

**TWICE TRAUMATISED:
ASSESSING THE UNACCOMPANIED REFUGEE CHILD'S
RIGHTS TO FAMILY UNITY AND REUNIFICATION**

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DECLARATION

I, **Kenechukwu Chimobi ESOM** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signature

Date

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Signature

Date

DEDICATION

This dissertation is dedicated to the Almighty God, my help from ages past and my hope for years to come and to the many innocent children who, as a result of armed conflict, find themselves across international borders separated from their families.

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LIST OF ABBREVIATIONS

CESCR	International Covenant on Economic, Social and Cultural Rights, 1966
CRC	Convention on the Right of the Child, 1989
CTA	Central Tracing Agency
DR	Designated Representative
EU	European Union
GAOR	General Assembly Ordinary Resolution
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights, 1966
ICRC	International Committee of the Red Cross
INS	Immigration and Naturalisation Service
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
SARIMM	<i>Service d'Aide aux Refugies et Immigrants de Montreal Metropolitain</i>
UDHR	Universal Declaration of Human Rights, 1948
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
US	United States
WWI	First World War
WWII	Second World War

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION.....	iii
ACKNOWLEDGEMENTS	iv
LIST OF ABBREVIATIONS.....	v

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE STUDY.....	1
1.2 STATEMENT OF THE RESEARCH PROBLEM	3
1.3 RESEARCH QUESTION	4
1.4 PRELIMINARY LITERATURE SURVEY	4
1.5 RESEARCH METHODOLOGY	6
1.6 LIMITATION OF STUDY	6
1.7 OVERVIEW OF CHAPTERS	6

CHAPTER TWO: CONCEPTUAL ANALYSIS AND DEFINITION OF TERMS

2.1 INTRODUCTION	8
2.2 THE RIGHT TO FAMILY LIFE UNDER INTERNATIONAL LAW	8
2.3 RIGHT TO FAMILY UNITY	10
2.4 RIGHT TO FAMILY REUNIFICATION.....	12
2.5 FAMILY DEFINED	14
2.6 ARMED CONFLICT AND THE UNACCOMPANIED MINOR.....	18
2.7 LEGAL OBLIGATION OF STATES	19
2.8 CONCLUSION.....	20

CHAPTER THREE: STATES' LEGAL FRAMEWORK AND JURISPRUDENCE

3.1 INTRODUCTION	21
3.2 JURISPRUDENCE OF STATES- EUROPE	21
<i>3.2.1 European Union.....</i>	<i>22</i>
<i>3.2.2 United Kingdom.....</i>	<i>27</i>
3.3 NORTH AMERICA	29
<i>3.3.1 United States.....</i>	<i>30</i>
<i>3.3.2 Canada</i>	<i>32</i>
3.4 AFRICAN SYSTEM	34
<i>3.4.1 Uganda.....</i>	<i>36</i>
3.5 CONCLUSION.....	37

CHAPTER FOUR: PROTECTING FAMILY UNITY RIGHTS: PRACTICE OF SPECIALISED AGENCIES

4.1 INTRODUCTION	39
4.2 OVERVIEW OF SPECIALISED AGENCIES	39
<i>4.2.1 International Committee of the Red Cross (ICRC).....</i>	<i>40</i>
<i>4.2.2 United Nations High Commissioner for Refugees (UNHCR)</i>	<i>41</i>

4.3	PRACTICE OF SPECIALISED AGENCIES IN THE AREA OF REUNIFICATION	42
	4.3.1 <i>Collection of information</i>	43
	4.3.2 <i>Tracing</i>	44
	4.3.3 <i>Family reunification</i>	44
4.4	ALTERNATIVES TO FAMILY REUNIFICATION	46
	4.4.1 <i>Community care</i>	46
	4.4.2 <i>Fostering and adoption</i>	46
	4.4.3 <i>Institutionalisation</i>	48
4.5	CONCLUSION	48

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1	INTRODUCTION	50
5.2	CONCLUSION	50
5.3	RECOMMENDATIONS	52
	5.3.1 <i>Universal application of existent international framework</i>	52
	5.3.2 <i>Adoption of effective guidelines for reunification at the domestic level</i>	52
	5.3.3 <i>Adoption of an international binding instruments on the rights of unaccompanied refugee children</i>	53
	5.3.4 <i>Addressing the causes of armed conflict</i>	53

BIBLIOGRAPHY	55
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CHAPTER ONE INTRODUCTION

1.1 Background to the study

The right to be cared for by family is provided for in the Convention on the Rights of the Child 1989, (CRC).¹ The family is accorded considerable protection under international law as the basic unit of society. Consequently, international protection is accorded to this unit in very wide and seemingly unambiguous terms and states are obligated to preserve the family unit.²

With its family and community-centred provisions and the concepts of peoples' rights, the African regional system is undoubtedly very innovative in its provisions on family unity. The African Charter on Human and Peoples' Rights 1981 (the African Charter) provides similarly for the protection of the family unit.³ With regard to the child within the family unit, the African Charter on the Rights and Welfare of the Child (African Children's Charter) recognises in its preamble the need for the child to 'grow up in a family environment in an atmosphere of happiness, love and understanding.'⁴ The African Children's Charter goes further to provide variously for the state protection and support of the family, and other measures to ensure that the family unit and environment is preserved.⁵ The right to family unity is a necessary corollary to the right to family life and is 'inherent in recognising the family as a

¹ Article 7(1) of the Convention on the Rights of the Child 1989 (CRC) provides that every child has 'the right to know and be cared for by his or her parents'. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 279.

² See article 16 (3) of the Universal Declaration of Human Rights, 1948 (Universal Declaration) 'The family is the natural and fundamental group unit of the society and is entitled to protection by society and the State.' See also article 10 (1) of the International Covenant on Economic, Social and Cultural Rights, 1966 (CESCR), 'The state parties to the present Covenant recognise that: [T]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of the society...' Article 23 (1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that, '[T]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.' For the texts of the Universal Declaration, CESCR and ICCPR, see G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 27, 33 43 respectively.

³ See African Charter on Human and Peoples' Rights, 1981 (African Charter) article 18. The African Charter's provision on duties and responsibility of the family and its members is the first of its kind in an international human rights instrument. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 191.

⁴ Preamble, African Charter on the Rights and the Welfare of the Child, 1990 (African Children's Charter), para. 5. See PULP, *Compendium of key human rights instruments of the African Union* (2005) 53.

⁵ See African Children's Charter (n 4 above) articles 9(2), (3); 18-20; 23; 25; 31.

“group” unit: if members of the family did not have a right to live together, there would not be a “group” to respect and protect.⁶

However despite the noble commitment of states to the preservation of the family as the ‘fundamental unit of the society’, and protection of the child’s need to grow within this unit, there seems to be a lack of will in extending these ideals to the refugee family. From a reading of its provisions, it would seem that the CRC provides for the refugee child’s right to reunification with his or her family,⁷ and that this right is similarly provided for in other human rights and humanitarian law instruments both international and regional.⁸

A more in-depth reading, however, will reveal that this right and its consequent obligations are not couched in the same mandatory and convincing terms as the provisions on the protection of the family unit. States are encouraged to ‘provide, as they consider appropriate, cooperation’ with agencies involved in family reunification,⁹ and this appears to absolve states of direct and primary responsibility in maintaining the family unit and ensuring the reunification of the refugee family and more particularly the unaccompanied refugee child. Its careful wording may be a reflection of the immigration concerns of states during the negotiation process of the CRC.¹⁰ Family reunification of the unaccompanied refugee child whose family is still outside the country of his or her asylum is thus a Herculean task for states. It is in this scenario, more than most, that issues of state sovereignty, the exact

⁶ Human Rights Committee (HRC), General Comment No. 19: Protection of the family, the right to marriage and equality of spouses (article 23) UN Doc. HRI/GEN/1/Rev.1 at 28, 39th Session, 1990.

⁷ Article 22 of the CRC ‘State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall... receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. For this purpose, State Parties shall provide, as they consider appropriate, co-operation in any effort by the United Nations and other competent inter-governmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.’

⁸ Article 74 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict, 1977 (Additional Protocol I); Article 4(3)(b) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Internal Armed Conflict, 1977 (Additional Protocol II) Full text available at <<http://www.icrc.org>> (accessed 10 August 2006); Articles 23, 25(2)(b) of the African Charter on the Rights and Welfare of the Child (n 4 above).

⁹ See Article 22 CRC (n 1 above). See also article 10 of the CRC, ‘... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner. State Parties shall further ensure that the submission of such a request shall entail no adverse consequence for the applicants and for the members of their family.’

¹⁰ Hodgkins *et al*, *Implementation handbook for the Convention on the Rights of the Child* (2002) 145. See also OHCHR, *OHCHR Migration papers: Family reunification* (November 2005) 3. Available at <<http://www.ohchr.org>> (accessed 11 May 2006).

nature of state obligation and the universality of the rights to family unity and reunification begin to play an enormous part. It is this obvious lack of consistency that informs this dissertation. The topic of this dissertation refers to the existence of a right to family unity and a corresponding right to reunification for the refugee child. The objective of this dissertation is to examine the ambit of these rights, within the context of international human rights law and humanitarian law, the obligation and legal framework of states to ensure the protection of these rights as well as the protective framework of the specialised agencies similarly charged with the protection of these rights.¹¹

1.2 Statement of the research problem

With high rates of internal and international armed conflicts globally, the family unit is dismantled and children end up across international borders as refugees, unaccompanied. In the turmoil of conflict and flight, children easily become separated from their families and caregivers.¹² Although all refugees, uprooted from their homes and communities, are unprotected to a certain extent, and this can be a traumatising experience, separated children are even more vulnerable.¹³ Boys and girls on their own are easy targets for recruitment into armed groups, as combatants, porters, spies or servants, and they are at high risk of exploitation and physical or sexual abuse, and even death.¹⁴ Involuntary separation thus increases the risks faced by the displaced, unaccompanied child; this separation can be more traumatic than the displacement itself.¹⁵ Africa seems most hit by this problem with an estimated refugee population of 4,861,400.¹⁶ As a result, unaccompanied refugee children require a higher level of protection and assistance in order to find a durable solution to their precarious situation.¹⁷ Detailed provisions on the reunification of the refugee family are provided for under international humanitarian law.¹⁸ The Additional Protocol I obliges states to facilitate family reunification of the refugee family

¹¹ Article 22(2) CRC (n 1 above).

¹² See the Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN ESCOR, 56th Session, UN Doc. E/CN. 4/2000/71 (2000).

¹³ See Press Release, Report of Impact of Armed Conflict on Children Exposes Moral Vacuum, Secretary-General's Expert Tells Third Committee, UN Doc. GA/SHC/3382 (8 November 1996) on the risks that unaccompanied children face.

¹⁴ Press Release (n 13 above).

¹⁵ See *Assistance to unaccompanied refugee minors* Report of the Secretary-General to the 53rd Session of the United Nations General Assembly, UN Doc.A/53/325 (1998) para. 6.

¹⁶ UNHCR, *Refugees by Numbers (2005 Edition)* <<http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c>> (accessed 23 August 2006).

¹⁷ See UN General Assembly resolution on protection and assistance to unaccompanied refugee children. Resolution 49/172 adopted 23 December 1994, U.N. Doc.A/Res/49/172 (1994).

¹⁸ See generally the Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, 1949, particularly article 82, available at <<http://www.icrc.org>> (accessed 20 August 2006).

'in every possible way.'¹⁹ However, practice shows that states are reluctant about actively facilitating reunification of refugee children. State sovereignty remains the rationale for this, as controlling the entry and reside of non-citizens in individual states remain the core features of sovereignty.²⁰ This refusal by state has also been justified by the 'safe third country' principle by which states deny asylum on the argument that an asylum seeker will have better protection in a third safe country.²¹

Consequent on the above, it is expedient to examine the mechanism for the protection of these rights by states and the specialised agencies, and in the light of this determine whether states are in violation of their obligations towards the refugee family as it relates to family unity and reunification.

1.3 Research question

This dissertation proceeds from the premise that there is a right to family unity and a right to family reunification which are corollary rights to the right to protection of the family unit already guaranteed under international law. This dissertation seeks to examine the exact obligation of states is with respect to these rights. It will furthermore determine whether the protective mechanisms and legal frameworks of states and specialised agencies guarantee effective protection of the unaccompanied refugee child.

1.4 Preliminary literature survey

There is considerable jurisprudence on the right to family life and family unity, the protection of these rights and various state practices in this regard.²² Very few articles however address the reunification of the unaccompanied refugee child with his or her family outside the country of conflict and the nature of state obligation in this regard.

¹⁹ Article 74 Protocol I to the Geneva Conventions, 1977, (8 above).

²⁰ J Vedsted-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states' exclusion' in F Nicholson, & P Twomey, (eds) *Refugee rights and realities: Evolving international Concepts and regimes* (1999) 273.

²¹ Vedsted-Hansen, (n 20 above) 270-273. The Danish Aliens Act, section 7(3), captures this argument by providing that '[T]he issue of residence permit may be refused if the alien already obtained protection in another country or if, because of prolonged stay or close relatives living there or other like circumstances, the alien has closer ties with another country where he must be deemed to be able to obtain better protection.' The effect of the argument is to minimise the number of asylum country options available to the refugee. The US-Canadian Safe Third Country Agreement came into force on 29 December 2004. Under the agreement, certain categories of asylum-seekers are precluded from being granted refugee status in either country in certain situations. See *Ten reasons why third safe country is a bad deal* on the Canadian Refugee Council's criticism of the Agreement available at <<http://www.web.net/~ccr/10reasons.html>> (accessed 30 October 2006).

²² Right to family life and unity is a generally established right under international law and is usually discussed under the broad categorisation of privacy rights.

