



**THE INTERNATIONAL LAW ON UNACCOMPANIED FOREIGN MIGRANT  
CHILDREN: AN EVALUATION OF WHETHER IT REFLECTS THE MODERN  
REALITIES OF ECONOMIC MIGRANCY IN SOUTHERN AFRICA.**

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## DISCLAIMER

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## Chapter One- Background and general introduction

### 1.1 Introduction

Does international and regional law protect children involved in the migration process who do not have genuine asylum claims or refugee aspirations?

Independent child migration is a growing reality globally. Literature depicting independent child migration in Europe, Asia, Central America and Africa is instructive. In Europe, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union analysed the phenomenon of unaccompanied migrant children from a perspective of border control.<sup>1</sup> The authors attempt to determine the magnitude of the phenomenon of unaccompanied migrant children in Europe with very little success. However, the authors note that the notion of unaccompanied migrant children in Europe is on the rise. The publication attributes independent child migration in Europe to smuggling and trafficking.

Most unaccompanied migrant children are undocumented and in Europe Bicchocchi and LeVoy<sup>2</sup> show that there is a trend in the erosion of rights of undocumented children. The authors provide evidence indicating a general lack of legal protection of undocumented children in almost all European Union (EU) member states. In addition, there is evidence of the social exclusion of unaccompanied migrant children.

In Asia, Thailand is a major destination country for unaccompanied child migrants from Myanmar due to its high economic status. Causes of migration to Thailand include the lack of economic opportunities at home and the proximity to an economic

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<sup>1</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) "Unaccompanied Minors in the Migration Process" (2010). Available at: <http://resourcecentre.savethechildren.se/sites/default/files/documents/5177.pdf> [accessed 6 December 2014].

<sup>2</sup> Bicchocchi, LeVoy "Children in Europe- Invisible victims of immigration restrictions" PICUM Report (2009) 8. Available at <http://picum.org/picum.org/uploads/publication/Undocumented%20Children%20in%20Europe%20EN.pdf> [accessible 6 December 2014].

magnet in the region.<sup>3</sup> In Central America, unaccompanied migrant children migrate from Mexico to USA. Causes of migration to the US are linked to poverty.<sup>4</sup> In Africa, economic migration is on the rise. Thousands of Zimbabwean and other children from countries in the SADC region travel to South Africa in search of a better life.<sup>5</sup> The bulk of research evidence shows the prevalence of independent child migration for economic reasons in most parts of the world. What is clear is the presence of autonomous ambitions in children from the global south. Yaqub notes that even though independent child migration is documented in all global regions it is a large phenomenon in many poor and middle income countries than in Europe and North America.<sup>6</sup>

Despite the documentation of unaccompanied migrant children in all global regions, what seems to be apparent is the lack of availability of official data on the actual number of children involved in independent migration globally and regionally. Some authors are of the view that the numbers regarding unaccompanied minors and their evolution are difficult to estimate because they are not part of States' regular data collection.<sup>7</sup> Yaqub<sup>8</sup> argues that this lack of official data on independent child migration blurs the life-stage issues between children and adults and fails to reflect age specific legal and social distinctions inherent in migration for example States duties under the UN Convention on the Rights of the Child (UNCRC).<sup>9</sup> Despite the

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<sup>3</sup> Gambaro et al "Unaccompanied migrant children what happens once they are back home?" *International Social Service Project Report* (2008)19.

<sup>4</sup> Gambaro et al *ibid*.

<sup>5</sup> Fritsch et al "The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action" *Denver Journal of International law and policy* Vol 38 (4) (2010) 624.

<sup>6</sup> Yaqub "Independent child migrants in developing countries: Unexplored links in migration and development" *Innocenti Working Paper No. 2009-01*. Florence: UNICEF Innocenti Research Centre (2009) 5.

<sup>7</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) "Unaccompanied Minors in the Migration Process" (2010) 3.

<sup>8</sup> Yaqub *supra* note 6, at 2.

<sup>9</sup> United Nations Convention on the Rights of the Child, entered into force in 1990. South Africa is a State party.

lack of official data, sources used in this dissertation all point to the fact that independent child migration is a growing concern globally.

Generally migration has always played a significant role in Africa. Sub-Saharan Africa in particular is a region of intensive internal migration.<sup>10</sup> Most migrants in the region are economic migrants and in the past these were mostly adult males.<sup>11</sup> Decades of economic crises and political upheavals have resulted in the region being the world's poorest, with most of the countries ranked low in terms of human development indicators. This has led many, including children to use migration as a survival strategy.<sup>12</sup>

Southern Africa is experiencing a rise in independent child migrants. Children have always been involved in migration as refugees and asylum seekers but recently the migratory processes are witnessing a different degree of involvement of minors as independent economic migrants.<sup>13</sup> Evidence suggests that this trend will continue over the next few decades, driven by economic developments, violent conflicts, state failure, natural disasters, and environmental and resource pressures, especially climate change.<sup>14</sup>

In their bid to survive, unaccompanied migrant children are defying the ideals of dependence and innocence associated with childhood. In light of these autonomous ambitions Yaqub<sup>15</sup> advocates that the agency and desire for children to use migration for their development should be further explored in migration policies and child protection frameworks. Bhabha supports Yaqub in that she views child migration as a significant and increasingly important phenomenon requiring the

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<sup>10</sup> Adepoju "Migration in Sub-Saharan Africa" *Current African Issues*, No. 37. Uppsala: The Nordic Africa Institute (2008) 5.

<sup>11</sup> Shimeles "Migration pattern, trends and policy issues in Africa" *Working paper services No.119. African Development Bank* (2010) 20

<sup>12</sup> Adepoju supra note 10, at 6.

<sup>13</sup> Furia "Victims or criminals? The vulnerability of separated children in the context of migration in the United Kingdom and Italy" *University of Sussex, Sussex Center for Migration Research, Working Paper No 69* (2012) 2.

<sup>14</sup> Reale "Away from Home protecting and supporting children on the move" Save the Children (2008) 4; Committee on the Rights of the Child's General Comment Number 6 (2005) 5.

<sup>15</sup> Yaqub supra note 6, at 5.



development of a more effective and protective approach.<sup>16</sup> Yaqub opines that the kind of protection and support required for unaccompanied migrant children is not yet fully understood. In light of this, it is imperative to evaluate whether or not unaccompanied migrant children are afforded sufficient protection in international law.<sup>17</sup> According to the legal framework and the dominant child protection paradigm, children are recognised as a specific vulnerable group which the family and the state should protect and be responsible for.<sup>18</sup>

Schafer<sup>19</sup> argues that one of the major challenges in contemporary child law is the need to devise legal principles that meet the changing needs of children. Children's needs in Sub-Saharan Africa have changed over the last few decades. This is evidenced by children's desire to use migration for their development and survival as indicated by Yaqub above. These changing needs demand that international law be reviewed to see if it lines-up with unaccompanied migrant children's protection needs.

Unaccompanied migrant children who travel for economic reasons exercise great autonomy and yet systems tend to be built around concerns about the protection of children and their survival away from home. Evidently, they are not yet adults and do indeed need the protection of the state. Nevertheless, it is important to question the protection awarded to children as a homogenous group in international law. Does child protection offer all the answers, or should international law also provide for children's autonomous ambitions or recognise their evolving capacities? If it is found that international law does not provide for these emerging needs a further question must be posed: Has this lack of recognition led to legal gaps and inadequate legal protection for unaccompanied migrant children?

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<sup>16</sup> Bhabha "Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework" *Innocenti Discussion Paper No. IDP 2008-02*. Florence: UNICEF Innocenti Research Centre (2008) 1.

<sup>17</sup> Mahati "The representations of unaccompanied working migrant male children negotiating for livelihoods in a South African border town" in Bourdillon M and Sangare A (Eds) *Negotiating the Livelihoods of Children and Youth in Africa's Urban Spaces* (2012) 67.

<sup>18</sup> Meloni, Rousseau, Montgomery & Measham "Children of exception: Redefining categories of illegality and citizenship in Canada" *Children and Society Vol 28* (2014) 307.

<sup>19</sup> Schafer *Child law in South Africa: Domestic and international perspectives* (2011) 28.

This dissertation rests on the assumption that international law takes a very paternalistic approach to child protection. It can be argued that this approach is justified particularly if the best interests of the child are to be upheld. Children are indeed vulnerable to abuse, exploitation and violence, as a result they need to be protected. The issue being advanced in this dissertation is that a balance needs to be struck between the child protection paradigm and the child autonomy paradigm in the context of child migration. Unaccompanied migrant children seem to be resisting a paternalistic approach to their rights in favour of a more liberal approach that sees them taking an active role in controlling and determining the course their lives ought to take.

Many children in Sub - Saharan Africa are now migrating to other countries in the region largely for economic reasons.<sup>20</sup> International and regional law mainly recognises and protects the needs of 'genuine' asylum seeking and refugee children<sup>21</sup> leaving unaccompanied foreign migrant children without clearly defined rights. The question that this dissertation seeks to answer is: Does international and regional law in its current form promote and protect the best interests of unaccompanied migrant children who cross international borders without 'genuine' asylum or refugee claims?

Are the current 'child protection systems' at regional as well as international level, providing adequate protective measures for this group of children or is there a need for them to be revised and updated in order to offer adequate protection? Two interlinked themes come to the fore, children's need for protection and the recognition of their autonomy. Children need protection when they are young; however they are separate beings and individual bearers of rights. As they grow their capacity gradually develops as evidenced by unaccompanied migrant children in Southern Africa.

