

## **Oh the shame of it: A first call on available resources for child refugees in South Africa**

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“If home is where the heart is then mother Africa must be heartbroken. Her children are scattered across the vast continent .....”<sup>1</sup> The World Refugee Survey of 2000 estimated that there were some 3.1 million refugees in Africa and a further 10.6 million internally displaced persons.<sup>2</sup> The 2005 Global Appeal of the United Nations High Commission for Refugees (UNHCR) identifies some 4.2 million persons of concern in Africa.<sup>3</sup> The main asylum countries in Africa are representative of some of the poorest in the world today. Some of these asylum countries are, themselves, economically and politically unstable. South Africa is not listed as a main asylum country despite the fact that Sylvester<sup>4</sup> indicated that the Department of Home Affairs estimated that at the time of going to press there were millions of Zimbabweans living illegally in South Africa for economic and political reasons. In 2003 South Africa deported some 114 416 illegal immigrants to other African states. 61 548 of them were deported to Mozambique and 41 207 to Zimbabwe.<sup>5</sup> The cost to SA of these deportations was in excess of seventy million rands. More than 1.4 million illegal immigrants have been sent home in the last decade. This would tend to suggest that there exists a very real problem that needs to be addressed.

International Human Rights laws oblige states to protect all persons within their territory, thus the primary responsibility to protect refugees lies with the country of refuge. International protections merely supplement and support domestic ones.<sup>6</sup> There can be no doubt that refugee situations create burdens for states of first asylum. For this reason the refugee problem is an international one requiring a collective

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<sup>1</sup> Sylvester E “Time to turn the tide on Africa’s tide of refugees” Pretoria News July 17 2002 9.

<sup>2</sup> [www.refugees.org/news/fact-sheet/faq-africa.htm](http://www.refugees.org/news/fact-sheet/faq-africa.htm) (accessed 16/01/2002). According to this site most African refugees are produced by Sudan, Angola and Burundi.

<sup>3</sup> UNHCR Global Appeal 2005 21 <http://www.unhcr/cgi-bin/texis/vtx/template?page=publ&src=static/ga2005/ga20051...> (accessed 07/01/2005).

<sup>4</sup> *Supra* n 2.

<sup>5</sup> Afrika M W “Aliens get a rough festival ride” Sunday Times January 4 2004 8.

<sup>6</sup> Refugees and stateless persons UN doc A/C.3/527, 26 Oct 1949 par 10; Fortin A “The meaning of ‘protection’ in the refugee definition” *International Journal of Refugee law* 2004 12 548 at 569-570.

response according to the principles of international solidarity and burden-sharing.<sup>7</sup> The UNHCR thus has two main tasks. The first to extend international protection to refugees, and the second, to seek permanent solutions to their problems.<sup>8</sup> Regional and international initiatives are however, secondary to obligations upon host countries. While voluntary repatriation of refugees is the preferred permanent solution, the process can be both a complex and lengthy one. The other permanent solution is the assimilation of refugees into new communities, either in the place of first asylum or, in a third country. This assimilation may result in an undue burden on the first asylum country and burden sharing may be essential for successful implementation of the solution.

Certain groups of refugees, most particularly women and children need special protection as a consequence of their exceptional vulnerability. How can we regard ourselves with pride and dignity when we treat our children appallingly? How, for example, could the Australian High Court uphold parliament's rights to hold children in immigration detention? What possible justification could a court have for finding that the letter of the Migration Act of Australia did not differentiate between adults and children as regards detention of unlawful non-citizens? Is not Australia, like South Africa, and almost the entire Western civilization, a member state of the Convention on the Rights of the Child?<sup>9</sup> How could Australia allow four children aged between seven and fifteen years to spend two and a half years in detention before their asylum application was filed? The family in question were fleeing political persecution in a Muslim state, yet the court refused to "frustrate the legislation" on the basis of mandatory detention. It found that the conflict, if any, between the legislation and international obligations under the Convention on the Rights of the Child, would not justify the court in refusing to give effect to the legislation. Kirby J indicated in his judgement that he did not see the failure of the legislation to differentiate between children and adults as an oversight, but rather as a deliberate policy on the part of the Australian Parliament which the court is duty bound to enforce. The court found no constitutional basis to invalidate the

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<sup>7</sup> Jackson IC "Ensuring that the exercise of UNHCR's traditional functions is maintained and reinforced in the 21<sup>st</sup> Century" 2000 12 *International Journal of Refugee Law* 589 at 589-590.

