CHAPTER 22

INTERNATIONAL ISSUES AFFECTING CHILDREN

22.1 Introduction

In the modern world children face risks in a variety of cross-frontier situations. Some are caught up in disputes over custody or contact between parents living in different countries. They may be the subject of parental abduction. Children who run away abroad face the multiple risks which confront the unaccompanied child in an alien environment. Some children are the subject of unregulated inter-country adoption, fostering or other alternative care arrangements. Other forms of cross-border illicit transfer for the purpose of economic or sexual exploitation of children occur.[1] Children may be displaced through war, civil disturbance or natural disaster.

The need for international co-operation at all levels, legislative, administrative and judicial, in addressing the protection of such children is becoming well established. The CRC is full of reminders of this, through its encouragement of bilateral and multi-lateral arrangements or agreements in a number of areas,[2] and through more general references.[3] International administrative and judicial co-operation is needed for a variety of reasons, some of which are well known at the national level. These include the multi-disciplinary nature of child protection work and the need for close liaison between different agencies involved, social work, medical and legal, as well as the vital importance of communicating information concerning children at risk when they move from one place or country to another. In addition, at the international level, there are linguistic barriers to overcome together with the problems which arise from lack of familiarity with other legal and child protection systems, and the need to accommodate differences, which may have cultural roots, between the systems concerned.

In this Chapter we will therefore look at some of the international dimensions as they relate to

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1 Professor Geraldine van Bueren 'Invisible exports: Transfrontier problems concerning the protection of children', paper delivered at the Reunite South African Conference 2001, Pretoria, 25 - 26 January 2001argues that globalisation has created a new international commodity: children who are exported for their bodies and for their labour.

2 Article 11, illicit transfer and non-return of children abroad. Article 21(e), inter-country adoption. Article 22, refugee children. Article 34, sexual exploitation. Article 35, sale, trafficking and abduction.

3 See, for example, Article 45.

children living in South Africa. In particular, we will consider such controversial issues as inter-country adoptions, child abduction, refugee children, and trafficking of children across borders.

22.2 Inter-country adoptions

22.2.1 Introduction

This section focusses on *inter-country* adoption, as opposed to *international* adoption,[4] in the South African context. An inter-country adoption is seen as one that involves a change in the child's habitual country of residence, whatever the nationality of the adopting parents.[5] The distinction between inter-country adoption and international adoption is important, as the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (hereinafter 'the Hague Convention') applies to only those adoptions involving the child's transfer to another country.[6] South Africa is not a signatory to this Hague Convention.[7]

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4 International adoption is the practice whereby adoptive parents adopt a child of a nationality that is different from theirs irrespective of whether or not they reside or continue to reside in the child's country of habitual residence. A South African child who is adopted by Canadian citizens resident in South Africa would be involved in an international adoption but not an inter-country adoption. If the South African child were to be adopted by Canadian citizens living in Canada, it would be both an international and inter-country adoption. Tshepo Motsikatsana 'Intercountry adoptions: Is there a need for new provisions in the Child Care Act?' (2000) 16 **SAJHR** 46, footnote 3.

5 UNICEF 'Intercountry adoption' (1998) **Innocenti Digest** 2.

6 Article 2 of the Hague Convention.

7 However, South Africa has acceded to the Hague Convention on the Civil Aspects of International Child Abduction, 1980. See also the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, in operation from 1 October 1997.

The section is divided into four parts. After a general introduction, the current South African law on inter-country adoptions will be discussed. This discussion will include an analysis of the recent judgment of the Constitutional Court in **Minister for Welfare and Population Development v Fitzpatrick and others**.[8] A comparative analysis will follow and the section will conclude with some options for law reform.

22.2.2 History of inter-country adoptions

When it first began to be practised widely, in the aftermath of the Second World War, inter-country adoption was an ad hoc humanitarian response to the situation of children orphaned by war. Children from Germany, Greece and the Baltic States were sent by religious organisations for adoption in other European countries and in the USA. From 1953 large numbers of orphaned or abandoned children from the Korean war were adopted overseas.

Since the 1970s another momentum has overtaken the original impetus for inter-country adoption. While demand for children in adoption has continued to rise in the industrialised world, fertility has fallen, and consequently the number of children who can be considered for domestic adoption has declined. Some of the demographic and social changes contributing to these dwindling numbers are the greater availability of contraceptive aids, the legalisation of abortion, the higher workforce participation of women, the postponement of childbirth to later ages - and an increasing destigmatisation of single motherhood, as well as state support for single mothers in many cases, leading to greatly reduced abandonment rates.

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8 2000 (3) SA 422 (CC).

This structural demand for children in adoption in high-income countries has been met with the 'structural supply' of children available for adoption abroad in low-income countries.[9] Over the last several decades, increasing numbers of children have been and are being abandoned and orphaned in the developing world in the wake of socio-economic change, especially the rapid urbanisation in Latin America, Africa and certain Asian countries; and the upheavals, wars, ethnic conflicts and natural disasters that affect populations in different parts of the world.[10] At this stage, the HIV/AIDS pandemic is redirecting socio-economic change.

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9 The only identified study seeking to gauge the global incidence of inter-country adoption, written by S L Kane and published in the (1993) Vol 30 No 4 **Social Science Journal** pp. 323 - 339, found that at least 170 000 - 180 000 children were involved in inter-country adoption in the 1980 - 1989 period. Inter-country adoption over that decade increased by 62%, and 90% of all children were drawn from only 10 countries. At the same time, the number of sending countries had jumped from 22 in 1980 to 68 a decade later. The USA is the world's foremost receiving country of foreign adoptive children, responsible for roughly half of all adoptions.

10 UNICEF 'Intercountry adoption' (1998) **Innocenti Digest** 3: 'In other words, intercountry adoption, which should be viewed as one option among a series of child welfare measures for an individual child in need of care and protection, is no longer always the purely child welfare measure it was originally intended to be. In a certain number of cases, instead, it has become a lucrative profit-making activity, sometimes involving major financial interests and its own lobby, in which children are treated as commodities'.

It can be seen, then, that inter-country adoption is a shifting, evolving phenomenon, responding to both domestic and international forces. One of the more recent concrete expressions of this lies in the use of the Internet to promote adoption in ways that often involve the marketing of children[11] - as well as spawning private adoptions and offering shortcuts to the legal adoption process.

During the adoption process, violations of the most basic rights of the child can occur. These violations are often perpetrated under the cover of the supposedly humanitarian aim of the act and 'justified' by the simplistic view that a child will somehow always be 'better off' in a materially rich country. Illegal acts and malpractices can involve criminal networks, intermediaries of all kinds, and couples prepared to carry out, be accomplice to, tolerate, or simply ignore abuses in order to secure an adoption. The diversity of the methods used, and the wide range of actors that may play a role, demonstrate the vastness of the task of protecting the rights of the child in inter-country adoption. The challenge is all the greater in that, in many if not most cases, the resulting adoption bears all the hallmarks of a perfectly legal procedure.

22.2.3 **The position before Fitzpatrick**

Before the Constitutional Court ruling in the **Fitzpatrick**-case, inter-country adoptions were not legally possible in South African law.[12] Section 18(4)(f)[13] of the Child Care Act 74 of 1983 stipulated

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11 See, for instance, 'Tug-of-war over twice-sold babies', News24.co.za, 1 January 2001.

12 The CRC is the only international instrument concerning inter-country adoptions to which South Africa is a party. See the discussion of this UN Convention below.

13 'A children's court ... shall not grant the application unless it is satisfied, in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act 44 of 1949, of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such certificate or certificates'.

that a children's court shall not award an order of adoption unless the applicant or one of the applicants for the adoption of the South African born child is a citizen of and resident in South Africa, except where the applicant is a spouse of the parent of the child.

To cross this legislative barrier, adoption practitioners found different ways to facilitate the adoption of South African children in other countries. One such way was to use the provisions of section 52 of the Child Care Act, 1983. Section 52 makes it an offence to remove a foster child or pupil without ministerial approval from the Republic. The scheme works as follows: The child is placed in the foster care of a non-South African citizen,[14] and then ministerial approval is sought for the removal of the child by the foster parent(s) of the child from the Republic to another country, whereafter an application for the adoption of the child in that other country would be made.

Another option open to adoption practitioners is to obtain the consent of the parent(s) of the South African born child under section 18(4)(d) of the Child Care Act, 1983. Prior to the expiration of the 60-day 'cooling off' period in which consent may be retracted the South African parent would then apply for a South African passport on behalf of the child and consent to the child leaving the Republic in the company of the prospective adoptive parents. After the expiration of the 60-day period, the birth parent's consent to adoption becomes irrevocable and the child is considered abandoned and becomes a child in need of care. The foreign couple would then apply to become curators personae over the child and submit a home study, done in the foreign country, to a South African court which would then approve the foreign couple as curators personae on the basis of the consent granted and the foreign home study. After the curatorship has been approved by a South African court, the foreign couple would then apply for a visa on behalf of the child with the aim of adopting the child in their country.[15]

In this regard it is worth noting the responses to the following question posed in Issue Paper 13:

> Question 71: Should the requirements for adoptions by non-citizens be made the same as by a citizen? Aside from the question of adoptions taking place within South African territory, should South African law be amended to permit taking children to another country

14 Which placement does not require citizenship of the Republic as a precondition.

15 See also Motsikatsana (2000) 16 **SAJHR** 45 at 67. He points out (at 68) that critics of inter-country adoption argue that the consent given to adoption is usually not given freely by relinquishing parents and that economic and social constraints and pressures play a significant role in relinquishing decisions.

in order to be adopted there in situations (such as close-relative adoptions), where this would be in the best interests of the child?

The SA National Council for Child and Family Welfare answered the question in the affirmative. It submitted that the law should be amended to allow for inter-country adoptions in especially close relative adoptions. The Council said the circumstances of each case have to be carefully evaluated and the best interests of the child should be the guiding factor. It said there should be no restrictions in allowing the adoption of a child outside our borders, provided that in-depth screening and motivation for the adoption is known.

The NICC answered all parts of the question in the affirmative, and added that a think tank should be established to evaluate the ratification by South Africa of the Hague Convention on Intercountry Adoptions. Phoenix Child and Family Welfare Society and the Natal Society of Advocates also answered the question in the affirmative.

The National Council of Women of South Africa submitted that where there is a close relationship between a South African child and a foreigner, the latter should after careful enquiry be permitted to take the child for adoption outside South Africa, but if there is no relationship, the best interests of the child should prevail.

The Johannesburg Institute of Social Services submitted that the best interests of the child principle should be made applicable in all cases of adoption, irrespective of whether the adoptive parents are South African citizens or not. It said all the outdated concepts and ideas that do not serve the interests of the child, for instance whether his or her parents are citizens of this country or not, should be omitted in future legislation.

The Cape Law Society was of the view that the requirements for adoption by non-citizens should indeed be made the same as for a citizen. The answer to the second question was similarly in the affirmative with the Society holding the opinion that the definition should be done away with in suitable circumstances. The Durban Committee added that there should be no objection to a non-citizen adopting a South African child nor should there be any problem with removing that child from the country. In reality, it was submitted, this situation is completely different.

Mr DS Rothman believed that it is necessary to amend the legislation dealing with non-South African citizens on the adoption issue but not necessarily in a way emulating the provisions pertaining to citizens. He was of the view that where non-citizens have a good track record with the child, the procedures should be relaxed.

It must be noted that the above submissions were made well before the Constitutional Court had the opportunity to consider the issue in **Minister for Welfare and Population Development v Fitzpatrick and others**.[16] We now turn to discuss this important decision.

22.2.4 Minister for Welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 (CC)

The facts in the case are fairly well-known and a brief summary should suffice. The Fitzpatricks are British citizens who have been living permanently in South Africa since March 1997. Mr Fitzpatrick works for a US corporation and expects to be transferred back to the United States. They wished to adopt a minor child, who was born to a South African citizen. The child was placed in foster care with the Fitzpatricks at age two-and-a-half months and strong bonds developed between the child, the Fitzpatricks, and their children. After a brief separation, the family decided to adopt the child and approached the Cape High Court for relief.[17] In this instance, the adoption of the child was firmly supported by the social worker and the court appointed curator involved.

One of the two[18] main issues for the Constitutional Court to resolve was whether section 18(4)(f) of the Child Care Act, 1983, was in conflict with the Constitution. Goldstone J, in whose judgment the whole Court concurred, held that the absolute prohibition of the adoption of a South African born child by non-South Africans is inconsistent with section 28[19] of the Constitution which requires that

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16 2000 (3) SA 422 (CC).

17 This case is reported as **Fitzpatrick and others v Minister of Social Welfare and Pensions** 2000 (3) SA 139 (C). See also C M A Nicholson 'Inter-country adoptions - The need for South Africa to accede to the Hague Convention - *Fitzpatrick v Minister of Social Welfare and Pensions*' (2001) 64.3 **THRHR** 496.

18 The other issue related to the form of the order to be made and, in particular, whether an order of invalidity should be suspended.

19 The so-called children's rights section. Having found the provisions of section 18(4)(f) inconsistent with the children's rights section, it was not necessary for the Constitutional Court to consider whether the section was also inconsistent with the rights of prospective adoptive parents which may be protected by the provisions of sections 9 (the equality clause) and 10 (the human dignity clause) in the Constitution. See par [21] of the

the best interests of a child are to be given paramountcy in every matter concerning the child.[20] The Court recognised that in some cases it might be in the best interests of a South African born child to be adopted by non-South Africans:

judgment.