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<sup>20</sup> Curatrix Ad Litem's report: *The AIDS Law Project v. Minister of Social Development and Others* South Gauteng High Court, unreported, (52895/09) 4, 45.

<sup>21</sup> Bhabha "Independent children, inconsistent adults: Child migration and the legal framework" *UNICEF Innocenti Research Centre Discussion Paper, IDP No. 2008-2* (2008) 1.

A second assumption on which this dissertation rests is that the current legal framework both at regional and international level, when they were originally negotiated and put in place, assumed children to always be with their parents or guardians, unless they had accidentally been separated through war or other disaster. Their autonomous ambitions were not a foreseeable reality at the time. Today children are leaving their homes and parents not as refugees or asylum seekers in the strict sense of these terms but as independent economic migrants. They are searching for jobs and better standards of life.<sup>22</sup> As a result there is need to rethink the applicability of the historical context of the current legal framework in contemporary Africa.

The initial argument being advanced in this dissertation is that unaccompanied migrant children who do not have genuine refugee or asylum claims are not adequately protected by international law. Constitutional democracies such as South Africa, when they find unaccompanied migrant children on the streets, they are obliged by their constitutional imperatives<sup>23</sup> to place this group of children in the child care and protection system, as they are identified and classified as children in need of care. Evidence suggests that these children want to be autonomous and they want to engage in economic activities.<sup>24</sup> International law on the other hand demands that when unaccompanied migrant children are found on the streets they are to be taken in and measures should be taken to reunite them with their families.<sup>25</sup>

There is a growing body of literature suggesting that children actually leave home voluntarily and sometimes with the consent of their parents in search of a better life in another country. This defies the underlying assumptions in international law that children are vulnerable and dependant on adults; that children are incapable of making independent decisions about their lives; that children are better taken care of in a family unit and that outside a family structure they perish.

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<sup>22</sup> Curatrix Ad Litem's report supra note 20, at 45.

<sup>23</sup> Section 28, Constitution of South Africa; Chapter 9 Children's Act 38 of 2005.

<sup>24</sup> Curatrix Ad Litem's report supra note 20, Mahati Supra note 17.

<sup>25</sup> UN Convention on the Rights of the Child's preamble and Art 20; African Charter on the Rights and Welfare of the Child's Art 25; UN General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin par 39.

## 1.2 Justification of the study

This dissertation focuses on unaccompanied migrant children who cross international borders alone for economic reasons. International law has clear protective measures for refugee and asylum seeking children, but unaccompanied foreign migrant children do not have well-defined rights peculiar to their situation. Flynn and Duvell point out that the dominant discourse amongst authorities is that generally irregular migration is a criminal activity and that illegal migrants are people who have sought to gain advantages to which they are not entitled to and consequently they should illicit little sympathy should they find themselves dealing with national authorities.<sup>26</sup> This applies equally to children. The authors argue that this view by authorities makes the need to develop a rights based approach to independent child migration an imperative.

This issue is a major concern in South Africa because the country's economic affluence attracts scores of foreign unaccompanied migrant children. They come with the hope of finding a better life in South Africa.<sup>27</sup> Because these children violate ideals of childhood, international and regional law needs to be reviewed to see whether it caters for children who aspire to be independent and engage in economic activities. Unaccompanied migrant children who do not have legitimate asylum claims are they afforded any protection in international law? This is a serious concern because border towns such as Musina accommodate a significant number of these children and they are working and earning a living.<sup>28</sup>

The existing legal framework clearly depicts the rights of refugee and asylum seeking children. There is a need to look at what narratives underpinned immigration

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<sup>26</sup> Flynn and Duvell "Undocumented Migrants –Symptom, not the problem" Platform for International Cooperation on undocumented migrants (PICUM) *Policy Brief* (2007) 1. Available at : <http://picum.org/en/publications/policy-briefs/25188> [accessed 24 April 2014]

<sup>27</sup> Hillier "Children on the move: Protecting unaccompanied migrant children in South Africa and the region" Save the Children UK (2007) 6.

<sup>28</sup> Mahati supra note 17.

regimes in Sub-Saharan Africa and internationally.<sup>29</sup> Furthermore, there is need to look at these narratives again to see if they are applicable in present day society.

In South Africa children who do not have adults to take care of them are deemed children in need of care, the Constitution<sup>30</sup> and the Children's Act<sup>31</sup> provides that such children are to be taken into the child care and protection system. Some unaccompanied migrant children found in Musina did not want to be put in care facilities as they wanted to earn a living.<sup>32</sup> This evidences a clash between the paternalistic view of child protection as provided by international, regional law and South African law and the principles of child autonomy.

Child protection efforts are based on the categorisation common in the Northern ideologies, of children as victims and who are not to blame for their situations.<sup>33</sup> Mahati argues that there is a power imbalance between children and adults and children are on the losing end as their position is disregarded in favour of a paternalistic approach. Children are viewed as weak and needing protection. This is the plight of unaccompanied migrant children in South Africa. Evidence<sup>34</sup> suggests that these children can survive away from home and have been surviving away from home.

### 1.3 Objectives of the study

This dissertation will ascertain whether international law applicable to unaccompanied migrant children reflects the modern realities of economic migrancy in the Southern African region.

In addition this dissertation will highlight the changing needs of children in this region. The purpose is to evaluate whether international and regional law adequately reflects the challenges of our time, particularly in Southern Africa where children

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<sup>29</sup> Furia supra note 13.

<sup>30</sup> Section 28.

<sup>31</sup> Section 150.

<sup>32</sup> Mahati supra note 17, at 71 "One of the boys, aged 15, argued: 'We didn't come to South Africa to eat and sleep. We crossed the border to work.'"

<sup>33</sup> Mahati 2012 *ibid*.

<sup>34</sup> Mahati 2012 *ibid*, Curatrix Ad Litem's report: The AIDS Law Project case supra note 23.

continue to defy widely accepted conceptions of childhood and children as being inherently dependant and vulnerable.<sup>35</sup>

Furthermore the aim is to ascertain the law that applies to unaccompanied migrant children and to highlight ambiguities and inbuilt weaknesses in affording protection to this group of children.

Lastly the objective is to gain familiarity with the phenomenon of unaccompanied children migrating for economic reasons and to achieve new insights on the issue. Recommendations will be made for possible strategies to be pursued at the regional and national level.

## 1.4 Definition of terms

### 1.4.1 Unaccompanied foreign children

Unaccompanied migrant children are defined by the Committee on the Rights of the Child<sup>36</sup> as children (also called unaccompanied minors), who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

Hillier explains 'foreign' as a person who '...has either crossed a border alone or has subsequently found him or herself living in a foreign country without an adult caregiver.'<sup>37</sup> This will be added to the definition given by the Committee on the Rights of the Child and for purposes of this study it will read as follows:

*'Unaccompanied foreign children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so, and has crossed a border alone or has subsequently found him or herself living in a foreign country without an adult caregiver'*

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<sup>35</sup> Furia supra note 13, at 25.

<sup>36</sup> Committee on the Rights of the Child *General Comment No. 6* "The Treatment of Unaccompanied and Separated Children outside their Country of Origin" 2005.

<sup>37</sup> Hillier "Children on the move: Protecting unaccompanied migrant children in South Africa and the region" Save the Children (2007) 8.

## 1.4.2 Economic migrancy

Migration is a change in the usual residence. International migration is therefore a change in the usual residence from one country to another.<sup>38</sup> Economic migrancy involves moving from one country to another for economic reasons e.g. looking for employment or other means of livelihood, better standard of living and education amongst others.

## 1.4.3 Children on the move

'Children on the move'<sup>39</sup> is an umbrella term that brings together the different categories of children who are involved in the migration process. Reale states that the term includes children that are fleeing some sort of harm either conflict, an exploitative or abusive situation at home, natural disasters amongst other things and children that are seeking better life opportunities or education.<sup>40</sup> In addition, children on the move also include children who cross national borders, and those who move about within a country. The focus of this dissertation is on children who cross international borders alone for economic reasons.

### *Distinction between the categories of children on the move*

#### a) Trafficked children and smuggled children

Children on the move include children who have been trafficked and smuggled. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children<sup>41</sup> (UN Trafficking protocol) gives a very broad definition of trafficking<sup>42</sup> and exploitation.

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<sup>38</sup> Yaqub "Independent child migrants in developing countries: unexplored links in migration and development" UNICEF (2009) 3.

<sup>39</sup> Reale "Children on the Move" IOM (2013) 66.

<sup>40</sup> Reale Ibid.

<sup>41</sup> Adopted in 2000.

<sup>42</sup> Child trafficking is defined in the UN Trafficking Protocol as follows:

"3(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the

Child trafficking is characterised by a phase of exploitation and the traffickers are aware that the people that they traffic will end up on one of the listed forms of exploitation in the UN trafficking protocol<sup>43</sup>

Child smuggling is defined as ‘the illegal transportation of children for profit’.<sup>44</sup> The UN protocol protects against the smuggling of migrants by land, sea and air. It states that the ‘smuggling of migrants’ shall mean the procurement in order to obtain directly or indirectly a financial or other material benefit of the illegal entry of a person into a state party which a person is not a national or a permanent resident. Smuggling is thus a crime against the state not a human rights violation as is trafficking.<sup>45</sup>

For the purposes of this dissertation these two groups of children will not be discussed.

