sup> have been so recognised in various international instruments such as the Universal Declaration of Human Rights of 1948 (UDHR).<sup>101</sup> Following the adoption of the UDHR, it is no longer unusual to take steps towards the realisation of these rights, especially for countries that have taken a cue from these instruments in ensuring the reality of these rights in the lives of the nationals within their territory and as much as it applies to their non-nationals, whatever their status.

In a bid to further enhance the effective realisation of these rights as provided for by various international instruments, several terms such as “goals” and “targets” have been adopted to

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<sup>96</sup> International Commission of Jurists (n 94) 54.

<sup>97</sup> International Commission of Jurists (n 94) 54.

<sup>98</sup> International Commission of Jurists (n 94) 54.

<sup>99</sup> For instance, in the Bible, the right to a fair hearing was entrenched when God, the divine being, asked of Adam and sought to hear his opinion on why he went against his commandments.

<sup>100</sup> Universal Declaration on Human Rights, 1948.

<sup>101</sup> Some of these rights some of these rights as provided by this instrument include rights such as right to life, dignity of human person and freedom from torture and other degrading treatment, right to education, etc.

convey the reality of these rights by some multilateral organisations, as can be seen in the Millennium Development Goals<sup>102</sup> and “education for all”<sup>103</sup>, and the term “capabilities” as made more visible by the works of Sen<sup>104</sup> and Nussbaum<sup>105</sup>.

The universality of human rights reflects in the various languages with which human rights is identified, either as treaties, resolutions, or recommendations. The fact that some of these rights are still illusory when it comes to their practical realisation leads to the question of why their implementation lags even when the international instruments that provide for such rights have been ratified by that country. Sen’s capability approach helps us to understand how migrants’ rights can be effectively realised when viewed as a capability. From a normative approach, viewing human rights as a capability that a person could possess aids in development and reshapes measures and strategies that could be adopted by states to realise this.<sup>106</sup>

When such a capability can be properly explored and measures are put in place to make an enabling environment available, the concept of recognising the rights of migrants can grow. When a child is given equal opportunity with other children to acquire and explore his capability in education, he becomes useful to the environment he finds himself in, whether he is a national of such a place or a migrant, and this adds to global development.<sup>107</sup> The implication here influences the position of the Universal Declaration of Human Rights, which states that every child deserves an education. The import of this is that the government is tasked with the responsibility of ensuring that the right of every child to education is guaranteed.<sup>108</sup>

It can be agreed that citizenship places an obligation on a nation to ensure that the rights of every individual be protected, promoted, and fulfilled as is replicated in the legal instruments that are enforced. These positions notwithstanding the protection of the rights of every individual are equally protected irrespective of their status as migrants or non-nationals.<sup>109</sup>

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<sup>102</sup> See generally, MC Nussbaum *Women and Development: The Capabilities Approach* (Cambridge: 2000).

<sup>103</sup> Nussbaum (n 102) 10.

<sup>104</sup> A Sen *Development as a Freedom* (Oxford University Press: 1999) 5.

<sup>105</sup> Nussbaum (n 102) 10.

<sup>106</sup> Sen (n 104) 5.

<sup>107</sup> I Robeyns ‘the capability approach’ (2011) *Stanford encyclopaedia of philosophy* at <https://plato.stanford.edu/entries/capability-approach/> (accessed 15 May 2020).

<sup>108</sup> Article 26 of the Universal Declaration of Human Rights.

<sup>109</sup> R Amit & N Krige ‘Making Migrants Il-legible: The Policy and Practices of Documentation in Post-apartheid South Africa’ (2014) 40 *Kronos* 269 at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0259-01902014000100012](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-01902014000100012) (accessed 15 May 2020).

Notwithstanding this position, some nations often make little or no provision to protect migrants' basic human rights.<sup>110</sup>

Aside from education, the right to health and enjoyment of the best attainable environment are other rights that are not limited to those of nationals of a state but should accrue to every individual. The process of enjoying the right to education does not exclude the enjoyment of other human rights; the enjoyment of the right to education should be achieved in recognition of other rights such as being educated in a conducive environment, health-wise and socially. States should enact legislation allowing migrants to access school.<sup>111</sup>

Understanding migration as a term also enhances a proper understanding of the evolution of migrants' human rights, since these concepts cannot be separated from each other. International migration, therefore, is a concept that encompasses various aspects of human existence including issues of an economic, social or security nature.<sup>112</sup> Migration therefore encompasses different paradigms of engagements of individuals in search of fulfilment or protection within or beyond borders of nation states. With growing globalisation and human mobility, migration transcends restrictions occasioned by ease of information transmission and dissemination.<sup>113</sup>

The impact of globalisation cannot be overlooked in recent developments. This is because globalisation cannot be fully separated from migration; people have always left their homes in search of better economic opportunities, both within and outside of their own countries of origin. Consequently, economic migration has created a new trend in global migration resulting in global uprootedness and human displacement at a high scale.<sup>114</sup>

The concept of globalisation is the basis for the dismantling of what before now were physical borders and increasingly enhances interactions between states. Globalisation is the main reason for enhanced interdependence in economic, technological and health relations.<sup>115</sup> It is thus

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<sup>110</sup> Amit & Krige (n 109) 269.

<sup>111</sup> K Watkins Leaving no one Behind: An Agenda for Equity (2014) *Lancet* 2248–2255 at <https://www.thelancet.com/pdfs/journals/lancet/PIIS0140673613624216.pdf> (accessed 15 May 2020)

<sup>112</sup> H De Haas 'The Migration and Development Pendulum: A Critical view on Research and Policy' (2012) 50 *International Migration* 8 available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2435.2012.00755.x> (accessed 15 May 2020).

<sup>113</sup> Ibid 10.

<sup>114</sup> R Čiarnienė & V Kumpikaitė 'The Impact of Globalization on Migration Processes' (2008) *Socialiniai tyrimai/Social Research* 42 available at <https://core.ac.uk/download/pdf/51724473.pdf> (accessed 15 May 2020).

<sup>115</sup> Čiarnienė & Kumpikaitė (n 114) 42.

arguable that the speed of globalisation is a basis for an increased human desire to migrate from one nation to another, which sometimes can be represented by legal or illegal migration and workforce.

Distinguishing migration from physical movement of either individuals or ideas is one that is not easily ascertained. This is because it is through migration that cultural, financial, and ideological transmissions occur. Its impact on livelihood is thus occasioned also by the transmission of different levels of expertise and skills that migrants bring to bear. It is therefore arguable that migration improves both the lives of the migrant and the receiving states.<sup>116</sup>

The surge in migration in recent years is traceable to economic push and the various forms of violence that affects several areas of the world today. In addition, challenges of environmental impacts, landslides, floods, and the search for opportunities are also strong factors that influence migration.<sup>117</sup> Despite this occurrence, it is to be noted that these circumstances do not warrant a basis for individuals engaging in irregular or illegal migrations. The level of irregular migration is touted to pose challenges to security and development planning for several receiving states and thus is not encouraged.<sup>118</sup> These irregularities can therefore be the singular reason why the issue of migration continues to be a preeminent issue.

It is these identified challenges that inform the need for human rights protection of issues as it pertains to migrants. It needs specific policy interventions to elicit political willingness from states parties to deal with migration issues without having to violate and disrespect the rights of any individual irrespective of migrant status.<sup>119</sup> Another reason for the high-level of attention placed on migrant issues is occasioned by the necessity to ensure that the gains of migration and the rights of migrants are both protected.<sup>120</sup> Perhaps this explains the need for the United Nations to make a Declaration on the enjoyment of solidarity rights as set out by Okafor,<sup>121</sup> and other special protections of the rights of the vulnerable nature of migrant children.

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<sup>116</sup> Čiarnienė & Kumpikaitė (n 114) 42.

<sup>117</sup> Taran (n 7) 11.

<sup>118</sup> Taran (n 7) 11.

<sup>119</sup> Taran (n 7) 11.

<sup>120</sup> De Haas (n 112) 10.

<sup>121</sup> OC Okafor 'Report of the Independent Expert on Human Rights and International Solidarity Rights'(2018) *United Nations* at <https://digitallibrary.un.org/record/3804645?ln=en> (accessed 30 March 2019).



With the advent of social media and the exhibition of opportunities inherent in different states, the impact of migration can hardly be ignored as more use of such means is engaged in the dissemination of knowledge, keeping up with developments both at home and in the diaspora and encouraging people to seek to migrate through whatever available means.

One must therefore come to terms with the fact that migrants bring with them so many positives and are not in all cases a liability to states. The United Nations Declaration for Refugees and Migrants of 2018 therefore sets out the need to understand the global connection of migration impact and drives discussions on the need for better treatment of migrants in the world. This supports the UN's suggestion of increasing recognition for the need to protect the rights of migrants irrespective of their legal status in states.<sup>122</sup>

The population of migrants as of 2017 is put at about 258 million (two hundred and fifty-eight million), representing about 3.3 percent of the world population.<sup>123</sup> The implication of this figure shows that the issue of focusing on migration is thus not excessive as it is sometimes made out to be by political commentators.<sup>124</sup> Migration is still so much more frequent within states' boundaries and not beyond. The surge for movement beyond borders as already discussed is oftentimes driven by economic pursuit, political persecution or acts of war. In other circumstances, the desire for greater opportunities and access to health and educational facilities are other driving factors. Contrasting internal migrations and cross border migration shows that about seven hundred and forty million persons move out of their countries in search of better opportunities.<sup>125</sup> With these projections, various statistics show that:

...by 2050 international migrants would account for 2.6 per cent of the global population, or 230 million (a figure that has already been

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<sup>122</sup> Office of the High Commissioner 'Open letter from the United Nations High Commissioner for Human Rights on Protecting and Promoting the Human Rights of all Migrants within the Global Compact on Safe, Regular and Orderly Migration' 16 February 2018 *United Nations Human Rights* at <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/OpenLetterGlobalCompactMigration.pdf> (accessed 15 April 2020).

<sup>123</sup> United Nations Department of Economic and Social Affairs (UN-DESA) 'International Migration Report 2017 Highlights' (2017) *United Nations* v

<sup>124</sup> United Nations Department of Economic and Social Affairs (UN-DESA (n 123).

<sup>125</sup> UNDP 'Development Report 2009 Overcoming barriers: Human mobility and development' (2009) *United Nations Development Programme (UNDP)* 1 at [http://hdr.undp.org/sites/default/files/reports/269/hdr\\_2009\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf) (accessed 15 April 2020).



surpassed).<sup>126</sup> In contrast, in 2010, a revised projection for 2050 was 405 million international migrants globally.<sup>127</sup>

Despite the above, it is noted that the current surge in the population of migrants' accounts for over forty million migrants informed by conflicts.<sup>128</sup> Some of these conflicts include the conflicts in the DR Congo, the Boko Haram in Nigeria, Libya, and Syria among several other conflicts that are influencing people's choices of safer environments within which they can pursue their goals and aspirations.

With this statistical analysis on the trends in migration, it is also important to begin a more specific examination on the historical connection between these trends on migration and the historical recognition of human rights that is due to migrants by virtue of their humanity, irrespective of whichever territory they find themselves in at any given time. Article 1 and 2 of the Universal Declaration of Human Rights<sup>129</sup> recognised and therefore initiated the evolution of human rights by affirming that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The way migrants' issues should be handled in states are enshrined in various international conventions, regional treaties, bilateral agreements, and national provisions.<sup>130</sup> One may, however, argue that the international instruments provided an acceptable benchmark for national laws and policies on the way rights of migrants must be protected. In some instances, the global laws influence the making and implementation of state policies as states strive to ensure compliance with their obligations under negotiated treaties and several other legal

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<sup>126</sup> International Organization for Migration (IOM) ' World Migration Report 2018' at [https://www.iom.int/sites/default/files/country/docs/china/r5\\_world\\_migration\\_report\\_2018\\_en.pdf](https://www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf) 2 ( accessed 15 June 2021).

<sup>127</sup> International Organization for Migration (IOM) (n 126).

<sup>128</sup> International Organization for Migration (IOM) (n 126).

<sup>129</sup> International Organization for Migration (IOM) (n 126).

<sup>130</sup> The South African's Schools Act (1996).

Admission of Learners to Private School Act (2001).

Loi-Cadre n° 14/004 du 11 Février 2014 De L'enseignement National.

frameworks.<sup>131</sup> This argument finds credence in literature as the impact of global laws or national policies and laws on treatment of migrants have proven to be positively influential.<sup>132</sup>

The application of international law, one must therefore recognise, transcends beyond nationals of a state and incorporates any individual within the jurisdiction of a state, “including migrants, whether their status is regular, irregular, documented or undocumented”.<sup>133</sup> The implication of this position is that human rights advocacy must be promoted regardless of migrants' status.<sup>134</sup>

The Geneva Convention provides for and protects the rights of any individual to move either within the country of origin or to any other country of choice.<sup>135</sup> The choice of such movements does not however foreclose the right of sovereign states to make decisions on the process of admitting or otherwise of intending migrants to move within their borders.<sup>136</sup> Similarly, it is identified that sovereign states must respect the provisions of international human rights laws that enshrines the tenets of protection of rights. This position is espoused in the decision of the International Labour Organization (ILO) to the effect that “all international labour standards are applicable to all workers, including migrant workers, except if otherwise stated”.<sup>137</sup> The challenge often encountered however, is that applicability of international law within the domestic realm is exceedingly dependent on the ratification of same.<sup>138</sup>

Apart from the basic recognition of human right of all persons by the Universal Declaration of Human Rights, many international instruments recognise human rights for migrants in different situations.<sup>139</sup> Those instruments make various provisions protecting the human rights of

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<sup>131</sup> South Africa's Refugees Act, 1998.

Promotion of Administrative Justice Act, 2002.

<sup>132</sup> Office of the High Commissioner for Human Rights 'Migration, Human Rights and Governance: Handbook for Parliamentarians No 24' (2015) *The Inter-Parliamentary Union, the International Labour Organization, and the United Nations* 153.

<sup>133</sup> Office of the High Commissioner for Human (n 132) 177.

<sup>134</sup> Office of the High Commissioner for Human (n 132) 177

<sup>135</sup> The Convention Relating to the Status of Refugees, known as the 1951 Refugee Convention or the Geneva Convention 1951 and its Protocol (1967).

<sup>136</sup> The Convention Relating to the Status of Refugees, known as the 1951 Refugee Convention or the Geneva Convention 1951 and its Protocol (1967).

<sup>137</sup> Office of the High Commissioner for Human (n 132) 177.

<sup>138</sup> Office of the High Commissioner for Human (n 132) 177

<sup>139</sup> Articles 1, 2 and 5 of International Convention on the Elimination of all Forms of Racial Discrimination; Articles 2 and 13 of the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families; International Covenant on Civil and Political Rights; Articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights; International Labour Organization Migration for Employment Convention (revised), 1949 (No. 97); International Labour Organization Migrant Workers (supplementary

migrants because of the vulnerability of the status of a migrant. Some of these provisions also protect not only migrants but members of their family. Some of these provisions are of a special kind; they protect migrants of a particular status who find themselves in a specific situation (such as migrants on sea, land or in the air, and are gender-sensitive on some occasions, especially where it recognises the rights of children and women).

Having examined the protection of migrants from a historical point of view, the Southern African perspective becomes the next area of attention of this work.

### *2.2.2 The Southern African perspective*

In discussing irregular migration, the role of the media and by extension that of social media as previously noted is worth re-examining. The push and desire to migrate to Europe as shown by the media portrays an image of desperation for a people in pursuit of a good life. As identified, the factors that influence this efflux range from challenges of poverty and the desire for a better life.<sup>140</sup>

One cannot argue that the level of poverty in the majority of African states is on the increase. With Africa accounting for very low developmental indices in the areas of access to education and maternal mortality for instance, the designation of Africa as a continent on the move may not be controverted.<sup>141</sup> According to Flahaux and De Haas:<sup>142</sup>

The portrayal of Africa as a “continent on the move” can be traced to stereotypical ideas about Africa as a continent of poverty and conflict and this perception of Africa is influenced by media images of massive refugee flows and “boat migration”, and alarmist rhetoric of politicians suggesting an impending immigrant invasion.

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provisions) Convention, 1975 (No. 143); articles 8 and 15 of the International Labour Organization Domestic Workers Convention, 2011 (No189); Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (general provision; principle 11); Protocol of 2014 to the forced labour conventions, 1930 (2(d)); UN Convention on the Law of the Sea (article 98); UN Convention on the Reduction of Statelessness, 1961; UN Convention Relating to the Status of Refugees, 1951, and 1967 protocol; UN convention relating to the status of stateless persons, 1954; UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; UN Protocol against the Smuggling of Migrants by Land, Sea and Air; article 2 and 15 of the Universal Declaration of Human Rights; Vienna Convention on Consular Relations; African Charter on Human and Peoples' Rights; African Charter on the Rights and Welfare of the Child; Convention Governing the Specific Aspects of Refugee Problems in Africa

<sup>140</sup> Office of the High Commissioner for Human (n 132) 177.

<sup>141</sup> Office of the High Commissioner for Human (n 132) 177.

<sup>142</sup> See generally Flahaux & De Haas (n 28) 1.

South Africa arguably provides an option for desiring migrants from other African Countries, with its level of respect for international law and what is today argued to be one of the world's most progressive legal instruments, it is arguable that the legal framework enshrines provisions worthy of protecting the rights of migrants within its borders.<sup>143</sup> This position is however, not as expected especially with bureaucracy and implementation by the Department of Home Affairs (DHA) which shows lack of political will in ensuring that rights of migrants are well protected by guaranteed ease of documentation when required.<sup>144</sup> The effect of this results in the inability of migrants to follow due process for documenting their presence within the republic and thus they are either advised to leave or they decide to go into hiding and continue living in South Africa as undocumented migrants.

Ultimately the DHA, is unable to contribute these statistics to developmental initiatives for government planning.<sup>145</sup> The reasons behind the DHA to delay or recklessly deny documentation of migrants is one that is yet to reach consensus, but it is noted that one of the key objectives of the DHA gets lost in the harsh approach adopted by various procedures dealing with migrants' documentation.<sup>146</sup> These practises go a long way to show how the street-level bureaucrats can influence the effective recognition and eventual enforcement of legal human rights applicable to migrants in Southern Africa, especially regarding documentation policy and practise in the determination of who gets access to documentation.<sup>147</sup>

Documentation of a migrant affords such a migrant a wide range of legal rights, including the right to education and access to other services that benefit a legal migrant. The Department of Home Affairs, fully aware of this, intentionally makes this process a tedious one for migrants, all targeted at facilitating the removal of these migrants. I call it "bureaucratic xenophobia". This has defeated the goal of the department, which is principally based on documentation, and documentation eventually does not enable the country to account for persons in their territory. Where a country is not able to account for its population, both nationals and non-nationals, the effective guarantee of human rights, especially of education, becomes elusive.<sup>148</sup>

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<sup>143</sup> See generally Flahaux & De Haas (n 28) 1.

<sup>144</sup> Flahaux & De Haas (n 28) 1.

<sup>145</sup> Amit & Krige (n 109) 1.

<sup>146</sup> Flahaux & De Haas (n 28) 1.

<sup>147</sup> Flahaux & De Haas (n 28) 1.

<sup>148</sup> Amit & Krige (n 109) 270.

In the account of Handmaker, the apartheid regime favoured migration of whites above other colours or races apart from persons who worked as domestic staff drawn from other countries in Africa.<sup>149</sup> Jonathan Crush and Raesibe Mojapelo emphasise that:

The aim of the country's carefully managed migration policy during this period was only "designed to utilise cheap labour from outside the country and dump it back over the borders when it was no longer wanted".<sup>150</sup> The implication of this is that migrants' rights to work and adequate remuneration were violated by the exploitation.<sup>151</sup>

The protection of white migrants can be attributed to the provisions of the Aliens Control Act of 1991 while the migration of non-whites was subjected to the implementation of the Bilateral Labour Agreements.<sup>152</sup>

According to Crush and Mojapelo, domestic workers lived within the republic despite the fact that their legal status was not ascertained because they provided a source of cheap labour in the menial sector needs of the economy.<sup>153</sup> The apartheid era while discriminatory in nature showed some form of consistency in its modus as opposed to the operation of the DHA with its unexplained bureaucracies; this situation has been described as "confused, incoherent, reactive, defensive, and lacking in vision".<sup>154</sup>

The democratic dispensation in South Africa influenced the 1997 Memorandum of understanding between the South African Development Community (SADC) and the United Nations High Commissioner for Refugees (UNHCR) which was targeted at ensuring a transparent and more coherent approach to handling migrant issues.<sup>155</sup> The implication of this arrangement as reported by Crush and Mojapelo influenced the enactment of several laws which includes the 1998 Refugees Act and the 2002 Immigration Act.<sup>156</sup> As previously argued, the impact of international law instruments on national laws and policies is one that is positive in

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<sup>149</sup> See generally J Handmaker *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa* (Human Rights Research Series: 2009).

<sup>150</sup> Crush & Mojapelo 'Introduction: Immigration, Human Rights and the Constitution' in J Crush (ed.) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* (1998) 18.

<sup>151</sup> Handmaker (n 149).

<sup>152</sup> Handmaker (n 149).

<sup>153</sup> Crush & Mojapelo (n 150) 19.

<sup>154</sup> Crush & Mojapelo (n 150) 18.

<sup>155</sup> Crush & Mojapelo (n 150) 19.

<sup>156</sup> Crush & Mojapelo (n 150) 18.

nature, it is thus worthy to note that some of the provisions of the International Refugee Convention influenced the wording of the laws and their implementation strategies. Consequently, in South Africa, the new laws post democracy, replaced apartheid laws like the Aliens Control Act.<sup>157</sup> This is positive; however, it suggests a further need to consolidate on the gains made and ensure that they are not lost to negative attitudes and defiant attitudes of policy implementations.

Another positive result of the democratisation of South Africa and the adoption of the 1996 Constitution is shown in the fact that with the progressive disposition of the Mandela led democracy, new legal frameworks in the country made provisions for the protection of the rights of individuals and not necessarily that of nationals or based on colour or birth circumstances. The effect of this is that many migrants were able to approach the institutions for proper documentation and reprieve.<sup>158</sup> These gains are further described by Handmaker, when it was found that:<sup>159</sup>

Under this relatively permissive scheme, many economic migrants began turning to asylum as a legal way to reside and work in the country temporarily because of the lack of alternative regularisation options, further increasing the ranks of asylum seekers.

While taking cognisance of the laudable attainments of the South African Constitutional achievements, it is however noted that public sentiment sometimes clouds the functionality of the agencies that implement immigration policies. These challenges are not devoid of the influence of the growing influx of the migrants into the country leading to the identifying of migrants as the main fulcrum for several financial and violent crimes.<sup>160</sup>

The attendant backlash is mainly focused on low income and low skilled migrants in the informal sector of the economy who are often seen as encumbering the space of South Africans. One may, however, also argue that these incidences are misplaced as some of the targets are not in any way interfering with the available work opportunities which in any circumstances is validly contested in a competitive approach.<sup>161</sup>

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<sup>157</sup> Crush & Mojapelo (n 150)19.

<sup>158</sup> Crush & Mojapelo (n 150)19.

<sup>159</sup> Handmaker (n 149).

<sup>160</sup> Handmaker (n 149).

<sup>161</sup> Handmaker (n 149).

These violent attacks on migrants which are classified as racial and xenophobic are a violation of fundamental human rights - rights to life, dignity, freedom of movement and association particularly. The restrictions and public hostilities occasioned by these occurrences implies that the migrants are unable to pursue their rights legally within the republic.<sup>162</sup> The activities of the perpetrators of these violent attacks on migrants and the almost non prosecution and conviction of the violators encourages the stigmatisation and repetition of the incidences.<sup>163</sup> The labelling of the migrants seeking asylum as “bogus asylum-seekers” or “makwerekwere”<sup>164</sup> or “ndingari”<sup>165</sup> encourages the continued violations of migrants’ rights.<sup>166</sup>

The basic source of the continued subsistence of violence against migrants has received some criticism from scholars and policy analysts. A major criticism is to blame the nature and way the state adopted instruments seeking to empower migrants; it identifies the need to ensure that policy adoption and implementation takes into consideration country specific peculiarities. One may therefore adopt a position here that African states must desist from wholesome acceptance of treaties without due consultations. According to the African National Congress (ANC):<sup>167</sup>

many of the current immigration challenges to the country’s unconditional adoption of regional and international instruments, which had failed to consider the migration realities confronting the state and to recognise migration as a strategic security issue during the democratic transition.

As a means of curing this defect, it has been recommended that “high risk” asylum seekers be monitored in all activities to reduce the risk which they constitute.<sup>168</sup> This position notwithstanding, it is the researcher’s view that this position often leads to racial profiling which on its own is a breeding ground for the violation of migrant rights. In several circumstances,

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<sup>162</sup> Taran (n 7) 6.

<sup>163</sup> Taran (n 7) 6.

<sup>164</sup> In South Africa, Makwerekwere is used to label all foreigners.

<sup>165</sup> In the DR Congo, Ndingari are east African migrants.

<sup>166</sup> Taran (n 7) 6.

<sup>167</sup> The African National Congress (ANC) National Policy Conference: Peace and Stability, Discussion Document (2012) at <https://www.sahistory.org.za/archive/2012-anc-national-policy-conference-peace-and-stability-discussion-document-march-2012> (accessed 15 June 2020).

<sup>168</sup> The African National Congress (ANC) National Policy Conference (n 167).



unfounded allegations against migrants have proven false and therefore, this approach must be adhered to cautiously.

A further implication of the approach is the drive to widen the scope of the processing of migrant documentation. This process informed a same day adjudication of asylum cases aimed at reducing the waiting list and integrating migrants properly into the system. This process according to Crush and Mojabelo had great results as it has increased documentation speed for some migrants especially of Zimbabwean origin.<sup>169</sup>

Although Xenophobia is recurring in South Africa, it has also happened in the DR Congo. Following the outbreak of war in the Kivu, the population of Kinshasa became increasingly hostile towards Rwandans, in particular the Tutsi whom they systematically accused of being in coalition with the Alliance of Democratic Forces for the Liberation of Congo (AFDL)/APR. At the end of October 1996, during public protestations organised by students against "Rwandans" in Kinshasa, men, women and children of Rwandan nationality or origin the Tutsi ethnic, were beaten and humiliated in public.<sup>170</sup>

Instead of protecting these people, security forces arbitrarily arrested many Rwandans, mostly Tutsi. Their houses were looted. The victims were arrested and detained in various places of detention.<sup>171</sup> Conditions of detention were conducive to large-scale deaths, as detainees were deprived of food and medical care. Many victims were tortured and subjected to cruel, inhuman, and degrading treatment. An unknown number of people were executed by the security forces. Some were deported by the Congolese authorities to Rwanda and Burundi while others fled to other countries.<sup>172</sup>

### **2.3 The context of migrants' human rights**

Migrant rights are the human rights that non-nationals enjoy in their state of residence outside their states of origin. These rights are explicitly enunciated in international human rights and

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<sup>169</sup> The African National Congress (ANC) National Policy Conference (n 167).

<sup>170</sup> <https://www.mapping-report.org/fr/attaques-contre-les-civils-tutsi-et-banyamulenge/> (accessed 1 September 2022).

<sup>171</sup> <https://www.mapping-report.org/fr/attaques-contre-les-civils-tutsi-et-banyamulenge/> (accessed 1 September 2022).

<sup>172</sup> <https://www.mapping-report.org/fr/attaques-contre-les-civils-tutsi-et-banyamulenge/> (accessed 1 September 2022).



public law instruments.<sup>173</sup> These rights are not different from the fundamental human rights that they enjoy in their various states of origin as citizens, although there will be limitations to some of these rights based on the workings of their host countries' legal systems.<sup>174</sup>

Although there are international instruments that provide for these rights in general<sup>175</sup> there are still specific instruments that protect the right of migrants at the international level, and regional efforts that provide for the protection of persons who are not their nationals but reside within their territory.<sup>176</sup> To ascertain the extent of implementation of these rights for migrants, these rights have been weighed in various contexts. It has been assessed both in principle and practise. These two contexts are both geared towards diverse goals in their various contexts.<sup>177</sup>

In principle, the target is to focus on the international and regional ratification of treaties and the subsequent enactments of those provisions in their national legal documents to protect migrants. In practise, evaluating the rights of migrants refers to the assessment of the actual implementation strategies adopted by these countries to see that these rights as applicable to migrants are truly upheld and exercised. This has been achieved only to a limited extent due to a lack of data, knowledge, and resources, as well as the existence of fewer enforced rights for migrants at the international and regional levels.<sup>178</sup>

### **2.3.1 Who is a migrant?**

The term migrant, like any other social context, has some complexities when it comes to creating a specific meaning. While it is true that context has provided for the term migrant and migration, it is recommended that these be done within the frames of geographical spheres and legal spaces.<sup>179</sup> This position gets some credence and validity by the position of the United

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<sup>173</sup> Crush & Mojapelo (n 150) 18.

<sup>174</sup> Crush & Mojapelo (n 150) 18.

<sup>175</sup> The Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination.

<sup>176</sup> CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, UN office of the High commissioner for Human Rights para 4.

<sup>177</sup> CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, UN office of the High commissioner for Human Rights para 4.

<sup>178</sup> Information available at <http://migrationdataportal.org/themes/migrants-rights> accessed 15 June 2020

<sup>179</sup> See generally M Poulain et al 'THESEM Towards Harmonised European Statistics on International Migration' (Presses universitaires de Louvain 2006) at <http://www.seemig.eu/downloads/resources/THESIMFinalReport.pdf> (accessed 15 June 2020).

Nations Department of Economic and Social Affairs (UNDESA) 1998, Recommendations on Statistics of International Migration.<sup>180</sup>

It is the position of UNDESA that in defining the concept of migration, there is a need to ensure that “technical definitions, concepts and categories of migrants and migration are necessarily informed by geographic, legal, political, methodological, temporal and other factors”.<sup>181</sup> De Beer also suggests that residence and place of birth could be factors that are related to the nuance of defining migration.<sup>182</sup> Consequently, migrants are broadly classified in the broad spectrum of either moving internationally or nationally driven by conflict, poverty, and natural disasters. This therefore brings to the picture the issues of internally displaced individuals who are in the majority migrants within their country boundaries but occasioned by involuntary movements.<sup>183</sup>

Though the terms refugee, asylum seeker and migrant are frequently used interchangeably, there are differences in the legal point of view. A refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>184</sup> Refugee is a person who has fled their own country fearing serious human rights violations and persecution. They so fear to lose their lives that the only choice is to leave and seek protection outside their country because their own government fails to or will not protect them from those threats. The host country recognises and protects the person. The refugees’ protection is guaranteed by International human rights instruments.<sup>185</sup> An asylum seeker is a person who flees from his/her country for his/her life, but who is not yet been officially recognised as a refugee and is waiting to receive a decision on their asylum entitlement.<sup>186</sup>

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<sup>180</sup> UN Department of Economic and Social Affairs (UNDESA) Recommendations on Statistics of International Migration (1998) at [https://unstats.un.org/unsd/publication/seriesm/seriesm\\_58rev1e.pdf](https://unstats.un.org/unsd/publication/seriesm/seriesm_58rev1e.pdf) (accessed 15 June 2020).

<sup>181</sup> ‘Migration and Human Rights: Improving Human Rights Based Governance of International Migration’ (2012) *Office of the High Commissioner* 7 at [https://www.ohchr.org/Documents/Issues/Migration/MigrationHR\\_improvingHR\\_Report.pdf](https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf) (accessed 15 June 2020).

<sup>182</sup> See generally J De Beer et al ‘Overcoming the Problems of Inconsistent International Migration Data: A New Method Applied to Flows in Europe’ (2010) *European Journal of Population* 459-481 at [https://www.researchgate.net/publication/49651721\\_Overcoming\\_the\\_Problems\\_of\\_Inconsistent\\_International\\_Migration\\_Data\\_A\\_New\\_Method\\_Applied\\_to\\_Flows\\_in\\_Europe](https://www.researchgate.net/publication/49651721_Overcoming_the_Problems_of_Inconsistent_International_Migration_Data_A_New_Method_Applied_to_Flows_in_Europe) (accessed 15 June 2020).

<sup>183</sup> Migration and Human Rights (n 181) 7.

<sup>184</sup> Article 1 of the 1951 Convention relating to the status of refugees.

<sup>185</sup> <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (accessed the 17 February 2023).

<sup>186</sup> Ibid.

Many will not fit the legal definition of a refugee but would be in danger if they remain in their home country. Some people leave their country because of work, study, or family reunification. Others flee due to poverty, political issues, social situations, natural disasters, or other severe conditions.<sup>187</sup>

The economic migrants leave their countries for better economic and living condition opportunities.<sup>188</sup> The lack of employment and basic conditions of life are major indices that drive economic migrations. The experiences of this class of migrants sometimes does not meet their expectations as they have, in some instances, been termed to be ‘middling transnationals’.<sup>189</sup> Bonin, however, is of the important view that when migrants access education, they have greater potentials for a better life.<sup>190</sup> The import of this reaffirms the basis of this thesis that education should be accessible to all migrant children as it is a strong basis for the realisation of potential.<sup>191</sup>

While this thesis may not specifically focus on stateless persons, it is nonetheless important to acknowledge their existence and potential relevance to the broader discussion. A stateless person is not a national of any state under the operation of its law.<sup>192</sup> Apart from the fact that their right to nationality is violated, stateless people’s other rights are violated as well, and they encounter difficulties in accessing fundamental rights, for example the right to education, to healthcare and to employment.<sup>193</sup>

According to the provision of UDHR in its Article 15, everyone has the right to a nationality. However, when an individual is deprived of this right, such individuals are still entitled to some basic rights, and this includes education among others.<sup>194</sup> Furthermore, the provision

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<sup>187</sup> Information available at <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (accessed the 17 February 2023).

<sup>188</sup> Information available at <https://dictionary.cambridge.org/dictionary/english/economic-migrant#:~:text=a%20person%20who%20leaves%20their,better%20working%20or%20living%20conditions> (accessed 17 February 2023).

<sup>189</sup> V Parutis ‘Economic migrants or “middling transnationals”? East European migrants’ experiences of work in the UK’ 2014) 52 *International Migration* 36-55

<sup>190</sup> H Bonin ‘The potential economic benefits of education of migrants in the EU. EENEE analytical report’ (2017) *European commission* 31.

<sup>191</sup> See generally G Crivello ‘becoming somebody: youth transitions through education and migration in Peru’ (2011) 14 *Journal of Youth Studies* 395-455. For the importance of education and how it impacts youth.

<sup>192</sup> Article 1.1 of the 1954 Convention relating to the Status of Stateless Person.

<sup>193</sup> <https://www.ohchr.org/en/nationality-and-statelessness> (accessed 17 February 2023).

<sup>194</sup> See generally D Weissbrodt & C Clay ‘The human right of stateless persons (2006) 28 *Human Rights Quarterly* 245.

of the 1954 convention on the status of stateless persons protects migrants of this category such that no “stateless person must be treated worse than any migrant who possesses a nationality”.<sup>195</sup>

Stateless individuals are therefore required to be treated equally with nationals of the host countries especially as it pertains to some rights, like the right to education. As it concerns education other than primary education, especially as it relates to having access to such study, stateless persons must be shielded from unfair policy that is inherently targeted at making education inaccessible.<sup>196</sup>

Statelessness is triggered by many aspects such as: discrimination in nationality laws, divergence between national laws and host countries’ laws. Being stateless and being undocumented are not the same. However, the absence of a birth certificate can expose one to statelessness since birth certificates provide information of the place of birth and the parents’ names, important evidence to determine nationality.<sup>197</sup> Indeed, the obstacles faced by stateless people are essentially the same on all fronts, necessitating a focused approach to ensure the realisation of their rights. According to Kits, stateless persons face insurmountable challenges in securing the core protection of the state in which they reside.<sup>198</sup>

It is important to understand that all migrants are entitled to have their full human rights protected and respected, regardless of the status they have in the country they moved to.<sup>199</sup> When it comes to refugees, international law forbids the host country from sending them back to their countries. A stateless person, by definition, does not have a country to which they may be repatriated, and hence should be treated decently, as the act of seeking refuge will confer identification on such individuals. In contrast, under the principle of non-refoulement, a refugee cannot be returned to the nation from which they fled.

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<sup>195</sup> Weissbrodt & Clay (n 194).

<sup>196</sup> Article 22 of the Convention Relating to the Status of a Stateless Person.

<sup>197</sup> MS Pais ‘Birth registration: right from the start’ (2002) 9 *UNICEF Innocenti Digest* 1-32.

<sup>198</sup> HJ Kits ‘betwixt and between refugees and stateless persons in limbo’ (2004) 22 *Refugee* 3.

<sup>199</sup> See generally, S Grant & HG Solicitors ‘International migration and human rights’ (2005) *global commission on international migration* at [https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy\\_and\\_research/gcim/tp/TP7.pdf](https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP7.pdf) (accessed 17 February 2023).

The principle of non-refoulement forms a vital safeguard under international human rights, refugee, humanitarian, and customary international law. It forbids states from sending individuals back to the countries they fled when there is serious evidence that they are at risk or could permanently be harmed upon return and be subjected to oppression, cruelty, mistreatment or other serious human rights violations.<sup>200</sup> The principle of non-refoulement is clearly articulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>201</sup> International human rights bodies, human rights courts, as well as national courts have directed that this principle be imbedded in the states' obligations to respect, protect and fulfil human rights.<sup>202</sup>

This thesis would consequently take into consideration the above and adopt the definition of migrants as individuals who in pursuit of safety or personal gain move across the borders of their country, taking note that this movement is either voluntary or involuntary.

### ***2.3.2 What rights are accruable to migrants?***

The UDHR is a fundamental instrument that enshrines the rights of every individual irrespective of status.<sup>203</sup> Other instruments such as the ICCPR and the CESCR also provide for the fundamental rights of individuals. On the regional level, the ACHPR is the core instrument that protects and promotes individual and group rights. Interestingly, migrants are not denied any rights provided for in the ICCPR, save for the limitation based on migrant rights to participate in political activities in host nations in General Comment No 25 of the CCPR<sup>204</sup>. This position is advanced in the wording of the Covenant itself and is the interpretation given by the Human Rights Council.<sup>205</sup>

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<sup>200</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (accessed 17 February 2023).

<sup>201</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (accessed 17 February 2023).

<sup>202</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (accessed 17 February 2023).

<sup>203</sup> Article 1 of the Universal Declaration of Human Rights (UDHR).

<sup>204</sup> UN General comment Under article 40, committee on the Covenant on Civil and Political Rights (1996) CCPR/C/21/Rev.1/Add.7 para 4 available at <https://undocs.org/en/CCPR/C/21/Rev.1/Add.7> (accessed 15 June 2019).

<sup>205</sup> CCPR General Comment No. 15: The Position of Aliens Under the Covenant (11 April 1986); Amnesty International *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest* (2012)13 at [https://www.amnestyusa.org/files/ai\\_inhostileterrain\\_final031412.pdf](https://www.amnestyusa.org/files/ai_inhostileterrain_final031412.pdf) (accessed 15 June 2019).

Consequently, the basic rights that are firmly linked to the protection of migrants are discussed below: right to life, right to equality and non-discrimination, protection against arbitrary arrest and detention, protection against torture and inhuman treatment, non-refoulement, prohibition against collective expulsion, procedural safeguards in individual expulsion proceedings, family rights, protection against labour exploitation, right to social security, rights to highest attainable standards of physical and mental health, right to primary education, freedom of movement and right to enjoy culture in community with others.<sup>206</sup>

a. Right to life

The right to life is arguably the most sacrosanct fundamental right of every individual and must be protected. The protection of the right to life implies that no individual should be deprived of life under circumstances of nationality or migrant status.<sup>207</sup> The importance of the right to life, has recently attracted attention for the suspension and moratorium on the execution of the death penalty even when conviction is obtained in line with legal provisions within a state. In this regard there is an obligation on states to ensure safe passage and protection of the right to life of migrants either in transit within their boundaries or at their destination.<sup>208</sup>

The protection required of states includes all situations and means of movement adopted by migrants. As already stated, many African migrants are engaged in voyages via land, sea, or air. States are nevertheless obligated to ensure that migrants are not wilfully put at risk.<sup>209</sup> Considering more closely the protection that is obligated on states during sea voyages by

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<sup>206</sup> Article 98 of United Nations Convention on the Law of the Sea; article 2 (2) of International Convention on Economic, Social and Cultural Rights and article 2 of the ILO declaration on fundamental principles and right to work; article 9 of International Covenant on Civil and Political Rights and article 16(4) of International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family; article 2(2) of the International Convention on Civil and Political Rights; article 33(1) of convention relating to the status of refugees (1951) and article 3 of Convention Against Torture; article 22 of international convention on the rights of all migrant workers and members of their family and the article 12(5) of African Charter on Human and Peoples' Rights (ACHPR); article 11 of International Convention on the rights of all migrant workers and members of their family and article 8 of International Covenant on Civil and Political Rights; article 30 of the convention on the rights of all migrant workers and members of their family; article 12(3) of International Covenant on Civil and Political Rights; article 27 of International Covenant on Civil and Political Rights as it relates to the right of minorities; article 6 of International Covenant on Civil and Political Rights; article 9 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); article 27 of the International Covenant on Civil and Political Rights as it relates to the right of minorities.

<sup>207</sup> Article 6 of International Covenant on Civil and Political Rights; article 9 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

<sup>208</sup> UN General Assembly, Resolution 23/20, Human Rights of Migrants (26 June 2013) UN Doc.A/HRC/RES/23/20, Para.4(c).

<sup>209</sup> UN General Assembly, Resolution 23/20, Human Rights of Migrants (26 June 2013) UN Doc.A/HRC/RES/23/20, Para.4(c).

migrants, the United Nations Convention on the Law of the Sea of 1982 provides that: “every person found at sea in danger must be protected and rescued”.<sup>210</sup> The use of the phrase every person here in the authors conceptualisation does not discriminate the identity of status of such a person. Furthermore, states have the obligation to ensure the safety of passengers on board a vessel. As a result, shipmasters are required to aid any individual who has been demonstrated to be in danger at sea and has become lost. They also have a responsibility to assist those in trouble if they are notified of their need, provided that such assistance does not imperil the ship, crew, or passengers.

In addition to the other rights offered to migrants, the International Convention on Maritime Search and Rescue (SAR) stipulates that anyone in trouble at sea shall be aided regardless of their nationality, status, or the circumstances in which they are discovered.<sup>211</sup>

b. Equality and non-discrimination

As provided by international human rights law, migrants enjoy freedom from discrimination as is also enjoyed by other citizens irrespective of their race, colour, sex, language, religion, political, national, or social origin or status.<sup>212</sup> The provisions made by some international instruments, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), or the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) are also applicable to migrants if they fall under the category of persons protected by the legal instruments.<sup>213</sup> African regional efforts such as the ACHPR indicate that migrants’ rights must be protected from both state and individual violations.<sup>214</sup>

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<sup>210</sup> Article 98 of the United Nations Convention on Law of the Sea (1982).

<sup>211</sup> Chapter 2.1.10 of the International Convention on Maritime Search and Rescue (SAR)1979. International Commission of Jurists ‘Migration and International Human Rights Law: A Practitioner’s Guide’ (2014) 101.

<sup>212</sup> Article 2(2) of International Covenant on Economic, Social and Cultural Rights.

<sup>213</sup> General Recommendation No. 30: Discrimination against Non-Citizens, UN Doc. CERD/C/64/Misc.11/rev.3 (19 August 2004).

<sup>214</sup> Article 2 of African Charter on Human and Peoples' Rights.



In a bid to further protect the rights of migrants, there is the provision made to protect the rights of a migrant in their workplace.<sup>215</sup> The ILO Declaration on Fundamental Principles and Rights at Work<sup>216</sup> recognises this right:

... all members, even if they have not ratified the ILO conventions in question, have an obligation arising from the very fact of membership in the organization to respect, to promote and to realize, in good faith and in accordance with the constitution, the principles concerning the fundamental rights which are subject of those conventions, namely: (a) freedom of association and the effective recognition of the rights to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

This provision of the ILO declaration protecting the rights of migrant workers in their place of work imposes an obligation without option on members to the declaration whether they have ratified the instrument or not, to ensure that they provide relevant laws in their individual countries for the human rights of migrants and ensure that it is carried out without discriminating against migrants at their workplace. Provisions such as this appear encouraging, but the eventual realisation of this provision by member states to the declaration becomes another challenge as it concerns protecting the right to non-discrimination and dignity of migrants in these various countries.<sup>217</sup>

c. Protection against arbitrary arrest and detention

Restating that rights may not be absolute and that any individual violating legal principles of states should be brought to justice. It is imperative to note that this is only permissible when carried out in accordance with the rule of law. Consequently, no migrant should be subjected to arbitrary treatment by a state in pretence of protection of national policy or laws.<sup>218</sup>

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<sup>215</sup> V Chetail 'Sources of international migration law' in B Opeskin et al (eds) *Foundations of International Migration Law* (Cambridge University Press: 2012) 56-92, 79c.

<sup>216</sup> Article 2 of ILO Declaration on Fundamental principles and rights at work and its follow-up (1998).

<sup>217</sup> Chetail (n 215) 79c.

<sup>218</sup> Article 6 of African Charter on Human and Peoples' Rights; article 7 of the American Convention, Article 9 of the International Covenant on Civil and Political Rights.



The express provisions of Article 9 of the ICCPR provides that every person has a fundamental right to personal liberty and security. Without a valid reason, no one should be held in custody or taken into custody. Only in line with established legal grounds and processes can someone's freedom be removed. It further said that when someone is detained, they must be quickly notified of the circumstances surrounding their detention as well as the existence of any charges against them. It also urges that people who have been detained or arrested on suspicion of a crime be brought promptly before a judge or other judicial official. They are entitled to a fair trial or release after a reasonable amount of time.

Detention of those who are awaiting trial should not be the standard procedure; rather, they should be freed, perhaps with guarantees to assure their attendance during court sessions and, if required, for the implementation of judgements. As a result, everyone who loses their freedom due to an arrest or detention has the right to file a lawsuit in front of a judge. This enables the court to swiftly evaluate whether the person's detention is justified and to order their release if it is not. Those who have been the victims of unlawful imprisonment or arrest have a legal right to compensation for their suffering.

States are restricted from arbitrarily arresting and detaining an individual. Therefore, where situations of arrest arise, the person arrested shall be promptly informed of the reason for the arrest and this should be communicated to such a person in a language they understand. Such a person might potentially initiate legal action so that the court could decide whether the arrest was lawful or not. There is an obligation on the state to show the process of the rule of law that was adhered to in any such instances. There is further a requirement for states to ensure that when migrant's rights are violated arbitrarily, states make efforts to ensure that there is a framework for compensation.<sup>219</sup>

The above-described process is clearly different from a situation where migrants are forcefully detained in pretence of enforcing deportation or repatriation.<sup>220</sup> In its specific provisions, the International Convention on the Protection of the Rights of all Migrant Workers, and Members

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<sup>219</sup> HS Mattila 'protection of migrants human rights: principles and practice' (2002) 38 *International Migration* 53 available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2435.00142> (accessed 15 June 2019).