Jastram and Newland examined the rights of family unity and reunification of refugee families²³ particularly as it affects state practice in this regard. They discuss the importance of family unity to the general well being of the refugee, family unity and reunification for the refugee under international law generally however, the issue of the unaccompanied minor is not addressed. *Refugee children: Guidelines on protection and care*²⁴ establishes practical guidelines for states and organisations on the implementation of the rights of the refugee child. It outlines the different procedural stages for effective protection of refugee children. It also raises the best interest of the refugee child as a primary consideration when dealing with the rights to family unity and reunification which can be quite challenging especially in cases where family members are located in more than one country. It establishes that the responsibility of states is not direct in this regard. The responsibility for reunification efforts rests more on the specialised agencies while states seem to have the option of a leeway in the form of the provision of alternative care such as fostering, adoption and institutionalised care. Without suggesting that alternative care is devoid of challenges, it however does not impact as much on the sovereignty of states hence the preference for it. This dissertation will argue that alternative care should be a last resort only and not a shield for states who will rather not deal with family reunification.

Jastram²⁵ examines the rights to family unity and reunification in light of the sovereignty of states over their borders and she submits that this sovereignty is qualified by states obligations in regard to the rights to family unity and reunification. This submission forms the basis for state obligation in the area of protection of the unaccompanied refugee child. The article also examines the definition of family and the impact this concept, as understood in the different regions, has on the implementation of these rights. This dissertation will examine the definition of family as it applies to family reunification and states obligation, and the challenges that these may have on the implementation of the right to reunification in refugee-hosting countries. For instance, varying definitions of 'family' between the country of origin and the asylum country may exclude certain persons who ordinarily would constitute family in the other jurisdiction.

²³ K Jastram & K Newland 'Family unity and refugee protection' in E Feller, V Turk & F Nicholson (ed) *Refugee protection in international law: UNHCR global consultations on international protection* (2005) 555.

²⁴ United Nations High Commissioner for Refugees, (1994).

²⁵ *Family unification, including migration of children*, discussion paper prepared for the International Legal Norms and Migration Project conference in Geneva 23-25 May 2002. Available at <http://www.hei.unige.ch/conf/psio_230502/files/jastram.doc> (accessed 13 May 2006).

The various treaties dealing with children and refugee law internationally and regionally will also be examined. State legislations and case law jurisprudence of the European Union, Canada and the United States (US) and the African Union will be examined.

1.5 Research methodology

This study will take the form of a qualitative research and will involve the examination of various international and regional instruments that relate to the subject matter as well as the writings of various authors on the subject of children's rights and refugee law. The study will describe the framework available within states for the implementation of the rights to family unity and reunification of unaccompanied refugee children and will consider the practices of the specialised agencies directly involved in family reunification, but further than that it will recommend a normative framework which will have the state as primarily responsible in this regard. This dissertation will look at the legal framework, practice and implementation of states and specialised agencies generally and drawing from experiences across regions, will recommend a framework that offers effective protection of the family rights of unaccompanied refugee children.

1.6 Limitation of study

This study will be limited to the rights of unaccompanied refugee children, in the context of armed conflict. The focus of this dissertation is on the mechanism for the protection of the unaccompanied refugee child's rights to family unity and family reunification and so the emphasis will be on the legal framework existent in the regions considered. Although this study argues strongly for family reunification, the concerns about the inappropriateness of family reunification in certain circumstances are acknowledged.²⁶ However, family reunification will be argued as an ideal situation for most refugee children.

1.7 Overview of chapters

Chapter II will examine the rights to family unity and reunification as provided by the various international and regional instruments. The rights to family unity and reunification in regard to the concept of state sovereignty, definition of terms and concepts, the scope of application and generally the extent of humanitarian and human rights obligation of states

²⁶ For example where family reunification may not be ideal because of abuse within the family, or where the child has developed a great degree of attachment to a foster family and other instances where the best interest of the child may dictate otherwise.

under international law. The concept of family as it applies under these instruments and their regions of application will also be examined.

Chapter III will examine state practice in this area generally, legislation relating to and affecting the implementation of the rights to family unity and reunification, case law jurisprudence (where applicable), administrative and procedural challenges and how these impact on the implementation of these rights. The jurisprudence of the European Commission and Court as well as the framework of the European Union, the United States and Canada (which are major asylum countries in North America) and the regime under the African human rights system will be discussed.

Chapter IV will examine the framework of specialised agencies particularly the International Committee of the Red Cross (ICRC) and the United Nations Office of the High Commission for Refugees (UNHCR) in the implementation of these rights. The responsibility for realising family reunification for the unaccompanied refugee child rests on both the states and specialised agencies. This chapter will examine the various documents on the protection of the unaccompanied refugee child's rights to family unity and reunification by the UNHCR, ICRC and other specialized agencies and NGOs especially in the area of family tracing, unity and reunification rights of the refugee child during the conflict. This chapter will also examine other alternatives to family reunification such as fostering, adoption and institutional care. The aim is to determine how successful these agencies have been in the realisation of their mandate as it relates to the family rights of the unaccompanied refugee child.

Chapter V will make recommendations on more effective ways for implementing the rights.

CHAPTER TWO CONCEPTUAL ANALYSIS AND DEFINITION OF TERMS

2.1 Introduction

This chapter sets out the conceptual framework upon which the study is set and provides a background for the issues discussed in subsequent chapters. The concepts – rights to family life, family unity and reunification as provided for under international law treaties and scholarly writings are examined. The definition of family in international law generally and refugee law in particular will be examined as will the issue of the unaccompanied minor in the context of armed conflict.

2.2 The right to family life under international law

The right to family life is recognised in many international, regional as well as national instruments. There is universal consensus that, as the fundamental unit of society, the family is entitled to respect, protection, assistance and support.²⁷ This consensus is aptly captured in the International Bill of Rights. The Universal Declaration of Human Rights (Universal Declaration) provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'²⁸ The International Covenant on Economic, Social and Cultural Rights (CESCR) guarantees to the family 'the widest possible protection and assistance' as the 'natural and fundamental unit of society',²⁹ while the International Covenant on Civil and Political Rights (ICCPR) provides that the family, 'as the natural and fundamental unit of society... is entitled to protection from society and state.'³⁰ The provisions on the right to family life are often in 'tandem with privacy protections, with the underlying theme of these instruments being the prevention of arbitrary interference with the family'.³¹ The Universal Declaration, for instance provides that '[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to

²⁷ K Jastram, (n 25 above).

²⁸ Article 16(3) Universal Declaration (n 2 above) 27.

²⁹ Article 10(1) CESCR (n 2 above 33).

³⁰ Article 23(1) ICCPR (n 2 above) 43

³¹ B Hernandez-Truyol, 'Asking the family question' 38 *Family Law Quarterly* (2004) 484.

attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference'.³²

The right to family unity has similarly been duplicated in the regional human rights instruments. The most comprehensive in this regard is the African Charter on Human and Peoples' Rights (the African Charter) which provides in article 18 that '[T]he family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and morals'.³³ The family is described in glowing terms as the custodian of morals and traditional values of the community and the State has a duty to assist it to fulfil this role.³⁴

Similarly the American Convention on Human Rights, 1969 (American Convention) provides that '[N]o one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks'.³⁵ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 (Protocol of San Salvador) provides that '[T]he family is the natural and fundamental element of society and ought to be protected by the State, which should see the improvement of its spiritual and material conditions'.³⁶

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (European Convention) provides jointly for the protection of family life and privacy thus '[E]veryone has a right to respect for his private and family life, his home and his correspondence'.³⁷ Although the European Convention provides a limitation to this right,³⁸

³² Article 12 Universal Declaration. See similarly article 17 ICCPR which provides that '[N]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attack on his honour or reputation.' (n 2 above).

³³ To further buttress the importance of the family as 'the natural unit and basis of society' the African Charter imposes duties on individuals to 'preserve the harmonious development of the family and to work for the cohesion and development of the family'. See article 29 African Charter, (n 3 above).

³⁴ Article 18(2) African Charter, (n 3 above).

³⁵ Article 11(2),(3) American Convention on Human Rights, 1969. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 155.

³⁶ Article 15(1) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 179.

³⁷ Article 8 (1) European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 81.

³⁸ See article 8(2) European Convention which prohibits interference with the exercise of this right by a public authority 'except in accordance with the law and [as] is necessary in a democratic society ...' (n 37 above).

the European Court of Human Rights (European Court) has interpreted the relevant article to emphatically protect the family against state interference.³⁹

The above provisions clearly show the high pedestal the family and respect for family life occupies in international law, and the obligation of particularly states in that regard. The subsequent paragraphs will examine the rights to family unity and reunification which are discussed as corollary rights to the right to family life.

2.3 Right to family unity

A right to family unity is inherent in recognising the family as a 'group' unit: if members of the family did not have a right to live together, there would not be a 'group' to respect and protect.⁴⁰ The right to family unity is implied by the right to marry and found a family. According to the UN Human Rights Committee (HRC),

The right to found a family implies, in principle, the possibility to procreate and live together. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.⁴¹

The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family which as shown above is provided for in both international and regional human rights instruments.⁴² Other pointers to the international recognition of the right to family unity are the special family rights accorded to children in international law. The Preamble of the United Nations Convention on the Rights of the Child (CRC) captures the essence of the right to family life and unity as well as the impact of protection of these rights on the development and well being of the child.

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

³⁹ See Hernandez-Truyol, (n 5 above) p. 485. In *Marckx v. Belgium* (1979) 2 EHRR 330 the European Court of Human Rights stated that in order to create legal safeguards for the family, 'there may be positive obligations inherent in an effective respect for family life... and states must act in a manner calculated to allow those concerned to lead a normal family life.'

⁴⁰ Human Rights Committee, (n 6 above) para. 5.

⁴¹ Human Rights Committee, (n 6 above) para. 5.

⁴² K Jastram, & K Newland, 'Family unity and refugee protection' in E Feller, V Turk, & F Nicholson, *Refugee Protection in international law: UNHCR's global consultations on international protection* (2003) 566.

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.⁴³

States have further undertaken to 'ensure that a child shall not be separated from his or her parents against their will' and in the extreme case, where for any reason the child is separated from either or both parents, the state is obliged to respect the right of the child 'to maintain personal relations and direct contact with both parents on a regular basis.'⁴⁴ This underscores the importance which is attached to the unity of this 'natural and fundamental unit of society', the family. The unprecedented speed and unanimity with which states have ratified the CRC also attest to the importance that states attach to the rights of the child of which the right to family unity is fundamental.⁴⁵ This right is so fundamental that certain jurisdictions accord this right to family unity the status of customary international law. In the case of *Beharry v. Reno*, for example a Federal district court in the US, a non-state party to the CRC, ruled that the government must take into account customary international law principles regarding the best interest of the child in deciding to separate an immigrant man slated for deportation for a criminal offence, from his US citizen daughter.⁴⁶

The regional instruments also recognise the right to family unity. For instance, the African Charter on the Rights and Welfare of the Child (African Children's Charter) provides that

Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.⁴⁷

The Organisation of American States recognises the protection of the rights of families and children in the Protocol of San Salvador. Article 16 provides that '[E]very child shall have the right to grow under the protection and responsibility of his parents; save in exceptional,

⁴³ See Preamble, CRC, (n 1 above) para. 5-6.

⁴⁴ Article 9 CRC, (n 1 above)

⁴⁵ The CRC has attained almost universal ratification with the USA and Somalia being the only countries yet to ratify the Convention.

⁴⁶ *Beharry v. Reno* US Dist. Ct., Eastern District of New York, 2002 US Dist. Lexis 757, 8 Jan. 2002. *Beharry v. Reno* conforms with the Concluding Observations of the Committee on the CRC regarding Norway UN Doc. CRC/C/15/Add. 126 (28 June 2000) para. 30-31 that states must consider the child's best interest before separating a child by deportation.

⁴⁷ Article 19(1) African Children's Charter, (n 4 above).

judicially recognised circumstances ...' Thus keeping the family together is ideal but derogation is permissible only in judicially recognised situations.

The European Convention provides generally for the rights to family life, without making a distinction between children's rights and family rights.⁴⁸ The defunct European Commission of Human Rights' (European Commission) jurisprudence is rich with case law favouring family unity. Family members can challenge a deportation order by direct petition to the European Commission for alleged violations of the European Convention.⁴⁹ The European Court of Human Rights has held, for instance, that the denial of a residence permit to the non-resident parent or child results in an interference with family life.⁵⁰

The right to family unity as shown above is a universally recognised right and one which states have bound themselves to protect. Having established the existence of the right to family unity and the obligation of states to protect this right, it becomes imperative therefore on the same premise that where there is violation of this right there is a corresponding obligation to remedy it. Therefore, reunification of the family in the event of separation or the right to family reunification is a necessary consequence of the recognition of the right to family unity.

2.4 Right to family reunification

The core of the right to family reunification in international human rights law is found in the Convention on the Rights of the Child. This right is codified as follows

In accordance with the obligation of state parties under article 9,⁵¹ applications by a child or his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt with by state parties in a positive, humane and expeditious manner.⁵²

The wording of the above provision and the elements contained therein are evidence of the importance and necessity of reunification of families. The link to article 9, which deals with the obligation to preserve family unity, shows that the rights to family unity and reunification are essentially different points of a continuum. Another important element of article 10 of

⁴⁸ Article 8(1) European Convention, (n 37 above).

⁴⁹ See G. Wolf 'Preserving family unity: The rights of children to maintain the companionship of their parents and remain in their country of birth' (1996) 4 *Indiana Journal of Global Legal Studies* 207 @211.

⁵⁰ *Berrehab v Netherlands* 138 ECHR (1988) Ser A 14.

⁵¹ Article 9 CRC provides for family unity and non-separation of a child from his family. (n 1 above).

⁵² Article 10 CRC, (n 1 above).

the CRC is the recognition that reunification may require a state to allow entry as well as departure so that there is an obligation on states to facilitate reunification of families separated by its borders within the state as well as outside the state. A third element is that article 10 creates a mutual right for the child and his or her parents such that either of the parties is entitled to join the other.⁵³ In order to give full effect to the provision of article 9, 'all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interest of the child.'⁵⁴

The Committee on the Rights of the Child (Committee on the CRC), which is the monitoring body of the CRC deals with the issue of family reunification regularly in its Concluding Observations. In the Concluding Observation on the second periodic report of Finland, the Committee on the CRC expressed concern about the length of the family reunification procedure and the possible negative impact on the children involved, and encouraged Finland to examine the causes of the delay in the processes and the settlement of the families with a view to shortening them.⁵⁵ Similar concerns were raised for Sweden⁵⁶ and Luxembourg.⁵⁷ The CRC Committee noted that Mauritania had no laws or practices guaranteeing the reunification of refugee children with families and recommended that the state 'enact legislation, policies and programmes guaranteeing the reunification of families where this is possible.'⁵⁸ So despite the seemingly non-obligatory wording of article 10 CRC, it seems the CRC Committee appears more willing to adopt a liberal interpretation of this provision in its Concluding Observations.⁵⁹

Thus the only limitation or qualification to the right to family reunification of the child is the best interest principle.⁶⁰ The Committee on the Rights of the Child (Committee on the CRC) has stated that family reunification in the country of origin is not in the best interest of the child and should therefore not be pursued where there is a reasonable risk that that such a

⁵³ Jastram (n 25 above) 4.