#### b) Refugee & asylum seeking children

Refugee children are the most protected in international and regional law due to the existence of legal provisions that apply specifically to their situations. The 1951 UN Convention relating to Refugees defines a refugee as:

*A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group, or political*

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purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;”

“3(c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;”

<sup>43</sup> Dottridge “Exploring methods to protect children on the move. A handbook for organisations wanting to prevent child trafficking, exploitation and the worst forms of child labour” Terre des Hommes International Federation (2011) 15-16. Available at

[:http://resourcecentre.savethechildren.se/library/exploring-methods-protect-children-move-handbook-organisations-wanting-prevent-child](http://resourcecentre.savethechildren.se/library/exploring-methods-protect-children-move-handbook-organisations-wanting-prevent-child) [accessed 6 December]

<sup>44</sup> Gambaro et al “Unaccompanied Children: What happens once they are back home?” *International Social Service* Project Report (2008) 8.

<sup>45</sup> Gambaro Ibid.





*opinion, is outside the country of their nationality and is unable to or, owing to such fear is unwilling to avail him/herself of the protection of that country.*

Children are an important component of the refugee population.

Asylum seeking children are children who have applied for protection.

Refugee and asylum seeking children are not the focus of this dissertation, although some unaccompanied migrant children in South Africa are refugee and asylum seeking children, it is important to understand the distinction in order to understand the arguments that will be posited in this dissertation.

### c) Separated children

Children on the move also include children who have been separated by war and natural disasters. UNCRC's Committee on the Rights of the child's General Comment Nr 6 (2005) defines this group of children as *children who have been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives*. These may therefore include children accompanied by other adult family members.<sup>46</sup>

### d) Unaccompanied migrant children

These are defined as *children that have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so*.<sup>47</sup> This group of children will be the focus of this dissertation.

## 1.5 Methodology

The research methodology followed in this dissertation will mainly be a theoretical approach consisting of the critical analysis of literature and content analysis of the law that applies to independent child migrants. In addition there will be a descriptive and analytical look at applicable legal instruments as well as case law.

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<sup>46</sup> General Comment Number 6 (2005) Treatment of unaccompanied and separated children outside their country of origin. Par 8.

<sup>47</sup> General Comment nr 6 *ibid* at par 7.

## 1.6 Structure of this dissertation

This dissertation comprises of four chapters. Chapter one provides the background and general introduction to the dissertation. Chapter two examines regional and international law applicable to unaccompanied migrant children and has a discussion of the reality of migration in Sub Saharan Africa.

Chapters three and four includes a discussion of the two conflicting paradigms on children's rights namely the child protection paradigm and child autonomy paradigm. The dissertation concludes with a summary of the findings and recommendations.

## Chapter Two– Economic migrancy by children in Southern Africa and International law

### 2.1 Introduction

According to Sloth Nielsen and Mezmur<sup>48</sup> children cannot be regarded as subject only to the laws of their countries of origin. Unaccompanied migrant children who cross international borders face the triple vulnerabilities of being children; migrants and undocumented migrants simultaneously.<sup>49</sup> As a result they need heightened and specific legal protection in international law. Child welfare and protection from economic exploitation and harmful work become priorities. In their need for protection and justice, children have a place on the international legal agenda. In the past children's rights were viewed as falling within the realm of charity, under the UNCRC this position has been altered.<sup>50</sup> Children's rights are now recognised as part of international human rights law. International and regional migration together with the issue of undocumented migrants is therefore a global concern that demands the attention of international human rights law. Flynn et al<sup>51</sup> and Gambaro, Kobayashi et al<sup>52</sup> support this view and note that the issue of unaccompanied migrant children is of global relevance. This part of the dissertation will address international law applicable to unaccompanied migrant children in Southern Africa. Their vulnerabilities and protection needs as they arrive in South Africa will be addressed.

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<sup>48</sup> Sloth Nielsen and Mezmur "Surveying the research landscape to promote children's legal rights in an African context" *African Human Rights Law Journal* (2007) 330.

<sup>49</sup> Bicocchi et al supra note 2, at 9.

<sup>50</sup> Sloth Nielsen and Mezmur supra note 48, at 330.

<sup>51</sup> Flynn and Duvell "Undocumented migrants—symptom, not the problem" Platform for International Cooperation on Undocumented Migrants (PICUM) *Policy Brief* (2007) 1.

<sup>52</sup> Gambaro et al "Unaccompanied migrant children what happens once they are back home?"(2008) 4.

## 2.2 International, regional and national law applicable to unaccompanied foreign migrant children in South Africa

The law that will be considered in this regard includes, the UN Convention on the Rights of the Child<sup>53</sup> (UNCRC- also referred to herein as the Convention), the African Charter on the Rights and Welfare of the Child<sup>54</sup> (ACRWC- also referred to herein as Children's Charter) and the Convention Relating to the Status of Refugees. Furthermore soft law will be considered, namely the UN Guidelines on Alternative Care of Children<sup>55</sup> and the UN General Comment Nr. 6 (2005).<sup>56</sup>

### 2.2.1 The Core Principles: The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

The UNCRC and the ACRWC both operate on the basis of the following core principles: The principle of *non-discrimination* (article 2 UNCRC & article 3 ACRWC); the *best interests of the child* (article 3 UNCRC & article 4 ACRWC); the *right to life survival and development* (article 6 UNCRC & article 5 ACRWC) and *respect for the views of the child*-child participation (article 12 UNCRC & Articles 4(2) and 7 ACRWC). These general principles are important for the rights of unaccompanied migrant children in that they strengthen their rights and they guide authorities in interpreting, implementing and protecting the rights of children in the context of economic migration.<sup>57</sup>

The principle of non-discrimination entails the prohibition of discrimination directed at the child. Mahery<sup>58</sup> cites the UN Committee on the Rights of the Child (Committee) in

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<sup>53</sup> The UNCRC was adopted 20 November 1989 and entered into force September 1990. South Africa is a state party to this convention.

<sup>54</sup> The African Children's Charter was adopted in 1990 and entered into force in 1999. South Africa is a state party to this convention. South Africa is a State party.

<sup>55</sup> UN Guidelines for the Alternative Care of Children: Resolution (2010) available at: <http://www.refworld.org/docid/4c3acd162.html> [accessed 10 October 2014].

<sup>56</sup> United Nations Committee on the Rights of the Child's General Comment No. 6 Treatment of unaccompanied and separated children outside their country of origin (2005).

<sup>57</sup> Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in Boezaart T (Ed) *Child law in South Africa* (2009) 309.

<sup>58</sup> Mahery *ibid* 316.

its General Comment Nr. 5<sup>59</sup> and notes that the principle of non-discrimination requires states to actively identify individual children and groups of children whose rights may demand special measures. Mahery adds that such children are at risk of discrimination because of their powerless and dependent nature. Therefore the Committee requires young children in general and particular groups of children not to be discriminated against on any grounds. Viljoen adds that the principle of non-discrimination is an overriding principle.<sup>60</sup> Discussing the issue of non-discrimination as found in the ACRWC Kaime points out that States are required to prevent discrimination and ensure positive enjoyment of the rights which enable children to be recognised as equally valuable members of society namely every child within a state's jurisdiction holds all the rights guaranteed under the charter without regard to citizenship or immigration status.

The best interests' principle provides that the best interests of the child should be taken into consideration in all actions concerning the child. Kaime argues that this principle dictates that a careful and objective assessment of the child's competing needs be made.<sup>61</sup> Mahery argues that this does not mean that the best interests are an overriding factor. Judiciously, the principle must be applied systematically by authorities who must consider how children's rights and interests will be affected by their decisions and actions.<sup>62</sup> The duty to 'consider' the best interests of the child requires those interests to actually be taken into account and not to merely be noted.<sup>63</sup>

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<sup>59</sup> General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (2003)12.

<sup>60</sup> Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart T (Ed) *Child law in South Africa* (2009) 336.

<sup>61</sup> Kaime "The protection of refugee children under the African human rights system: Finding durable solutions in international law" in Sloth- Nielsen J (Ed) *Children's rights in Africa: A legal perspective* (2008) 185.

<sup>62</sup> Mahery 318.

<sup>63</sup> Mahery *ibid.*

Life, survival and development entail that steps must be taken to ensure the healthy development of a child.<sup>64</sup> Respect for the views of the child, means that states parties are to put in place measures to facilitate child participation at all levels.<sup>65</sup>

When considering the rights of unaccompanied migrant children in international, regional and national law these core principles are the pillars on which the rights of these children will be based.

### 2.2.2 The UNCRC

The Convention's preamble recognizes that, in all countries in the world, there are children living in exceptionally difficult conditions, and that these children need special attention. The first step that the Convention takes in protecting the rights of children is placing their interests within the family unit. This is evidenced by the wording in the preamble which acknowledges the importance of the family in a child's life. The Convention starts by noting that the family is the fundamental group of society and the natural environment for the growth and well-being of all children. In addition, the preamble provides that, for the full and harmonious development of a child's personality, he or she should grow up in a family environment. The reason for focusing on the family and children's rights at this point will become clear below.

Unaccompanied migrant children who cross international borders for economic reasons are usually awarded protection in international law based on article 20 of the Convention. This article reads as follows:

#### Article 20

- 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
- 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.*

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<sup>64</sup> Mahery 320.