<sup>220</sup> Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol in respect of *A v. Australia*, communication No. 560/1993 (April 1997) para. 8.2.

of their Families (ICRMW)<sup>221</sup> protects migrant workers and their families<sup>222</sup> from individual and collective arbitrary arrests or detention. It further provides that in such situations, where arrest is seen not to be arbitrary, it must be specifically “prescribed by law”, “pursue a legitimate aim under the ICRMW”, be “necessary in specific circumstances”, and also “proportionate to the legitimate aim”.<sup>223</sup> In addition, the committee further explains that the criminalisation of irregular migration does not constitute a legitimate interest in regulating irregular migration.<sup>224</sup> Thus, there is a framework for how long, a state may detain a migrant in such circumstances.<sup>225</sup>

d. Protection against torture and inhumane treatment

The UDHR abhors any form of action that derogates the dignity of an individual. As earlier indicated, states are obligated to ensure and enforce the protection of the dignity of every individual irrespective of the individual’s status. This obligation, having attained a customary norm of international law does not require state ratification before respecting the obligation.<sup>226</sup>

There is therefore no basis or grounds on which an individual may be subjected to any inhumane treatment or torture. In the same vein, it is provided in the ICCPR, particularly Article 2 (2) that states are not permitted to leverage on war or public emergency to subject any individual to torture. Regionally, the absolute nature of the protection of an individual from torture is enshrined in the ACHPR<sup>227</sup> and the African Charter on the Rights and Welfare of the Child.<sup>228</sup> In addition to the regional efforts mentioned, there is also the African Union Conventions governing specific aspects of refugee problems in Africa.

Migrants in their workplace also enjoy the right to be free from torture and cruel and inhuman treatment,<sup>229</sup> by the provisions of the ICRMW in Article 17(1), which provides that “migrant workers and members of their families who are deprived of their liberty shall be treated with

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<sup>221</sup> Article 16(4) of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

<sup>222</sup> General comment No. 2 on rights of migrant workers in an irregular situation and members of their families General (28 August 2013) para. 23.

<sup>223</sup> General comment No. 2 on rights of migrant workers in an irregular situation and members of their families General (28 August 2013) para. 23.

<sup>224</sup> Mattila (n 219) 53-71.

<sup>225</sup> Mattila (n 219) 53-71.

<sup>226</sup> International Justice Resource Centre ‘Immigration and Migrants’ Rights’ at <https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/> (accessed 15 June 2019).

<sup>227</sup> Articles 2 of ACHPR.

<sup>228</sup> Article 23 of ACRWC.

<sup>229</sup> Article 10 of ICRMW.

respect for the inherent dignity of the human person and for their cultural identity”, it extends such rights to the period of a migrants’ detention.

In meeting the above obligations, states are consequently required to ensure that the situation of migrants are made comfortable to the minimum core. Minimum core in this wise includes, ensuring that migrants are provided access to water, food, and medical care at every point while they are in detention or awaiting documentation process. Additionally, migrants must not be denied the right to access information and family communication when needed.<sup>230</sup>

e. Non-refoulement

The doctrine of non-refoulement is another customary norm of international law that does not permit a fleeing migrant to be repatriated or returned to the state of origin. This comes into play when it is clear that such actions would subject the individual to political persecution or places the individual in reasonable danger for fear of the violation of the right to life.<sup>231</sup> The doctrine of non-refoulement is grounded in several international treaties such as the Convention Against Torture<sup>232</sup> and the American Convention on Human Rights.<sup>233</sup>

Notwithstanding that this principle tends to focus more on persons with refugee status, it could be broadly interpreted to also cover migrants who do not have refugee status. Apart from risks of war or insurgence, where a person would face inhumane or degrading treatment or even limited medical treatment upon refoulement, the right to non-refoulement should not be ignored.<sup>234</sup> “The application of this principle also comes to bear extraterritorially whenever states hold individuals abroad, including in the context of armed conflict or offshore detention in refugee detention facilities, even with migrants who do not have refugee status”.<sup>235</sup>

f. Prohibition against collective expulsion

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<sup>230</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families General (28 August 2013) para 36-48.

<sup>231</sup> Article 33(1) of Convention Relating to the Status of Refugees, known as the 1951 Refugee Convention or the Geneva Convention

<sup>232</sup> Article 3 of Convention Against Torture

<sup>233</sup> Article 22 (8) of American Convention on Human Rights.

<sup>234</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families General (28 August 2013) CMW/C/GC/2 (2013) para 50.

<sup>235</sup> UN general assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment (7 August 2015) UN Doc, A/70/303 (2015) para 38.

As with the doctrine of non-refoulement, states are prohibited from subjecting any group of people to collective expulsion. This is because it is also one of the rights of migrants that has attained the status of customary international law. Consequently, non-ratification of a treaty is not inviolable in this instance.<sup>236</sup> Migrants within the African region are specifically protected also in the ACHPR.<sup>237</sup> The ambit of the enforcement of these migrant rights expands to migrants that are in transit. Thus, migrants that are accosted in the sea or on land are to be protected from collective expulsion.<sup>238</sup> In any circumstance, when this right is violated, states are mandated to ensure proper institutional redress for migrants who have been subjected to such violations.<sup>239</sup>

The provisions of Article 22 of the ICRMW provides the basis on which a migrant could be expelled. It is underscored that such procedures must be carried out in a respectful manner and within the language that the migrant is able to comprehend. Additionally, such proceedings must be conducted with all the aspects of the doctrine of a fair hearing in place and “permitting the individual to settle claims”,<sup>240</sup> within a reasonable time before or after their departure.<sup>241</sup> This position has received the support of the African Commission on Human and Peoples’ Rights when it held that a migrant has the right to have their cause heard before being expelled.<sup>242</sup>

g. Protection against labour exploitation

Another important migrant right is to ensure a decent work experience for migrants and guaranteeing that they are not subject to exploitation. The ILO and the ICRMW are core institutions that abhor such violations of the rights of migrants. In addition to several other rights that must be upheld for migrant workers, the ICRMW stipulates that freedom from "slavery and servitude" of workers is one of those rights.<sup>243</sup> An exception is provided in article

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<sup>236</sup> M Kamto ‘Third Report on the Expulsion of Aliens’ UN DOC. A/CN.4/581(19 April 2007) para 115.

<sup>237</sup> Article 12 (5) of African Charter on Human and Peoples’ Rights.

<sup>238</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, General Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (28 August 2013) para 51.

<sup>239</sup> Articles 2 and 3 of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005).

<sup>240</sup> Article 9 (1) of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

<sup>241</sup> Article 22 (6) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

<sup>242</sup> Communication No. 313/05, *Good v. Republic of Botswana*, forty-Seventh Ordinary Session

<sup>243</sup> Article 11 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

11 (C) to the effect that "any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the state concerned".

The interests of migrant workers are clearly protected by this provision, ensuring that they are not taken advantage of in countries where they are not citizens. It also protects migrant workers' families in situations where they are most at risk, but it does not cover them when the host country imposes forced labour as part of a criminal penalty given by an appropriate court.

Article 8 of the ICCPR states that no one shall be held in slavery or servitude. The combined effect of the provisions, therefore, makes it obligatory for states to ensure that no form of forced or compulsory labour is permissible within the territory irrespective of the status of the migrant.<sup>244</sup> This position also covers and protects children of migrant workers who are protected from all forms of child labour and abuses.<sup>245</sup>

#### h. Right to primary education

The right to primary education is compulsory and immediate. This right finds expression in the wordings of the CRC particularly, Article 28(1) which makes primary education free and compulsory. There is therefore no exception to the right of access to primary education by a child within a state, as the status of the child is not to be considered in the promotion and fulfilment of this obligation on the state.<sup>246</sup>

The position of the Committee on Child Migrant Workers (CCMW) also buttresses this position, when it found that "there is an obligation on states to ensure the migration status of a child or a child's parents does not prevent the child from receiving education".<sup>247</sup> To give effect to this obligation, states are encouraged to eliminate all forms of barriers that may limit the realisation of access to primary education. Some of these limiting factors include, cost of

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<sup>244</sup> Article 11 of the C029 - Forced Labour Convention, 1930 (No. 29).

<sup>245</sup> UN Committee on the Rights of the Child, *Report on the 2012 Day of General Discussion on the Right of all Children in the Context of International Migration* (28 September 2012) para 90.

<sup>246</sup> Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

<sup>247</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, General Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (28 August 2013) CMW/C/GC/2 (2013) para 75-77.

education, distance, cultural and policy restrictions.<sup>248</sup> Consequently, schools are not under any obligation to provide authorities with information on the immigration status of children enrolled in the schools.<sup>249</sup>

i. Freedom of movement

Freedom of movement is a fundamental right that has some limitation attached to it. However, the limitations must be carried out within the confines of a legitimate premise and in adherence to the rule of law. Despite this restriction, a state cannot arbitrarily deny a migrant of this right.<sup>250</sup> A migrant must, however, be subject to the territorial limitations and decisions of the state while exercising this right. A migrant should consequently not be prevented from returning willingly to the state of origin.<sup>251</sup>

The right to move around freely is as good as life itself; therefore, migrants are also entitled to the right to freedom of movement within the territory of the state in which they are located, the right to leave a state,<sup>252</sup> and the right to return home to their own state. This right however does not imply arbitrary entry and exit of persons into the territory of a country without due process.

j. Right to enjoy culture in community with others

Recognising that every individual has ethnic and cultural affiliations in addition to religious and cultural belief systems, it is crucial to consider the conditions of a migrant and inversely of the child. A migrant is therefore expected to have the right to hold beliefs and practise cultural identity.

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<sup>248</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, General Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (28 August 2013) CMW/C/GC/2 (2013) para 75-77

<sup>249</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, General Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (28 August 2013) CMW/C/GC/2 (2013) para 75-77.

<sup>250</sup> General Comment No 15 on the Position of Aliens under the Covenant, Committee on Civil and Political Rights (11<sup>th</sup> April 1986) para 5.

<sup>251</sup> General Recommendation No. 22 on article 5, and Refugees and Displaced Persons, UN Committee on the Elimination of Racial Discrimination (24 August 1996) UN Doc. A/54/18 (1996).

<sup>252</sup> Article 12 (3) of the International Covenant on Civil and Political Rights.

In the case of *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development*,<sup>253</sup> the courts reiterated the need to ensure that children are not made to suffer for the wrongs of their parents and denied their rights and in this instance, the right to access education. As a result, this right is safeguarded by international law, specifically the ICCPR, which does the same for other rights, including language rights.<sup>254</sup>

The protection of these rights pertains to every individual irrespective of immigration status within any state.<sup>255</sup> Consequently, states are under obligation to take deliberate steps policy wise to ensure that the rights of migrants belonging to minority linguistic and religious groups must be protected.<sup>256</sup>

### **2.3.3 Permissible restrictions on migrants' human rights**

It is settled that human rights are not absolute, save for the exception of the right to dignity and prevention from torture. It is also reiterated that for such derogation to be permissible in law, it must follow the regime of the rule of law which complies to lay down national and international standards. This implies that states must not act arbitrarily in curtailing the rights of migrants. In permitting derogation, states are required to share clear objective of legitimate state aims and needs.<sup>257</sup> This provision however, does not foreclose the understanding that human rights of every individual must be enforced and protected despite the immigration status of the individual.<sup>258</sup> As already advanced in this thesis, the core area of distinction remains the participation in the political process of the receiving states by a migrant while noting that the migrant is not precluded from participating in the political process of the home state.<sup>259</sup>

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<sup>253</sup> *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

<sup>254</sup> General Comment No. 23: Article 27 (Rights of Minorities), Human Rights Committee (8 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 5.1.

<sup>255</sup> General Comment No. 23: Article 27 (Rights of Minorities), Human Rights Committee (8 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 5.2.

<sup>256</sup> General Comment No. 23: Article 27 (Rights of Minorities), Human Rights Committee (8 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 6.1-6.2.

<sup>257</sup> General Recommendation No. 30: Discrimination against Non-citizens, Committee on Elimination of Racial Discrimination (19 August 2004) UN Doc. CERD/C/64/Misc.11/re.3 (2004).

<sup>258</sup> General Comment No 15 on the Position of Aliens under the Covenant, Committee on Civil and Political Rights (11th April 1986) Para 5.

<sup>259</sup> Article 41 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)



## 2.4 Challenges to the recognition of migrant rights globally and in Southern Africa

Adherence to the principles of the rule of law and respect for the fundamental rights of the individual is a core basis for measuring the societal adherence to democratic principles. Despite this position, the level of abuse and violation of migrant workers continues to increase.<sup>260</sup> With the presence of many migrants outside their states of nationality, it is still observable that the “legal application of human rights norms to non-nationals remains inadequate or seriously deficient, and the same is the case with its application on persons with irregular migrant status”.<sup>261</sup>

The increasing nature of racial and xenophobic attacks on migrants remains worrisome and perhaps calls for more concerted efforts internationally to curb this scourge. The need to ensure the existence of political will in following through on the letters of various legal regimes that are applicable with respect to migrants is one that is re-emphasised. The challenge of political will remains the most evident premise for the non-realisation of state treaty obligation in this respect and thus continues to limit the developmental potentials that migrants offer to host states.<sup>262</sup>

According to Adamson, “the prevalent resistance to the recognition of the human rights of migrants is bound up in the exploitation of migrants in marginal, low-status, inadequately regulated or illegal sectors of economic activity”.<sup>263</sup> Adamson’s position is further reinforced by recognising that unauthorised migrants are subjected to the prohibited forced labour and near slavery standards in their working conditions.

Another challenge is the seeming reluctance to adhere to human rights standards and approaching issues that affect migrants from a rights perspective. This dismal attitude includes states’ inability to adhere to the recommendation of various ILO regulations as it pertains to migrant workers. Some of the reasons advanced by states as the basis for this include arguments based on socioeconomic restrictions and obligations.<sup>264</sup> Other reasons advanced include the inability to put in place requisite infrastructures that can conveniently meet the needs of both

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<sup>260</sup> Taran (n 7) 11.

<sup>261</sup> Taran (n 7) 11.

<sup>262</sup> Taran (n 7) 11.

<sup>263</sup> FB Adamsom *et al* ‘The Limits of the Liberal State: Migration, Identity and Belonging in Europe’ (2011) 37 *Journal of Ethnic and Migration Studies* 843 at <https://www.tandfonline.com/doi/abs/10.1080/1369183X.2011.576188> (accessed 15 June 2019).

<sup>264</sup> Adamsom *et al* (n 263) 843-859.



nationals and migrants. Clear examples of these are seen in the education and health care sectors which ordinarily require financial intervention from states to meet the laid down obligations.

Despite these limitations advanced by states, there seems to be a general agreement for states to ensure that the rights of migrant workers are comprehensively protected. As assessed by Ryszard Cholewinski, the various obstacles to the recognition of the human rights of migrants are:<sup>265</sup>

That the ICMW (1990 convention) is a complex and detailed instrument, and contains new wording, which in many cases departs from established human rights language. Secondly, the recent proliferation of specific human rights conventions hardly facilitates the acceptance of the ICMW's sizeable text. Technical questions alone, therefore, may prevent many states from speedily accepting its provisions. Thirdly, the lack of publicity about the ICMW has also contributed to misconceptions about the purpose of the instrument.

Aside from the above, another key basis for the violation of migrant rights and the seeming helplessness of states is the lack of awareness and promotional efforts. The perspective from which the thesis accepts this position is anchored on the lack of a consultative approach adopted by most states in entering either bilateral or multilateral treaties. There is the need to ensure that citizens and all major stake holders in a country are involved in the process of either domestication of treaties or formulation of policy documents and procedures for protecting the rights of migrants as may be enshrined in the treaties.<sup>266</sup>

According to the United Nations Secretary-General report on the implementation of general assembly resolution A/RES/68/179 on the protection of migrants' rights in 2014, protecting the rights of migrants continues to loom large. Despite the identification of laudable initiatives by states the situation of migrants within state borders remains limited. This is the view of the

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<sup>265</sup> R Cholewinski *Migrant Workers in International Human Rights Law Their Protection in Countries of Employment* (Oxford University Press: 1997) 202.

<sup>266</sup> Handmaker (n 149).

Centro de Estudios Legales Sociales (CELS) in their report to the United Nations Secretary-General, where it was stated that:<sup>267</sup>

...the implementation of a UN resolution on the protection of migrants' rights, borders have been seen and treated as the quarters in which immigration control takes precedence over compliance with human rights standards. The security process, which views migration as a challenge to security, tends to make legitimate the increasing use of detention and methods of interception and return that are not subject to judicial control. As a result of this, migrants who have been victims of mistreatment at border zones are often not afforded the opportunity for redress if they are subsequently removed from the country where the abuse took place, thus contributing to the culture of impunity.<sup>268</sup>

The implication of the above is that migrants' rights remain violated within state boundaries and ports of entry, where deprivation of fundamental rights and subjection of individuals occurs.<sup>269</sup>

It is important to state, therefore, that seeing illegal entry as a crime and the subsequent imposition of penalties that violate migrant rights along the border of countries should not be encouraged.<sup>270</sup> The overall effect of this is that grave violations which negate states' obligation under international law are reinforced and this has a way of inspiring the perpetration of crimes against migrants by nationals.<sup>271</sup>

## **2.5 Overcoming these challenges and the way forward.**

Notwithstanding the obvious challenges faced by migrants in situations where states do not effectively enforce or show an interest in efficiently enforcing the available human rights as provided by various international and regional instruments, one is left with the concern of what steps could be taken to ensure the proper enforcement and realisation of migrants' human rights.

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<sup>267</sup> Contribution of the Centro de Estudios Legales y Sociales to 'Challenges and best practices in promoting and protecting the human rights of all migrants at international borders the United Nations secretary-general report on the implementation of the general assembly resolution A/RES/68/179 on the protection of migrants' (2014) at [https://www.ohchr.org/Documents/Issues/Migration/GA69thSession/CELS\\_PDBI.pdf](https://www.ohchr.org/Documents/Issues/Migration/GA69thSession/CELS_PDBI.pdf) (accessed 15 June 2019).

<sup>268</sup> Contribution of the Centro de Estudios Legales y Sociales (n 267).

<sup>269</sup> Contribution of the Centro de Estudios Legales y Sociales (n 267).

<sup>270</sup> Contribution of the Centro de Estudios Legales y Sociales (n 267).

<sup>271</sup> *Velez Loor v Panama* (3 November 2010) para 146.

Sustenance of the efforts by states based on the regional and international treaty obligations must be encouraged. The effect of this adherence would see states put in place institutional frameworks and policy safeguards to ensure that migrants are protected within the territory of states. In elucidating this process, the following processes are advanced as possible avenues. The building of the institutional frameworks would result in the engagement of special procedures laid down to monitor state performance in Universal Peer Reviews (UPR) and State Reporting mechanisms before treaty bodies.<sup>272</sup>

At the regional level, the African Union should through its organs like the Peace and Security Council ensure that conflicts and wars are limited and not allowed to push individuals from seeking migration induced by conflicts. The process of the developmental policies of states should also be monitored closely through efforts like the African Peer Review Mechanism (APRM) which would provide sufficient monitoring of state efforts and the situation of migrants within member states.

Another important area to be looked at is the need for cooperation among African States particularly in the spirit of Ubuntu. More bilateral agreements and free trade policies are encouraged by states, as replicated in the various sub-regional groups on the continent. Additionally, efforts should be made to promote states' adherence to regional and international instruments that protect migrants and encourage cooperation between security services, especially for more effective border controls.<sup>273</sup>

Nationally there is the urgent need for states to enhance access to educational services by curbing or limiting the negative effects of corruption on state policies.<sup>274</sup> Where states are genuinely unable to achieve these obligations, the suggestion of Taran, that:

“There is a need to create mechanisms for the strengthening of links between the countries of origin and African communities in the diaspora. Inter-sectorial or inter-ministerial coordination and dialogue

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<sup>272</sup> *Velez Loor v Panama* (3 November 2010) para 146.

<sup>273</sup> The Revised Migration Policy Framework for Africa and Plan of Action (2018-2027) Draft available at [https://www.ilo.org/africa/areas-of-work/labour-migration/policy-frameworks/WCMS\\_671952/lang--en/index.htm](https://www.ilo.org/africa/areas-of-work/labour-migration/policy-frameworks/WCMS_671952/lang--en/index.htm) (accessed 15 June 2019).

<sup>274</sup> Taran (n 7) 38.

should be improved by establishing a central body to manage migration.<sup>275</sup>

As much as states need to put all these mechanisms in place, there is a need for routine review within the ministries to mitigate the influence of bureaucracy and corruption on the practical implementation and realisation of these rights.

## **2.6 Conclusion**

The history of migrant rights demonstrates the complicated and dynamic nature of human movement and its impact on societies throughout history. People's motivations for migrating are varied and can be influenced by economic, social, political, and environmental variables. Understanding these motives is critical for developing successful policies that address migrants' needs and rights.

The environment of migrants' human rights is marked by a wide disparity between international human rights norms and migrants' real experiences. Migrants frequently confront a variety of difficulties, including discrimination, exploitation, limited access to basic services, and insufficient legal protection. This emphasises the importance of establishing a comprehensive framework that recognises and respects the rights of all migrants, regardless of their legal status.

The acknowledgment of migrant rights faces various hurdles both globally and in Southern Africa. These difficulties include restrictive immigration rules, xenophobia, criminalisation of irregular migration, and a lack of international collaboration in tackling migration-related concerns. These factors contribute to migrants' vulnerability and marginalisation, making it difficult to guarantee that their rights are respected and preserved.

Regardless of their nationality, migrant status, or assessed category, all human beings should not be deprived of their basic human rights. Although there may be certain limitations on civil and political rights, migrants are entitled to fundamental human rights, international instruments provide safeguards for ensuring the right to education for migrants, recognising their status both as human beings and as migrants. It is crucial to implement and uphold the recognition of migrants' human rights at the national level, in alignment with international and regional legal

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<sup>275</sup> Ibid.

instruments, to effectively protect these rights, considering the enduring nature of migration. States should establish institutions and mechanisms dedicated to safeguarding the human rights of migrants.

The right to education is guaranteed to children, regardless of their immigration status. While addressing irregular migration for security and developmental concern, states must ensure that the rights of migrants, as guaranteed by international conventions, regional treaties, and national laws, are not violated. Harmonising national laws with international standards is essential in this regard.

The Geneva Convention acknowledges the right of individuals to migrate between countries, but states establish conditions for internal movement within their territories, in compliance with international legal standards. Despite the existence of adequate provisions for these rights at various levels, this research reveals persistent challenges that impede the full realisation of the human rights of migrants. However, potential solutions to these identified challenges have been proposed, raising hope for positive change upon implementation.

Documentation grants migrant various legal rights, but certain bureaucratic procedures in South Africa often make this process open to expelling migrants. I refer to this phenomenon as “bureaucratic xenophobia”. Both bureaucratic xenophobia and xenophobic attacks violate human rights’ laws. Similar xenophobic attacks have also occurred in the DR Congo, specifically targeting Rwandan Tutsis due to their distinct physical features. However, such incidents are not as recurrent as in South Africa.

Overcoming these difficulties necessitates a multifaceted approach that includes policy changes as well as societal improvements. It is critical for countries to implement inclusive, rights-based migration policies that promote migrants' well-being and dignity. This entails establishing legal migration routes, combatting discrimination and xenophobia, and ensuring access to important services such as healthcare and education. Furthermore, developing international cooperation and discourse is critical in dealing with the transnational aspect of migration. Countries must collaborate to create common frameworks and standards that protect migrants' rights, enable regular migratory pathways, and combat human trafficking and smuggling.

While treaties and national laws alone cannot eliminate discrimination against migrants, additional measures such as education and awareness raising campaigns on migrant rights are crucial. It is essential to educate immigration officials, as well as teachers, school children and university students, on these matters.

Civil society, non-governmental groups, and human rights advocates are critical in pushing for migrant rights and holding governments accountable. They can help migrants, raise awareness about their rights, and push for legislative changes that prioritise human rights and dignity.

To summarise, recognising and safeguarding migrants' rights is not only a legal and moral necessity, but also critical for establishing inclusive, diverse, and prosperous countries. We can create a more just and equitable society for migrants and their host communities by addressing the historical, social, and economic issues that drive movement, removing barriers to recognising migrant rights, and adopting a holistic approach that prioritises human rights.

## CHAPTER THREE: OVERVIEW OF THE RIGHT TO PRIMARY EDUCATION

### 3.1 Introduction

This chapter discusses from a general perspective the notion of education as a concept with a view to further arguing why education is a fundamental right for migrant children. The chapter discusses concepts such as the 4A's theory of education, inclusive education and finally, it draws inferences to establish the perspective of various international law treaties in given ambit to the question of compulsory education as could be linked to migrant children.

It is important to reiterate that education plays a vital role in the personal development of individuals and in the general well-being of all societies. Building on the classical rights nature of the right to education, it is understood that for every person, education is essential to the enjoyment of their dignity and all their fundamental rights. The importance of education as conceptualised implies that education has the potential to sustain the culture of a people and lead to emancipation.<sup>276</sup>

Similarly, in the words of Mandela, "education is a tool for transformation and enhancing the capacity of a child".<sup>277</sup> Hansungule and Onuora-Oguno contend that if education is to reach its full potential, it must be viewed as a human right rather than a human capital.<sup>278</sup> This position is fundamental to this thesis as migrant children would be unable to reap the benefits of education if it is treated as a human capital. There is a need to ensure that education is treated from a human rights perspective to ensure that migrant children can take full advantage of education without let nor hindrance.<sup>279</sup>

Primary education is obligatory or legally binding on states in international law. States are bound to provide for it regardless of the immigration status of the child and regardless of the

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<sup>276</sup> K Tomaševski Annual report of the Special Rapporteur on the right to education, , submitted pursuant to Commission on Human Rights resolution, Economic and Social Council 2001/29 (7 January 2002) E/CN.4/2002/60 para.59 at <https://digitallibrary.un.org/record/457788?ln=en#record-files-collapse-header> (accessed 22 May 2021).

<sup>277</sup> <https://borgenproject.org/nelson-mandela-quotes-about-education/> (accessed 27 May 2021).

<sup>278</sup> Read generally M Hansungule and AC Onuora-Oguno 'Education as Human Capital or Human Rights in Africa' in Onuora-Oguno A C (eds) *Development and the Right to Education in Africa* (2018)

<sup>279</sup> Hansungule and Onuora-Oguno (n 278).

financial situation of the state.<sup>280</sup> The importance of primary education was reaffirmed by the UDHR in its Article 26 that states that everyone has the right to education and that primary education shall be free and compulsory.

Since 1948, the right to education has been recognised in many international covenants and treaties. The international standard of the right to education was strengthened with the coming into effect of the CESCR.<sup>281</sup> Particularly, Article 13 of the CESCR is the core provision of the right to education. The scope of the right is further elucidated in the General Comment No 13 that accentuates concepts like availability and access. Similarly, the CRC follows suit by advocating for the full development of the individual, these provisions are also akin to the provisions of the ACRWCR.<sup>282</sup>

According to the CESCR Committee, the enumeration of the first paragraph of Article 13 means that states parties agree that any teaching, “whether public, private, formal or non-formal”,<sup>283</sup> must strive towards the achievement of these fundamental goals. The expression of such purposes was intended to counter the use of education systems for the purposes contrary to those of the Charter of the United Nations and those of human rights, such as racism, discrimination, xenophobia, intolerance and calls for genocide and crimes against humanity.<sup>284</sup>

Article 13 of the CESCR emphasises the responsibility of states to acknowledge, recognise, and support the right to education for everyone. The same article reinforces that education should empower people to fully participate in a free society and reinforce respect for human dignity. Article 13 (3) of the CESCR supports the UDHR’s provision that states should recognise the right of parents and guardians to opt for non-public schools for their children.<sup>285</sup>

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<sup>280</sup> Hansungule and Onuora-Oguno (n 278).

<sup>281</sup> MS Villeneuve 'Les politiques de la Banque Mondiale dans le domaine de l'éducation et le droit de l'enfant à l'enseignement primaire : vers la réalisation ou la violation de ce droit dans les pays en développement ? ' 40 (Master dissertation, university Quebec/Montreal 2006) at <https://archipel.uqam.ca/2895/1/M9506.pdf> (accessed 25 May 2021).

<sup>282</sup> The International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child.

<sup>283</sup> OHCHR General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 para 4.

<sup>284</sup> Villeneuve (n 281) 40.

<sup>285</sup> Centre on Global Justice for the Global Citizenship Commission 'Article 26: The Education Provision Appendix E to the Report of the Global Citizenship Commission' (2016) *open book publishers* 4 at <https://www.openbookpublishers.com/shopimages/The-UDHR-21st-C-AppendixE5.pdf> (accessed 20 October 2020).



Additionally, the CRC committee focuses on a child friendly education,<sup>286</sup> aligning with Article 26 of the UDHR, the importance of education designed to enhance a lifelong learning practise. This is also followed up with the ACRWC placing obligations on a child. The combined effect is that education delivered must prepare a child for lifelong learning.<sup>287</sup>

The Convention on Combating Discrimination in Education, established within the framework of UNESCO in 1960, aimed to address a broad range of issues, including the promotion of equal opportunities in education and adherence to national laws as outlined in the treaty. This underscores the principle that no form of discrimination should be tolerated in denying anyone their inherent right to education.<sup>288</sup> Consequently, all legislative and policy measures discriminating against migrant children must be reassessed in accordance with the treaty's provisions, ensuring fair and equitable treatment for all children regardless of their status.<sup>289</sup>

A holistic interpretation of these provisions suggests that education should encompass all aspects of learning to equip children with the necessary skills to contribute positively to society.<sup>290</sup> This perspective is echoed by Onuora-Oguno in his analysis of Article 26 of the Universal Declaration on Human Rights (UDHR), wherein he argues that true education should empower individuals to make a meaningful impact on themselves and society.<sup>291</sup>

Marie Françoise Valette highlights that the UDHR introduced the right to education, with debates during its development emphasizing the inclusion of all forms of learning, not just primary education.<sup>292</sup> Although the term "instruction" was initially considered, it was ultimately excluded from the UDHR text.<sup>293</sup> An important aspect of the UDHR provision on education is the freedom of parents to choose the type of education for their children, which encompasses

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<sup>286</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1.

<sup>287</sup> Ibid.

<sup>288</sup> UNESCO 'Implementing the Right to Education, A Compendium of practical examples' (2010) Based on the Seventh Consultation of Member States on the implementation of the Convention and the Recommendation against Discrimination in Education 10.

<sup>289</sup> UNESCO (n 288).

<sup>290</sup> UNESCO (n 288).

<sup>291</sup> Onuora-Oguno (n 1) vii.

<sup>292</sup> MF Valette 'The right to education to the test of migration in France' (2018) 34 *European Journal of International Migration* at <http://journals.openedition.org/remi/11712> (accessed 29 April 2021).

<sup>293</sup> Ibid 34.

issues such as language preference, attire choices like wearing Hijab, or cultural practices like nose rings.<sup>294</sup>

Considering that migrants are often people of different opinions from their host states, these conflicts would always arise. This issue was a source of divergence that emerged during the preparatory work of the UDHR, on whether minorities should have the right to receive education in their own language when it is different from that of the majority.<sup>295</sup> This is equally important to this thesis as no child is to be subjected to an education that derogates from the child's dignity or religious beliefs. Therefore, as a matter of fundamental rights, migrant children must not be exposed to educational processes that infringe on such rights.

### 3.2 Migrant's Right to education in South Africa

Every child, regardless of ethnicity, social origin, or legal status, has an inalienable right to a basic education. South Africa's national policy requires that a child submit certain documentation for school enrolment.<sup>296</sup> Yet, for most migrant children, this endeavour has proven daunting, as numerous lack the requisite paperwork. Although documentation may vary, the primary concern regarding school enrolment revolves around identity papers, study visas, refugee documentation, and asylum seeker documentation.<sup>297</sup> Additionally, migrant students encounter hurdles in accessing fundamental education due to various factors, such as ambiguous legislative and regulatory frameworks, legal deficiencies, administrative and socioeconomic obstacles, school funding models, inadequate awareness of pertinent laws and policies, and a failure to differentiate between basic service provision and immigration matters.<sup>298</sup>

While concluding its observations on South Africa in 2018, the Committee on Economic, Social, and Cultural Rights expressed concern over the large number of undocumented migrants, refugees, and asylum seekers who are not enrolled in school. The state should,

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<sup>294</sup> Valette (n 292) 34.

<sup>295</sup> Valette (n 292) 34.

<sup>296</sup> South Africa Human Rights Commission. Position Paper. *Access to a Basic Education for Undocumented Learners in South Africa*. September 2019.

<sup>297</sup> South Africa Human Rights Commission. Position Paper. *Access to a Basic Education for Undocumented Learners in South Africa*. September 2019.

<sup>298</sup> CESCR Concluding observations on the initial report of South Africa as approved by the Committee at its 58th meeting (29 November 2018) E/C.12/ZAF/CO/1 para 73.

according to the Committee, “ensure that all migrant, refugee and asylum-seeking children have access to education regardless of their immigration status”<sup>299</sup>.

According to the Consortium for Refugees and Migrants in South Africa, migrant children in South Africa have a difficult time accessing education.<sup>300</sup> This is in violation of international agreements that state that all children, regardless of their socioeconomic level, should have access to education.<sup>301</sup> All children have the right to a quality education that recognises diversity and does not discriminate based on gender, disability, national origin, or their parents' political affiliations, according to the 1949 United Nations Declaration on Human Rights and the 1989 Convention on the Rights of the Child. This means that migrant children, who may not have formal citizenship status in the host country, still have a right to education. Yet some countries deny migrant children the right to an education.<sup>302</sup> Access to education for refugee children is a significant barrier and impediment to the implementation of Universal Primary Education in South Africa.

South Africa is a signatory to several international conventions and treaties that safeguard refugee rights, including the 1951 United Nations Convention on the Status of Refugees and its 1967 Protocol, as well as the 1969 Organization of African Unity Convention (OAU). The Refugees Act of 1998 guarantees refugees the right to health treatment and education.<sup>303</sup> However, children of migrants have been deprived of educational opportunities due to their immigrant status, and they have faced challenges in completing their education in South Africa. This situation is particularly exacerbated in urban areas, where school's available spots are limited.<sup>304</sup> Additionally, numerous school principals hold the belief that admitting these children into their schools would be unlawful due to the disposition of immigration laws that forbids schools to register undocumented foreigners.<sup>305</sup>

The lack of access to education for children is a key impediment to achieving Universal Primary Education. Due to a lack of documents and their refugee status, children experience challenges

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<sup>299</sup> UN CESCR Concluding observations on the initial report of South Africa as approved by the Committee at its 58th meeting (29 November 2018) E/C.12/ZAF/CO/1 para 73.

<sup>300</sup> CoRMSA 2011.

<sup>301</sup> CoRMSA 2011.

<sup>302</sup> CoRMSA 2011.

<sup>303</sup> Section 27 of the refugee Act.

<sup>304</sup> Refugee Children in South Africa.

<sup>305</sup> Section 39 of the South African Immigration Act.

in enrolling in public schools, and once enrolled, they receive little or no support, notably from the government and schools.<sup>306</sup> Many learners drop out of school due to a lack of funds. Physical access (lack of infrastructure), economic barriers (inability to cover educational costs), and regulatory barriers or inability to meet enrolment requirements (lack of documentation: birth certificates, immunisation records, report cards) are all cited by Buckland (2011) as barriers to children's access to education.<sup>307</sup>

### 3.3 Migrant's right to education in the DR Congo

The Great Lakes Region has witnessed one of the largest human migration situations on the African continent and, indeed, in the world. This is a result of the combination, over the past two decades, of generalised violence among the various groups under arms, inter-community conflicts and disputes for access to resources, the weakness of nation states and the absence of any mechanisms for guaranteeing the rights of the local populations.<sup>308</sup>

The humanitarian emergency in the east of the DR Congo and the political and security crises in Burundi have created a dramatic deterioration in the affected population's daily lives and, in this context, not surprisingly, the fundamental rights of children is a secondary consideration. Despite their relevance, families who are forced to move homes frequently can scarcely put education at the top of their list of priorities. The reason may simply be the lack of accessible schools, but, most usually, comes down to a lack of resources.<sup>309</sup>

The Congolese education system is plagued by low coverage and poor quality. 3.5 million children of primary school age are not in school, and of those who do attend, 44 percent start school late, after the age of six. National data indicate that only 67 percent of children who enter first grade will complete sixth grade. Of those who reach 6th grade, only 75 percent will pass the exit exam<sup>310</sup>.

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<sup>306</sup> S Buckland 'From policy to practice: The challenges to educational access for non-nationals in South Africa' (2011) 4 *International Journal of Educational Development* 367-373 at <https://www.sciencedirect.com/science/article/pii/S073805931100006X> (accessed 20 June 2020).

<sup>307</sup> Ibid.

<sup>308</sup> BM Lututala 'Les migrations en Afrique centrale : caractéristiques, enjeux et le développement des pays de la région' (2007) 10 at <https://www.migrationinstitute.org/files/events/lututala.pdf/@@download> (accessed the 20 March 2020).

<sup>309</sup> USAID Report on Education in DRC, 2021 at <https://www.usaid.gov/democratic-republic-congo/education> (accessed 15 November 2021).

<sup>310</sup> USAID Report on Education in DRC, 2021 (n 309).

Moreover, children in conflict-affected provinces suffer more severely than other when it comes to school attendance with 50 percent of out of school children globally being in conflict-affected provinces.<sup>311</sup> In this instance, the Committee on the Elimination of Discrimination against Women recommended that the DR Congo address the particular requirements of internally displaced women and girls, including their necessities for humanitarian assistance, and guarantee their adequate access to health services, education and sustainable employment prospects.<sup>312</sup>

Financial obstacles emerge as the primary impediment to education in the DR Congo. Although the government has pledged to finance education for all, it proves inadequate as parents are frequently tasked with financially supporting teachers' salaries. Additionally, indirect expenses such as uniforms and materials, as well as opportunity costs are expensive; consequently, parents facing financial constraints often opt to remove their children from school. The economic obstacle is particularly significant for migrants who grapple with financial sustainability, resulting in their children ultimately being unable to attend school.<sup>313</sup>

The Research Base (2016) underscored the compounding effect of poverty, revealing that while girls from the poorest quintile are the least likely to attend school, both boys and girls from the wealthiest quintile (especially those residing in urban areas) demonstrate the highest likelihood of completing primary education.<sup>314</sup>

Education is commonly perceived as a gateway to a brighter and more promising future, offering opportunities for personal growth, economic advancement, and social mobility. However, despite its critical importance, access to education remains out of reach for nearly 7 million children between the ages of 5 and 17 due to poverty.

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<sup>311</sup> USAID Report on Education in DRC, 2021 (n 309).

<sup>312</sup> UN Committee on the Elimination of All Forms of Discrimination against Women, CEDAW/C/COD/CO/8 (6 August 2019) Concluding observations on the eighth periodic report of the Democratic Republic of the Congo para 49.

<sup>313</sup> UN Committee on the Elimination of All Forms of Discrimination against Women, CEDAW/C/COD/CO/8 (6 August 2019) Concluding observations on the eighth periodic report of the Democratic Republic of the Congo para 49.

<sup>314</sup> USAID Report on Education in DRC, 2021 (n 309).

Since 2019, primary education is free but parents still bear the financial burden of indirect expenses associated with supporting their children's education. There exist significant economic disparities among families, leading to an unequal distribution of educational institutions and infrastructure throughout the country.<sup>315</sup>

Besides the financial factor, political instability and natural disasters have hindered the DR Congo's efforts to achieve universal primary education for its children. Additionally, concerns regarding the quality of education persist, with a low proportion of qualified teachers and high rates of repetition and dropout among schoolchildren.<sup>316</sup> Furthermore, other socio-cultural barriers and vulnerabilities such as child labour, child marriage, health conditions, and teenage pregnancies encompass a range of factors that hinder children's participation in schooling and contribute to educational disparities.<sup>317</sup>

Child labour, for instance, forces many children to prioritise work over education, often leading to their exploitation and exclusion from formal schooling. The need to contribute to family income or support household chores can compel children, especially those from economically disadvantaged backgrounds, to forego their right to education in favour of fulfilling immediate economic needs. Similarly, child marriage poses a significant barrier to girls' education, as it often results in early withdrawal from school and undermines their opportunities for personal development and empowerment. Girls who are married off at a young age are typically denied the chance to continue their education and are instead expected to assume domestic responsibilities and childcare duties.<sup>318</sup>

Additionally, teenage pregnancies present a major obstacle to girls' education, as they often lead to school dropout due to social stigma, lack of support, and practical difficulties associated with pregnancy and motherhood. Pregnant girls may encounter discrimination or exclusion from school, depriving them of the opportunity to complete their education and pursue future opportunities.<sup>319</sup>

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<sup>315</sup> J Prashad, 'Concrétiser les droits de l'enfant en République démocratique du Congo' 19 May 2020 <https://www.humanium.org/fr/republique-democratique-du-congo/> (accessed 30 October 2021).

<sup>316</sup> Prashad (n 315).

<sup>317</sup> Prashad (n 315).

<sup>318</sup> Prashad (n 315).

<sup>319</sup> Prashad (n 315).

Health conditions, including illness, disability, and inadequate access to healthcare, can also hinder children's educational attainment by affecting their physical well-being and ability to attend school regularly. Children who struggle with health issues may face challenges in keeping up with their studies and participating in classroom activities, thereby impeding their academic progress.<sup>320</sup>

The educational participation of girls is of particular concern, with a significant proportion of girls not enrolled in school. UNICEF's report highlighting that 52.7% of girls aged 5 to 17 are not attending school underscores the urgent need to address the complex socio-cultural factors that perpetuate gender disparities in education.<sup>321</sup>

Inclusive education is a pedagogical approach designed to enhance participation and minimise exclusion within mainstream educational settings by effectively addressing the diverse needs of all learners. It recognises and accommodates the unique requirements for teaching and learning of every child and young person, particularly those facing marginalisation and vulnerability.<sup>322</sup> This encompasses various groups such as street children, girls, ethnic minorities, economically disadvantaged families, nomadic, refugee, and displaced families, children affected by HIV/AIDS, exceptional learners, and children with disabilities. The primary goal of inclusive education is to ensure that these children receive equitable rights and educational opportunities. It embraces diversity as a fundamental aspect of the teaching-learning process and holds the promise of fostering human development.<sup>323</sup>

The number of educational institutions catering to children and adolescents with disabilities is notably scarce and insufficient. This scarcity is not solely due to infrastructure or resource constraints but is deeply intertwined with cultural beliefs and practices. Indeed, in Congolese society, individuals with mental disabilities are often stigmatised and marginalised, there is also no inclusive education and they do not have access to mainstream education settings. Instead,

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<sup>320</sup> Prashad (n 315).

<sup>321</sup> <https://www.unicef.org/drcongo/en/what-we-do/education> (accessed 20 June 2020).

<sup>322</sup> CL Tshiunza, GB Bina & DS Kapinga 'inclusive education in DR Congo: legal foundations, state, challenges and perspectives' (2018) 3 *European Journal of Alternative Education Studies* 90 available at [www.oapub.org/edu](http://www.oapub.org/edu) (accessed 24 April 2024).

<sup>323</sup> Tshiunza (n 322).



many are cared for within religious institutions, particularly churches.<sup>324</sup> This situation affects both migrants and Congolese children living with mental disabilities.

The ongoing instability in the country has further exacerbated the challenges faced by existing schools. To address this issue, Handicap International initiated efforts to support inclusive education in Kinshasa, starting with the Bon Départ and Kikesa centers in 2007. Following a successful pilot project, these inclusive practices were expanded to 12 additional mainstream primary schools in Kinshasa by 2009. Additionally, Handicap International actively participates in a government-led working group aimed at reforming the education system to adopt a more inclusive approach. By the school year 2010-2011, the project had resulted in the enrolment of 1,069 children with disabilities across the 14 targeted schools, marking a significant increase of nearly 30% compared to 2009.<sup>325</sup>

The efforts toward inclusive education are still in their infancy, primarily focusing on improving school access for marginalised groups such as girls, children from impoverished backgrounds, ethnic minorities, and those in remote areas, including children with disabilities. However, compared to other marginalised groups, the inclusion of children with disabilities has often received less attention in the implementation of inclusive education policies.<sup>326</sup>

Transitioning from the recognition of this right to the effective implementation of inclusive education policies is particularly challenging in the DR Congo. Integrating all children with disabilities or special needs into mainstream schools within their communities proves to be a formidable task. It requires a flexible and pragmatic approach rather than rigid adherence to prescribed methods. Significant efforts are needed to develop policies and practices tailored to the specific contexts and challenges of developing nations.<sup>327</sup>

Some foreign tribes experience more discrimination than others due to political conflicts. The attempt at political decompression imposed by internal and external factors took place against the backdrop of the reactivation of the question of nationality. During the National Sovereign

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<sup>324</sup> Le Comité des droits de l'enfant examine les rapports de la République démocratique du Congo, 19 Jan 2017, <https://reliefweb.int/report/democratic-republic-congo/le-comit-des-droits-de-lenfant-examine-les-rapports-de-la-r> (accessed 30 octobre 2021).

<sup>325</sup> Tshiunza *et al* (n 322) 90.

<sup>326</sup> Tshiunza *et al* (n 322) 92.

<sup>327</sup> Tshiunza *et al* (n 322) 90.



Conference (CNS), several subjects relating to the identification of nationals, the census of voters, the issuance of identity cards were discussed.

Due to “dubious nationality”, the Hutu and Tutsi delegates from North and South Kivu were even excluded from the negotiations. Even more, with the rise to the niche of local political leaders handling the issue of nationality in the areas of Masisi and Walikale (North Kivu), relations between the different communities (Hunde, Nyanga, Hutu, Tutsi ...) are significantly degraded. Some individuals with distinct physical body features, whose Zairian nationality was denied for the reason of their inclination to “Tutsify” the administration and fertile territories or to establish a “Hamite Kingdom” including Burundi, Uganda, Rwanda, and Zaire, have constantly been the targets of discrimination and violence since 1993.<sup>328</sup>

### **3.4 Legal framework for the migrant learners in South Africa**

The Constitutional Court of South Africa held in the *Juma Masjid* case, that the right to a basic education is compulsory, universal, and immediately realisable, which means that it cannot be limited due to a lack of resources, in agreement with international legal standards.<sup>329</sup> The right to education is enshrined in the 1996 South African Constitution (South Africa, 1996a) and has since been enacted through a variety of laws. The right to education is promoted in the constitution, and children's rights are protected.