20 Par [16] of the judgment.

> It is not difficult to find other illustrations. South African parents may die leaving close non-South African relations in a foreign country. It might well be in the best interests of such an orphaned child to be adopted by those relations. Moreover, South African nationality is no guarantee that adoptive parents will continue to reside within the jurisdiction of South African social welfare services. What is more, the protection conferred by s 18(4)(f) does not extend to children, orphaned or abandoned in South Africa, but born of non-South African parents.[21]

While conceding that section 18(4)(f) of the Child Care Act, 1983, was unconstitutional, both the Minister of Social Development and the amicus curiae argued in favour of the suspension of the order of invalidity. They submitted that striking down the provisions of section 18(4)(f) of the Child Care Act, 1983, in the absence of any amending legislation would expose children to the threat of child trafficking. Moreover adequate background investigations of the prospective adoptive parents could not be undertaken and South African adoptive parents would not be given priority in suitable cases.[22]

The Court reasoned that the remaining provisions of the Child Care Act, 1983,[23] were sufficient to enable a children's court to accommodate the concerns of the Minister and the amicus curiae. The Court said:[24]

> In effect, until the amended legislation, administrative infrastructure and international

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21 Par [19] of the judgment.

22 The principle of subsidiarity.

23 As discussed in paragraphs [30] to [33] of the judgment.

24 Paragraph [34] of the judgment.

> agreements envisaged by the Minister are in place, foreign applicants will have a greater burden in meeting the requirements of the Act than they will have thereafter. They will have to rely on their own efforts and resources in placing all relevant information before the children's court.

It will be recalled that the Minister and the amicus curiae inter alia argued for a suspension of the order of invalidity on the basis that such order would not give adequate effect to the principle of subsidiarity.[25] The Hague Convention itself indicates that while inter-country adoption has a role to play, it should be considered a measure of last resort.[26] The principle of subsidiarity could therefore be accommodated in the new children's code.

It follows from the Hague Convention's emphasis on good process rather than on the legal formalities involved in the recognition and effects of adoption, that the Hague Convention applies to a wide range of types of adoption, including those where there is a possibility of termination of the adoption relationship, and those where the adopted child retains some links with his or her family (and country) of origin. Under the Hague Convention, recognition of adoptions effected in other countries cannot be limited to those adoptions which have a sufficient degree of identity to a South African adoption. All adoptions, whatever their effects, which have been made through Convention procedures, must then be recognised in South African law.

This could pose a challenge to South Africa as, at the moment, we recognise only one type of adoption - 'full adoption': this creates a new and irrevocable legal relationship between the child and adoptive parents which severs all legal ties between the child and his birth parents.[27] However, given the preliminary decision taken by the Commission to move away from parental rights to the concept of parental responsibilities, and the possibility of assigning components of parental responsibility to different care givers;[28] greater recognition to the role of the extended family; the move to 'open adoptions'; etc., a new South African children's statute might provide for what is called a 'simple' adoption.[29]

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25 Subsidiarity refers to the principle that inter-country adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth.

26 This is reflected in the Preamble and in Article 4 of the Hague Convention.

27 Sections 20(1) and (2) of the Child Care Act, 1983.

28 See 8.4.5.1 and 8.4.5.3 above.

29 This is an adoption which allows for the legal relationship between the child and the birth parents (and or the

22.2.5 Current Practices and Approaches: An Overview of Comparative Law

extended family) to continue in some form.

The majority of states who have ratified or acceded to the Hague Convention on Intercountry Adoption are still in the early stages of the implementation process for the Hague Convention. Others, like South Africa, are still contemplating ratifying or acceding to the Hague Convention. However, a number of states have already either enacted implementing legislation, or have put forward proposals for such legislative measures. Before setting out the implementing measures which need to be taken in South Africa, it is useful to consider the relevant laws of other states.[30]

22.2.5.1 United Kingdom

The United Kingdom, as a common law jurisdiction which recognises only full adoptions, faces problems of implementation similar to those encountered in South Africa. The United Kingdom has signed the Hague Convention in January 1994, and legislation has been adopted[31] which amends the Adoption Act, 1976 and the Adoption (Scotland) Act, 1978 in respect of inter-country adoption, enables the United Kingdom to ratify the Hague Convention, and introduces sanctions to deal with unacceptable practices in inter-country adoption.

In the United Kingdom, adoption is entirely a creature of statute. It is regulated by the 1976 Adoption Act and in Scotland by the 1978 Adoption (Scotland) Act. Inter-country adoption was unusual at the time this legislation was passed and detailed provisions were therefore not included (other than for the implementation of the 1965 Hague Convention). Every local authority has a duty

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30 For the position in Ireland, see Ireland Law Reform Commission **Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993**, September 1997; **Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993**, June 1998; Ireland Law Society "Adoption law: The case for reform" at www.lawsociety.ie/adoption(report).htm . For the position in New South Wales, Australia, see New South Wales Law Reform Commission **Report No. 6: Intercountry Adoption and Parent Support Groups**, March 1997.

31 The Adoption (Intercountry Aspects) Act 1999. See also Kisch Beevers 'Intercountry adoption of unaccompanied refugee children' (1997) Vol. 9. No. 2 **Child and Family Law Quarterly** 131.

to establish and maintain an adoption service in its area. Only local authorities and adoption agencies approved by the Secretary of State may make arrangements for the adoption of a child (except where the child is a relative). The process is set out in regulations.

The UK Adoption (Intercountry Aspects) Act, 1999, extends to all forms of inter-country adoption or adoption with a foreign element.[32] It enables England, Wales and Scotland to give effect to the 1993 Hague Convention through regulations. It establishes a Central Authority for each of England, Wales and Scotland to be responsible for the operation of the Convention and the appointment of approved adoption agencies as Accredited Bodies.[33] Provision is also made to enable the Secretary of State to make regulations for Convention adoption orders and for the recognition and annulment of Convention adoptions. The British Nationality Act 1981 is amended to enable children adopted overseas under the Convention to receive British citizenship automatically under certain conditions.[34]

The Act also amends the 1976 Adoption Act and the 1978 Adoption (Scotland) Act to regulate inter-country adoption in both Convention and non-Convention cases. It clarifies that there is a duty on local authorities to include inter-country adoption within their adoption services and enables adoption societies to be approved for inter-country adoption work.[35] It makes changes to the period a child must live with the adopters before an adoption order is made in inter-country cases and provides that adoption agencies will have responsibilities towards the placement.[36]

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32 For the text of the legislation, see www.bailii.org/uk/legis/num_act/aaa1999353/ .

33 The Secretary of State for Health; Sections 1 and 2.

34 Section 7.

35 Sections 9 and 10.

36 Sections 11 and 13.

Where the UK is the receiving state, in a 'simple adoption'[37] made under the Hague Convention, the Act provides for automatic conversion to a full adoption in the United Kingdom, provided that the UK authorities are satisfied that the birth parents consented to the adoption in the knowledge that it would be converted into a 'full' adoption once the child was brought to the UK.

37 A "simple adoption" does not have the effect of totally severing all ties from the birth parents.

Where the UK is not the receiving State, it is possible that a child may be brought to the UK in circumstances where simple adoptions are recognised in both the State of origin and the receiving State and no consent to full adoption has been given (a so called 'third country case'). In those cases, the adoption will still be treated as a full adoption by operation of law, but if any issue of status arises where it is felt it would be more favourable to the child to treat the adoption otherwise than as a 'full adoption',[38] an application may be made to the High Court. Insertion of a new subsection (3A) provides that where a child has been adopted under a Convention order and the High Court is satisfied, on an application under this subsection,

(a) that under the law of the country in which the adoption was effected the adoption was not a full adoption;

(b) that the consents referred to in Article 4(c) and (d) of the Convention have not been given for a full adoption, or that the United Kingdom is not the receiving State (within the meaning of Article 2 of the Convention); and

(c) that it would be more favourable to the adopted child for a direction to be given under this subsection, the Court may direct that subsection (2) shall not apply, or shall not apply to such an extent as may be specified in the direction.

The effect of this new subsection is to provide a new legal mechanism for the High Court to give a direction whether and to what extent a child adopted through a simple adoption under the Hague Convention should be treated as if he were not the child of any person other than the adopters or adopter. It will be available only if the adoption was not a full adoption, if the consents to a full adoption were not given or the UK is not the receiving State. It must be more favourable to the adopted child for the direction to be given.

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38 The adoption law of the United Kingdom recognises only one type of adoption - "full adoption" : this creates a new and irrevocable legal relationship between the child and the adoptive parents which severs all legal ties between the child and his or her birth parents.

Changes are made to the procedure which requires the Registrar General to enter in the Adopted Children Register adoptions effected under the Convention and overseas adoptions.[39]

39 Section 12.

Sections 14 to 18 deal with miscellaneous and supplemental provisions which include the introduction of new sanctions to make it a criminal offence in inter-country adoptions for a person to make arrangements for the adoption of a child or place a child for adoption unless requirements to be prescribed in regulations are complied with. These sanctions will not apply to birth parents, legal guardians or blood relatives. The Act makes the necessary provisions to enable the United Kingdom in due course to denounce the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions, concluded at the Hague on 15 November 1965. This Convention was ratified by only two other countries - Austria and Switzerland - which have also declared their intention to denounce it.[40] The purpose of the Convention was to resolve some of the difficulties and legal conflicts which may arise in inter-country adoption relating to recognition of adoption orders granted in other countries. This Convention has now been overtaken by the 1993 Convention.

22.2.5.2 **France**

France signed the Hague Convention on 5 April 1995, but has yet to ratify. On 24 February 1998, the French National Assembly approved the implementing legislation to enable France to ratify the Convention. Under the legislation, the body designated as Central Authority is the International Adoption Mission (Mission de l'adoption internationale) (MAI), which is under the aegis of the Ministry of Foreign Affairs, and which also includes representatives of the ministry of social affairs and the ministry of justice. The role of the MAI is to supervise the conduct of inter-country adoptions under the Convention and to ensure that the child has permission to enter and reside in France.[41]

22.2.5.3 **Sweden**

Sweden ratified the Hague Convention on 28 May 1997, and the Convention entered into force on 1

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40 Sections 15 and 17.

41 Ireland Law Reform Commission **Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in respect of Inter-Country Adoption, 1993**, June 1998, p. 8.

September 1997. The legislation which implements the Convention is the Act consequent upon Sweden's accession to The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1997.191) (The Hague Convention Act). The Intercountry Adoption Intermediation Act (1997:192) also makes provision for inter-country adoptions in which Sweden is the receiving State.

The Hague Convention Act provides that the Central Authority for Sweden is to be the Swedish National Board for Intercountry Adoptions (NIA). The NIA is responsible for issuing certificates under Article 23 of the Convention. Under section 5 of the Intercountry Adoption Intermediation Act, the NIA is also responsible for the accreditation of agencies and for their supervision. Under section 6 of the same Act, accreditation may only be granted to an agency which has as its main purpose the facilitating of inter-country adoptions. It must be shown that the agency will provide adoption assistance in a competent and judicious manner, without expectation of profit and in the child's best interests. Under section 7, authorization is for a fixed term. Authorization enables the agency to administer inter-country adoptions in respect of specified countries of origin only, and may also be subject to other conditions, for example in relation to the imposition of charges or the rendering of accounts. However, the Act does permit an accredited agency to make some reasonable charges. Accreditation may be revoked by the Central Authority if the agency no longer meets the standards set in section 6.

Under the Swedish legislation, all inter-country adoptions must be conducted through an accredited agency, except in certain cases where the child is related to the prospective adoptive parents, or where there are other special circumstances. Provision is made for fines to be imposed where a person provides inter-country adoption services without authorization, or where a child is removed from the country of his or her domicile, without the approval of the NIA.

A number of the responsibilities of the Central Authority are delegated under the Swedish legislation. Article 14 applications to adopt a child under the Convention are to be made to municipal social welfare committees. The social welfare committee must then prepare reports on the

prospective adoptive parents' eligibility and suitability to adopt, under Article 15, and agree to the adoption proceeding to the placement stage under Article 17.c. The social welfare committee is also responsible for taking any necessary measures under Article 21, where the continued placement of the child with the prospective adoptive parents is no longer in the child's best interests. Functions are also delegated to the accredited agency, which is responsible for the transmission of reports on the prospective adoptive parents under Article 15.2, and the receiving of reports on the child drawn up under Article 16.1. Agencies are also charged with obtaining permission for a child to enter and reside in the State, ensuring the safe transfer of the child under Article 19, and with supplying information to the authorities in the State of origin as to the progress of the adoption.

Under the Swedish Code of Parenthood and Guardianship, the effect of adoptions carried out in Sweden is to terminate the parent-child relationship between the child and the biological parents, and to create a new parent-child relationship with the adoptive parents. The adoption is thus a "full" adoption similar to that under UK and Irish law. Under section 5 of the 1997 Hague Convention Act, an adoption made abroad which has the effects of a ‘simple’ adoption may be converted to a full adoption in the Swedish courts. As a necessary condition to conversion, the consents required under Article 27.1.b of the Convention and Chapter 4, section 5 of the Code of Parenthood and Guardianship must have been granted. No provision is made for the recognition of simple adoptions as having the effects of a simple adoption in Swedish law.