⁵⁴ Committee on the CRC, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (2005) 22.

⁵⁵ Concluding Observation Finland, CRC/C/15/Add.132, (16 October 2000), paras. 37 and 38.

⁵⁶ Concluding observations Sweden, CRC/C/15/Add.248, (16 January 2000), para. 41.

⁵⁷ Concluding Observations Luxembourg, CRC/C/15/Add.250, (28 January 2005), Para. 53.

⁵⁸ Concluding observations Mauritania, CRC/C/15/Add.159 (6 November 2001), paras. 47 and 48.

⁵⁹ OHCHR, (n 10 above) 4. See also the Committee on the CRC (n 54 above) para. 83 which states that 'whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligation under articles 9 and 10 of the Convention come into effect and should govern the host country's decision on family reunification therein'.

⁶⁰ See article 3(1) CRC which provides 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' (n 1 above).

return will lead to the violation of the fundamental human rights of the child.⁶¹ It is argued that where it is not in the best interest of the child to be returned to the country of origin for the purposes of reunification, there is an obligation on the host country to effect reunification within its territory or assist reunification in a safe third country.

Similarly, the right to family reunification provisions in general international law are found in international humanitarian law. The Fourth Geneva provides for the maintenance of family unity during internment,⁶² and evacuation,⁶³ and in situations where family members are separated, mechanism such as family tracing, family messaging and registration of children to enable family communication and reunification where possible.⁶⁴ In the Additional Protocol I states accepted the obligation to facilitate family reunification in every possible way.⁶⁵

The right to reunification is recognised at the regional level under the jurisprudence of the African Charter, American Convention and the European Convention. This will be examined more specifically at a later stage. It suffices to say however, 'as with the right to family unity, scholars are generally in agreement that there is at present under international law a right to family reunification' and that 'existing instruments provide an adequate and appropriate legal framework, at least for the reunification of unaccompanied/separated children and their parents.'⁶⁶ This dissertation will however point out that the existing legal framework in the area of family reunification of the unaccompanied refugee child is not adequate. A case will be made for a more appropriate legal framework in this regard.

2.5 Family defined

There is no universally applicable definition of the concept 'family'. As noted by the UN Human Rights Committee, 'the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible

⁶¹ Committee on the CRC (n 54 above) 22.

⁶² Article 82 Fourth Geneva Convention provides 'Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment...' (n 18 above).

⁶³ Article 49 Fourth Geneva Convention provides that an occupying power may undertake evacuation of a particular area if security demands so however 'The occupying power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent ...that members of the same family are not separated.' (n 18 above).

⁶⁴ See Fourth Geneva Convention, articles 140, 25, 50 respectively, (n 18 above).

⁶⁵ Article 74 Additional Protocol I, (n 8 above).

⁶⁶ Jastram & Newland, (n 23 above) 579.

to give the concept a standard definition.⁶⁷ Thus, the family must be defined 'to include all those comprising the family as understood in the society of the state party concerned.'⁶⁸

Understanding of what constitutes a family varies tremendously across cultures. The institution of polygamy is one such cultural divide, for although many countries in the West forbid polygamy, yet in much of the world polygamy is a reality. Islamic law allows for as many as four wives and many Islamic law jurisdictions incorporate this into domestic laws.⁶⁹ Furthermore, the African Charter recognises polygamy as a legitimate system of marriage although it encourages monogamy as a preferred system.⁷⁰ Thus for communities where polygamy is legitimate the definition of family must reflect this reality.

Any definition of the family in an African context must take into cognisance the fact that many African states operate a bi-jural legal system with respect to family issues, comprising of customary/Islamic law and statutory law.⁷¹ The nature of the family in Africa has been recognised by the Human Rights Committee (HRC) in its rejection of an argument by France that a refugee from Cameroon forfeited the right to be reunited with his wife by virtue of the absence of the evidence of conjugal relations with her. According to the HRC

Article 23 of the Covenant (ICCPR) guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term 'family' for purposes of the Covenant must be understood broadly [so] as to include all those comprising a family in the society concerned. The protection of such a family is not necessarily obviated, in any particular case by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage.⁷²

The existence of a family is a question of fact to be determined on a case-by-case basis.⁷³ Thus the concept of family may differ from country to country and even from region to region within the same country. There is an obligation on states to report on how the

⁶⁷ Human Rights Committee, (n 6 above) para. 2.

⁶⁸ U.N. GAOR, Human Rights Committee, 32nd Session, U.N. Doc. CCPR/C/21/Add.6 (1988).

⁶⁹ S. Starr & L. Brilmayer, 'Family separation as a violation of international law' (2003) 21 *Berkeley Journal of International Law* 244.

⁷⁰ Article 6(c) Protocol to the African Charter on the Rights of Women in Africa 2003. See PULP *Compendium of key human rights instruments of the African Union* (2005).

⁷¹ As a result of multiplicity of ethnicities in these countries, recognised customary forms of marriages are sometimes as diverse as there are ethnic groups. Cameroun is an example of such a system with what has been termed 'a multi-jural' family law system. See E Ngwafor, 'Nullity: The squaring of a questionable dilemma' in A Bainham, *The international survey of family law 1994* (1996) 101.

⁷² *Ngambi and Nebol v France*, UNHRC Comm. No. 1179/2003, UN Doc. CCPR/C/81/D/1179/2003, decided 16 July 2004.

⁷³ Jastram (n 25 above) 7.

concept and scope of the family is construed and defined in their own society and legal system. Such definitions should be wide enough to accommodate unmarried couples and their children, and single parents and their children.⁷⁴

Although the nuclear family is the most widely accepted for family unity and reunification purposes, some states have included other forms of family relationships that reach beyond the nuclear family. In Europe, there is extensive support for a wider acceptance of other family members including unmarried partners living in a durable relationship with the applicant, the elderly, infirm or otherwise dependent.⁷⁵ A Russian court overturned the denial of refugee status to an unmarried adult dependent sister of a refugee, specifically citing the situation of single women and the notion of extended family in the refugee's country of origin.⁷⁶ Canada allows fiancés, parents and grandparents in the family class although with stricter criteria than immediate family while the United States includes parents as well as spouses and unmarried children in its refugee resettlement programme.⁷⁷

International humanitarian law adopts a fairly liberal definition of family especially for the purpose of family reunification. According to Pilloud *et al* on article 74 of Additional Protocol II to the Geneva Conventions 1977,

In the narrow sense, the family covers persons related by blood and living together as one household. In a wider sense it covers all persons with the same ancestry. In the context of Article 74 it would be wrong to opt for an excessively rigid or precise definition; common sense must prevail. Thus the word "family" here of course covers relatives in a direct line - whether their relationship is legal or natural - spouses, brothers and sisters, uncles, aunts, nephews and nieces, but also less closely related relatives, or even unrelated persons, belonging to it because of a shared life or emotional ties (cohabitation, engaged couples, etc.). In short, all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family.⁷⁸

There is therefore no universally accepted definition of family under international law. The obligation is on states to report on the definition of family recognized within its territory and

⁷⁴ Human Rights Committee, (n 6 above) para.2.

⁷⁵ European Union, Council Directive EC/86/2003 of 22 September 2003 on the right to family reunification, article 4. Available at <<http://www.europa.eu.int>> (accessed 21 April 2006).

⁷⁶ *S.A.K. v Moscow Region Immigration Control Department*, Civil Case No. 2-3688, Moscow Central Administrative District, Zamoskvoretsky Municipal Court, 10 May 2001.

⁷⁷ Jastram and Newland (n 23 above) 583-584.

⁷⁸ C Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 859.

to ensure the protection of the rights to family life, unity and reunification accordingly. It is unlikely however that a state will be permitted to adopt a strict and narrow definition of the family.⁷⁹ The problem of the refugee may well be that that legal and cultural peculiarities of the asylum country do not recognise their families, for example, the family of a refugee in a polygamous marriage or same-sex union, or an extended refugee family seeking protection from a society in which the nuclear family is the norm.⁸⁰ The asylum state thus has broad autonomy to interpret who qualifies as 'family' and thus entitled to 'live together'.⁸¹ It is urged however that states exercise this autonomy to interpret very liberally.

The autonomy of states to define family for the purpose of family reunification raises a few challenges. For example, how to balance the public policy demands of the asylum countries with the right to family reunification. How does Canada, a country which criminalises polygamy handle family reunification for a polygamous Ugandan family?⁸² For instance on this issue, France in reaction to anti-polygamy sentiments in 1993 passed the *Loi Pasqua*. The *Loi Pasqua* changed French policy on polygamous immigrants by

- (a). providing that only one spouse of a new French immigrant would be issued a spousal visa and the attendant benefits. Other spouses and their children were excluded; and
- (b). applying (a) above retroactively to polygamous families already residing in France. Polygamous men and their wives risked deportation unless they legally divorced and physically separated the household so that each wife was living separately.⁸³

More recently, the debate on same-sex marriage raises the question of whether states should be required to authorise such marriages domestically or at least recognise the validity of those legally performed abroad. Most states (and advocates) of same-sex marriage do not endorse polygamy and vice versa,⁸⁴ there is thus hardly ever a consensus among states of

⁷⁹ *Ngambi and Nebol v France* (n 73 above).

⁸⁰ J Hathaway, *The rights of refugees under international law* (2005) 553.

⁸¹ Hathaway (n 80 above) 555.

⁸² Section 293 of the Criminal Code of Canada makes it an offence to participate in a polygamous marriage celebration, to 'enter any form of polygamy' or 'any kind of conjugal union with more than one person at the same time.' See generally the discussion on polygamy and human rights protection N Bala *et al* 'An international review of polygamy: Legal and policy implications for Canada' in *Polygamy in Canada: Legal and social implications for women and children (A collection of policy research reports)*. Available at <http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.pdf> (accessed 22 October 2006).

⁸³ See articles 20 and 15bis *Loi Pasqua*. Available at <<http://www.gisti.org/doc/plein-droit/51/etapes.html>> (accessed 29 October 2006).

⁸⁴ Most African countries while endorsing polygamy, criminalize same-sex relations. See J Martin, 'English polygamy law and Danish Registered Partnership Acts: A case for the consistent treatment of foreign

what constitutes a family. The unaccompanied refugee child caught between these various definitions is therefore in a precarious situation if states do not apply their autonomy to define 'family' liberally.

2.6 Armed conflict and the unaccompanied minor

The focus of this paper is on children who cross international borders as a result of armed conflict. Granted that there is a host of other reasons which cause children to cross international borders such as child trafficking, economic migration, abduction and natural disasters, and that all children who cross international borders unaccompanied deserve some level of protection, this paper is limited to unaccompanied children who cross international borders as a result of armed conflict.

An unaccompanied minor is a child (as defined by article 1 of the CRC) who is separated from both parents and not cared for by an adult who is responsible for him or her under either custom or law.⁸⁵ There are many reasons why children become separated from their families in emergencies such as armed conflicts. Separation occurs accidentally because the family is fleeing from danger or deliberately where the child is handed over to an individual or a residential centre in the belief that the child would be safer or have better access to services.⁸⁶

Family life constitutes one of a child's fundamental rights. War has no respect for this right. It drives people out of their homes as they flee battle zones or direct attack, leaving behind not only their property, but also their family and friends. During the 1990s, around 20 million children were forced to leave their homes due to conflict or human rights violations.⁸⁷ As they flee conflict, families may become separated. Children left alone are more likely to be sexually abused or recruited into combat. Deprived of a support network, they are also more vulnerable to hunger and disease.⁸⁸ Their situation is more precarious because unlike the unaccompanied children who cross international borders for other reasons, those escaping armed conflict seldom have the option of returning to their country of origin. It is for these reasons that this group of unaccompanied children deserves special attention. 'Children who

polygamous marriages and Danish same-sex marriages in England' (1994) 27 *Cornel International Law Journal* 419.

⁸⁵ Committee on the CRC (n 54 above) para.7. See also 'Refugee Children, UNHCR Guidelines on Protection and Care' in G Van Buren, (ed) *International documents on children* (1998) 502.

⁸⁶ ICRC, *Inter-agency guiding principle on unaccompanied and separated children* (2004) 22.

⁸⁷ UNICEF, *State of the World's Children* (2005) 45.

⁸⁸ Committee on the CRC (n 54 above). See also UNICEF, (n 87 above) 45.

are separated from their families are without their natural shield of protection, making intervention on the international community's behalf essential, even where such intervention pierces a country's internal affairs.⁸⁹

2.7 Legal obligation of states

As mentioned above, states have an obligation to protect the unity of the family whatever the definition of family within their territory. However, this protection does not only apply to families of their citizens but extends to everyone within their borders. According to the Committee on the CRC,

State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction. Moreover, State obligations under the Convention apply within the borders of a State including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children-including asylum-seeking, refugee and migrant children- irrespective of their nationality, immigration status or statelessness.⁹⁰

States cannot therefore exclude non-citizen children from protection under the Convention by relying on domestic laws as states are forbidden from using domestic law as an excuse to violate treaty obligations.⁹¹ There is a positive obligation on states to take all necessary measures to identify unaccompanied or separated children and to carry out tracing activities, and except where it is not in the best interest of the child, to reunify separated children with their parents as soon as possible. The obligation of the states goes beyond protecting those already identified as unaccompanied but also to prevent separation of otherwise united families.⁹² A state whose immigration laws or policy encourage the separation of families or makes it impossible for reunification to take place within their territory, is clearly in violation of the CRC, except if and when such laws are justifiable on grounds of public policy or domestic security and the consideration of the best interest of the child principle.