<sup>8</sup> Statute of the UNCHR par1.

<sup>9</sup> 1989.

legislation.<sup>10</sup> So too, how can we South Africans hold child refugees in appalling conditions and deport them to live as street children?<sup>11</sup> South Africa herself has condemned young girls seeking asylum in South Africa to rape, fear and uncertainty. (Ann Skelton later)<sup>12</sup> Two young girls seeking protection and security in the aftermath of the Rwandan genocide were, inter alia, raped, imprisoned with adults, in direct contravention of the Constitution,<sup>13</sup> and shunted from pillar to post in their desperate fight to avoid being returned to Rwanda. The legal framework showed a total lack of human compassion for their plight. This serves to highlight the importance of the failure of the Children's Bill to deal with refugee children as a class apart for adult refugees.<sup>14</sup>

Child refugees suffer many times over. Not only do they suffer human rights violations that are often the cause of their fleeing their country of nationality, but they then become the most abused group of refugees. They constitute the most vulnerable part of an extremely vulnerable population. More than half of the world's refugees are children, yet their special needs are not truly protected. They become exploited, by the labor market and the sex industry, are militarized, denied education, and the wherewithal for healthy development.<sup>15</sup> The conditions in which unaccompanied child refugees who arrive seeking asylum are kept, are shocking.<sup>16</sup> As a uniquely vulnerable population, children are entitled to receive care from child welfare authorities who will act in the best interests of the child and are capable of protecting their rights. Indeed, these children are often truly children in need of care. Despite this, gaps in law policy and practice serve only to exacerbate the trauma of these children displaced from their country, home and family.

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<sup>10</sup> Shaw M "Courts back detention of children" *The Age* 8 Oct 2004.

<sup>11</sup> McNamara D "Promises Broken" <http://www.hrw.org/campaigns/cpr/promises/refugees.html>

<sup>12</sup> Skelton A "No dumping: Litigating for the proper treatment of undocumented children in South Africa" paper presented at the 4<sup>th</sup> World Congress on Family Law and Children's Rights, Cape Town 20<sup>th</sup>-23<sup>rd</sup> March 2005.

<sup>13</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>14</sup> "Today's analysis" Legalbrief 07/06/2004 <http://www.Legalbrief.com> (accessed 7 June 2004); Rickard C "Shameful truth about SA's treatment of refugees" *Sunday Times* 6 June 2004.

<sup>15</sup> *Ibid.* Van Bueren G *The international law on the rights of the child* 1995 Martinus Nijhoff, Dordrecht 360 ; McNamara D *supra* n11.

<sup>16</sup> Becker J "The other immigrant children" <http://www.hrw.org/editorials/2000/crd-0107-mh.htm> (accessed 31 07 2003)

States of first asylum are often delighted when unaccompanied minor refugee children are taken in and fostered by families along their way. This relieves the burden on the state and resolves the food insecurity of these children, however, these children too must be monitored and efforts made to trace their families and reunite them. Furthermore, some of these fostered children may find themselves in abusive or neglectful environments from which they must be removed.

There is no lack of international and regional documentation providing for the protection of refugees.<sup>17</sup> Some of the most progressive of these are found in Africa where definitions have been widened in attempts to recognise the realities of the African refugee situation.<sup>18</sup> Despite efforts, however, the definition is still not wide enough to allow the majority of adults and children seeking refuge due to environmental upheavals to seek refugee status. Some documents such as the London Declaration of International Law Principles on Internally Displaced Persons (London Declaration) and the African Children's Charter specifically provide for protection of internally displaced persons. The London Declaration includes provision for preferential treatment to be afforded to, inter alia, expectant mothers, mothers with young children and unaccompanied minors.<sup>19</sup> Sadly, this same recognition of the plight of these vulnerable groups is not widely reflected in international refugee instruments.