The Children's Act No. 38 of 2005 (South Africa, 2005) articulates children's constitutional rights and establishes standards for the type of care and protection children must get. The most fundamental of these is the 'best interests of the child' principle. The application of this principle, according to Section 7(1) of the Act, includes protection from bodily and psychological harm caused by ill-treatment, abuse, neglect, and degradation, among others. The Act's provisions for care and protection apply to all children (including migrant learners) across the country (including schools). Section 32(2) imposes child-care and protection responsibilities on anyone acting as or on behalf of a parent (including school managers and teachers)

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<sup>328</sup> M Dieng ‘L’*étranger*” dans les stratégies de conquête et de conservation du pouvoir en Afrique : une analyse à l’aide des conflits politiques congolais et ivoirien’ (2010) Presses de l’Université Toulouse 1 Capitole 105-123 at <http://www.openedition.org/6540> (accessed 30 October 2021).

<sup>329</sup> *The Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) para 37

Section 29(1)(a) of the Constitution of South Africa also states that "everyone," even undocumented people, has the right to a basic education.<sup>330</sup> This interpretation is supported by international bodies such as the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Rights of the Child, and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which argue that everyone has the right to a basic education, regardless of their legal or documented status. Furthermore, it is stated that the right to a basic education is read in conjunction with the right to non-discrimination, and that the child's best interests are paramount in all matters concerning the child.<sup>331</sup>

Basic education is required for all children from the age of seven (7) until they reach the age of fifteen (15) or ninth grade, whichever comes first, according to Section 3 of the South African Schools Act (SASA).<sup>332</sup> These provisions relating to compulsory attendance are not limited to learners with documentation. Criminal sanction can be imposed on parents or any other person who prevent a learner from gaining access to educational facilities.<sup>333</sup> However, learners who do not fall within the category of compulsory attendance are still legally and constitutionally guaranteed basic education. The only distinction, therefore, lies in the ability of the state to impose criminal sanctions on persons preventing learners within a particular category from attending school. Documentation is therefore *not* a requirement for access to a basic education.<sup>334</sup>

The National Admission Policy for Ordinary Schools (National Admissions Policy) compels schools to admit learners without unfairly discriminating against them, and it needs an official birth certificate, proof of communicable disease immunisation, a copy of the temporary or permanent residence permit, a study permit, and evidence that learners and/or parents have applied to the Department of Home Affairs (DHA) to legalise their stay in the country.<sup>335</sup>

In the absence of the appropriate documentation, Section 15 of the National Admissions Policy specifies that the learner may be conditionally admitted and that the learner's parents must

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<sup>330</sup> Constitution of South Africa, Section 29.

<sup>331</sup> South Africa Human Rights Commission, Position Paper September 2019.

<sup>332</sup> Act 84 of 1997.

<sup>333</sup> Section 3 (5) and (6) of SASA.

<sup>334</sup> Section 3 (5) and (6) of SASA.

<sup>335</sup> Section 15 of the National Admission Policy for Ordinary Schools 1998.

finalise the admission within three months. However, under Section 39 of the Immigration Act, learning institutions are prohibited from intentionally offering training and teaching to "illegal immigrants" or a foreigner whose "*status does not authorize him or her to receive such training or instruction*". Moreover, Section 42(1) makes it an offence for any person to "*aid, abet, assist, enable or in any manner help*" an "illegal foreigner" or a foreigner "*in a manner that violates their status, including by providing instruction or training to him or her, or allowing him or her to receive instruction or training*". Contravention of these provisions constitutes an offence, and any person found guilty is liable on conviction to a fine or to imprisonment. This provision, however, is contradictory to Section 3(5) and (6) of SASA, as referred to above, which outlines compulsory attendance of all learners within the category outlined above.

The National Admission Policy, under sections 15 and 21, enables schools to provisionally admit undocumented migrant learners, but requires parents or guardians to submit proof of their application to regularise their stay to the DHA. Section 39 of the Immigration Act, on the other hand, makes it an offence to knowingly provide training or instruction to persons deemed to be "illegal foreigners".

Adding to this complexity, Section 44 explicitly states that organs of state are *not prevented* from providing basic services to "illegal foreigners" to which they are entitled under the Constitution and the law. The current construction of the legal framework has therefore given rise to significant confusion around whether schools are legally permitted to admit undocumented migrant learners deemed to be "illegal foreigners" under the Immigration Act, and if they do, whether they are exposed to sanctions. This confusion is addressed by the court with the following cases.

In 2017, the Centre for Child Law lodged against the Minister of Basic Education in which it emerged that many children were unable to attend school because they didn't have identity numbers, birth certificates, permits or passports. The Eastern Cape High Court in Makhanda ruled that undocumented children, including children of illegal foreigners, can now attend public schools. The defendants were also barred from removing or barring minors, including illegal alien children who had previously been accepted, on the premise that the child lacked an

identifying number, permission, or passport, or had failed to present any identification documents.<sup>336</sup>

In this case, the right to basic education, established in Section 29 of the Constitution, is at the heart of this issue. The issue involves children who have been barred from attending public schools unless they or their parents/guardians provide identification in the form of passports, identity documents, birth certificates, or permits, among other things. The Department of Basic Education's requirements are justified by the desire to improve internal administration and, on a higher level, to manage and alleviate issues related to immigration control.<sup>337</sup>

Two provisions of the schools' admissions policy were determined to be objectionable by the court. Clause 15 requires a parent to present a birth certificate for a child to be admitted to a school, while Section 21 requires minors categorised as illegal aliens to provide proof that they have applied to legalise their stay in the nation.<sup>338</sup> The clauses were found to be illegal and invalid. The judge ordered that all children who do not have an official birth certificate be admitted to public schools in the province by the Minister of Basic Education, the MEC for Education in the Eastern Cape, and the Superintendent General of the Eastern Cape Department of Education. He ordered that if a child cannot offer a birth certificate the schools must accept alternate forms of identification, such as an affidavit or sworn statement signed by the learner's parent, caregiver, or guardian.<sup>339</sup>

In the case of *Minister of Home Affairs v Watchenuka*,<sup>340</sup> on 19 June 2019, the Western Cape High Court handed down judgment in a case brought by the University of Cape Town's Refugee Rights Unit on behalf of the Scalabrini Centre of Cape Town, which sought to improve the lives of thousands of asylum-seeking families across South Africa.<sup>341</sup> The order, which was made after successful negotiations with the Department of Home Affairs, determined whether the

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<sup>336</sup> *Centre for Child Law v Minister of Basic Education* [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019).

<sup>337</sup> <http://www.derebus.org.za/wp-content/uploads/2020/06/Centre-for-Child-Law-and-Others-v-Minister-of-Basic-Education-and-Others.pdf> (accessed 30 October 2021).

<sup>338</sup> B Khumalo & A Mji 'Exploring Educators' Perceptions of the Impact of Poor Infrastructure on Learning and Teaching in Rural South African Schools' (2014) *Mediterranean Journal of Social Science* 1522.

<sup>339</sup> <https://www.right-to-education.org/sites/right-to-education.org/files/resourceattachments/South%20Africa%20Constitutional%20Court%20Juma%20Musjid%20Primary%20School%20v%20Essay%20202011%20v5.pdf> (accessed 16 November 2021).

<sup>340</sup> *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

<sup>341</sup> *Centre for Child Law v Minister of Basic Education* [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019).

appellant and the son are permitted to work and study while waiting for the outcome of their application. This meant that wives, husbands, children and other dependents of asylum-seekers and refugees are now able to document themselves in South Africa as ‘dependents’ of the principal asylum applicant in a process commonly known as ‘family-joining’. This aspect of the Refugee Act – outlined at Section 3(c) – means that refugee families can be documented together, ensuring their rights to family unity and dignity in South Africa.<sup>342</sup>

In this case of *Minister of Home Affairs v Watchenuka* the Supreme Court stressed the universal right to dignity as a fundamental element of South Africa’s constitution and international law, thus stating that human dignity has no nationality. Courts have addressed various aspects of mobility and containment and have recognised the restrictive efforts by the various government departments to contain refugees and have successfully relied on constitutional and international law to ensure that refugee rights are upheld. The Standing Committee held that while it may not prohibit all asylum seekers from working and studying, it still has a discretion in individual cases to refuse these rights.<sup>343</sup>

In the instance of the Gauteng Provincial Legislature case,<sup>344</sup> the Constitutional Court of South Africa has further held that there is the need to ensure that “education follows an adaptable sequence to ensure that no child is left behind”. The import of this is that policies and laws must not systemically discriminate against children especially those with a migrant background. This case as interpreted by the researcher has some resonance with the *Belgian linguistic case*<sup>345</sup> where the question of providing education in specific languages was examined by the courts. The inference drawn is that there is a need to ensure that all the requisite structures are put in place to guarantee an all-inclusive learning experience for migrant children.

In the case of *AB & CB V Pridwin Preparatory School Et Al And Equal Education: Supreme Court Of Appeal Of South Africa*, 2018, the Supreme Court interpreting the protection of the employment of parents’ rights took into consideration the impact it would have on their children and their right to education. The court opined that the termination of the contract of a migrant

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<sup>342</sup> *Centre for Child Law v Minister of Basic Education* [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019).

<sup>343</sup> <https://www.ibanet.org/article> (accessed 30 October 2021).

<sup>344</sup> *Gauteng Provincial Legislature v Kilian & 29 Others* [2000] ZASCA 75; 2001 (2) SA 68 (SCA); [2001] 1 All SA 463 (A) (29 November 2000).

<sup>345</sup> *Belgium v Belgium* [1968] ECHR, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (23 July 1968).

parent would impact on their ability to sustain their responsibility towards ensuring that their children's access to education does not suffer. This position is construed to represent the pivotal role of the best interests of the child principles.<sup>346</sup>

Consequently, this research finds this position crucial similarly to the decision in the case of *Juma Masjid* where the right to education was also elevated above property rights and protected. This therefore promotes the best interests of a migrant child as it pertains to education which cannot and should not be sacrificed for any policies and legal restrictions such as documentation that a state may put in place to restrict access to education of migrant children.

### **3.5 Legal framework for the migrant learners in the DR Congo**

The review of literature in this area has shown that the DR Congo has ratified almost all international legal instruments related to the Right to Education. It has legal texts that are supposed to protect primary and secondary education access. Article 13 of the Constitution and the Framework Law of Education of 11 February 2014, places particular emphasis on non-discrimination and the protection of minorities or indigenous peoples in the Congolese education system.

The Constitution of the DR Congo establishes universal free access to education for all children of primary school age; however, most families must pay school fees to cover the salaries of teachers who are not paid by the state. This was a major obstacle especially for children of the hundreds of thousands of displaced families with no possessions or livelihoods.<sup>347</sup> But since September 2019, primary education in public schools is free in the DR Congo.

However, the quality of education is poor. Many schools throughout the country are in a deplorable state without materials, sanitation, and transportation to school. This situation is even worse for migrants, especially refugees, who are struggling to survive, hence education becomes a major challenge for migrant children. Only 34% of children in North Kivu have access to basic education, compared to 52% in the rest of the country.<sup>348</sup>

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<sup>346</sup> *AB & CB v Pridwin Preparatory School & Equal Education* [2018] ZASCA.

<sup>347</sup> Refugees International 'Break the Routine of Humanitarian Assistance' 19 May 2008, [www.refugeesinternational.org/policy/field-report/dr-congo-break-routine-humanitarian-assistance](http://www.refugeesinternational.org/policy/field-report/dr-congo-break-routine-humanitarian-assistance) (accessed 15 April 2020).

<sup>348</sup> Refugees International (n 347).

In June 2008, World Vision/DR Congo did a comprehensive needs assessment in twenty-three communities across various districts in South and North Kivu, and every focus group surveyed cited lack of access to education as one of the top issues in their community.<sup>349</sup> The North Kivu Education Cluster has established a strategy aimed primarily at supporting displaced children to gain access to education, although financing for emergency response in this area is among the lowest in the DR Congo.<sup>350</sup>

The National Education Law n°14/004 of 11 February 2014 is the most important instrument governing education in the DR Congo. It states that every child has the right to education.<sup>351</sup> The most essential aspects of these laws concern the financial resources of educational institutions (schools), their budgets, and the financial contributions of parents. The budget of public education institutions is integrated into the general budget of the state or decentralised administrative organisations, according to the provisions of the current National Education Law. The National Education Law mandates that public educational institutions receive funding from a variety of sources, including governmental subsidies, as well as explicit contributions from students' parents, local income-generating activities, and contributions from other donors.<sup>352</sup>

Apart from the National Education law, there is the Congolese law n°021/2002 relating to refugee status. This law did not integrate an approach aimed at protecting vulnerable groups such as children, women or the elderly as recommended by the international instruments to which the DR Congo is party. Despite this shortcoming, the DR Congo remains bound by its international commitments.<sup>353</sup>

The DR Congo ratified the Convention on the Rights of the Child and one of its provisions is specifically devoted to children, refugees, or asylum seekers. The Convention provides for a committee and several themes have so far attracted the attention of the committee in relation to child refugees: birth registration, access to education, discrimination between child refugees of

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<sup>349</sup> World Vision EDRC Comprehensive Assessment Report, July 2008.

<sup>350</sup> World Vision EDRC Comprehensive Assessment Report, July 2008.

<sup>351</sup> Article 9 de la Loi-cadre n° 14/004 du 11 Février 2014 de l'enseignement national/ article 9 of the Congolese national education.

<sup>352</sup> Article 20- 24 de la Loi-cadre n° 14/004 du 11 Février 2014 de l'enseignement national / article 20-24 of the Congolese national education.

<sup>353</sup> TM Maheshe 'analyse critique de la loi n°021/2002 portant statut des refugies au regard de la situation socio-politique de la RDC et de ses engagements internationaux 552 [https://www.nomos-elibrary.de/10.5771/2363-6262\\_2014\\_3\\_542.pdf?download\\_full\\_pdf=1](https://www.nomos-elibrary.de/10.5771/2363-6262_2014_3_542.pdf?download_full_pdf=1) (accessed 24 February 2023).



various origins, procedures and arrangements relating to unaccompanied children, possibilities for family reunification and detention of child refugees.<sup>354</sup> In one of its conclusions, the executive committee of UNHCR recognised that there is a particular need for protection of women and children. The committee emphasises the importance of paying special attention to the protection needs of the vulnerable, including women, children, and the elderly, in the application of international refugee instruments and related protection standards<sup>355</sup>.

Aiming at a specific category of individuals, in particular orphans, who are numerous due to conflict, the “Regulation of Asylum Act” of Sudan of 1974, in its article 2, stipulates that: “The term refugee includes also children who are not accompanied by adults, or who are war orphans, or whose guardians have disappeared and are outside the countries of their nationalities”. This text expressly grants the possibility, even the certainty, of granting “refugee” status to unaccompanied children, in accordance with the provisions of the Handbook which includes an entire section on the subject.<sup>356</sup>

The DR Congo is a clear demonstration of a country in turmoil with large numbers of displaced persons in various areas. Some of these are refugees who came from neighbouring countries such as the Central African Republic, Rwanda, and South Sudan. About 26% of the Central African refugees registered live with Congolese families.<sup>357</sup>

Non state actors supply 80 to 90% of justice services in most countries in Sub-Saharan Africa, and customary courts are often the main form of law and dispute resolution, involving up to 90% of the population. However, it should be emphasised that in many cases, in the DR Congo, for example, the most successful way to address cases is through mutual agreement.<sup>358</sup> Only approximately 20% of the population has access to the official court system, according to a comprehensive audit conducted in 2004. Only 53 of the 180 peace tribunals (the lowest level

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<sup>354</sup> Maheshe (n 353) 552.

<sup>355</sup> Lexique des Conclusions du Comité exécutif (août 2009) 4ème édition 284-285 at <https://www.unhcr.org/fr/publications/legal/4af436266/lexique-conclusions-comite-executif-4eme-edition-ao-t-2009.html> (accessed 25 February 2023).

<sup>356</sup> Maheshe (n 353) 553.

<sup>357</sup> C Jacobs *et al* ‘justice needs, strategies and mechanisms for the displaced: reviewing the evidence’ (2017) Social Science Research Council working papers 29 available at [https://webarchive.ssrc.org/working-papers/CPPF\\_Justice%20Needs\\_WorkingPaper.pdf](https://webarchive.ssrc.org/working-papers/CPPF_Justice%20Needs_WorkingPaper.pdf) (accessed 18 November 2021).

<sup>358</sup> Jacobs *et al* (n 357)29.

of the state court administration) were found to be operating in a more recent assessment, mostly in urban regions.<sup>359</sup>

Customary chiefs are frequently the only officials that can be reached, especially in rural areas. They are almost self-evidently the principal source of justice in rural areas for persons who choose to take their conflict outside of their family or internal group. In the DR Congo, customary authorities arbitrate and decide 95 percent of land title disputes.<sup>360</sup> According to a poll performed in the DR Congo by *Avocats Sans Frontières* (ASF), 25% of participants stated that they had no idea where to go to seek justice. Furthermore, the Congolese people have little faith in the legal system. Even though "modern" judicial tribunals were named as one of the most important actors in resolving disputes by 11% of participants, just 29% indicated they had faith in the court system.<sup>361</sup> Migrants prioritised conflict resolution by mutual agreement (45 percent), followed by mediation by elders, the church, or other mediators (16 percent). As a result, more than 60% of participants indicated dispute mediation and mutual agreement as the most viable methods for resolving conflicts.<sup>362</sup>

Based on the existing conventional mechanism of community meetings, the Barza Inter-Communautaire is an example of an innovative strategy to increasing justice available to the refugees in the DR Congo. The Barza brings together leaders from North Kivu's nine major ethnic groups to address topics that affect communal life, with the primary goal of 'preventing, resolving, and healing wounds after violence.' International donors began to finance local peace initiatives, which had a significant impact on their development. The assemblies demonstrated their success by preventing local conflicts from developing and resolving ethnic conflicts, mostly over land concerns in North Kivu.<sup>363</sup>

Regrettably, the Barza dissolved by the end of 2005, but people continued to gather in certain places to handle local conflicts. Furthermore, mainly because of the Barza's efforts, migrants in North Kivu are increasingly settling in multi-ethnic rather than mono-ethnic communities. Similar initiatives have sprung up in other Congolese regions, including Ituri and Haut-Uele, though a lack of independent study and documentation on them makes it difficult to establish

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<sup>359</sup> Jacobs *et al* (n 357)30.

<sup>360</sup> Jacobs *et al* (n 357)30.

<sup>361</sup> Jacobs *et al* (n 357)35.

<sup>362</sup> Jacobs *et al* (n 357)35.

<sup>363</sup> Jacobs *et al* (n 357)35.

definitive statements about their efficacy. Much depends on the people in charge of the meetings and how well they gain public trust.<sup>364</sup>

An example of how Congolese and migrants in the DR Congo do not trust the Congolese legal system is manifested in the case of *Institute for Human Rights and Development in Africa V Democratic Republic of Congo*.<sup>365</sup> In this case, Mr. Jean Simbarakiye, a Burundian national, a refugee in Lomé, Togo, is assisted by The Institute for Human Rights and Development in Africa. Mr. Jean Simbarakiye said he arrived in Zaire, now the Democratic Republic of Congo, in 1974 and was recognised as a refugee by both the Republic of Zaire and the United Nations High Commission for Refugees. He completed his undergraduate studies until 1984, then worked as a civil electrical engineer for and on behalf of the State of Zaire at the Office National des Transports (ONATRA) until 1989. The Haut Conseil de la République (Transitional Parliament) adopted Resolution No. 04/HCR6PT/96 on October 31, 1996, shortly after the war in the east of the country between the Democratic Republic of Congo and Burundi, Uganda, and Rwanda, in which it was decided to terminate work contracts for all Rwandan, Burundian, and Ugandan citizens.

On the 3rd of January 1997, Mr. Jean Simbarakiye was sacked by ONATRA without warning or compensation for the sole reason of being Burundian. He is married to a Congolese woman, and they have three children. According to the declaration, Mr Simbarakiye made repeated unsuccessful attempts to obtain justice by visiting Congolese authorities between January 1997, when he was fired without warning or compensation, and June 1997, when he fled the DR Congo. Due to moral and material constraints, he was forced to escape the DR Congo in June 1997 and sought asylum in Lomé, Togo, as a refugee, before exhausting all domestic options. He argued that he kept in touch with the Congolese Chargé d'Affaires in Lomé and, through him, sent a letter to the Congolese Minister of Justice on 21 February 2000, but his efforts, like his wife's, were in vain. According to the letter, the Haut Conseil de la République, the Democratic Republic of Congo's Transitional Parliament, is accused of breaking African Charter Articles 1, 2, 3, 7, 14, 15, and 18.

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<sup>364</sup> Jacobs *et al* (n 357)35.

<sup>365</sup> *Institute for Human Rights and Development in Africa v Democratic Republic of Congo*, Communication No. 247/2002, [2003] ACHPR 43 (29 May 2003).

The Complainant says he did not exhaust domestic remedies because he was under moral and financial duress. The Congolese government said he failed to provide proof of the difficulties of exhausted local remedies while in the DR Congo and Lomé, Togo, in June 1997. Indeed, the DR Congo's government noted that national remedies exist and are available, and that the Complainant had the option of pursuing legal action in Togo before bringing the matter to the African Commission. According to Article 56(5) of the African Charter on Human and (' Rights, communications to the African Commission must be sent "after exhausting all local remedies, if any, unless it is evident that this procedure is unreasonably delayed." Before being sued in an international court, Article 56 aims to make the Respondent Government aware of the detrimental repercussions of its actions on human rights and to study the possibility of taking corrective action. The existence of a national remedy, according to the African Commission, should be both theoretical and practical, as the national remedy in question would be unavailable and ineffective as if it did not exist. This is the scenario when the complainant is unable to present his case to the Respondent state's courts under conditions that guarantee him a fair trial for objective reasons.

When it finds it unreasonable to demand the exhaustion of national remedies, the African Commission has never admitted that the criterion of exhaustion of national remedies applies ipso facto to receiving a communication. To back up his claims that he was unable to exhaust domestic remedies, the Complainant cited numerous earlier African Commission rulings, including Communication 103/93: Alhassan Abubakar (Ghana) was found guilty and sentenced to prison. He found sanctuary abroad after escaping from prison and seized the African Commission. The African Commission did not believe it was reasonable to ask him to return to Ghana and exhaust local possibilities.

According to the African Commission, none of these comments were comparable to the communication made by the Complainant, who did not exhaust domestic remedies before bringing the matter to the African Commission in 2002. Given that he left the DR Congo in June 1997, there is no evidence that he or his wife (who remained in the DR Congo until November 2002) tried to exhaust local remedies while he was in Togo. Furthermore, the Complainant gives no evidence of the asserted moral and material obstacles that prevented him from employing the Congolese legal system's adequate remedies. For these reasons, the African Commission ruled that this communication was inadmissible for failure to exhaust domestic remedies, as required by Article 56. 5 of the African Charter.

This case proves that migrants do not trust the Congolese judiciary system. The trust issue is also common to nationals due to corruption. This case further proves that individuals can use regional courts to seek justice when it is not carried out by national courts. But many migrants are ignorant of the tools available and many lack the financial means to take this route.

### **3.6 SADC and the right to Education**

The international and continental legal frameworks that have been adopted by most of the SADC member states, demand that SADC member states create equitable inclusive educational systems that allow all learners to study and develop. In response to these conventions and instruments and others the SADC has developed regional frameworks that are aimed at enhancing regional access to education for all learners.

The SADC Protocol on Education and Training (1997), as well as the SADC Framework and Programme of Action for Comprehensive Care and Support for Orphans, Vulnerable Children, and Youth in SADC, are two of these instruments (2008 -2015). The major goal of the two SADC instruments is to ensure that all learners in the SADC region have their basic rights and needs satisfied, allowing them to reach their full human potential. Its principal goal is to prioritise vulnerable learners in all parts of the SADC's development agenda, including policy, legislation, and intervention, with a focus on providing them with full, holistic services. Migrant children are identified as vulnerable children and are given special attention through the Framework's activities.

Education has a substantial impact on human growth in addition to the benefits it provides in other areas. It is critical to remember that a well-educated populace is better prepared to face concerns such as industrial development and poverty eradication in Southern Africa. Since the 1960s, enrolment rates in Southern African schools have risen at all levels, from basic to university and post-graduate.<sup>366</sup> Despite these gains, the SADC area continues to lag below international and continental standards. The region's educational levels have also been impacted by the region's immigration difficulties.<sup>367</sup> However, as indicated by its Protocol on Education

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<sup>366</sup><https://www.sadc.int/themes/social-human-development/education-skills-development/> (accessed 30 September 2020).

<sup>367</sup><https://www.sadc.int/themes/social-human-development/education-skills-development/> (accessed 30 September 2020).

and Training, which was adopted in 1997, the SADC remains dedicated to enhancing access to high-quality education across the region.

The Protocol on Education and Training, in general, aims to foster a regionally integrated and harmonised educational system, particularly in terms of concerns such as access, equity, relevance, and quality of education interventions. A Regional Implementation Plan on Education and Training 2007–2015 was designed to address these areas of cooperation to execute the Protocol on Education and Training's provisions. Other cross-cutting hurdles to education in the region, such as HIV and AIDS, are included in the strategy in addition to the areas of cooperation.<sup>368</sup>

South Africa remains a popular destination for migrants from the SADC and beyond in the Southern African region. The growing number of migrants, particularly from African countries, has sparked discussion and hostility. This has been marked by discourses advocating for stricter immigration policies precisely because migrants, particularly those from African countries, are assumed and/or perceived to be fierce competitors with South African citizens for jobs and resources, as well as services such as health and education.<sup>369</sup>

African migrants in Southern Africa encounter challenges in gaining access to educational facilities. African migrants have been forced to adopt means ranging from the illegal to those that might be described as dynamic agentive, such as the use of forged documents, due to structural and institutional barriers to education. This highlights the tensions between, for example, social integration at the educational level across SADC member states and migratory securitisation. This, it is said, appears to be at odds with the objective of regional integration enshrined in the SADC Declaration and Treaty (1992).<sup>370</sup>

Member states, conversely, have made significant progress in terms of policy and education provision for learners in pre-primary, technical and vocational education, and higher education. Early Childhood Education has become a key topic for the SADC Secretariat, as well as the

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<sup>368</sup> <https://www.sadc.int/themes/social-human-development/education-skills-development/> (accessed 30 September 2020).

<sup>369</sup> See generally Flahaux & De Haas (n 28) 1.

<sup>370</sup> Southern African Development Community (SADC) Region 'Reviewing the Region's Progress in Reaching the Goals of the Second Decade of Education for Africa' (2016) policy brief available at [www.adeanet.org](http://www.adeanet.org) (accessed 30 September 2020).

rest of the continent, in recent years. A technical committee on higher education, research, and development has been formed, with the task of drafting a Regional Higher Education Strategic Framework entrusted to it.<sup>371</sup>

A review of curricula has also begun at the regional level. The emphasis in teacher education is on engendering curricula and mainstreaming education for long-term development. Ministers of Higher Education have also endorsed a regional Open and Distance Policy Framework. The SADC secretariat is promoting recommendations from a recent regional review of its member states' capacity in technical and vocational education and training when it comes to improving skills development capacity.<sup>372</sup>

The Dakar World Education Conference (2000) committed governments to ensuring that their education systems are inclusive and specifically cater for the needs of disadvantaged, vulnerable and marginalised learners.<sup>373</sup> This has been the benchmark used by regional organisations such as the SADC to address the right to education. The immigrant child can also be classified under disadvantaged, vulnerable and marginalised learners.

### **3.7 The 4 A**

Article 13 of the ICESCR affirms that states parties shall recognise the right of every person to education. It is envisaged that education must aim to enhance dignity and sustain human respect amongst its freedoms. Furthermore, it is important to conceptualise that education “must put everyone in a position to play a useful role in a free society, foster understanding, tolerance and friendship between all nations and all racial, ethnic or religious groups, and encourage the development of United Nations peacekeeping activities”.<sup>374</sup> This position is further elucidated in the provisions of the CESCR General Comment No 13 on Education<sup>375</sup> and the CRC general comment No.1 on the aims of education (2001)<sup>376</sup> that provide for the importance of ensuring that education is available, accessible, adaptable and affordable. These criteria are called the 4A.

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<sup>371</sup> Southern African Development Community (SADC) Region (n 170).

<sup>372</sup> Southern African Development Community (SADC) Region (n 170).

<sup>373</sup> World Education Forum, Dakar, Senegal, 26-28 April 2000: final report available at <https://unesdoc.unesco.org/ark:/48223/pf0000121117> (accessed 20 June 2023).

<sup>374</sup> The International Covenant on Economic, Social and Cultural Rights (CESCR)

<sup>375</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para.6

<sup>376</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1.



These concepts represent the availability, accessibility, adaptability, and affordability of education. The 4A are interdependent and essential to the enjoyment of the right to education. They must be applied at all levels of education offered in the territory of the state party, although their application will vary according to the prevailing conditions in each country.<sup>377</sup>

The availability is to ensure that enough educational institutions and curricula exist and operate in the territory of the State party.<sup>378</sup> To this end, government obligations essentially include: the construction and maintenance of buildings, infrastructures, and necessary equipment; the employment of qualified teachers; the definition and implementation of educational programmes; and the availability of school and teaching materials.<sup>379</sup>

It is a criterion that goes beyond the construction of classrooms and represents, in the case of several developing countries, a serious challenge.<sup>380</sup> It is indeed a serious challenge for the DR Congo where there are no schools in some areas and huge infrastructural deficits which affect learning and teaching experiences.<sup>381</sup> Sadly, the impact of conflict and violence contributes to the poor availability of basic school needs in some regions especially in the Eastern Region.<sup>382</sup>

The accessibility of educational institutions suppose that education must be accessible to all in law and in fact, without discrimination, in accordance with the second paragraph of Article 2 of the CESCR.<sup>383</sup> However, physical distances are also a barrier to accessibility of education. In the DR Congo, there is currently one school per 120 km.<sup>384</sup> In this matter, the CESCR Committee considers that the prohibition of discrimination and equal treatment in education are neither subject to the principle of progressivity nor dependent on available resources and

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<sup>377</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para. 6

<sup>378</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para. 6

<sup>379</sup> Villeneuve (n 281) 43.

<sup>380</sup> Villeneuve (n 281) 43.

<sup>381</sup> Banque Mondiale 'Le système éducatif de la république démocratique du Congo : Priorités et alternatives' Région Afrique Département du développement humain Document de travail 18 available at <https://documents1.worldbank.org/curated/zh/244781468026664848/pdf/328140DRC0Systeme0educatif0AFHDno68.pdf> (accessed 27 May 2021).

<sup>382</sup> Banque Mondiale (n 381) 18.

<sup>383</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>384</sup> Banque Mondiale (n 381) 74.

apply unreservedly and directly to all aspects of education and applies to all grounds on which international law prohibits the basis of any discrimination.<sup>385</sup>

This prohibition covers all persons of school age living within the territory of the State party, irrespective of their legal status.<sup>386</sup> In addition, the Committee points out that the existence of significant inequalities in the allocation of budgetary resources resulting in the provision of quality services of different quality depending on the place of residence may constitute discrimination within the meaning of the Covenant.<sup>387</sup>

This is the case in the DR Congo where schools in the capital city have better services than those in the provinces. As the size of the private sector was initially small, the public sector remains predominant everywhere. Even if the DR Congo is in a post-conflict situation, there is still so much structure that does not take into cognisance the needs of pupils.<sup>388</sup> Before September 2019, there was a system of school fees payable by parents partly created on exchanges between the administration, teachers, and parents”.<sup>389</sup> The majority of villages do not have schools. The comparison of the number of schools in 2001 to the number of villages indicated by the 1984 census shows that there is roughly 1 school for every 5 villages depending on the province.<sup>390</sup>

In terms of obligations, the prohibition of discrimination in the enjoyment of the right to education requires states parties to abolish all de jure (in law, policy and practice) and de facto discrimination (those resulting from the unequal enjoyment of rights in practice).<sup>391</sup> According to the CESCR Committee, states parties must exercise control over all education, including all education policies, educational institutions, curricula, expenditure and other education practices, in order to detect and remedy any de facto discrimination.<sup>392</sup>

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<sup>385</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>386</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>387</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 34.

<sup>388</sup> Banque Mondiale (n 381) 74.

<sup>389</sup> Banque Mondiale (n 381) 74.

<sup>390</sup> Banque Mondiale (n 381) 74.

<sup>391</sup> Banque Mondiale (n 381) 74.

<sup>392</sup> Banque Mondiale (n 381) 74.

Also, the enjoyment of the right to education in full equality and without de facto discrimination may require the State to adopt special measures to correct the discrimination and inequalities suffered by traditionally disadvantaged and vulnerable groups in this regard.<sup>393</sup> Thus, in its review of the implementation of the Covenant by the states parties, the Committee has “repeatedly expressed concern about discrimination and the difference in treatment in education against several groups of vulnerable children, including girls, child labourers and child heads of households, children from ethnic minorities, refugee or displaced children, or those from traditionally disadvantaged communities”.<sup>394</sup>

There is another dimension of the accessibility criterion. It concerns the physical accessibility of educational institutions. According to the CESCR Committee, education must be provided in a place reasonably accessible to all, or through modern technology where appropriate and possible.<sup>395</sup> In this matter, during the period of COVID 19 where education was mostly online, children living in developing countries, like the DR Congo, were disadvantaged because most do not have internet and the necessary equipment to be able to continue their education. To cure this defect, the General Comment No. 9, lays emphasis on ensuring that all barriers to reasonable accommodation should be eliminated. This access would include schools and other public facilities. A denial of this level of access to pupils is described as a systemic denial of the rights to education.<sup>396</sup>

The last dimension to the criterion of accessibility, is the economic accessibility that implies education be economically accessible to all.<sup>397</sup> Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enshrines provision for the protection of the rights of every child to education irrespective of the child’s migrant status.<sup>398</sup> This position is further reiterated by the work of the committee in General Comment No 2 “as such, states’ parties have an obligation to eliminate all direct costs of

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<sup>393</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>394</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>395</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>396</sup> General Comment No. 9 The rights of children with disabilities, Committee on the Rights of the Child (11 – 29 September 2006) CRC/C/GC/9 (2006) para 39.

<sup>397</sup> General Comment No. 2: Article 9 (Accessibility), committee on the Rights of people Living with Disability (31 March–11 April 2014) CRPD/C/GC/2 (2014) para 6.

<sup>398</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

schooling, such as school fees, as well as alleviate the adverse impact of indirect costs, such as expenses for school materials and uniforms”.<sup>399</sup>

Acceptability is a criterion relating to the form and content of curricula and teaching methods that must be relevant, of good quality and culturally appropriate for students and parents, subject to the objectives listed in the first paragraph of Article 13 of the CESCR and the minimum standards of education that can be defined by the State.<sup>400</sup> This is an important criterion in practise, as there are several cases where parents do not send their children to school because of the lack of interest in the teachings provided in terms of their future. There are also deep disparities between countries in the quality of education, particularly between developed countries and developing countries.<sup>401</sup> The acceptability of education touches issues such as curriculum definition, textbook content, evaluations and the language of instruction, the latter being a question subject to much debate.<sup>402</sup> In this matter, “the Constitutions of Croatia, Slovakia, Slovenia and Nepal guarantee minorities the right to education in their own language”.<sup>403</sup>

This criterion also affects the issue of teachers, as it is one of the most important, if not the most important, factor influencing the quality of education.<sup>404</sup> Some writers decry the poor state of teacher’s welfare and hint at the importance of the narrative to be changed for a better outcome of the type of education that is available.<sup>405</sup> States parties have a responsibility to provide teachers with training, suitable working conditions and a salary that ensures the proper exercise of their profession.<sup>406</sup>

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<sup>399</sup> General Comment No. 2: Article 9 (Accessibility), committee on the Rights of people Living with Disability (31 March–11 April 2014) CRPD/C/GC/2 (2014) para 6.

<sup>400</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>401</sup> General Comment No. 13: Art. 13 (The Right to Education), Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

<sup>402</sup> Villeneuve (n 281) 47.

<sup>403</sup> UNESCO (n 288) 20.

<sup>404</sup> Villeneuve (n 281) 47.

<sup>405</sup> AC Onuora-Oguno ‘Craving for the Message but shooting the Messenger: RBA to teacher Welfare and Quality in Basic Education in Nigeria’ In AC Onuora-Oguno, W Egbewole, T Kleven (eds) *Education Law, Strategic Policy, and Sustainable Development in Africa* (Palgrave: 2018) 101-120.

<sup>406</sup> Onuora-Oguno (n 405) 101-120.

The scope of the acceptability test also extends to the pedagogical methods and the framework within which education is provided.<sup>407</sup> Indeed, the school environment as a whole must be acceptable to children, which implies respect for their dignity and all their fundamental rights.<sup>408</sup> This concerns specific issues such as the safety of children in school and the prohibition of corporal punishment and any disciplinary measures that may be related to humiliating or degrading treatment of the dignity of the child.<sup>409</sup> On this point, the CRC Committee states that the convention promotes the indivisibility of rights and advocates for a holistic approach to the realisation of the right to education.<sup>410</sup> The import of this is that education must speak in terms of its curriculum to the promotion of other rights such as respect for human dignity, gender equity and other fundamental rights' provisions.<sup>411</sup>

Adaptability of education means that it must be flexible enough to be adapted to meet the needs of students or groups of pupils (such as child soldiers in the process of demilitarisation) and, the transformations of communities and societies (such as learning knowledge and practises related to new technologies of information and communications).<sup>412</sup>

### **3.8 Right to education and right in education**

Article 13 of the CESCR prohibits any teaching whose content would be contrary to the fundamental purposes set out in its first paragraph.<sup>413</sup> Over time, education has increasingly been defined and seen as a tool to address the main challenges of the contemporary world: promoting peace, ensuring development, combating HIV/AIDS, protecting the environment.<sup>414</sup> The need to ensure that issues of access and content of education is again reiterated.

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<sup>407</sup> B Onuora-Oguno 'Quality education in A COVID-19 era: Formative Assessment challenges and worries of E-learning' (2020) available at <https://www.africanwomeninlaw.com/post/quality-education-in-a-covid-19-era-formative-assessment-challenges-and-worries-of-e-learning> (accessed 20 May 2021).

<sup>408</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1 (2001) para 8.

<sup>409</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1 (2001) para 8.

<sup>410</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1 (2001) para 8.

<sup>411</sup> General comment No1(2001): Art. 29(1) (the aims of education), Committee on the Rights of the Child (17 April 2001) UN Doc CRC/GC/2001/1 (2001) para 8.

<sup>412</sup> Villeneuve (n 281) 49.

<sup>413</sup> The International Covenant on Economic, Social and Cultural Rights (CESCR)

<sup>414</sup> Villeneuve (n 281) 40.

The education that the migrant child receives must speak to the general well-being of the child and reinforce the dignity of the child.<sup>415</sup> Realisation of this notion is underscored but does not take into consideration its attendant challenges. However, it is worth noting that issues can be resolved if all factors that impact on education dissemination are taken into consideration.<sup>416</sup> However, the right to education is first and foremost an individual right.<sup>417</sup>

The first paragraph of Article 13 of the CESCR is a protection afforded to the individual, under which the right to education is not limited to the right to any education.<sup>418</sup> It is therefore necessary to distinguish education as a collective tool, and education as a fundamental right of the individual. To this end, Article 29 of the Convention on the Rights of the Child is a reminder that the full development of the personality and dignity of the person is the main objective to which education must strive.<sup>419</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>420</sup> specifically provides for education:

- (a) the full development of the child's personality, talents, and mental and physical capacities;
- (b) the encouragement of fundamental human rights and freedoms;
- (c) the preservation and strengthening of positive African traditional and cultural moral values;
- (d) the preparation of the child to live a responsible life in a free society, in a spirit of understanding, tolerance, dialogue, and mutual respect.
- e) the protection of national sovereignty and national integrity.
- f) the promotion and establishment of African unity and solidarity.
- g) the promotion of environmental and natural resource respect.
- h) the development of primary health care understanding through children.

The African Charter states that primary education must be free and compulsory, and that states' parties have the obligation to fulfil the enjoyment of this right, and make sure that vulnerable

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<sup>415</sup> Article 29 of the Convention on the Rights of the Child.

<sup>416</sup> General comment No1, article 29 (1): the aims of education, Committee on the Rights of the Child (17 April 2001) CRC/GC/2001/1 (2001) para 3.

<sup>417</sup> Villeneuve (n 281) 41.

<sup>418</sup> Villeneuve (n 281) 41.

<sup>419</sup> Villeneuve (n 281) 41.

<sup>420</sup> The African Charter on the Rights and Welfare of the Child (ACRWC).

groups like girls are not discriminated.<sup>421</sup> Similarly, Article 24 of the Convention of Rights of Persons with Disability (CRPD) recognises that children living with disability have the right to inclusive education as opposed to mainstream education.

Nevertheless, the African Committee of Experts on the Rights and Welfare of the Child noticed that in many African countries a birth certificate is required to enrol children in school and that children who are already enrolled need it to be admitted to take national exams.<sup>422</sup> In such countries, like in South Africa,<sup>423</sup> the right to education of children who lack a birth certificate is violated.<sup>424</sup> A child whose birth is not registered and who does not go to school, loses not only its potential for the future, but also becomes more vulnerable to other rights violations.<sup>425</sup> He / she is exposed to child trafficking, child labour, early marriage, illegal adoption, sexual exploitation and other negative practices.

In this regard, the African Union committee stated that when the child has not been registered at the birth and has reached school age, states parties shall take all appropriate measures to register, issue a birth certificate and enrol them in school. Birth registration should be done as soon as the non-registration becomes evident, to prevent it from becoming a barrier for the child to access other rights.<sup>426</sup> However, the committee should have proposed another solution, for example that schools need to register the children even without a birth certificate because lack of a birth certificate cannot hinder a child from accessing education.

Moreover, it has been reported recently by Lawyers for Human Rights that some services in Gauteng are intentionally denying the proof of birth, a document essential for registering a child's birth, to patients who are incapable of paying their hospital bills.<sup>427</sup> In this matter, the

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<sup>421</sup> Article 11.3 of the African Charter on the Rights and Welfare of the Child (ACRWC).

<sup>422</sup> Observation générale sur l'article 6 de la charte africaine des droits et du bien-être de l'enfant (07 - 16 avril 2014) CAEDBE/OG/02 (2014) para 31.

<sup>423</sup> In South Africa, the production of birth certificate is one of the requirements to be register at school. Children that do not have birth certificate encounter difficulties to be accepted by public schools, though the South African department of education issued a circular that instructs school to accept children even without birth certificate.

<sup>424</sup> Observation générale sur l'article 6 de la charte africaine des droits et du bien-être de l'enfant (07 - 16 avril 2014) CAEDBE/OG/02 (2014) para 31.

<sup>425</sup> See the Jurisprudence

<sup>426</sup> Observation générale sur l'article 6 de la charte africaine des droits et du bien-être de l'enfant (07 - 16 avril 2014) CAEDBE/OG/02 (2014) para 31.

<sup>427</sup> Lawyers for Human Rights 'Press statement: Department of Health and Department of Home Affairs to provide proof of birth for all children' (17/06/2021) at [https://www.lhr.org.za/lhr-news/press-statement-department-of-health-and-department-of-home-affairs-to-provide-proof-of-birth-for-all-children/?fbclid=IwAR0UrXiazIvOIw59oYibU5AcQXdXRHSXQ3SDtgMVBrcLgeFuXY6J\\_6WArig](https://www.lhr.org.za/lhr-news/press-statement-department-of-health-and-department-of-home-affairs-to-provide-proof-of-birth-for-all-children/?fbclid=IwAR0UrXiazIvOIw59oYibU5AcQXdXRHSXQ3SDtgMVBrcLgeFuXY6J_6WArig) (accessed 18 June 2021).



South African Minister of Home Affairs, Dr Aaron Motsoaledi, was interviewed a year ago, regarding the situation of the birth certificate backlog. He argued that migrants are interpreting the South African constitution incorrectly and that South Africa is not compelled to issue birth certificates to migrants born in South Africa. He added that birth certificates are only for South Africans, permanent residents, and refugees.<sup>428</sup>

He alleged that the Department of Home Affairs issues a record or registration of birth so that migrants can go to their own embassies to get birth certificates. However, he acknowledged that since the *Makhanda* case, the DHA published a policy instructing all schools to accept all children documented or not to access primary schools.<sup>429</sup>

### 3.9 Inclusive education

The education of persons with disabilities is not a recent concern, its realisation in an ordinary environment is a right recognised by Article 24 of the United Nations Convention on the Rights of Persons with Disabilities.<sup>430</sup> The acknowledgement of the right to inclusive education for people living with disability, is innovative in several aspects: It confirms that persons living with disabilities are subjects of rights, regardless of their disability and that they must be able to share their daily life with non-disabled peers; it further assumes that any person can learn and the education system should consider that a child with disability is a learner whose developmental opportunities and well-being depend on his or her ability to strengthen potential and to stand up for learning opportunities.<sup>431</sup>

The new vision of the development of human capital has considered education as a vehicle for social protection in the same way as health. Consequently, many developed countries have taken measures to accommodate children living with disability.<sup>432</sup> In the United States, the schooling of children living with disability must be primarily in conventional settings and schools are required to provide them with an education appropriate to their needs and to include them in the various forms of assessment imposed on them. In France, the law of 11 February 2005 makes the schooling of people living with disabilities an obligation and asks the education

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<sup>428</sup> <https://youtu.be/xrcLYH3ThTs> (accessed 24 February 2023).

<sup>429</sup> <https://youtu.be/xrcLYH3ThTs> (accessed 24 February 2023).

<sup>430</sup> S Ebersold 'Accessibility, inclusive policies and the right to Education: conceptual considerations and Methodological age' (2015) 9 *European Journal of Disability Research* 22–33 at <http://dx.doi.org/10.1016/j.alter.2014.06.0011875-0672/> (accessed 25 May 2021).

<sup>431</sup> Ebersold (n 430) 22-33.

<sup>432</sup> Ebersold (n 430) 22-33.



system to guarantee the continuity of their educational careers. In the Netherlands, schools no longer have the right to refuse a child schooling because of the severity of the child's disability.<sup>433</sup>

The respect of the right to inclusive education implies public action, first, to individualise and conceptualise, by reorganising school systems around a school for all. Secondly, to ensure protection, action must be taken to prohibit all forms of discrimination that have become general in many countries over the past two decades; and thirdly, for its effectiveness, there is a need to allocate human, technical and financial resources to enable schools to assume their social responsibility and to reconcile the academic prerequisites with those living with disability.<sup>434</sup>

However, it must be noted that at present few countries have reliable information on the implementation of the right to education and the Global Disability Report stresses the need to implement systems for evaluating and piloting education systems in relation to its implementation. While all countries can provide relatively reliable data on the number of students with a particular educational need admitted to specialised schools, some have difficulty identifying and counting those in mainstream settings, particularly on an individual basis.<sup>435</sup> The implementation above is important as the focus of the thesis is on migrant children (who as a matter of course must include children with disability). Indeed, in most African countries, children with disability, nationals or migrants, are left without proper education.