⁸⁹ M Kures, 'The effect of armed conflict on children: The plight of the unaccompanied refugee minors' (2001) 25 *Suffolk Transnational Law Review* 141.

⁹⁰ Committee on the CRC (n 54 above) para. 12.

⁹¹ Article 27 Vienna Convention on the Law of Treaties 1969. Available at <<http://www.molossia.org/lawoftreaties.html>> (accessed 20 October 2006).

⁹² Committee on the CRC (n 54 above) para. 13.

2.8 Conclusion

This chapter concludes with the assertion that the rights to family life, family unity and reunification are internationally guaranteed rights which states have an obligation to protect. While not giving a universal definition of the word 'family', states have an obligation to protect these rights within subjective but liberal definitions applicable within their territories. The particularly vulnerable situation of unaccompanied refugee children who cross international borders as a result of armed conflict is also established with a view to justifying the need for adequate protection of the children's rights to family life, unity and reunification. This chapter has also highlighted some of the challenges faced in the implementation of these rights. The next chapter will build on this analysis by focussing on the legal framework of certain asylum countries and regions, how their laws capture these issues raised and the impact of such laws on the family reunification of unaccompanied refugee children.

CHAPTER THREE

STATES' LEGAL FRAMEWORK AND JURISPRUDENCE

3.1 Introduction

This chapter will examine the protective framework within selected states with respect to reunification of unaccompanied refugee children especially at their statutory provisions and case law jurisprudence where the latter exists. The chapter will focus on the main asylum countries of Europe and North America, as well as Africa. The choice of countries is out of two considerations; firstly, the countries examined are the destination countries of most refugees and asylum-seekers fleeing from situations of armed conflict; and secondly, the states examined have an easily identifiable legal framework relating to refugee children generally and reunification of unaccompanied children particularly. Although some of the legislations examined do not deal specifically with unaccompanied refugee children, they often provide a framework from which the likely protection that an unaccompanied child may get under them can be determined.

The jurisprudence of the European Union and the European Commission and Court are examined in the first part of the chapter, with the United Kingdom examined specifically. The second part examines the practice in the North American countries of Canada and the United States. Finally, the regime under the African human rights system is examined with specific highlights of on Ugandan.

3.2 Jurisprudence of states – Europe

A significant number of unaccompanied children fleeing conflict around the world, eventually end up in Europe. According to SCEP statistics, there are at least 100,000 unaccompanied asylum-seeking children in Europe at any given time.⁹³ There is a fairly developed jurisprudence on the treatment of refugee children in Europe, both within the European Union and individual member states. This is examined below.

⁹³ According to figures collated by Separated Children in Europe Programme (SCEP), a joint initiative and partnership between some members of the International Save the Children Network and the UNHCR. Figures quoted in A Hunter, 'Between the domestic and the international: The role of the European Union in providing protection for unaccompanied refugee children in the United kingdom' (2001) 3 *European Journal of Migration and Law* 383.

3.2.1 European Union

The obligation of member states of the European Union (EU) towards refugees generally arises from the UN Convention relating to the Status of Refugees, 1951 (UN Refugees Convention) and its 1967 Additional Protocol. Since the UN Refugee Convention does not make a distinction in regards to age, children need to meet the same standards as adults in order to qualify as a refugee.⁹⁴ Based on the principle of *non-refoulement* as set out in the UN Refugees Convention, a state cannot return an asylum-seeker to a country where his or her life and freedom would be threatened. This principle applies to children and adults alike.⁹⁵ The UNHCR also has two main guidelines which prescribe policies for European Union countries: (i) *1994 Refugee Children: Guideline on Protection and Care*; and (ii) *1997 Guidelines on Policies and Procedure in Dealing with Unaccompanied Children Seeking Asylum*. The provisions of the UN Convention on the Rights of the Child on protection of refugee children also govern the obligations of EU states, particularly with regard to unaccompanied refugee children.⁹⁶

In addition to the above, the European Convention provides asylum-seekers in Europe with a minimum standard framework of protection. Although there are no refugees or asylum-specific provisions in the European Convention, the European Commission and Court have interpreted certain rights as guaranteeing protection to asylum seekers. For example, article 8 on respect of privacy and family life has been used to provide protection for refugees from being separated from families, while article 3 on prohibition of inhuman and degrading treatment or punishment has been used to prevent a refugee from being returned to his country if there is likelihood that he or she will face persecution there.

The provision on privacy and family rights has been interpreted to prevent the separation of families. However, this provision is mostly applied to prevent separation of families already within the EU. The European Court decided that the expulsion of an alien, divorced from a Dutch woman, who had a Dutch daughter living in the Netherlands, violated the right to family unity granted by the European Convention. This is based on the fact that after expulsion it will become difficult for the expelled alien to visit his daughter. The court

⁹⁴ 1951 UN Convention Relating to the Status of Refugees, article 1 A (2) read in conjunction with its 1967 Additional Protocol article 2 gives the definition of a refugee without a distinction as to age so that technically a child must meet the same requirements. A few jurisdictions have modified the requirement to address specific child-related fears. See G Melander & G Alfredsson, (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 234 and 261 respectively.

⁹⁵ Article 33 of the 1951 UN refugees Convention. (n 94 above).

⁹⁶ Articles 10, 22 CRC, (n 1 above).

considered the relationship between a father and a small daughter to be under the protection of the European Convention.⁹⁷

In another case, however the Court upheld the decision of the Dutch government to deny entry to the nine-year old son of a father who had both Moroccan and Dutch citizenship. The Court stressed that the man's dual citizenship weakened his request to bring his son to live with him and concluded that they were only apart because of the father's decision to live in the Netherlands. He could move back to Morocco as he had retained his Moroccan nationality.⁹⁸ Tiburcio criticises the decision of the court and states that this is a clear situation where the right to family life should prevail.⁹⁹ It is however unlikely that the court would have confirmed the expulsion where the country of origin is embroiled in armed conflict. The latter situation is the contemplation of this dissertation.

The case law jurisprudence of the European Court with respect to the right to family unity of aliens has not been consistent as in certain cases much reliance is placed on the right to family unity and not in others. Although none of the cases deals specifically with the reunification of unaccompanied children as contemplated by this dissertation, it would seem, from an analysis of the jurisprudence of the Court and the principle of *non-refoulement* that family unity would be upheld where the child or parents has been granted refugee status in an EU country and returning the other party to their country of origin where they are likely to face persecution would violate international law.¹⁰⁰ From Lambert's analysis of European Court's jurisprudence, article 8 of the European Convention does not guarantee refugees an unlimited right to be joined by family members or protection from separation but it limits the

⁹⁷ *Berrehab Case*, ECHR (21 June 1988) Series A 138 quoted in C Tiburcio, *The human rights of aliens under international and comparative law* (2001) 120. See a similar decision in the *Beldjoudi's Case* (Judgement of 26 September 1992) (1992) 13 *Human Rights Law Journal* 413, involving an Algerian Mr. Beldjoudi born in France and married to a French woman and had received an expulsion order. The court held that the expulsion of an alien, who had family in the country of residence, violates the right to family life.

⁹⁸ *Ahmut v Netherlands* (Judgement of 28 November 1996) *The British Yearbook of International Law* (1997) 392-393, quoted in Tiburcio, (n 97 above) 122.

⁹⁹ Tiburcio, (n 97 above) 122. See also the decision in *Gul v Switzerland*, (Judgement of 13 February 1996) *The British Yearbook of International Law* (1996) 623-624, of Mr Gul, a Turkish Kurd, who entered the Switzerland upon an application for political asylum and subsequently became ill. He was living with his wife who also had serious health problems. His request to have his sons, separated from him for over a decade, to join him was rejected by Switzerland. The Court upheld the decision and stated that there was no violation of article 8, firstly because there had never been family life and secondly, because if the couple wished they could go back to Turkey and live together there.

¹⁰⁰ This is particularly so in situations where the country of origin is still embroiled in an armed conflict which had caused the family to flee in the first place. See H Lambert, 'Protection against 'refoulement' in Europe: Human rights law comes to the rescue' (1999) 48 *International and Comparative Law Quarterly* 515.

exercise of state's discretion in matters of entry, expulsion and deportation of non citizens.¹⁰¹ The inconsistencies in the jurisprudence of the European Commission and the European Court on the ambit of the European Convention's provision on the right to family unity present a challenge to the unaccompanied refugee child. It is difficult in the light of the present jurisprudence to predict the likely outcome of an application of an unaccompanied refugee child for family reunification presented to the European Court which is premised on article 8 of the European Convention.

Council Directive on Family Reunification

In December 1999, the European Commission issued a proposal for Council Directive on the right to family reunification.¹⁰² Acknowledging that entry for the purpose of family reunification has been the main form of legal immigration of third-country nationals, the Directive sought to establish a right to family reunification of third-country nationals legally residing in the territory of member states and the European Union.¹⁰³ The Council Directive on the Right to Family Reunification was adopted on 22 September 2003 and is currently one of the most important documents on family reunification within the EU framework.¹⁰⁴

The Directive, a binding instrument having reference to the Treaty of the European Community is binding on the members states of the EU except United Kingdom and Ireland and Denmark.¹⁰⁵ Certain interesting aspects of the Directive include the definition of an 'unaccompanied minor' which means

third country nationals and stateless persons below the age of eighteen, who arrive on the territory of the member states unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into care of such a

¹⁰¹ For a more comprehensive examination of the case law of the European Court on article 8 and the rights to family life, see H Lambert, 'European Court of Human Rights and the rights of refugees and other person in need of protection to family reunion' (1999) 11 *International Journal of Refugee Law* 427.

¹⁰² December 1, 1999, COM (1999), 638 def. 1999/0258 (CNS). On 6 September 2000, the European Parliament adopted an opinion on the Directive, approving the proposal of the Commission subject to amendments. On 10 October 2000, the European Commission presented an amended proposal to the European Parliament.

¹⁰³ The effect of the Directive would be harmonising practise in regard to family reunification. The practice of states in Europe differed in that respect although certain states had already recognised the right to family reunification. In France, the Council of States had decided that family reunification for aliens legally residing in France was general principle of law; the Constitutional Court of Italy ruled in 1995 that family reunification is a constitutional right of workers; see P Boeles, 'Directive on family reunification: Are the dilemmas resolved?' (2001) 3 *European Journal of migration and Law* 61.

¹⁰⁴ See Council Directive (n 75 above).

¹⁰⁵ Preamble, Council Directive (n 75 above).

person, or minors who are left unaccompanied after they enter the territory of member states.¹⁰⁶

This definition expands the general international law definition of unaccompanied minors by including minors who are left unaccompanied after entry into the territory of a member state of the EU. 'Family members' for the purpose of reunification also receives a broader definition by the Directive which includes applicant's spouse and the minor (including adopted) children of both of them; unmarried partner living with the applicant in a durable relationship with the applicant, where the legislation of the member state recognises such union as corresponding to those of married couples; relatives in the ascending line of the applicant, his or her spouse or unmarried partner who are dependent on them for support and have no means of support in country of origin; children of the applicant, his or her spouse or unmarried partner who being of full age are objectively unable to satisfy their own needs by reason of their state of health.¹⁰⁷

The Directive also enumerates grounds on which family reunification may be refused.¹⁰⁸ A member state may refuse entry for the purpose of family reunification on grounds of public policy, domestic security and public health and the grounds of public policy and domestic security must be based exclusively on the conduct of the person.¹⁰⁹ Even if entitled to sponsor the entry of a family member, there is the additional challenge of the definition of specific relationships that qualify as family members for the purpose of reunification. Under the Directive mentioned above, if the refugee is not formally married to the spouse seeking reunification, it is in the asylum state's discretion to decide whether or not to allow entry for reunification.¹¹⁰ A second and subsequent spouse in a polygamous marriage cannot be allowed at all.¹¹¹ This raises the issues outlined earlier on the effect of subjective definitions of family on the realisation of the right to family reunification.

The Directive also makes it mandatory for member states to 'authorise the entry and residence for the purpose of family reunifications' of the 'first degree relatives in the direct ascending line' of the unaccompanied minor; member states may authorise entry and residence for the purposes of family reunification of the other members of the family where

¹⁰⁶ Article 2(f) Council Directive, (n 75 above).

¹⁰⁷ See Council Directive (n. 75 above) article 4.

¹⁰⁸ See Council Directive (n. 75 above) article 6.

¹⁰⁹ Boeles, (n. 103 above) 63.

¹¹⁰ Council Directive (n 75 above) article 4(1).

¹¹¹ Council Directive (n 75 above) article 4(3).

direct ascending line relatives cannot be traced.¹¹² This provision exempts the unaccompanied minor from the provision of article 4(2)(c) applicable to adult sponsors who may only be permitted reunification with first degree relatives in the ascending line where they are dependent on them (the sponsor and his or her spouse) and do not enjoy proper family support in the country of origin.

On 3 October 2003, the EU Commission announced that, whereas the deadline for national implementation of the Directive, setting out the rules for the reunification of family members of third-country nationals legally residing in member states of the EU had expired, it will take appropriate procedural steps according to powers conferred on it by the Treaty establishing the European Community.¹¹³ As at that date, only six member states had notified the commission of their implementing measures, namely Belgium, Estonia, Latvia, Lithuania, Poland and Slovenia.¹¹⁴ Apart from Denmark, Ireland and the United Kingdom who are not bound by the Directives, the other member states have not notified the EU Commission of their implementation measures.¹¹⁵ This non-implementation by certain member states remains a major obstacle to the realisation of the reunification right of the unaccompanied child.

As mentioned above, the jurisprudence of the European Commission and Court has not been consistent, contributing to difficulties in clearly determining the fate of an unaccompanied refugee child in a matter for family reunification where family members are not yet within the EU, since the cases handled so far deal more with prohibition of separation rather than reunification of separated families.¹¹⁶ Although a better framework is provided for by the Council Directive on family reunification, the definition of family is too restrictive and discriminatory since it provides a less generous standard than that afforded to persons granted temporary protection in the event of mass influx (including refugees).¹¹⁷ Another problem with the protective framework under the European Union is the provision that application for family reunification must be filed within three months of the formal

¹¹² Council Directives, article 10(3)(a), (b).