<sup>65</sup> Mahery 321.



*3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, 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.*

Some argue that the UNCRC has been enormously influential in advancing children's rights and that it is thus regarded as a touchstone for children's rights throughout the world.<sup>66</sup> However, some criticise the UNCRC for being too ambitious and have identified some internal inconsistencies for example, the UNCRC emphasises the need to promote children's capacity for eventual autonomy<sup>67</sup> whilst simultaneously supporting the traditional role of the family in society and the authority of parents over children it is argued that these aims are irreconcilable.<sup>68</sup>

### 2.2.3 The ACRWC

When considering the rights of unaccompanied migrant children in the ACRWC the core principles discussed above guide the interpretation and implementation of the rights in question. The applicable provisions for unaccompanied foreign migrant children from the ACRWC are found in articles 18 and 25.

They read as follows:-

#### Article 18

*1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development....*

#### Article 25: Separation from Parents

*1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;*

*2. States Parties to the present Charter:*

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<sup>66</sup> Fortin *Children's rights and the developing law* (2009) 53.

<sup>67</sup> UNCRC art. 5 and art. 14.

<sup>68</sup> Fortin *supra* note 66, at 43.



*(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;*

*(b) Shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.....*

The ACRWC proclaims the family as the 'natural unit and basis of society' and entitles every child to the enjoyment of parental care and protection. These affirmations are strengthened by the placement of children's rights within the context of parental rights and duties alongside community responsibilities.<sup>69</sup> The ACRWC advocates placement in alternative care or family reunion because it is understood that children are better protected from harm within the family. Article 2(b) only provides for family tracing and reuniting the child with the family only when separation results from armed conflict or natural disasters, the case of voluntary separation as with unaccompanied migrant children falls outside the scope of this provision.

Kaime<sup>70</sup> notes that the obligation of States under the ACRWC is to ensure that children deprived of their family are provided with alternative family care which may take any one of the prescribed forms. Kaime portrays the paternalistic nature of law pertaining to the situation of unaccompanied children in Africa.

Chirwa<sup>71</sup> in addressing the merits and demerits of the ACRWC points out that in Africa, children are considered to be deficient in their decision making capabilities

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<sup>69</sup> Kaime "From lofty jargon to durable solutions: Unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child" 2004 (3) *INT J REFUGEE LAW* 342.

<sup>70</sup> Kaime *ibid.*

<sup>71</sup> Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* 10 (2002)160.



and are therefore seen as deserving protection. That is why their rights are placed within the family. The recognition of the centrality of the family in the upbringing of children forms the basis of the prioritisation of family reunification as a primary response in situations of separation.<sup>72</sup>

#### 2.2.4 The 1951 Convention Relating to the Status of Refugees

Unaccompanied migrant children are often classified as refugees in literature. It is for this reason that international refugee law will be considered. Article 1 of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol defines a refugee as:

*A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself of the protection of that country, or to return there, for fear of persecution.*

Unaccompanied foreign migrant children are explicitly excluded from this definition. They travel mainly for economic reasons; they do not have a fear of persecution. Refugees are thought to be involuntary migrants forced to flee because of imminent threat of violence, injury or death from human or natural disasters. Unaccompanied foreign migrant children migrate voluntarily with purely economic motives, for instance employment opportunities or searching for educational opportunities.<sup>73</sup> Evidence suggests unaccompanied migrant children want to work. While some children want to stay in South Africa many others want to travel safely and legally to and from Zimbabwe. This automatically disqualifies this group of children from being classified as refugees.

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<sup>72</sup> Kaime supra note 69, at 342.

<sup>73</sup> Fritsch et al "The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action" 2010 (4) *DENV. J. INT'L L. & POL'Y* 625.

The essential feature which differentiates refugees from migrants is their lack of choice in migration and lack of possibility to return to their home country.<sup>74</sup> However, some authors contend that the distinction between refugees and migrants is not as refined as it is depicted in literature. Some argue that chronic poverty is just as life threatening as political persecution.<sup>75</sup>

The UN refugee Convention is criticized for being narrow by Fritsch, Johnson and Juska,<sup>76</sup> they argue that the UN Refugee Convention does not capture the situation of unaccompanied migrant children involved in economic migration. Oucho adds to this view and argues that the drivers and faces of forced migration are only seen through the lens of colonialism.<sup>77</sup> Rwamatwara in support, highlights that causes and manifestations of refugees in contemporary Africa have changed with time. In the past forced migrations were mainly attributed to armed conflicts as nations engaged in liberation struggles against colonial rule.<sup>78</sup> Post-colonial Africa is now marked not only by civil wars but also by failed States and economic meltdowns, problems that impact the lives of people in the region. Unaccompanied migrant children, though they migrate voluntarily, some argue that chronic poverty forced them to migrate, particularly if one considers that unemployment, lack of income and sustainable livelihood can cause malnutrition and starvation.<sup>79</sup> Viewed this way, the situation of unaccompanied foreign migrant children can lead one to question the suitability of the operational definition of 'refugee' in contemporary Africa. However, proposing a change to the definition to include poverty as a ground for refugee status is unrealistic and will not offer pragmatic solutions to the plight of unaccompanied

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<sup>74</sup> Derluyn and Broekaert "Unaccompanied refugee children and adolescents: The glaring contrast between a legal and a psychological perspective" *International Journal of Law and Psychiatry* 31 (2008) 320.

<sup>75</sup> Derluyn and Broekaert *IJLP* 2008 (31) 320.

<sup>76</sup> Fritsch et al "The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action" 2010 (4) *DENV. J. INT'L L. & POL'Y* 634.

<sup>77</sup> Oucho "Voluntary versus forced migration in Sub-Saharan Africa" in Fischer C and Vollmer R (Eds) *Migration and displacement in Sub-Saharan Africa: The security migration nexus II* (2009)16.

<sup>78</sup> Rwamatwara "Coping mechanisms of refugees in Africa" in Fischer C and Vollmer R (Eds) *Migration and displacement in Sub-Saharan Africa: The security migration nexus II* (2009) 55.

<sup>79</sup> Rwamatwara *ibid.*

migrant children. Looking at the international definition of refugee this argument does not hold water. The international and domestic legal frameworks do not currently allow the use of poverty as a ground for refugee or asylum status however understandable the plight of these children might be.

The majority of unaccompanied migrant children in Southern Africa do not conform to the legal definition of a refugee and therefore have no protection in international refugee law.

#### 2.2.5 UN General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin.

The General Comment recognises that children migrate unaccompanied for economic reasons.<sup>80</sup> Furthermore, it recognises that the rights in the UNCRC also apply to unaccompanied migrant children.<sup>81</sup>

The General Comment recognises the appointment of a guardian for an unaccompanied migrant child as a key procedural safeguard to ensure and respect the best interests of the child. After the appointment the General Comment directs that where applicable, the child should be referred to asylum or other procedures.<sup>82</sup> When an unaccompanied foreign migrant child's presence in the host country does not raise the question of international refugee protection needs, the States are required to refrain from referring these children into asylum procedures. This is to be done without prejudice to the obligation of States to refer unaccompanied migrant children to relevant procedures serving child protection say child welfare legislation.<sup>83</sup>

The General Comment notes that unaccompanied children are temporarily deprived of their family environment and as such are beneficiaries of States obligations under article 20 in the UNCRC and shall be entitled to special protection and assistance provided by the relevant state.<sup>84</sup> In addition the

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<sup>80</sup> See par. 2.

<sup>81</sup> See par. 12.

<sup>82</sup> See par. 21.

<sup>83</sup> See par. 32.

<sup>84</sup> See par. 39.

General Comment states that the alternative care mechanisms under national law applies to unaccompanied migrant children in accordance with article 22 of the UNCRC.<sup>85</sup> In line with the placement of the child's rights within the family unit, the General Comment provides the child must first be assessed to ascertain the needs of the child and thereafter, tracing of the family is to commence as early as possible.<sup>86</sup>

#### 2.2.6 UN guidelines on alternative care of children

The Guidelines are intended to enhance the implementation of the UNCRC and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care.<sup>87</sup>

The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enable the child to remain in or return to the care of his/her parents, or when appropriate, other close family members.<sup>88</sup>

Paragraph 9 (b) provides that, as part of efforts to prevent the separation of children from their parents, States should seek to ensure appropriate and culturally sensitive measures to provide appropriate care and protection for vulnerable children.....such as unaccompanied and separated children...

In cases where a child is separated from the family the law does not recognise a child's autonomy. The interests of the child are placed within the family unit and where there is no family alternative care settings take the place of a family. To a great extent this position is justified but for children who display autonomous ambitions such as unaccompanied migrant children this position leaves them outside the ambit of the law.

It is interesting to note that the UNCRC and ACRWC do not make specific reference to unaccompanied migrant children who voluntarily leave the family. A plain look at

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<sup>85</sup> See par. 40.

<sup>86</sup> See par. 31(v).

<sup>87</sup> See par. 1.

<sup>88</sup> See par. 3.

the text leads one to deduce that the drafters did not foresee the possibility of children leaving the family voluntarily and therefore requiring their individual rights to be protected in other contexts other than the family. It is apparent therefore that there is a lacuna in the UNCRC and the ACRWC pertaining to the rights of unaccompanied migrant children who are autonomous. One can therefore criticise these legal instruments for being too protective in that they fail to strike a delicate balance between child protection and child autonomy.