### **3.10 State obligations on education**

Generally, in international law, states assume obligations when they became parties to a treaty. The obligation is such that a state is obligated to take all necessary measures to ensure that provisions of such treaties are promoted, respected, and fulfilled.<sup>436</sup> The implication is that states are to ensure the protection of rights positively and negatively. Thus, states must protect individuals from actions of non-state actors which can violate rights and similarly, states must refrain from policy decisions that can affect the rights of individuals.<sup>437</sup> This underscores the

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<sup>433</sup> Ebersold (n 430) 22-33.

<sup>434</sup> Ebersold (n 430) 22-33.

<sup>435</sup> Ebersold (n 430) 22-33.

<sup>436</sup> <https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx#:~:text=International%20human%20rights%20law%20lays,States%20are%20bound%20to%20respect.&text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights> (accessed 23 May 2021).

<sup>437</sup> <https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx#:~:text=International%20human%20rights%20law%20lays,States%20are%20bound%20to%20respect.&text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights> (accessed 23 May 2021).

imperative for states to enact policies that do not hinder migrant children from enjoying their right to basic education. Barriers, whether stemming from policy or administrative actions, that impede the enjoyment of the right to education must be eradicated.<sup>438</sup> In this matter, the CESCR asserts that states parties must ensure that all educational programs, at every level, are aligned with these fundamental objectives. States parties are obligated to establish and maintain a transparent and effective system to ensure that education provided within their jurisdiction is oriented towards these goals.<sup>439</sup>

Similarly, the Convention on the Rights of the Child (CRC) aligns closely with the provisions of the CESCR, affirming that all states parties are obligated to ensure the right to education for all children within their jurisdiction.<sup>440</sup>

It states that:<sup>441</sup>

Primary education must be compulsory and free of charge for all; Secondary education, in its various forms, must be generalized and made accessible to all by all appropriate means, including the gradual introduction of free education; Higher education must be made accessible to all in full equality, according to the capacities of each individual, by all appropriate means and in particular by the gradual introduction of free education; Basic education should be encouraged or intensified, to the full extent possible, for those who have not received primary education or who have not received it until the end of the year; There is a need to actively pursue the development of a school system at all levels, establish an adequate system of scholarships and continuously improve the material conditions of teachers.

The important phrase in this provision is that all children within the state and not only nationals are entitled to the right to education. It is the argument of this thesis that this provision is very important to accentuate the need for states parties to have in place cogent and measurable plans to ensure compliance of all states to their obligation under the treaty.

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<sup>438</sup> <https://www.ohchr.org/en/professionalinterest/pages/internationalaw.aspx#:~:text=International%20human%20rights%20law%20lays,States%20are%20bound%20to%20respect.&text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights> (accessed 23 May 2021).

<sup>439</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 49.

<sup>440</sup> Article 2 of CRC.

<sup>441</sup> Article 28 of CRC.

Additionally, states parties undertake to recognise the freedom of parents and legal guardians to decide for their children whether to attend other institutions other than the public ones, except that it must be in accordance with the minimum requirements set or accepted by the state in matters of education - and to make sure that the religious and moral education of their children is in accordance with their own beliefs.<sup>442</sup> The African Charter on the Rights and Welfare of the Child (ACRWC) also has similar provisions.<sup>443</sup> The importance of this is that under no circumstances should policies be put in place that can limit a child's access because of the child's immigration or any other status.<sup>444</sup>

The CRC compels States parties to respect the rights of the child and refrain from directly violating a right or obstructing its enjoyment;<sup>445</sup> it must also prevent, or remedy violations committed by a third party and thus protect the law; Finally, it must adopt implementation measures to achieve the full realisation of the law.<sup>446</sup> The CESRC Committee has also drawn up a list of the provisions of the treaty that can be immediately applied by judicial bodies in many countries, including the positive right of children to compulsory and free primary education.<sup>447</sup> In these circumstances, the need to ensure migrant friendly legislation must be put in place to ensure that the right to education of migrant children is not limited in any way. As shown in the next chapters, South Africa runs afoul of this as some legislations still exist that have the ability of denying migrant children access to school.<sup>448</sup>

Many states tend to excuse themselves from the burden of meeting the education obligation under international law by recalling the progressive realisation. But the inclusion of the principle of progressivity in Article 2(1) of the CESCR is an acknowledgement that the available human and financial resources do not ensure the full realisation of all rights at the same time and with the same energy.<sup>449</sup> The principle, however, does not allow the state party to defer its commitment to act for the full exercise of the rights protected by the Covenant.

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<sup>442</sup> Article 29 of CRC.

<sup>443</sup> Article 11.4 of African Charter on the Rights and Welfare of the Child (ACRWC).

<sup>444</sup> Villeneuve (n 281) 28.

<sup>445</sup> Article 2 of CRC.

<sup>446</sup> Articles 3 and 4 of CRC.

<sup>447</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 58.

<sup>448</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 58.

<sup>449</sup> Villeneuve (n 281) 28.

States still have the basic obligation to respect, protect and promote the rights of the Covenant and are not exempt from adopting immediate measures to protect the essentials of each right and to guarantee the benefit of the right without discrimination. This position is however not to be used as a shield for the state but as a guiding principle in ensuring that state obligations are not overlooked.<sup>450</sup>

In ensuring that the aspiration of making education available to all, the importance of a “free and compulsory” education must be highlighted. This is evident in the provisions of Article 13(2) and Article 13(3) of the CESCR while noting the focal position of primary education.<sup>451</sup> An aspect which most states rely on to derail the realisation of the right to primary education, is that of progressive realisation. However, Beiter has argued in line with Articles 13(2) that the right to education is of immediate realisation and is not subject to progressive realisation.<sup>452</sup> Furthermore, the CESCR Committee specifies that any regressive measures must be undertaken with the utmost caution and must be justified in relation to all the rights protected by the Covenant and all the resources available to the state party.<sup>453</sup>

When serious constraints arise on the volume of available resources, in particular because of an amendment procedure, economic downfall or crisis, the CESCR Committee considers that states parties must pay specific attention to the protection of groups whose enjoyment of rights is likely to be particularly hampered by the situation in question.<sup>454</sup> Also, the state party must use the maximum resources available to protect, at a minimum, the essential content of each of the rights, and remains obliged to promote strategies or programmes to ensure as much as possible the enjoyment of rights without discrimination.<sup>455</sup>

The CESCR has established a habit of recommending that governments increase the amount of funding allocated to particular fields, like education, particularly when the enjoyment of the

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<sup>450</sup> Villeneuve (n 281) 28.

<sup>451</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 51.

<sup>452</sup> See generally KD Beiter 'Article 13 of the International Covenant on Economic, Social and Cultural Rights in KD Beiter (eds) *The Protection of the Right to Education by International Law* (2005).

<sup>453</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 35.

<sup>454</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>455</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

law or its fundamental principles is severely harmed by a lack of funding.<sup>456</sup> In situations where a state is unable to meet its obligations, it is important to differentiate between outright refusal and genuine incapacity to fulfil human rights responsibilities. In cases of incapacity, Article 2(1) of the CESCR highlights international cooperation and assistance as avenues for realising the rights outlined in the Covenant. In this context, the CESCR Committee asserts that the "available resources" mentioned in the same article encompass both domestic resources within the state and those accessible through international cooperation.<sup>457</sup> Furthermore, it emphasises that all states, particularly those with the means to do so, are obligated to engage in such cooperation with the aim of advancing and realising the rights enshrined in the Covenant.<sup>458</sup>

On the issue of breaches of the right to education and the failures of states parties to their obligations, the CESCR Expert takes up the pattern of violations by commission and omission, and cites several examples of breaches of article 13: [...] the adoption or failure to revoke laws and regulations that abuses certain individuals or groups in education, [ ... ] Failing to adopt measures to address discrimination in education in practise; the application of school curricula that does not fit with the learning purposes outlined in paragraph 1; the lack of transparent and effective systems to ensure that education is in line with paragraph 1 of Article 13; the failure to provide compulsory and accessible primary education to all as a priority; failing to safeguard that private establishments observe the 'minimum education standards' required under paragraphs 3 and 4 of Article 13; closing of learning institutions in times of political conflict, in violation of Article 4.<sup>459</sup>

### **3.11 Implementation of the right to education**

As stated above, no nationality requirement is in principle pertinent to limit the benefit of the right to education. All children are beneficiaries of the right to education, irrespective of their parents' status. Denying access to education to an irregular child will make him/her even more vulnerable and the child will suffer the consequences in his or her life.<sup>460</sup>

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<sup>456</sup> Villeneuve (n 281) 30.

<sup>457</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>458</sup> Ibid.

<sup>459</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>460</sup> Valette (n 292) 2.

Despite the rise and the proliferation of standards guaranteeing the right of children to primary education and the prevention of discrimination in primary education, millions of children are still deprived of access to schooling, due to the lack of implementation by many states.<sup>461</sup> Children in vulnerable categories for instance children living with disabilities and children in a migration context are unable to access education.<sup>462</sup>

The diversity of migration situations in which the right to education is not respected illustrates hesitations, contradictions, and confusions in its implementation. However, one thing in common with all these cases is to be found in the vulnerability of the individuals concerned, rather than in their nationality.<sup>463</sup> With the exception of disability, it would be the precariousness of families, or isolation, the fragility of the statutes and the sense of exclusion that would characterise all the victims of the failures of states to their educational obligations.<sup>464</sup>

The CESCR Committee mentioned that millions of individuals do not enjoy the right to an education which continues to be an unattainable ambition.<sup>465</sup> Apart from the barriers to access schools, there are other aspects such as the quality and content of education, fairness and non-discrimination, and respect for the dignity and fundamental rights of children in education.<sup>466</sup>

The consideration of the culture and language of the parents could be seen as the result of the desire to forge a bond with families.<sup>467</sup> This point is raised only in this light by the Convention on the Rights of All Migrant Workers and Their Family Members. However, the relevant provisions of this treaty do not create any obligation for states to adhere to, only merely encouraging them. It is therefore not directly addressed in terms of the division of rights and obligations between parents and the state.<sup>468</sup> The question of mother-tongue teaching cannot

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<sup>461</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>462</sup> Valette (n 292) 2.

<sup>463</sup> Valette (n 292) 2.

<sup>464</sup> Valette (n 292) 2.

<sup>465</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>466</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>467</sup> Valette (n 292) 2.

<sup>468</sup> Valette (n 292) 2.

therefore be seen as indicative of a desire to facilitate parent-school relations. Language can be a source of frustration as seen in the Belgian Linguistic case.<sup>469</sup>

The instant case was based on the alleged violation of Article 8 of the European Convention which provides for the protection of private and family life. Additionally, there was a violation of Article 14 of the European Convention on Human Rights and most importantly Article 12 on the right to education. The main purpose of the case was to strike down provisions alleged to have the capacity of curtailing language rights in education. The court in considering the arguments on both sides held that education in one's personal language is not envisaged within the ambit of the provision on the right to education.<sup>470</sup> It is crucial however, to note that the jurisprudence of the court advanced the fact that the parents did not constitute a minority, thus the question would be if the approach would be different if the status of the applicant were different. Considering the challenges attendant with the resources to provide such support, states should do everything possible to ensure that no barrier limits the individual's access to education.

Indeed, the fight against discrimination in the realisation of the right to education sometimes requires the adoption of specific measures.<sup>471</sup> The CRC on its article 29 is based on the principle of child-centred education, meaning that the fundamental goal of education is the development of an individual's personality, gifts, and particular learning requirements.<sup>472</sup> In continuity with this interpretation, states and international organisations under the auspices of UNESCO adopted the Salamanca Declaration for Education and Special Needs in 1994. This Declaration and the accompanying programme of action are more focused on special needs related to disabilities, but also take into account all specific needs, including language.<sup>473</sup> The reasonable planning imperative introduced by Article 2 of the 2006 Convention on the Rights of Persons with Disabilities could usefully be transposed and adapted to combat discrimination against migrant children.<sup>474</sup> In my view, teaching migrant children in their parents' language can hinder

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<sup>469</sup> Relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium' (23 July 1968) ECHR (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64)

<sup>470</sup> Relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium' (23 July 1968) ECHR (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64)

<sup>471</sup> Valette (n 292) 2.

<sup>472</sup> Article 29 of CRC.

<sup>473</sup> The UNESCO Salamanca Statement at <http://www.csie.org.uk/inclusion/unesco-salamanca.shtml> (accessed 20 September 2020).

<sup>474</sup> Valette (n 292) 2.



the integration of these children in the host state and discriminate them, so they need an ‘inclusive education’ too.

The General Comments No. 13 recalls that while the implementation of the right to education is subject to the principle of progressivity, certain immediate obligations are also valid with regard to, including the prohibition of discrimination and the obligation to act in order to achieve the law.<sup>475</sup> The Committee further notes that regressive measures with respect to the right to education are not permitted, and that the state deliberately doing so must prove that it has carefully weighed all other possible solutions in a manner that is consistent with the full range of rights guaranteed by the CESCR and with regard to the resources available.<sup>476</sup> In the same vein, it recalls that the limitations of Article 13, such as closing an educational institution, must be fully justified in relation to each of the conditions set out in Article 4 of the Covenant.<sup>477</sup>

### **3.12 Compulsory and free primary education**

Free and compulsory primary education is guaranteed internationally and regionally.<sup>478</sup> The specific protection of the right to primary education in international law is based on different logics or is built from the different facets of the same right. Thus, the Universal Declaration of Human Rights and CESCR create a subjective and whole right to a child to compulsory and free primary education as a component of every person's right to education.<sup>479</sup>

The Convention on the Rights of the Child also recognises the right of the child to education and makes the objective of gradually ensuring the exercise of that right a condition for the realisation of the right to education, but also of a right to education free from discrimination by guaranteeing its recognition on the basis of equal opportunities.<sup>480</sup>

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<sup>475</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>476</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>477</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 56.

<sup>478</sup> Article 26.1 Universal Declaration of Human Rights (1948); Article 4.a of Convention on combating discrimination in education (1960); Article 3.1; 13.2 a and 14 of International Covenant on Economic, Social and Cultural Rights (1966); Article 28 of the Convention on Rights of the Child (1989); Article 24 of Convention on the Rights of Persons with Disabilities (2006); Article 1 1.1 and 11.3a of African Charter of the Rights and Welfare of the Child (1990).

<sup>479</sup> UDHR and ICESCR.

<sup>480</sup> CRC.

The Convention on Combating Discrimination in Education, adopted within the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1960, also favours the latter objective. Article 14 of the CDESCR specifically aimed at countries still colonised when the treaty was adopted and provided for a two-year deadline for the adoption of a detailed plan to gradually ensure that all children have compulsory and free schooling.<sup>481</sup> Despite these distinctions between the provisions, the fact remains that the free and compulsory nature of primary education has an undeniable legal and normative value in international human rights law. Based on these achievements, today's trend tends to refine the contours of this right in contexts or according to specific groups (such as refugees, migrants).<sup>482</sup>

During the 1980s, the World Bank implemented structural adjustment programmes (SAPs) in developing countries, leading to significant reductions in public spending, including education.<sup>483</sup> This resulted in violations of the right to primary education for children in countries like the DR Congo.<sup>484</sup> The focus shifted towards managing and financing education at a lower cost, negatively impacting national education systems.<sup>485</sup> These programmes were introduced to address balance-of-payments deficits and debt burdens, but the cuts in non-productive sectors like education had adverse effects on the economy and social well-being.<sup>486</sup> These reduced expenditures had further adverse effects on the economy and social well-being as the population became too impoverished to afford manufacturing industry products.<sup>487</sup> The education sector was particularly affected by the reduction in state spending. The underlying notion behind the World Bank's educational policy during this period was that developing countries lacked sufficient resources to develop their national education systems.<sup>488</sup>

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<sup>481</sup> CDESCR.

<sup>482</sup> Villeneuve (n 281) 18.

<sup>483</sup> MR Abouharb & DL Cingranelli 'The Human Rights Effects of World Bank Structural Adjustment, 1981–2000' (2006) *International Studies Quarterly* 50, 233–262 at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.375.5960&rep=rep1&type=pdf> (accessed 20 November 2021).

<sup>484</sup> MA Geo-Jaja and G Mangum 'Structural Adjustment as an Inadvertent Enemy of Human Development in Africa' (2001) 32 *Journal of Black Studies* 30–49 at <https://www.jstor.org/stable/2668013> (accessed 20 June 2021).

<sup>485</sup> *Ibid* 30–49.

<sup>486</sup> TT Saskia at al 'State failure in the Congo: perceptions & realities' (2002) 29 *RAPE* 379 available at <https://www.jstor.org/stable/4006785?seq=1> (accessed 20 November 2020).

<sup>487</sup> Nathanaël Aleyeti Kabwa *Bâtir le Congo* (l'Harmattan: 2012) 112.

<sup>488</sup> LD Tableman 'The impact of structural adjustment policies on education systems of developing countries: a comparative study between Thailand and Malaysia after the Asian financial crisis' (master dissertation University of Oregon March 2009) at [https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/9167/Tableman Leslie Diana MPA Win09.pdf?sequence=1&isAllowed=y](https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/9167/Tableman%20Leslie%20Diana%20MPA%20Win09.pdf?sequence=1&isAllowed=y) (accessed 20 June 2021).

The 1980s witnessed significant declines in education rates and the introduction of school fees. However, most studies fail to address the public spending cuts imposed as part of the World Bank and IMF's structural adjustment policies. Despite the evidence, the discourse often blames the degradation of the education sector on the "inefficient use of available resources" rather than inadequate resource allocation.<sup>489</sup>

For the past decade, several states parties to the CESCRC have appeared before the Committee of Experts justifying the breaches of their obligations, particularly with regard to primary education, as a result of the structural adjustment measures imposed on them by the international financial institutions.<sup>490</sup> Also, a review of the Concluding Observations of the Committee of Experts of the CESCRC reveals that on many occasions, in agricultural areas, the distribution of free uniforms or textbooks, the provision of free transport and the establishment of subsidy or scholarship programmes offered to families for the schooling of children are presented under the objective of strengthening financial support for 'primary education', or that of "Improving teacher training and preparation".

In its initial report submitted in 2001, Benin drew attention to the steady decline in the share of the national budget devoted to education as a result of structural adjustment, and stated that successive SAP had prevented it from adopting a national primary education plan and thus from giving effect to Article 14 of the CESCRC.<sup>491</sup> Cameroon and Zimbabwe also mentioned structural adjustment as an obstacle to the realisation of the right to education.<sup>492</sup> Concerns have been expressed about the detrimental effects of the debt burden and structural adjustment initiatives on human rights, particularly for vulnerable people.

The 1980s saw the emergence of criticism of these policies, which prompted greater focus and the hiring of an impartial expert. It is now widely acknowledged that the recommended debt cure through structural adjustment programmes made matters worse and had a negative impact on human rights, development, and poverty reduction. Numerous studies have emphasised that

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<sup>489</sup> Abouharb & Cingranelli (n 483) 233-262.

<sup>490</sup> CESR General Comment No. 11: Plans of action for primary education (article 14) (10 May 1999) E/C.12/1999/4 para 3.

<sup>491</sup> UN CESR, report on the 10th and 11th sessions, 2-20 May 1994, 21 November-9 December 1994 1995 paras 369-370.

<sup>492</sup> UN CESR, report on the 10th and 11th sessions, 2-20 May 1994, 21 November-9 December 1994 1995 para 81, 166 and 207.

one of the main effects of these policies is the impoverishment of social groupings and families in developing countries.<sup>493</sup>

In terms of the specific right to education, as with other social rights, it is arguably the reduction in public spending that has generated the most negative direct effects. Withdrawal of the state in key areas of social services has left significant gaps that have at times been filled by local survival initiatives.<sup>494</sup> Added to this are the effects of the measures prescribed at the same time by the World Bank in the context of its education loans to support this budgetary discipline, such as the reduction of education costs and the transfer of responsibility for financing primary schooling from the state to parents and communities.<sup>495</sup>

Two significant results of the state's lack of involvement in structural adjustment have been the growth of private schools and the implementation of fees for public school enrolment. This disengagement has caused many private schools to open in developing nations, regardless of their financial success or affiliation (confessional or community-based), and it has also made it necessary to impose taxes and tuition charges in public schools.<sup>496</sup> In several African countries, non-profit community schools have become increasingly important vehicles for parents to realise their goals to educate their children when the state has made insufficient or no provision for basic schooling in a particular location.<sup>497</sup> Concerns are raised by the expansion of private schools in developing nations, especially unrecognised ones that provide education of subpar quality.<sup>498</sup> Religion is prioritised in denominational schools, which restricts access to unbiased education. Because of this, communities frequently have few options, which exacerbates educational inequalities.<sup>499</sup>

Discriminations have become worse in many nations because of the state's disengagement and the expansion of private education. Disadvantaged groups are left with inadequately supported, underfunded public or community education, while privileged groups have access to a paid, exclusive private system.<sup>500</sup> This fragmentation emphasises the necessity to see education as

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<sup>493</sup> Abouharb & Cingranelli (n 483) 233-262.

<sup>494</sup> Abouharb & Cingranelli (n 483) 233-262.

<sup>495</sup> Abouharb & Cingranelli (n 483) 233-262.

<sup>496</sup> Villeneuve (n 281) 81.

<sup>497</sup> In the DR Congo for example, parents must contribute every month to pay teachers.

<sup>498</sup> Geo-Jaja and Mangum (n 484) 30-49.

<sup>499</sup> Geo-Jaja and Mangum (n 484) 30-49.

<sup>500</sup> Villeneuve (n 281) 82.

both a fundamental human right and an individual freedom, highlighting the value of equitable opportunity and societal cohesiveness.<sup>501</sup> Private schools can worsen gender gaps regardless of their type. Many developing countries have also implemented school fees for basic education, which makes it more difficult for people to receive education and widens the gap in educational opportunity.<sup>502</sup>

Today, in practise in most of these countries, tuition fees are commonly charged for access to school, including those of the public system. There are also several other fees, contributions or levies imposed, for example, for the correction of work and examinations, for the purchase of uniforms, textbooks, or school materials, for transportation and for compulsory membership in the parents' association. This phenomenon is particularly common in the regions of sub-Saharan Africa and South-East Asia and the Pacific, which, overall, have the lowest enrolment rates in the world.<sup>503</sup>

And it is mainly children from the poorest families, in particular girls, who have been most affected. Consequently, the hard-won progress achieved in developing countries over past decades faces significant erosion. The imposition of such expenses emerges as a pivotal factor contributing to marked declines in primary school enrolment during the 1980s and 1990s in various countries undergoing structural adjustment programs. Furthermore, it has dealt a severe blow to the principle of free primary education, rendering it largely inaccessible or at least challenging to implement effectively.<sup>504</sup>

The African Charter on Human and Peoples' Rights unequivocally affirms the entitlement of every individual to the right to education. Moreover, Article 2 of the African Charter on the Rights and Welfare of the Child bolsters this initial safeguard. The CESCR committee underscores the imperative of ensuring the fulfilment of the essential components of the right to education as a fundamental and immediate obligation. According to the Committee, providing compulsory and free primary education constitutes an immediate obligation for all

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<sup>501</sup>The Supreme Court in Colombia.

<sup>502</sup> Villeneuve (n 281) 83.

<sup>503</sup> K Tomasevski 'The State of the Right to Education Worldwide Free of Fee' (2006) Global Report available at [http://www.katarinatomasevski.com/images/Global\\_Report.pdf](http://www.katarinatomasevski.com/images/Global_Report.pdf) (accessed 20 November 2021).

<sup>504</sup> Tomasevski (n 503) 86.

states parties, and they must prioritise this duty in the implementation of the right to education.<sup>505</sup>

The Committee on the Implementation of the International Covenant on Economic, Social and Cultural Rights emphasises the critical role of UN agencies in implementing Article 13. It directs more attention to international financial institutions, urging them to prioritise the protection of the right to education in their lending regulations, credit agreements, structural adjustment programmes, and all other actions taken to address the debt crisis and managed by these institutions.<sup>506</sup> The Committee is aware of the influence and weight of these institutions and their policies on the safeguard and implementation of economic, social and cultural rights, including the right to education, in the context of developing countries.<sup>507</sup>

According to research by K. Tomasevski, tuition fees are charged in public primary education in 91 countries, including 39 in sub-Saharan Africa. School fees and other fees charged to parents remain the main barrier to children's access to school in at least 89 of the 103 countries for which data are available. The Report also highlights the fact that this particularly affects access to education for certain groups of children, primarily girls.<sup>508</sup> A more detailed study conducted by R.B. Kattan and N. Burnett on behalf of the World Bank on school fees in public primary education also concludes that they are widespread in developing countries. Their research covered registration fees, textbook fees, fees for compulsory uniforms, and all other fees charged for children's schooling, such as those for the correction of examinations (but excluding those for accommodation or meals), as well as community or parental compulsory contributions (usually paid to the parents' association).<sup>509</sup>

Fees are charged in more than 75 countries in Africa, more than one fee is charged to parents; they are unofficial in one third of the cases; and community contributions and those paid to parents' associations are the most frequent. This represents a heavy legacy for the public education systems of these countries.<sup>510</sup> On several occasions, the CESCR Committee has

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<sup>505</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999).

<sup>506</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999).

<sup>507</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999).

<sup>508</sup> Tomasevski (n 503) 86.

<sup>509</sup> Tomasevski (n 503) 86.

<sup>510</sup> Villeneuve (n 281) 84.

described the reduction of budgetary resources and the introduction of such tuition fees at this level of schooling as measures incompatible with the provisions of the Covenant. This violation of the child's right to free primary education has resulted in the breaking of the fundamental link between compulsory and free education, as many parents can no longer fulfil their duty to have their children educated because they do not have the financial means.<sup>511</sup>

### **3.13 Conclusions**

The promotion and protection of the right to education for all individuals, including migrants, faces various infringements. Ensuring the realisation of migrants' right to education relies on inclusive educational approaches that value diversity and provide equal opportunities for all. Addressing the challenges faced by migrant learners and supporting their integration and academic development requires the implementation of inclusive classrooms and educational policies.

The significance of the rule of law is undermined when people are unaware of their rights. Migrant rights are often violated due to misconceptions that undocumented migrants are devoid of any rights. Similarly, international treaties lack effectiveness without the support of corresponding national laws, as seen in certain provisions of South African immigration laws.

The right to education becomes impractical when children's education does not adhere to the 4A principles. In underdeveloped countries, the right to primary education remains unattainable for many children due to various barriers. These barriers include lack of documentation or birth certificates, disabilities without proper provisions for inclusive education, financial constraints, geographic limitations, and education that fails to meet international standards.

States have an obligation to ensure the right to education for everyone, including immigrants. This entails providing access to education, eliminating prejudice, and allocating necessary aid and resources. Collaboration among governments, politicians, and relevant stakeholders is crucial in creating an environment that upholds these commitments and guarantees the right to education for migrant learners.

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<sup>511</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999).



The World Bank's Structural Adjustment Program (SAP) contributed to the introduction of school fees in some African countries, thus breaking the essential link between compulsory and free education and failing to meet the minimum educational standards set by international instruments. Implementing compulsory and free primary education is a vital step in ensuring that every child, regardless of immigration status, can access basic education. Although several African countries' constitutions declare primary education as free and compulsory, the presence of fees creates a hindrance and goes against the requirements of the CDESCR. It is crucial for African states to prioritise the right to free and compulsory education in their national programmes.

Taking inspiration from South African judges who prioritise international human rights standards in their court decisions, the DR Congo should enact immigration laws that reflect a commitment to human rights laws. Safeguarding and advancing the basic right to education for migrants should be a priority for authorities, decision-makers, and other stakeholders. By addressing challenges, promoting inclusivity, fulfilling state commitments, and implementing compulsory and free primary education, we can create a society where every child, regardless of their background, can enjoy their right to education and fulfil their potential.

## CHAPTER FOUR: MIGRANT CHILDREN'S RIGHT TO EDUCATION

### 4.1 Introduction

This chapter will discuss the right to education as it relates to migrant people. It will further seek to underscore the importance of education as a means of building the capabilities of migrants towards self-actualisation and contributing to the host state in particular, and humanity in general. The importance of education as a fundamental right is an ideal agreed to by scholars globally, however, the actualisation of same continues to prove to be a challenge for most countries. The right to education is a recognised human right that should be afforded to migrants as they would have ordinarily enjoyed these rights if they were in their home countries.<sup>512</sup>

This right, as recognised by various international legal instruments, would be enjoyed by migrants in their host countries only where the host countries have ratified the international instrument that specifically protects the right to education of migrants.<sup>513</sup> International treaties providing for the right to education of migrants apply to all migrants. International conventions such as the Convention on the Right of a Child (CRC) make elaborate provisions for the protection of the right to education of a migrant child.

It is emphasised here that access to education and the recognition of the right to compulsory primary education for every individual are not contingent upon any individual's status. The international legal acknowledgment of the right to primary education is thus fully safeguarded.<sup>514</sup>

For the purpose of examining the right to education of migrants in this chapter, the researcher interprets the situation of refugees, asylum seekers, and stateless individuals in a narrow sense. While the distinction between refugees and stateless individuals may be a matter of legal

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<sup>512</sup> JE Doek 'What does the children's Convention require?' (2006) *Emory International Law Review* 199-208, 199

<sup>513</sup> Doek (n 512) 199-208.

<sup>514</sup> The status of the right to education of migrants: International legal framework, remaining barriers at national level and good examples of states' implementation 'Paper commissioned for the 2019 Global Education Monitoring Report, Migration, displacement and education: Building bridges, not walls' available at [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE\\_UNESCO\\_Background\\_Paper\\_Migrants\\_2018\\_En.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_UNESCO_Background_Paper_Migrants_2018_En.pdf) (accessed 25 June 2019).

definition, albeit not a primary concern of this thesis, <sup>515</sup> the assumption is made that they all fall under the category of non-nationals within a state and are therefore considered migrants. This assumption is further reinforced by the fact that they suffer similar discriminatory challenges. This position finds support in the views of Fullerton, who posits that:

In a world of nation states, they live on the margins without membership in any state, and, consequently, have few enforceable legal rights. Stateless individuals face gaps in protection and in many cases experience persecution that falls within the refugee paradigm.<sup>516</sup>

In addition to the above, Kits opines that:

the refugee experience is far from over upon arrival in a place of asylum. Indeed, in many ways, the struggle to create a new life has only begun. As refugees can attest to, the process of fully normalising their lives – reuniting with family members, securing local education... Like refugees, stateless people face often insurmountable difficulties in securing the core protections of the state in which they reside...<sup>517</sup>

Conclusively, the researcher aligns with the perception of Onuora-Oguno, who advocates for a broader conceptualisation of refugees, asylum seekers and stateless persons towards the protection of their rights.<sup>518</sup> The chapter will thus discuss from an encompassing perspective issue affecting the access to education of migrants.

#### **4.2 International Conventions that recognise the right to education of migrants.**

Taking into consideration that most international laws and treaties that enshrine the provisions for the protection of the right to education is found within the soft law regime, considering the

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<sup>515</sup> For a clear distinction between the concept of statelessness and refugees see generally V Budislav ‘International Instruments Dealing with the Status of Stateless Persons and of Refugees’ (1972) *Revue belge de droit international* 8, 143-175.

<sup>516</sup> M Fullerton ‘The intersection of statelessness and refugee protection in US asylum policy’ (2018) 2 *Journal on Migration and Human Security* 144 at <https://journals.sagepub.com/doi/abs/10.1177/233150241400200301> (accessed 25 June 2019).

<sup>517</sup> HJ Kits ‘Betwixt and between: refugees and stateless persons in limbo’ (2005) *Refuge: Canadas Journal on Refugees* 3-5 at <https://refuge.journals.yorku.ca/index.php/refuge/article/view/21327> (accessed 25 June 2019).

<sup>518</sup> AC Onuora-Oguno ‘Migration, Refugees, Asylum and Uprooted Peoples’ Rights’ (2014) *Sage Handbook of Human Rights* 253 at [https://www.researchgate.net/publication/294622855\\_Migration\\_refugees\\_asylum\\_and\\_uprooted\\_peoples'\\_rights](https://www.researchgate.net/publication/294622855_Migration_refugees_asylum_and_uprooted_peoples'_rights) (accessed 25 June 2019).

challenges that are attendant with the respect to soft laws, it is noted that the recognition of the right to education is not as simple as it seems.<sup>519</sup> Despite this stance, the researcher agrees that for other rights that pertain to migrants to become a reality, the right to education must be achieved.

Additionally, the predicate that states must uphold their duties under treaties necessitates measures for the rapid implementation of the right to education. This position, it is argued, has influenced several countries to enshrine the right to basic education within their constitutions and make deliberate efforts to ensure that this is realised. In this regard also, several treaty bodies have made recommendations in this trajectory with the hope that states are able to implement and sustain the aspiration of the right to education.<sup>520</sup> International treaties providing for the right to education apply to all persons including migrants. International conventions, such as the CRC make elaborate provisions for the protection of the right to education of a migrant child.<sup>521</sup>

Additionally, human rights principles of equality and non-discrimination cover the ambit of protecting rights of every individual irrespective of the status of such individuals.<sup>522</sup> Because of a variety of factors, from economic hardship to antagonistic relations with the nations they are in, most migrants who are categorised as irregular migrants are usually unable to exercise their right to education.<sup>523</sup>

This position is further supported by authors who stress that migrant children are often subjected to more discrimination which, coupled with the inability of their parents to meet the financial obligations that may be required to support their schooling, are resultantly unable to complete schooling.

According to Osler,

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<sup>519</sup> The status of the right to education of migrants (n 514).

<sup>520</sup> The status of the right to education of migrants (n 514).

<sup>521</sup> A Osler 'Human Rights Education, Post-Colonial Scholarships, and Action for Social Justice' (2015) 43 *Theory and Research in Social Education* 244 available at <https://www.tandfonline.com/doi/abs/10.1080/00933104.2015.1034393> (accessed 25 June 2019).

<sup>522</sup> The Status of the Right to Education of Migrants (n 514)

<sup>523</sup> 'Migration and Human Rights: Improving Human Rights Based Governance of International Migration' (2012) Office of the High Commissioner 7 available at [https://www.ohchr.org/Documents/Issues/Migration/MigrationHR\\_improvingHR\\_Report.pdf](https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf) (accessed 15 June 2020).

there is ample evidence that migrant, refugee, and asylum-seeking students in many countries face a higher risk of marginalization regarding education systems and opportunity when compared with native students.<sup>524</sup>

The implication of this is that policy sometimes tilts negatively towards migrants. In some places the imposition of a birth certificate or a demand for proof of documentation before enrolment in school scares migrants from approaching schools. In some instances, migrant parents have been arrested in a show of strength by immigration authorities at schools noted to admit migrant children.<sup>525</sup>

In overcoming this limitation, the CRC demands that every child be recognised and thus allowed to enjoy the rights available to the child irrespective of the status of the parents. The CRC is lauded for the provisions that protect the right of every child and has a huge level of acceptance by states. However, the fact that most constitutions require the CRC dispositions to be incorporated in the national laws to be justiciable, constitutes a challenge. The provision of the CRC spans economic and cultural rights. It includes rights such as education, documentation of the abolition of child marriages and child labour.<sup>526</sup> In addition, the CRC makes provision for the child to have the right to an adequate standard of living.<sup>527</sup>

In addition to the cultural rights discussed above, children are also to be protected from violation of their civil and political rights.<sup>528</sup> The rights that are included in this regime include the protection of the right to life, dignity and non-subjection to inhuman and degrading treatment.<sup>529</sup> Furthermore, CRC protects the right to freedom of expression,<sup>530</sup> “the right to freedom of

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<sup>524</sup> Osler (n 521) 244-274.

<sup>525</sup> Parliamentary Assembly of the Council of Europe, Undocumented Migrant Children in an Irregular Situation: A Real Cause for Concern (4 October 2010) Committee on Migration, Refugees and Population, Doc. 12718 <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13007&lang=en> (accessed 25 June 2021).

<sup>526</sup> Article 27 of Convention on the Rights of the Child; article 11 of the International Covenant on Economic, Social and Cultural Rights

<sup>527</sup> Article 6 of Convention on the Rights of the Child; article 6 International Covenant on Civil and Political Rights

<sup>528</sup> Article 37 (a) of Convention on the Rights of the Child, CRC.

<sup>529</sup> article 13 of Convention on the Rights of the Child CRC; article 19 of the International Covenant on Civil and Political Rights.

<sup>530</sup> Article 14 of Convention on the Rights of the Child CRC; article 18 of the International Covenant on Civil and Political Rights.

thought, conscience, and religion, the right to freedom of association and to peaceful assembly, and the right to protection of privacy, family, home, and correspondence”.<sup>531</sup>

A close perusal of the provisions of the CRC elucidates the deliberate use of the words “everyone” and “no one”, in effect, the provision applies either to prohibit any individual or state agent from violating the rights of children or denying them from enjoying their rights. It is important therefore to ensure that children are not also denied their right to make choices within the states in which their parents find themselves.<sup>532</sup> Children must not be subjected to legislative and other administrative processes that violate their rights irrespective of their documentation status. According to Doek,<sup>533</sup>

Article 12 of the CRC requires that state parties take various legislative, administrative, and other measures to ensure that this right is anchored in the child’s daily life in the home, in the extended family when applicable, in other settings such as childcare institutions, and in their community.

Aside from the CRC, several other international instruments enshrine the protection of the right to education of a child and bring this to the fore to ensure that every discriminatory bottleneck be dismantled.<sup>534</sup> The right to educational provisions of these instruments will be accessed by discussing them under the heading of the category of migrants to which they apply, as follows.

#### **4.2.1 Refugees**

The right to education of refugees finds a basis in two very important instruments. The first is the Convention Relating to the Status of Refugees (CSR) of 1951<sup>535</sup> and its 1967 Protocol (PCSR).<sup>536</sup> The provisions are directly associated with the entitlement to education for asylum seekers and underscore the imperative of guaranteeing that every child has unfettered access to

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<sup>531</sup> Article 6 of International Covenant on Civil and Political Rights

<sup>532</sup> Doek (n 512) 200.

<sup>533</sup> Doek (n 512) 200.

<sup>534</sup> Article 2.2 of International Covenant on Economic, Social and Cultural Rights (CESCR); article 2.1 of Convention on the Rights of the Child (UNCRC); article 1 of International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); articles 1.1 and 3 of UNESCO Convention against Discrimination in Education (CADE); Articles 2, 18(3) and 12 of African Charter on Human and Peoples’ Rights; Articles 3, 11 and 23 of African Charter on the Rights and Welfare of the Child.

<sup>535</sup> Doek (n 512) 200.

<sup>536</sup> Doek (n 512) 200.

school.<sup>537</sup> The emphasis is placed on the fact that according to the CRC, unaccompanied minors are under the protection of the state and must never experience mistreatment or adversity due to their circumstances. The same degree of safeguarding is also extended by the refugee convention, which secures the well-being of children seeking asylum.<sup>538</sup>

The right to education of refugees finds a basis in two very important instruments. The first is the Convention Relating to the Status of Refugees (CSR) of 1951 and its 1967 Protocol (PCSR). The provisions are directly associated with the entitlement to education for asylum seekers and underscore the imperative of guaranteeing that every child has unfettered access to school. The emphasis is placed on the fact that according to the CRC, unaccompanied minors are under the protection of the state and must never experience mistreatment or adversity due to their circumstances. The same degree of safeguarding is also extended by the refugee convention, which secures the well-being of children seeking asylum.

A combined reading of the above provisions highlights that children must not be discriminated against based on their status especially with reference to primary education. The provision of this article in relation to public education urges states who have refugees in their jurisdictions to give them treatment as would ordinarily be accorded a foreigner in their country as concerns elementary education. It further expects states to ensure less discrimination against foreign certificates for students applying for studies other than elementary education. This right however does not include obtaining a public education in the parents' language.<sup>539</sup> On whether a child is entitled to an education in a particular language it is noted that while there is no international right to language in education, there is the need for states to ensure that the language rights of individuals are not intentionally violated.

Importantly, access to educational materials must not be conducted in such a manner that migrant children are discriminated. States are also mandated not to engage in an education curriculum that would violate the religious rights of migrant children and ensures that appropriate measures are adopted in guaranteeing that migrant children with special needs are accommodated.

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<sup>537</sup> The Status of the Right to Education of Migrants (n 514).

<sup>538</sup> Article 22 and 29 of the 1951 Refugee Convention.

<sup>539</sup> Doek (n 512) 200.



The provisions of the Convention on the rights of Persons with Disability clearly provides a leverage and obligates states to ensure that everyone living with disability is protected.

#### **4.2.2 *Asylum seekers***

Asylum seekers are protected by the Refugee Convention until such time as their documentation procedures are completed.<sup>540</sup> Invariably the same protection accorded to children under the CRC are also applicable to children of asylum seekers. Therefore, the right to education is protected and should not be violated under any guise with obligations on states to ensure that special measures are in place to drive realisation of this.

Once the application for the international protection of asylum seekers is granted, they enjoy the same protection as a refugee.<sup>541</sup>

#### **4.2.3 *Migrant workers and members of their families***

Migrant workers are protected from any form of discrimination and denial of their right to education. These are provided for in Articles 7 and 12 of the International Covenant on the protection of rights of migrant workers (ICPRMW). The right to education of children of migrant workers finds protection in the wordings of Article 30. An important aspect of the wordings of the Convention is the demand for quality in all ramifications within the education sphere. Additionally, access to school must be carried out only based on the child and not on the status of the migrant parents or any other policy requirement of the state. It is however, noted that this requirement excludes post primary education.<sup>542</sup>

### **4.3 Legally non-binding international instruments**

In and of itself, the Declaration is not a legally binding document. However, it does incorporate a set of principles and rights based on human rights norms found in other legally binding international instruments, such as the International Covenant on Civil and Political Rights. Furthermore, the Declaration was adopted by agreement by the United Nations General Assembly, suggesting that states are committed to its implementation.<sup>543</sup> The declaration is

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<sup>540</sup> Article 22 and 29 of 1951 Refugee Convention.

<sup>541</sup> The Status of the Right to Education of Migrants (n 514).

<sup>542</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, Committee on the Protection of the Rights of All Migrant Workers, and Members of Their Families (28 August 2013) CMW/C/GC/2 (2013) para 5-11 and 75-79.

<sup>543</sup> Information available at <https://www.ohchr.org/en/issues/srhdefenders/pages/declaration.aspx> (accessed the 21 November 2021).

important for migrants' human rights as human beings first, but it also protects their rights as migrants and children.

Article 26 of the Universal Declaration of Human Rights acknowledges that education is a right:

- Education is a right that everyone possesses. At least in the early and fundamental stages, education must be free. Elementary education will be required of all students. Technical and professional education must be widely available, and higher education must be open to everybody on a merit-based basis.
- Education should be geared toward the complete development of the human personality as well as the promotion of human rights and fundamental freedoms. Its mission is to promote understanding, tolerance, and friendship among all nations, races, and religions, as well as to support the United Nations' efforts to keep the peace.
- Parents have the right to choose the type of education their children will receive.

The right to education has been confirmed and expanded in several international and regional accords since the passage of the UDHR. Today, all states (excluding South Sudan) have ratified at least one human rights treaty, adopting the legal obligation to respect, preserve, and fulfil everyone's right to education. However, properly realising the right to education remains elusive. This right is abused every day, worldwide, especially for the marginalised, refugees, and migrant children.

With its guarantee of the right to education and affirmations that ‘education will be free, at least in the basic and fundamental phases’ and that ‘basic education shall be compulsory’, article 26 is also crucial for African children.”<sup>544</sup> On a continent where illiteracy is pervasive and the promise of universal primary education remains a distant dream for millions of children, Article 26 continues to offer a forum for rigorous analysis and soul-searching. Unquestionably, Article 26, of the African Charter for the Rights and Welfare of the Child (ACRWC), <sup>545</sup> and the International Covenant on Economic and Social Rights (CESCR) were inspirations for the

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<sup>544</sup> Article 26 of UDHR.

<sup>545</sup> UN General Assembly, Convention on the Rights of the Child articles 28-29, 44th Session (Nov. 20, 1989) U.N. Doc A/Res/44/25.

addition of a right to education in the United Nations Convention on the Rights of the Child ("CRC").<sup>546</sup>

In 2002, when the Kenyan government announced free primary school education for all, Kimani Ng'ang'a Maruge decided to enrol in Grade One. What's unusual about that? He was an 84-year-old great-grandfather.<sup>547</sup> Article 26 of the Universal Declaration of Human Rights (UDHR) makes universal free primary education compulsory and is usually thought of as a right for children. But as Maruge showed, people of any age can seek and benefit from education and literacy.

In Article 26 of the UDHR, it is addressed as the right to "full development of the human personality," which also appears in Articles 22 and 29. It is clear the drafters saw this term as a way of summarising many of the social, economic and cultural rights in the Declaration, and there has been an increasing focus by international bodies on the role of education in empowering individuals – both children and adults. Of the rights enshrined in the UDHR, the right to education has been widely achieved. More children around the world have access to education today than ever before, with rates of primary school attendance for girls rising to parity with boys in some regions. The overall number of children out of school worldwide declined from 100 million in 2000 to an estimated 57 million in 2015.<sup>548</sup>

International human rights law guarantees an education for all, without discrimination. This non-discrimination concept applies to all persons of school-going age residing in a state's territory, including non-nationals, regardless of their legal status.<sup>549</sup> Irregular or undocumented migrants can therefore invoke the right to education. This right creates immediate and unequivocal obligations – the state has no margin of freedom in this area. Discrimination on any grounds is prohibited because the very essence of the law is at stake. This implies an equal right of access to educational institutions, which can be described as the core, or minimum content, of the right.<sup>550</sup>

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<sup>546</sup> Organization of African Unity (OAU) African Charter on the Rights and Welfare of the Child, chapter 1 article 11, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999,

<sup>547</sup> <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 30 September 2020).

<sup>548</sup> <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 30 September 2020).

<sup>549</sup> UNESCO 'Right to education handbook' Right to Education Initiative (UK) 2019.

<sup>550</sup> UNESCO 'Right to education handbook' Right to Education Initiative (UK) 2019.