That is not to say that no efforts have been made in the right direction, the CRC specifically grants special protection to child refugees in article 22, which special protections are supplemental to the other protections contained in the Convention.

Article 22 states:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate

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<sup>17</sup> *Inter alia*: United Nations Convention Relating to the Status of Refugees, 1951 (1951 Convention)

<sup>18</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention); African Charter on the Rights and Welfare of the Child (African Children's Charter)

<sup>19</sup> "Documents The London Declaration of International Law Principles on Internally Displaced Persons" *International Journal of Refugee Law* 2000 12 672 673ff . See art 2(2).

protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.<sup>20</sup>

The article thus protects refugee children and those seeking asylum equally. This is an important provision, however, as the definition of “refugee” remains restrictive and the CRC contains no positive obligation to grant asylum, the CRC is of limited value as a protection instrument. The only international convention that broaches the issue of a duty to receive refugees is the OAU Convention, which indicates that member states must, subject to their national laws, do their best to receive refugees.<sup>21</sup>

Furthermore, the UNHCR has developed policies and guidelines to protect refugee children.<sup>22</sup> These guidelines take cognizance of the difficulties that may be experienced by children in expressing their fears, difficulties arising from language and cultural barriers, and the added difficulties associated with proof in cases involving children. However, the UN continues to presume that children below the age of 15 are immature, thus treating their views as unreliable in many instances. The UNHCR has also been fundamental in the development of inter organizational measures such as Action for the Rights of Children,<sup>23</sup> which is involved in rights training and capacity building initiatives.

All but two countries worldwide are members of the CRC. This Convention sets minimum standards of health care, education and services (civil, legal and social). Member states have committed to undertake all actions and policies in the best interests of the child. Indeed, member states of the CRC have committed themselves to the principles of the Convention and are accountable for the delivery on these principles. So it is imperative that steps are taken to make the ideology of the

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<sup>20</sup> For a detailed discussion of the meaning of protection within the context of refugee provisions see Fortin *supra* n 6 at 548 where he argues strongly that protection should be interpreted to mean diplomatic protection.

<sup>21</sup> Van Bueren *supra* n 15 362

<sup>22</sup> *Refugee Children Guidelines on Protection and Care* UNHCR Geneva 1994 reprint 2002; UNHCR Summary Note on UNHCR’s Strategy and Activities concerning Refugee Children Refugee Children Co-ordination Unit May 2002.

<sup>23</sup> UNHCR May 2002.

instrument a reality for the world's children. Only then can the words of Carole Bellamy<sup>24</sup> regarding the twentieth century, "A century that began with children having virtually no rights is ending with children having the most powerful legal instruments that not only recognizes but protects their human rights" be altered for the twenty-first century to read, "A century that began with children having virtually no rights is ending with children having the most powerful legal instruments that not only recognizes but protects their human rights." States need support to enable them to meet their obligations of child protection under the Convention. Hence, the Hague Conference on Private International Law launched The Hague Project for International Co-operation and the Protection of Children. The purpose of this project is primarily information exchange<sup>25</sup>

The CRC is viewed by some as customary international law and thus containing law to which all states must adhere even if they did not ratify it.<sup>26</sup> This is of course a controversial view and not fully accepted. However, the CRC has a western bias,<sup>27</sup> and for this reason the African Children's Charter is seen as more progressive within the African context.<sup>28</sup> This charter seeks to protect the child's best interests in all situations, including those in which cultural beliefs and traditions may conflict with those interests.<sup>29</sup> The child's health and safety are paramount. One of the most important clauses of the African Children's Charter is art 2 which clearly states that a child is any person below the age of 18. This age is cast in stone and states parties to the convention must ensure that their domestic legislation accords with this principle. This principle is however compromised to the extent that the socio-economic realities of Africa often force children into adult roles, creating a clear contradiction between

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<sup>24</sup> UNICEF Executive Director [www.unicef.org/crc/introduction.htm](http://www.unicef.org/crc/introduction.htm) (accessed 07 Jan 2005.)