¹¹³ OHCHR, (n 10 above) 16.

¹¹⁴ OHCHR, (n 10 above) 16.

¹¹⁵ OHCHR, (n 110 above) 16.

¹¹⁶ See generally the analysis of the jurisprudence of the European Commission on Human Rights and the European Court of Human Rights in Turbicio (n 97 above) 120

¹¹⁷ Under the European Union 2001 Directive on Temporary Protection, article 15 a person granted temporary protection in the case of mass influx have the additional right to sponsor the admission of an unmarried partner, and may apply to be united with any other close relatives who were part of the family unit and dependent upon the refugee in the country of origin. See Hathaway (n 80 above) 536-537.

recognition of the refugee status.¹¹⁸ After this time, family reunification will be subject to investigation where the refugee may have to provide proof of ability to provide for the sponsored family members.¹¹⁹ This latter provision does not take into cognisance the fact that it may take many months to trace family members who have been separated as a result of armed conflict in the country of origin. In recognition of the fact that family tracing in most cases takes a long time, the UNHCR's Guidelines¹²⁰ provide a period of two years for tracing of family members before adoption can take place. It is submitted that the three months period provided for by the Directives is not reasonable in the circumstance.

However, the issues raised above on the Directive do not change the fact that it is perhaps the most favourable instrument on family reunification for the unaccompanied refugee child.

3.2.2 United Kingdom

Though the United Kingdom (UK) has extensive international and domestic obligations towards children generally, its reservation to article 22 of the CRC concerning the protection of refugee children supports the view that the UK does not believe refugee children should be afforded the same rights as other children.¹²¹ According to Russell, UK asylum law carries no recognition of the vulnerability of unaccompanied refugee children, nor are other international or domestic laws applied to refugee children in a consistent manner.¹²² This is despite the fact that a large number of unaccompanied minors seeking asylum continue to arrive in the UK.¹²³ The effect of the UK's reservation to article 22 of the CRC is that decision-makers and the courts when challenging policies against unaccompanied children cannot rely it upon the CRC.¹²⁴

The instruments that provide the closest protection of family rights of the unaccompanied refugee child in the UK are the 1950 European Convention which has been incorporated into UK, the 1992 Treaty on the European Union (Maastricht Treaty) and the Immigration Rules

¹¹⁸ Council Directive, (n 75 above) article 7(1).

¹¹⁹ Council Directive, (n 75 above) article 12(1).

¹²⁰ UNHCR, (n 24 above) 53.

¹²¹ S Russell, 'Unaccompanied Refugee Children in the United Kingdom' (1999) 11 *International Journal of Refugee Law* 126.

¹²² Russell, (n 121 above) 128.

¹²³ For example according to available data 2833 unaccompanied refugee children sought asylum in the UK in 1998 compared to 1105 in 1997. See A Hunter, 'Between the domestic and the international: The role of the European Union in providing protection for unaccompanied refugee children in the United Kingdom' 3 *European Journal of Migration and Law* 383.

¹²⁴ The court rejected the attempts of the appellants to rely on the CRC in the case of *R v Secretary of States for the Home Department, ex parte Khan* (1998) INLR 206 at 216 and *R v Secretary of State for the Home Department ex parte Ahmed, Patel & ors* (1998) INLR 570 at 583 because of the reservation.

for Refugee Children. By incorporating the European Convention into UK law, the UK is bound by the jurisprudence of both the European Commission and the European Court especially in regard to protection of the family unity and *non-refoulement*.¹²⁵

As a member of the EU, the UK faces obligations to unaccompanied refugee children under EU law. The Maastricht Treaty states that asylum policy is a matter of common interest to be dealt with in compliance with the European Convention and the 1959 UN Refugee Convention.¹²⁶ Since then the EU has passed several resolutions on the treatment of unaccompanied refugee children.¹²⁷ The UK however, opted out of the Amsterdam Treaty in the immigration and asylum field but nevertheless under an obligation not to do anything which is inconsistent with the Treaty as a whole and to act in good faith.¹²⁸

The Immigration Rules for Refugee Children establish a minimum level of good practice and setting out that in some procedural matters the welfare of the child must be considered, for example providing that asylum application from an unaccompanied child involves greater effort on the part of the decision maker in eliciting evidence.¹²⁹ In practice, however applications for asylum by unaccompanied children are characterised by long delays in clear violation of the UK Children's Act which provides for speedy decisions concerning children.¹³⁰ These delays jeopardise the chances of the unaccompanied child of being granted refugee status which is the prerequisite to family reunification in the UK.

Technically, with regard to family reunion for the asylum seeker who has been recognised as a refugee, the UK will normally permit the reunion of immediate family members. Under the

¹²⁵ See generally the discussion on the jurisprudence of the ECHR para 4.2.1 above.
¹²⁶ 1992 Treaty on the European Union, article K.1. Available at <<http://www.eurotreaties.com/maastrichttext.html>> (accessed 20 September 2006).
¹²⁷ For example article v.26, EU Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures states that 'provision must be made for unaccompanied minors seeking asylum to be represented by a specifically appointed adult or institution if they do not have capacity under national laws... these persons are to protect the child's interest.' Article 3 EU Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries states that, '(4) For the purposes of applying this Resolution, member states should provide as soon as possible for the necessary representation of the minor: (a) legal guardianship, or (b) representation by a (national) organisation which is responsible for the care and well-being of the minor, or (c) other appropriate representation. (5) Where a guardian is appointed for an unaccompanied minor, the guardian should ensure, in accordance with national law, that the minor's need (for example, legal, social, medical or psychological) are duly met.'
¹²⁸ Russell, (n 121 above) 132. See also the Vienna Convention on the Law of Treaties 1969, (91 above) article 18.
¹²⁹ Russell, (n 121 above) 138.
¹³⁰ Section 1(2) UK Children's Act of 1989 provides that 'in any proceedings in which the question with respect to the upbringing of the child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.'

policy, people recognised as refugees immediately become eligible to be joined by the spouses and minor children provided they lived together as a family before the sponsor travelled to seek asylum. Other dependent relatives may be admitted if there are compelling compassionate circumstances.¹³¹ According to the Diplomatic Service Procedures- Entry Clearance Volume 1- General Instructions (DSP Instructions), only pre-existing families are eligible for family re-union and that is the spouse, civil partner and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum.¹³² Other members of the family may be allowed into the UK if there are compelling, compassionate circumstances. However, the DSP Instructions are discriminatory against the unaccompanied child who has been recognised as a refugee as his siblings and parents are not entitled to family reunion. Their applications are subject the compelling, compassionate circumstances qualification.¹³³ Although the UK has entered a reservation to the provision on family reunification in the CRC, it is still bound by the general non-discrimination provisions of the CRC and general international law,¹³⁴ as well as the requirement to make the best interest of the child the primary consideration in all actions concerning children.¹³⁵ Russell is of the opinion that one reason for the challenges faced by the unaccompanied refugee child in the UK is that the classic picture of a refugee as 'a young politically active male is still prevalent.'¹³⁶ This picture however impacts negatively on the rights of the unaccompanied refugee child as he is denied the rights available to a similarly qualified adult male refugee.

3.3 North America

North America hosts a good number of the refugee population in developed countries. According to the UNHCR's *State of the World's Refugees 2006* North America was host to 562,000 refugees and 291,000 asylum seekers as at 1 January 2005.¹³⁷ The United States and Canada host a large percentage of these numbers. Since most of these refugees are children,¹³⁸ it is important to examine specific protective mechanisms for children refugees

¹³¹ *Munim v Secretary of State for the Home Department*, Lexis Unreported Decisions (English Court of Appeal, 3 May 2000) quoting the statement of Mr. Nicholas Baker MP to the House of Commons, 17 May 1995. See Hathaway (n 80 above) 544.

¹³² Diplomatic Service Procedures, Entry Clearance Volume 1- General Instructions (5 December 2005), chapter 16.2 available on <<http://www.ukvisas.gov.uk>> (accessed 26 October 2006). The DSP Instructions gives guidance on the procedure for handling applications for reunification of family members with a person in the UK.

¹³³ DSP Instructions (132 above) article 16.2.

¹³⁴ CRC, article 2, (n 1 above).

¹³⁵ CRC, article 3, (n 1 above).

¹³⁶ Russell, (n 121 above) 140.

¹³⁷ UNHCR, *State of the world's refugees 2006*, (2006) 10.

¹³⁸ UNHCR (n 137 above) 20.

generally and unaccompanied children specifically, especially in relation to their rights to family unity and reunification.

3.3.1 United States

About 5000 unaccompanied children enter the United States (US) each year.¹³⁹ Although the US has not ratified the CRC, it signed the CRC on 16 February 1995 and thus is under an obligation to refrain from any acts which would defeat the objects and purpose of the treaty.¹⁴⁰ Similarly as a state party to the 1967 Additional Protocol to the 1951 Refugees Convention, it is also under obligations to accord protection to persons granted refugee status within its territory which would include unaccompanied refugee children.¹⁴¹

The greatest challenge faced by the unaccompanied minor entering the US is the non-differentiation in grounds of asylum claims between children and adults. Such that, often without representation, these unaccompanied children must satisfactorily prove persecution on one of the five traditional grounds listed under the 1951 UN Refugees Convention and its 1967 Additional Protocol¹⁴² and incorporated into US laws by the US Refugee Act of 1980.¹⁴³ This is a major handicap since by virtue of their age and cultural differences they are unable to properly articulate their fear of persecution such that generally unaccompanied children fare worse than other asylum-seekers.¹⁴⁴

¹³⁹ J Dalrymple, 'Seeking asylum alone: Using the best interests of the child principle to protect unaccompanied minors' (2006) 26 *Boston College Third World Law Journal* 131.

¹⁴⁰ Vienna Convention on the Law of Treaties, 1969, (n 91 above) article 18. The US had also signed and ratified the two additional protocols to the CRC on the use of children in armed conflict and the on prohibition of the sale of children, child prostitution and child pornography. See <<http://www.childrightscampaign.org>> (accessed 20 October 2006).

¹⁴¹ The US is not a signatory to the 1951 Refugee Convention although it has acceded to the 1967 Additional Protocol, (n 94 above). However the US Refugee Act 1980 incorporated certain provisions of the 1959 Refugees Convention.

¹⁴² For a person to qualify as a refugee under the UN Refugee Convention he or she must prove persecution or fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion. See 1951 UN Convention Relating to the Status of Refugees, article 1 A (2) read in conjunction with its 1967 Additional Protocol article 2, (n 94 above).

¹⁴³ The US Refugee Act is codified by the Immigration and Nationality Act (INA) which defines a refugee in terms of the UN Refugee Convention as a person who is 'unable or unwilling... to return to their country because of persecution or fear of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.' See Immigration and Nationality Act § 101 (a)(42)(A). Available at <<http://www.fourmilab.ch/uscode/8usc/8usc/htmi>> (accessed 22 August 2006).

¹⁴⁴ According to Amnesty International, unaccompanied minors are seven times less likely to receive refugee status than other applicants aged 25 years and above. See Amnesty International, *Most vulnerable of all: The treatment of unaccompanied children in the UK* (1999) 5. The situation in the US though different is not much better, according to the Human Rights Watch's Children's Rights Project unaccompanied children in the US detained by the INS are often denied access to their attorneys and relatives and many are not eligible for release after posting bond. See Human Rights Watch, *Slipping through the cracks: Unaccompanied Children detained by the US Immigration and Naturalization Service* (1997) available at www.hrw.org/reports/1997/uscrcks/ (accessed 28 October 2006).

The major instruments that advance the best interests of the child in domestic matters and relating particularly to the unaccompanied child in the US are the INS Guidelines for Children's Asylum Claims and the Unaccompanied Alien Child Protection Act.¹⁴⁵ However, these instruments deal more with the treatment of unaccompanied minors who enter the US than with family reunification of these children.

The Immigration and Naturalization Service Guidelines for Children's Asylum Claims (INS Guidelines) provides greater procedural protection incorporating the best interest of the child principle for the unaccompanied child-seeking asylum in the United States. It provides such special procedural protection such as creating a child-friendly environment and recognises that children 'may not present their cases in the same way as adult' and suggests interview techniques that 'seek to ensure that the applicant feels comfortable and free to discuss his claim.'¹⁴⁶ While keeping the onus of proving his or her asylum claim on the child, the INS Guidelines follow the UNHCR recommendation that children's testimony should be given a liberal benefit of doubt with respect to evaluating a child's alleged fear of persecution.¹⁴⁷ The positive effect of the INS Guidelines is that it has improved the procedure for evaluating the asylum claim of the unaccompanied child which was hostile to the unaccompanied child.¹⁴⁸

The Unaccompanied Alien Child Protection Act which has passed the US Senate and is pending in the House, build upon the INS Guidelines and has the a few major highlights for the protection of the unaccompanied child. These are the establishment of a system to provide pro-bono counsel for unaccompanied children to represent them and inform them of their rights; the appointment of guardians *ad litem* to ensure the best interest of the child is provided for in court; and to make sure that these unaccompanied children are placed in

¹⁴⁵ The Unaccompanied Alien Child Protection Act 2005 (UACPA) was reintroduced to the Senate on 24 January 2005 and reintroduced into the House of Commons on 8 March 2005, the precursor to the 2005 Act that is the Unaccompanied Alien Child protection Act 2001 had been somewhat rendered redundant with the passing of the Homeland Security Act of 2002. The 2005 Bill has passed through the US Senate but is still pending before the House. See Dalrymple, (n 139 above) 153.

¹⁴⁶ Immigration and Naturalization Service (INS) Guidelines for Children's Asylum Claims 23 (1998) available at <http://usics.gov/graphics/lawregs/handbook/10a_chldrGdlns.pdf> (accessed 10 October 2006).

¹⁴⁷ INS Guidelines (n 146 above) 16.