22.2.5.4 **Canada**

Implementing legislation for the Hague Convention has been enacted by seven of the twelve Canadian provinces: British Columbia, Prince Edward Island, Manitoba, New Brunswick, Saskatchewan, Alberta and Yukon.[42] Each province has a provincial Central Authority, who may be

42 Manitoba: The Intercountry Adoption (Hague Convention) and Consequential Amendments Act, 1995; Prince Edward Island: The Intercountry Adoption (Hague Convention) Act, 1994; New Brunswick Intercountry Adoption Act, 1966; British Columbia, Adoption Act, 1995; Yukon: Intercountry Adoption (Hague Convention) Act, 1997. Quebec, Nova Scotia, Newfoundland and the Northwest Territories intended to implement the Hague Convention by the end of 1998. See also Tara Mani “Monitoring the implementation of the Hague Convention on Intercountry Adoption”, Canadian Coalition for the Rights of the Child, December 1997 at www.crin.org/crpublic1.nsf/14.../992f2c904bfc091d80256695003c249d?OpenDocumen .

either a government minister or a public official. In British Columbia,.the Central Authority is the Director of Adoption at the Ministry of Children and Families; in Prince Edward Island, the Director of Child Welfare; in Manitoba, the Director of Child and Family Services; in New Brunswick, the Minister for Health and Community Services; in Saskatchewan, the Minister for Social Services; and in Yukon, Director of Family and Children's Services. There is a Federal Central Authority for Canada, the National Adoption Desk (NAD).

The majority of the implementing statutes allow for the delegation of the functions of the Central Authority to public authorities and accredited agencies, and for some functions under the Convention to be performed by independent operators, subject to the approval of the relevant Minister. For example, the legislation of New Brunswick provides as follows:

> 5. ... (2) Where the Minister so authorizes, the functions of a Central Authority under Articles 15 to 21 of the Convention may, to the extent determined by the Minister, be performed by a person or body who meets the requirements of subparagraph (a) and (b) of paragraph 2 of Article 22 of the Convention.

However, the implementing legislation of Manitoba does not allow for delegation of functions to independent operators. Under section 5 of the province's Intercountry Adoption (Hague Convention) and Consequential Amendments Act, functions of the Central Authority may be delegated to public authorities or accredited bodies only. The legislation of all of the provinces provides that bodies accredited in other Contracting States may operate on their territory, with ministerial authorization, and that the Minister may authorise a body accredited in the province to operate in other Contracting States.

The legislation of the Yukon and Manitoba provides that the certification of consents provided by State of origin in a Convention adoption shall be accepted as valid by the authorities of the province.[43]

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43 Intercountry Adoption (Hague Convention) Act, section 10 (2) (Yukon); The Intercountry Adoption (Hague Convention) and Consequential Amendments Act, section 9 (3) (Manitoba).

The legislation for British Columbia makes detailed provision for the conversion of adoptions under Article 27 of the Convention. Section 55 of the British Columbia Adoption Act provides that:

> (1) On application by a person resident in British Columbia, the court may make an order converting an adoption referred to in Article 27 of the Convention to have the effect of an adoption under this Act.
>
> (2) An application for an order under this section must be accompanied by proof that the consents required under Article 27 of the Convention have been given.

Under the Adoption regulations for British Columbia, an adoption cannot be converted unless the court is provided with proof that the required consents have been obtained; a certified copy of the adoption order granted in the State of origin; a certificate of conformity issued by the State of origin; a Convention letter of approval issued by the British Columbia Central Authority; the child's birth registration; and, where applicable, details of any access orders or orders dispensing with consents.[44]

44 British Columbia Adoption Regulations (4 November 1996), section 33.

22.2.5.5 New Zealand[45]

In 1997, New Zealand passed the Adoption (Intercountry) Act, 1997, which allowed the State to accede to the Hague Convention. Whilst the Act makes comprehensive provision for implementation, it also allows (under section 24) for regulations to be made by the Governor General for the administration of the Act. The Act provides that the Hague Convention shall have the force of law in New Zealand, and provides for a Central Authority, which is to be the Director-General for Social Welfare, the chief executive of the Department of Social Welfare. The Act also provides for delegation of the Central Authority's functions to accredited agencies.

The Act makes detailed provision for accreditation of agencies. Agencies are accredited by the New Zealand Central Authority, where it is established that the body in question purses only non-profit objectives, that it is capable and competent to carry out the tasks that may be delegated under the Convention, that it will operate in the best interests of the child, and that it is directed and staffed by persons who are properly qualified in the field of inter-country adoption. Accredited bodies must report annually, under section 21, to the Director-General on the exercise of the functions delegated to them under the Convention. The Director-General can at any time carry out an assessment of an accredited body and must do so at intervals of not more than twelve months.

The Act provides that foreign agencies may operate in New Zealand, if they are authorised by the Central Authority. In addition, New Zealand agencies may operate in other jurisdictions, with the approval of the Central Authority.

Where an application is made to the Director-General for accreditation, the Director-General must place an advertisement in at least one daily newspaper circulating in the area where the organisation's principal office is situated in order to allow for submissions to be made on whether the organisation should be accredited. Where the Director-General refuses accreditation, the

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45 See also the New Zealand Law Reform Commission **Report 65: Adoption and its Alternatives**, September 2000, 293 et seq.

unsuccessful applicant must be given a copy of any information on which the Director-General relies in proposing to decline the application, and the organisation must be given a reasonable time in which to make submissions in relation to this information.

Section 19 of the Act provides that the Director-General may suspend or revoke accreditation, where an organisation is not performing its functions adequately, is pursuing profit objectives, or has imposed unreasonable charges for its services. There is also a provision, in section 20 of the Act, that any decision of the Director-General, to decline, revoke or suspend accreditation, may be appealed to the District Court.

Section 26 of the Act deals with the prohibition of payments to agencies accredited under the Convention. It provides that the prohibition does not extend to the payment of reasonable costs and expenses to any organisation approved as an accredited body, provided that these costs are in connection with a function delegated under the Act. By section 27 of the Act, accredited bodies may not advertise, but may notify the public that they have been accredited under the Act, and that functions have been delegated to them under the Act.

It is stipulated under the Act that prospective adoptive parents must be offered a choice, of a governmental or a non-governmental authority to prepare the report as to their eligibility to adopt.[46] Reports may be prepared either by the Director-General as Central Authority, or by a public authority or an accredited body.[47] Where a prospective adoptive parent applies to the Director-General and requests him or her to prepare the report, this request must be complied with.[48]

With regard to recognition of adoptions effected outside New Zealand, section 11 of the Act provides that an adoption recognised under the Convention has the same effect as a New Zealand adoption, that is, it fully terminates the pre-existing parent-child relationship. The Act does not make provision for the recognition of simple adoptions. Section 12 provides that, if the adoption

46 Section 7(3).

47 Sections 7(1) and (2).

48 Section 7(1).

does not already have the effects of a full adoption, it may be converted to such by an order of the Family Court, if the Court is satisfied that, inter alia, the consents to the conversion of the adoption have been given for the purposes of conversion.

Section 12(3) of the Act reflects Article 24 of the Convention, in allowing for the New Zealand Central Authority to refuse to recognise an adoption made under the Convention, subject to such terms and conditions as it thinks fit. It appears that this would allow the Central Authority to refuse recognition to a simple adoption where it was not possible to convert it to a full adoption in the New Zealand courts.

Section 13 of the Act details the right of access to information relating to adoptions effected under the Convention. It places an obligation on the Central Authority to ensure that all reports prepared or received under Article 16, are retained either by the Central Authority or by the Chief Archivist, where such reports result in an adoption.

22.2.5.6 **Ecuador**

Ecuador ratified the Convention on 21 August 1995. It is primarily a sending State in which there is a 2:1 ratio of inter-country to domestic adoptions. Ecuador has a history of corrupt commercial inter-country adoptions which has led to an increase in regulation.[49] The Code of Minors of 7 August 1992 regulates both domestic and inter-country adoption.

The Central Authority for Ecuador is the National Court of Minors. Inter-country adoptions are administered by the Technical Department of Adoptions - a component of the Welfare and Popular Promotion Ministry. It is State-financed, and has 3 regional offices, as well as a central national office. The National Court of Minors oversees adoptions, pre-and post-placement. It receives adoption applications from prospective adoptive parents, selects and advises adopters and. children,

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49 Ireland Law Reform Commission **Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption**, 1993, June 1998, p. 13.

and also prepares all the requisite reports and provides post-adoption services. The matching of the child with the prospective adoptive parents is the responsibility of the Assignment Committee of the Technical Department of Adoptions.

Accreditation agreements, signed by the Ministry of Social Welfare in consultation with the Technical Department of Adoptions, are valid for two years, and are renewable. Only one indigenous agency has been accredited - the 'Adoption Foundation for Our Children'. There are also foreign agencies which have been accredited through signing agreements with the Ecuadorian authorities. Again, the competent body is the Ministry for Social Welfare, in consultation with the Technical Department of Adoptions.

Prospective adoptive parents must adopt through an accredited agency. The child is consulted where appropriate, and in the case of an adolescent adoptee, he or she is required to give consent to the adoption. However, the practice of this varies between the provinces. A declaration of adoptability can be made where a child is orphaned or abandoned, or where the birth parents consent. Before adoptability can be declared, there must be a study carried out on the family of origin.

22.2.5.7 **India**

India is a multi-religious and multi-ethnic society, consisting of Hindus, Muslims, Khojas, Christians, Parsis and Jews. With the exception of Christians, Hindus and Khojas, the personal laws of these groups do not recognize a complete legal adoption. In general there is a lack of uniform adoption policies. The Supreme Court Judgment of February 1984 and its subsequent review provided guidelines for the inter-country adoption procedure. These guidelines are based on the Hindu Adoption and Maintenance Act of 1956, the Guardians and Wards Act of 1980 and the Juvenile Act of 1986.

It is a prerequisite that the foreign country must have:

(a) Enacted adoption laws under which a child from India can be legally adopted.

(b) Enacted immigration laws that allow Indian children to legally immigrate into the foreign country.

(c) Enacted citizenship laws that allow the Indian child to receive the lawful citizenship of the foreign country.

(d) Established diplomatic relations with India so that the foreign social welfare agency can apply directly to the Indian Social Welfare Ministry for an Intercountry Adoption License.

(e) Approved and licensed the foreign social welfare agency that is applying for the inter-country adoption of an Indian child.

As a point of departure, a document releasing the child for placement in adoption/guardianship (relinquishment document by a parent/relative or juvenile court order or release order from the government) is required.

The documents in respect of the child are the following:

(a) child study report;
(b) physical examination report;
(c) photograph; and
(d) I.Q. report (if the child is older).[50]

A Home Study Report is required, and the following supporting documents:

50 Standard formats for the child study and physical examination report are available. These documents and the photograph are to be countersigned by the adopting parents, as evidence of their approval of the child.

(a) Marriage certificate;
(b) medical certificates of both prospective parents, and their children (if any);
(c) medical report concerning the couple's prospects for having biological children (if relevant);
(d) certificate of employment/income of the working parents (a copy of the income tax return form, a bank reference and/or evidence of property ownership, if any);
(e) three reference letters from relatives, friends, colleagues, neighbours, or persons knowing the petitioners for at least two years;
(f) photograph of the family;
(g) statement about child care arrangements (if the prospective mother is working away from home);
(h) views of the other children on adoption (if relevant); and
(i) copy of the adoption order of the adopted children (if applicable).

Certain documents relating to consents and undertakings of the petitioners and the agencies concerned are required:

(a) Consent affidavits of the petitioner to be appointed a guardian; consent of the spouse; joint declaration of intent to act as if the adopted child is a biological child.
(b) Undertaking of the petitioner(s) to abide by the conditions set by the court for adoption and follow-up reports of the child.
(c) Consent affidavit of the placing institution/agency's representative affirming the proposal contained in the petition.
(d) Undertaking by the institution/agency to abide by the conditions of post-placement follow-up and supervision, and to keep responsibility for the welfare of the child in case of a disruption of the adoption.
(e) Mandatory authorization of the designated government agency (in cases of inter-country adoption).

The following documents are also required:

(a) Delegation or authorization instruments and attestation of the documents (in cases of inter-country adoption).
(b) Petition to adopt.
(c) Foster care agreement or the order of the juvenile / state authority.
(d) Clearance of the coordinating agency (in cases of inter-country adoption).
(e) Post-court order documents: Court order, indemnity bond; and follow-up report.

A foreign adoption agency must send a written application for each prospective adoptive family. The foreign adoption agency must prepare a home study report according to the laws of its country and this report must accompany the application. Upon receipt of the application and the home study report, the collaborating Indian social welfare agency locates a particular child for the family. The Indian agency must prepare and send to the foreign country a child study report which includes the child's name, medical history, physical and emotional status and other relevant information.

The foreign social welfare agency must share the child study report with the prospective adoptive family. If the family wishes to adopt the child they must sign the child acceptance form. It is the responsibility of the two collaborating agencies to make the necessary arrangements if the prospective adoptive parents choose to visit their assigned child in India.

The Indian social welfare agency can appoint an attorney to petition the local state court to award guardianship of the assigned child to the prospective adoptive parents in terms of the Guardians and Wards Act of 1890.

A local court can by decree award the guardianship of the child to the foreign adoptive parents residing in the foreign country. The court can also grant permission to arrange for the child to travel to the foreign country where he will be adopted. The prospective adoptive parents can be present at the court hearing, but it is not a requirement. The prospective adoptive parents are required to follow other court decree stipulations. They may be required to execute a bond in the child's name

for a short period of time, for the welfare of the child and to ensure his repatriation to India if the court should so order. The prospective adoptive parents must apply for a visa and arrange for the child's travel according to the immigration law of their country. This is done with the assistance of the collaborating social welfare agencies of the two countries. The adoptive parents are not legally required to pick up the child themselves. However, they may choose to do so in order to familiarize themselves with the child's culture and life prior to adoption. The child must be legally adopted by the adoptive parents in their own country within two years of the guardianship order. The adoptive parents must ensure that the child receives the same legal status and inheritance rights as biological children receive. The adoptive parents must also see to it that the child receives citizenship of the country.