<sup>25</sup> See [www.hcch.net/e/conventions/project.html](http://www.hcch.net/e/conventions/project.html) for objectives of project.

<sup>26</sup> Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' 2002(2) *African Human Rights Law Journal* 11 13.

<sup>27</sup> Viljoen F "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and welfare of the Child" 1998(31) *Comparative International Law Journal of Southern Africa* 199 200; Lloyd *idem* 14-15.

<sup>28</sup> Lloyd *idem* 15ff.

<sup>29</sup> Lloyd *idem* 17.

the reality and the law. Furthermore, there is some conflict between the provisions of the CRC and the African Children's Charter.<sup>30</sup>

Article 23 of the African Children's Charter makes specific reference to child refugees. The provision is innovative and takes the internally displaced person into account too. The right to life as reflected in the African Children's Charter includes not only the right not to be deprived of life, save in circumstances where this is the direct result of due process of law, but also obliges states to grant necessities of life to those who otherwise prove to be without the means to sustain themselves.<sup>31</sup>

In South Africa, the paramountcy of children's rights is guaranteed in the Constitution<sup>32</sup> as well as in the international and regional instruments to which she adheres.<sup>33</sup> The South African Constitution reflects the legislature's recognition of the need to provide extra protection to all children **present within the country**,<sup>34</sup> as evidenced by the inclusion of article 28(1)(c) to supplement, in respect of children, the rights granted in articles 26 and 27. Article 28 is capable of being interpreted to create a positive duty on the government to provide for the needs of the child. There is no indication that these rights are to be implemented progressively, nor that they are subject to availability of resources. This would tend to indicate that the legislators envisaged that a minimum core of rights should be met in respect of children irrespective of resource availability.<sup>35</sup> Hence, a first call for children. It is unfortunate that the South African courts have interpreted article 28(1)(c) in the same manner as articles 26 and 27 which deal with the socio-economic rights of the entire

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<sup>30</sup> Art 38 of the CRC permits persons of 15 to be recruited as child soldiers. The African Children's Charter, art 22, bans recruitment of children as defined in the Charter. Art 39 of the CRC provides for recovery and reintegration of child victims into society, the African Children's Charter fails to do this.

<sup>31</sup> Art 5. See too Lloyd *supra* n 26 at 21. The African Children's Charter creates wide protection and promotion capacity vested in the Committee. Enforcement mechanisms are discussed in Lloyd at 23ff 4. The African Children's Charter came into force on 29 Nov 1999. Mozambique and SA are both members. (SA ratified on 7 Jan 2000 and deposited on 21 Jan 2000 <http://www1.umn.edu/humanrts/instree/afchildratifications.html> (accessed 03 11 2003).

<sup>32</sup> Constitution of the Republic of South Africa Act 108 of 1996 art28.

<sup>33</sup> United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

<sup>34</sup> Constitution of the Republic of South Africa Act 108 of 1996 art 7(1).

<sup>35</sup> Proudlock P "Children's socio-economic rights: Do they have a right to special protection?" 2003 Sept *ESR Review* [www.communitylawcentre.org.za/ser/esr2002/2002sept\\_special.php](http://www.communitylawcentre.org.za/ser/esr2002/2002sept_special.php)

population.<sup>36</sup> This failure of the courts to distinguish their treatment of the rights of children from those of adults has effectively denied those children the extra protections envisaged by article 28. It is hard to believe that this could have been the legislative intention and such an interpretation of the Constitutional provisions flies directly in the face of the South African Government's stated support for a first call for children.<sup>37</sup> This said, where *Grootboom*<sup>38</sup> allowed the state to place the primary responsibility to provide a child with food, shelter, nutrition, etc upon the parents where the child lives with the parent, *TAC*<sup>39</sup> interpreted the section in such a way as to indicate that while the duty to meet the health care needs of the child lies with the parents, the state has a responsibility to intervene and meet those needs where the parents are unable to do so, not only when the child is removed from family care. It could be argued strongly that the very inclusion of section 28(1)(c) indicates that the government and the people of South Africa have given a clear indication that they believe that the needs of the vulnerable elements of the country should be given first priority.