¹⁴⁸ See generally Dalrymple, J.K (n 139 above). The ills of this system was captured aptly by the Californian District Court in *Perez-Funez v District Director, Immigration and Naturalisation Service* 619 F. Supp 656 where the court noted that 'the unaccompanied child of tender years encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different. The law is complex. The children generally are questioned separately. In short, it is obvious to the Court that the situation faced by unaccompanied minor aliens is inherently coercive.'

shelters or foster care and that detention is only a last resort.¹⁴⁹ The US Refugee Act provides for the financial maintenance, placement and provision of alternative care for the unaccompanied, a compilation of the last address of the parent of the child but is silent on the issue of reunification.¹⁵⁰

Although none of these instruments provides explicitly for family reunification of the unaccompanied minors, they provide an initial mechanism for the realisation these rights which are the effective handling of and granting of refugee status to the unaccompanied child. The US government's refusal to ratify the CRC remains a major obstacle to the implementation of the internationally guaranteed rights to family reunification of the unaccompanied child.¹⁵¹ In the absence of a legal framework specifically addressing the issue of family reunification in the US, the about 5000 unaccompanied children who flee conflict and other forms of terror in their countries of origin, will have to sacrifice their right to family unity as the price for safety.

3.3.2 Canada

As in many countries, despite Canada's long history of providing asylum to those fleeing conflict in various part of the world, family reunification of unaccompanied children is the most serious defect of Canada's treatment of separated children.¹⁵² Canada has a federal system of government with a division of power between the federal government in Ottawa and the ten provincial (and three territorial) governments. The federal government is empowered to make laws in respect of naturalisation and aliens, while the provincial legislatures have jurisdiction to make laws with respect to the property and civil rights of persons living in the province and among others asylum.¹⁵³ The effect is that immigration laws have not developed evenly across the provinces however Quebec provides the most satisfactory situation for unaccompanied separated children.¹⁵⁴ The situation in Quebec will be examined as the best framework within the Canadian system. The only accommodation for children in

¹⁴⁹ M Bucci, 'Young, alone and fleeing terror: The human rights emergency of unaccompanied immigrant children seeking asylum in the United States' (2004) 30 *New England Journal on Criminal and Civil Confinement* 297-298.

¹⁵⁰ US Refugee Act 1980, codified in the Immigration and Nationality Act, Title 4, chapter II, ACT412(2)(A)(B) available on <<http://www.acf.hhs.gov/programs/orr/policy/refact3.htm#refact3>>(accessed 25 October 2006).

¹⁵¹ The US is one of only two states that has failed to ratify the CRC. The only other country being Somalia which has not has an effective government for many years. The attitude of the US government towards rights of immigrant children has been worsened since 11 September 2001 and the countries general fear of terrorism.

¹⁵² G Sadoway, 'Canada's treatment of separated refugee children' (2001) 3 *European Journal of Migration and Law* 349.

¹⁵³ Constitution Act, 1867, U.K. 30-31 Victoria, c. 3, section 91 and 92. Sadoway, (n 152 above) 351.

¹⁵⁴ Sadoway, (n 152 above) 356.

Canada's immigration law is the requirement that minors must have a 'designated representative' (DR), usually a parent or guardian, at any inquiry or hearing concerning them under the Act.¹⁵⁵ Thus under the Act, the only protection the unaccompanied child is entitled to is an adult representation at the refugee status determination hearing.

Upon the arrival of an unaccompanied child in Quebec, the Citizenship and Immigration Canada (CIC) officials contact *Service d'Aide aux Refugies et Immigrants de Montreal Metropolitain* (SARIMM). SARIMM is a para-public organisation deriving authority from the Minister of Social Services of Quebec and with a mandate to provide social work assistance to refugees and immigrants in the greater Montreal area.¹⁵⁶ SARIMM provides designated representative, who in turn retains a counsel for the unaccompanied child's refugee status determination hearings. SARIMM also acts on behalf of the child in subsequent legal proceedings, for example ensuring that in the case of a successful refugee status determination an application for permanent residence status is filed on behalf of the child and in a timely manner.

SARIMM also is often involved with the assistance of the ICRC, in tracing the parents or other family members of the unaccompanied child. If there is possibility of reuniting the family in Canada, SARIMM would make the necessary applications.¹⁵⁷ In collaboration with the *Centre Jeunesse de Montreal* (Ministry of Social Services), SARIMM provides placement for children in foster care, group homes and semi-dependent living pending family reunification or permanently.

Although, other provinces have policies with respect to the unaccompanied child, the Quebec model is the most satisfactory for the protection of the general rights of the unaccompanied child and in particular case, the right to family reunification. The empowerment of such para-public and autonomous agencies with government support and funding is a positive development in the realisation of the rights to family unity and reunification of the unaccompanied refugee child and a model which other states could learn from.

Generally with respect to family reunification of families of those granted refugee status, Canadian law is a bit stringent with conditions that the refugee must satisfy in order to

¹⁵⁵ Immigration Act, 1976, R.S.C 1985, c. 1-2, sections 29 and 69.

¹⁵⁶ If the child arrives after working hours, the child is referred to Centre Jeunesse (Youth Centre) and subsequently referred to SARIMM.

¹⁵⁷ Sadoway, (n 152 above) 358.

reunified with family. Canada requires the refugee to prove his or her financial ability and willingness to meet the needs of some or all categories of sponsored family members, the refugee must undertake 'to provide housing, care and maintenance and normal settlement needs of the applicant and accompanying dependents for up to ten years'.¹⁵⁸ Such a requirement will have adverse effects on the realisation of the unaccompanied child's rights to family unity and reunification either as a sponsoring refugee or dependent of the resident-refugee family member.

3.4 African system

At the end of 2005 the total refugee population in Africa was estimated at 41% of the global refugee figure of 8.4 million which is an estimated 3.4 million refugees.¹⁵⁹ More than half of this population are children under 18 years.¹⁶⁰ At least five percent of the population of refugee children are unaccompanied. Despite the existence of such a high number of unaccompanied refugee children in Africa and the recognition of the peculiar vulnerability of their separation from parents and caregivers, the African human rights system does not have a special protection mechanism addressing their plight.¹⁶¹ However, with the coming into force of the African Charter on the Rights and Welfare of the Child (African Children's Charter), fundamental and profound changes in the protection of children generally and unaccompanied minors in particular have been introduced into the African human rights system.¹⁶²

Article 23(1) of the African Children's Charter guarantees to the unaccompanied child not only the expressly provided rights in the Charter but also rights guaranteed under other human rights and humanitarian law instruments that the state is party to. By ratifying the Charter, States are bound to international law standards of protection of the unaccompanied refugee minor.¹⁶³

¹⁵⁸ Hathaway, (n 80 above) 537.

¹⁵⁹ UNHCR, *Global refugee trends 2005* (2006) 3.

¹⁶⁰ UNHCR, (n 159 above) 7.

¹⁶¹ Kaime T, 'From lofty jargons to durable solutions: Unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child' (2005) 16 *International Journal of Refugee Law* 337.

¹⁶² Article 23(1) African Children's Charter provides that, 'states parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status and who is considered a refugee in accordance with international and domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are parties.' (n 4 above).

¹⁶³ Article 23(1) African Children's Charter (n 4 above).

The African Children's Charter identifies two key responses with respect to unaccompanied refugee children. These are with regards to the tracing of parents for purposes of reunification and placement in alternative care where the former fails. Article 23(2) of the African Children's Charter provides,

States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.¹⁶⁴

Once family is traced, reunification is fairly matter of course in most asylum countries for family members as the challenge is only with arrival within the territory of the asylum country.¹⁶⁵ The absence of major travel logistics for refugees from African countries, which sometimes inhibit 'arrival within territory' for family members of refugees in asylum countries in Europe and North America also aids quicker reunification of family members in African countries. The African Children's Charter further provides extensively for adoption procedure,¹⁶⁶ and provides equal protection for refugee children and internally displaced children, and innovative provision which the CRC omitted.¹⁶⁷ It is therefore not surprising that African States offer better protection, comparatively, to unaccompanied refugee minors. There are few legal impediments for reunification of the unaccompanied child with family in most African countries as these countries normally rely on group status determination of refugees, the acceptance of members of refugee families able to reach the their territory tends to occur as a matter of course, with no differentiation made between the arrival of some family members as part of an initial influx and the subsequent arrival of others.¹⁶⁸

The problem, however, is that the refugee laws of most African asylum countries are either old laws which do not provide for the relatively contemporary issues of protection of unaccompanied refugee children and their rights to family reunification,¹⁶⁹ or currently have a refugee bill being considered by their parliaments.¹⁷⁰ Uganda, however, recently passed a very progressive refugee law which addresses the issues of refugee children and family

¹⁶⁴ See generally article 25 African Children's Charter, (n 4 above).

¹⁶⁵ Hathaway, (n 80 above) 533. Uganda for instance, grants equal rights to members of the refugee's family who come within its territory.

¹⁶⁶ Article 24 African Children's Charter, (n 4 above).

¹⁶⁷ Article 25 African Children's Charter, (n 4 above).

¹⁶⁸ Hathaway, (n 80 above) 533.

¹⁶⁹ For example in Zambia, the Refugee Control Act Chapter 120 of 1970 is the law that governs issues of refugee and asylum seekers. The Act has no provisions for the treatment of refugee children or family reunification. Chad which is one of the major asylum countries in Africa has an equally outdated law.

¹⁷⁰ The Kenyan and Tanzanian parliaments are yet to pass the respective refugee bills pending for some years before them.

reunification rights, and which captures the general practice of asylum countries within the region. The relevant provisions of the law are mentioned below.

3.4.1 Uganda

Uganda is on the UNHCR's list of top ten asylum countries recording 24,000 refugee arrivals in 2005.¹⁷¹ The majority of refugees arriving in Uganda are from Sudan, Democratic Republic of Congo, Burundi and Rwanda.¹⁷²

Uganda has a new Refugee Act (the Act) which repealed the Control of Alien Refugee Act, cap 62¹⁷³ and which provides protection for unaccompanied refugee children and for family reunification rights. The Act provides under the heading 'Family of Recognised Refugee'

26.(1) Every member of the family of a recognised refugee who enters Uganda shall enjoy the same protection as the recognised refugee and shall-

- (a) be permitted to enter and remain in Uganda for as long as the recognised refugee is permitted to remain; and
- (b) be issued with all necessary documents relevant to his or her status.

(2) On the death of a recognised refugee, any member of the family of the recognised refugee in Uganda shall continue to enjoy the protection referred to in subsection (1) of this section and shall remain in Uganda until otherwise disqualified.

(3) Nothing in this section shall prevent a member of the family from applying for the grant of refugee status in accordance with this Act.¹⁷⁴

The exceptional highlights of this provision are (a) the right is granted to 'every member of the family; since states are enjoined to apply the same definition of family legally recognised and practised within their territory to refugees for the purpose of family reunification¹⁷⁵ which would in the circumstance of Uganda include customary law marriages and polygamous families. (b) the right granted is the same as those already enjoyed by the recognised refugee; (c) the right continues to apply to family members of deceased recognised refugee unless they are otherwise disqualified; and (d) the right applies to all family members who arrive in the territory of Uganda, so that issues of detention of illegal immigrant which is a feature of refugee laws in the West will not apply in Uganda.

¹⁷¹ UNHCR, (n 159 above) 5.

¹⁷² UNHCR, (n 137 above) 15.

¹⁷³ The Control of Alien Refugee Act is similar to the refugee laws of some of the asylum countries mentioned above in terms of content and non-provision for refugee children.

¹⁷⁴ The Refugees Act 2003.

¹⁷⁵ UN General Assembly Resolution (n 68 above).

In the case of family members of the recognised refugee who are not yet in Uganda, the Act provides that the 'recognised refugee may apply to the Eligibility Committee for permission for a member of his or her family to enter and reside in Uganda for the purposes of reunion.'¹⁷⁶ The Eligibility Committee is empowered to grant permission to 'enter and reside' in Uganda of 'any family member of a recognised refugee' as well as any 'dependent of the family member of the recognised refugee'.¹⁷⁷

The Refugees Act 2003 accords the same treatment to refugee children as is enjoyed by nationals with regard to elementary education, and also guarantees for the refugee child the rights and freedoms contained in the Ugandan Children's Statute No. 6 of 1996, the Africa Children's Charter, the CRC and the UN Refugee Convention.¹⁷⁸ As evidenced from the above examination, there is a legal framework which guarantees the rights of the unaccompanied refugee child to family unity and reunification in Uganda. A replication of similar refugee bills as Uganda's in other African asylum countries will go a long way in providing a justiciable legal framework to implementing family reunification rights of the unaccompanied refugee child.

3.5 Conclusion

This chapter has examined the jurisprudence with respect to protection of the rights of family unity and reunification particularly as it affects the unaccompanied refugee child in Europe, North America and under the African system as a reflection of state practice in the regions and countries discussed. It obvious from the examination of the practice and jurisprudence of states that a legal framework which recognises and protects the rights to family unity and reunification of the unaccompanied child is a *sine qua non* for effective protection of the refugee children who find themselves in the territory of asylum countries unaccompanied.

As noted earlier on, the responsibility for family reunification is shared between states and specialised agencies. Having examined the framework of states in this chapter, the next

¹⁷⁶ Article 27(1) The Refugees Act 2003.

¹⁷⁷ Article 27(4) The Refugees Act 2003. This provision further widens the scope of protection to include dependents of the family member of the recognized refugee who may not necessarily be family members of the recognized refugees.

¹⁷⁸ Article 32 The Refugees Act 2003. The effect of this provision is that the reunification rights guaranteed under the CRC and the African Children's Charter apply equally to the unaccompanied refugee child in Uganda.

chapter will examine the framework of the specialised agencies and their mandate as it relates to family reunification of the unaccompanied refugee child.

CHAPTER FOUR

PROTECTING FAMILY UNITY RIGHTS: PRACTICE OF SPECIALISED AGENCIES

4.1 Introduction

This chapter will examine the implementation of the rights to family reunification from the practice of specialised agencies working in this area. The preceding chapter clearly established the existence of the rights to family unity and reunification and the obligation of states towards their implementation; however, states have generally been passive in the implementation of these rights. This is perhaps because the relevant provision of the CRC which provides for the family reunification of refugee children seems to place primary obligation in this regard on specialised agencies, with states playing only complementary role.¹⁷⁹ This chapter seeks to examine the framework for protection and the practices of these specialised agencies with a view to determining how effective they have been in protecting the unaccompanied refugee child's rights to family unity and reunification.