#### **4.4 Legally binding international instruments**

All internationally recognised human rights instruments to which a state is a party, are legally binding. Ratification, accession, or succession are all ways for a state to join a treaty. Ratification is the state's formal agreement to be bound by the obligations established in the legal text. The distinction between accession and ratification is in the process (those that have not signed a treaty prior to its entry into force accede to it rather than ratify it).<sup>551</sup>

A state can also become a party to a treaty through succession or declaration if the legal instrument has such a provision. In the same way, states can make reservations to a treaty. This means that the state that ratifies the treaty does not agree to be bound by some provisions of the legal instrument. This can only be done if the reservations do not threaten the purpose or objective of the treaty.<sup>552</sup>

##### ***4.4.1 International Covenant on Economic, Social and Cultural***

The International Covenant on Economic, Social and Cultural Rights 1966 (CESCR) is of special importance within not only the education framework but also within the socioeconomic and cultural rights of migrant children. Both South Africa and the DR Congo have ratified the CESCR (South Africa: 2015 and DR Congo: 1976).<sup>553</sup>

The most comprehensive provision of the right to education is Article 13. It recognises the universal right to education without discrimination of any kind and establishes a framework for realising this right, including free compulsory primary education, universally available and accessible secondary education through the progressive introduction of free education, equal access to higher education based on capacity, literacy, and quality improvement measures. This article also specifies the right of parents to choose the type of education they want to provide their children, as well as the right of parents to construct and direct educational institutions in accordance with state minimum criteria. Article 14 imposes on the state the need to create a plan of action to ensure free and compulsory primary education if it has not yet been achieved. Articles 13 and 14 of the CESCR deal with the right to education.

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<sup>551</sup> Information available at <https://au.int/en/documents/20200516/compendium-regional-and-international-legal-instruments-girls-and-womens> (accessed 21 November 2021).

<sup>552</sup> Information available at <https://au.int/en/documents/20200516/compendium-regional-and-international-legal-instruments-girls-and-womens> (accessed 21 November 2021).

<sup>553</sup> Information available at <https://indicators.ohchr.org/> (accessed the 21 November 2021).

Article 13, the Covenant's longest provision, is the most extensive and broad-based article on the right to education in international human rights law. General Remark 11 on Article 14 (plans of action for primary education) was already adopted by the Committee; General Comment 11 and the current general comment are complementary and should be studied together. The realisation of the right to education is still a long way off. Furthermore, in many circumstances, this objective is becoming increasingly elusive. The full implementation of Article 13 in states is hampered by a variety of difficult structural and other impediments.

Article 13 of the CESCR establishes a universal right to education for all people, regardless of age, language, social or ethnic origin, or other position. In comparison to other Covenant rights, Articles 13 and 14 are quite detailed.<sup>554</sup> They lay out the actions that states must take to realise the right to education. This is especially true of paragraph 2 of Article 13, which lists the many measures to be taken to achieve full realisation of this right.<sup>555</sup> The problem here is the state's special commitment to make education available and accessible to all people without discrimination.

For states parties that have not yet achieved this goal, Article 14 is dedicated to the implementation of obligatory and free elementary education for all. The Committee on Economic, Social, and Cultural Rights places high importance on the provision of free and obligatory primary education. When discussing the DR Congo, for example, it was made apparent that charging fees for basic education is in violation of Article 13, par. 2 of the Congolese Constitution (a). A State party cannot use severe economic circumstances to justify such an action.

Article 13(2) is defined as the entitlement to an education by the CESCR General Comment on Article 13. It distinguishes four interconnected and crucial aspects of education:<sup>556</sup>

- a) Availability: A State must have enough operating educational institutions and programmes.
- b) Accessibility: Educational programmes and institutions must be open to everyone, without exception, and this includes both physical and financial accessibility.

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<sup>554</sup> P Alston & G. Quinn 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 9 156-229 at 185.

<sup>555</sup> The present article does not deal with the aims of education laid down in Article 13 (1).

<sup>556</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) para 6.

c) Acceptability: The curriculum and teaching strategies, as well as the form and content of education, must be current, culturally suitable, and of the highest calibre.

d) Adaptability: Education must be flexible to fulfil the demands of cultures and civilisations that are changing, as well as students' requirements within their own unique social and cultural contexts.

This 4A scheme is a helpful tool for analysing the specific requirements that a state party must uphold under the right to an education and its broader commitments.<sup>557</sup> The elimination of discrimination must happen immediately.<sup>558</sup>

The Dominican Republic, for instance, was judged to have violated the American Convention when it refused to provide a birth certificate for a girl of Haitian descent who was born there, prohibiting the child from enrolling in day school because she lacked identity.<sup>559</sup> The Inter-American Court determined that the State had violated the child's rights and the right to equal protection. The state was ordered to comply with its "obligation to guarantee access to free primary education for all children, regardless of their origin or parentage, which arises from the special protection that children require."<sup>560</sup> With regard to discrimination, the Court mentioned that "the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group."<sup>561</sup>

#### ***4.4.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979***

The Convention on the Elimination of All Forms of Discrimination against Women establishes an international bill of rights for women. It is a very important instrument for this thesis because it caters not only for women but for migrant girls as well. South Africa ratified the convention in 1995 while the DR Congo ratified it in 1986.<sup>562</sup>

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<sup>557</sup> This scheme has also been used by the Special Rapporteur on the right to education in her preliminary report, K Tomasevski Preliminary 'report of the Special Rapporteur on the Right to Education' submitted in accordance with Commission on Human Rights resolution 1998/33 (1999) UN Commission on Human Rights chapter 11 at <https://digitallibrary.un.org/record/1487535?ln=en> (accessed 30 September 2020).

<sup>558</sup> Ibid at para 10.

<sup>559</sup> See I/A Court H.R., *The Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 8 September 2005, Series C No. 130 para 3.

<sup>560</sup> See I/A Court H.R., *The Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 8 September 2005, Series C No. 130 para 244.

<sup>561</sup> See I/A Court H.R., *The Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 8 September 2005, Series C No. 130 para 134.

<sup>562</sup> Information available at <https://indicators.ohchr.org/> (accessed 21 November 2021).

Their right to education is guaranteed by Article 10 that supports gender equality by giving every woman the same educational rights as a male, from pre-school to higher technical education. It refers to educational possibilities, career and vocational assistance, scholarships and other study awards, continuing education (adult learning) programmes, and illiteracy elimination. It also calls for the abolition of any gender-based stereotypes about men and women's duties at all levels and in all forms of education.

The purpose of this article is described in Article 10, which calls on states parties to end discrimination against women to give them access to the same educational opportunities as men. States parties shall, among other things, make sure that men and women have equal access to the same curricula, tests, teaching staff with equivalent credentials, and educational facilities and equipment of comparable quality to fulfil this goal.

Additionally, states parties are required to take specific actions to address the unique educational needs of girls and women, including lowering the number of female students who drop out of school, setting up programmes for those who have left school early, and facilitating access to information specifically pertaining to women's health and family planning. This article makes it very clear that states parties have obligations that could have significant repercussions for nations when discrimination against girls and women permeates every aspect of daily life and society.

#### ***4.4.3 The Convention on the Rights of the Child (CRC)***

The Convention on the Rights of the Child is significant because it protects children, whose right to education is the focus of this research. The convention was established in 1989, and the idea that the best interests of the child must be the driving principle for measures taken for the care and protection of children is a common element of duties imposed on States parties because of the treaty. (Article 3(1)). South Africa ratified this convention in 1995 while the DR Congo did it in 1990.<sup>563</sup>

Children under the age of 18 are covered by the Convention on the Rights of the Child (CRC, 1989). It recognises education as a legal entitlement for all children, regardless of their socioeconomic status. Article 28 provides all nationals free compulsory elementary education;

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<sup>563</sup> Information available at <https://indicators.ohchr.org/> (accessed the 21 November 2021).



progressive free secondary education, which should in any event be available and accessible to all; and access to further education based on need. It involves the state's responsibility to adopt efforts to improve school attendance and discipline. It promotes international cooperation in education, particularly in the areas of illiteracy and ignorance, as well as access to scientific and technical knowledge.

Article 29 outlines the goals of education and acknowledges parents' freedom to choose the type of education they want to provide their children, as well as their freedom to construct and direct educational institutions in accordance with statutory minimum criteria. To begin with, Article 28(1a) emphasises the incremental realisation of the right to elementary education, whereas Articles 13(2a) and 14 of the Covenant are more required and stringent. Furthermore, Article 28(2) states that states parties must take all reasonable steps to ensure that school punishment is administered in a manner that respects the human dignity of children and is consistent with the present Convention.

Article 28 highlights (1e) the need of regular school attendance and of lowering dropout rates, both of which are qualities that are neglected in other instruments. Regarding the goals of education in connection to the formation of a child's personality, Article 29(1) is wider and more specific. Article 32(1) outlines the state's protective measures against economic exploitation of children (child labour) that may obstruct their education. The Convention adds several key components for children's safety and education, which represents a significant step forward in guaranteeing their rights.<sup>564</sup>

'The enjoyment of the rights established in the Convention [must] be available to all children... irrespective of their nationality, immigration status, or statelessness,' the Committee on the Rights of the Child (CRC) stated in its general opinion No. 6.<sup>565</sup> It goes on to say that "the non-discrimination principle of the Convention on the Rights of the Child obliges states parties to respect and ensure the rights set out in the Convention to all Children, whether they are considered, inter alia, migrants in regular or irregular situations, asylum seekers, refugees, stateless and/or victims of trafficking, including in situations of return" in its general comment

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<sup>564</sup> A comparative analysis of international provisions concerning the right to education may be found in a paper prepared by Mr. José L. GOMEZ DEL PRADO, U.N. Doc. E/C.12/1998/23.

<sup>565</sup> Committee on the Rights of the child, general comment No.6 (2005) Treatment of unaccompanied and separated children outside their country-of-origin Para 12.

No. 22 adopted in 2017. 'States parties should guarantee that migrant children and their families are integrated into receiving societies by ensuring that their human rights are effectively realised and that they have equal access to services as nationals,' it continues.<sup>566</sup>

#### ***4.4.4 The African Charter on the Rights and Welfare of the Child***

The African Charter on the Rights and Welfare of the Child establishes a significantly larger and more comprehensive right to education than the African Charter on Human and Peoples' Rights (1981) does.<sup>567</sup> It is an important instrument because it caters specifically for the rights of African children. South Africa ratified the Charter on 7 January 2000 while the DR Congo signed the Charter on the 2<sup>nd</sup> of February 2010 but did not ratify it.<sup>568</sup>

Article 11 declares that every child has the right to education and lays out the steps that states must take to fully realise this right, including school discipline and pregnant girls. It establishes the goals of education and recognises parents' rights to choose the type of education their children get in accordance with their religious and moral values. Despite important progress over the past decades to ensure wide ratification and implementation of the African Charter on the Rights and Welfare of the Child, many African children are denied their fundamental right to education. This includes tens of thousands of girls who face discriminatory barriers due to pregnancy, parenthood, or child marriage.

Children in at least 18 African countries are affected by attacks against education and the military use of their schools. The 2021 African Union theme focuses on accelerating implementation of its Agenda 2040, which outlines the AU's commitments to secure progress for children and young people. Ensuring the right to free, quality, and inclusive education, and reducing inequalities in access to quality education is key to carrying out this agenda.<sup>569</sup>

The African Charter on the Rights and Welfare of the Child commits members of the African Union to realise the right of every child to education.<sup>570</sup> According to the Charter, "state parties

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<sup>566</sup> CRC and CMW Joint general comment No. 3 and No. 22 on the general principles regarding the human rights of children in the context of international migration (2017) Paras 9 and 22.

<sup>567</sup> <https://www.corteidh.or.cr/tablas/r27050.pdf> (accessed 20 November 2020).

<sup>568</sup> Information available at [https://au.int/sites/default/files/treaties/36804-sl-  
AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHIL  
D.pdf](https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf) (accessed the 21 November 2021).

<sup>569</sup> <https://www.hrw.org/news/2021/06/16/africa-prioritize-education-safeguard-childrens-rights> (accessed 20 November 2020).

<sup>570</sup> <https://www.corteidh.or.cr/tablas/r27050.pdf> (accessed 20 November 2020).

shall take all appropriate measures with a view to achieving the full realisation of this right, in particular: a) Provide free and compulsory basic education; b) Encourage the development of secondary education in its various forms and to gradually make it free and accessible to all; c) Make higher education accessible to all on the basis of capacity and ability by all appropriate means; d) Take actions to support regular attendance at schools and the decrease of drop-out rates; e) Take distinct actions in respect of female, gifted and disadvantaged children, to guarantee equal access to education for all sections of the community.<sup>571</sup>

#### **4.4.5 African regional treaties protecting migrant children.**

With the adoption of the Migration Policy Framework<sup>572</sup> by the African Union, the need to ensure that guidelines that would enable the positive implementation of the provisions of the Policy started coming into place. The need to adopt a rights-based approach to issues of migration that concerns migrant workers started coming into place.<sup>573</sup>

A core provision of the document is to ensure that:<sup>574</sup>

Addressing irregular migration and establishing comprehensive migration management systems can contribute to enhancing national and international security and stability. However, it remains paramount to uphold the rights of all migrants, asylum seekers and refugees during all stages of the migration process, and enhanced security measures should serve to uphold these rights.

In addition to the above, the policy further advocates for a holistic approach to issues of migrant administration and safety.<sup>575</sup> The implication of the above aspiration is that migrant issues across Africa ought to be treated within legal frameworks spanning regional initiatives in Africa and international treaty obligations. Importantly, the values that migrants can contribute to the economy of the host country and their state of origin is to be harnessed by ensuring that strong institutions be put in place to ensure maximum efficiency.

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<sup>571</sup> Article 11 of the African Charter on the Rights and Welfare of the Child.

<sup>572</sup> African Union Migration Policy Framework and Plan of Action at [https://au.int/sites/default/files/documents/35956-doc-2018\\_mpfa\\_summary\\_english\\_version.pdf](https://au.int/sites/default/files/documents/35956-doc-2018_mpfa_summary_english_version.pdf) (accessed 20 June 2020).

<sup>573</sup> The Status of the Right to Education of Migrants (n 514).

<sup>574</sup> African Union Migration Policy Framework and Plan of Action (n 571).

<sup>575</sup> African Union, The Revised Migration Policy Framework for Africa and Plan of Action (2018-2027) Draft at [https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english\\_revised\\_au\\_migration\\_policy\\_framework\\_for\\_africa.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_revised_au_migration_policy_framework_for_africa.pdf) (accessed 20 June 2020).

Another important initiative in the African region is the AU Youth and Women Employment Act,<sup>576</sup> which identifies the factor that drives irregular migrations in Africa to be linked to pursuit of greater and more beneficial work experience. It provides that:<sup>577</sup>

...As a result, millions of young people work in informal jobs with no social security or prospects for improvement. This situation leads obviously to emigration as an attractive alternative...

A means of realising the aspirations of the pact is encouraging regional and sub-regional collaborations. This is identified as enabling job mobility among states and enhances free movement of goods, services, and skills. The initiatives already in place to support this includes the collaborations between the AU and ILO,<sup>578</sup> IOM<sup>579</sup> and the UN Economic Commission for Africa (UNECA).

African Union conventions governing specific aspects of refugee problems in Africa,<sup>580</sup> supports the need for collaboration between states as a means of ensuring the elimination of all forms of rancour that are identified to arise between states. Article 7 provides for *Co-operation of the National Authorities with the Organization of African Unity*. Similarly, it provides in Article 8 for Cooperation with the Office of the United Nations High Commissioner for Refugees.

From the wording of the treaties above, there is an obvious expectation on states to ensure that they do all that is possible within the legal framework to ensure the full integration of migrants within their states. It is in this respect that the CMW demands that no obstacle is placed in the path of any child from accessing education.<sup>581</sup> This position finds credence in the provision of

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<sup>576</sup> AU Youth and Women employment Act, available at [https://au.int/sites/default/files/newsevents/workingdocuments/28065-wd-youth\\_employment\\_pact\\_for\\_africa-english.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/28065-wd-youth_employment_pact_for_africa-english.pdf) (accessed 1 June 2020).

<sup>577</sup> AU Youth and Women employment Act, available at [https://au.int/sites/default/files/newsevents/workingdocuments/28065-wd-youth\\_employment\\_pact\\_for\\_africa-english.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/28065-wd-youth_employment_pact_for_africa-english.pdf) (accessed 1 June 2020).

<sup>578</sup> International Labour Organization.

<sup>579</sup> International Organization for Migrants.

<sup>580</sup> Information available at [https://au.int/sites/default/files/treaties/36400-treaty-0005\\_-\\_oau\\_convention\\_governing\\_the\\_specific\\_aspects\\_of\\_refugee\\_problems\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf) (accessed 20 May 2020).

<sup>581</sup> General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, Committee on the Protection of the Rights of All Migrant Workers, and Members of Their Families (28 August 2013) CMW/C/GC/2 (2013) Para 75-79.

the ACRWC which provides in Article 3 that regardless of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status, every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter.

A proper understanding of the provision of this Charter envisages the protection of every child, including migrants, and thus they should not be discriminated against even outside their state of origin, seeing that the core basic principle of human rights includes non-discrimination in the enforcement of these rights.

The Charter further makes specific provision for the right to education and for the target and purpose of the right stipulating what it should achieve once enforced in Article 11. Every child has the right to an education and the child's education shall be directed toward: promoting and developing the child's personality, talents, and mental and physical abilities to their full potential; fostering respect for human rights and fundamental freedoms, with particular reference to those set out in the provisions of various African instruments on human and peoples' rights, as well as international human rights declarations and conventions; and preserving and strengthening of positive African morals, traditional values, and cultures; the preparation of the child for a responsible life in a free society in the spirit of understanding, tolerance, dialogue, mutual respect, and friendship among all peoples, ethnic, tribal, and religious groups; the preservation of national independence and territorial integrity; the promotion and achievement of African unity and solidarity; and the enhancement of the child's awareness of basic health care; and the development of respect for the environment and natural resources.

The context of this provision makes it clear that every child under the definition of the convention has an uncompromisable right to education. It further makes more explicit and even more convincing the benefit a child stands to gain upon the effective realisation of this right to education. The benefits that a child stands to accrue from education is that an educated child can effectively integrate and contribute to the development of the society. A positive contribution of a child to the society is an obligation that is placed on the child by the ACRWC.

It is provided that “Every child shall have responsibilities towards his family and society, the State and other legally recognized communities, and the international community”<sup>582</sup>

The effect of all discussed above is that states must act within the available resources to ensure that all actions are taken in the best interests of the child. Article 4 of the ACRWC specifically provides that “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”. It is therefore the position of the author that any policy which places obstacles in the way of a migrant child’s accessing education is a violation of the above state obligation.

In determining the best interests of the child, several judicial decisions have been issued with reference to ensuring that the access to education of the child is not in any way encumbered. For instance, in the *Juma Masjid case*,<sup>583</sup> the right to access education was elevated above the right to own property. In the instant case, the trustee of the Juma Masjid based on the inability of the Municipal Council to pay rent on the property, initiated a process to reclaim their property from the school council. It is imperative to note that the importance of education is elevated and must not be compromised by any means.

Furthermore, in a bid to elaborate on the importance of recognising the right to education, the above provision aims at admonishing states to ensure that suitable measures are in place to promote effective recognition and realisation of migrant children’s right to education. According to the article, this strategy entails providing free and obligatory basic education at the primary level.<sup>584</sup> It is further advised that secondary education should be made available and accessible and should be free where it is necessary and the free education envisaged applies to public schools, not privately owned ones. Parents are also further given the liberty to put their children in schools other than public schools, provided such a school has a curriculum approved by the government.<sup>585</sup>

On a more specific note, regarding the migrant child’s right to education, the Charter in Article 23 admonishes states to take appropriate measures to ensure protection for refugee children, without regard to whether they are accompanied or unaccompanied. States parties to the Charter

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<sup>582</sup> Article 31 of African Charter on the Rights and Welfare of the Child.

<sup>583</sup> *The Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* [CCT 29/10] [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011).

<sup>584</sup> Watkins (n 111) 2248.

<sup>585</sup> Watkins (n 111) 2248.

are obligated to offer child refugees the necessary protection and humanitarian aid in order to ensure that they can exercise the rights outlined in the Charter and other pertinent international human rights and humanitarian instruments.

States parties are also obliged to work with international agencies that provide protection and aid to refugees to make it easier to find parents, close relatives, or unaccompanied refugee children. This will allow families to reunite. In more precise language, states are urged to ensure the existence of efficient frameworks that enable a child who is seeking refugee status or who has been granted refugee status whether such a child is accompanied by a parent or guardian or not, to still get support, and have their rights promoted, protected, and fulfilled, especially the right to education.

Having examined the various international laws that relate to education, the next section of this chapter examines the concept of education from the 4As paradigm and draws the link between this and its impact on migrants' right to education.

#### **4.5 The 4As concept of right to education and migrants**

The concept of education as already stated in this thesis finds its basis in the provision of Article 26 of the UDHR. The UDHR however did not provide the content of the right. Following closely on the UDHR was the CSECR and its attendant General Comment. From the wordings of the above efforts, several other initiatives in respect to the right to education have been initiated. Some of the efforts are the Millennium Development Goals (MDGs), the Education for All (EFA) and more recently the Sustainable Development Goals (SDG). These have led to several scholarly engagements seeing education either as a right or as capabilities as shown in the discourse of “capabilities” made famous by the work of Sen<sup>586</sup> and Nussbaum.<sup>587</sup> A common denominator in this thesis is the need to ensure that quality content of education is provided for and realised.<sup>588</sup>

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<sup>586</sup> Sen (n 104) 5.

<sup>587</sup> Nussbaum (n 102)10.

<sup>588</sup> See generally AC Onuora-Oguno 'Beyond Nomenclature: Special Education or Inclusive Education—Advocating Quality Basic Education' In AC Onuora-Oguno (eds) *Development and the Right to Education in Africa* (2019)



The implication of the above is that the right to basic or primary education has attained the status of classical rights. It also implies that all actions must be taken to guarantee that basic education is available to those on the margins and should no longer be elusive.<sup>589</sup>

Despite the buoyant international and regional provisions both on a general basis and those that more specifically provide for the right to education of migrants and the consequent commitment of states to the right to education of migrants, migrants encounter a variety of legal, administrative, and practical obstacles in obtaining adequate education at the national level. Some of these limitations to the realisation of migrants' right to quality education include language of instruction, school fees and other costs, geographical inaccessibility of schools, lack of information, lack of qualified and experienced teachers, lack of educational structures or school closures, documentation requirements, temporary protection, discriminatory laws and policies and social integration issues.

The idea of equality and non-discrimination is the foundation on which migrants' right to education is based. This equality and non-discrimination concept is at the heart of international human rights law, "indicating the universality of every human being's enjoyment of fundamental human rights."<sup>590</sup> The protection of migrants' right to education is recognised and based on the principles of equality and non-discrimination in all major international and regional human rights instruments.<sup>591</sup>

It is noted and worthy of mention, that a core challenge or setback to international efforts on ensuring the availability of education is the practise of reservation on treaties. Some of the reservations entered by states parties sometimes are best described as discriminatory and a disruption of the aspiration of the international community to guarantee that every child has the right to gain access to education. A clear example is the effect of South Africa's Immigration Act,<sup>592</sup> which prevents undocumented migrants from enrolling in schools, regardless of their national or legal status.<sup>593</sup> The wording of the Act presents such migrants as illegal and subject to deportation.

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<sup>589</sup> Nussbaum (n 102)10.

<sup>590</sup> The Status of the Right to Education of Migrants (n 514)

<sup>591</sup> The Status of the Right to Education of Migrants (n 514)

<sup>592</sup> Available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a13-020.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a13-020.pdf) accessed 29 January 2020

<sup>593</sup> South African immigration Act as amended the 26 May 2014 Secs 2(1) (c) & 39(1).

In a similar manner, some form of discrimination is exhibited in the trajectory of religious bias. In some states like Egypt, it is on record that children from Sudan and Syria can access public education while migrant children from non-Islamic states are unable to do the same.<sup>594</sup> This position, to the researcher, is a discriminatory stance which is premised on religion and is capable of stifling freedom of conscience and thought.

The same discriminator trajectory is present in China, where a higher tuition fee is charged by the state for migrant children to attend public schools. This practice is sustained by the “discriminatory *hukou* or household registration system, which puts them on an unequal footing with their urban peers”.<sup>595</sup> This practise in China is aimed at giving persons within a particular region preference in accessing education over persons from a distant region. Despite the good intent attached to this and how it is traditionally respected, it is discriminatory and as such not consonant with international provisions that prohibit all forms of discrimination.<sup>596</sup>

It is then presumed that the existence of some of the above limitations and restrictions on access to education informs the efforts of the CESCR and the CRC to object to the linking of access to education to migrant status as it continues to increase the gap on the statistics of out of school migrant children.<sup>597</sup>

The nature of this right should be emphasised to fully comprehend the entire scope of the right to education guaranteed by international and regional mechanisms. Migrants of all kinds have the right to an education, and that education must be available, accessible, acceptable, and adaptable. The varied interpretations of migrants' right to education will now be discussed in its proper context.

#### **4.5.1 Availability**

The amount and quality of education available to migrants, including effective educational institutions and programmes, must be sufficient. As a result, buildings or other forms of weather

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<sup>594</sup> Office of the United Nations High Commissioner for Refugees ‘No more excuses: provide education to all forcibly displaced people’ (2016) 8 available at <https://unesdoc.unesco.org/ark:/48223/pf0000244847> (accessed 30 January 2020).

<sup>595</sup> The Status of the Right to Education of Migrants (n 514)

<sup>596</sup> The Status of the Right to Education of Migrants (n 514)

<sup>597</sup> General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Committee on Economic, Social and Cultural Rights 10 August 2017 E/C.12/GC/24 (2017) para.8

protection, sanitation facilities for both sexes, safe drinking water, educated teachers earning domestically competitive salaries, teaching materials, library facilities, and computer and information technologies are all required.<sup>598</sup> States have an obligation to guarantee that education is available to everyone, as it influences migration governance; states must ensure that there are spaces available in established public schools to welcome migrants. Additionally, in circumstances where there is a large influx of migrants as in refugee camps, the international community collaborates with states to provide temporary schools.<sup>599</sup>

#### ***4.5.2 Accessible***

An important component of the right to education is the extent of its accessibility. This implies that no matter the level of availability which a state can attain in its provision of education, if it is not accessible it falls short of the standard. This implies that states must do all they can to ensure that all barriers that would make the available education inaccessible are removed. There is therefore a huge burden on states to ensure that migrant children are not barred from accessing education because of discriminatory practises or other actions like economic barriers or policy barriers. This protection from the state must assume both the horizontal and vertical dimensions of protection and support systems put in place to ensure that no migrant child is unable to access schools.<sup>600</sup>

State obligation to ensure that migrants can access schools must meet the minimum threshold of ensuring that distance is not a barrier. This implies that where, are resident in location or retention facilities, there must be deliberate efforts by the states to ensure that they are able to have access to school.<sup>601</sup>

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<sup>598</sup> General Comment No. 13: Art. 13 (The Right to Education) Committee on Economic, Social and Cultural Rights (8 December 1999) E/C.12/1999/10 (1999) Para 6a.

<sup>599</sup> Ibid Para 6b.

<sup>600</sup> UNESCO The status of the right to education of migrants: International legal framework, remaining barriers at national level and good examples of states' implementation Background paper prepared for the 2019 Global Education Monitoring Report Migration, displacement and education: Building bridges, not walls ED/GEMR/MRT/2018/P1/8 8 available at [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE\\_UNESCO\\_Background\\_Paper\\_Migrants\\_2018\\_En.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_UNESCO_Background_Paper_Migrants_2018_En.pdf) (accessed 30 September 2020).

<sup>601</sup> UNESCO (n 600).

In discussing accessibility, a core question is the ability of a child to access a school within a reasonable distance. In the case where this question was considered, *Tripartite Steering Committee & Another v Minister of Basic Education and Others*,<sup>602</sup> the Court held that:<sup>603</sup>

...To sum up, the applicants are entitled to orders: (a) directing the respondents to provide scholar transport to the scholars from Masi vuyiswe Secondary School who applied for it; (b) reviewing and setting aside the decision to refuse scholar transport to the scholars.

From the above it is evident that states must ensure that migrant children - like any other child - is provided with full support to access schools as that is the only way that accessibility can be upheld in the context of ensuring the promotion of the access component of the right to education. As much as this education for migrants is accessible, it means that it must be affordable to migrants in the same manner as it is affordable to any other person within the context as defined by international law. In underscoring the need for education to be accessible, the mandatory nature of primary schools and the progressive nature of other levels is noted. According to Munoz, “access to education further requires that states, where necessary, provides free transport or allocate grants to low-income families to support the indirect costs of education especially in the area of uniform, lunch, and so forth”.<sup>604</sup>

#### **4.5.3 Acceptable**

In describing this component of education, it is important to enter a caveat that states do not have an obligation to provide curriculum that would be to the satisfaction of the child. This position is clearly stated in the fact that states do not have an obligation to provide education to a child in a language of the parents’ choice or to teach a particular religious belief to the child. This is further elucidated on by the decision of the European Convention on Human Rights (ECHR), in the case of *Kjeldsen, Busk Madsen & Pedersen v. Denmark*.<sup>605</sup> The challenge of the content of sex education as a violation of Article 2 of the ECHR was not upheld by the court, as it was found that parents do not have the right to determine the specific content of the

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<sup>602</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG) (25 June 2015)

<sup>603</sup> *Ibid* Para 66.

<sup>604</sup> V Munoz ‘The right to education of migrants, refugees and asylum-seekers - Report of the Special Rapporteur on the right to education’ (2010) Para 19 at <https://www.right-docs.org/doc/a-hrc-14-25/> (accessed 20 June 2020).

<sup>605</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, ECHR, Application no. 5095/71; 5920/72; 5926/72.7 (December 1976)

education their children receive. While noting the provisions of Article 2 of the ECHR provides that:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The distinction was drawn on from “indoctrination” to state obligation to ensure that the content of education serves the purpose for which it was set in place. And in this instant to ensure that children are educated and prevented from becoming ignorantly victimised in sexual offences. However, it is key to note that the nucleus of the provided education is one that has quality value content and meets a minimum core threshold to advance literacy and numeracy. This includes that curricula and teaching methods must be appropriate and of good quality.

In discussing acceptability of education further, it is important to ensure that available education does not in any manner derogate the dignity of the individual. The implication of this is that the curriculum must as of necessity respect the beliefs and right to freedom of thought of the individual. In the case of *Judgment T-363/16 (Colombia)*, the question of acceptability of education was interrogated. In this instant case, a student’s right to express his identity and orientation was the subject of contention. It was found by the court that:<sup>606</sup>

The actions taken by the institution in response to the student’s request to be treated according to his gender identity violated the right to education by not allowing him to wear a male uniform, not treating him according to his gender identity, and asking him to modify his identification card. The orders made by the appellate judge were confirmed so that the student was allowed to wear a male uniform and to be treated according to his gender identity.

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<sup>606</sup> See case analysis at [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE\\_Erika%20Comas%20Gómez\\_Constitutional%20Court%20-%20Fifth%20Chamber%20of%20Review%20Barranquilla%3B%20July%202016\\_EN.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Erika%20Comas%20Gómez_Constitutional%20Court%20-%20Fifth%20Chamber%20of%20Review%20Barranquilla%3B%20July%202016_EN.pdf) (accessed 28 May 2020).

The international Community and the states, in ensuring access to the right to education for migrants, should make the education of good quality, including for migrants in refugee camps. The minimum educational standards that respond to the aims of education as obtainable to nationals of the state should be the same as that received by the migrants.<sup>607</sup>

#### **4.5.4 Adaptable**

Education for migrants should be of such a nature that it meets the various unique educational needs of the migrant. This requires that the international community and states are obligated to provide measures such as mobile schools for internal migrants. States are also under obligation to ensure that migrant children are integrated fully into the school system by providing an assimilation programme or where possible establishing language policy that supports the original language of the migrants.<sup>608</sup>

From the above, it is important that we examine the direct impact of the 4As as advanced by the former UN Special Rapporteur on Education on migrant children's desire to access education. Spreen and Vally in their study point out that several policy restrictions on migrant parents by host states ensure that children are unable to access education and that the 4As are not met.<sup>609</sup> Closely linked to the findings of Spreen and Vally is the fact that resources are not dispensed on an equal basis between nationals and migrant children. Scholars in Germany posit that "resources and opportunities available within the migrant group foster educational success".<sup>610</sup>

However, in South Africa, the resources open to children of migrants are so minimal that non-working parents are unable to raise the required financial resources to ensure that the children access quality education. From the research, it appears migrant parents are only able to send

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<sup>607</sup> Article 26 of the Universal Declaration of Human Rights; Article 13.1 of the International Covenant on Economic, Social and Cultural Rights.

<sup>608</sup> For further literature on language rights as it pertains to the right to education see generally OH Magga et al 'Indigenous Children's Education and Indigenous Languages' (2005) at [http://www.tove-skutnabb-kangas.org/pdf/PFI\\_Expert\\_paper\\_1\\_Education\\_final.pdf](http://www.tove-skutnabb-kangas.org/pdf/PFI_Expert_paper_1_Education_final.pdf) (accessed 20 May 2020).

<sup>609</sup> CA Spreen & S Vally 'Monitoring the right to education for refugees, migrants and asylum seekers' (2012) 18 *Southern African Review of Education with Education with Production* 71 at <https://www.right-to-education.org/resource/monitoring-right-education-refugees-migrants-and-asylum-seekers> (accessed 20 May 2020).

<sup>610</sup> C Kristen et al 'The education of migrants and their children across the life course' (2011) 14 *Zeitschrift für Erziehungswissenschaft* 121 at [https://www.researchgate.net/publication/331188766\\_The\\_Education\\_of\\_Migrants\\_and\\_Their\\_Children\\_Across\\_the\\_Life\\_Course](https://www.researchgate.net/publication/331188766_The_Education_of_Migrants_and_Their_Children_Across_the_Life_Course) (accessed 20 May 2020).

their children to poor locality schools where the quality of education available is generally believed to be poor.<sup>611</sup> This position obtains credence in the findings that migrant children, despite their show of hope and promise in attaining lofty heights in education, need to push extra hard. For instance, it is noted that:<sup>612</sup>

...[the] extreme nature of social dislocation they have faced, including in some cases trauma related to why and how they left, xenophobia directed towards African foreigners, poverty, language barriers and lack of communication between parents and the school.

The implication of the above shows that migrant children are in some situations determined to surmount social and economic barriers that would ordinarily affect their academic performance. For instance, during the last outbreak of xenophobic attacks in South Africa, many migrant families refrained from taking their children to schools because of the fear of attack. The existence of several other challenges also contributes to the non-implementation of the 4As model.<sup>613</sup>

In the same vein, Mkhondwane<sup>614</sup> is of the opinion that “The safety and security of immigrant learners is also a thorny issue that township schools have to deal with on a daily basis”. Consequently, from the above, it is evident that much is required to be put in place if the 4As are to be realistic for migrant children and enhance the education experience of migrant children.

The next section will examine in closer detail the limiting circumstances that impede the realisation of the right to education at national levels as closely linked with the 4As.

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<sup>611</sup> To reinforce this perception of the researcher, Kanamugire advocates for the elimination of factors that creates barriers that are sufficient to limit the ability of migrants to interact and integrate. See generally, JC Kanamugire ‘Local Integration as a Durable Solution for Refugees in South Africa’ (2016) 12 *Acta Universitatis Danubius Juridica* 44 at <http://journals.univ-danubius.ro/index.php/juridica/article/view/3682/3699> (accessed 20 May 2020).

<sup>612</sup> C Hemson ‘Fresh grounds: African migrants in a South African primary school’ (2011) 17 *Southern African Review of Education with Education with Production* 65 at <https://journals.co.za/doi/abs/10.10520/EJC99007> (accessed 20 May 2020).

<sup>613</sup> B Dube & W Setlaletoa ‘But We Do Not Know Anything, We Were Born in This Predicament: Experiences of Learners Facing Xenophobia in South Africa’ (2024) 14 *Education Sciences* 297 available at <https://www.mdpi.com/2227-7102/14/3/297> (accessed 30 April 2024).

<sup>614</sup> GT Mkhondwane ‘Protecting the rights to basic education of immigrant learners in South African public schools’ unpublished PhD Thesis, University of Pretoria, 2018.



## 4.6 Specific factors limiting access to education of migrants from the 4As perspective.

With the above examination of the concepts of 4As, it is needful to discuss specific situations that reinforce the limitation of access to education.

### 4.6.1 Requirement of certain documents for enrolment

Documentation is a major component that has the potential to affect development generally and access to education particularly. For instance, in the *Children of Nubian Descent in Kenya v. Kenya*<sup>615</sup> it was found that non documentation of children of Nubian descent amounts to a violation of their rights.

However, this thesis draws a distinction in respect of positive documentation with that of documentation that essentially ensures that migrant children are unable to access education, for example in places like South Africa where the documentation process precludes migrant children from registering in schools. The demand for a study permit, asylum, or refugee documentation in both primary and post primary schools is one that should not be encouraged as it bars the ability of children to attend schools. It is reported that:<sup>616</sup>

...although the Refugees Act makes provisions where students could be exempted from having to obtain a study permit tertiary and lower education institutions turn away refugee students due to a lack of required documentation.

Aside from the situation as described in South Africa, some other countries continue to adopt policies that deny migrants their access to education. Some of these countries such as Lebanon, Jordan, Iran, Iraq, and Egypt, prevent migrant children from gaining access to schools based on the irregular status of their parents and incomplete documentation procedures.<sup>617</sup>

### 4.6.2 Lack of educational structures or school closures

Considering that migrants are found in certain areas of cities, states sometimes neglect the provision of adequate facilities and educational materials in these areas. It is therefore safe to

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<sup>615</sup> *Children of Nubian Descent in Kenya v The government of Kenya (002/2009 IHRDA)* available at <https://www.justiceinitiative.org/litigation/children-nubian-descent-kenya-v-kenya> (accessed 20 August 2019).

<sup>616</sup> UNESCO (n 600) 17.

<sup>617</sup> UNESCO (n 600) 17.

assume that the lack of educational structures or requisite materials denies migrant children their access to education. The courts have ruled that where suitable facilities are not given, it is a violation of the state's commitment to ensure that the right to education is promoted and provided for, affirming the importance of proper infrastructure for the right to education. This gained jurisprudential pronouncement in the case of *Environmental & Consumer Protection Foundation V Delhi*,<sup>618</sup> where the Court held specifically that:<sup>619</sup>

We are, inclined to dispose of this Writ Petition with a direction to all the States to give effect to the various directions already given by this Court like providing toilet facilities for boys and girls, drinking water facilities, sufficient classrooms, appointment of teaching and non-teaching staff etc., if not already provided, within six months from today. We make it clear that these directions are applicable to all the schools, whether State owned or privately owned, aided or unaided, minority or non-minority.

The judgement above implies that it is irrelevant whether such schools are in areas with a significant concentration of migrants. This position is like the decision in the case of *Mohini Jain v Karnataka*<sup>620</sup> where the courts held that policies that put in place different school fees regimes are in violation of the right to education. In addition, to the above decisions, it has also been held in the case of the *Minister of Basic Education & Others V Basic Education for All & Others*<sup>621</sup> where the court upheld the provision of Section 45 of the South African Constitution on equality, defending that the immediate, realisable right to education as enshrined in the *Juma Masjid* case and the provision of school text books to all schools is an integral part of ensuring the realisation of the right to education.

In 2013, the DR Congo hosted nearly 60 000 Central African refugees, about half of whom live in refugee camps. There was a primary school in Molé camp, where the curriculum taught in the Central African Republic was currently delivered to 650 children. But those who were in

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<sup>618</sup> *Environment & Consumer Protection Foundation V Delhi Administration & Others* (3 October 2012) Writ Petition (Civil) No. 631 OF 2004.

<sup>619</sup> See generally Paragraph 9 of the Writ Petition.

<sup>620</sup> *Mohini Jain v State of Karnataka* (1992 AIR 1858).

<sup>621</sup> See <http://section27.org.za/wp-content/uploads/2015/12/Minister-of-Basic-Education-and-others-vs-Basic-Education-for-All-and-others-Supreme-Court-of-Appeal-Judgment.pdf> (accessed 1 June 2020).

high school were without schools. While looking for solutions, UNHCR built a cybercafé so that these knowledge-hungry students could access information via the Internet in Molé camp. Though it was a positive development and young people were happy about it, it was not sufficient since it could not quench their desire to be in school.<sup>622</sup>

#### **4.6.3 Lack of information**

A core benefit of education is the ability to access information, a strong bedrock on which education can be realised. Thus, this thesis construes a strong link between the right to education in terms of access to information. The more information is available to migrants, the more available and accessible educational opportunities become. In situations where available information on educational opportunities is not conducted in the language that migrants are able to comprehend, they become automatically disadvantaged.

When migrants are precluded from information about their rights it contributes to their inability to fully pursue those rights. For instance, the codification of laws that relate to the right of migrants to education which are not conveyed by state institutions to inform them of their available rights makes the realisation of those rights unrealistic. It is therefore one of the core benefits of this thesis, to inform migrants of the available legal frameworks within which they can pursue their rights.

#### **4.6.4 Geographical inaccessibility of schools**

The internationally accepted distance of a school from a learner's residence is not more than five kilometres.<sup>623</sup> However, the distance of schools from residential areas and the insecurities on the route to the schools may make schools inaccessible. As discussed in this thesis, several factors may contribute to the inaccessibility of schools. It is important and it is the duty of each state to ensure that measures are taken to guarantee the provision of transport so that all children, migrants, and nationals alike, do not find it impossible to access school. According to the report of Equal Rights:<sup>624</sup>

Nomadic communities are faced with difficulties accessing primary schools physically, the reason being that they do not live in one fixed area. In the territory of Ethiopia there exists a high level of risk that

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<sup>622</sup> See <https://reliefweb.int/report/democratic-republic-congo/limportance-de-l-ducation> (accessed 2 June 2020).

<sup>623</sup> <http://uis.unesco.org/en/news/263-million-children-and-youth-are-out-school> (accessed 9 March 2020).

<sup>624</sup> UNESCO (n 600).

children coming from nomadic and pastoralist communities might not attend schools simply because they travel long distances to reach the towns where the educational facilities are located.

To avoid this, governments must ensure that schools are well funded and equipped to serve the needs of the populace inclusive of migrants.

#### **4.6.5 Schools and other costs**

The challenge of fees in education limits availability and access to education for the child.<sup>625</sup> Compulsory primary education implies that all fees in education must be eliminated as it inhibits access. The provision of quality education as it relates to the supply of textbooks, and provision of transport are components of eliminating fees in education that continually affect migrant children who are generally more vulnerable, and poverty stricken. Any form of fee in accessing primary education must be eliminated.<sup>626</sup>

Since the implementation of the policy of free primary education in the DR Congo in 2019, there has been a massive influx of learners into schools. In his speech on the 23 July 2022, Tony Mwaba, the Congolese National Minister for basic education (EPST) confirmed that the number of learners who have returned to school since the implementation of free primary education amounts to more than 4 million children throughout the Congolese territory.<sup>627</sup>

#### **4.6.6 Language of instruction**

The challenge of language affects the accessibility of education of an individual, and the challenge of the right to education in a particular language is one that remains controversial.<sup>628</sup> The challenge of language continues to problematise migrant students' integration in schools as language constitutes barriers. In some jurisdictions, the policies in favour of mother tongue

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<sup>625</sup> See generally K Tomasevski *Education denied: Costs and remedies* (University of Chicago Press:2003) TG Wiley 'Accessing language rights in education: A brief history of the US context' in O García& C Baker (eds) 61 *Bilingual Education and Bilingualism* (2007) 89.

<sup>626</sup> Ibid.

<sup>627</sup> <https://www.eduquepsp.education/v1/infrastructures-scolaires-le-gouvernement-projette-la-construction-de-70-nouvelles-ecoles-au-maniema/> (accessed 14 February 2023).

<sup>628</sup> T Skutnabb-Kangas 'Human rights and language policy in education' (1997) *Encyclopaedia of language and education* 55 at [https://www.researchgate.net/publication/302377936\\_Human\\_Rights\\_and\\_Language\\_Policy\\_in\\_Education/citati\\_on/download](https://www.researchgate.net/publication/302377936_Human_Rights_and_Language_Policy_in_Education/citati_on/download) (accessed 20 June 2020).

are a challenge that excludes the migrant child who often is not skilled in the language of the host country.<sup>629</sup>

There is therefore the need to rethink the South African Policy of educating children in mother tongue until post primary institution level. While mother tongue language education is laudable, it is the author's perception, that the host state must ensure adequate support to assist migrant children learning languages they do not know and vigorously pursue the integration and assimilation of the children without eroding their language rights. This challenge does not only affect the migrant child but also teachers who are deployed in certain areas. The implication is that the quality content in curriculum development by the teachers is low due to their language barriers.<sup>630</sup>

#### **4.7 Conclusion**

This chapter takes a wide approach to exploring the situation of refugees, asylum seekers, and stateless people in fighting for the right to education. It is based on the 4As and addresses the different challenges that limit access to education, and it advocates for improved solutions to realise migrants' right to education based on international law.

Education systems should shift toward teaching and learning techniques that value cultural and linguistic variety. Education regulations should enshrine teaching and learning approaches that integrate children from various cultures and languages. The policy goals and implementation should attempt to integrate migrant children into host school systems and communities, rather than alienating and isolating them in "foreign/migrant children's programs". Policymakers must draw on abundant accessible knowledge in this field, as well as recorded best practices in other locations throughout the world, to do this.

Recognition and good implementation of the right to education for migrants have a favourable impact on development in both the migrant's home country and the host country that recognises this right for a migrant on its territory. When the migrant in question is a child, it is critical for the host state to recognise and properly implement the migrant child's right to education. The

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<sup>629</sup> Skutnabb-Kangas (n 628) 55.

<sup>630</sup> The Status of the Right to Education of Migrants (n 514).

significance of this is seen in the different worldwide and regional activities championing the educational rights of the migrant child, as highlighted in this paper.

It is also crucial to note that a lack of infrastructure is a breach of the State's responsibility to offer education; similarly, state financial obstacles such as a lack of, transportation, and textbooks are all violations of the right to basic education.<sup>631</sup> It should be noted that the problem of access to quality education is an issue for both the migrant and local population. Initiatives addressing this obstacle concern both categories.

Access to quality education through the formal schooling system for migrant children is frequently hampered by national regulations governing the regularisation of stay and admissions for international pupils. In both South Africa, schools charge fees, which some migrant and local children from low-income families cannot afford and entrance to public schools requires many documents that sometimes migrants lack; as a result, access to education becomes unequal, potentially preventing migrant children from attending school entirely. Because financial resources are some of the hurdles to access, states should implement measures that make it easier for migrants to obtain an education, access school financing and be eligible for exemptions if that service is provided to nationals.