Bhabha<sup>89</sup> finds that international, regional and domestic law applicable to child migration has three broad approaches: Punitive and criminalizing;<sup>90</sup> Regulatory<sup>91</sup> and lastly Protective.<sup>92</sup> Bhabha argues that contemporary independent child migration does not fit into the existing legal template. These children are not trafficked therefore they do not fit perfectly under the first approach, the second approach does not recognise child autonomy and places children's rights within the family unit as family dependants this again does not suit, reflect and protect the situation that unaccompanied migrant children who migrate for economic reasons find themselves in. The third one has potential to reflect and guarantee the rights of unaccompanied migrant children if a more effective and protective approach that specifically recognises economic migrancy amongst children is developed.

Unaccompanied migrant children are vulnerable to exploitation, arbitrary arrests amongst other things. Kaime argues that their vulnerability stems from the absence of an older guardian and their young age.<sup>93</sup> He adds that their heightened vulnerability requires a raised level of assistance in order to find durable solutions in law. Kaime takes on a very paternalistic view at the protection issues required for unaccompanied migrant children.

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<sup>89</sup> Bhabha supra note 21, at 1.

<sup>90</sup> This approach seeks to penalize and prevent exploitative child migration. It is mostly aimed at child trafficking. This approach is narrow and paternalistic but this is justifiable.

<sup>91</sup> This approach is common in regional and domestic law. It establishes the parameters for legal migration and is based on the notion that children are family dependants who lack autonomous agency. This approach is paternalistic.

<sup>92</sup> This approach includes international law directed at the protection of specific groups e.g. refugees, children etc.

<sup>93</sup> Kaime supra note 69, at 336.

The dominant discourses in migration involve children as dependants. These fail to acknowledge children as independent beings.<sup>94</sup> Yaqub adds that most migrant children are not seen as migrants and as a result other labels are used, for instance refugee children. Yaqub argues that this may partly explain their lack of recognition and consequently lack of protection in law.

The law mainly protects the rights of refugee and asylum seeking children.<sup>95</sup> Migrant children who are not refugees or asylum seekers are not specifically catered for in law. Their rights are gleaned from different sets of provisions applicable to other children. This makes their protection much more challenging in international law.

Children who do not have genuine refugee or asylum claims face the dangers of inadequate protection. Yaqub<sup>96</sup> notes that issues surrounding independent child migration were, in the past, dominated by the view that unaccompanied migrant children were as a result of trafficking or asylum seeking. Authorities were not aware of the unaccompanied migrant children who wanted to be independent and engage in economic activities and help alleviate poverty within the family. Yaqub points out that as a result of this oversight unaccompanied migrant children who did not have genuine asylum or refugee claims were automatically disqualified from global debates.

Flynn et al<sup>97</sup> point out that protection gaps in international law in protecting unaccompanied migrant children who cross international borders arise from very specific international definitions. The result is that categories of children who neither meet the criteria of the refugee convention or of subsidiary protection nor qualify for any other immigration status fall outside the letters of the law. This demonstrates that where the law does not define protective measures for a specific group in society there is room for human rights violations. Sloth Nielsen and Mezmur<sup>98</sup> point out that,

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<sup>94</sup> Yaqub "Independent child migrants in developing countries: Unexplored links in migration and development" *Innocenti Working Paper No. 2009-01 UNICEF* (2009) 6.

<sup>95</sup> Skelton "Migration and repatriation laws and procedures for unaccompanied migrant children in Mozambique, South Africa and Zimbabwe" *Save the Children* (2013)

<sup>96</sup> Yaqub supra note 94, at 1.

<sup>97</sup> Flynn supra note 51, at 5.

<sup>98</sup> Sloth Nielsen and Mezmur supra note 50, at 339.

were certain aspects of law are not specifically spelt out there is danger of applying the existing legal architecture formalistically without reference to practicalities or to implementation related issues. Gambaro et al<sup>99</sup> supports the view by Flynn et al above by stating that unaccompanied migrant children have few legal possibilities to get proper protection in international law therefore they tend to fall into the 'illegal immigrant' category.

International law, although it recognises the evolving capacities of children, can be criticised for being too paternalistic in that children's rights are placed within the family unit and there is almost no recognition of children's autonomy especially children in migration. If children cannot be reunited with their families the only alternative is to place them in alternative care.

### 2.3 Migration in Southern Africa

Generally, economic migration is an inherent part of Southern Africa. This region is the epicentre of labour migration in Sub Saharan Africa both historically and in contemporary terms.<sup>100</sup> This is attributed to deepening and widening inequality in incomes and opportunities within nations in the region and an increase in the numbers of people enduring poverty and extreme hardships.<sup>101</sup> As mentioned above the main drivers of migration in the region include migrants' search for greater economic well-being and South Africa's economic development. Therefore migration to South Africa remains a survival strategy for members of poor households in Lesotho, Mozambique, Zimbabwe and other countries in the SADC region.<sup>102</sup>

#### 2.3.1 Child migration to South Africa

Children are independently and actively involved in the migration process for economic reasons within Southern African. The drivers and determinants of child migration in the region include; chronic poverty, the prospects of employment or

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<sup>99</sup> Gambaro et al supra note 52.

<sup>100</sup> Ouchou "Cross border migration and regional initiatives in managing migration in Southern Africa" in Kok P et al *Migration in South and southern Africa: dynamics and determinants* (2006) 57.

<sup>101</sup> Adepoju "Internal and international migration within Africa" in Kok P et al *Migration in South and southern Africa: dynamics and determinants* (2006) 26.

<sup>102</sup> Adepoju ibid 40.

education opportunities in South Africa, abuse or domestic violence at home, the chance to rebuild their lives as a result of the impact of HIV and AIDS on their family and other reasons.<sup>103</sup>

The levels of autonomy of these children differ. Sometimes parents encourage and support their children to migrate seeing it as opening opportunities for a better future.<sup>104</sup> In other cases children move against the wishes of their parents or caregivers and in others children may not have any parents or close relatives due to HIV and AIDS.<sup>105</sup> This is indicative of the fact that the circumstances that push children to migrate differ; unaccompanied foreign migrant children are therefore not a homogenous group.<sup>106</sup> This has a bearing on the kinds of interventions that are suitable for these children under international, regional and national law. There are some children that can go back home and often do and there are those that cannot go back even if they wanted to. For purposes of this study the focus will be on those children that often go back home, usually with money or groceries to assist the family, whose aspirations are not to seek refuge or asylum in South Africa but due to extreme economic needs and duties seek economic opportunities.

### 2.3.2 Vulnerabilities and protection needs of unaccompanied foreign migrant children in South Africa.

Yaqub notes that there is an assumption that unaccompanied migrant children are 'just children' and the only concerns their independent migration illicit are their vulnerability and protection needs.<sup>107</sup> Yaqub admits that protection issues are key and relevant but he shows that children's agency and purposes as migrants make sense within the context of the realities in the developing countries they come from.

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<sup>103</sup> Reale "Away from home: Protecting and supporting children on the move" *Save the Children* (2008) 7.

<sup>104</sup> Fritsch et al/supra note 76, at 623.

<sup>105</sup> Reale Supra 14.

<sup>106</sup> Hillier "Children on the move: Protecting unaccompanied migrant children in South Africa and the region" (2007) 10.

<sup>107</sup> Yaqub supra note 94, at 67.



In the protection of children's rights in South Africa the point of departure is the Constitution.<sup>108</sup> Section 28 of the Constitution contains children's rights and Skelton points out that the section makes no distinction between citizens and non-citizens.<sup>109</sup> Therefore the rights contained therein apply to unaccompanied migrant children. Chapter 9 in the Children's Act<sup>110</sup> provides for the identification and treatment of children who are in need of care and protection. In terms of the Act unaccompanied migrant children are children without visible support and as such they are classified as children in need of care. Therefore according to the South African child protection system these children are to be placed in alternative care. In a nutshell, South African law follows closely on international and regional law in that Section 28 of the Constitution read together with relevant provisions in the Children's Act provides that unaccompanied migrant children after a Children's Court social inquiry are to be placed in alternative care and if the child has no refugee or asylum claim he/she must be deported if it is safe to do so.

In Southern Africa Yaqub<sup>111</sup> shows and digresses from the widely accepted idea that independent child migration is a result of trafficking or other criminal channels. The author depicts a clear picture of independent and voluntary child migration with children being active and decisive as opposed to passive victims. Such children, the author discovers, resemble economic migrants. Mahati<sup>112</sup> supports Yaqub by providing research evidence on unaccompanied migrant children engaged in economic activities found in the border town of Musina in South Africa.<sup>113</sup> Hillier<sup>114</sup> adds to the views of Mahati and Yaqub by challenging the common understanding that child migration always entails trafficking and refugee movement. She demonstrates that children cross international borders unaccompanied as a survival strategy. She further notes that the concept of children moving unaccompanied is

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<sup>108</sup> Constitution of South Africa Act 108 of 1996.

<sup>109</sup> Skelton *Save the Children* (2013) 25.

<sup>110</sup> Act 38 of 2005.

<sup>111</sup> Yaqub *supra* note 94, at 1.

<sup>112</sup> Mahati *supra* note 17, at 67.

<sup>113</sup> See also the Curatrix Ad Litem's report: *The AIDS Law Project v. Minister of Social Development and Others* South Gauteng High Court, unreported, (52895/09) 4, 45.