4.2 Overview of specialised agencies

The provision on family reunification of unaccompanied refugee children places a major responsibility in this regard on the 'United Nations and other competent inter-governmental organisations [and] non-governmental organisations.'¹⁸⁰ There are many inter-governmental and non-governmental organisations working in the area of reunification of unaccompanied refugee children. However for the purpose of this chapter, the two major ones with specific mandates related to the family reunification of unaccompanied refugee children, will be discussed specifically although the practices discussed include those of other agencies and non-governmental organisations (NGOs) working in the area of family reunification. The two agencies to be examined in this chapter are the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR).

¹⁷⁹ Article 22 of the CRC '...State Parties shall provide, as they consider appropriate, co-operation in any effort by the United Nations and other competent inter-governmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.' (n 1 above).

¹⁸⁰ Article 22 CRC, (n 1 above).

4.2.1 International Committee of the Red Cross (ICRC)

Historical background

The ICRC was formed in 1863 as the International Committee for the Relief of the Wounded. The idea for the ICRC was inspired by the horrors of the battle between the Austrians and the French which left over 40.000 soldiers of the two armies dead or wounded and strewn on the battlefields in Solferino, a town in northern Italy on 24 June 1859. Henry Dunant, a Swiss businessman passing by the fields was horrified by the sight and solicited the help of the local people to treat the wounded regardless of the nationality of the soldiers. Upon his return to Switzerland he published *The Memory of Solferino*¹⁸¹ in which he appealed for the formation of a relief society with international protection in peacetime to care for the wounded in time of war. At an international conference convened in October 1863 with the representatives of 16 states and four philanthropic institutions, the distinctive emblem of the Red Cross on a white background was adopted thus, giving birth to the Red Cross.¹⁸² In 1864, the first international humanitarian law treaty, the Geneva Convention for the Amelioration of the Conditions for the Wounded in the Armies in the Field¹⁸³ was adopted to formalise protection for medical services on the battle field and to gain international recognition of the emblem of the Red Cross and its ideal.¹⁸⁴

ICRC and family reunification

The ICRC has a Central Tracing Agency (CTA) which is responsible for restoring contact between family members in all situations of armed conflict or internal violence.¹⁸⁵ The history of the ICRC-CTA goes back to the Franco-Prussian war in 1870, in a small Swiss town called Basel a reception area had been set up for the wounded on both sides. The doctors discovered that the soldiers were in greater distress because their families did not know whether they had died or survived the war. The ICRC representatives soon discovered the necessity to set up an information bureau on neutral ground in order to convey messages to anxious families on the conditions of their relatives involved in the conflict. The International Prisoner of War Agency was established in 1914 at the beginning of the First World War

¹⁸¹ H. Dunant, *A memory of Solferino* (1862). An online copy available at <<http://onlinebooks.library.upenn.edu/webin/books/lookupid?key=olbp16247>> (accessed 2 October 2006).

¹⁸² See *Geneva, the calling of an international city* <<http://www.ville-ge.ch/en/decouvrir/sdn/croix-rouge/htm>> (accessed 2 October 2006).

¹⁸³ The Swiss government convened a diplomatic conference with the 12 participating states adopting the treaty.

¹⁸⁴ ICRC, *Discover the ICRC* (2005) 6.

¹⁸⁵ J. Kuper, *International law concerning child civilian in armed conflict* (1997) 161.

(WWI) to consolidate ICRC tracing and correspondence activities which had been going on for a while.¹⁸⁶ After the Second World War (WWII), the International Tracing Agency was established under the auspices of the United Nations and coordinated by the United Nations Relief and Rehabilitation Administration, and subsequently by the International Refugees Organisation before being handed over to the ICRC in 1955.¹⁸⁷ The CTA has been responsible for restoring family contacts and effecting the reunification of hundreds of thousands of people dispersed by armed conflict. For example, between 1998 and 2003, as a result of the efforts of the CTA, about 5000 children separated from their families during the conflicts in Angola and the Democratic Republic of Congo were reunited with their families.¹⁸⁸

4.2.2 United Nations High Commissioner for Refugees (UNHCR)

Historical Background

The U.N. General Assembly established the United Nations High Commissioner for Refugees (UNHCR) in 1950 following various attempts at rehabilitation undertaken by the U.N. in the aftermaths of World War II.¹⁸⁹ The office was created by UN General Assembly Resolution 428 (V) 1950 and began operations on 1 January 1951.¹⁹⁰ The UNHCR had an initial limited mandate of three years to resettle 1.2 million European refugees displaced as a result of WWII. The mandate was extended every five years in the face of continued global humanitarian crises; however in December 2003 the UN General Assembly decided to remove the time-based mandate of the agency until international refugee problems were solved.¹⁹¹ In the over half century of its existence, UNHCR has offered assistance to more than 50 million people and has twice won the Nobel Peace Prizes in 1954 and 1981.¹⁹²

UNHCR and family reunification

¹⁸⁶ I Abrams, *The Noble Peace Prize and laureates: An illustrated biographical history, 1901-2001* (2001) 85.

¹⁸⁷ ICRC, *History of the Central Tracing Agency of the ICRC* <<http://www.icrc.org>> (accessed 26 September 2006).

¹⁸⁸ ICRC, *Armed conflicts and family ties* (2004) 5.

¹⁸⁹ Statute of the Office of the United Nations High Commissioner for Refugees, Resolution 428(v) of 14 December 1950. See G Melander & G Alfredsson (eds) *The Raoul Wallenberg Institute compilation of human rights instruments* (1997) 337.

¹⁹⁰ UNHCR, *Partnership: An operations management handbook for UNHCR's partners* (2003) 3.

¹⁹¹ M Zeick, *UNHCR and voluntary repatriation of refugees: A legal analysis* (1997) 70.

¹⁹² UNHCR, *Helping refugees: An introduction to the UNHCR 2004 Edition* <<http://www.unhcr.org>> (accessed 26 September 2006).

The UNHCR has five Senior Regional Advisors for refugee children covering the East and Horn of Africa and the Great lakes; West and Central Africa; Southern Africa; Eastern Europe, Central and South-West Asia; and North Africa and the Middle East. A Senior policy advisor based in Brussels, Belgium focuses solely on the realisation of rights and best interests of separated and unaccompanied children who have come to or from across Europe. In regard to separated children, including their reunification, the UNHCR works in partnership with other UN and non-governmental organisations in particular UNICEF, the International Save the Children Alliance and the ICRC. Together with these partner organisations, the UNHCR has been involved in collaborative efforts to strengthen the tracing and reunification of refugee children in Africa, particularly in Guinea and Sierra Leone.¹⁹³ Documentation, inter-camp tracing and reunification have also been carried out for Rwandan, Congolese and Burundian refugee children in Tanzania, an effort which resulted in more than 50,000 family reunifications.¹⁹⁴ UNHCR also commissions study programmes aimed at assessing the adequacy of existing policies and action concerning separated children.¹⁹⁵ In carrying out's mandate, the UNHCR is dependent of state magnanimity as they require permission to set up office in refugee sending countries, rely on states for information on conditions and numbers of refugees within their regions, and have to work within law and regulations governing refugees in the territory of the states.¹⁹⁶ As shown above, these laws and regulations do not always go far enough in facilitating the work of these agencies.

4.3 Practice of specialised agencies in the area of reunification

This section will look at the practice of the specialised agencies and other organisations working in the area of reunification of unaccompanied children. Discussed below are various aspects of the family reunification process as gleaned from the practice of specialised agencies and other organisations working in the area of family reunification. They are discussed with a view to setting out the responsibility of the specialised agencies in this co-operative relationship with states towards family reunification of the unaccompanied refugee child as well as highlighting a normative framework for other agencies similarly charged with

¹⁹³ See 'Summary note on UNHCR's strategy and activities concerning refugee children' (2003) 15 *International Journal of Refugee Law* 149.

¹⁹⁴ Progress report on refugee children and adolescents, including UNHCR's strategy for follow-up to the report on the impact of armed conflict on children Executive Committee of the High Commissioner's programme standing committee report, 7th meeting EC/47/SC/CRP.19 (1 October 2001).

¹⁹⁵ Some of these study and policy documents include the *UNHCR Guidelines on policies and procedure in dealing with unaccompanied children seeking asylum 1997*, *Inter-agency guiding principles on unaccompanied and separated children, 2002* and *Partnership: An operations management handbook for UNHCR's partners* (2003).

¹⁹⁶ Statute of the Office of the United Nations High Commissioner for Refugees (n 189 above) article 8.

responsibility in this area. The practices discussed below are a result of years of experience and research by the relevant agencies.¹⁹⁷

4.3.1 Collection of information

This generally involves the identification, registration and documentation of unaccompanied or separated children. Under the Geneva Conventions, the ICRC has a mandate to register family members who have been displaced due to armed conflict.

Identification is the process of establishing which children have been separated from their parent or other caregivers, and where they may be found. Registration is the compilation of key personal data: full name, date and place of birth, father's and mother's names, former address and present location.¹⁹⁸ This information is collected for the purpose of establishing the identity of the child, for protection and to facilitate tracing. Documentation is the process of recording further information in order to meet the specific needs of the child, including tracing, and to make plans for his or her future. This is a continuation of the registration process and not a separate undertaking.¹⁹⁹

The identification of separated children is a priority for these agencies and once identified as much information as possible is collected through interviews with the child.²⁰⁰ These interviews are conducted by trained staff under an atmosphere that protect the privacy of the child and ensures a lack of distress. Confidentiality of such information is also paramount. Photographing of younger children, especially those who are unable to provide adequate personal information is also undertaken. Items of clothing and other materials found on the child are carefully preserved as these could help identification. In all the overall aim is to ensure that there is as little delay as possible in identifying and documenting unaccompanied children because of the vulnerable situation that they are exposed to as a result of their separation from their primary care givers.²⁰¹

¹⁹⁷ The practices discussed below are as stated in the working manuals of the UNHCR and the ICRC. See generally ICRC, *Inter-agency guiding principles on unaccompanied and separated children* (2004); UNHCR, *Refugee children: Guidelines on protection and care (1994)*; UNHCR, *Partnership: An operations management handbook for UNHCR's partners* (2003).

¹⁹⁸ Article 78 (3) Additional Protocol I to the Geneva Conventions.

¹⁹⁹ ICRC, *Inter-agency guiding principles on unaccompanied and separated children* (2004) 33.

²⁰⁰ ICRC, (n 199 above) 33.

²⁰¹ Kuper, J (n 185 above) 85.

4.3.2 Tracing

In the context of the unaccompanied child, tracing is the process of searching for family members or primary legal or customary care-givers. It also refers to the search for children whose parents are looking for them. The object of tracing is reunification of children with parents or family members,²⁰² and even in situations where reunification may not be immediately possible it is still important to trace the family and relatives of the separated child in order to restore contact. The protection of the child is paramount at this stage and although the tracing methods used by agencies differ the different methods ensure the protection of the child. Sharing information within and between countries is essential for tracing, but the protection and best interests of the child should govern the extent to which it is shared and the type of information involved.²⁰³ The basic principle of information sharing is that the maximum information necessary for tracing should be shared at the minimum risk to the child and the family.²⁰⁴

4.3.3 Family reunification

Once the family of the separated child is successfully identified through tracing, the next goal is to establish reunification with such family members or relatives. Reunification is the process of bringing together the child and his or her family or principal care-giver for the purpose of establishing or re-establishing long-term care.²⁰⁵ This is where the greatest challenge in the whole process exists since reunification has to conform to the legislation and policies of the government of the country concerned. These legislations and policies, often do not comply with international human rights standards especially in regards to children's rights and international humanitarian law. Reunification is usually with one or both parents and where this is not possible with other family members is the best alternative. Before actual reunification takes place verification has to be undertaken to ensure that such reunification is in the best interest of the child. This is because there will be situations where family reunification will not be in the best interest of the child and in such situations an appropriate alternative has to be found.

Under international law and most national legal systems, the primary consideration in all matters relating to the welfare of children is the best interest of the child. The CRC states that 'in all actions concerning children, whether undertaken by public or private social

²⁰² ICRC, (n 199 above) 35.

²⁰³ See generally article 78(3) of the Addition Protocol I to the Geneva Convention 1977, (n 8 above).

²⁰⁴ ICRC, (n 199 above) 36.

²⁰⁵ ICRC, (n 199 above) 37.

welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interest of the child shall be the primary consideration.²⁰⁶ International law views children as best off with their families and the article 9(1) CRC captures this consensus by placing an obligation on states to ensure that children are not separated from their families except where it is otherwise in the best interest of the child.

The UN General Assembly in UN Resolution 41/85 set forth guiding principles on certain aspects of children welfare determination and particularly states 'that the first priority for a child is to be cared for his or her own parents.'²⁰⁷ The Committee on the CRC in General Comment 6 restates this principle thus

In the case of a displaced child, the [best interest] principle must be respected during all stages of the displacement cycle. A determination of what is the best interest of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.²⁰⁸

It follows therefore that, all actors charged with the task of family reunification of the unaccompanied child must be guided by this consideration. It would seem however that with regard to laws on family reunification of the unaccompanied refugee child, states take other factors into consideration. Under such unfavourable laws, the mandate of the specialised agencies like the UNHCR is severely inhibited.

International law recognises that there may be instances where parental care and family reunification may not be possible or in the best interest of the child.²⁰⁹ In placing the child in alternative care environments, the best interest of the child shall remain a paramount consideration and such placement must be in accordance with law.²¹⁰ Family reunification remains the ideal situation for the unaccompanied child and alternatives to family reunification should only arise where the former is not possible or not in the best interest of the child.

²⁰⁶ Article 3 CRC, (n 1 above).

²⁰⁷ Article 3, United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally, G.A. Resolution 41/85, UN GAOR, 41st Session (1986).

²⁰⁸ Committee on the CRC (n 54 above).

²⁰⁹ Kaime, (n 161 above) 343.