Another key issue is the jurisprudence of various courts as it relates to the right to education. It is quite concerning that there are no readily available court cases from the DR Congo online. The country's legal system's accessibility, transparency, and accountability are called into doubt by the limited availability of information. It undermines the rule of law, makes it harder for the public to access legal precedents, and may make it harder for people to access the justice and protection they need. Legal professionals, researchers, and others wishing to examine and study the DR Congo's legal system face difficulties because there are not any easily accessible court cases online. This presents a barrier to legal knowledge and comprehension. To promote openness, accountability, and the impartial administration of justice, actions should be taken to address this problem and improve the legal system's accessibility and transparency to all.

The chapter concludes that a socio-legal strategy to achieving migrants' right to education is required. States are consequently urged to take appropriate steps to ensure the effective and

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<sup>631</sup> The Status of the Right to Education of Migrants (n 514).

non-discriminatory implementation of migrants' right to education in their territory. Addressing these areas will lead to the empowerment of migrant children and the facilitation of their economic involvement. This is an investment in individuals and future economies since a competent work force is a valuable economic asset: migration is an economic asset rather than a burden.



## CHAPTER FIVE: THE SITUATION OF MIGRANT CHILDREN WITHIN THE LAWS OF SOUTH AFRICA AND THE DEMOCRATIC REPUBLIC OF CONGO VIS-À-VIS THE INTERNATIONAL LAW

### 5.1 Introduction

This chapter will analyse the situation of migrant children in both South Africa and the DR Congo. The laws that protect and promote the rights of children domestically will be examined. This is to help determine the extent of compliance between national law and international laws. The chapter also examines the situation of migrant children within these states to establish the extent of the practicability of the laws and their efficiency. The rights that are enjoined by the migrant children, in fact, will be analysed vis-à-vis the rights that the laws provide for them, to compare the law as it is and as it ought to be, as well as the current practice and the aspired practice. This will enable an easy assimilation of the challenges of the status quo to readily recommend ways to better the present situation.

This chapter will also fully discuss the international and regional legal frameworks in relation to the situation of migrant children. The extent of the pragmatics and enforcement of the laws will also be examined to appreciate the areas that need to be improved, not only in the laws but also in the implementation schemes. The research will compare the situation in South Africa and DR Congo to see how and what suggestions can be taken from each one to apply to the other. Through this comparative analysis, the extent of compliance of the laws with international law and practice will be examined. Lastly, the chapter will accentuate the contemporary trends in relation to the situation of migrant children and migrants' children.

This chapter underscores that the development of social protection in Africa has been phenomenal.<sup>632</sup> African countries have in fact been described as the centre of attention of the world today in relation to human rights issues and the marginalisation of socially low-class persons.<sup>633</sup> One of the trending discussions in human rights circles in Africa is the situation of

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<sup>632</sup> P Kok at al *Migration in south and southern africa: dynamics and determinants* (HRSC Press:2005).

<sup>633</sup> JS Crush & R Mojapelo *Towards a New South African Immigration Policy* in JS Crush & R Mojapelo (eds) *Towards a New South African Immigration Policy* Migration Policy Paper No 3 (Southern African Migration Project 1996).

migrants,<sup>634</sup> particularly migrant women and children.<sup>635</sup> The number of migrant children in African states is continuously growing and so is the concern in relation to them, particularly as it relates to laws.<sup>636</sup> Violence meted out to migrants in South Africa in recent times raises concern for legal space, especially with the protection of the life and property of migrant parents and by extension their children.

Migration in its general sense remains a persistent phenomenon in African countries, especially South Africa.<sup>637</sup> The presence of migration has been so pervasive that it has permeated all aspects of statehood, especially the law.<sup>638</sup> Migrant children in South Africa suffer from a series of marginalising treatments and the sterling aspirations of the laws have not been fully met.<sup>639</sup> Nonetheless, the analysis in this thesis shows that fewer disadvantages are suffered in South Africa compared to some other African states due to the better state of South Africa, its developments in terms of social amenities and security as well as the wealth of its laws.<sup>640</sup>

The DR Congo continues to face many challenges related to migration due to the poor legal framework and worse implementation schemes.<sup>641</sup> The situation of migrant children has illustrated that there is little or no advantages in their regard. There is a need to refocus the attention, especially from the legal perspective.<sup>642</sup>

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<sup>634</sup> MP Olivier 'Social Protection in SADC: Developing an Integrated and Inclusive Framework - A Rights-based Approach' (Unpublished paper delivered at the University of Cape Town Cape Town on 30 September 2005)

<sup>635</sup> Migration Dialogue for Southern Africa 'Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child' Day one of the conference held at Victoria Falls, Zimbabwe 7-9 July 2015 15 available at [https://www.iom.int/sites/default/files/our\\_work/ICP/RCP/English-Final-Report-MIDSA2015.pdf](https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA2015.pdf) (accessed 1 July 2019).

<sup>636</sup> Migration Dialogue for Southern Africa (n 634).

<sup>637</sup> Migration Dialogue for Southern Africa (n 634).

<sup>638</sup> See generally K Valtonen *Social work and migration: Immigration and refugee settlement and integration* (Routledge:2008)

<sup>639</sup> Valtonen (n 638).

<sup>640</sup> Such as DR Congo, Chad, Somalia etc.

See generally O Stark & JE Taylor 'Relative Deprivation and International Migration' (1989) 26 *Demography* 1-14 at [www.jstor.org/stable/2061490](http://www.jstor.org/stable/2061490) (accessed 20 June 2020).

<sup>641</sup> Taran et al, *Economic migration, social cohesion, and development: Towards an integrated approach* (Council of Europe: 2009).

<sup>642</sup> International migration and development, Report of the Secretary-General, United Nations General Assembly (25 July 2013) UN doc. A/68/190 at [http://www.un.org/esa/population/migration/SG\\_Report\\_A\\_68\\_190.pdf](http://www.un.org/esa/population/migration/SG_Report_A_68_190.pdf) (accessed 1 July 2019).

Despite being a growing population, research has revealed that the children of migrants have received little attention,<sup>643</sup> hence the analysis and findings under this research are timely and will contribute to existing knowledge on migrants' children and their conditions.

The discussion under the research has been put under different sub-headings for proper analysis and appreciation. The laws of South Africa will be examined in relation to migrant children as well as the laws of DR Congo.

## 5.2 Protection of migrants in South African law

The situation of immigration and immigrants in South Africa is not a novel phenomenon.<sup>644</sup> It dates to the early 1900s, when the formal record of migration started in South Africa and it was due to different factors, including the discovery of wealth, diamonds, and gold in South Africa, as well as impoverishment in neighbouring African states.<sup>645</sup>

The first civil enactment in relation to immigrants in South Africa was the Immigration Regulation Act of 1913.<sup>646</sup> Procedure of entry and removal from South Africa was enshrined in the provisions of Section 4(1)(a) of the Act. One of the core provisions of the section was the proscription of persons that are deemed to be unsuitable.<sup>647</sup> The use of the word unsuitable is one that this thesis finds to be a very nuanced conceptualisation as this put migrants at a great disadvantage in their quest to access the rights that are accruable to a migrant and in this instance the right to basic education. Further restrictions on language in foreign European languages were other limitations that had the potential of discriminating against African migrants.<sup>648</sup> The protection of the household of admitted migrants may perhaps be viewed as a positive disposition of the Act.<sup>649</sup> This notwithstanding, it is the view of the researcher that this position is inherently discriminatory against undocumented migrants.

In the same discriminatory stance, it is noted that this exception did not cover husbands or wives married under Islamic law or Indian law.<sup>650</sup> Conclusively, it is the provisions of the Act to

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<sup>643</sup> 2017 findings on the Worst Form of Child labour, available at <https://www.refworld.org/country,...COD,,5bd05ab82,0.html> (accessed 1 July 2019).

<sup>644</sup> A Minnaar et al 'Who goes there? Illegals in South Africa' (1995) 12 *Indicator South Africa* 33.

<sup>645</sup> H Tqolo & L Bethlehem 'Immigration and the labour movement' (1995) 19 *South African Labour Bulletin* 85.

<sup>646</sup> Crush & Mojapelo (n 150).

<sup>647</sup> South African Immigration Act 1913 (Secs 4).

<sup>648</sup> South African Immigration Act 1913 (Secs 5).

<sup>649</sup> South African Immigration Act 1913 (Secs 22).

<sup>650</sup> Aliens Control Act 96 of 1991 (Secs 39).

manifestly favour some races, religions and sexes over others and it established a few discriminatory stances against migrants.<sup>651</sup>

The legislation that is referred to as the foremost and most important legislation in relation to migration in South Africa is the Aliens Control Act 96 of 1991.<sup>652</sup> The Act was a by-product of colonialism, segregation and apathy in South Africa, and rather than encouraging immigration and protecting the rights of migrants, the Act focused on the marginalisation and expulsion of migrants from South African territories.<sup>653</sup> The Act referred to migrants with the term “aliens”, which is deemed a derogatory term used for lower-class persons.<sup>654</sup>

Few migrants were granted temporary permits of residence according to this Act, because they first needed to establish their identity and disclose their nationality.<sup>655</sup> It was discovered that this Act failed in the protection of migrants and recognition of their rights;<sup>656</sup> hence, the amendment of the Act after its three years of active operation was necessitated.<sup>657</sup> The amendment and outlawing of the 1991 Act by the 1995 Act were due to the non-compliance of the 1991 Act with human rights and international standards regarding the social security and welfare of people, especially migrants.<sup>658</sup>

The implications of the foregoing demonstrate a clear breach of the South African Bill of Rights. As a result, many elements were determined to be in violation of the Bill of Rights and ruled unconstitutional, necessitating new legislation. This position obtained judicial approval, in the case of *Larbi-Odam v MEC for Education (North-West Province)*,<sup>659</sup> the question before the court was on whether a foreign national could hold a permanent teaching position in South Africa. It is important to recall that in the discourse of the content of education, the role of teachers is one that cannot be ignored. The importance of ensuring that there are sufficient

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<sup>651</sup> Aliens Control Act 96 of 1991 (Secs 32).

<sup>652</sup> Aliens Control Act 96 of 1991.

<sup>653</sup> *Mahlaule & Another v Minister of Social Development & Others* (CCT) 12/03 and 13/03.

<sup>654</sup> *Kok* (n 632) 75.

Aliens Control Act 96 of 1991.

<sup>655</sup> Aliens Control Act 96 of 1991 (Secs 23).

<sup>656</sup> S Yaqub ‘Independent Child Migrants in Developing Countries: Unexplored Links in Migration and Development’ (2009) Innocenti *United Nations International Children's Emergency Fund & Innocenti Research Centre* 4 at <https://www.unicef-irc.org/publications/559-independent-child-migrants-in-developing-countries-unexplored-links-in-migration.html> (accessed 20 June 2020).

<sup>657</sup> *Crush & Mojapelo* (n 150).

<sup>658</sup> Aliens Control Act 96 of 1991 (Secs 34 (1)).

<sup>659</sup> *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 12 BCLR 1655

qualified personnel in the teaching sector is thus construed as equally important to the availability of education as it is with the provisions of structures and reading materials. In the instant case it was held that “temporary residents may in fact have employment of a permanent nature through holding one job and renewing their temporary residents’ permits from time to time”.<sup>660</sup> The implication from the above, suggests that there is need to eschew all practices capable of eliciting discrimination in employment and other areas like the right to access education of a child.

Another piece of legislation that is relevant to this is the South African Refugee Act of 1998. This act “emphasises the fact that a person will only be granted an endorsement to stay in the country if the person’s life has been proven to be in danger in his state of origin or residence”.<sup>661</sup> Any failure in that regard will lead to non-permission and denial of a visa for the applicant. The Act protects migrants to the extent that it provides that anyone who has been confronted with the directive to leave the state or has been denied a visa or permit of residence has the right to appeal such a decision, and until the decisions are finalised, the affected persons cannot be arrested provided that they deliver the document evidencing the pendency of their application or appeal.<sup>662</sup> The Act also provides for a term of imprisonment and quantum of punishment for anyone who overstays the permitted period.<sup>663</sup>

The Immigration Act of 2011 is also one of the extant laws in relation to immigration in South Africa. This Act was birthed by the former Immigration Act of 2002. The Immigration Act 13 of 2002 (South Africa, 2002) “controls the entrance of immigrants so that provisional and perpetual visas are administered proficiently and efficiently”.<sup>664</sup> The Act provides that “no person shall enter or leave this country at any place other than the port of entry (unless special permission is granted)”.<sup>665</sup> In a bid to implement this law, this legislation proffers that the “South African Police Services (SAPS) should hinder the entrance and confirm the identities of the perceived undocumented foreign nationals and hold those in contravention of this law

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<sup>660</sup> *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 12 BCLR 1655.

<sup>661</sup> R Stupart ‘Is South Africa Home to More than a Million Asylum Seekers? The Numbers don’t Add Up’ (2016) available at <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/> (accessed 30 July 2019).

<sup>662</sup> South African Refugee Act 1998 Act No. 130 of 1998 (Secs 2)

<sup>663</sup> South African Refugee Act 1998 Act No. 130 of 1998 (Secs 12)

<sup>664</sup> Preamble to the Immigration Act, 13 of 2002.

<sup>665</sup> Immigration Act, 13 of 2002 (Secs 2(1)(a)).

and report them to the Department of Home Affairs (DHA) before deportation”.<sup>666</sup> Provision on the regulation of marriage relationships is also enshrined in the Act and stipulates the minimum number of years that migrants married to South African citizens must stay in such relationships.<sup>667</sup> Conversely, where there is a breakdown of such marriages the migrant loses status conferred by the marriage Act.<sup>668</sup> While the 2002 Act is generally not favourable to foreigners, it allows migrants who are investors, skilled entrepreneurs or experts and provides them easier access by granting them work permits, which are also referred to as corporate permits.<sup>669</sup>

The Immigration Amendment Act of 2011, which followed the 2002 Act, improves the conditions of the status of migrants in South Africa.<sup>670</sup> The Act made the threshold that is set for obtaining permits for living in South Africa easier and it also provided for the possibility of the granting of permanent citizenship or residence permits to migrants, in so far as it is ascertained that there is a good faith spousal relationship between the spouses. This permanent citizenship is subject to reversal depending on how the granted individuals conduct themselves.<sup>671</sup>

The Act also altered the prison terms given in instances of contravention of the principal Act. It added to the period of imprisonment,<sup>672</sup> where it provides that “anyone who overstays their visa period or enters the country illegally shall be deemed guilty of an offence and be fined or imprisoned for a period of not more than two years, instead of three months which was provided by the old Act”.<sup>673</sup> The Act also provides that “a person who does not leave the country after being expelled shall be deemed guilty of an offence and be punished with a fine or imprisonment not exceeding four years, instead of the initial nine months”.<sup>674</sup>

Beyond the provisions of the above legislative framework, departments and bodies were also put in place for the sake of immigrants in South Africa. The Department of Home Affairs is one

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<sup>666</sup> Immigration Act, 13 of 2002 (Secs 2).

<sup>667</sup> Immigration Act, 13 of 2002 (Secs 21).

<sup>668</sup> Immigration Act, 13 of 2002 (Secs 25).

<sup>669</sup> Immigration Act, 13 of 2002 (Secs 26-28).

<sup>670</sup> See generally V Williams ‘South African Immigration Reform’ (2007) 8 *Southern African Migration Programme*.

<sup>671</sup> Ibid.

<sup>672</sup> South African Immigration Act as amended 2014 (Secs 34(1b)).

<sup>673</sup> South African Immigration Act as amended 2014 (Secs 34).

<sup>674</sup> Immigration Act as amended 2014 (Secs 34(1d)).

of these bodies.<sup>675</sup> This department's mission is to manage immigration and residency issues for those entering and living in South Africa.<sup>676</sup> The department is divided into two groups, each with its own set of responsibilities. The first component oversees the provision of civic services to the public, including birth, marriage, and death certificates, as well as identification and travel cards.<sup>677</sup> The second section of the DHA deals with matters relating primarily to immigration and asylum-seeking. It manages and evaluates the applications made by foreign nationals for permits.<sup>678</sup>

According to the United Nations global report, the South African section of immigration in the DHA processes about 200 000 applications for intended immigrants per annum.<sup>679</sup> The concern of the UN is that the largest number of these applications are refused.<sup>680</sup> The large number of applications to be processed means that several arrests are also made in this respect. It is however reiterated that even in such situations that states must ensure that they respect the constitutional processes that upholds the fundamental rights of every migrant. For instance, in *Lawyers for Human Rights v Minister of Home Affairs & Others*,<sup>681</sup> the court upheld section 12 of the South Africa Bill of rights which protects freedom and demands a trial within 48 hours of any individual who is arrested. Justice O Regan relying on the Dawood case advanced that:<sup>682</sup>

We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the

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<sup>675</sup> Save the children 'In Search of a better Future: Experiences of Unaccompanied Migrant Children in Limpopo and Mpumalanga' (2016) 15 at [https://resourcecentre.savethechildren.net/node/10229/pdf/in\\_search\\_of\\_a\\_better\\_future.pdf](https://resourcecentre.savethechildren.net/node/10229/pdf/in_search_of_a_better_future.pdf) (accessed 28 March 2019).

<sup>676</sup> Save the children (n 675).

<sup>677</sup> Save the children (n 675).

<sup>678</sup> *Lawyers for Human Rights v Minister of Home Affairs & Others*, CCT 38/16, [2017] ZACC 22 para 1.

<sup>679</sup> University of Cape Town Refugee Rights Unit University of Cape Town Refugee Rights Unit 'Children's Rights Manual' 20 at [http://www.refugeerights.uct.ac.za/sites/default/files/image\\_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf](http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf) (accessed 27 March 2019).

<sup>680</sup> University of Cape Town Refugee Rights Unit University of Cape Town Refugee Rights Unit (n 679).

<sup>681</sup> *Lawyers for Human Rights v Minister of Home Affairs & Others*, CCT 38/16, [2017] ZACC 22.

<sup>682</sup> *Lawyers for Human Rights v Minister of Home Affairs & Others*, CCT 38/16, [2017] ZACC 22 para 49.



constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport, and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.

The implication of the above is that migrants must be protected from discretionary powers that seem often to present as limitless in their application and left at the whims and caprice of the officer to interpret such discretions. In the instant case, the court opined the need for a literal position on how such duties are to be engaged with and urged the legislation to ensure that no ambiguities are encouraged in such laws.

Another very relevant department is the South African Police Service (SAPS), which has the objectives of preventing,<sup>683</sup> combatting and investigating crimes as well as maintaining public order and ensuring the protection and security of inhabitants as well as the enforcement of the law.<sup>684</sup> The SAPS has a responsibility to ensure the safety of the South African borders and also to ensure compliance with laws and legislations by all individuals seeking to engage in trans-border movements.<sup>685</sup> The internal tracing unit of the border police<sup>686</sup> is focused on the “administration of matters of undocumented migrants such as in the Johannesburg city centre and the areas around the border”.<sup>687</sup>

The National Aliens Investigation Unit is another sector under the SAPS that focuses on matters relating to drug trafficking and any other organised crime committed or abetted by an immigrant.<sup>688</sup> The SAPS and other police officials in the country work hand in hand with the

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<sup>683</sup> Farhana ‘Sweeping Changes for Refugee Law in SA’ Mail and Guardian 2 February 2017, para 4 available at [http://www.africadaily.co.za/index.php?option=com\\_k2&view=item&id=607:sweeping-changes-for-refugeestatus-in-sa-amid-world-outcry-against-usa](http://www.africadaily.co.za/index.php?option=com_k2&view=item&id=607:sweeping-changes-for-refugeestatus-in-sa-amid-world-outcry-against-usa) (accessed 15 July 2019).

<sup>684</sup> Farhana (n 683).

<sup>685</sup> L Claase ‘Factsheet: Why is government proposing amendments to South Africa’s Refugees Act and what are they?’ 10 August 2016 <https://africacheck.org/fact-checks/factsheets/factsheet-why-government-proposing-amendments-south-africas-refugees-act-and> (accessed 20 June 2020).

<sup>686</sup> Claase (n 685).

<sup>687</sup> Claase (n 685).

<sup>688</sup> M Olivier ‘Regional Social Security: Are Innovative Developments in Southern Africa Relevant to the European context?’ in D Pieters (eds) *European Social Security and Global Politics* (2003) 5.

specialised unit to control the illicit movement of persons within the territory of South Africa.<sup>689</sup> The South African National Defence Force (SADF) is another body in charge of defence and protection against any illicit activities as well cross-border crimes. In addition to this onerous duty, the SADF also engages in ensuring that the immigrants are orderly and do not transgress the limits of the law.<sup>690</sup>

### 5.3 Situation of migrant children in the laws of South Africa

The attention directed towards migrant children in South Africa is increasing as much as the population does. The laws of South Africa recognise the status of migrants and protects them to a limited extent; this is the same with migrant children. It is worth examining to confirm whether there are special laws in relation to migrant children in South Africa, as well as examining their status within the state.<sup>691</sup>

There is a distinction between immigrants' children and immigrant children; the latter are far more vulnerable than the former.<sup>692</sup> Immigrants' children are the offspring of immigrants, who still have parental care, security and guidance,<sup>693</sup> unlike immigrant children, who cross the border on their own without any parent or guardian or usually without anyone that bears *locus parentis* in their regard.<sup>694</sup> They are often more vulnerable and insecure, and reports have shown that they are the most violated class of migrants.<sup>695</sup>

Children crossing South Africa's borders increases from time to time and these children are without parents or any relative, hence they fend for themselves as they are often without care or support once they move into the territory of the foreign state, South Africa.<sup>696</sup> Records have shown that these children are easily exposed to exploitation and they are vulnerable to abuse

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<sup>689</sup> Olivier (n 688) 5.

<sup>690</sup> SADC Treaty Section 4.

MP Olivier, N Smit and ER Kalula '*Social security: a legal analysis*' (LexisNexis Butterworths: 2003) 664.

<sup>691</sup> *Johnson v Minister of Home Affairs & Another* 1997 3 BCLR 355 (C).

<sup>692</sup> F Collins 'South Africa's Asylum Seeker Figures Questioned' 20 June 2017 <https://www.timeslive.co.za/news/2017-06-20-south-africas-asylum-seeker-figures-questioned/> (accessed on 12 September 2019).

<sup>693</sup> Mixed Migration Centre 'monthly trends analysis' (2018) at <http://www.mixedmigration.org/wp-content/uploads/2018/06/ms-ea-1806.pdf> (20 June 2020).

<sup>694</sup> Mixed Migration Centre 'monthly trends analysis' (n 670).

<sup>695</sup> L Thompson 'Protection of Migrants' Rights and State Sovereignty' (2013) L *United Nations Chronicle* 8 at <https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty> (accessed 20 June 2020).

<sup>696</sup> Thompson (n 695).

and maltreatment.<sup>697</sup> Most of these children lack any status, whether of a documented immigrant or of a registered refugee.<sup>698</sup>

In South Africa, unaccompanied migrant children face severe challenges with securing documentation and consequently being able to integrate and access utilities such as healthcare and education. Several stories have been told about these children, among which is that of Nestor and Moses. These immigrant children crossed the borders of South Africa in search of greener pastures and a better future. The state ensured their protection and that there was no marginalisation of any kind, although reports reveal that their maltreatment and biased handling in some instances could not be prevented.<sup>699</sup>

This part of the research sheds light on the domestic and international laws surrounding the situation and protection of immigrant children. It is clear that in African countries, which were once victims to the pain and scorn experienced by immigrants and refugees, have remained uninterested in the improvement of the situation of migrant children within their countries, thereby showing no sense of regional solidarity.<sup>700</sup> According to Spreen and Valley, “African states have in fact increasingly followed the lead of European states by instating extreme border restrictions and restricting the freedom and liberty of persons who have formerly made it to South Africa”.<sup>701</sup>

Despite the assumption that South Africa has the most progressive domestic immigrant laws in Africa, the positives of protection and the realisation of the rights of migrant children are not realised and continue to loom large.<sup>702</sup> Some of the laws as described already in the thesis and inclusive of jurisprudence from the courts seek application of available national, regional, and global laws. The laws govern the placement, accommodation, and prevention of family assistance and family reunion.<sup>703</sup> Importantly, the law stipulates the standard of care that must be provided. The laws subsequently addressed under this heading are looked at in two layers.

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<sup>697</sup> D Dass et al ‘The socio-economic rights of refugees and asylum seekers in South Africa’ in F Khan & T Schreir (eds) *Refugee Law in South Africa* (2014) 226.

<sup>698</sup> Dass (n 697).

<sup>699</sup> Dass (n 697).

<sup>700</sup> Spreen & Vally (n 609) 71.

<sup>701</sup> Spreen & Vally (n 609) 71.

<sup>702</sup> JC Hathaway & AK Cusick ‘Refugee Rights Are Not Negotiable’ (2000) *University of Michigan Law School Scholarship Repository* 495.

<sup>703</sup> JC Hathaway & M Foster *The Law of Refugee Status* (Cambridge University Press:2014) 1

### 5.3.1 *The situation under global laws*

The reference to international law here is quite germane because South Africa has signed and ratified many UN conventions, which are an essential component of its legal system.<sup>704</sup> While some of these laws are specifically in relation to children, others generally deal with migration. The foremost law in this regard is the UN Convention on the Rights of the Child (CRC).<sup>705</sup> This convention is regarded as one that is holistic in relation to immigrant children because it directly affects the numerous rights of children.<sup>706</sup>

The CRC is the most salient convention in relation to the rights of children. The convention also reaches the interests of children, especially those who have departed from their homes unaccompanied.<sup>707</sup> It is important as envisaged in the Convention that every child therefore receives special care and protection. Special emphasis is placed by the Convention on the implementation of its provisions by states parties, especially by starting with the enactment of national laws that have the same aspirations as those of international law.<sup>708</sup> The Convention goes further to state particularly a strong benchmark for the protection of children especially in respect of adoption and foster home care.<sup>709</sup>

The vulnerability of children presupposes that they require greater protection than the adults in the migration circles.<sup>710</sup> This vulnerability is often linked to age and lack of power, it is therefore, premised on this that:<sup>711</sup>

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

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<sup>704</sup> G Jaeger 'On the History of the International Protection of Refugees' (2001) 83 *International Review of the Red Cross* 728 at [https://www.icrc.org/ar/doc/assets/files/other/727\\_738\\_jaeger.pdf](https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf) (accessed 20 June 2020).

<sup>705</sup> BA Simmons *Mobilizing for Human Rights: International Law in Domestic Politics* (2012) 307

<sup>706</sup> Ibid.

<sup>707</sup> J Pobjoy 'A child's right framework for assessing the status of refugee children' in SS Juss & CH (eds) *Contemporary Issues in Refugee Law* (Edward Elgar: 2013) 91-138, 91.

<sup>708</sup> Geneva Declaration on the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec. Supp. 21, 43 (1924 Declaration)

<sup>709</sup> Article 11 of CRC.

<sup>710</sup> Simmons (n 705) 307.

<sup>711</sup> Article 22(1) of CRC.

After Consideration of the above provision, there is an obligation to ensure that an unaccompanied minor be accorded the same protection that an accompanied child receives.<sup>712</sup>

Another relevant international law in this regard is the UN Convention Relating to the Status of Refugees. The convention relates strictly to refugees and incidental immigrants.<sup>713</sup> But the Convention does not expressly have the heading of any of its provisions as the situation or right of immigrant children.<sup>714</sup> While the Convention's provisions are arguably favourable to the situation of migrants, it is critiqued on the perspective that its protection of children falls short. This is so because in trying to protect the family unit as the sole basis of a healthy society, it neglects the protection of an unaccompanied minor.<sup>715</sup> This criticism in the perception of the thesis is agreeable because, there is need to ensure that the vulnerability of children is consistently taken into consideration.

This position finds credence in the wordings of the preface to the UNHCR Guidelines on the Care and Protection of Children (Guidelines on Care and Protection) which provides “that since children are vulnerable, dependent and developing, their care is instrumental to their well-being”.<sup>716</sup> From this aspiration of the guidelines, there is the need to ensure that unaccompanied minors have access to an environment that is conducive for their upbringing in terms of care, love and healthy living, protecting the child's spiritual and all round development.<sup>717</sup> Pobjoy further supports this position when reiterating the need for unaccompanied children to be placed in family units as stipulated by the CRC.<sup>718</sup> Time is also considered to be of essence in ensuring settlement of such unaccompanied children, so as to avoid harm befalling them.<sup>719</sup> Other factors that are important considerations in settling children in this category include language affinity, religion and cultural affinity.<sup>720</sup>

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<sup>712</sup> Article 7 of CRC.

<sup>713</sup> Pobjoy (n 707) 91.

<sup>714</sup> Pobjoy (n 707) 91.

<sup>715</sup> Hathaway & Cusick (n 702) 594.

<sup>716</sup> Preface to UNHCR Guidelines on the Care of Protection of Children.

<sup>717</sup> This is in line with article 20(3) of CRC.

<sup>718</sup> Pobjoy (n 707) 91

<sup>719</sup> Hathaway & Cusick (n 702) 594.

<sup>720</sup> Hathaway & Cusick (n 702) 594.

### *5.3.2 The situation in terms of regional laws*

The foremost regional law in Africa is the African Charter on Human and Peoples' Rights, which provides for the rights of all generations and their practicability within the African region. Although the Charter has no direct provisions for the rights of immigrant children, it provides for rights in relation to persons generally without any exclusion, hence, its application in relation to immigrant children in African states can be correctly drawn.<sup>721</sup>

Other regional documents like the Maputo Protocol failed also to provide for the rights of migrants specifically for that of children, however, in a bid to cure this lacuna, the coming into place of the African Charter on the Rights and Welfare of the Child (ACRWC) is lauded. Modelled after the CRC the specific protection of the child is now at the forefront. The wordings of the ACRWC are premised on the dire disadvantages that the African child suffers. These disadvantages are closely linked to the socioeconomic, cultural, religious, and traditional way of life that drives the need for the specific protection of the rights of children. Other identifiable factors are the incessant conflicts, hunger, and natural disaster induced displacements.<sup>722</sup>

In analysis of the ACRWC, several scholars laud the provisions as having a higher threshold of protection than the CRC and other treaties that are made specifically for children. The threshold according to Van Baalen is based on the "specific vulnerabilities African children face".<sup>723</sup> Closely related to this theory as advanced by Van Baalen is that of Kaime, who underscores the peculiarities of the ACRWC primarily on the theory of non-discrimination and the best interests of the child.<sup>724</sup> The position of Van Baalen and Kaime is thus in agreement with this thesis as the ACRWC provides in Article 3 for the:<sup>725</sup>

... enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or their parents' or legal guardians' race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status.

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<sup>721</sup> Sen (n 104) 5.

<sup>722</sup> Preface to African Charter on the Rights and Welfare of the Child

<sup>723</sup> Van Baalen 'The Rights of Refugee Children in South Africa' (LLM dissertation Northwest University 2012) 29.

<sup>724</sup> See generally Kaime (n 74).

<sup>725</sup> Article 3 of African Charter on the Rights and Welfare of the Child.

The implication of the above supports the earlier assertion that unaccompanied children must be well protected from all situations that may violate them. In the same way, the provision of Article 4(1) is a reaffirmation of the position of the CRC on placement of unaccompanied children in homes that meet the minimum threshold of the best interests of the child in all decisions affecting the child.<sup>726</sup>

It is important however to underscore the fact that what constitutes the best interests of the child is not one that is not devoid of nuances as previously stated. However, it is important that we do not allow the nuanced nature of the specific content to derail the intentions of best interests' policy.<sup>727</sup> Primarily, the core focus of the ACRWC is to ensure that the child acquires and realises their full potential through all round development. The obligation that is placed on the state is well crafted by the provisions of the importance of the family unit.<sup>728</sup> In addition, Article 19(3) emphasises the obligation on states to ensure full support for a child's full integration with a family.<sup>729</sup>

On a sub-regional front, Initiatives like the Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration (MIDAS) which came into effect in 2000 collaborates with the IOM and the Southern African Migration Project (SAMP) towards ensuring compliance with all norms and standards of implementation as it concerns migration issues. This is achieved through regular capacity building meetings with policy makers and legislators in the region.<sup>730</sup> An indicator from such meetings include what Mezmur decried as the poor state of statistics on migrant children which affects the planning or policy formulation by states.<sup>731</sup> Further challenges identified by countries range from inability to identify the unaccompanied migrant

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<sup>726</sup> Article 4 (1) of African Charter on the Rights and Welfare of the Child provides that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

<sup>727</sup> Mc Adam 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complimentary Protection' in H Lambert (eds) *International Refugee Law* (2010) 262.

<sup>728</sup> Article 18 (1) of African Charter on the Rights and Welfare of the Child states that the family should be the natural unit and basis of society. It should enjoy the protection and support of the State for its establishment and development.

<sup>729</sup> Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

<sup>730</sup> Data available at <https://www.iom.int/midsa> (accessed 20 July 2020).

<sup>731</sup> BD Mezmur, MIDSA conference at Victoria Falls, Zimbabwe 'Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child', 7- 9 July 2015, 15 at [https://www.iom.int/sites/g/files/tmzbd1486/files/our\\_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf) (accessed 25 July 2020).



children and the lack of a legal framework that would be engaged in ensuring the protection of this category of migrants.<sup>732</sup>

Closely related to the finding of Mezmur is that of Van Zyl and Virgili who explain “that South Africa is a primary destination country in the region and that the majority of unaccompanied children are not identified or referred to protection service providers”.<sup>733</sup> The implication of this irregular migration and uncertainty of data has a cumulative effect of children not being able to access facilities which includes health and educational services.<sup>734</sup>

In a bid to resolve the above identified challenges, efforts are in place to support the settlement of unaccompanied migrant children. A key initiative supported by the International Organization for Migrants (IOM) is the Assisted Voluntary Return (AVR).<sup>735</sup> This process supports the search for and finding of family members of migrant children who are willing to return to their home country to reunite with families. It is, however, noted that this process must be conducted with a highly ethical framework to avoid an abuse of the process. It is suggested by the thesis that this initiative must be conducted with the principle of the best interests of the child in full consideration.

#### **5.4 Challenges facing migrant children in South Africa**

As already stated in the thesis, there is some level of discrimination against migrants in accessing basic facilities in full. These restrictions, as already argued, must not include the access to basic education and other amenities that would violate the best interests of a child. It is also restated here that the status of a child is not a requirement for the child to enjoy the fundamental rights accruable. This position is further supported by Freedman, when it was opined that a sustained discriminator practice continues to exist between migrants and nationals

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<sup>732</sup> Mezmur (n 731).

<sup>733</sup> Van Zyl & Virgili, MDSA conference at Victoria Falls, Zimbabwe ‘Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child’ 7- 9 July 2015, 16 at [https://www.iom.int/sites/g/files/tmzbdl486/files/our\\_work/ICP/RCP/English-Final-Report-MDSA-2015.pdf](https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ICP/RCP/English-Final-Report-MDSA-2015.pdf) (accessed 25 July 2020).

<sup>734</sup> Van Zyl & Virgili (n 733).

<sup>735</sup> AVRR is defined by the IOM as the administrative, logistical, and financial support, including reintegration assistance, provided to migrants unable or unwilling to remain in the host/transit country, who volunteer to return to their countries of origin.

of a state.<sup>736</sup> According to Neocosmos, individual status affects the level of treatment and cooperation that migrants receive from various agencies and service providers in a country.<sup>737</sup> Undocumented foreign nationals confront several obstacles, which are detailed below.

#### ***5.4.1 Unfair treatment from the police***

According to Klaaren and Ramji,<sup>738</sup> the policing of undocumented foreign nationals in South Africa, includes many migrant children, is marred by unpleasant behaviour toward suspicious and arrested foreign individuals.<sup>739</sup> This hostile attitude against foreign nationals is reminiscent of police behaviour during the apartheid era.<sup>740</sup> This was obvious in the Operation Crackdown effort, which began in 2000 with the goal of removing undocumented foreign nationals from the country.<sup>741</sup>

This procedure was carried out along racial lines; it primarily aimed at regions occupied by black people, with the police focusing on determining the legal status of the population in those areas. However, it appeared that the police had little experience in dealing with foreign nationals during the investigation.<sup>742</sup> Some officers lacked sufficient knowledge of immigration law and information regarding foreign nationals' rights. Due to this limitation, foreign nationals were mostly policed by unreasonable techniques, such as the arresting and detaining of certain foreign nationals with valid permits at Lindela repatriation centre, while denying others the opportunity to get their permits at home to establish their status.<sup>743</sup> In other cases, the police did not bother to examine the documents presented by the foreign nationals or believe that they were authentic. This method of policing resulted in a new form of criminalisation based on race and status, which is eventually a reflection of state policies and preferences.<sup>744</sup>

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<sup>736</sup> J Freedman 'Analysing the gendered insecurities of migration (2012) 14 *International Feminist Journal of Politics* 36 at <https://www.tandfonline.com/doi/abs/10.1080/14616742.2011.631281> (accessed 20 July 2020).

<sup>737</sup> M Neocosmos 'From 'foreign natives to 'native foreigners': Explaining xenophobia in post-apartheid South Africa (2010) 10 at <https://www.codesria.org/IMG/pdf/neocosmos-3.pdf> (accessed 20 July 2020).

<sup>738</sup> J Klaaren & J Ramji 'Inside illegality: Migration policing in South Africa after Apartheid' (2001) 48 *Africa Today* 35-47 at <http://www.jstor.org/stable/4187432> (accessed 22 November 2018).

<sup>739</sup> Ibid.

<sup>740</sup> D Vigneswaran 'A foot in the door: Access to asylum in South Africa' Refugee (2008) 25 *Refuge: Canada's Journal on Refugees* 41 available at <https://refuge.journals.yorku.ca/index.php/refuge/article/view/26030> (accessed 20 July 2020).

<sup>741</sup> Klaaren & Ramji (n 738) 35.

<sup>742</sup> Amit & Kriger (n 109) 270.

<sup>743</sup> Amit & Kriger (n 109) 269.

<sup>744</sup> Tshabalala 'Negotiating the movement: Everyday immigration policing in Johannesburg' (Master dissertation University of Witwatersrand 2009).

#### 5.4.2. *Lack of safety for unaccompanied minors*

The risk that confronts migrant children is one that is already reiterated in the thesis, specifically due to age and vulnerability. However, as a way of reemphasising this, the work of Fritsch, Johnson, and Juska,<sup>745</sup> becomes important to refer to as they pinpoint further such challenges and attribute them to the lack of protection available from guardians or parents. The girl child is further exposed to greater harm, as they in most instances become victims of multiple rapes and physical abuse. While the laws and policies that may be of protection to them is in place, the reluctance to come forward with such allegations against perpetrators is traceable to the fear generated because of their undocumented status.<sup>746</sup> This situation is also reflected in the quest for employment which subjects them to dire child labour conditions.<sup>747</sup> Another challenge is the inability and ineligibility of getting support from government in terms of education and other facilities.<sup>748</sup>

Additionally, difficulty in accessing the limited Refugee Reception Offices (RROs), implies huge traveling cost for migrants to seek documentation and redress of rights when in danger.<sup>749</sup> Furthermore, communication and language barriers also contribute to the challenges that migrants face while trying to effect legalisation and documentation in South Africa. This position is supported by the findings of King who opines that communication barriers most often than not projects the migrant in the perspective of a victim and in a weak position. This is because the migrant is unable to express and advance the points or stories that they are required to tell in the documentation interview processes.<sup>750</sup>

Additionally, King pinpoints profiling and stigmatisation as a basis for the non-integration of migrants in the host nations, particularly, it is noted that “the police and foreign nationals often find it difficult to participate together in community policing forums because of their preconceived ideas about each other’s behaviour”.<sup>751</sup> Closely related to the study of King is that

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<sup>745</sup> C Joppke ‘Beyond national models: Civic integration policies for immigrants’ (2007) 30 *Western Europe Politics* 1 available at <https://www.tandfonline.com/doi/abs/10.1080/01402380601019613> (accessed 20 July 2020).

<sup>746</sup> See generally C Fritsch et al ‘The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action’ (2020) 38 *Denver Journal of International Law & Policy* 623-658 at <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1218&context=djilp> (accessed 20 September 2020).

<sup>747</sup> Amit & Kriger (n 109) 270.

<sup>748</sup> Joppke (n 745) 1.

<sup>749</sup> Flahaux & De Haas (n 28) 1

<sup>750</sup> See generally M King *Justice and safety in America’s immigration communities* (2006)

<sup>751</sup> King (n 750).

of Creese.<sup>752</sup> Creese found the challenges of language and culture as major obstacles to the integration of foreign nationals in the Vancouver area of Canada. The implication is the labelling of migrants as less efficient and productive in the activities they engage in.<sup>753</sup>

#### ***5.4.3 Workplace and movement challenges for undocumented foreign nationals***

The work condition of migrants is always dismal. This is primarily because of the quest for survival and sustenance. Migrants are unable to negotiate terms of employment and are in most circumstances left to the mercy of such unwilling employers. This situation is linked to phobia by migrants. This situation is supported by the work of Gomberg and Nussbaum<sup>754</sup>, who link constant police surveillance and arrests as an ignitor of fears that restricts undocumented migrants from exploring their full potential.

#### ***5.4.4 Exclusion of foreign nationals from national identity***

Exclusion of migrants from the identity documentation process is a major bane for planning for development of infrastructure that would accommodate every individual. This position already advanced in the decision in the Nubia case is further reaffirmed by Croucher<sup>755</sup> who links identity to oneness and integration. Hence, often migrant children are not considered as bearing any national identity, especially in South Africa. The more alarming situation is that migrants and migrant children, no matter their specialty and qualifications, are not considered for employment in this country.

A similar situation can be seen in the case of the Nubians in Kenya, whose nationality was not recognised for a long time. Even though they have lived in the country for a considerable time, they are still termed as aliens and are not recognised as nationals, nor granted the right to have rights. The most significant way in which the rights of the Nubian children were violated was

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<sup>752</sup> G Creese 'Erasing English language competency: African migrants in Vancouver, Canada' (2010) 11 *International Migration and Integration* 295 at [https://www.researchgate.net/publication/225126319\\_Erasing\\_English\\_Language\\_Competency\\_African\\_Migrants\\_in\\_Vancouver\\_Canada](https://www.researchgate.net/publication/225126319_Erasing_English_Language_Competency_African_Migrants_in_Vancouver_Canada) (accessed 20 July 2020).

<sup>753</sup> Creese (n 752).

<sup>754</sup> R Gomberg-Munoz & L Nussbaum-Barberena 'Is migration policy labor policy? Immigration enforcement, undocumented workers and the state' (2011) 70 *Human Organisation* 366 at [https://www.researchgate.net/publication/290530792\\_Is\\_Immigration\\_Policy\\_Labor\\_Policy\\_Immigration\\_Enforcement\\_Undocumented\\_Workers\\_and\\_the\\_State](https://www.researchgate.net/publication/290530792_Is_Immigration_Policy_Labor_Policy_Immigration_Enforcement_Undocumented_Workers_and_the_State) (accessed 20 July 2020).

<sup>755</sup> S Croucher 'South Africa's illegal aliens: Constructing national boundaries in a post-apartheid state' (1998) 21 *Ethnic and Racial Studies* 639 at <https://www.tandfonline.com/doi/abs/10.1080/014198798329801> (accessed 20 September 2020).

that they were not acknowledged as citizens and that, even in cases of birth registration, they were not given the necessities and provisions that Kenyan children receive.<sup>756</sup>

This case was handled by the African Committee of Experts on the Rights and Welfare of the Child. The complaint was brought by the Justice Initiative on behalf of the Children of Nubian Descent in Kenya. This case held clearly that the Kenyan government is in violation of several provisions of the African Charter and ordered the government to completely desist from such acts of marginalisation, discrimination and injustice.<sup>757</sup> The effect of this case is still seen in Kenya to date, wherein the Nubians are not as segregated as they used to be; nonetheless, it is clear that some forms of discrimination linger against this set of persons who are still referred to as aliens.<sup>758</sup>

The implication of the search for an identity drives migrant towards denouncing religious and cultural affiliation to embrace that of the communities in which they find themselves. According to Nzayabino<sup>759</sup> the adoption of new ideologies often enhances the speed of acceptance and integration into the society.<sup>760</sup> This situation is conceived in this thesis to be a violation of the guaranteed right of freedom to hold religious and cultural beliefs by an individual. The implication of this challenge permeates all spheres of society and continues to ensure that migrants remain vulnerable. Croucher<sup>761</sup> and Ibrahim<sup>762</sup> capture this succinctly by observing that:

... the practice of referring to foreign nationals as “them” and to South Africans as “us” is used by scholars, politicians, the media, and public officials, including the policing agencies, as well as ordinary citizens...<sup>763</sup>

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<sup>756</sup> *Children of Nubian Descent in Kenya v Kenya* available at <https://www.justiceinitiative.org/litigation/children-nubian-descent-kenya-v-kenya> (accessed 20 August 2019).

<sup>757</sup> *Children of Nubian Descent in Kenya v Kenya* available (n 756).

<sup>758</sup> *Children of Nubian Descent in Kenya v Kenya* available (n 756).

<sup>758</sup> *Children of Nubian Descent in Kenya v Kenya* available (n 756).

<sup>759</sup> V Nzayabino ‘Rethinking the impact of the church on the dynamics of integration of Congolese migrants in Johannesburg: A case study of Yahwen Shammah Assembly’ (PhD thesis, Wits University 2011).

<sup>760</sup> M Ibrahim ‘The securitization of migration: A racial discourse’ (2005) 43 *International Migration* 163 available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2435.2005.00345.x> (accessed 20 September 2020).

<sup>761</sup> Ibrahim (n 760) 639.

<sup>762</sup> Ibrahim (n 760) 163.

<sup>763</sup> Croucher (n 755) 639.

The position above has also been reinforced by recent judicial interventions in South Africa which ruled in favour of removing all documentary barriers. The move to ensure that foreign national's access to education is not limited by discriminatory laws further received judicial blessing in the *Makhanda* case.<sup>764</sup> The Eastern Cape High Court's judgement reaffirmed that schools are required to guarantee that illegal students are not denied access to education. Prior to 2016, the Eastern Cape Department of Education (ECDE) supplied teaching staff and funds to all learners enrolled in schools in the Eastern Cape, regardless of whether they submitted birth certificates or other forms of identification.

The National School Nutrition Programme ensured that all children enrolled in schools had access to basic education and nutrition. However, in 2016, the ECDE published a circular (Circular 6 of 2016) prohibiting schools from receiving funds for students who do not have their identity numbers or passport numbers recorded in the Education Department's Management System Database (SASAMS). Because they no longer received financing for them, several schools decided to remove undocumented students from their premises because they were either unwilling or unable to shoulder the cost of delivering an education to unfunded students.<sup>765</sup>

Two independent applications were presented to the court for consideration in this case. The Centre for Child Law and the School Governing Body of Phakamisa High School (the main application) argued that a policy decision by the Eastern Cape Department of Education (ECDE) to withdraw funds to schools in respect of illegal learners was unconstitutional. The 37 students filed the second application, alleging that Clauses 15 and 21 of the Department of Basic Education's (DBE) Admission Policy for Ordinary Public Schools of 1998 (Admission Policy) and Sections 39 and 42 of the Immigration Act of 2002 (Immigration Act) infringed on several constitutional rights of undocumented children.