Most socio-economic rights entrenched in the Bill of Rights are qualified by the state's available resources and should be subject to progressive realisation. Children's socio-economic rights are not limited in this way. Children are entitled to basic nutrition, shelter, not housing, basic health care and social services. To limit the rights of the child, a legislative provision that complies with article 36 of Constitution would be required. SA must realise the CRC objectives to the maximum extent of available resources.<sup>40</sup> One of the primary challenges faced by SA in realising CRC rights is lack of resources. The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states to reorganise their priorities to meet their obligations under the Convention.<sup>41</sup> SA must prioritise budgetary allocations to meet obligations under

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<sup>36</sup> *Government of the Republic of South Africa and Others v Grootboom and others* 2000 (11) BCLR 1169 (CC) (*Grootboom*); *Minister of Health and others v Treatment Action Campaign and Others*, Case CCT 8/02 (TAC).

<sup>37</sup> Proudlock *supra* n 35.

<sup>38</sup> *Government of the Republic of South Africa and Others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

<sup>39</sup> *Minister of Health and others v Treatment Action Campaign and Others*, Case CCT 8/02 (TAC).

<sup>40</sup> Klinck E "The United Nations Convention on the Rights of the Child: Obstacles in the implementation of children's rights In South Africa" Paper delivered at conference on The Protection of the Rights of Children Bloemfontein 21-23 August 2000.

<sup>41</sup> South Africa ratified the ICESCR on 3 Oct 1994 and has thus adopted the underlying principles thereof.

the CRC to the maximum extent of its available resources. International co-operation in this regard would be welcome. Education, health and survival are still of huge concern. States are not relieved of their responsibilities because of scarce resources.<sup>42</sup>

Much is written on the “first call” for children, especially in the context of children in armed conflict.<sup>43</sup> The 1990 world summit leaders agreed to be guided by the principle of a first call for children. Thus the needs of children should be prioritized in resource allocation at all levels.

Why should children have any claim to special treatment? If children have equal status to adults and are entitled to all human rights afforded to adults why do they need special protection? Simply put, because our children are our future. If we do not invest in our children then our future is bleak, at best. Children depend upon adults to nurture and support their development. Where there is no suitable adult to assume that role society must step in to address the child’s developmental needs or the child’s special vulnerability may be exploited.

The term “child” has a measure of vulnerability inherent in it. Can keeping children in refugee camps, especially for extended periods ever be in their best interests? Refugee camps may well be a necessity but attempts should be made to normalise the lives of children in those camps as far as possible<sup>44</sup> Education is vital to identifying long term sustainable solutions.

Children’s development may be threatened by their special vulnerability to factors such as poverty and disease. External aid to asylum countries often fails to take the special needs of children into account and aid in the form of food rations, for example, is often unsuited to the needs of children. Malnutrition can lead to other health and developmental problems. Education remains a huge factor. Deprivation of

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<sup>42</sup> “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” Maastricht 22-26 January 1997 [www1.umn.edu/humanrts/instree/Maastrichtguidelines.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html) par 13 states that states must provide the minimum core obligations on a minimum essential level. Klinck *supra* n 40 is of the opinion that the core minimum obligations are those entrenched in art 28(1) of the Bill of Rights.

<sup>43</sup> Nylund BV “International law and the child victim of armed conflict- Is the “First Call” for children?” 1998 6 *The International Journal of Children’s Rights* 23 Certainly this is relevant to our discussion as armed conflict on the African continent and elsewhere is an important cause of refugees.

<sup>44</sup> *Idem* 31.

cultural role-models, culture and language are also important developmental factors. The 1951 Convention<sup>45</sup> requires asylum states to provide refugee children with a primary education of an equivalent standard to that offered by that state to its own nationals. This education must include education in their own language and culture.<sup>46</sup> The ICESCR and CRC also provide for progressive provision of secondary education. This said, however, the nature of the primary education to be provided and the language of instruction remain thorny issues. Many developing states are unable to provide primary education for their own children and even with added international funding this affects access of refugee children to education.