<sup>114</sup> Hillier *supra* note 106, at 4.

currently not well integrated into policy planning and legislation in the Southern African region.

The interplay between the legal framework and the practical realities of unaccompanied migrant children in Southern Africa needs to be interrogated. Thousands of Zimbabwean unaccompanied migrant children travel to South Africa in search of a better life.<sup>115</sup> Skelton observes that migration by the majority of children is motivated by the need for better economic opportunities rather than fear of persecution in their countries of origin.<sup>116</sup> While some children want to stay in South Africa many others want to travel legally and safely to and from Zimbabwe.<sup>117</sup> Children who do not have refugee or asylum claims in South Africa are by law required to be returned to their countries of origin after a social inquiry and only if it is safe to do so. International migration is therefore emerging as one of the key issues affecting children.<sup>118</sup> A lack of protection, respect and fulfilment of human rights within the migration process increases children's vulnerabilities to exploitation, arbitrary arrests by the police amongst other things.<sup>119</sup>

The South African government is largely unable and unwilling to provide services to these children. Unaccompanied migrant children face and experience detention.<sup>120</sup> In the past children were held with adults in detention centres, although a lot has changed since the 2005 Centre for Child Law case<sup>121</sup> isolated incidences of the infringement of unaccompanied migrant children's rights still occur. In a recent

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<sup>115</sup> Fritsch et al supra note 76, at 624.

<sup>116</sup> Skelton "Migration and repatriation laws and procedures for unaccompanied migrant children in Mozambique, South Africa and Zimbabwe" Save the Children (2013) 5.

<sup>117</sup> Fritsch et al supra note 76, at 627.

<sup>118</sup> Cortina J et al (Eds) "Adolescents, Youth and Migration: Challenges and Opportunities" (2013) 4. Available at: <http://picum.org/en/> [accessed 6 December 2014]

<sup>119</sup> Cortina *ibid*.

<sup>120</sup> Fritsch et al supra note 76, at 629.

<sup>121</sup> Centre for Child Law and Another vs. Minister of Home Affairs and others 2005 (6) SA 50 (T). The court in this ruled that the law in South Africa orders State authorities to bring unaccompanied migrant children before a children's court and they are to be removed to a place of safety pending judgement of the court.

unreported case<sup>122</sup> the Centre for Child Law came to the aid of two unaccompanied migrant children who were unlawfully held in police cells. The two were about to be deported without any social inquiry in terms of the Children's Act. The Centre for Child Law approached the court and argued that the children may be in need of care and protection and that they were vulnerable to unlawful detention and faced unlawful deportation.<sup>123</sup>

The most common dangers that unaccompanied migrant children faced include xenophobic attacks by police in the form of arbitrary arrests, victimisation by employers and threats of or actual violent attacks by criminal elements in the Musina area. In some cases children are robbed of their earnings by the adults they trust.<sup>124</sup> Sometimes children were harassed by adults both South African and Zimbabwean as well as criminal and non-criminal.<sup>125</sup>

Despite the dangers they faced on a daily basis Mahati presents evidence on how these children are resilient and managing to survive away from home. When put in alternative care settings some children runaway to go and work and they point out that education is just as important as earning a living. Save the Children interviewed some of these children and asked them what assistance they needed from South Africa and most cited jobs and schooling.<sup>126</sup> In spite of the challenges these children face they take their duties to provide for their loved ones back home seriously. The discussion of children in Musina paints a picture of child autonomy.

Johannesburg like Musina has a significant number of unaccompanied migrant children. In the unreported High Court case of *The AIDS Law Project v. Minister of Social Development and Others*<sup>127</sup> a Curatrix ad litem was appointed for some 56 named children who had been living at the famous Methodist Church in

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<sup>122</sup> Centre for Child Law v The Minister of Home Affairs and Minister of Police, unreported case no 61398/13, North Gauteng High Court.

<sup>123</sup> Child Law Matters 2013: Annual report of the Centre for Child Law pg. 10.

<sup>124</sup> Mahati supra note 17, at 76.

<sup>125</sup> Mahati ibid 72.

<sup>126</sup> Save the Children "Children crossing borders: report on unaccompanied minors who have travelled to South Africa" (2007) 5.

<sup>127</sup> Unreported (52895/09).

Johannesburg. Amongst other things the Curatrix was tasked to investigate where these minor children were living and to determine what was in the best interest of these children.

The Curatrix noted that the presence of unaccompanied migrant children at the Methodist Church was a symptom of a wider problem relating to the lack of a properly resourced and a coordinated system for the management of unaccompanied migrant children in South Africa.<sup>128</sup> It was argued elsewhere that though South African law provides that unaccompanied migrant children are to be placed in the child care and protection system, evidence<sup>129</sup> suggests that there are difficulties in placing these children there. This is due to the unclear interface between the refugee regime applicable to unaccompanied migrant children and the child protection regime under the Children's Act.

At the Methodist Church, the Department of Social Development and UNICEF became involved and went to the church to assist the children and move them to a place of safety. The children were moved but some ran away and others returned to the church.<sup>130</sup> The relevance of the Curatrix's report is that it paints a picture of how South Africa responds to the vulnerabilities and needs of unaccompanied children according to its international and Constitutional law imperatives. South Africa follows a child protection model that is similar to the one in international and regional law. Children's rights are placed in the family and in the absence of the family children are to be placed in alternative care settings. The recognition in law of the rights of an increasingly autonomous child therefore stands to be questioned together with the balance between child protection and child autonomy.

Holistically, the legislative framework applicable to the situation of independent child migrants suffers from two defects according to Bhabha,<sup>131</sup> Firstly, the normative

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<sup>128</sup> Curatrix Ad Litem's report: The AIDS Law Project v. Minister of Social Development and Others para 2.4

<sup>129</sup> Schreier "Critical challenges to protecting unaccompanied and separated foreign children in the Western Cape: Lessons learned at the University of Cape Town Refugee Rights Unit" Refugee: Canada's Journal on Refugees Vol 28, No.2 (2011) 62.

<sup>130</sup> Curatrix report par 2.22.

<sup>131</sup> Bhabha supra 16.

framework is incomplete because it fails to cover the circumstances of most independent child migrants. Secondly, it is dramatically ineffective because even where binding obligations or legal requirements exist their implementation is erratic. This is true as evidenced by the Curatrix report cited above and the situation of children in South Africa.

It is interesting to note that international, regional and national law does not reflect or balance children's autonomy and their protection needs. It is clear that the position in law is that when a child is not with the family he/she should be placed in alternative care where there is adult supervision. Unaccompanied migrant children on the other hand do not want to be placed in alternative care. They want to work and earn money that they can send home. The fact that they demonstrate high levels of autonomy renders them vulnerable in that there is no law or set out procedures that provide for children that are highly autonomous. International law makes no provision for them and this trickles down to domestic law. This group of children is on the rise in South Africa and despite their sense of autonomy they need protection because of child labour concerns, exploitation and many other dangers they face.

Flynn et al point out that protection gaps regarding the rights of unaccompanied migrant children arise from very specific international definitions.<sup>132</sup> The authors argue that categories of children who neither meet the criteria of the applicable legal provisions fall outside the ambit of the law and therefore become vulnerable to human rights violations. This rings true for unaccompanied migrant children who migrate for economic reasons to South Africa.

Unaccompanied migrant children who are highly autonomous have few legal possibilities enabling them to get proper protection in international law that's why they often fall in illegality.<sup>133</sup> According to Gambaro et al current mainstream political trends do not favour addressing the needs and rights of unaccompanied migrant children as they seem to criminalise and stigmatise children in migrant situations.<sup>134</sup>

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<sup>132</sup> Flynn supra 26.

<sup>133</sup> Gambaro et al (2008) 4.

<sup>134</sup> Gambaro ibid 8.

## 2.4 Conclusion

It is trite that children's rights are part of international human rights law. Unaccompanied migrant children cross international borders with autonomous ambitions. The law in its current form places children's rights within the family unit. In the context of migration, there is very little recognition and provision for children with autonomous ambitions in international law. Touzenis observes that there is no international or regional legislative framework dealing directly with unaccompanied child migrants.<sup>135</sup> It is evident that as children migrate to South Africa they exercise a great deal of autonomy, however they are exposed to various dangers and as such they could benefit from specific legal protection peculiar to their situation.

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<sup>135</sup> Touzenis "Human rights of migrant children" *IOM* (2008) 9, 13.

## Chapter Three – Childhood

### 3.1 Introduction

This chapter discusses the concept of childhood and the two schools of thought that dominate the discussions on theories of children's rights. These are the kiddie libbers and the child savers. The arguments of these two schools of thought will be applied to the situation of unaccompanied child migrants as a means to understand the nature of the legal protection that unaccompanied migrant children are entitled to.

### 3.2 Childhood

Schafer holds the view that childhood is a continuous process of physical, emotional and intellectual development which starts with complete dependence on others and ends with physical maturity and a substantial measure of factual autonomy.<sup>136</sup> In the past societies in Europe and North America changed their notions of childhood towards study, play and not work and they provided resources and institutions to support these new notions and as a result children did not migrate. Consequently, most legal and social policies are based on the belief that children lack capacity to make decisions on their own and that parental control is needed.<sup>137</sup> Therefore the prevailing constructions of childhood centre around children's vulnerability and dependency on adults.<sup>138</sup>

According to Meloni et al, childhood is conceived to be a mere preparatory stage to adulthood, during which time, children's interests and agency are rarely acknowledged. Children are therefore viewed as needing adults for their survival, and so adults must provide food, shelter, health care, affection, and education. Children are therefore recognised as a specific vulnerable group which the family and the state should protect and be responsible for.<sup>139</sup> The law reflects and reinforces this understanding of childhood by limiting children's capacity to act and make decisions.