The foreign social welfare agency must provide the collaborating Indian agency with regular post-placement reports for a specified period of time and a copy of the final adoption decree granted in the foreign country. Should the original adoption be disrupted, the social welfare agency of the foreign country must ensure, in consultation with the collaborating Indian social welfare agency, that an alternative adoption is arranged. It is also possible that an Indian court may order that the child be repatriated to India where the original adoption is disrupted.

Each collaborating social welfare agency provides its fee schedule based on its funding source. Prospective adoptive parents should anticipate the following expenses:

(a) Daily maintenance costs such as food, clothing and medicine;
(b) major medical or surgical costs;
(c) fees to free the child for adoption;
(d) lawyers fees; and
(e) passport and visa fees.

No provision is made for a Central Authority as understood under the Hague Convention. To a certain extent this role is fulfilled by the Social Welfare Ministry. Any social agency from a foreign country applying for an Inter-country Adoption Licence must submit its application to the Ministry.

The Social Welfare Ministry reserves the right to accept or reject any application and its decision is based on prevailing Indian child welfare policies, specified quotas of children for inter-country adoption and other factors. A list of all the approved foreign social welfare agencies and the approved Indian social welfare agencies licensed to work with foreign agencies is maintained and updated by the Ministry.

The Central Adoption Resource Agency (CARA) also plays an important role. It was established in 1984 and has the following role and functions:

(a) It serves as a clearinghouse for information on children available for adoption. Through its monitoring and supervision, it provides uniformity to nationwide inter-country adoption practice.

(b) Applications from the foreign prospective adoptive parents are submitted to the CARA who then forwards them to recognized Indian agencies for processing. The CARA also maintains data both on children admitted to Indian social welfare agencies and on children available for adoption.

(c) The CARA monitors and regulates the operation of recognized child welfare agencies and inspects their annual audited reports. It receives adoption data from all competent courts and submits it to Indian Diplomatic Missions in the respective countries. The Indian Diplomatic Missions submit progress reports to the CARA and in this way it is possible to keep a watch on the development and progress of the children adopted by foreign parents.

(d) The CARA organizes and arranges periodic meetings of voluntary coordinating agencies and sponsors training programs for social workers and other people involved in adoption matters.

The social welfare agency from a foreign country applying for an Intercountry Adoption License must submit a notarized copy of its state/country adoption license, together with accompanying documents as requested by the Social Welfare Ministry of the Government of India. This Ministry reserves the right to accept or reject any application and its decision is based on prevailing Indian child welfare policies, specified quotas of children for inter-country adoption, and other factors.

If the foreign social welfare agency is approved for inter-country adoption, the name of that agency will be placed on a master list of all approved agencies from different countries. This list is periodically updated and distributed to all the social welfare agencies in India involved in providing adoption and children's services. As only a few of the Indian social welfare agencies are licensed to work with foreign agencies for the purpose of inter-country adoption, these agencies are also listed. This list is also periodically updated by the Social Welfare Ministry.

Once a foreign social work agency receives the Intercountry Adoption License from the Social Welfare Ministry of the Government of India, it may work directly with any one or more of the licensed Indian social welfare agencies.

Indian children are to be placed with Indian families as a first priority. They can only be placed for inter-country adoption with foreign nationals when parents of Indian origin, either in the country or in foreign countries, are not available.

It is only Indian social welfare agencies licensed by the Social Welfare Ministry of India that can place children for inter-country adoption.

A direct application from a foreign individual may not be considered by an agency in India. The application can only be presented by a social welfare agency licensed or recognized by the Social Welfare Ministry of the Government of India.

A single biological parent or legal guardian has three months to reconsider his decision and a married couple has four months to reconsider their decision. A licensed social welfare agency in India must honour these waiting periods.

All licensed social welfare agencies in India must ensure that a child is legally free for adoption in accordance with the Juvenile Justice Act of 1986.

If possible, a child placed for inter-country adoption should be under three years of age, so as to accelerate his assimilation into the new family, community and society.

22.2.5.8 **Romania**

The legislative framework for adoption was modified by Law No 11 which came into effect on 1 August 1990. Articles 73 and 74 of the Family Code that had assigned the responsibility for granting adoptions to the Guardianship Authority were abrogated. The responsibility for granting adoptions was given to the jurisdiction of the courts. International adoptions now belonged to the jurisdiction of the country court (*judet*), while domestic adoptions formed part of the jurisdiction of the local courts.

As a result of the growing number of inter-country adoptions of Romanian children, plus Romania's ratification of the CRC, Law No 11/1990 was amended. This was done by the passage of Law No 48 on 16 July 1991.

The amendments were primarily aimed at inter-country adoptions. The new regulations stipulate that foreign citizens, or Romanian citizens domiciled or with habitual residence abroad, may only adopt children who could not be placed or adopted in the country during a period of at least six months from the date of their registration. The names of these children are recorded in the files of the Romanian Committee for Adoptions. In effect inter-country "direct" or "independent" adoptions from private Romanian families are no longer possible.

The Romanian Committee for Adoptions is the Central Authority under the Hague Convention. It is a governmental organisation with the purpose to supervise and support actions for the protection of minors and to foster international cooperation on issues dealing with adoption.

Some of the State Departments represented on the Committee are as follows: the Ministry of Health,

Ministry of Justice, Ministry of Finance, Ministry of Foreign Affairs, Ministry of Education and Science, Minister of Labour and Social Security, the State Secretariat for the Handicapped and the Department for Local Administration. The permanent Secretariat of the Committee is located in the Ministry of Health and is made up of physicians, lawyers and experts on social security matters.

One of the main tasks of the Committee is to establish a centralized listing of children being protected through adoption, and to ensure placement or adoption of these children within the country, during a period of six months from the date of their registration. It is only when the child cannot be placed or adopted that the Committee will issue an acknowledgement of the fact. A court can then notify the prospective foreign adoptive family.

Foreign citizens or Romanian citizens domiciled or with habitual residence abroad, who wish to adopt Romanian children, have to apply to the Central Authority in their country of residence with competence in the field of child welfare and inter-country adoption, or to another legally authorized adoption organization in that country approved by the Romanian Committee for Adoptions.

The criteria set by the Committee in selecting foreign adoption authorities or agencies for mutual cooperation are the following:

(a) Their legislative status;
(b) the date of their establishment;
(c) their aims in the field of inter-country adoption;
(d) the diversity of their actions;
(e) the legislation in effect in the respective country;
(f) the agency's ability to provide the Committee with follow-up reports about the child's adjustment for a period of at least two years after the adoption;
(g) the experience of the agencies in counselling applicants, especially applicants who wish to adopt an older, handicapped or sick child.

The Committee prefers to limit its selection to a small number of adoption authorities in the receiving countries and priority is given to those organizations placing older, sick or handicapped children.

The basis for cooperation between the foreign adoption authority or agency and the Romanian Committee for Adoptions can be found in a working arrangement. This arrangement is signed by the institutions involved and stipulates certain obligations for parties involved in the inter-country adoption, in particular the obligation of parties involved to abide by the principles of the CRC.

The working arrangement has the following content:

(a) It establishes guidelines for concluding inter-country adoptions, taking into account both parties' national legislation.

(b) It places an obligation on the foreign authority or agency to cooperate exclusively with the Romanian Committee for adoptions in coordinating the adoption of Romanian children by applicants in its country. In terms of the arrangement, the Romanian Committee can only accept the applications forwarded by the selected foreign authority or agency.

(c) The procedures and requirements for conducting inter-country adoptions are set out in an annex, which forms part of the working arrangement. The following obligations are stipulated:

(i) The obligation of both parties to give priority to applications submitted by foreign citizens of Romanian origin, or Romanian citizens domiciled or with habitual residence in the country in question.

(ii) The obligation of the Romanian Committee to provide the prospective adoptive parents, or their legal representatives, with an acknowledgement that the child could not be placed nor adopted in Romania within the six month period from the date of his registration.

(iii) The obligation of the Romanian Committee to provide the file containing documents regarding the applicants necessary for the future court proceedings.

(iv) The obligation of the foreign authority or agency to follow up the adjustment of the child in the adoptive family for a period of at least two years and to send periodic reports to the Romanian Committee.

(v) The obligation of the foreign authority or agency to assume responsibility for protection and placement of the child in the event of a breakdown of the adoption process.

Applications for adoptions should be accompanied by the file prepared by the foreign adoption authority or agency for every family or person adopting. In general, the file includes the following:

(a) The application from the applicants expressing their desire for a full adoption of a Romanian child, with an authenticated statement to that effect.
(b) The birth and marriage certificates of the applicants.
(c) Police clearance.
(d) Authenticated medical certificates for the applicants, their children, and other members of their household.
(e) Statement of family income.
(f) Photographs of the applicants and their family (children and parents).
(g) A certified copy of a home study prepared by a specialised welfare authority or a registered social worker, as outlined in the working arrangement. This home study includes: the motivation for adoption, the psychological history and family dynamics of the adopting party, the attitude of children over age ten in the household toward a possible adoption, the family's interest and attitudes toward Romania, the attitudes of their immediate community, and the family's cultural, religious and general interests.
(h) A certified, authenticated copy of the agreement of the adoption agency, or other competent authority, regarding the applicant's capability to adopt the child in accordance with the respective country's legislation.

If necessary, the documents are translated into Romanian by an authorized translator. The Romanian Committee then proceeds to review the applicants' files together with the records of

children available for adoption in order to select the family or person considered to be the most appropriate for the child.

Once the choice has been made the Romanian Committee informs the foreign authority or agency. More documentation can be requested and can include the following:

(a) The child's social case history and the circumstances surrounding his becoming available for adoption.
(b) The child's medical history.
(c) The child's current health status report.
(d) A recent photograph of the child.
(e) A social and medical history of the child's birth parents, if available.

If the prospective parents, upon seeing the documentation, accept the choice made by the Romanian Committee, they may travel to Romania where they will meet the child. They can then begin the necessary legal procedure in court. Should the Romanian Committee's choice not be acceptable to the prospective adoptive parents, they must provide their reasons in writing to the foreign authority or agency. These reasons will then be forwarded to the Romanian Committee.

An inter-country adoption cannot be concluded without the Romanian Committee's confirmation, and the application for adoption is dealt with by that country's court. The following documents are needed for the court proceedings in cases of adoption, whether domestic or inter-country:

(a) Documents with reference to the adopted child:

    (i) Notarized and authenticated copy of his birth certificate.
    (ii) Notarized and authenticated copies of birth certificates of the biological parents and, if specific to the case, marriage or death certificates,
    (iii) Authenticated declaration of consent to adoption given by the child's biological

parent(s), guardian, legal custody representatives, or the Guardianship Authority.

(iv) Medical certificate attesting to the minor's current health status, issued either by the country, city, or district polyclinic.

(v) The Romanian Committee for Adoptions' acknowledgement, in an inter-country adoption case, that the child could not be placed nor adopted within the country during the six month period from the date of his registration.

(b) Documents with reference to the adopting family or individual:

(i) Notarized, authenticated statement in which the applicants specify whether the adoption is made with full or restricted effects.

(ii) Notarized, authenticated copies of birth and marriage certificates.

(iii) Certificates of police clearance.

(iv) Medical certificates of current health status.

(v) A document, in the case of an inter-country adoption, issued by the foreign competent authorities regarding the applicants' capability to adopt a child in accordance with the country's legislation.

(vi) A home study, in the case of an inter-country adoption, prepared by the competent foreign authorities in the place of domicile stating their opinion regarding the adoption.

The application is heard by two judges and all those who must consent to the adoption are summonsed to be present. The court delivers its ruling by means of a court order. The court needs to be convinced that the child will enjoy safeguards and standards in the receiving country at least equivalent to those existing in Romania.

There is a right to appeal the court's decision within fifteen days from the date of its pronouncement. After the decision becomes final, a new birth certificate is drawn up for the adopted person, and the adoptive parents are entered as the natural parents in domestic adoptions. Their place of residence is entered as the child's birthplace. In the case of inter-country adoptions, Law No 48/1991, Article IV

stipulates that the adoptive parents' place of residence should not be entered as the child's birthplace. The former birth certificate is retained and the new certificate is mentioned. The adopted child is also given a passport and accompanied to the foreign country by at least one of the adoptive parents.

A parent, guardian or foster parent who claims or accepts money or other material goods, for himself or somebody else, in exchange for a child's adoption, can be sentenced to imprisonment from one to five years. The same sentence applies to a person who obtains improper financial gain through acting as an intermediary or facilitator in a child adoption. The money, valuables or other goods received as payment will be confiscated. Where these cannot be found, the person sentenced is forced to pay their equivalent in money.

22.2.5.9 **Colombia**

The institution of adoption in Colombia has changed over time from initially private arrangements between families to a highly formalized legal institution under public control. Formerly, orphaned and abandoned children were absorbed by local families for domestic or agricultural work or were left to the care of the church and private charities. Although these private bodies continue to provide daily care for children they are now under state control.

When centralized health and welfare services were created in the 1960s, the control of substitute care and adoption was transferred from the family and private sector to the State, which began to use adoption systematically as a child protection measure. A special children's division was created in the Ministry of Justice that included an adoption service. Decree 1818 of 1964 and Law 75 of 1968 created a central authority, the Colombian Institute of Family Welfare (hereafter the Institute) to provide family and child care services nationwide.