The UNHCR Global Appeal 2005 is published with the purpose of keeping all interested parties informed about the circumstances of persons of concern who fall within the UNHCR's mandate.<sup>47</sup> It contains information relating to programmes and strategies envisaged to assist these persons during the forthcoming year. All the strategies and programmes that are envisaged must be funded from a budget comprised predominantly of donor funds.<sup>48</sup>

Currently the UNHCR recognises 17 million refugees and persons of concern in 121 countries worldwide, to whom they undertake to afford international protection and for whom they seek to identify sustainable solutions ranging from voluntary repatriation to integration into their country of asylum or a third country. Numbers take no account of illegal immigrants who do not seek official status. The High Commissioner,<sup>49</sup> was responsible for the initiation of the 4R's initiative that seeks to repatriate, reintegrate, rehabilitate and reconstruct with a view to creating durable solutions. In 2003 the Convention Plus initiative was launched to engage all interested states and parties to commit to resolving the refugee problem through shared responsibility and burden sharing through development of multilateral agreements.

It is vital to note that in addition to the refugees and persons of concern that fall within the UNHCR mandate, there are millions of stateless persons and of internally

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<sup>45</sup> Art 22.

<sup>46</sup> Art 29.

<sup>47</sup> [www.unhcr.ch/cgi-bin/tehis/vtx/template?page=publ&src=static/ga2005/ga2005\\_1...](http://www.unhcr.ch/cgi-bin/tehis/vtx/template?page=publ&src=static/ga2005/ga2005_1...)

<sup>48</sup> Statute of the UNHCR UN Gen Ass Res 428 (v) Dec 1950.

<sup>49</sup> Mr Ruud Lubbers

displaced persons who have not yet crossed an international border. The UNHCR recognises some 546 478 refugees and persons of concern in Southern Africa where their focus in 2004 was on the repatriation of Angolan refugees and the Zambian Initiative,(ZI) both of which have met with some considerable success.<sup>50</sup> Concern remains around the delays in processing asylum applications, thus preventing access to national services. UNHCR has attempted, to some extent, to address this problem by lending support to government authorities. The UNHCR is aware of the fact that national strategies are faced with other problems such as dealing with the HIV pandemic and that refugees are consequently overlooked, especially in terms of funding. UNHCR does, however, provide limited funding for HIV programmes in the camps.

Social and economic empowerment will be a vital element of any initiative aimed at durable solutions to the refugee problem in Southern Africa. In Southern Africa the UNHCR has committed itself to assisting local governments in developing legal frameworks that better protect refugees and asylum seekers, and make provision for the local integration of refugees and asylum seekers who cannot or do not wish to be repatriated. The UNHCR will attempt to replicate the ZI elsewhere in Southern Africa. Advancement of gender equality and respect for women and children's rights has been identified as a Commission priority and programmes are to be introduced to that end. The UNHCR has operations in South Africa and has stated in the Global Appeal that it will "implement activities intended to ensure that the society of South Africa continues to assume increasing responsibility for the protection of and assistance to asylum-seekers and refugees"<sup>51</sup> Planned programmes are aimed at reducing xenophobia and rendering support for the backlog programme of government.<sup>52</sup> To this end the UNHCR has provided a budget for South Africa for 2005 of \$ 4 038 695.

In South Africa, refugees have been declared eligible for treatment and care under the public HIV/AIDS programme, to education through the Education Department, and to work and study as soon as asylum applications are processed. Problems remain,

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<sup>50</sup> Global Appeal 2005 *supra* n 3 Southern African Report.

<sup>51</sup> *Idem* at 182.