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<sup>136</sup> Schafer *Child law in South Africa: Domestic and international perspectives* (2011)

<sup>137</sup> Abrams and Ramsey *Children and the law: Doctrine, policy and practice* (2003) 113-114.

<sup>138</sup> Todres "Independent children and the legal construction of childhood" *Southern California Interdisciplinary Law Journal* Vol. 23 (2014) 269.

<sup>139</sup> Meloni et al supra note 18.

Todres challenges the dominant narrative on childhood that underlies law and policy on children's issues. He argues that the way law and policy frames the concept of 'childhood' does not reflect the diversity of all children's experiences and actions. He states that the current construct of childhood is not inclusive. To date, independent children have received comparatively less attention from legal scholars than other categories of children, as both young children and adolescents in families have been examined in considerable depth.<sup>140</sup> Todres' view holds true for unaccompanied migrant children. The way 'childhood' is framed does not reflect the experiences of unaccompanied migrant children.

In international law, the portrayal of children as vulnerable and in need of family care is challenged by unaccompanied migrant children who voluntarily leave the family. The law places children's rights and best interests within the family, a view that is not misplaced, but a view that can be criticised for not fully taking into account the changing needs of children. Aderanti<sup>141</sup> notes that Sub-Saharan Africa is the world's poorest major region with high rates of unemployment for family heads and poor social conditions for both individuals and families. Aderanti adds, pervasive poverty is at the root of many problems confronting families in the region. Consequently these conditions compel children to defy the accepted norms of childhood namely dependent and vulnerable. In many cases Todres argues that the law's response to independent children not only fails to serve these children but actually facilitates harmful responses toward them.<sup>142</sup>

### 3.3 The theory of children's rights

South African child rights advocate Sonia Human advocates that any well balanced theory of children's should consist of both elements of protection and elements of

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<sup>140</sup> Todres supra note 138, at 265.

<sup>141</sup> Adepoju "Migration and Social Policy in Sub-Saharan Africa" Paper prepared for the UNRISD-IOM-IFS project on Social Policy in Migration in Developing Countries (2008) 6. Available at: [http://www.unrisd.org/80256B3C005BCCF9%2F\(httpAuxPages\)%2FAC96A6E2D6C0FF9CC125751200354DDB%2F\\$file%2Fdraft\\_adepoju.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F(httpAuxPages)%2FAC96A6E2D6C0FF9CC125751200354DDB%2F$file%2Fdraft_adepoju.pdf) [accessed 6 December 2014]

<sup>142</sup> Todres supra note 138, at 266.



liberation.<sup>143</sup> Theories of children's rights as argued by Freeman, Eekelaar, Wald and Hafen will now be discussed.

### 3.3.1 Freeman

Freeman argues that a balance be struck between children's nurturance and self-determination.<sup>144</sup> He proposes four categories of children's rights namely; rights to welfare; rights to protection; rights to be treated as adults; rights against parents. For purposes of this dissertation only rights to protection and rights to be treated as adults will be discussed.

Freeman reasons that protective rights aim to ensure that minimum acceptable standards of treatment are ensured. However, these rights do not bring about more independence. One decision maker is replaced by another say an adult is replaced by a social worker.<sup>145</sup>

Rights to be treated as an adult on the other hand are grounded in social justice and egalitarianism.<sup>146</sup> Freeman notes that the rights and liberties extended to adults should be extended to children as fellow human beings.<sup>147</sup> He is sceptical of the claim that children should be treated as adults. In his view, respect for children, requires society to provide a 'childhood for every child and not an adulthood for every child'. He argues that any child rights programme must recognise the integrity of the child and his/her decision-making capacities but at the same time note the dangers of complete liberation, children must not be 'abandoned' to their rights.<sup>148</sup> Freeman points out that children's rights require that adults take nurturance and self-determination seriously, hence he advocates for what he calls 'liberal paternalism'.<sup>149</sup>

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<sup>143</sup> Human "The theory of children's rights" in Boezaart T (Ed) *Child law in South Africa* (2009) 248.

<sup>144</sup> Human 255.

<sup>145</sup> Human 253.

<sup>146</sup> Human 253.

<sup>147</sup> Human *ibid*.

<sup>148</sup> Freeman "Taking children's rights more seriously" *International Journal of law and the family* 6, (1992) 66.

<sup>149</sup> Freeman *ibid* 69.

### 3.3.2 Eekelaar

Eekelaar acknowledges that children often lack the information or ability to decide what is in their best interests, therefore his theory of rights involves some kind of imaginative leap and guess what a child might retrospectively have wanted once he or she reaches a position of maturity.<sup>150</sup> Eekelaar proposes that children have three kinds of interests; basic interests, developmental interests and autonomy interests. He suggests that autonomy interests rank subordinate to the other two.<sup>151</sup>

### 3.3.3 Wald

Wald argues that children as family members cannot enjoy total autonomy over their lives, even if they are capable of making their own decisions. However Wald does recognise that some autonomy rights can be given to older children. Wald's theory of rights therefore advocates for an interdisciplinary approach.<sup>152</sup>

### 3.3.4 Hafen

Hafen divides children's rights into rights of protection and rights of choice. Protection rights aim to protect children against the long term implications of their own decisions made at a time they lacked sufficient maturity and capacities.<sup>153</sup> Hafen notes that the rights of choice are rights based on the assumption that capacity for making rational and moral decisions exist. He maintains that the distinction between rights of protection and rights of choice should be preserved. In his view, to restrict the child's right of choice is an important form of the right of protection.<sup>154</sup>

## 3.4 Analysis

It is clear from the scholar's views above that the dominant view on the protection of children's rights favours paternalism over child autonomy. Bainham is of the view that children's rights, although distinct from welfare includes welfarist or protectionist concerns.<sup>155</sup> He holds that the welfare of children dictates that they be allowed a

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<sup>150</sup> Human 256.

<sup>151</sup> Eekelaar "The emergence of children's rights" Oxford Journal of Legal Studies, Vol 6, No. 2 (Summer 1986) 171.

<sup>152</sup> Human 259.

<sup>153</sup> Human 260.

<sup>154</sup> Human *ibid*.

<sup>155</sup> Bainham *Children: The modern law* (1998) 80.

degree of self-determination or qualified autonomy. In light of the issues relating to the interpretation of children's rights, Sonia Human points out that scholars such as Freeman, Eekelaar, Wald and Hafen have tried to provide practical frameworks for children's rights by classifying them into certain categories.<sup>156</sup> In-light of these categories, Fortin prefers Bevan's scheme which simply divides children's rights into two broad categories: 'protective' and 'self-assertive rights'.<sup>157</sup> Fortin observes that this distinction represents the fundamental conflict underlying child law namely the conflict between the need to fulfil children's rights to protection and to promote their capacity for self-determination. This categorisation helps identify the two schools of thought that dominate children's rights discourse namely the 'kiddie libbers' and the 'child savers'. It is to these schools of thought that we now turn.

#### a) Child savers

Bainham<sup>158</sup> notes that child savers stress the vulnerability of children and the need to protect them from others and from themselves. He cites Mnookin an advocate of the 'child savers' who stresses the vulnerability of children and the need to protect them from others and from themselves. Mnookin opines that child protectionism is a highly paternalistic notion which supports the right of adults to take decisions for children and not the right of children to act for themselves. Human<sup>159</sup> states that, protective measures and paternalistic conduct in law is justified in light of promoting the best interests of the child.

The need to protect children from being forced into adulthood before they are sufficiently mature is a concern of those opposing the recognition of children's autonomy rights. Fortin cites Campbell who argues that the stress on children's adult-like competences is tantamount to redrawing the boundaries between childhood and adulthood. He argues that the current needs of the child here and now should not be sacrificed to those of the future child.

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<sup>156</sup> Human 252.

<sup>157</sup> Fortin *Children's rights and the developing law* (2009) 17.

<sup>158</sup> Bainham 79.

<sup>159</sup> Human *supra* pg. 247.

Child savers therefore are very protective of children and their childhood and place children's rights and interests in the hands of adults. The law is structured to reinforce and respond to the idea that a child's natural place is within a family.<sup>160</sup>

#### b) Kiddie libbers

Claims that children have a right to autonomy are derived from liberal political philosophies which emphasise the need to promote an individual's freedom to make rational autonomous decisions.<sup>161</sup> It is argued that children, should like adults, be free to lead their own lives according to their own conception of a good or worthwhile life.

According to Human, the 'kiddie libbers' argue that the protective approach to child rights is unacceptable because it impairs the child's status and dignity.<sup>162</sup> This school of thought deplures any paternalistic restrictions on children's freedom.

Holt<sup>163</sup> and Farson<sup>164</sup> were the most well-known child liberationists. According to Fortin they argued that childhood is a form of oppressive and unwarranted discrimination to exclude children from the adult world.<sup>165</sup> Holt advocated for children to enjoy adult privileges. Criticisms laid against child liberationists included the fact that they did not take into account the slow rate of children's physical and mental development when they gave them the same rights and responsibilities as fully matured adults.<sup>166</sup> Fortin cites research evidence that reinforced the view that the liberationists' ideas were based on unrealistic perception of children's capacities.