The Institute sought to expand adoption services and foreign placement for unwanted

institutionalized and abandoned children. Specialized private agencies set up to cater for increasing foreign demand for children were contracted by the Institute to arrange adoptive placements. The Institute also made contact with western adoption experts and agencies to guide service planning and to promote the placement of Colombian children abroad.

The National Adoption programme is based at the head office of the Institute in Bogota and forms part of the larger health and welfare structure. Adoption is classified as a "special protection" measure along with fostering and institutional care, but is administered separately. Responsibility for the programme is divided between the Legal Assistance Division and the Adoption Division. The Adoption Division monitors services and processes applications from adopters addressed to the Institute. Local services are implemented through the Institute's regional offices and via municipal authorities and eight licensed private agencies. These are called *casas de adopcion* and are located in the larger cities. The Legal Assistance Division has the responsibility to oversee legal aspects and to give advice in difficult cases.

Cases referred to the Institute, which handles two-thirds of all adoptions, are dealt with by regional adoption panels and interdisciplinary teams based in local service units. The teams are headed by children's advocates (*defensores de menores*), who are lawyers specialized in child legislation. The *defensores* are in charge of all Institute child protection cases and deal with all legal aspects. They are assisted by psychologists, nutritionists and other professionals who advise on individual cases. Most of the preliminary investigation and assessment of children and adopters are done by social workers, but the *defensor* is the primary decision-maker.

Specific responsibilities of the *defensores* include the following:

(a) They authorize children's admission to care and placement in foster, residential or adoptive homes, attend court hearings and grant exit permits for children going abroad;

(b) They must order an investigation of the child's circumstances on referral of a case,

assess the child's eligibility for adoption, notify the parents and obtain their consent and that of the older child; and

(c) They issue the declaration of abandonment on completion of the investigation process, and refer the child for adoptive placement. The declaration is a requirement for every adoption petition and if contested, must be ratified by the court. Once it is finalized, it is equivalent to termination of parental rights.

Applications from prospective adopters are processed by the Institute's head office in collaboration with the Prosecutor-General. Approved applicants are then redistributed to the regions for allocation of children.

Adoption *casas* manage their own referrals and applications and adoptive placements. They must however, submit case histories and documentation to the Institute *defensor*, certifying the parents' consent or the child's abandonment. The majority of children dealt with are referred by their mothers, who are mostly poor, uneducated women. The case directors and their staff do not necessarily have professional training in child care work, but most have long-standing experience and are assisted by various professionals. *Casas* all have accommodation facilities and care- taking staff where children are cared for pending placement with adopters.

Eligibility criteria for adopters are very flexible. Anyone, whether single or married, Colombian or foreign, related or unrelated to the child can adopt, provided they are older than twenty five and fifteen years older than the child and can provide a suitable home. Applicants must provide certification of their physical and mental health, occupation and income and personal references.

Institute guidelines on adoption also recommend a social work assessment of the applicant's family circumstances, lifestyle and motivations, 'natural' age matching of child and adopters, and follow-up of foreign adoptive placements by agents in the receiving country. Foreigners bear the responsibility of obtaining an exit permit and immigration clearance for the child to enter their country. They also have to sign an undertaking to care for the child and that they will inform the Colombian authorities

of their whereabouts and the child's condition.

Practitioners are obliged under article 107 of the 1989 Code to give preference to Colombian applicants over foreigners. This principle is confirmed in Institute Resolution 773/81, Article 67 in the following way: 'Colombian and foreign adoptive applicants having equal conditions, the former shall be given preference'. It is also specified that the socio-economic situation of applicants is not decisive, but they must have sufficient means to provide for the child's integral development.

A particularly unsatisfactory feature of Colombian adoption practice is the inexpert handling of the placement process and children's surrender to adopters. The placement process is described as follows:

> The Colombian model of adoption can be conceptualized as a configuration of fixed, temporal roles in which adult participants perform a transaction centred on the exchange of the child. The transaction is broken into stages with each set of adult participants vanishing from the scene and the child's life once their part is over and the adopters depart with the child. The natal parents are the suppliers of children, defensores are brokers and managers of the exchange, foster parents are interim care givers until the child's "entraga" or delivery to the final recipients, the adopters.

The child's 'entrega' or handover to the adopters marks the break from previous relationships. Where the adoption is arranged by the Institute, the child is collected by an Institute worker from the foster home or institution and brought to the defensor's office for the entrega. This is handled by the defensor and the social worker and neither the foster parents or institutional staff are present. The entrega usually constitutes the child's first meeting with the adopters, and once handed over to the adopters, all links with former caretakers are terminated.

In the case of an inter-country adoption, the cut-off is even more absolute as the child is not only separated from his parents or caretakers, but also from their language and culture. It is legally required for foreign adopters to collect the child in person and most only stay for a week or just long enough to complete the legal formalities. Thus there is no opportunity for a gradual introduction to

the child and assessment of the adoptive relationship before departure, nor is there an opportunity for a trial placement period before issuing the order. Furthermore, foreign adopters are not required to learn basic Spanish and most do not even attempt to do so.

It is left to the discretion of practitioners to manage the adoption process according to their professional and personal viewpoints and interpretation of rules, roles and aims. The result is that much attention is given to legal and medical aspects in adoption work, but little attention to sensitive handling of children, a crucial aspect to successful placement. Institute referred children tend to be older and often have the most problematic backgrounds, but there are very few psychologists who can provide the necessary preparation and counselling. As mentioned earlier, defensores are not trained to deal with deprived children and with their legal background they are more inclined to view adoption as a legal transaction.

Adoption in Columbia involves an extreme, closed procedure and a large scale foreign export of children. According to official statistics, an average of 2 700 Colombian children have been adopted annually over the past ten years. Two-thirds of the children are under the age of three years.

A striking feature of these statistics is that nearly all the adoptions are absolute and that the large majority of the children are placed in adoptive homes outside Colombia, mainly in the USA and Europe. An absolute adoption means that the child loses his past identity and acquires an entirely new legal and social persona, signified by a new surname and in some instances a new first name. The birth parents' name is omitted from the adoption decree, which constitutes a new birth certificate. Hereby the child's knowledge of and link with the birth parents are destroyed.

A second remarkable feature of Colombian adoption practice is the emergence of an absolute or exclusive variant of adoption. Although absoluteness, confidentially and the principle of a 'clean break' from the birth family is the norm in inter-country placements, the Colombian adaptation is extreme and is described as follows:

> [T]he placement process…is handled with little sensitivity and understanding of children. It makes no allowance for a gradual introduction of adopters and child or continuing links between children and their care-givers or relatives. Modern-style Colombian adoption is a secretive, tightly guarded, legalistic procedure managed primarily by lawyers and upper-class women. It involves a series of abrupt breaks in the child's relationships culminating in a definitive shift of the child's socio-legal persona from the natural family to the adopters to the exclusion of all previous ties.

22.2.5.10 Conclusions

Of those states which have already put implementation measures in place, the majority have put in place detailed provisions and administrative structures to allow for the operation of the Hague Convention, and for the recognition of adoptions made through Convention procedures. This has been achieved through implementing legislation, or through a combination of legislation and subsidiary regulation. The designated Central Authorities have in all cases been public bodies, either government ministries, or boards or committees established by the State. There are differing approaches to the making of payments to adoption agencies, to be seen in the law of New Zealand and the less restrictive law of Sweden.

22.2.6 The need for law reform

Abuses of inter-country adoption lead to serious violations of the basic human rights of the most vulnerable members of society - our children. Legal procedures are circumvented or loopholes in the laws of sending countries exploited, creating the potential for child trafficking; permission to adopt is obtained illegally and false information provided to prospective adoptive parents.[51] That child trafficking or these abuses should not be allowed, is not disputed. How this should be done is a different matter.

The CRC is the only international instrument concerning international adoptions to which South

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51 For a discussion of these forms of abuse, see Motsikatsana (2000) 16 **SAJHR** 52 et seq. See also New South Wales Law Reform Commission **Report 81: Review of the Adoption of Children Act 1965 (NSW)**, March 1997, p. 381 et seq.

Africa is a party. Of particular relevance is Article 21 of the CRC which states that:

> States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
> (b) recognise that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
> (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those in the case of national adoption;
> (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
> (e) promote, where appropriate, the objectives of the present Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

It is within this framework and the prescripts of the Constitution that the Commission will have to make its recommendations for law reform.

22.2.7. **Evaluation and recommendations**

If it is true, and we have no reason to doubt the words of Goldstone J in the **Fitzpatrick** case, that 'foreign applicants will have a greater burden in meeting the requirements of the [present Child Care] Act'[52] than they will have after the amended legislation, administrative infrastructure and international agreements envisaged by the Minister for Social Development are in place, then the question arises whether it is indeed necessary to further regulate inter-country adoption by law in

52 Par [34] of the judgment in **Minister of Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC).

South Africa. This question is posed even though the majority of respondents at a focus group discussion on adoption and several prominent persons working in the field agree on the need for [new] legislation governing inter-country adoptions.[53]

If the children's court does a proper screening of the prospective adoptive parents on the basis of a social worker's report;[54] if the court has regard to the religious and cultural background of the child and of his or her parents as against that of the adoptive parents;[55] if the court is satisfied that the prospective adoptive parents are possessed of adequate means to maintain and educate the child,[56] that they are of good repute and fit and proper to be entrusted with the custody of the child,[57] that the proposed adoption will serve the interests and conduce to the welfare of the child,[58] etc;[59] then

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53 See Motsikatsana (2000) 16 **SAJHR** 46 at 69 where he refers to the S A National Council for Child and Family Welfare's, Lynette Schreuder, and Frances Viviers, director of International Social Services Affiliated Bureau in South Africa, which is a directorate of the national Department of Social Development. Professor Motsikatsana himself argues for legislative reform.

54 Section 18(1)(b) of the Child Care Act, 1983.

55 Section 18(3) read with section 40 of the Child Care Act, 1983.

56 Section 18(4)(a) of the Child Care Act, 1983.

57 Section 18(4)(b) of the Child Care Act, 1983.

58 Section 18(4)(c) of the Child Care Act, 1983.

59 Section 24 of the Child Care Act, 1983 is designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. See also section 40 that mandates the court to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.

children's courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike.[60]

60 See paragraphs [30] to [33] of the **Fitzpatrick** judgment.

This leaves us with a lot of 'if's'. It is in this context that it is worth investigating what other countries are doing in respect of inter-country adoptions. As the comparative review shows, several countries have either signed and or ratified the Hague Convention or are in the process of doing so.[61] The Hague Convention has also been an influential model for national laws, in countries other than those which are party to the Hague Convention. Convention-type structures have been employed in bilateral agreements; and the administrative structure based on a Central Authority, a key component of the Hague Convention, has been used in many other states. Indeed, some sending countries, for example Venezuela and Paraguay, have decided to permit inter-country adoptions only with receiving states which are party to the Hague Convention.

Given the difficulty of national regulation of a quintessentially international phenomena such as inter-country adoption, it is likely that it will be through the Hague Convention that standards in inter-country adoption will be raised, procedures streamlined and abuses addressed.[62] Having regard to the importance of the Hague Convention for the development of the regulation of inter-country adoption, **we recommend that South Africa should ratify the 1993 Hague Convention on Intercountry Adoption**. Serious consideration should at the same time be given to the incorporation into our domestic law of the principles contained in the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1980.

Ratification of the Hague Convention by the South African government does not in itself give it the force of domestic law and legislation will have to adopted to achieve this. Although legislation cannot independently prevent all the possible abuses surrounding inter-country adoption, a sound legislative framework is fundamental in establishing child-centred standards in its practice and procedures. Equally important is the need for a proper infra-structure for the Central Authority. The situation must not develop where the Central Authority basically operates as a one-person post-

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61 In the short period of time since its coming into force, the 1993 Hague Convention has had considerable success, with 32 signatories, 17 ratifications, and 4 accessions as on 15 May 1998.

62 See Peter H Pfund 'Intercountry adoption: The 1993 Hague Convention: Its purpose, implementation, and promise' (1994) Vol. 28 No. 1 **Family Law Quarterly** 53.

office which just directs all requests to NGO's because it lacks the resources to do anything more.

We submit that the new children's code is the ideal place to comprehensively deal with adoption and specifically inter-country adoptions. **We further submit that the aim of inter-country adoption, as of all adoptions, should be to find the best parents for the child, and not to find the best child for adoptive parents**.

This section on inter-country adoptions in the new children's code should follow the section on adoptions in general and should then deal with three specific scenarios.

* Adoption of a child to or from a Hague Convention State in accordance with the provisions of the new children's statute (Hague Convention adoptions);
* Adoption of a child to or from a country with whom a bilateral or multilateral agreement in this regard has been concluded (agreement type adoptions); and

* Adoption of a child to or from a non-Hague Convention State or a country with whom no agreement has been concluded (other overseas adoptions).

To cater for the Hague Convention-type inter-country adoptions, the relevant section of the new children's statute should provide for the Hague Convention to have force of law in South Africa; the establishment of a Central Authority;[63] the recognition of Convention adoptions; termination of pre-existing legal parent-child relationships;[64] access to information; the establishment of accredited bodies; etc. Once the relevant provisions have been complied with, recognition of the adoption could follow automatically.

To cater for the agreement type adoptions, the section in the new children's statute might have to

63 Obviously the Central Authority must be properly resourced and equipped to fulfil its functions.

64 See also Kisch Beevers 'Intercountry adoption of unaccompanied refugee children' (1997) 9(2) **Child and Family LQ** 131 who recommends that in the case of refugee children adoption orders should not end all ties with the country and family of origin.

regulate the adoption by a South African parent of a child[65] in that other country as stipulated in that agreement and recognition of the adoption need not follow automatically. As for the case of the other overseas adoption category, the section of the children's code could well be premised on the principle that such adoptions should be discouraged and be subject to very strict regulation.