Clause 15 of the Admission Policy stipulates that when a parent applies for admission of their child to a public school, they must provide the child's birth certificate. If the parent is unable to provide a birth certificate, the child may be admitted conditionally, but if the document is not provided within three months, the child may be expelled from school. Clause 21 deals with so-

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<sup>764</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) at <http://www.saflii.org/za/cases/ZAFSHC/2018/7.html> (accessed 30 September 2020).

<sup>765</sup> <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2020/probono/Downloads/Pro-Bono-Human-Rights-Alert-29-January-2020.pdf> (accessed 30 September 2020).

called "illegal aliens," requiring parents who are not legitimately present in the Republic to show proof that they have applied to the Department of Home Affairs (DHA) to legalise their residence in the nation under the Aliens Control Act.<sup>766</sup> Sections 39 and 42 of the Immigration Act criminalise the fact to "aid and abet" or assist an illegal migrant in obtaining instruction or training.<sup>767</sup>

The Court made the following rulings based on the right to basic education as defined by international and comparative law:

a. Best interests of children

The court stated that Section 28 of the Constitution cannot be understood narrowly and must be interpreted broadly to include in the term "every child" not just South African children but also children who are legally present in the nation and children who have birth certificates. Even children who have been detained for the purpose of deportation as illegal foreigners are bearers of the right enshrined in Section 28, according to the court. Section 28(2), which aims to protect children's best interests in "every case," also reinforces the right to a basic education.

Additionally, several instruments, including the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have been signed and ratified by the South African government. The best interests of the child are paramount in all circumstances involving them, according to these conventions. By ratifying these conventions, South Africa has agreed in principle to always consider children's best interests.

b. Right to dignity

Most migrant children inherit their parents' immigration status while maintaining their own dignity. They are individuals with distinct personalities who are neither influenced nor judged by their parents' actions. "Each child has his or her own sense of worth. A child cannot be

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<sup>766</sup> National Education Policy Act, 1996 (Act No. 27 of 1996) available at [https://www.education.gov.za/Portals/0/Admission%20Policy%20for%20ordinary%20public%20schools%20\(Notice%20of%201998\).pdf?ver=2009-10-13-135307-413](https://www.education.gov.za/Portals/0/Admission%20Policy%20for%20ordinary%20public%20schools%20(Notice%20of%201998).pdf?ver=2009-10-13-135307-413) (accessed 20 September 2020).

<sup>767</sup> The South African Immigration Act 13 of 2002 available at [https://www.gov.za/documents/immigration-act?gclid=EAIaIQobChMIrcSavcHG7AIVBevtCh1J7wrgEAAYASAAEgKkGvD\\_BwE](https://www.gov.za/documents/immigration-act?gclid=EAIaIQobChMIrcSavcHG7AIVBevtCh1J7wrgEAAYASAAEgKkGvD_BwE) (accessed 20 September 2020).



considered as an ordinary extension of his or her parents, doomed to sink or swim with them, if he or she is to be constitutionally envisioned as a human being with a distinct personality”.<sup>768</sup>

Data collected shows that denying children access to education has had negative implications for them. Some have experienced feelings of shame and embarrassment because they are unable to execute activities that their age mates can; others have been despondent, and others have found themselves in unsafe situations because of being out of school. These disadvantaged children are stripped of their self-esteem and self-worth, as well as their capacity for human fulfilment, leaving them with no possibility of escaping poverty or being allowed to participate meaningfully in the society in which they live. As a result of their lack of engagement, some of the children become involved in criminal behaviour and thus become a menace to society.

### c. Right to equality

Unfair discrimination is prohibited by Section 9(3) of the Constitution. The Schools Act, Section 5(1), requires public schools to enrol students and meet their educational needs without prejudice. However, Clause 15 of the Admission Policy appears to essentially deny children access to education based on their immigration status, which is unjustifiable discrimination.<sup>769</sup> Even though the required documentation for enrolment in public schools is not a stated ground of discrimination under section 9(3), the differentiation will be discriminatory if it is based on a factor like those mentioned in the section.<sup>770</sup>

According to the 37 children, paperwork status is a ground like those specified in Section 9(3). Indeed, there is one common thread that runs through all these factors: the children have no influence over them. Furthermore, distinguishing children based on their paperwork status infringes their fundamental right to dignity, placing such distinction alongside the expressly specified ones.<sup>771</sup> It is undeniable that the children affected by the contested Circular are disadvantaged by their lack of documents and come from a vulnerable and impoverished black neighbourhood.

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<sup>768</sup> <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2020/probono/Downloads/Pro-Bono-Human-Rights-Alert-29-January-2020.pdf> (accessed 30 September 2020).

<sup>769</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

<sup>770</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020). (accessed 30 September 2020).

<sup>771</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

When one considers that this divergence is based on characteristics that have the potential to diminish human dignity, it is impossible to avoid the conclusion that Article 15 restricts the right to equality by discriminating against children based on their immigration status. If one considers the status of children in society, whether they have been disadvantaged in any way, and the extent to which their fundamental right to dignity has been harmed, it is unavoidable to conclude that Article 15 of the Admission Policy is unjust.<sup>772</sup>

Each of the international human rights instruments signed and ratified by the South African government clearly forbids discrimination in the exercise of the guaranteed rights. The Convention on the Rights of the Child applies without discrimination to all children within a state party's authority, regardless of the child's or his or her parent's or legal guardian's national ethnic, social origin, birth, or other status.

It is worthy to note that Clause 21 of the Admission Policy, which reads:

Persons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 ...

Clause 21 entails learners classified as "illegal aliens" to demonstrate that they have applied to legalise their stay before being admitted to public schools, which is nearly impossible given that the children were brought into South Africa illegally and thus do not meet the requirements of having a residence or study permit. They have no say in the decision to be brought to the country, but they must endure the repercussions of their parents' decisions. The right to education applies to "everyone" inside South Africa's borders, regardless of nationality or immigration status.<sup>773</sup>

Emphasising the ambit of "everyone" contained in Sections 12 and 35(2) of the Constitution the Constitutional Court held:

The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not

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<sup>772</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

<sup>773</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution.

There is no reason why 'everyone' in Sections 12(2) and 35(2) should not be accorded its ordinary meaning if it is agreed, as it must be, that anyone inside the territorial boundaries receive the protection of courts. When the Constitution seeks to limit citizens' rights, it expressly states so. Sections 12 and 35 apply to everyone who falls into this category (2). It is not required to respond to the question of whether those who attempt to enter South Africa by road at border crossings are entitled to our Constitution's rights if they are denied entry.<sup>774</sup>

The 37 applicants and amici curiae referred to a plethora of international laws that makes it clear that minors, especially those with irregular status, are bearers of the right to education.<sup>775</sup> There is no doubt that paragraph 21 imposes severe restrictions on other rights that safeguard children. To the researcher's satisfaction, Clauses 15 and 21 of the Admission Policy are unconstitutional.

In this thesis, it is emphasised that Section 29 of the Constitution, which safeguards the right to basic education, is a right that may be realised immediately and is placed on a higher pedestal. The Constitutional Court held that:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realized” within “available resources” subject to “reasonable legislative measures”.

Therefore, the right to basic education may only be limited in accordance with the law of general application in accordance with Section 36 of the Constitution.<sup>776</sup> The first to third respondents bear the onus to establish that the limitation is justified. Section 36 of the Constitution provides:

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<sup>774</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed the 30 September 2020).

<sup>775</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

<sup>776</sup> South African Constitution

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

(2) “Except as provided in subsection or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.” Both Clauses 15 and 21 of the Admission Policy are essentially policies that are incapable of authorising the limitation of a right guaranteed by the Bill of Rights. Both applications were vigorously defended by the DBE and the DHA, who argued that the policies and provisions in question were necessary measures put in place, among other things, to prevent or at least discourage people from illegally entering the country to obtain free education for their children. This was argued to be because traditional measures of restricting and restraining illegal immigration, such as proper border control and enforcement of immigration rules, were ineffective.

However, the court determined that there was an ongoing, live controversy because it was clear from the evidence that many children are unable to obtain the necessary documentation required by the DBE or to regularise their presence in South Africa due to personal circumstances and systemic problems at the DHA.<sup>777</sup> As a result, they are still at risk of being expelled from school under the current Admissions Policy, which has yet to be modified. Indeed, the court highlighted that over a million undocumented children are enrolled in schools, all of whom are subject to ultimate expulsion under the Admission Policy and the modified Circular, based on information presented by the DBE.<sup>778</sup>

Undeniably, on the evidence put before the court by the DBE itself, the court noted that over a million undocumented children are in the schooling system all of whom remain vulnerable to eventual expulsion in terms of the Admission Policy and the amended Circular.<sup>779</sup> The court confirmed that everyone has the right to basic education, regardless of their circumstances or ability to show proof of identity through the submission of a birth certificate or other official papers, in a thorough judgement on the merits. It was in this context that it examined Clauses

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<sup>777</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> accessed the 30 September 2020

<sup>778</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

<sup>779</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

15 and 21 of the Admission Policy, finding that they unjustifiably limit numerous constitutional rights, including the right to equality (Section 9), the right to dignity (Section 10), the right of children to have their best interests considered paramount (Section 28(2)), and the right to a basic education (Section 29(1)(a)) by rejecting or expelling undocumented learners from public schools.<sup>780</sup>

The court properly stated that all children have their own dignity and are unique individuals who are not dependent on or measured by their parents' or guardians' activities. As a result, they were found unconstitutional. These sections were also found to be unjustifiable under Section 36 of the Constitution, because fundamental rights can only be curtailed by laws that apply to everyone. Because the Admission Policy is not a general law, but rather a policy, it is incapable of authorising the restriction of any right guaranteed by the Bill of Rights. Consequently, the learners (considering that many had no choice in the decision to be brought into South Africa or had been abandoned by their parents and placed in the care of others) should not bear the negative consequences of their parents' illegal entry, failure to obtain their own documentation, or failure to apply to have their children documented.

The court determined that, when properly interpreted through the lens of the Bill of Rights, as required by Section 39(2) of the Constitution, the references to "learning institution" and "training" in Section 39 of the Immigration Act should not be construed to include schools' provision of basic education to children. Sections 29 and 28(2) of the Constitution, as well as international conventions, supported such an interpretation. Considering this understanding, it was determined that declaring these provisions invalid was unnecessary.<sup>781</sup>

Circular 6 of 2016 was declared invalid by the court, and it was set aside. When a learner is unable to provide a birth certificate, the principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the learner's guardian/parent/caregiver that fully identifies the learner. It also prohibited state authorities from excluding children from schools (including undocumented children already admitted) solely because they lacked an identity document/number, permission, or passport or were unable to present any identifying papers. This decision gives millions of undocumented children in South Africa much-needed protection. It gives hope to many forgotten undocumented

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<sup>780</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

<sup>781</sup> <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

children who have all been victims of circumstance, because the most powerful tool of all – the right to education – is finally at their disposal.<sup>782</sup>

After the ruling, the department of basic education published a circular ordering all schools to comply with the judgment.<sup>783</sup> This case shows that there are still violations of children’s right to basic education even from the department of education that is supposed to implement this right. As the researcher has stated previously, DHA must implement an easier procedure for children that are in primary schools to apply for a study visa.

#### **5.4.5 Consistent exposure to abuse**

Migrants’ inability to approach law enforcements institutions, further exposes them to abuse and violence. The question should then be if documentation should be a premise on which the police, for instance, should investigate an offence against a victim? According to Vishnuvajjala<sup>784</sup> this situation is solely responsible of the high level of abuse and low reporting cycle by the migrant victims.<sup>785</sup> In the case of minors, they are further subjected to abuses by those in whose care they are placed, they are often threatened with exposure and for lack of a place to turn to and ignorance of the available laws and policy, they remain in such abusive environments.<sup>786</sup> Aside from the above violence patterns, females are, according to Freedman, also vulnerable to violence perpetrated by the co migrants as a means of exerting power and control.<sup>787</sup>

#### **5.4.6 Lack of access to health services**

Access to health is a key right which migrants are consistently excluded from. The importance of health to the enjoyment of other rights like good working conditions are not arguable. The realisation is, however, not attainable by migrants as states give excuses of limited resources to

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<sup>782</sup><https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2020/probono/Downloads/Pro-Bono-Human-Rights-Alert-29-January-2020.pdf> (accessed 30 September 2020).

<sup>783</sup><https://www.news24.com/news24/southafrica/news/motshekga-instructs-schools-to-enrol-undocumented-children-after-court-ruling-20200213> (accessed 30 September 2020).

<sup>784</sup> R Vishnuvajjala ‘Insecure communities: How an immigrant enforcement program encourages battered women to stay silent’ (2012)32 *Boston College of Law and Social Justice* 32 at <https://lawdigitalcommons.bc.edu/jlsj/vol32/iss1/7/> (accessed 20 September 2020).

<sup>785</sup> J Crush ‘Introduction: Immigration, Human Rights and Constitution’ (1998) in J Crush (eds) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 9.

<sup>786</sup> CW Kihato ‘Invisible lives, inaudible voices? The social conditions of migrant women in Johannesburg’ (2007) 5 *African Identities* 89 at <https://www.tandfonline.com/doi/abs/10.1080/14725840701253787> (accessed 30 September 2020).

<sup>787</sup> J Freedman ‘Analysing the Gendered Insecurities of Migration’ (2012) 14 *International Feminist Journal of Politics* 36-55

exclude migrants from enjoying some of the services that are free and affordable. According to Vearey<sup>788</sup> and Vearey, Richter, Nunez and Moyo,<sup>789</sup> “undocumented foreign nationals are denied access to health services on the basis of their status”.

### **5.5 Protection of migrants under the laws of the DR Congo**

Data on migrants in the region of Central Africa, particularly the DR Congo is limited. The presumption of the above situation is that there might not be serious occurrences of migration in the region. This presumption is however negated by the occurrences of continuous wars, violence and natural disasters which are factors that trigger the migration of individuals. Migrants who enter the DR Congo come from neighbouring or distant countries. Some are economic migrants while others are compelled to leave their countries, especially during political crises or natural disasters.<sup>790</sup> Due to the high level of conflict in the DR Congo, it is assumable that as a hub, the level of influx of migrants into the state would be almost at par with the number of individuals migrating from there. That is where the complexity of the phenomenon lies. The DR Congo serves as a refuge when socio-political crises erupt in neighbouring countries, but it also pushes its population to find refuge in neighbouring countries.<sup>791</sup> Like migrants from other nations, migrants from the DR Congo are subjected to inhuman treatment and are subjected to repatriations.<sup>792</sup>

The DR Congo is one of the African countries with the largest number of migrants.<sup>793</sup> In 2018, it was classified amongst the least developed countries, including Bangladesh, Chad, Ethiopia, Uganda, Rwanda, Sudan, South Sudan, Tanzania, and Yemen, which welcomed 6.7 million refugees, 33% of the world total. Nine of the ten main host countries for refugees were in developing regions and 84% of refugees lived in these countries.<sup>794</sup>

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<sup>788</sup> J Vearey ‘Migration, access to ART and survivalist livelihood strategies in Johannesburg’ (2008) 7 *African Journal of AIDS Research* 361 at <https://pubmed.ncbi.nlm.nih.gov/25875464/> (accessed 30 September 2020).

<sup>789</sup> Ibid

<sup>790</sup> M Lututala ‘Les migrations en Afrique centrale : caractéristiques, enjeux et le développement des pays de la région’ (2007) 10 at <https://www.migrationinstitute.org/publications/les-migrations-en-afrique-centrale> (accessed 7 April 2020).

<sup>791</sup> Lututala (n 790)13.

<sup>792</sup> Lututala (n 790) 1.

<sup>793</sup> Kihato (n 763) 89.

<sup>794</sup> UNHCR *Éducation des réfugiés 2030 : Une stratégie pour l’inclusion des réfugiés* (2019) 10 at <https://www.unhcr.org/5dfcd3aa4.pdf> (accessed the 9 April 2020).



The situation is such that every year there are records of nationals of the DR Congo being returned home from foreign countries that they migrated to.<sup>795</sup> While the analysis concerning South Africa above focuses on that of migrants and foreign nationals coming into South Africa, there is a reversal in the Congolese situation, because the discussion will rather tilt towards the returnees and migrants from Congo.<sup>796</sup> Some human rights NGOs in the DR Congo confirm that interviews conducted with many returnees show that upon arrival back in their country (DR Congo), the harassment and hassles they are exposed to by the authorities is more than they experienced in foreign countries, although there is usually no arrest.<sup>797</sup> “Another report shows that Congolese immigrants returning to DR Congo via N’djili International Airport denounced the ill-treatment that they were subjected to upon arrival”.<sup>798</sup> It is reported that in 2011, “the Congolese Prime Minister, Adolphe Muzitu, visited the airport and ports in Kinshasa, and in the course of his inspection, he had contact with various returnees that are migrants and he confirmed that harassments and hassles take place”.<sup>799</sup>

The June 2009 report of the Country of Return Information Project corroborates the information provided above regarding harassment of returnees.<sup>800</sup> According to this report, “Upon arrival at the airport, immigration agents will wait for the returnee and identify him before taking him to the litigation office of the “Direction General des Migrations” (DGM) for the formalities before the hearing.<sup>801</sup> The returning Congolese candidates are sometimes subject to harassment from the DGM agents (systematic searches and extortion of their private belongings: shirts, pants, shoes, watches, lighters and many others as well as money if for example the vaccination certificate is not valid).<sup>802</sup> This hunt continues in the parking as well, after leaving the passenger zone of the airport they risk harassment from zealous agents (police, military...) as they rightly or wrongly believe that returnees have a lot of money and goods with them.”<sup>803</sup>

M Lututala

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<sup>795</sup> Reports on the Democratic Republic of Congo, <https://www.refworld.org/pdfid/4f5dbb9b2.pdf> accessed 10 July 2019.

<sup>796</sup> Reports on the Democratic Republic of Congo, <https://www.refworld.org/pdfid/4f5dbb9b2.pdf> accessed 10 July 2019.

<sup>797</sup> UK Border Agency (2013) 7.

<sup>798</sup> Mc Calpin ‘Historicity of a Crisis – The Origin of the Congo War’ in J Clark (eds) *The African Stakes of the Congo War* (2002) 20.

<sup>799</sup> Calpin (n 798) 21

<sup>800</sup> Internal Displacement Monitoring Centre at <https://www.internal-displacement.org/countries/democratic-republic-of-the-congo> accessed 20 September 2020

<sup>801</sup> Calpin (n 798) 21.

<sup>802</sup> Calpin (n 798) 22.

<sup>803</sup> Ndaywel è Nziem *Histoire générale du Congo : de l'héritage ancien à la république démocratique* (1998) 5. [General History of the Congo: from the ancient heritage to the Democratic Republic]

Similarly, Flahuax reports that “returnees are at risk of persecution, and even more so if they are asylum returnees.”<sup>804</sup> The fear of such acts by officials is noted to be responsible for the reason why failed asylum seekers go to rural areas and avoid documentation processes.<sup>805</sup> Some migrants have also complained of being treated as state enemies when accosted by state agents. It is accounted that:<sup>806</sup>

One of the returnees declared that “The government in the DR Congo views Congolese people deported back home from the UK as enemies [...]. The guards who beat me kept saying to me ‘You are a spy, give us information, why are you doing this to your country?’

There exist records of immigrants from other nations in the DR Congo, even though the country is in a parlous state and many of its citizens leave for countries with better economic opportunities.<sup>807</sup> As of 2013, UN reports on migrations show that among African countries, Congo is one of the top five countries of destination and almost 300 000 persons were measured as migrant stock by destination.<sup>808</sup>

Sadly, given that the country is endowed with natural resources and beautiful scenery, the violence and war in the DR Congo only partially reflects the country's potential.<sup>809</sup> The implication is that aside from the challenges of migration of its own inhabitants in pursuit of a better life in foreign countries, the situation of internally displaced persons is on the increase. With its rich potential, the DR Congo is a migration hub for other countries in the Great Lakes region and continues to serve as a hub for the heightened issues of migration in the region.<sup>810</sup>

The situation of the DR Congo continues to depreciate because of the growing insecurity in the country that has invariably titled it from being a receiving state to a giving state in terms of migrants’ statistics.<sup>811</sup> A report on the statistics shows that “more than 650 000 immigrants and

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<sup>804</sup> ML Flahuax, *Retourner au Sénégal et en RD Congo : Choix et contraintes au cœur des trajectoires de vie des migrants* [Return to Senegal and DR Congo. Choices and constraints in the heart of the life trajectories of migrants] (PhD thesis, Université Catholique de Louvain, 2013) [https://dial.uclouvain.be/pr/boreal/object/boreal:137675/datastream/PDF\\_01/view](https://dial.uclouvain.be/pr/boreal/object/boreal:137675/datastream/PDF_01/view) accessed 30 September 2020

<sup>805</sup> Flahuax & De Haas (n 28) 1.

<sup>806</sup> Flahuax (n 804) 4.

<sup>807</sup> Flahuax (n 804) 4.

<sup>808</sup> Flahuax & De Haas (n 28) 3.

<sup>809</sup> Flahuax & De Haas (n 28) 1.

<sup>810</sup> Australian Government Department of Social Services (2014)

<sup>811</sup> International Commission of Jurists *Migration and International Human Rights Law: A Practitioner’s Guide* (2014) 101

refugees resided in the DR Congo in 1990, according to UN Population Division estimates, most from neighbouring countries; this number stood at more than 400 000 as of mid-2015”.<sup>812</sup>

It is to be noted however, that the DR Congo is not alone in the push factor influenced by violence as countries like Rwanda had a spike in its migrants’ contribution during the genocide years.<sup>813</sup> In 1994, Wilkinson,<sup>814</sup> cited by Lutatala, wrote that:<sup>815</sup>

“The Great Lakes would have been one of the most serious and complex crises of our time” when he saw a flow of more than a million Rwandan refugees storm the small town of Goma in the DR Congo a day after the assassination of Rwandan president Juvenal Habyarimana and Burundian president Cyprien Ntaryamina.

It is on record that quite a sizeable number of Rwandan refugees are still resident in the DR Congo.<sup>816</sup> It is on record that in 1972, Mobutu Sese Seko granted collectively Congolese nationality to the Banyarwanda living in the DR Congo. This fuelled ethnic hatred. In 1982, to satisfy the native population, the DR Congo voted in the Law of Nationality based on *jus soli*<sup>817</sup> and recognised as Congolese only individuals whose ancestors lived in the Congo before 1885, the year in which the political boundaries were demarcated.<sup>818</sup> There was confusion between the law of 1972 automatically and collectively conferring Congolese nationality on Rwandan nationals living in the DR Congo (at that time it was Zaire), and that of 1982, which cancelled the previous law which recognised nationality solely on an individual basis.<sup>819</sup> It should be noted that the granting of that Congolese nationality was administratively incorrect since there

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<sup>812</sup> See generally PP Dika *La politique d’immigration de la nouvelle Afrique du Sud postapartheid (Défense, Stratégie et Relations Internationales)* (2009) [The Politics of Immigration in the New Post-Apartheid South Africa]

<sup>813</sup> M Lutatala ‘Intra- and Extraregional Migration in the South: The Case of Africa’ in R Anich, J Crush, S Melde & J O Oucho (eds) *A New Perspective on Human Mobility in the South* (2014) 13

<sup>814</sup> Wilkinson cited by M Lutatala ‘Les migrations en Afrique centrale : caractéristiques, enjeux et le développement des pays de la région’ 10.

<sup>815</sup> Lutatala (n 813) 1

<sup>816</sup> General Recommendation No. 30: Discrimination against Non-Citizens, (19 August 2004) UN Doc. CERD/C/64/Misc.11/rev.3.

<sup>817</sup> A rule that the citizenship of a child is determined by the place of its birth at <https://www.merriam-webster.com/dictionary/jus%20soli> (accessed 8 April 2020).

<sup>818</sup> [https://www.memoireonline.com/12/13/8225/m\\_Problematique-des-identites-nationales-dans-la-region-des-grands-lacs-cas-de-la-RDC-et-du-Rwanda12.html](https://www.memoireonline.com/12/13/8225/m_Problematique-des-identites-nationales-dans-la-region-des-grands-lacs-cas-de-la-RDC-et-du-Rwanda12.html) (accessed 8 April 2020).

<sup>819</sup> [https://www.memoireonline.com/12/13/8225/m\\_Problematique-des-identites-nationales-dans-la-region-des-grands-lacs-cas-de-la-RDC-et-du-Rwanda12.html](https://www.memoireonline.com/12/13/8225/m_Problematique-des-identites-nationales-dans-la-region-des-grands-lacs-cas-de-la-RDC-et-du-Rwanda12.html) (accessed 8 April 2020).

were no names nor records of Rwandans that were conferred collectively with Congolese nationality.

Countries like Burundi that are presently in conflict also now contribute to the surging number of migrants seeking refuge in the DR Congo.<sup>820</sup> Additionally in the past, the DR Congo was a hub for Angolan refugees fleeing from war.<sup>821</sup>

Another factor that drives surges in the migrant status of the DR Congo is the scramble for its natural resources. China therefore contributes substantially to these emerging statistics due to the expansion of trade relations between it and Africa.<sup>822</sup> It is thus reported that:<sup>823</sup>

Many Chinese workers came to provide labour in this context, working in mines and on infrastructure construction projects, and running businesses. According to China's embassy, between 4 000 and 5 000 Chinese nationals lived in DR Congo in 2015. However, the actual number is probably higher; estimates in 2007 suggested up to 10 000 Chinese nationals were already living in DR Congo.

The implication of the above analysis shows clearly that the DR Congo is not entirely a liability in the migrant situation but rather contributes to and receives migrants just like every other country. It is necessary at this point to consider both national and international laws that regulate the lives of immigrants in the DR Congo.

## **5.6 Situation of migrant children under the laws of the DR Congo**

The DR Congo has few laws that relate to immigration in its domestic domain; nonetheless, several other international treaties were described in an earlier section of this thesis, the DR Congo is thus signatory to core instruments such as the CRC, ACRWC, ACHPR etc. The laws stated above have different provisions that relate to the lives and livelihoods of migrant children. In substance, the provisions of these international treaties tilt towards ensuring that the rights of migrants and migrant children are not only promoted but also fulfilled and protected. The government of the DR Congo and its agencies are under obligation to ensuring

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<sup>820</sup> General Recommendation No. 30: Discrimination against Non-Citizens (19 August 2004) UN Doc. CERD/C/64/Misc.11/rev.3

<sup>821</sup> Agence France Presse & M&G Africa Reporter (2015).

<sup>822</sup> Chetail 'Sources of International Migration Law' in Opeskin et al (eds) *Foundations of International Migration Law* (2012) 79.c

<sup>823</sup> Agence France Presse and M&G Africa Reporter (2015).

the security of lives and properties of these persons. Several lofty aspirations are documented in these laws; however, the reality reveals otherwise.

Although the domestic legal framework of the DR Congo is not as encapsulating as that of South Africa, there are also several relevant pieces of legislation. The accessible national legislation concerning migration in the DR Congo is Legislative Ordinance No. 1983-033 of 12 September 1983<sup>824</sup>, relating to the policy regarding immigrants and it is to the effect that the immigrants are generally subject to derogation, restriction and policing provided for and allowed within the purview of the law.

Article 50 of the Congolese constitution states that “subject to reciprocity, any immigrant who is legally on the national territory enjoys the same rights and freedoms as Congolese nationals, except political rights.” The DR Congo strives to ensure that every migrant is accorded protection to both life and property as applicable under the international legal regime, this is however subject to compliance to the laws of the DR Congo.<sup>825</sup> The Law 83-033 of 12 September 1983, relating to the policing of foreigners, had its enforcement measures laid down in Law 87-281 of 13 August 1987. It constitutes the regulation that organises the entry of migrants into Congolese territory, but also their stay and departure, as well as their work.

Thus, the DR Congo recognises for migrants the enjoyment of all the rights that are not specifically denied to them by law and the only civil rights whose enjoyment is denied to them are those which a legal text reserves for Congolese.<sup>826</sup>

Concerning visas, the legislator has established five categories: the special establishment visa; the ordinary establishment visa; the work establishment visa; the establishment visa for studies; and the missionary establishment visa.<sup>827</sup> The visa for study is granted to migrants whose stay in the DR Congo is justified for reasons of study or scientific research, and it is valid for a renewable year. Any request for a study visa is supported by a certificate of admission to an

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<sup>824</sup> Ordonnance-Loi No. 1983-033 du 12 September 1983 relative à la police des étrangers (*Legislative Ordinance No. 1983-033 of 1983 relating to the Aliens Police*)

<sup>825</sup> The Congolese Constitution, la Constitution de la République Démocratique du Congo telle que modifiée par la Loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la République Démocratique du Congo du 18 février 2006.

<sup>826</sup> Data available at <https://www.legavox.fr/blog/yav-associates/visa-admission-sejour-travail-etrangers-6301.htm> (accessed 15 April 2020).

<sup>827</sup> Article 5 Ordonnance 87-281 portant mesures d'exécution de l'ordonnance-loi 83-033 du 12 septembre 1983 relative à la police des étrangers (Law 87-281 relating to executive measures of Legislative Ordinance No. 1983-033 of 1983 relating to the Aliens Police)

official or approved educational establishment under the legislation on education in the DR Congo and a document attesting to sufficient resources for the year.<sup>828</sup> Generally, a study visa is mostly required for tertiary education and research purposes; in fact, schools do not ask that migrants' children have study visas.

Apart from the international treaties, DR Congo also has a refugee law, Law number 021/2002 of 16 October 2002 on the status of refugees in the DR Congo. In its preamble, it is stated that the law complies with the 1951 Geneva Convention relating to Refugee Statute and its Protocol of 31 January 1967, as well as the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (1969). The Congolese refugee law states in Article 32 that the DR Congo will grant any recognised refugee the same treatment as nationals in the exercise of a professional activity, social assistance, access to medical care and education as well as freedom of movement subject to administrative restrictions applicable to migrants staying in the DR Congo.

The DR Congo is known for its legendary welcoming and hospitality tradition towards migrants. In the 1960s, following the social revolution in Rwanda, a significant movement of around 100 000 to 150 000 people sought refuge in the DR Congo.<sup>829</sup> Between 1965-1972, the killings in Burundi forced Burundians to seek refuge in the surrounding countries and particularly in the DR Congo. The most important movement was from Portuguese territories such as Angola, with people fleeing the independence armed conflicts. People who were in Northern Angola came into the DR Congo and settled there. From July 1994, the DR Congo hosted 1.2 million Rwandan Hutu refugees who arrived in the DR Congo in the aftermath of the genocide of Tutsis and settled in the extensive refugee camps near Goma and of Bukavu.<sup>830</sup> Even today, although in conflict, the DR Congo still receives thousands of refugees from neighbouring countries and other countries as well. In 2007, the DR Congo counted approximately 204 000 refugees, with approximately 161 259 in 2010.<sup>831</sup>

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<sup>828</sup> Article 11 Ordonnance 87-281 portant mesures d'exécution de l'ordonnance-loi 83-033 du 12 septembre 1983 relative à la police des étrangers (Law 87-281 laying down enforcement measures of the law 83-033 of 12 September 1983)

<sup>829</sup> Maheshe (n 353) 544.

<sup>830</sup> Haut-Commissariat aux Droits de l'Homme des Nations Unies, Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo (Août 2010) 51 at [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_MAPPING\\_REPORT\\_FINAL\\_FR.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_FR.pdf) (accessed 25 February 2023).

<sup>831</sup> UNHCR DRC Factsheet (2010) 1 at <http://www.unhcr.org> (accessed 25 February 2023).



Despite its legendary welcoming and hospitality tradition, the DR Congo lacked a specific legal framework to regulate the situation of refugees till 2002, so migrants were managed by a multitude of legal texts and an inconsistent migration policy. The lack of a proper legal framework was covered by the creation of commissions with the refugees' countries of origin.<sup>832</sup> In 1967, the decision to grant refugee status in the DR Congo rested with the Ministry of the Interior, according to Article 18 of Ordinance-law No. 67/302. A national consultative commission was established, comprising representatives from organisations assisting refugees.<sup>833</sup> Subsequently, Ordinance-law No. 83/033 in 1983 dealt with admission, acceptance, and expulsion of refugees, with the Ministry of the Interior having the authority to handle refugee matters based on the advice of the National Commission for Refugees.<sup>834</sup>

From independence until the early 2000s, the day-to-day management of refugees in the DRC was largely handled by international organisations such as the UNHCR, as there was no proper legislation in place.<sup>835</sup> The Congolese government's involvement was primarily limited to security and reception aspects. For example, during the influx of Rwandan refugees in 1959, the management of 100 000 to 150 000 refugees was mainly carried out by the International Committee of the Red Cross (CICR) and the UNHCR in the North and South Kivu regions.<sup>836</sup>

The Congolese law n°021/2002 relating to refugee status set conditions for refugee status and established the national commission for refugees within the Ministry of the Interior. It maintained the definition of refugees as provided by the 1951 Geneva Convention and added the definition of the 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa.

However, the law did not define who qualified as family members and dependents.<sup>837</sup> The SADC Protocol on the facilitation of movement of persons, states that family has the meaning

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<sup>832</sup> Maheshe (n 353) 544.

<sup>833</sup> Ordinance-law No. 67/302 of 2 August 1967 relating to the police of foreigners.

<sup>834</sup> Legislative Ordinance-law No. 83/033 of 12 September 1983 relating to the police of foreigners/ Ordonnance-loi No. 1983-033 du 12 septembre 1983 relative à la police des étrangers.

<sup>835</sup> G Ngoie & D Lelu Migration en République Démocratique du Congo : Profil National 2009 (2010) 79 at [https://publications.iom.int/system/files/pdf/drc\\_profile\\_2009.pdf](https://publications.iom.int/system/files/pdf/drc_profile_2009.pdf) (accessed 15 April 2018).

<sup>836</sup> Maheshe (n 353) 544.

<sup>837</sup> Maheshe (n 353) 544.



ascribed to it by national laws of each State party.<sup>838</sup> The African Union Protocol to the treaty establishing the African economic community relating to the free movement of persons, right of residence and right of establishment, defines only dependants as a child or a person who a national of a member state is required to support and maintain as defined by laws of the host member state.<sup>839</sup> In the European Union, family members of the refugee are the spouse of the beneficiary of the status and the children of the couple.<sup>840</sup>

The Congolese refugee law lacked appropriate procedures for group protection, it did not reference the mandate of the UNHCR, and it did not address the specific needs of vulnerable groups such as children and women. It also did not provide for temporary protection in the event of mass arrivals. Although refugee status determination was theoretically conducted on an individual basis, practical solutions were developed for group recognition in cases of mass influx.<sup>841</sup> Temporary protection corresponds to a crisis leading to a massive and supposedly temporary influx of displaced persons. An individual examination of each case, as for refugee protection, is not possible. The group is, *prima facie*, subject to temporary protection. However, the Congolese refugee Law is essentially based on individual protection.<sup>842</sup>

Unlike the Congolese refugee law, the Burundian refugee law allowed for temporary protection and *prima facie* status in the event of a mass influx. Residence was not guaranteed under the Congolese law, but the 2003 decree provided guarantees for the temporary stay of refugees and their family members. Refugees in the DR Congo had the same rights as nationals concerning work and education.<sup>843</sup>

It is important to note that Congolese refugee law does not guarantee residence. According to Article 24, the refugee's identity card serves as an equivalent to a residence and establishment permit, valid for two years and renewable.<sup>844</sup> However, there is no specific provision regarding the residence of family members and dependents, like what is outlined in the European

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<sup>838</sup> SADC protocol on the facilitation of movement of persons at [https://www.sadc.int/sites/default/files/2021-11/Protocol\\_on\\_Facilitation\\_of\\_Movement\\_of\\_Persons2005.pdf](https://www.sadc.int/sites/default/files/2021-11/Protocol_on_Facilitation_of_Movement_of_Persons2005.pdf) (accessed 25 February 2023).

<sup>839</sup> The Protocol to the treaty establishing the African economic community relating to the free movement of persons, right of residence and right of establishment at [https://au.int/sites/default/files/treaties/36403-treaty-protocol\\_on\\_free\\_movement\\_of\\_persons\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf) (accessed 25 February 2023).

<sup>840</sup> Article 2.h of directive 2004/83/CE of European Council of 29 April 2004 at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:fr:HTML> (accessed 25 February 2023).

<sup>841</sup> The OUA Convention provides in its art. 2.5 the rule of temporary admission in the event of a mass influx.

<sup>842</sup> Congolese law n°021/2002 relating to the refugee status.

<sup>843</sup> Article 81 and 82 of law N°1-32 of 13 November 2008 relating to asylum and refugee protection in Burundi.

<sup>844</sup> Congolese refugee law.

directive. This gap is addressed by the 2003 decree, which ensures temporary stay guarantees for both the refugee and their family members.<sup>845</sup> The decree states that upon receiving the application, the authorities issue a receipt equivalent to a temporary residence permit to each family member, valid for the entire duration of the procedure.<sup>846</sup>

It is worth mentioning that there are other migration policies in place in the DR Congo; however, these policies are closely monitored by Congolese immigration officers.<sup>847</sup> Nevertheless, it is evident that the legal situation for migrants is outdated and not favourable, which contributes to the critical conditions faced by migrants in the DRC.<sup>848</sup>

### *5.6.1. Rights of migrant children under the national laws of the Democratic Republic of Congo*

There exists no domestic law within the DR Congo that focuses on the rights of migrant children; however, certain fundamental rights are applied under constitutional provisions as well as international law provisions.

The provision of these laws is to the effect that children must enjoy civil, political and economic or judicial aspects, although subject to the restrictions put in place by the laws.<sup>849</sup> Therefore, it is clear that migrant children in the DR Congo enjoy some rights conferred on them by the provisions of the law, such as the right to life, right to movement, right to liberty, right to education as well as other civil and political rights, although some rights can only be enjoyed by nationals of the DR Congo, especially regarding political rights such as the right to vote.<sup>850</sup> It is worth noting that the immigrant children also enjoy certain rights by virtue of their infancy and position.<sup>851</sup> Such rights include that of education and development, as well as freedom from arbitrary arrest.<sup>852</sup> Typically, these rights are accorded under international law however, migrant children are entitled to these rights even though social and economic conditions are often

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<sup>845</sup> Maheshe (n 353) 557.

<sup>846</sup> Maheshe (n 353) 558.

<sup>847</sup> Maheshe (n 353) 558.

<sup>848</sup> Congolese law n°021/2002 relating to the refugee status.

<sup>849</sup> *Sefu & Others v The Attorney General of Botswana*, F46 of 2005, Botswana: High Court, 10 June 2005]

<sup>850</sup> *Sefu & Others v The Attorney General of Botswana*, F46 of 2005, Botswana: High Court, 10 June 2005]

<sup>851</sup> J Steinberg Monograph 117: A Mixed Reception, Mozambican and Congolese Refugees in South Africa (*Institute for Security Studies* June 2005) at <https://issafrica.org/research/monographs/monograph-117-a-mixed-reception-mozambican-and-congolese-refugees-in-south-africa-jonny-steinberg> (accessed 15 April 2020).

<sup>852</sup> Preamble of the African Charter on Human and Peoples' Rights.

adverse in the DR Congo, even for Congolese children. These rights are, infrequently granted to its residents due to the general situation of the nation and the difficulties they face.<sup>853</sup>

## **5.7 Challenges and prospects of the laws and their enforcement**

Several challenges have prevented the DR Congo from maximising its potential in terms of its security and especially the well-being of its nationals and inhabitants. International laws and even national laws, as shown above, are sufficient to cater for the needs of the migrants in general; however, several challenges have thwarted the provisions and aspirations of these laws, some of which are:

### **5.7.1 The socioeconomic status of the country**

Research has shown that the DR Congo is one of the countries with the least socioeconomic provisions and achievements;<sup>854</sup> this decadence is not due to the poverty of the state by itself but to its impoverishment by leaders whose selfish interests outweigh the interest of the state.<sup>855</sup> The components of the legal framework of migration in the DR Congo is manifestly insufficient.<sup>856</sup> The available ones are also age-worn and anachronistic. This is one of the greatest challenges that the DR Congo has been engaged with in terms of immigration and many other aspects of its development.<sup>857</sup>

### **5.7.2 Lack of proper record**

The records that are up to date in terms of immigration and emigration in DR Congo are that of international organisations such as the UN.<sup>858</sup> The state itself lacks a proper record of the metrics of migration within its territory.<sup>859</sup> This has contributed to the invasion and exploitation of the State and its nationals by foreigners and foreign governments.

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<sup>853</sup> G Vanthemsche *Belgium and the Congo, 1885-1980* Alice Cameron and Stephen Windross, trans. (2012) 196

<sup>854</sup> J Zong & J Batalova 'Sub-Saharan African Immigrants in the United States' (2017) *Migration Information Source* at <https://www.migrationpolicy.org/article/sub-saharan-african-immigrants-united-states> (accessed 31 January 2019).

<sup>855</sup> Zong (n 854).

<sup>856</sup> *Ngoyi Ngoho v Minister of Home Affairs*, 3829/08, South Africa: High Court, 27 March 2008]

<sup>857</sup> A., B. (Congo (Kinshasa)) représentés par Centre Suisses-Immigrés (C.S.I.) c. Secrétariat d'Etat aux migrations (SEM), E-7481/2014, Switzerland : Tribunal administratif fédéral, 20 January 2015, available at [https://www.refworld.org/cases,CHE\\_TFS,58c2708c4.html](https://www.refworld.org/cases,CHE_TFS,58c2708c4.html) (accessed 20 January 2015).

<sup>858</sup> A., B. (Congo (Kinshasa)) représentés par Centre Suisses-Immigrés (C.S.I.) c. Secrétariat d'Etat aux migrations (SEM), E-7481/2014, Switzerland : Tribunal administratif fédéral, 20 January 2015, available at [https://www.refworld.org/cases,CHE\\_TFS,58c2708c4.html](https://www.refworld.org/cases,CHE_TFS,58c2708c4.html) (accessed 20 January 2015).

<sup>859</sup> A., B. (Congo (Kinshasa)) représentés par Centre Suisses-Immigrés (C.S.I.) c. Secrétariat d'Etat aux migrations (SEM), E-7481/2014, Switzerland : Tribunal administratif fédéral, 20 January 2015, available at [https://www.refworld.org/cases,CHE\\_TFS,58c2708c4.html](https://www.refworld.org/cases,CHE_TFS,58c2708c4.html) (accessed 20 January 2015).

Another challenge that must be highlighted due to its considerable contribution to the worsened situation in DR Congo is the lack of regional solidarity. The support of the DR Congo by other African states will, to a very large extent, assist the development of the situation within the state as well as reduce the risk of under-development and social decadence.<sup>860</sup>

In principle, the rights of refugees must be protected and guaranteed in accordance with the various treaties, but in practise national policy and legislation are not really interested in migrants. Civil society could play a role in monitoring the living conditions of migrants, but it does not do so. The international community generally does not cover aspects such as justice, and instead focuses on the material needs of refugees. On this point, it has been argued that the refugees are traditionally relegated to the category of humanitarian problems, and that the human rights dimension of their situation is often ignored.<sup>861</sup>

Consequently, refugees' resort to community mediations to settle disputes between groups of internally displaced persons, refugees or not. This remedy voluntarily or involuntarily recalls, unequivocally, the theories that were developed by the political scientists and Africanist anthropologists relating to the "retraditionalization" of states in Africa.<sup>862</sup> In normal situations or in times of crisis, these states lose their capacity to guarantee modernity in various fields including education, health, justice, food, transport, housing, etc. In contemporary Africa, the population is faced with the trials of resorting to ancestral practices to hold out, to be and to have. At times and according to the opportunities, analyses show that refugees articulate local practices and modern forms of justice and security. This articulation suggests the hybridism approach. Refugees have a margin of freedom to make choices despite the precarious conditions in which they move and live.<sup>863</sup>

A further analyse that has been observed by research over the years is the lack of accessibility to research resources. There is no database for proper records of the laws and policies of the

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<sup>860</sup> SR Rosenbloom & N Way 'Experiences of discrimination among African American, Asian American, and Latino adolescents in an urban high school' (2004) 35 *Youth & Society* 420

<sup>861</sup> Institut Supérieur de Développement Rural de Bukavu 'personnes déplacées et provision de la justice en République Démocratique du Congo' (avril 2017) Numéro spécial, 25ème année, No 24 *Revue du Centre d'Etudes et de Recherches pour la Promotion Rurale (CERPRU)*18 available at [https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new\\_publication\\_3/personnes-deplacees-et-provision-de-la-justice-en-republique-democratique-du-congo.pdf](https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/personnes-deplacees-et-provision-de-la-justice-en-republique-democratique-du-congo.pdf) (accessed 17 November 2021).

<sup>862</sup> Rosenbloom & Way (n 860) 8.

<sup>863</sup> Institut Supérieur de Développement Rural de Bukavu (n 839) 8.

republic, thereby hindering the possibility of proper research. This problem has also inhibited the possibility of further research because very few materials were accessed after a concentrated attempt to discover more through research.<sup>864</sup>

A weak institutional arrangement is also one of the inadequacies thwarting the situation with the laws on immigration and their practise. The institutional framework that has been put in place has continuously failed to establish an efficient system to improve the status and well-being of migrants.<sup>865</sup>

The struggle for supremacy between national governments and international bodies is also one of the problems. The laws and policies made by the national bodies sometimes contradict that of the international body and the tussle for supremacy between the two bodies has been persistent over the years and more harm has resulted from it than good. There is also a lack of a functional international body solely concerned with security or humanitarian crises.<sup>866</sup>

It must be observed however that this is not to say that the situation in the Republic cannot be bettered.<sup>867</sup> The chance to have a better situation is more viable in the DR Congo of today, since countries are now more easily joining together than at any other time, hardly raising international attention, although the seeming bias against African states cannot be overlooked.<sup>868</sup>

## 5.8 The national laws of South Africa and DR Congo vis-à-vis international laws

The situation in the two African countries examined above has revealed that the aspirations of the international legal instruments have not been satisfactorily met, even though the two states are parties to these laws.<sup>869</sup> The situation in South Africa and many other African countries can

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<sup>864</sup> CM Rogerson 'International migration, immigrant entrepreneurs and South Africa's small enterprise economy' (1997) *Southern African Migration Project* 1 available at <https://samponline.org/wp-content/uploads/2017/07/PS-3-International-Migration-Immigrant-Entrepreneurs-and-South-Africas-Small-Enterprise-Economy.pdf> (accessed 30 July 2020).