<sup>52</sup> Directed towards addressing the backlog of asylum applications through appointment and training of further officials.

however. High unemployment, over-stretched social services and xenophobia in the community at large. There is a huge gap between local service delivery and the needs of vulnerable refugees. UNHCR funds restrictively only to cater for those in greatest need.<sup>53</sup>

Two of the primary difficulties associated with achieving UNHCR objectives in Africa are logistics and lack of resources, exacerbated by the phenomenon of donor fatigue. It cannot be denied that “Africans are the most committed and best suited to safeguard the rights of Africans”<sup>54</sup> however, Africans lack the resources and logistical capacities to provide adequate protection” It is essential that capabilities be developed to accurately determine location, direction, numbers and needs of refugees and other displaced persons, if such persons’ human dignity, livelihood and hope are to be restored. In addition, conflict prevention and management must be prioritised and adequate international resources allocated for conflict maintenance if the well-being of displaced populations is to be secured.<sup>55</sup>

A fundamental point of departure for any successful refugee strategy in Africa is the understanding that humane laws and policies do not always automatically translate into humane law enforcement.<sup>56</sup> The presence of a progressive legal framework is insufficient to alter the realities of refugees in Africa. Lack of commitment to the implementation of that framework goes unpunished. This perhaps is a place where the African Commission on Human and People’s Rights established under article 30 of the Banjul Charter<sup>57</sup> might intervene to hear petitions from individuals seeking protection.

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<sup>53</sup> The UNHCR office for SA is in Pretoria. The High Commission works with partners, both Government agencies and Non Governmental Organisations listed in the report, *supra* n3 at 193.

<sup>54</sup> Levitt J “Conflict prevention, management, and resolution: Africa – regional strategies for the prevention of displacement and protection of displaced persons: the cases of the OAU, ECOWAS, SADC, and IGAD (Organisation of African Unity, Economic Community of West African States, Southern African Development Community, Intergovernmental Authority on Development) 2000 *Duke Journal of Comparative & International Law* 39 (<http://infotrac.london.galegroup.com/i...4-0-A13398930>).

<sup>55</sup> *Idem* 56ff.

<sup>56</sup> [www.lhr.org.za/refugee/page0.php](http://www.lhr.org.za/refugee/page0.php) (accessed 28 Feb 2005).

<sup>57</sup> African Charter on Human and People’s Rights adopted June 27 1981, reproduced in 1982 21 *ILM* 59.

Furthermore, until society develops effective mechanisms to hear the voices of children in matters of policy making, we hold their interests in trust and have a responsibility to further these. Without healthy development the contributions that these children can be expected to make to future societies will be stunted and ultimately undermine society.

In general, South Africa's public culture has become increasingly xenophobic. The myth that "the "deluge" of migrants" is responsible for crime, unemployment, and the spread of diseases has turned migrants into the target of abuse at the hands of South African society. Those with distinctive identifying features are especially vulnerable to abuse.<sup>58</sup>

The international community must cease to advance other nations ahead of Africa. The problem of donor fatigue must be addressed and in South Africa and, possibly other African states, struggles in respect of space, services and livelihoods must be put to rest by dispelling the myths that African immigrants are the direct cause of many of our modern social evils. Corruption in processing asylum applications, and other unconstitutional behaviours must be eradicated if they are not to threaten the fabric of our emerging democracy.<sup>59</sup>

If the experience of refugees and asylum seekers who have legally enforceable rights in South Africa is bad, how much worse the experience must be for the undocumented migrant, especially where the migrant is a child.

South Africa aspires to regional cosmopolitanism and, post-Apartheid South Africa is a new destination for migrants and immigrants. As such, it is necessary for South Africa to carefully rethink the entire refugee situation. Children must be prioritised and efforts made to normalise the lives of refugees. Detention should only be used as a last resort, especially in cases where children are involved.<sup>60</sup> Resources available for

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<sup>58</sup> "Prohibited persons' abuse of undocumented migrants, asylum-seekers, and refugees in South Africa" 1998 *Human Rights Watch* (Xenophobia and abuse of foreigners).

<sup>59</sup> Landau LB "The laws of Inhospitality: Black Africans in South Africa forced migration" May 2004 Working Paper Series #7 <http://migration.wits.ac.za> (Accessed 07 Mar 2005) 2.

<sup>60</sup> CRC art 37; Van Bueren *supra* n 15 371.

refugee programmes should first be allocated to children so as to secure the future of Africans on the African continent.