65 Or the adoption of a South African born child by non-South African citizens.

In addition, it is recommended that the general section dealing with adoptions will have to provide for the financial aspects regarding the adoptions;[66] preparation, assessment and counselling; post-placement reports; record-keeping, confidentiality of information; the use of advertising;[67] citizenship, and the like.

The specifics of such a three-pronged approached in legal format is set out below.

INTER-COUNTRY ADOPTIONS

GENERAL PROVISIONS

Object of part

1. The purpose of this part is to give effect to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption; to give effect to certain bilateral arrangements for inter-country adoption; to deal with miscellaneous matters.

Definitions

2. In this part,

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66 At the extreme end of the scale of improper financial gain is the sale of, and trafficking in, children. On the other end of the scale could lie requests for donations to the institution involved. Between these two ends one finds location or agent fees, legal fees, etc. The Johannesburg Child Welfare Society, for instance, is contemplating requiring inter-country adopters to make a contribution towards the costs of maintaining the in-country service to enable the Society eg to ensure that all mothers get good health care and support and not just those who give their babies up for adoption. Dr Jackie Loffell points out that at the moment adopters can gear all their money only to the child who may be coming to them and the mother whose consent they need. She says this is a source of pressure on mothers to give up their babies rather than face the future with little or no help. Dr Loffell therefore recommends that the legislation should provide for a fee to be permitted, or even required, for maintaining and improving the local service infra-structure.

67 It has for some decades been accepted practice in a number of countries (especially the UK and the USA) to use advertising as a way to find families for hard-to-place children. There are programmes which have had a great deal of success in arranging adoptions for eg severely mentally or physically disabled children, adolescents, and those with severe behavioural problems, who would otherwise have spent their entire childhood in institutions. The families have been found by putting photo's of the children in newspapers and even having them appear on TV.

"**Accredited body**" means a body accredited under section XX as an accredited body for the purposes of the Hague Convention;

"**adoption compliance certificate**" means a certificate issued in accordance with Article 23 of the Hague Convention;

"**Central Authority**" means a person or office designated for a Convention country under article 6 of the Hague Convention;

"**Convention country**" means, subject to Article 45 of the Hague Convention -

(a) a country specified in column xx in Schedule xx; and

(b) any other country for which the Convention has entered into force, other than a country against whose accession the Republic has raised an objection under Article 44 of the Convention;

"**Hague Convention**" means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993, a copy of the English text of which is set out in Schedule xx.

HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Convention to have force of law

3. (1) On, from and after the date the Convention enters into force in respect of the Republic as determined by the Convention, the Convention is in force in the Republic and its provisions are law in the Republic.

(2) The law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the law of the Republic and the Convention, the Convention prevails.

Central Authority

4. (1) The Director-General of the Department of Social Development is the Central Authority for the Republic for the purposes of the Convention.

(2) The Central Authority must discharge the duties which are imposed by the Convention upon such authorities.

(3) The Central Authority must maintain a register of accredited adoption agencies and approved adoption practices.

(4) Upon application, the Central Authority may accredit an adoption agency and approve an adoption practice, provided the prescribed requirements are met.

(5) No person may process or facilitate an adoption in terms of this Chapter unless such adoption is done through the Central Authority or an accredited adoption agency.

(6) A person who contravenes subsection (5) commits an offence and is liable to a fine or to imprisonment, or to both.

Delegation of functions

5. Where the Minister so authorises, the functions of a Central Authority under Articles 15 to 21 of the Convention may, to the extent determined by the Minister, be performed by public authorities or by bodies accredited under Chapter Ill of the Convention.

Authority for South African accredited bodies to act overseas

6. The Central Authority may authorise a body accredited in the Republic to act in a Contracting State.

Authority for overseas accredited bodies to act in South Africa

7. If authorised by the Central Authority, a body accredited in a Contracting State may act in the Republic.

Access to information

8. Subject to the regulations; the Director-General may disclose to an adult who, as a child, was adopted in accordance with the Convention, any information in the records of the Director-General concerning the adult's origin.

Adoption in South Africa of a child from a Convention country

9. (1) A person who-

(a) is habitually resident in South Africa; and

(b) wishes to adopt a child who is habitually resident in a Convention country-

may apply to the Court for an order for the adoption of the child.

(3) The Court may make an order for the adoption of a child on an application under sub-section (1) if the requirements of sections xx, xy and xz[68] are satisfied and the Court is satisfied that-

(a) the child is in South Africa;

(b) and the child is not prevented from residing permanently in South Africa-

(i) under a law of the Republic; or

(ii) because of an order of a court of the Republic; and

68 Sections 17, 18(4) and 40 of the present Child Care Act, 1983.

(iii) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention; and

(iv) the Central Authority of the Convention country has agreed to the adoption of the child; and

(v) the South African Central Authority has agreed to the adoption of the child.

(3) For the purposes of a proposed adoption order under this section-

(a) a report under section XX may be made only on behalf of the Director-General or the principal officer of an approved agency that is an accredited body;

(b) a reference in section XY to an authorized agency is a reference to an accredited body.

Adoption of a child in South Africa who is to live in a Convention country

10. (1) A person who-

(a) is habitually resident in a Convention country; and

(b) wishes to adopt a child who is habitually resident in South Africa-

may apply to the Court for an order for the adoption of the child.

(2) The Court may make an order for the adoption of a child on an application under sub-section (1) if the requirements of section XX are satisfied and the Court is satisfied that-

(a) the child is in South Africa; and

(b) the child is not prevented from leaving South Africa under a law of the Republic or because of an order of a court of the Republic; and

(c) the approved adoption practices are in accordance with the requirements of the Hague Convention; and

(d) the Central Authority of the Convention country has agreed to the adoption of the child; and

(e) the South African Central Authority has agreed to the adoption of the child.

(3) For the purposes of a proposed adoption order under this section, a report under section XX may be made only on behalf of the Secretary or the principal officer of an approved agency that is an accredited body.

Issue of adoption compliance certificate

11. If the Court has made an order for the adoption of a child under section 9 or 10, the Central Authority may issue an adoption compliance certificate.

Recognition of adoption of a child from a Convention country to South Africa

12. (1) Subject to this section, an adoption in a Convention country-

(a) of a child who is habitually resident in a Convention country; and

(b) by a person who is habitually resident in South Africa-

is recognised automatically if an adoption compliance certificate issued in that country is in force for the adoption.

(2) An adoption recognised under sub-section (1) is effective on and from the day the adoption compliance certificate becomes effective.

(2) Sub-section (1) does not apply if-

(a) a declaration is made under section 17; or

(b) a declaration is made under a law of the Republic that corresponds to section 17(2)(a).

Recognition of adoption of a child from a Convention country to another Convention country

13. Subject to section 17, if-

(1) a child, who is habitually resident in a Convention country, is adopted by a person who is habitually resident in another Convention country; and

(2) an adoption compliance certificate issued in the Convention country in which the adoption is granted is in force for the adoption-

the adoption is recognised with effect on and from the day the certificate becomes effective.

Effect of recognition of adoption under this Part

14. (1) Subject to this section, if the adoption of a child is recognised under section 12 or 13, then, for the purposes of the laws of the Republic, the adoption has the same effect as an adoption order under this Act.

(2) If the laws of the Convention country where the adoption was granted do not provide that the adoption of the child terminates the legal relationship between the child and the individuals who were, immediately before the adoption, the child's parents, section XY does not apply to the adoption unless-

(a) an order is made under section 16 or under a law of the Republic that corresponds to section 16; or

(b) a decision is made in a Convention country to convert the adoption in accordance with article 27 of the Convention.

(3) Sub-section (2)(b) does not apply if a declaration is made under section 17(2)(b) or under a law of the Republic that corresponds to section 17(2)(b).

Evidential value of adoption compliance certificate

15. Subject to section 17, an adoption compliance certificate is evidence, for the laws of the Republic, that the adoption to which the certificate relates-

(1) was agreed to by the Central Authorities of the countries mentioned in the certificate; and

(2) was carried out in accordance with the Hague Convention and the laws of the countries mentioned in the certificate.

Order terminating legal relationship between child and parents

16. (1) If -

(a) a child who was or is habitually resident in a Convention country was adopted in a Convention country; and

(b) the adoption was by a person who is habitually resident in the Republic; and

(c) the laws of the Convention country do not provide that the adoption of the child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents, any of the parties to the adoption may apply to the Court for an order that the adoption of the child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents.

(2) The Court may make an order on an application under sub-section (1) if satisfied

that-

(a) an adoption compliance certificate issued in the Convention country is in force for the adoption; and

(b) the laws of the Convention country do not provide that the adoption of a child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents; and

(c) the child is allowed to enter the Republic;

(d) to reside permanently in the Republic; and

(e) in the case of refugee children, sufficient provision is made for the child to retain and foster ties with his or her family, tribe, and country of origin.

Refusal to recognise an adoption or an article 27 decision

17. (1) If the Central Authority considers that-

(a) an adoption recognised under sections 12 or 13; or

(b) a decision made in accordance with article 27 of the Hague Convention

is manifestly contrary to public policy, taking into account the best interests of the child to whom the adoption or decision relates, the Central Authority may apply to the Court for a declaration that the adoption or decision is not recognised.

(2) The Court may make a declaration on an application under sub-section (1) if satisfied that-

(a) an adoption recognised under section 12 or 13; or

(b) a decision made in accordance with article 27 of the Hague Convention-

is manifestly contrary to public policy, taking into account the best interests of the child to whom the adoption or decision relates.

(3) If a court declares that an adoption or decision is not recognised, the adoption or decision has no effect in the Republic.

Report on person who wishes to adopt a child in a Convention country

18. (1) If a person-

(a) wishes to adopt a child in a Convention country; and
(b) is on the register of approved persons kept under section xx by the Central Authority or the principal officer of an accredited agency, the Central Authority or the agency must prepare a report that complies with article 15 of the Hague Convention.

(2) The Central Authority must send each report prepared under sub-section (1) to the Central Authority of the Convention country.

BILATERAL AGREEMENTS

Adoption by South African parent in prescribed overseas jurisdiction of a child from that overseas jurisdiction

19. (1) This section applies if-

(a) an adoption, by a person who is habitually resident in the Republic, of a child who is habitually resident in a prescribed overseas jurisdiction, is granted under the law of that overseas jurisdiction, and
(b) an adoption compliance certificate issued by a competent authority of that overseas jurisdiction is in force in relation to the adoption.

(2) The adoption is recognised and effective, for the law of the Republic, on and after the

adoption takes effect in the overseas jurisdiction.

Effect of recognition

20. For the purposes of the law of the Republic, an adoption of a child that is recognised and effective under section 19 is to be treated as having the same effect as an adoption order made under this Act.

Evidential value of adoption compliance certificate

21. An adoption compliance certificate issued in a prescribed overseas jurisdiction, or adoption order certified by the competent authority of such a country as having been made in accordance with the law of that country, is evidence, for the purposes of the law of the Republic, that the adoption to which the certificate or order relates was carried out under the law of the overseas jurisdiction whose competent authority issued the certificate or certified the order.

RECOGNITION OF OTHER OVERSEAS ADOPTIONS

Recognition of foreign adoptions in countries other than Convention countries and prescribed overseas jurisdictions

22. (1) This section applies to an order for the adoption of a person:

(a) that was made (whether before or after the commencement of this section) in a country other than the Republic that is not a Convention country or a prescribed overseas jurisdiction, and

(b) if, at the time at which the legal steps that resulted in the adoption were commenced, the adoptive parent or parents:

(i) had been resident in that country for 12 months or more, or

(ii) were domiciled in that country.

(2) An order for the adoption of a person to which this section applies is to have the same effect as an adoption order made under this Act if:

(a) the adoption is in accordance with and has not been rescinded under the law of that country, and

(b) in consequence of the adoption, the adoptive parent or parents, under the law of that country, have a right superior to that of the adopted person's birth parents in relation to the custody of the adopted person, and

(c) under the law of that country the adoptive parent or parents were, because of the adoption, placed generally in relation to the adopted person in the position of a parent or parents.

(3) Despite subsection (2), a court (including a court dealing with an application under section 23) may refuse to recognise an adoption under this section if it appears to the court that the procedure followed, or the law applied, in connection with the adoption involved a denial of natural justice or did not comply with the requirements of substantial justice.

(4) A court that refuses to recognise an adoption may, at the time of refusing or at a later time, give leave to the applicant to seek an order for the adoption of the child concerned.

(5) In any proceedings before a court (including proceedings under section 23), it is to be presumed unless the contrary appears from the evidence, that an order for the adoption of a person that was made in a country outside the Republic that is not a Convention country or a prescribed overseas jurisdiction complies with subsection (1).

(6) Nothing in this section affects any right that was acquired by, or became vested in, a person before the commencement of this section.

Declarations of validity of foreign adoptions

23. (1) Any of the parties to an adoption under an order made outside the Republic may apply to the Court for a declaration that the order complies with section 22.

(2) On an application under this section, the Court may

(a) direct that notice of the application be given to such persons (including the Director-General) as the Court thinks fit, or
(b) direct that a person be made a party to the application, or
(c) permit a person having an interest in the matter to intervene in, and become a party to, the proceedings.

(3) If the Court makes a declaration under this section, it may include in the declaration such particulars in relation to the adoption, the adopted child and the adoptive parent or parents as the Court finds to be established.