<sup>865</sup> K Tekilazaya, D Fataki & M W Koso 'Republique Democratique du Congo : le secteur de la justice et l'Etat de Droit' (July 2013) *Open Society Foundations*, 1-32 at <https://issat.dcaf.ch/content/download/48033/758731/file/RDC%20Justice%20et%20Etat%20de%20droit.pdf> (accessed 17 February 2023).

<sup>866</sup> Tekilazaya *et al* (n 865).

<sup>867</sup> Rogerson (n 864) 3.

<sup>868</sup> A Nsubuga-Kyobe & L Dimock 'African communities and settlement services in Victoria: towards better service delivery models' (2002) *Australian Multicultural Foundation* 25 available at <https://catalogue.nla.gov.au/Record/2181258> (accessed 30 July 2020).

<sup>869</sup> TA Aleinikoff 'International Legal Norms and Migration: A Report' in TA Aleinikoff and V Chetail (eds) *Migration and International Legal Norms* (2003) 2 See also for discussion norms established in international law,

prompt one to say that African countries are the most proactive in becoming party to and ratifying treaties but the most sluggish when it comes to implementation and enforcement.<sup>870</sup> Although there are several laws in South Africa that are compliant with the international law standard, the actual situation with migrant children reveals otherwise. The situation in DR Congo is, however, worse than this because there are no sufficient and explicit laws in the first instance. There is also a dearth of available resources. Hence the compliance with international law is incomplete in the two countries, but there appears to be more prospects of compliance in relation to South Africa.

Some cases have been decided by various regional African human rights bodies like the African Commission and the Committee on the Rights and Welfare of a Child, exposing the level of non-compliance of African countries with international standards that they have assented to. For instance, the Nubian case, which was briefly described above, shows that the African Commission and its committees have contributed to the jurisprudence of the African law concerning migrants; however, little, or no pragmatic response has been seen from states. The situation has shown no chance of increase, such that the few times that African countries are seen complying properly with international standards set by international laws are the few times when the judicial actions are taken up.<sup>871</sup>

The lack of compliance of these countries has been reinforced by different principles, including the widely known principle of “progressive realisation”. African countries have continuously hidden behind this principle and assert that their available resources are not sufficient to cater to international standards and needs.<sup>872</sup> The principle of state sovereignty has also been continuously paraded by African states, especially in relation to immigration matters, to the effect that they have the absolute and sole control of matters relating to their borders and territory; in fact, some African leaders have asserted that matters relating to their borders and territories vis-à-vis migration are strictly their responsibility and international bodies have little to contribute in that regard.<sup>873</sup>

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LB Sohn and T Buergenthal ‘The Movement of Persons Across Borders: Studies in Transnational Legal Policy’ (1992) 23 *The American Society of International Law* 2

<sup>870</sup> Report of the Special Rapporteur on the human rights of migrants (2013).

<sup>871</sup> Report of the Special Rapporteur on the human rights of migrants (2013).

<sup>872</sup> United Nations General Assembly, Report of the Secretary-General, International migration, and development 68th Session (25 July 2013) UN doc. A/68/190.

<sup>873</sup> United Nations General Assembly, Report of the Secretary-General, International migration, and development 68th Session (25 July 2013) UN doc. A/68/190.



This situation is indeed alarming, because no country has the right to set international standards or laws aside. The relations and interactions between countries and nations are increasingly growing; hence, there is a need to have an international framework that is not only strong but enforced properly by all that have signed it. This situation of low or non-abidance is not restricted to African nations alone but has been observed to be the situation globally.<sup>874</sup>

### **5.9 Exploring emerging opportunities: Inspector General Office of the UNHCR**

An important arm of the United Nations that has the potential to protect and positively enhance refugee experiences is the Inspector General's Office (IGO) of the High Commissioner of the United Nations. The core responsibility of the IGO is to "conduct investigation into misconduct, as well as inquiries into matters that present, or may present, a high risk to the organisation".<sup>875</sup>

The functioning of the IGO remains largely unengaged in African states, however, it is worth noting that the provisions of the guiding law of the IGO office presents some promises of an accountable approach to investigations of abuses that may be related to refugee rights and redresses. This position finds support in the reasoning of Dale, who opines that the IGO has a strong potential to promote transparency in refugee dealings.<sup>876</sup> The functioning of the IGO is greatly limited by the restraints occasioned by low budgetary allocations.<sup>877</sup>

From the foregoing analysis of the importance of the IGO office in the implementation of refugee standards, it is significant to examine to what extent refugees in Africa have engaged with this mechanism. From the respondents interacted with in South Africa, the first finding is that refugees are not aware of the existence and functioning of the Office of the Inspector General. For instance, in cases where refugees fleeing from war have failed in their attempts to receive assistance from other African countries and where all efforts to get support from the United Nations Human Rights Commission have continued to fail due to reasons as flimsy as not enjoying a refugee status, it was evident that many do not have knowledge of the existence of the IGO office. As a result, it is the researcher's postulation that the need to ensure advocacy

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<sup>874</sup> Strengthening migration governance, Implementation of OSCE Commitments related to migration by OSCE participating States (OSCE-ILO, 2010) at [https://www.ilo.org/wcmsp5/groups/public/--ed\\_protect/--protrav/--migrant/documents/publication/wcms\\_204168.pdf](https://www.ilo.org/wcmsp5/groups/public/--ed_protect/--protrav/--migrant/documents/publication/wcms_204168.pdf) (accessed 20 September 2020).

<sup>875</sup> <https://www.unhcr.org/inspector-generals-office.html> (accessed 21 October 2020).

<sup>876</sup> B Dalle 'Transparency and its significance for enhancing accountability at UNHCR' (2006).

<sup>877</sup> N Kelley, S Peta & LW Simon 'Enhancing UNHCR's capacity to monitor the protection, rights, and well-being of refugees' (2004) *Main report: United Nations High Commissioner for Refugees*.



around the office and mandate of the IGO be increased as this would assist refugees in seeking redress and in complaining of other unethical circumstances which violate their rights generally and the right to education, particularly.

### **5.10 Conclusion**

The situation of migrant children is a continuous discourse in the public domain, especially in social and legal spheres. There are many international instruments that guarantee the rights of migrant children; however, this study has shown that the protection of migrant children in South African and DR Congo laws has considerable issues and requires additional attention and development. While there are legislative measures in South Africa to safeguard migrant children, gaps in implementation and ineffective enforcement impede the effective enjoyment of their rights.

South Africa has some deficiency in the national laws, where some sections contradict the Bill of Rights and violate the rights of migrant children as guaranteed by international instruments. Although court decisions always consider the position of international law, South Africa needs to modify the provisions of immigration laws that violate the rights of migrant children.

Migrant children face several challenges to access education, including the requirement of a birth certificate, and other valid documentation. These impediments are worsened by social and economic situations, such as xenophobic attacks, “bureaucratic xenophobia”, and fees. Similarly, there are no immigration legal frameworks in place for economic migrants in the DR Congo to safeguard migrants, particularly children. This is a clear indication of lack of consideration of migrants’ rights even if migrant children access schools without many requirements. Migrant children confront challenges such as limited access to education, fees, and lack of quality education. The situation is abysmal and there is a need for a more pragmatic view of the challenges in proffering working solutions to the situation.

The Inspector General Office under the United Nations High Commissioner for Refugees (UNHCR) can help to improve the protection of migrant children. Such an office is critical in monitoring and overseeing the execution of international and national migrant protection legislation, as well as guaranteeing accountability and identifying areas for improvement.

Also, it is critical to align national legislation with international legal standards, such as the Convention on the Rights of the Child and other related human rights agreements. This alignment would create a strong framework for migrant children's protection, ensuring that their rights are preserved and respected. Furthermore, SADC states should explore establishing flexible immigration legislation to facilitate migrant regularisation and access to educational resources, especially when it comes to basic education. It should be stressed, however, that attempts to achieve the right to education for migrant children in the SADC region must be personalised specifically to each country because of each country's distinct needs.

Finally, addressing the issues and opportunities of migrant laws and their enforcement necessitates a multifaceted and comprehensive strategy. Improving the enforcement and implementation of existing laws and regulations is critical to ensuring the effective protection of migrant children. However, it entails not just legal reforms, but also measures to address underlying socioeconomic causes, building institutional capacity, increasing awareness, and training essential parties involved in migrant protection, educating the public, and promoting inclusive policies and behaviours. Governments, civil society, and international organisations must work together. By focusing on the protection of migrant children, countries can endeavour to create more inclusive and equitable environments in which the rights and well-being of all individuals, regardless of migration status, are protected.

## CHAPTER SIX: GENERAL CONCLUSION

### 6.1 Introduction

This chapter summarises the findings of the study and makes recommendations on ways to enhance the access to education of migrant children in Southern Africa, particularly in South Africa and the DR Congo. Recommendations are premised on the addition to the knowledge that the thesis has garnered from the entirety of the study.

This thesis adds to the academic debate on education and immigration by examining the challenges and implications of providing basic education to immigrant children in the Southern African Development Community (SADC) region, with a focus on South Africa and the Democratic Republic of the Congo (DR Congo).

The research focuses on South Africa and the DR Congo and provides a deep analysis of these countries' distinctive settings, policies, and experiences. The research offers insights into the parallels and variations in educational policies, practices, and outcomes for immigrant children in two different contexts by conducting a comparative analysis between South Africa and the DR Congo. This comparison provides a more comprehensive knowledge of the difficulties confronting immigrant children and the potential factors influencing their access to school in these two different countries.

The study looked at the right to basic education as it is established in international human rights treaties and contributes to the academic discussion on the nexus of human rights, education, and immigration by studying the execution of this right for immigrant children. This research can help policymakers and educators in the SADC area, as well as in other contexts experiencing similar issues. The research contributes to current discussions about how to improve educational opportunities for immigrant children and promotes inclusive school systems by giving evidence-based ideas.

Furthermore, the research fills the gap in the existing literature on the specific experiences of immigrant children from the DR Congo and expands the knowledge base of the chosen topic. Certainly, while South Africa may have many writings on immigrant children, it is not the case of the DR Congo. I noticed that it was rare to find Congolese studies and court cases on this

topic online. I struggled even to find books written on the topic in the Congolese libraries. There is an urgent need to create a centre in the DR Congo able to publish online law cases, and legal writings pertaining to the DR Congo. This will also motivate judges to take decisions that align with human rights laws.

Overall, this research study contributes to the academic discussion on the right to basic education of immigrant children in the SADC area by offering a localised viewpoint, comparative analysis, human rights framework, policy implications, and potentially addressing gaps in the current literature.

Humans, by the mere nature of their humanity, should not be denied their basic human rights wherever they find themselves; regardless of their status as nationals or migrants or whatever status they find themselves in. The presence of migrants has been so pervasive that it has invaded all aspects of statehood, especially the law.<sup>878</sup> Migration in its general sense remains a persistent phenomenon in African countries. Therefore, there is a need to create mechanisms for cooperation between SADC countries concerning education and other areas as well.

It is obvious that this will take time due to the disparities among SADC countries. Unlike European countries, where all countries have almost the same level of development, SADC countries are unequal when it comes to development. South Africa, Botswana and Mauritius are the most developed while other countries are struggling to reach that level. Consequently, those that are more developed fear being overwhelmed if they accept policies of free borders (which is understandable).

There is a common pattern observed in many countries regarding immigration policies and attitudes towards migrants. As a country becomes more economically prosperous, it tends to attract a greater number of migrants seeking better opportunities and living conditions. However, this influx of migrants often leads to the tightening of immigration laws and a perception of migrants as threats to peace and security.

This protective attitude towards immigration often extends beyond mere security concerns to encompass the protection of the interests of nationals. There is a tendency to view migrants as

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<sup>878</sup> Crush & Mojapelo (n 150).

competitors for resources, including jobs, social services, and cultural identity. This dichotomy between "us" (nationals) and "them" (migrants) can lead to sentiments of exclusivity and a focus on preserving the privileges and advantages enjoyed by the native population.

Furthermore, this protective attitude can sometimes overlook the historical reality that many of those who are nationals today are descendants of migrants themselves. People tend to forget or ignore the fact that their own ancestors may have migrated to the country in search of better opportunities or to escape persecution. This selective memory reinforces the "us versus them" narrative and perpetuates divisions between migrants and the native population.

Overall, this observation underscores the complex interplay between economic factors, immigration policies, and social attitudes towards migrants. It highlights the importance of promoting a more inclusive and empathetic approach to immigration that recognises the contributions of migrants to society and respects their rights and dignity as fellow human beings.

The thesis emphasises the need for communal acceptance and solidarity as espoused in the *Ubuntu* philosophy. This is depicted by the fact that migration is an ages-long event that has several mixes of different origins. Historically for instance, black South Africans, before the arrival of Europeans, were Bantu people who came from the Niger Delta.<sup>879</sup>

The emergence of agriculture 4 000 to 5 000 years ago marked a decisive turning point in African history; mastering this new technology, which enabled them to invest in new territories, the Bantu-speaking peoples, previously hunter-gatherers living in a region between Cameroon and Nigeria, gradually extended their habitat area and, after a millennium-long journey, settled throughout Sub-Saharan Africa.<sup>880</sup>

Then came the Europeans, who later became nationals as well. In 1652, storms stranded the first Dutch people on the South African coast. The Dutch East India Company later erected many commercial posts as well as a military stronghold at Mouille Point to safeguard the site;

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<sup>879</sup><https://www.sahistory.org.za/article/when-why-and-where-first-african-farmers-settled-southern-africa> (accessed 28 February 2023).

<sup>880</sup> C Coupé et al 'Transition 2: Modelling the peopling of an already inhabited territory: the case of expanding Bantu populations and Central African forest foragers' in L Sanders (eds.) *settling the world From Prehistory to the Metropolis Era* (Presses universitaires François-Rabelais 2021).

the latter allowed Dutch ships to anchor before continuing their journey to India. The interactions with the locals remained amicable, notably with the Khoekhoen, also known as the Hottentots (stammerers) by the Dutch.<sup>881</sup>

Similarly, the Dutch East India Company authorised the Dutch in the Cape region to stay permanently in 1657. The first settlements were accompanied by the importation of slaves, the establishment of missions, and the exploitation of the soil. In addition, the Dutch accepted French Huguenot immigrants into their territories. Following the Dutch East India Company's bankruptcy, the French defeat at Trafalgar, and the Napoleonic wars, the British acquired possession of the Cape colony at the beginning of the nineteenth century to safeguard and develop their connection networks.<sup>882</sup>

In America, too, the first Europeans arrived from the far north. These forefathers were Vikings led by a courageous chief, Leif Ericsson, who established Vinland, a little colony on the Labrador coast, in the year 1000. Other Europeans arrived on the future Canadian shore half a millennium later. On March 27, 1513, the Spanish sailor Juan Ponce de Leon landed on a flowery shore north of the Antilles, becoming the first European to set foot on the future United States' soil.<sup>883</sup>

Considering history, this thesis is against developing negative views toward migrants. It emphasises, however, that citizens' fear of migrants is nothing new; it has always existed, even in ancient times. However, the thesis highlights the importance of considering history to create a better future. Today, Europeans in America identify themselves and are identified by others as Americans, not migrants. The same phenomenon exists in South Africa for both Bantu and Europeans who moved here eons ago. Fear of migrants should be eliminated because it is human nature to relocate for various reasons. Children who are labelled migrants today are the potential nationals of tomorrow and should attend school in order to become better citizens.

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<sup>881</sup> <https://www.sahistory.org.za/article/dutch-settlement-indian-ocean-slave-trade-and-slavery-cape-seventeenth-and-eighteenth> (accessed 26 May 2023).

<sup>882</sup> D Denoon 'Dependence and interdependence: southern Africa from 1500 to 1800' in (BA Ogot eds) *General history of Africa - V: Africa from the Sixteenth to the Eighteenth* (HEINEMANN CALIFORNIA UNESCO: 1992) 683-700.

<sup>883</sup> See generally, GV Scammell *The World Encompassed: The First European Maritime Empires, C. 800-1650* (Routledge 2018).

This chapter further summarises the responses to the three research questions asked at the beginning of the thesis:

1. Does international human rights law protect the right to education of migrant children?
2. What are the obstacles that stand in the way of migrant children accessing primary education in the SADC region (especially DR Congo and South Africa)?
3. What is the position of South African and Congolese national laws concerning the rights of migrant children?

## **6.2 Does international human rights law protect the right to education of migrant children?**

The thesis concludes that international human rights law provides equal access to education for all. The answers to question are found in chapters three and four. Non-discrimination principle applies to all persons of school-going age residing in a state's territory, including non-nationals, regardless of their legal status. Irregular or undocumented migrants might so claim the right to an education. This right imposes immediate and unambiguous obligations on the state; the state has no leeway in this regard. Discrimination on any basis is illegal since the fundamental basis of the law is at stake. This entails an equal right of access to educational institutions, which might be defined as the right's core, or minimum content. This stems from the fact that human rights are universal.<sup>884</sup>

In Chapter one section one the thesis and chapter two section one analysed the 1951 Convention relating to the Status of Refugees that provides for special measures to guarantee the right to education. It concludes that as per Article 22, nations are obligated to provide refugees with treatment equal to their own citizens regarding basic education. Moreover, this treatment should not be less favourable than that given to other migrants in similar circumstances, particularly concerning access to education, recognition of foreign educational credentials, exemption from fees, and the availability of scholarships.<sup>885</sup>

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<sup>884</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

<sup>885</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).



Furthermore, the Refugee Convention of 1951, while ground-breaking in its time, is nowadays outdated due to significant changes in the global landscape since its inception. One of the primary weakness in my view is its limited definition of who qualifies as a refugee. The convention defines a refugee as someone who has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to their home country.

Flowing from chapter one of the thesis, it is noted that beyond conflict, However, the reality of forced displacement is complex today. Some of the situations that compel individuals to flee their homes, include environmental disasters, generalised violence, and socio-economic hardships. These circumstances may not fit neatly into the narrow definition outlined in the 1951 Convention.

Furthermore, the Convention's focus on state responsibility often overlooks the role of non-state actors in perpetuating displacement, such as rebel groups, criminal organisations, or environmental factors like climate change. As a result, many people who are in dire need of protection may fall through the cracks of the current legal framework.

Expanding the circle of refugees to encompass a broader range of circumstances and vulnerabilities is crucial in addressing the complexities of modern displacement. This could involve updating the definition of a refugee to include those fleeing environmental disasters, conflict-affected areas, and other situations of generalised violence or insecurity.

The thesis in its wholistic approach, underscores the importance to ensure that efforts to reform and expand the Refugee Convention must involve collaboration among governments, international organisations, civil society, and affected communities. By adapting to the realities of contemporary displacement, the international community can better uphold the principles of humanitarianism and provide adequate protection to those in need.

As we all know, poverty can pose a significant threat to individuals' lives, prompting them to seek better economic opportunities elsewhere. Economic migrants, like refugees, may face precarious conditions and hardships that compel them to leave their home countries in search

of a better life. While economic migrants may not meet the strict criteria outlined in the Refugee Convention of 1951, their motivations and vulnerabilities often overlap with those of refugees.

For many economic migrants, poverty is not just about lacking material wealth but also encompasses broader issues such as limited access to education, healthcare, and basic rights. Economic disparities, systemic inequalities, and lack of economic opportunities can create conditions of deprivation and insecurity that drive individuals and families to migrate in pursuit of a more stable and prosperous future.

In this sense, the distinction between economic migrants and refugees can be blurred, especially in cases where individuals are fleeing situations of extreme poverty, social exclusion, or economic instability that jeopardise their well-being and survival. Recognising the interconnectedness of poverty, economic migration, and forced displacement is essential for developing more holistic and inclusive approaches to migration governance and humanitarian assistance.

In the same vein as poverty, environmental degradation is increasingly recognised as a significant driver of human displacement. Environmental factors such as climate change, deforestation, desertification, and natural disasters can directly threaten people's livelihoods, food security, and safety, compelling them to leave their homes in search of safer and more sustainable living conditions.

While the Refugee Convention of 1951 does not explicitly address environmental displacement, there is growing acknowledgment of the need to expand legal frameworks to provide protection to those affected by environmental factors. This includes recognising individuals who are displaced due to environmental degradation as a distinct category of migrants with specific protection needs.

For example, rising sea levels, extreme weather events, and prolonged droughts can devastate agricultural lands, destroy infrastructure, and lead to the loss of homes and livelihoods. In some cases, entire communities may be forced to relocate due to the irreversible impacts of environmental degradation.

By recognising the complex interplay between environmental degradation, human displacement, and migration, policymakers can develop more effective strategies to address the challenges posed by environmental change and ensure the protection and well-being of affected populations.

Article 3 of the Convention on the Rights of the Child (1989) says that the best interests of the child shall be a primary consideration in all acts involving children. This involves offering educational services to all migrants.

The International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families (1990) ensures that migrant workers, their children, and members of their families are treated equally with natives of the state of employment. Article 30 states that every child of a migrant worker shall have the basic right of access to education based on equality of treatment with nationals of the state concerned. Access to public pre-school educational institutions or schools shall not be denied or curtailed because of any irregularity in either parent's stay or employment, or because of the irregularity of the child's stay in the state of employment. The issue with this Convention is that it has not been generally approved by the governments of employment since it imposes quite stringent obligations.<sup>886</sup> The limited ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) underscores a significant gap in the international legal framework for migrant rights. This Convention was designed to specifically address the rights and protections of economic migrants and their families, recognising their unique vulnerabilities and the need for comprehensive legal safeguards.

The thesis reaches a conclusion that the low number of signatories to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) highlights a concerning pattern of neglect and inadequate protection for economic migrants compared to refugees. While the Refugee Convention of 1951 and its 1967 Protocol enjoy widespread international support and recognition, the rights of economic migrants have not received the same level of attention and commitment from states. Economic

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<sup>886</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

migrants often face exploitation, discrimination, and abuse in their countries of destination, including in the workplace, housing, healthcare, and other essential services. Many are subjected to precarious working conditions, wage theft, and human rights violations, with limited avenues for legal recourse or protection. The failure of many states to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families reflects a broader reluctance to address the systemic injustices and inequalities faced by economic migrants. This neglect perpetuates a two-tiered system of migrant rights, where refugees are afforded greater legal protections and support compared to economic migrants. Addressing this disparity requires a concerted effort to recognise and uphold the rights of all migrants, regardless of their legal status or reason for migration. This includes ratifying and implementing international instruments such as the 1990 Convention, as well as adopting domestic laws and policies that safeguard the rights and dignity of economic migrants and their families.

The thesis determines that the right to education for migrants is so important that it should not be neglected. In chapter three section one, the thesis restates that the recognition and effective realisation of the right to education has a positive impact on development, both in the country of origin of the migrant and the host country that recognises this right for a migrant in its territory.<sup>887</sup> Where the migrant in view is a child, it should be a matter of utmost importance for the host state to recognise and effectively realise this right to education for the migrant child. The importance to be attached to this is visible in the various international and regional efforts, as discussed in this research, which protect the educational rights of the migrant child. Effective realisation of this right to education as variously provided for does not end in the existence of relevant and robust legal instruments providing for it; it entails the effective implementation of human rights rules, as well as the ratification and implementation of instruments expressly related to the treatment of migrants.<sup>888</sup>

With the worsening situation of migrants, especially the more dependent ones such as children being a continuously discussed topic in the public domain, especially in the social and legal parlances, and the obvious fact that the situation has become abysmally poor, there is a need,

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<sup>887</sup> Tqolo & Bethlehem (n 645) 85.

<sup>888</sup> Crush & Mojapelo (n 150) 10.

therefore, for a more pragmatic look at the challenges in order to proffer working solutions to the situation.<sup>889</sup>

To the question “Does international human rights law protect the right to education of migrant children?” my answer will be yes. There are many international instruments that provide for the right to basic education of migrant children as shown in the thesis, but the problem is the implementation of these rights. African states are eager to ratify international conventions but have shortcomings and confusions when applying these conventions and incorporating them into national laws. The fact that South African judges always consider international conventions when it comes to migrant children is inspiring. I do not think that it is the case in the DR Congo because the relevant data sourced and analysed in the thesis show a very low jurisprudence in this respect. However, there are still some shortcomings, for example in South Africa where the case of circulars issued by the department of basic education were unconstitutional, and in the DR Congo, the lack of proper immigration laws.

### **6.3 What are the obstacles that stand in the way of migrant children accessing primary education in the SADC region (especially DR Congo and South Africa)?**

This question finds answers in chapter two section four and chapter five sections four and seven. From the thesis, this question is resolved by the realisation that the right to education for migrants presents several obstacles and quandaries for host-country governments. It may sound right for the public interest to prevent irregular non-nationals from accessing education. This could be done to restrict the allocation of scarce resources to individuals who have just secured a residence visa.<sup>890</sup> But as I said, considering history, this is not a good move.

Newcomers have a valid desire to become full members of a society through engagement and progressive inclusion. And education is crucial in this regard. States are allowed to allocate their financial resources, however, in doing so, they must adhere to the requirements of help

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<sup>889</sup> Stupart ‘Is South Africa Home to More than a Million Asylum Seekers? The Numbers don’t Add Up, (2016) available at <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/> (accessed on 30 July 2019).

<sup>890</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

and protection to which they have willingly agreed by becoming signatories to human rights treaties.<sup>891</sup>

For example, the public interest may necessitate the state discouraging irregular migrants from fleeing their home country and embarking on a risky route to Europe. Once these migrants arrive, however, their fundamental human rights must be upheld. This does not imply that they should have equal access to all services as citizens of the host country. States may have a justifiable interest in limiting free access to higher education if it attracts more irregular migrants. However, authorities cannot limit access to basic education. This right must be protected under all circumstances.<sup>892</sup>

It is evident that some migrants will most likely remain indefinitely in the host country. It is consequently critical that national and local governments anticipate and implement culturally relevant educational programmes, allowing for individuals who are interested in becoming integrated and in gaining access to the labour market. Above all, a balance must be achieved between the educational demands of young migrants and the disparities in access to education between nationals and migrants. Language instruction, for example, is suggested for migrants as soon as they arrive.<sup>893</sup>

Providing migrants with access to school, housing, social and healthcare services, and employment is sure to be financially costly to governments.<sup>894</sup> However, because a generous policy of welcoming migrants can cause confusion, uneasiness, and discontent among some nationals, governments must explain and justify their choices considering other budgetary priorities, political interests, and international human rights obligations. Nevertheless, migrants' rights to education must be publicly acknowledged as intrinsic human rights, rather than as

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<sup>891</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

<sup>892</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

<sup>893</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

<sup>894</sup> Information available at [https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203\(1,educational%20services%20for%20all%20migrants](https://en.unesco.org/courier/2018-4/education-migrants-inalienable-human-right#:~:text=To%20this%2C%20Article%203(1,educational%20services%20for%20all%20migrants) (accessed 25 May 2023).

goals to be reached by public policy measures. National, municipal, and school authorities must be aware of this and take appropriate action.

The trends that marked the development of the rights of migrants by international, regional, and various national efforts bear witness to the importance of and need to recognise and effectively realise in practise the human rights of migrants. It was also observed by this research that notwithstanding the token provision of these rights at various levels, challenges still abound that hinder the effective realisation of the human rights of migrant whatever status they are accorded. However, prospective solutions to the challenges identified in this research have been proffered and are hopeful of creating change when implemented. The entire gamut of the thesis has shown though the situation in South Africa is better than that of DR Congo, both countries distinctly need some improvement.<sup>895</sup> Thus it is concluded that the following needs to embark on from the analyses of the thesis:

### **1. Challenges common to both countries**

The challenge of teaching language for migrant children who speak a different language is a topic that raises concern in many countries as was the situation in the Belgium case. Some argue that migrant children should be taught in the language with which they are familiar. I personally think that this option will not assist them to socialise in the host country. Teaching migrant children in their own language will marginalise, expose them to more discrimination and bullying and delay their integration.

The other challenge is the implementation of inclusive education. There is not much effort both in South Africa and in the DR Congo to accommodate children living with disabilities in the mainstream schools. In South Africa, there are few schools catering for children with disabilities but in the DR Congo, there are no public schools catering for children living with disabilities. These schools are mostly private or run by NGOs or churches.

The other challenge is xenophobia. The extent and frequency of xenophobic incidents differ between the two countries. In South Africa, xenophobia has been more prevalent and recurrent compared to the DR Congo. In the DR Congo, while xenophobic sentiments exist, they are often directed towards specific groups, such as Rwandans. This animosity towards Rwandans

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<sup>895</sup> Tqolo & Bethlehem (n 645) 85.



stems tensions between the two countries, including conflicts and territorial disputes. Some Congolese perceive Rwanda as an aggressor due to its involvement in the Congolese war, leading to heightened distrust and hostility towards Rwandan nationals.

In contrast, South Africa has experienced widespread and systematic xenophobic violence targeting migrants from various African countries. This xenophobia is often fuelled by socio-economic factors, including competition for jobs, housing, and resources, as well as perceptions of foreigners as threats to national identity and security. Migrants, particularly those from other African countries, have faced discrimination, violence, and marginalization in South Africa, leading to tensions and instability within communities.

The other challenge is fear to seek justice. Migrants, particularly those who are undocumented, fear to go to court to seek justice when they encounter abuse. Undocumented migrants often face significant legal obstacles that deter them from seeking legal recourse through the court system. They may fear being identified, detained, or deported by immigration authorities if they engage with the legal system, leading to a reluctance to come forward with grievances or complaints. Additionally, their lack of legal status may limit their access to legal aid or representation, making it difficult for them to navigate complex legal processes.

Furthermore, undocumented migrants may perceive the legal system as inaccessible or biased against them, particularly if they belong to marginalised or minority communities. They may have experienced discrimination or mistreatment based on their immigration status, race, ethnicity, or language proficiency, leading to a lack of trust in the legal system and authorities.

Overall, the fear of undocumented migrants to take matters to court reflects broader systemic challenges related to immigration enforcement, access to justice, and socio-economic inequality. Addressing these barriers requires efforts to ensure that all individuals, regardless of their immigration status, have equal access to legal protections, remedies, and support services. This includes providing pathways to legal status, promoting awareness of rights and available resources, and fostering a culture of inclusivity and respect for the dignity of all individuals.

In the case of South Africa, some migrants approached the courts of law to seek justice as demonstrated in the thesis in diverse court cases however it must be noted that the majority of

migrant in South Africa, as many migrant in the world, prefer to keep quiet. In the DR Congo, however, it should be noted that the justice is so corrupted that it is affecting both nationals and migrants as it is seen in the case of Mr. Jean Simbarakiye, a Burundian national in chapter three section five.

While both countries grapple with xenophobia, addressing its root causes and fostering greater tolerance and understanding among diverse communities are essential steps towards building more inclusive and harmonious societies. This requires concerted efforts from governments, civil society organisations, and communities to promote dialogue, respect for human rights, and social cohesion, while also addressing underlying issues such as poverty, inequality, and political instability.

Political xenophobic rhetoric can easily cross the line into hate speech when it targets specific groups of people based on their nationality, ethnicity, religion, or immigration status in a derogatory or inflammatory manner. While political discourse often involves debating policies and ideologies, hate speech goes beyond the realm of legitimate expression by promoting intolerance, discrimination, and violence against individuals or communities. When politicians use language that dehumanises or vilifies migrants, portraying them as threats to society or scapegoats for economic or social problems, they contribute to a climate of fear, division, and hostility. This can lead to the marginalisation and exclusion of targeted communities, fuelling prejudice and discrimination in society.

Hate speech can take various forms, including derogatory remarks, stereotypes, scapegoating, and the incitement of violence or discrimination against migrants. It often appeals to people's fears and prejudices, seeking to rally support by demonising "others" and portraying them as inferior or dangerous.

In this thesis, I suggest that some political xenophobic rhetoric be assimilated to hate speech when it crosses the threshold of legitimate political discourse and incites hatred or violence against migrants because this has serious consequences, not only for the targeted communities but also for social cohesion, democratic values, and human rights.

By recognising the harmful impact of political xenophobic rhetoric when it veers into hate speech, societies can take steps to counteract it. This includes holding politicians accountable

for their words and actions, promoting inclusive and respectful public discourse, strengthening legal frameworks to address hate speech, and fostering greater understanding and empathy among diverse communities.

## 2. Challenges in South Africa.

Many international instruments state that countries should make basic education free. Since 2019, the DR Congo made primary education free in all public schools, but in South Africa, parents still need to pay school fees. Migrant children in South Africa suffer from a series of marginalising treatments and the high aspirations of the laws have not been fully met.<sup>896</sup> Some human rights organisation experts think that migrant children still face challenges in being accepted by schools due to a lack of study visa or asylum/refugee papers. The gravity of this challenge is further exacerbated by the lack of standards engaged in measuring this document.

Aside from the above, another dire situation is the exclusion of students from schools. This is represented in the researcher's findings that sometimes children were excluded from schools when the school's administration discovers that their papers have expired and that they are not able to bring proper documentation. This situation invariably does not take cognisance of whether the student's parents are in the process of reapplying for an extension or even if the file is already under review.

Due to Sections 39 and 42 of the Immigration Act that criminalises registering an undocumented immigrant to obtain instruction or training,<sup>897</sup> the fear of being accused by the authorities of not abiding by state policy and laws push school's directors to sometimes discriminate. It is then worthy to state that there should be a deliberate policy interpretation guideline for school directors to understand that there is no basis on which the rights of any child should be violated, especially with respect to the right to access basic education.<sup>898</sup> Referring to that, the court in the Makhanda case determined that, when properly interpreted through the lens of the Bill of Rights, as required by Section 39(2) of the Constitution, the

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<sup>896</sup> See generally Valtonen *Social work and migration: Immigration and refugee settlement and integration* (Ashgate 2008).

<sup>897</sup> South African Immigration Act 13 of 2002.

<sup>898</sup> It is to be underscored however, that there is great advocacy already by NGO's and other major stake holders to change this narrative. The research notes that the situation is getting better since the circular that the department of basic education made stating that all children have the right to study even if a child is undocumented or without birth certificate, if the parent or caretaker show that they are making effort to get the document.

references to "learning institution" and "training" in Section 39 of the Immigration Act should not be construed to include schools' provision of basic education to children. Sections 29 and 28(2) of the Constitution, as well as international conventions, supported such an interpretation. Considering this understanding, it was determined that declaring these provisions invalid was unnecessary.<sup>899</sup>

In this court case, schools had two options: expel undocumented children because they were not being funded, or if they did accept them, the schools would struggle as government was not paying them to educate the children. The implication here is that resources were spread thin in these schools – particularly when there are many undocumented children in the school. It leads to overcrowding, lack of books and teachers, and not enough money for school meals. However, the Makhanda case was a great victory and brought about change, as it found this practise unconstitutional for both undocumented South African children, as well as for migrant children. A circular from the DHA was sent to all primary schools to register all children even undocumented. But other barriers remain as it relates to the new system of online registration that does not allow migrants to register without the 13-digit South African ID. This is a systemic discrimination that is laden with the potential to deny access to education of migrant children in South Africa.

There are also barriers such as language and age. Sometimes children's chronological age and their educational age are vastly different. Schools may not want a child who reads at grade three level but is already 15 years of age. Their education is often interrupted due to circumstances in their home countries and then they are not able to continue their studies in South Africa. What the researcher also found is that children will sometimes attempt to be admitted into school once but are denied admission. They then assume that they cannot be accepted and will not try to register again and thereby they fall out of the system. The above challenge highlights the need to encourage counselling services to support migrant children and their families in their quest to acquire education.

A core challenge identified by the researcher is the role of the Department of Home Affairs (DHA) and the attainment of documents issued to children. Undocumented children, and

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<sup>899</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) at <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> (accessed 30 September 2020).

particularly migrant children, are treated appallingly by the DHA. They openly discriminate against them and prevent them from acquiring their documents. I call it “bureaucratic xenophobia”. If they were more child focussed and not absorbed by their rules and regulations, children would be more successful in accessing education. Several respondents who spoke on the grounds of anonymity share the same experience as they all had at some point faced issues of financial or emotional extortion by the DHA in their quest of seeking documentation.

The human rights experts are convinced that there is an easy solution to these challenges; to educate principals and schools teachers about their duties and children’s rights. Where schools know what the law says, they are likely to admit undocumented children without hesitation. There is also a need for a communication flow between the Department of Basic Education (DBE) to the DHA. This because on occasion when these children enter the education system the DHA becomes aware of them through the schools or the DBE and targets them to discover whether they are undocumented. This in the researcher’s view is obviously problematic because children may decide not to access school due to fear of deportation.

Nonetheless, the analysis within this thesis shows that fewer disadvantages are suffered in South Africa compared to some other African states due to South Africa’s superior state of development in terms of social amenities and security, as well as the wealth of its laws.<sup>900</sup> The study further found that the knowledge of available mechanisms that help enhance the protection of the rights of migrant children is poor especially as it relates to the office of the Inspector General of the UNCHR, and that South Africa’s primary schools’ representatives are aware that children must attend primary school whether they are documented or not.

Although undocumented children can be accepted following the GDE admission regulations, Southern African citizens require an Unabridged Birth Certificate while foreign learners require an Unabridged Birth Certificate and a passport and Study Visa or Asylum/Refugee Permit as well as other supporting documents. And for those who have a study visa, parents need to show proof of sufficient funds even when applying for a child attending primary school.

### **3. Challenges in the DR Congo**

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<sup>900</sup> Such as DR Congo, Chad, Somalia etc.

O Stark & JE Taylor ‘Relative deprivation and international migration’ (1989) *Demography* 1-14, 3 <https://pubmed.ncbi.nlm.nih.gov/2737350/> (accessed 25 May 2021).

In the DR Congo however, there is no distinction between foreigners or nationals, all children are registered without being asked to produce their visa or asylum seeker permit. But most public schools' infrastructures are in a pitiful state. Some schools do not have chairs and tables. Teachers are not paid well or not paid at all. This results in teachers asking for money from children and favouring children who give money and mistreat those who do not.

When educational infrastructure or necessary resources are lacking, migrant children are effectively denied their right to access education. The absence of proper facilities, such as schools, classrooms, and teaching materials, creates significant barriers that hinder migrant children from receiving a quality education. This denial of access not only limits their academic development but also perpetuates social inequality and exclusion.

Without access to education, migrant children face multiple challenges in integrating into their host communities and realising their full potential. Education plays a crucial role in empowering individuals, fostering social inclusion, and promoting economic opportunities. It equips children with essential skills, knowledge, and opportunities for personal growth, enabling them to participate fully in society and contribute to its progress. Furthermore, education serves as a protective factor for migrant children, offering a safe and supportive environment where they can learn, grow, and develop. It provides opportunities for socialisation, peer interaction, and emotional support, which are essential for their overall well-being and resilience.

According to Congolese human rights organisations, human rights or rather human rights violations affect everyone: Congolese or migrants. They are victims of human rights abuses in general but not pertaining to them particularly as migrants. Though in 1998, the DR Congo witnessed the killing of Rwandan soldiers that helped President Laurent Desire Kabila to bring down President Mobutu's dictatorial regime. The violence escalated against Rwandan Tutsi people, recognised for their morphology (some Congolese, having the same morphologic features, were also victims of violence). One could find in the Kinshasa press many horrific testimonies.<sup>901</sup>

According to the Congolese human rights experts, there is no record of many cases of human rights violations on migrant children but of human rights violations in general, affecting both

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<sup>901</sup> G De Villers & JO Tshonda 'La bataille de Kinshasa' (2001) 4 *Politique africaine* 17-32 at <https://www.cairn.info/revue-politique-africaine-2001-4-page-17.htm> (accessed 30 April 2020).

nationals and migrants such as arbitrary arrests, police harassment and illegal detentions. In my next research, the scanty data in this regard is seen as an opportunity for future research to engage in post-doctoral research of making a compendium of all judgements concerning migrants in all the courts in Kinshasa. This I am convinced will provide a huge opportunity of developing the jurisprudence in DR Congo and learning from other developed jurisdictions on the subject matter.

#### **6.4 What is the position of South African and Congolese national laws concerning the rights of migrant children?**

Laws are based on human actions, morals, culture, and religious beliefs. Laws are predicated on social concepts. The relationship between the law and society is that laws are historically created by the community and reflect the methods that society uses to combat injustice and impunity. A society without laws is a society that has declined.<sup>902</sup> Law, to my thinking, reflects societal opinion and will.

In South Africa, the position of the South African law is assessed through the constitution and national laws. In the analysis of the South African Legal Framework in Chapter five section two of the thesis, it was found that in the South African Constitution, the right to education is enshrined in Section 29(1)(a) stating that "everyone" (even undocumented migrants) has the right to a basic education. This position has since been enacted through a variety of laws. The Children's Act No. 38 of 2005 (South Africa, 2005) also guarantees children's right to education as stated by the constitution. It considers the principle of the 'best interests of the child' and provides for all children (including migrant) within the state. Section 3 of the South African Schools Act states that basic education is required for all children from the age of seven until they reach the age of fifteen or the ninth grade, whichever comes first. The Refugees Act of 1998, in its section 27, guarantees refugees the right to health treatment and education.

However, in the Immigration laws, there is no distinction between adult and children. Though South Africa has a proper immigration law, unlike the DR Congo, the procedure to acquire the temporary visa or study permit is the same for everyone, which is indefensible. Procedure to obtain a study permit for children attending primary schools should be easier. The immigration

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<sup>902</sup> Information available at <https://www.bu.edu/bulawreview/2021/12/30/law-and-culture/> (accessed 30 May 2022).



law should remove some requirements that could hinder parents from applying for a study visa for children in primary school, such as proof of funds and medical aid.

In the DR Congo, the Constitution establishes universal free access to education for all children of primary school age (nationals and migrants). The Congolese refuge law affirms the constitutional rights by stating that refugees have the same right as nationals when it comes to work and study. Law No. 14/004 of 11 February 2014 on National Education also guarantees education for all including migrants, and nationals. However, as it was found in chapter five section five of the thesis, the Congolese immigration law is not well elaborated. The Congolese government must rectify this. This shows a lack of consideration towards economic migrants and non-respect of its obligation as a state party of many international instruments that promote the non-discrimination principles. The Congolese legislator should take an example from the South African and other countries' immigration laws to construct a legitimate Congolese immigration law.

## **6.5 Recommendations**

The following recommendations are made based on the research:

1. Efforts to achieve the recognition of human rights especially education and migrant rights as applicable and as so recognised by both international and regional legal instruments should further be given life at the various national levels for effective realisation of these rights of migrants, seeing that migration is inevitable.
2. States should endeavour to establish institutions and relevant mechanisms to ensure the true protection of the human rights of migrant children. Governments should establish procedures that offer accurate and accessible information to immigrant families about their rights, available educational options, and social services. This can be accomplished by establishing dedicated helplines, providing online resources, creating multilingual materials, and implementing community outreach activities. To effectively assist and cater to the needs of immigrant children, teachers and education professionals should undergo training on cultural sensitivity, diversity, and inclusive teaching approaches. This training should also include an understanding of the unique problems that immigrant children encounter, as well as solutions for creating inclusive learning environments. To provide a holistic approach to addressing the educational needs of immigrant children, governments, education authorities, and relevant agencies should

improve collaboration and coordination. Collaboration between education, immigration, and social welfare departments is one example of how to streamline services and provide complete support to immigrant children and families.

3. States are admonished to further take appropriate action to guarantee the efficient and non-discriminatory realisation of this right to education for migrants in their territories. They can do so through ensuring the effective application of human rights rules, as well as the ratification and enforcement of agreements especially related to the treatment of migrants. Public awareness campaigns should be performed to educate communities, parents, teachers, and other key stakeholders about immigrant children's rights to basic education. This can assist in dispelling myths, reducing discrimination, and promoting a welcoming and inclusive climate in schools and communities. Attempts should be made to give language help to immigrant children who do not speak the host nations' prevailing language. Offering language classes, hiring bilingual teachers, and providing translated educational materials can all help with the assimilation into the school system. Governments should also build comprehensive data collection methods to reliably track immigrant children's enrolment, attendance, and educational outcomes. Monitoring and evaluation should be carried out on a regular basis to assess progress, identify gaps, and inform evidence-based policy and programmatic actions.
4. That there is a need for a regional integration of African countries in terms of progressive deliberations and collaborations is germane, as is promoting the need for a stronger scheme for international laws. SADC countries should design and implement inclusive policies and legal frameworks that expressly acknowledge all children's rights to basic education, regardless of immigration status. These regulations should be in accordance with international human rights norms and ensure that immigrant children have equitable access to a high-quality education. SADC countries should work with regional and international organisations such as UNICEF and UNESCO to share best practices, exchange knowledge, and gain access to resources to strengthen the protection and promotion of immigrant children's right to basic education. By putting these ideas in action, governments in the SADC area may make important gains toward ensuring that immigrant children have equal access to basic education, fostering of their integration, and nurturance of their potential for a better future.
5. States should consider age-specific standards when issuing study visas and other immigration documents, particularly for children. This includes streamlining processes, reducing unnecessary requirements, and eliminating excessive costs associated with

their immigration. By tailoring procedures to the unique needs and vulnerabilities of children, states can ensure a more efficient and equitable immigration system that prioritises the well-being and rights of migrant children.

6. The DR Congo would benefit greatly from establishing a comprehensive and transparent immigration law. Additionally, creating a dedicated Centre for human rights, coupled with leveraging technology to disseminate information about legal cases and rights-related literature, especially concerning migrant rights, could significantly enhance legal awareness and understanding among the populace. By promoting access to legal resources and fostering a culture of human rights, including migrant rights, judges would be better equipped and motivated to make informed and fair decisions in accordance with established legal frameworks.
7. There is a need to make the operations of the IGO more accessible and advocacy around its mandate and operations should be increased so that migrants can seek help from the office.

To make access to basic education easier will take the contribution of everyone involved in migrants' rights; the government must do the work of informing the ministers, the districts, and schools about migrants' children's rights to education. and the migrant's parents must make efforts to have valid documentation. The community must also educate one another. The law makers must consider child protection over state security. This position is in tandem with the aspiration of the African Charter on the Rights and Welfare of the Child<sup>903</sup> that places an obligation on the state, child, and parents in ensuring the realisation and protection of the rights and best interests of the child.

The ACRWC underscores the pivotal role of parents or guardians in nurturing and guiding the development of children, emphasizing their duty to prioritise the child's best interests, administer discipline with compassion, and uphold the child's inherent dignity. Similarly, the Charter delineates the responsibilities of children, stressing their obligation to contribute positively to their family, society, and broader community, while respecting authority figures and assisting in times of need.

While these provisions set forth crucial principles for the welfare of children and the cohesion of families, it is incumbent upon states to create conducive environments that facilitate the

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<sup>903</sup> African Charter on the Rights and Welfare of the Child.

realisation of these responsibilities. This involves enacting supportive policies, providing essential services, and fostering a culture of respect for children's rights and well-being. By doing so, states can ensure that children are nurtured in environments that promote their holistic development and enable them to fulfil their potential as valued members of society.

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