Fortin notes that the more recent proponents of the children liberation school such as Franklin<sup>167</sup>, although less radical, still promote the central idea that even quite young

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<sup>160</sup> Todres pg. 272.

<sup>161</sup> Fortin supra note 157.

<sup>162</sup> Human supra.

<sup>163</sup> *Escape from Childhood: The Needs and Rights of Children*, 1975.

<sup>164</sup> Farson *Birthrights* (1974).

<sup>165</sup> Fortin supra note 157, at 4.

<sup>166</sup> Fortin *ibid* 5.

<sup>167</sup> Franklin "The case for children's rights: A progress report, in: Franklin, B (Ed) *The handbook of children's rights: Comparative policy and practice* (1995).

children are capable of competent thought and of making informed choices and some are more competent than many adults.<sup>168</sup>

Bainham<sup>169</sup> questions whether there is any difference in substance between protecting the ‘welfare’ of children and protecting their ‘rights’. He points out that the welfare of the child incorporates the best interests of the child. He cites Farson an advocate of the extreme liberationist school who advocates that the critical birth right that children possess is ‘self-determination’. This, Farson argues, overrides all other rights. The extreme liberationist school that Farson represents is of the view that children should be treated as adults and extend to them all liberties associated with adulthood.

These two schools of thought are important in that they feed into the challenges in international and regional law regarding the rights of unaccompanied migrant children. Bainham<sup>170</sup> points out that the status of minority has as its basis children’s assumed inability to act in their own best interests. Child protectionism is therefore highly paternalistic and supports the right of adults to make decisions for children. He points out that the concentration on safeguarding the welfare of children obscures the issue of their rights. He argues that the welfare of children dictates that they be allowed a degree of self-determination or qualified autonomy. This debate<sup>171</sup> between child protection and child autonomy is important in that it applies to the situation of child migrants who are stretching the boundaries and definitions of childhood.

### 3.5 Unaccompanied migrant children

International law as discussed above places the rights of unaccompanied migrant children within the family unit, or failing that, the alternative care system. The placement of children’s rights within this context is reminiscent of the views of the child savers. International law to some extent does recognise the evolving capacities

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<sup>168</sup> Fortin supra note 157, at 6.

<sup>169</sup> Bainham 78.

<sup>170</sup> Bainham 79.

<sup>171</sup> This is a worldwide debate as evidenced by the English case of *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] UKHL 7 (17 October 1985) where children’s autonomy rights were spelt out.

of children but the legal provisions applicable to unaccompanied migrant children do not seem to reflect this view. Nothing in the provisions supports the idea that children can be independent or that if they are independent they are guaranteed some form of provision in law. This leads one to conclude that international law as it stands is heavy on paternalism. This view seems plausible given the vulnerabilities common in childhood but the situation that is unfolding in South Africa requires the law to recognise some form of autonomy for children exposed to extreme poverty. This dissertation in no way endorses child labour, child exploitation and other exploitative practices children are subject to when they cross international borders in search of better economic conditions. Rather the dissertation seeks to bring to light the reality that is playing itself out in the region. Deportation has not worked, placing children in alternative care has worked to some degree, there is need to promote children's rights in a more realistic and practical way.

The Children's Act recognises the autonomy of young people and allows them to make certain decisions without parental consent.<sup>172</sup> Schafer agrees and acknowledges that South African law recognises evolving capacities of childhood by clothing children with an increasing number of legal capacities as they approach adulthood. He therefore notes that there is a gradual process of empowerment which occurs. Schafer however points out that there is a weakness in contemporary South African law in that it doesn't have a coherent doctrine of how to regard the increasingly independent child.<sup>173</sup>

### 3.4 Conclusion

Law operates on the basis that children lack capacity to make decisions on their own. It is clear that the dominant construction of childhood centre around children's vulnerability and dependency on adults. This construction rarely acknowledges children's views and agency. Law reflects and reinforces this understanding of childhood by limiting children's capacity to act and make decisions. This position is evidenced by the placement of unaccompanied migrant children's rights within the

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<sup>172</sup> Friedman, Pantazis and Skelton 'Children's rights' in Woolman, Roux, and Bishop (Eds) *Constitutional law of South Africa* (2006) 47-47.

<sup>173</sup> Schafer *Child law in South Africa: Domestic and international perspectives* (2011).



family with little to no recognition of their autonomy. Some authors argue that this concept of childhood does not reflect the diversity of children's experiences. In addition international law's portrayal of unaccompanied children as vulnerable is challenged by unaccompanied migrant children as they voluntarily leave home.

## Chapter Four – Summary of findings and recommendations

From the onset this dissertation sought to answer whether the international law on unaccompanied foreign migrant children reflected the modern realities of economic migrancy in Southern Africa. Evidence presented supports the view that there is a significant number of children involved in migration as independent economic migrants. Unaccompanied migrant children in reality are autonomous and are not as passive as law and policy makes them out to be and yet their rights are placed within the family or in alternative care settings with little to no recognition of their autonomy. Their migration is characterised by the need to engage in economic activities to alleviate poverty but at the same time maintaining contact with their families.

International law justifiably places the rights of children within the family and in cases where children have been separated from the family; within alternative care settings. Although there is some recognition of children's evolving capacities, international law is criticized for having internal inconsistencies; simultaneously promoting children's capacity for eventual autonomy and the traditional role of the family and authority of parents over children. This dissertation supports the view that the concept of childhood as it stands does not reflect the diversity of children's experiences in Southern Africa. Law operates on the basis that children lack capacity to make decisions on their own. This portrayal of children as vulnerable and in need of family care is supported in law by the placement of children's rights and best interests within the family. However, this view does not recognise the situation of the majority of unaccompanied migrant children in South Africa. These children test the validity and applicability of the notion of childhood and the rights associated with it.

Unaccompanied migrant children also need to be protected as individuals not only as part of a family. If pragmatic solutions are to be found in international law child protection and child autonomy should co-exist, they do not have to exist exclusively of each other. In giving meaning to children's rights, Human argues that it is important to accommodate the status of children as both individuals and as members of a family.<sup>174</sup> Guaranteeing these rights is challenging in law as evidenced by the situation of migrant children. The challenge lies in balancing children's conflicting

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<sup>174</sup> Human 243.



rights: 'rights to protection' and 'rights to autonomy' as well as protecting children 'as individuals' and 'as part of the family'.<sup>175</sup>

In light of this and the need to also protect the rights of future generations, it is important to refer to child demographic trends in Africa. UNICEF<sup>176</sup> presents evidence that demographics of Africa's children are experiencing a shift on a scale unprecedented in human history. On current trends, almost 2 billion babies will be born in Africa in the next 35 years. Over the same period Africa's under-18 population will increase by two thirds, reaching almost 1 billion by mid-century; and close to half of the world population of children will be African by the end of the 21st century. Related to this, about 60 per cent of the African population and 70 per cent of sub-Saharan Africa survives on less than US\$2 per day. Extreme poverty is rife on the continent; around 40 per cent of Africa's population, and almost half (48 per cent) of sub-Saharan Africa live on less US\$1.25 per day. What this means is that today's unaccompanied migrant children's needs will most likely be the same needs of future generations in Southern Africa. This argument seeks to counter the argument by Campbell above that children's needs in the here and now should not be sacrificed for the rights of the future child. These demographics present evidence for one to assume that there is a high possibility of the current push and pull factors in migration to continue in future and force children into independent economic migration as a way to survive.

To conclude, it can be said international law on unaccompanied migrant children does not reflect the modern realities of economic migrancy in Southern Africa. There are no simple solutions to the situation of unaccompanied migrant children, all solutions are uphill battles that are costly to undertake and politically difficult to execute. For instance establishing a special protective status for them by changing the international definition of refugee will generate considerable controversy. Receiving countries like South Africa will resist this as these children are an unwelcome responsibility and changing the international definition is neither easy nor practical.

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<sup>175</sup> Human *ibid*.

<sup>176</sup> Generation 2030/Africa: Child demographics in Africa. UNICEF (2014) 5, 9. Available at : [http://www.unicef.org/policyanalysis/index\\_74707.html](http://www.unicef.org/policyanalysis/index_74707.html) [accessed 6 December 2014]



A long term and sustainable solution demands a regional response to this problem. South Africa alone cannot deal with this situation. For instance, collaboration with Zimbabwe for the safe and sustainable return of these children will go a long way. Reception centres in Zimbabwe can be established through collaborations between the South Africa government, international humanitarian organisations and the Zimbabwean government. These centres will facilitate the reception and placement of children into the Zimbabwean welfare system and there can also be the establishment of skills and training facilities where children will be trained in life skills and other practical abilities that prepare them for work. This solution is not without its problems, it is costly and collaborations are not easy given Zimbabwe's economic meltdown. However this solution, if given support by the international community and the national duty-bearers, can be sustainable and realistic. It will add to human capital development in Zimbabwe and will pay off in the long run thereby taking pressure off South Africa.

Another solution, although short term, is the build-up of space and capacity in South Africa to make the care and protection system work effectively to care for the children who would be truly in danger if returned to their home countries. The difficulty lies in assessing which children genuinely cannot go home in the absence of strong international social services. Thus, creating a coherent, sustainable, and consistent approach towards these children requires an honest reflection.

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