(4) For the purposes of the law of the Republic, a declaration under this section binds the State, whether or not notice was given to the Director-General, and any person who was:

(a) a party to the proceedings for the declaration or a person claiming through such a party, or
(b) a person to whom notice of the application for the declaration was given or a person claiming through such a person, but does not affect:

(i) the rights of any other person, or

(ii) an earlier judgment, order or decree of a court or other body of competent jurisdiction.

(4) In proceedings in a court of the Republic, the production of a copy of a declaration under this section, certified by the nominated officer to be a true copy:

(a) if the proceedings relate to a person referred to in paragraph (a) or (b) of subsection (4), is conclusive evidence, and

(b) if the proceedings relate to the rights of any other person, is evidence,

that an adoption was effected in accordance with the particulars contained in the declaration and that it complies with section 22.

Prior approval required before child is brought into South Africa for adoption

24. (1) Before a child who is not a resident of South Africa is brought into the country for adoption, the prospective adoptive parents must obtain the approval of the Central Authority or an accredited adoption agency.

(2) The Central Authority or the accredited adoption agency must grant approval if:

(a) the birth parent or other guardian placing the child for adoption has been provided with information about adoption and the alternatives to adoption,

(b) the prospective adoptive parents have been provided with information about the medical and social history of the child's biological family,

(c) a home study of the prospective adoptive parents has been completed in accordance with the regulations and the prospective adoptive parents have been approved for the child in on the basis of the home study, and

(d) the consents have been obtained as required in the jurisdiction in which the child is resident.

(3) The Central Authority or the adoption agency must preserve for the child any information obtained about the medical and social history of the child's biological family.

(4) The provisions of this section does not apply to a child who is brought into South Africa for adoption by a relative of the child or by a person who will become an adoptive parent jointly with the child's birth parent.

Prior approval required before child is send out of South Africa for adoption

25. (1) Before a child who is resident in South Africa is placed for adoption in another country, the prospective adoptive parents must obtain the approval of the Central Authority or an accredited adoption agency.

(2) The Central Authority or the accredited adoption agency may grant approval if:

(a) a home study of the prospective adoptive parents has been completed in accordance with the regulations and the prospective adoptive parents have been approved on the basis of the home study,
(b) the consents have been obtained as required in the jurisdiction in which the child is resident, and
(c) if it has been shown that it was not possible to place the child for adoption with a South African parent or parents within a six month period starting from the date on which application for approval is lodged with the Central Authority or an accredited adoption agency.[69]

(3) The provisions of this section do not apply to a child who is resident in South Africa

69 See section 24(1) above.

who is to be placed for adoption outside South Africa with a relative of that child or with a person who will become an adoptive parent jointly with the child's birth parent.

OFFENCES

Contravening inter-country adoption requirements

26. A person who contravenes sections xx commits an offence and is liable to a fine or to imprisonment, or to both.

Paying or accepting payment for an adoption

27. (1) No person may give, receive or agree to give or receive any payment or reward, whether directly or indirectly,

(a) to procure or assist in procuring a child for the purposes of adoption in or outside South Africa, or

(b) to place or arrange the placement of a child for the purposes of adoption in or outside South Africa.

(2) Adoption services delivered by an approved adoption practice in terms of this Chapter shall be undertaken under contract to the Central Authority, which shall receive all approved fees and shall make the necessary payments to the adoption practice. The Central Authority has the option of delegating the contracting function and the associated responsibilities with regard to the reception and disbursement of fees to an accredited adoption agency which is willing to undertake this task.

(3) Subsection (1) does not apply to any of the following:

(a) a birth mother receiving expenses that do not exceed those allowed under the regulations;

(b) a lawyer receiving reasonable fees and expenses for legal services provided in connection with an adoption;

(c) the Central Authority or an accredited adoption agency receiving prescribed fees;

(d) any other persons prescribed by regulation.

(3) Any payments or rewards made or given in terms of subsection (2) must be declared in the prescribed manner by the accredited adoption agency to the Central Authority.

(4) A person who contravenes this section commits an offence and is liable to a fine or to imprisonment, or to both.

Advertising

28. (1) A person must not publish or cause to be published in any form or by any means an advertisement dealing with the placement or adoption of a specific child.

(2) Subsection (1) does not apply to any of the following:

(a) the publication of a notice under a court order;

(b) the publication of a notice authorized by the director;

(c) an advertisement by an adoption agency advertising its services only, without referring to specific children;

(d) an announcement of an adoption placement or an adoption;

(e) other forms of advertisement specified by regulation.

(3) A person who contravenes this section commits an offence and is liable to a fine or to imprisonment or to both.

22.3 International child abduction

22.3.1 Introduction

The Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 gives statutory recognition to the Hague Convention with the same name.[70] This Hague Convention has been ratified by many nations, including South Africa. The Hague Convention Act came into force on 1 October 1997.[71] In terms of section 2 of this Act, the Hague Convention, which is a schedule to the Act, applies in South Africa and, in terms of section 231(4) of the Constitution, 1996, it has become law. The Act designates the Family Advocate[72] as Central Authority.

The need for legislation and international agreements with regard to the (parental) abduction of children has been abundantly demonstrated, particularly in recent years.[73] The increase in rapid international transportation, the freer crossing of international boundaries, the continued decrease in

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70 For the regulations issued in terms of this Act, see Proclamation No. R 65 of 1997, published in Government Gazette No. 18322 of 1 October 1997.

71 Following the publication of the **Report on the Accession to the Hague Convention on the Civil Aspects of International Child Abduction** (Project 80) by the South African Law Commission in October 1991.

72 Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

73 See, for instance, the conference papers at the Reunite Training Seminar on International Child Abduction, Justice College, Pretoria, 21 - 23 January 1998; Reunite Southern African Development Community Conference 2001 on International Family Law in a Commonwealth Context, Justice College, Pretoria, 25 - 26 January 2001; the papers presented at the Common Law Judicial Conference on International Child Custody, hosted by the US Department of State, Washington, D.C., 17 - 21 September 2000.

documentation requirements when entering foreign jurisdictions, the increase in 'international families', where parents are of different countries of origin, and the escalation of family breakups worldwide, all serve to multiply the number of international abductions.[74]

22.3.2 The Hague Convention on the Civil Aspects of International Child Abduction, 1980

74 Per L'Heureux-Dubé J in **Thompson v Thompson** (1994) 119 DLR (4th) 253 at 296, as quoted in **Sonderup v Tondelli and another** 2001 (1) SA 1171 (CC) at 1178I.

The Hague Convention applies only to children who have not attained the age of sixteen years and who are habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention was designed to facilitate the swift return of abducted children to their place of habitual residence immediately before the abduction.[75] It is not the purpose of this Convention to regulate the recognition and enforcement of foreign custody orders but to protect custody rights. A court implementing the Convention is required to determine the court best placed to make a custody determination and not to make a custody determination itself. The Convention is premised upon a belief that the court of the child's place of habitual residence immediately before the abduction is best placed to make a determination on the merits and has the most significant interest in resolving the matter. The Convention attempts to deter parents from resorting to self-help in custody matters by providing for the enforcement of custody and access rights of one Contracting State in another.

The central provisions of the Convention are to be found in Articles 3, 12, 13 and 20. Article 3 defines the crucial concept of 'wrongful removal or retention'.[76] It reads as follows:

> The removal or the retention of a child is to be considered wrongful where-
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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75 Article 1 of the Convention. See also B M Bodenheimer "The Hague Draft Convention on International Child Abduction" 1980 (14) **FLQ** 99 at 102 - 103; A E Anton "The Hague Convention on International Child Abduction" 1981 (30) **ICLQ** 537 at 540 - 545; L Silberman "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" 1994 (28) **FLQ** 9 at 10 - 11.

76 See also S Davis, J Rosenblatt and T Galbraith **International Child Abduction** (1993) 12 - 13; **C v S (A Minor)** [1990] 3 WLR 492, [1990] 2 FLR 442; **Re J (A Minor)(Abduction)** [1989] Fam 85; **Re S (Minors) (Wrongful detention)** [1994] 1 All ER 237 (Fam).

Rights of custody are defined in Article 5 to include 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

Article 12 is the main operating provision. It provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Where a child has been wrongfully removed or retained in terms of Article 3 of the Convention, and a period of less than a year after the wrongful removal or retention has elapsed, the judicial or administrative authorities of the requested State 'shall order the return of the child forthwith'. Such judicial or administrative authority is granted a discretion to refuse to order such return by the provisions of Article 13. It provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;[77] or

77 The leading English case relating to Article 13(a) acquiescence is **Re A (Minors) (Abduction: Acquiescence)** [1992] Fam 106, [1992] 1 All ER 929, [1992] 2 WLR 536, [1992] 2 FLR 14, [1992] 2 FCR 9 in which the court

found that acquiescence could be active or passive. A person could not acquiescence unless aware of the rights he or she has against the other parent. Acquiescence that is active must be clearly stated and acquiescence is not a continuing state of affairs. Here the plaintiff need not have day-to-day care and control of the child. Exercising a say in the child's upbringing or a right of access is sufficient. Consent or acquiescence here should not be confused with consent or acquiescence to the child travelling for a specific period of time which, when that period expires, may result in a wrongful retention.

(b) there is a grave risk[78] that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[79]

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

° **The defence of grave risk of exposure to physical or psychological harm; otherwise placing a child in an intolerable situation**[80]

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78 Grave risk has been analysed in, inter alia, **Re C (A Minor) (Abduction)** [1989] 1 FLR 403 in which the court declared that the risk must not be trivial and that risk must not be equated to the child's personal welfare. In **Re A (A Minor) (Abduction)** [1998] 1 FLR 365 Nourse LJ stated at 372 that the risk had to be more than ordinary risk, more than one expects from simply taking the child away from one parent and passing him or her to the other. In America the Article 13(b) exception based on grave risk was invoked but rejected in **Becker v Becker** 15 Fam LR (BNA) 1605 (NJ Super Ct 1989); **Sheikh v Cahill** 145 Misc 2d 171, 546 NYS 2d 517 at 521 (Sup Ct 1989) and **Navarro v Bullock** 15 Fam LR (BNA) 1576 (Cal Super Ct 1989); **Tahan v Duquette** 259 NJ Super 328, 613 A 2d 486 (App Div 1992).

79 For an examination of Article 13(b) by the English courts see also **Re D (A Minor) (Child Abduction)** [1989] 1 FLR 97; **C V C (Abduction : Custody Rights)** [1989] 2 All ER 465, [1989] 1 WLR 654 (CA). The Article wass examined by the Australian courts in **Gsponer v Johnstone** [1988] 12 Fam LR 755, (1988) FLR 164.

80 The discussion of the Article 13(b) defences is largely based on the paper 'Article 13b and the child's objections under the Hague Child Abduction Convention' presented by Marilyn Freeman at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

Article 13(b) has, in the main, been narrowly, interpreted by the courts of the Signatory States. This approach is necessarily correct as, not only is it in accordance with the original aims of the drafters it is also clear that, unless Article 13(b) fulfils its original purpose, that of a provision allowing for non-return in **exceptional** cases, it will destroy the effectiveness of the Convention.

Intolerable situation is intended to cover the position when the child would not be exposed to physical or psychological harm but where the situation would otherwise be intolerable for the child on return. It has been said that '... it is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated'.[81] In England, it has been said that it must bear some similarity to the serious risk of physical or psychological harm relevant to the first part of the provision.[82]

In order for the defence of grave risk of harm to be made out there needs to be evidence of a **grave** risk. This means not just an ordinary risk but a serious one. So, therefore, what is required is a grave - i.e. a serious - risk of physical or psychological harm. The question here is, what amounts to physical or psychological harm? It is unusual for grave risk of physical harm to the child to be argued, and reliance is far more often placed on the concept of psychological harm. Again, what will amount to psychological harm has been the subject to different interpretations at different times within different jurisdictions.[83]

In the United States the leading authority in this area is **Friedrich v Friedrich**[84] where the court stated that the only circumstances in which grave risk of harm could exist is when return would put

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81 **H v H** [1995] 13 FRNZ 498.

82 **Re N (Minors) (Abduction)** [1991] FCR 765.

83 See e.g. McClean **The Haque Convention on the Civil Aspects of International Child Abduction**, Explanatory Documentation prepared for Commonwealth Jurisdictions in association with the Commonwealth Secretariat 1997 at 2: 'It has to be admitted that the courts in common law jurisdictions have failed to develop a consistent approach to the handling of international child abduction cases. That state of affairs is not surprising when one considers some characteristics of the cases and of the legal context in which they have to be addressed'. In the Scottish case of **MacMlillan** [1989] SLT 350 the child was not returned because the petitioner father had been depressed and alcoholic and, although now improved, the court were concerned that he might slip back. Grave risk to the child was found to be 'beyond argument'.

84 78 F 3D 1060, 1069 (6th Cir 1996).

the child in imminent danger prior to the resolution of the custody dispute, e.g. by returning the child to a zone of war, famine or disease. Additionally, grave risk would exist in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable of giving or unwilling to give the child adequate protection.

In the jurisdiction of England and Wales, the Court of Appeal has adopted a strict and narrow approach to the provision so that in **C v C (Abduction: Grave risk of psychological harm)**[85] Ward L.J. was not prepared to find the provision fulfilled where the harm had been created by the parent's own actions, notwithstanding that the return involved splitting siblings and the serious possibility of criminal prosecution of the mother.

85 [1999] 1 FLR 1145.