²¹⁰ See Resolution 41/85 (n 207 above), article 5 provides that 'in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.' See also article 9 CRC, (n 1 above); articles 4, 19 African Children's Charter, (n 4 above).

4.4 Alternatives to family reunification

UN Resolution 41/85 states, 'when care by the child's own parent is unavailable or inappropriate, care by relatives of the child's parents, by another substitute (foster or adoptive) family or, if necessary, by an appropriate institution should be considered.'²¹¹ The resolution gives alternative care options where care by the parents is not possible. It first mentions relatives, then other family forms, and lastly institutional care. These alternative options are discussed below.

4.4.1 Community care

Community care is discussed here to include care by other relatives, members of the wider extended family that may not fit with the definition of family adopted by the host state and members of the same cultural community to which the child belongs. International law recognises that in certain circumstances, 'the extended family or community' has certain rights and responsibilities towards the child.²¹² The alternative of community placing in the absence of the parents and immediate family members is strengthened by the argument of the importance of keeping the child in a culturally similar environment.²¹³ Both the CRC and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993 (Hague Convention on Adoption) assert that inter-country adoption can only be considered where it is impossible to place the child within his or her community.²¹⁴

In contrast to the succeeding forms of care, community care has the advantage of sparing the child the agony of adjusting to a new environment which most times entails linguistic, cultural, educational, religious changes some of which impact negatively on the child's overall development.²¹⁵

4.4.2 Fostering and adoption

Adoption as an option for an unaccompanied child should only be considered where it has been established that it is in the best interest of the child to do so. This means that every

²¹¹ Resolution 41/85 (n 207 above) article 4.

²¹² Article 5 CRC; article 20 African Children's Charter; see also S Starr, & L Brilmayer, 'Family separation as a violation of international law' (2003) 21 *Berkeley Journal of International Law* 226.

²¹³ This argument is founded on article 20(3) CRC which states that 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.' (n 1 above).

²¹⁴ See generally articles 20 and 21 CRC and article 4(b) of the Hague Convention on Adoption. Full text available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=69> (accessed 25 October 2006).

²¹⁵ See A Boye, 'Note, making sure children find their way home: Obligating states under international law to return dependent children to family members abroad' (2004) 69 *Brooklyn Law Review* 1515 at 1532

effort has been made with regard to tracing and family reunification and failed, or that parents have consented to adoption. The consent of parents, institutions and authorities that are necessary for adoption must be free and informed, and this supposes that consent must not have been induced by payment or compensation of any kind.²¹⁶ It is the policy of the UNHCR that children in emergency situations are not available for adoption. This is because in such situations it is difficult to ascertain whether a separated child has parents or other family member so it is extremely important to exhaust all avenues in regard to tracing and family reunification.²¹⁷ Adoption is discouraged if:

- a. there is reasonable hope for successful tracing and family reunification in the child's best interests;
- b. a reasonable period (normally at least two years) during which time all feasible steps to trace the parents or other surviving family members have been carried out has not yet elapsed;
- c. it is against the expressed wishes of the child or the parent; or
- d. voluntary repatriation in conditions of safety and dignity appears feasible in the near future and options in the child's country of origin would provide better for the psychosocial and cultural needs of the child than adoption in the country of asylum or a third country.²¹⁸

Most times, adoption of unaccompanied children occurs in countries other than their country of origin where they have likely fled to for refuge. In most cases, these adoptions are trans-cultural and often trans-racial. This highly contentious practice is often fraught with abuses and factors other than the best interest of the child and usually present challenges for the child that only become obvious in adolescence and early adulthood.²¹⁹ The Hague Convention on Adoption regulates inter-country adoption. This Convention establishes a system of co-operation among contracting states and a requirement that adoptions are arranged through a central authority within each state. It requires, among others, that inter-country adoption be only carried out if it is in the best interests of the child and sets out the consents that must be made. It is necessary to ensure that adoption, whether inter-country or otherwise, is in the best interest of the separated child and only after family tracing and reunification is not possible.

²¹⁶ Committee on the CRC (n 54 above) Para. 91.

²¹⁷ Action for Rights of Children, *Foundations: Separated Children* (2004) 55.

²¹⁸ UNHCR, (n 190 above) 53.

²¹⁹ Action for Rights of Children, (n 217 above)

4.4.3 Institutionalisation

Institutionalisation entails the placement of the separated child in an institutional facility such as an orphanages and group homes. It is important that this form of care should only be resorted to as a final measure when all the other forms have failed. Institutional placement, especially within the host country, should almost always be avoided as this has the effect of detaching the child from his community and culture and raises serious difficulties in terms of durable solutions.²²⁰ Institutional homes are notoriously where children with various problems end up making it less ideal for the separated child such that instead of being therapeutic, often these homes are breeding grounds for the development of more complex and severe problems.²²¹ However, whilst the principle of non-institutional care has been widely endorsed, preventing institutionalisation remains a major stumbling block to family tracing and reunification programmes. This is as a result of the need to provide short term care facilities while a more durable care programme is arranged for the child, however, it is important to ensure that this measure as much as possible is only short term and that positive steps are being taken to trace family or provide alternative care.²²² Also, it is necessary to ensure that adoption procedures within the states are compliant with international instruments in that regard and that states do not give the unaccompanied refugee child up for adoption until adequate efforts have been made to trace family members without success. In this area, also the specialised agencies are dependent on the framework of the states concerned.

4.5 Conclusion

This chapter examined the two agencies most involved in the area of reunification of refugee children and the protective framework as gleaned from the experience of these and other agencies similarly involved with unaccompanied children. Although these agencies rely on state support and policies to be effective in carrying out their mandate, states are generally not in the frontline with respect to reunification. These agencies work within the operative space provided by the laws and policies of states and without a favourable operative space they will be ineffective in fulfilling their mandate. What is urged in this chapter is a review of state policies and legislation in order to enhance the co-operation envisaged by the CRC between the states and the specialised agencies.

²²⁰ Action for Rights of Children, (n 217 above) 33.

²²¹ Boye, (n 215 above) 1532.

²²² C Petty, 'Family tracing and reunification- safeguarding rights and implementing the law' (1996) 4 *International Journal of children's Rights* 169.

Acknowledging that reunification may not be immediately possible in every situation, or at all, alternative forms of care for the unaccompanied child are also discussed while highlighting the dangers inherent in some of these systems. In each of these alternative care mechanisms, the best interest of the child is advocated as the underlying consideration. The capacity of the international agencies to act on behalf of the unaccompanied child is limited chiefly by political will,²²³ and until this changes more favourably towards the unaccompanied refugee child, the specialised agencies will still have to scale many hurdles to achieve their mandate.

²²³ Petty, (n 222 above) 168.

CHAPTER FIVE CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Unaccompanied refugee children are in a very vulnerable situation as a result of the absence of parents or legal caregivers.²²⁴ This dissertation has established the necessity for the protection of unaccompanied refugee children by guaranteeing their rights to family unity and reunification, which as this dissertation has shown is an internationally recognised right. Although international, regional and national instruments affirm the importance of the family unit to the well-being and development of children, not very much is being done to ensure that the unaccompanied refugee child has the benefit of growing up in a stable and supportive family unit. This dissertation has demonstrated the reluctance of states to actively facilitate the reunification of unaccompanied children with their out-of-territory family members, and it is suggested that this undermines the obligations of states under international law.

5.2 Conclusion

International law recognises the family as the basic and fundamental unit of the society and guarantees the right to family unity under various instruments that affirm the necessity to protect the unity of the family.²²⁵ The necessity of the child to grow up within the family environment and the positive impact this plays in the well being and development of the child has similarly been acknowledged to such an extent that state are obligated to exercise extreme caution in making decision to remove the child from this environment, and where the child is separated are obligated to facilitate family reunion.²²⁶

The challenge to this duty of states arises in situation where unaccompanied refugee children within the territories of asylum countries have family members outside the asylum countries. The nature of obligation of states to facilitate reunification in this scenario vis-à-vis their sovereign power to control entry to and exit from their territories is somewhat imprecise. States' responsibility with respect to the reunification of the unaccompanied

²²⁴ Press Release (n 13 above).

²²⁵ See the international law provisions on the family unit set out in n 2 above.

²²⁶ Preamble, CRC, (n 1 above) paras. 5 & 6; article 9.

refugee child seems less direct by its wording with the specialised agencies seemingly bearing the primary responsibility of facilitating reunification.²²⁷

Another challenging issue is what constitutes family for the purpose of the refugee generally and the unaccompanied refugee child in particular. Without a universal definition of the term 'family', states are given discretion to adopt a definition of family that is conducive to their society and to apply such definition to the refugee for purposes of reunification.²²⁸ The effect of these variations in the conceptualisation of family is that in regard to the reunification of refugee families, asylum countries therefore apply the definition of family recognised within their territory which often do not accommodate the members of the refugee's family as constituted in the country of origin. As this dissertation has shown, the unaccompanied refugee child who has to meet the same requirement as the adult to be granted refugee status is in many jurisdictions not entitled to similarly sponsor family members for the purpose of reunification, whatever the definition of family recognised by the asylum country.²²⁹

As shown above, specialised agencies have developed an effective framework for facilitating the family reunification of the unaccompanied refugee child. These agencies have been fairly successful in tracing and identification of family members of the unaccompanied minor for the purpose of family reunification however they are still hampered by the ineffective framework for reunification available in the asylum countries.

This dissertation has shown that the unaccompanied refugee child's rights to family unity and reunification are not effectively protected in the countries of asylum thus twice traumatising these young children who have fled traumatic situations of armed conflict to arrive in asylum countries. It is the submission of this dissertation that there is need for a comprehensive framework in the asylum countries that ensures family reunification for the unaccompanied refugee child. In the absence of this, the child who has fled the traumas of conflict still has to endure yet another trauma, namely living without the comfort of his or her family which has been recognised as necessary for the well-being and development of the child.²³⁰

²²⁷ Article 22 CRC, (n 1 above).

²²⁸ Human Rights Committee (n 6 above).

²²⁹ See the discussions on the United Kingdom para 3.2.2 above.

²³⁰ Preamble CRC,(n1 above) paras. 5 & 6.

5.3 Recommendations

Although it is recognised that it is almost impossible to completely obliterate the trauma of fleeing one's home as a result of armed conflict and being separated from one's family in the cause of such flight, the unaccompanied refugee minor can be spared the effects of another trauma if his rights to family unity and reunification are guaranteed in the asylum country, by enabling a smooth adjustment to life from a conflict situation. It is submitted that the following recommendations will go a long way in facilitating the realisation of the unaccompanied refugee child's rights to family unity and reunification and thus sparing the unaccompanied refugee child the additional trauma of a life without his or her family in the asylum country.

5.3.1 Universal application of existent international framework

The first recommendation is the universal application of the existent framework provided under international law for the family reunification of the unaccompanied refugee child. Unsatisfactory as these provisions may seem, in regard to the obligation placed on state, they however provide a minimum framework that offers hope of family reunification for the unaccompanied refugee child. However, a situation where major asylum countries, such as the UK and the US either enter reservations to family reunification clauses in these international instruments or refuse to ratify these instruments is unacceptable. States that have entered reservations to or opted out of instruments which provide protection for the unaccompanied refugee child, both international and regional instruments, should be encouraged to withdraw such reservation and opt in/ratify such instruments. A ratification of the CRC by the United States, for instance, will provide a protective framework for the 5,000 unaccompanied children who enter the US every year.²³¹

5.3.2 Adoption of effective guidelines for reunification at the domestic level

As shown from this dissertation, very few states have a comprehensive guideline for the reunification of unaccompanied refugee children even in those countries that have accepted obligations under the international and regional instrument. Specific guidelines and policies that deal with unaccompanied refugee children should be adopted by these states so that a definite framework is in place to achieve the goal of reunification rather than having different laws and policies simultaneously dealing with unaccompanied refugee children in an in comprehensive manner. States are urged to set up autonomous agencies with state support and funding whose mandate will be to protect the rights of the unaccompanied refugee child

²³¹ Dalrymple (n 139 above) 131.

from the time they arrive on the territory of the state to when reunification has effectively taken place or the child is otherwise alternatively placed, where family reunification is impossible. In this respect, the Quebec model is commendable. Such guidelines should also provide a clear relationship between the specialised agencies and the asylum country in question on responsibilities and duties with respect to family reunification of unaccompanied refugee children.

5.3.3 Adoption of an international binding instruments on the rights of unaccompanied refugee children

An international instrument binding on states and dealing specifically with the rights of unaccompanied refugee children should be adopted. This instrument which could be an additional protocol to the near-universally ratified CRC, should bring together the provisions of various documents (general comments, concluding observations, scholarly works, best practice documents and council directives) which have emanated from international and regional bodies dealing with the protection of this vulnerable group of children, unaccompanied refugee children. Such a protocol (instrument) should provide for the responsibility in more directive and categorical terms and provide a clearer relationship between states and specialised agencies under the new arrangement.

Without giving a definition of 'family', the proposed protocol (instrument) should provide a minimum categorisation of family members who are entitled to family reunification with the unaccompanied minor such as parents and siblings while urging states to exercise discretion on how to assess application from other categories of family members liberally.

5.3.4 Addressing the causes of armed conflict

As long as countries continue to resort to non-pacific means of dispute resolution especially armed conflict, displacement of persons from their communities will continue to occur and so will increase in the population of unaccompanied refugee children. The international community should do more to encourage pacific resolution of dispute and address the political, economic and social imbalances that fuel armed conflict. This is a Herculean task as the international community for the last decade has seemingly been seeking means to achieve a conflict-free world, however much more needs to be done in this regard.

The cost of conflict in human resources is enormous and the traumatising effect on children is so grave to rob them the chance of a normal life in future, much more has to be done. As

the saying goes, 'when two elephants fight, the grass suffers.' The grass in this case being the family, the internationally acclaimed 'basic and fundamental unit of the society,' and the traumatised child who in flight loses the company of his or her family and is further traumatised in an asylum country by the state's unwillingness to facilitate family reunification with his or her family. Until states take the issue of family reunification of unaccompanied refugee children more seriously, the innocent children who have endured the trauma of armed conflict in their country of conflict will only end up twice traumatised in the country to which they have fled for sanctuary.

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