But does the degree of harm have to be grave, or is it just the **risk** of harm which must fulfil this criterion? There is English and Australian authority to suggest that such a degree of harm is required. In England it was held that the phrase 'intolerable situation' cast considerable light on the matter in the case of **Re C (Minor: Abduction: Rights of custody abroad)**[86] and in Australia the court held[87] that it is not a grave risk of **any** physical or psychological harm which would suffice - it must be of a substantial or weighty kind. It is possible, however, to argue that there is no need to colour the degree of harm with the degree of risk required for satisfaction of the provision as this relies on the second part of Article 13(b), 'otherwise place the child in an intolerable situation'. The limbs of this provision are disjunctive, and this interpretation is not necessarily consistent with the terms of the Convention.[88] However, most courts appear to have placed the same interpretation on this provision, accepting that the degree of harm that is required is weighted by the juxtaposition of the phrase 'or otherwise place the child in an intolerable situation' to the first part of the provision relating to harm.

In England and Wales, there are not many reported cases where return has been refused on this basis. One such reported example of a successful Article 13(b) defence is in **Re G (Abduction: Psychological harm)**[89] where the court accepted that, if the mother was forced to return, it was likely that she would become psychotic, which would expose the children to a grave risk of harm.

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86 [1989] 2 All ER 465.

87 **Gsponer v Johnstone** [1989] FLC 92-001.

88 See Beamont and McEleavey **The Hague Convention on International Child Abduction** Oxford University Press 1999, p. 151 footnote 129 on the inter-relationship between intolerable situation and harm where they argue that the use of the word 'otherwise' identifies intolerable situation as 'an alternative'.

89 [1995] 1 FLR 64.

This is an unusual outcome because the traditional position of the court in relation to parents who refuse to accompany their children is to hold that it does not amount to an Article 13(b) defence.[90]

90 In **C v C (Minor: Abduction: Rights of custody abroad)** [1989] 2 All ER 465 Butler-Sloss L.J. asked, in connection with a mother who would not return with her child and argued that the child would, therefore, be exposed to a grave risk of psychological harm by the practical effect of the order for return: 'Is a parent to create the psychological situation and then rely on it?' it would be relied upon by every mother of a young child who removed him out of the jurisdiction ... it would drive a coach and four through the Convention'.

Another successful Article 13(b) defence within England and Wales may be found in **Re M (Abduction: Psychological harm)**[91] where two children, aged 7 and 9 years, were not returned to their state of habitual residence both in relation to their objections and the fact that they were at risk of psychological harm if returned based on reports from psychologists both in England and the state of habitual residence.

As stated already, prospective harm to the returning parent will not usually constitute a grave risk of harm to a child within the meaning of Article 13(b). However, it may be that there is now a need to re-evaluate this position in certain circumstances. This is because the pattern of abductions has apparently changed,[92] with far more abductors now being mothers, and usually primary care-givers. Often these women are escaping situations of violence and abuse. As far back as 1988, the judge in the English case of **Re A (A minor)(Abduction)**[93] warned that the court in the requested state could not be blinkered against the practical effect of an order for the child's return. To return the child, and by inference, usually the mother, to a situation of violence or abuse may be to do just that. These mothers have often been unable to secure the necessary protection in the state of habitual residence, or it may be that they have not been able to find the strength to face up to their situation, and to seek protection, without the support of their family and friends, who are far away from the state of habitual residence. There is a strong argument that returning such a parent would, indeed, place her child in an intolerable situation, or expose her to the risk of physical or

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91 [1997] 2 FLR 690.

92 See e.g. Beamont and McEleavey **The Hague Convention on International Child Abduction** Oxford University Press 1999, p. 3 - 4: 'Wrongful removals and retentions are now more likely to be brought about by mothers who may have moved abroad with the father of their children but who subsequently wish to return to their country of origin'.

93 [1988] 1 FLR 36500.

psychological harm. To ignore such a probability flies in the face of reality.[94]

In the recent Constitutional Court of South Africa case of **Sonderup v Tondelli**,[95] Goldstone J. admirably addressed this situation when he stated:

> ... in the application of art 13, recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction. Our courts should not trivialise the impact on children and families of violence against women. In *S v Baloyi* this court quoted the following statement with approval.
>
> > 'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person.
>
> Where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that return might place the child at grave risk of harm as contemplated by Article 13 of the Convention.

Where such risk of harm is found by the court it may be that a return will still be ordered subject to undertakings or conditions being attached to the return order, designed to ameliorate the risk inherent in such a return. However, such action alone will not usually offer realistic protection. More is required, e.g. in terms of mirror orders, and more may not always be possible or available. In

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94 Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

95 2000 (1) SA 1171 (CC) par [34].

such cases, where protection cannot presently be guaranteed, courts should not flinch from refusing to return a child. This is the reason for the existence of Article 13(b) and the Convention, which is based on the premise that a child's best interests are, in general, served by not being abducted, envisages situations which are outside of the normal.

Such circumstances were considered in the New Zealand case of **Ryding and Turvey**[96] where Inglis J stated that '... in a case where the abductor has provided the child with a haven from emotional and psychological abuse or an intolerable situation, removal of the child from the haven and returning the child to home base, *however protected,* (emphasis added) may be to provide a cure which is worse than the original disease. It is that kind of situation which the framers of the Convention had in mind when they laid down, in article 13, that the judicial authority of the requested State is not bound to order the return of the child'.

Where the mother has been the subject of violence or abuse from which she has escaped, often to the home and security of family members in her country of birth, it may be convincingly argued that her child, too, has been thereby been provided with a haven from an intolerable situation and that return would provide a cure, in the words of Inglis J, 'worse than the original disease'.

° **The child's objections within Article 13**

Children's objections stand alone under Article 13 but they may also amount to an Article 13(b) defence in that return, in spite of objections, would expose to the child to a grave risk of harm or intolerable situation as envisaged by that provision.

96 New Zealand Family Court, Evin FP 031 14797, 9 December 1997.

In most cases the child's objections will come to the attention of the court through the abductor. This means that unless the defendant raises the child's objections, there is no other way in which they will be heard unless that child is in some way able to bring his or her objections to the notice of the court. Usually an abducting parent will welcome the opportunity of airing the child's objections to return in the course of Hague Convention proceedings but there are circumstances where this will not be the case. There is no obligation on a judicial or administrative authority to enquire into a child's views. Indeed in the English case of **P v P (Minors: Child Abduction)**[97] the court declined even to find that there was a mandatory requirement for the court to adjourn to enquire further into a child's objections once they had been raised as an issue. Such a decision will be a matter of discretion for the judge. This must create an unacceptable risk that a child's strong objections to return will never be heard as they rely on the willingness of the defendant parent to be raised. There is sufficient anecdotal evidence to raise grave concerns that this matter is one of practical significance. Academic commentators have also expressed disquiet on this issue leading Professor Lowe to state that '... some mechanism needs to be devised for making at least preliminary enquiries about, at any rate, older children's wishes'.[98]

Making enquiries in this way will, it is argued, slow up the summary process which is at the heart of the Convention. This observation is incontrovertible. However, although speed is of the essence in the effective implementation of the Convention, it must be remembered that the purpose of the Convention is to protect the best interests of children generally. Those interests cannot be said to be protected without even an enquiry, as to their objections, even if this is in an effort to further the

97 [1992] 1 FLR 155.

98 Lowe [1994] Fam Law 234 in case comment on **Re M (A Minor)(Child abduction)** [1994] 1 FLR 390.

original aims of the Convention. A culture of 'return at all costs' must be avoided.[99]

99 Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

On the related issue of separate representation for children, the position in England and Wales is that, as this is not provided for in the Convention, the child has no right to such representation. This is the case even for those of sufficient maturity for their objections to be taking into consideration.[100] This is apparently not the case in other jurisdictions. In Australia, e.g. it has been held that where there is a clear issue as to whether a child objects to being returned, '... the court has an obligation to give the child an opportunity to be heard in an appropriate manner and that is a right of the child independent of the person opposing return. Additionally ... where issues ... arise with respect to a child of [appropriate] age and maturity, there ordinarily should be separate representation'.[101]

Some judicial attention has been paid to the meaning of the term 'objects'. Although it was stated that an objection must amount to more than a mere preference - a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute[102] this was later rejected by the English court which stated that the term should be applied without any additional gloss[103] and this interpretation has been accepted by courts in Australia and New Zealand.[104]

° Age and sufficient degree of maturity

As there are no guidelines in the Convention relating to the precise age at which the provision takes

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100 **Re M (A Minor)(Child abduction)** [1994] 1 FLR 390.

101 **Director-General Department of Community Services v De L** [19961 FLC 92-674; **De L v Director-General of the New South Wales Department of Community Services** [1996] 20 Fam LR 390. However, anecdotal evidence in Australia indicates that is not always the case.

102 **Re R (A minor: Abduction)** [1992] 1 FLR 105.

103 **Re S (A minor)(Abduction: Custody rights)** [1993] Fam 242.

104 Where the objection arises from a wish to remain with the abducting parent, the English court have stated that 'little or no weight should be given to those views' : **S v S (Child Abduction)(Child's views)** [1992] 2 FLR 492.

effect, the potential for subjective interpretation has been significant both in relation to the age, and the assessment of the child's degree of maturity.

The English courts have refused to lay down any chronological threshold below which a child's objections will not be taken into account. It will be a question of fact to be determined on the evidence. Although the English courts have stated that it is not inappropriate to take into account the objections of children aged 6 years and 7 and a half years respectively,[105] other jurisdictions have taken children's views conclusively into account at earlier ages, which may be more difficult to justify. However, age has been qualified in this Article by consideration of the degree of the child's maturity, and it must be recognised therefore that it may be appropriate to take account of the views of even very young children. In the case of older children, it is a matter of practicalities. Such children tend to 'vote with their feet'. If they do not want to do it, they usually won't. The known views of the older child must be taken into account and the older the child, the greater the weight that must be attached thereto. As another commentator has put it: '... whatever the rights and wrongs of the parents' claim, it seems inconceivable that a child aged 13 should be forcibly returned against his will'.[106]

° **The weight to be attached to such objections**

It is instructive to consider at this point the relevant provision of the United Nations Convention on the Rights of the Child. Article 12 states that State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right to express the views held within Article 12 belongs to the child 'capable of forming his or her own views'. Article 13 of the Hague Convention refers to the objections of a child who has

105 **Re R (Child abduction: Acquiescence)** [1995] 1 FLR 716.

106 Cretney [1998] Fam Law 580 in relation to **Re HB (Abduction: Children's Objections)** [1997] 1 FLR 392 where children were returned, aged 11 and 13 years respectively. although the judge found that they were both of an age and degree of maturity at which their objections should be taken into account.

'attained an age and degree of maturity at which it is appropriate to take account of his views'. Clearly a child may be capable of forming his or her own views at an earlier age than that at which it may be considered appropriate to take account of those views.

In those circumstances, it may be that, although the UN Convention on the Rights of the Child assures the right to the child concerned to express the views formed and to have due weight attached to them, those same views do not warrant consideration under the Hague Convention on the subjective interpretation of the 'age and degree of maturity' requirement of Article 13. Also, it is questionable how far Article 13 complies with the Article 12 assurance that the child has the right to 'express those views freely in all matters affecting' him or her. There is, as we have seen, no requirement in the Hague Convention for the child's views to be ascertained. Without such an obligation, the discretion in Article 13 not to return the objecting child begins to sound rather hollow.[107]

The exceptions allowed in Article 13 and that in Article 12 relating to children who have settled in a new environment are permissive, not mandatory. Even if a party opposing the return of the child establishes that the case comes within one of these exceptions, the Convention in Article 18 allows that the judicial or administrative authority of the requested State may still be permitted to order that the child be returned. The Convention would also seem to allow a Contracting State to return a child even when its judicial and administrative authorities have declined to do so pursuant to the Convention. Thus, for example, the power to deport aliens need not be affected by adherence to the Convention.[108]

A further exception to the obligation to return a child to the country of habitual residence is to be found in Article 20. It provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

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107 Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

108 Ireland Law Reform Commission **Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related matters** (LRC 12 - 1985), p. 12.

Accordingly it would be possible for a court to refuse to return a child where its return would be contrary to the guarantees relating to the protection of human rights in the Constitution.

22.3.3 **Sonderup v Tondelli and another 2001 (1) SA 1171 (CC)**

The operation of the Hague Convention on Child Abduction, the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, and the 'grave risk' requirement as set out in article 13 of the Convention were discussed in the recent case of **Sonderup v Tondelli and another**.[109]

The issues placed before the Constitutional Court were (1) whether the provisions of the Convention were applicable to the present case; (2) if so, whether, as incorporated by the Act, they were consistent with the Constitution; and (3) whether these provisions required the return of the child to British Columbia. As to (1), the mother denied that the father possessed a 'right of custody' as defined in the Convention and thus asserted that neither the removal of the child from British Columbia nor her retention in South Africa was wrongful and that consequently the Convention did not apply. As to (2), she contended that the Act was inconsistent with the Constitution in that it obliged South African courts to act in a manner that did not recognise the paramountcy of the best interests of the child. As to (3), she submitted that there should be no order for the return of her child because she would, on the basis of a series of allegations about violent and threatening behaviour by the father and the special needs of the child, be at grave risk of psychological harm

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109 2001 (1) SA 1171 (CC). Also reported as **LS v AT and Another** (2001) 2 BCLR 152 (CC). See also **K v K** 1999 (4) SA 691 (C) and the discussion of this case by C M A Nicholson 'The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980)' (2001) 64 **THRHR** 332.

and placed in an intolerable situation should she be returned.

Goldstone J, for the Court held, as to (1), that the non-removal provision in the British Columbia Court order could, depending on the circumstances, confer a right of custody within the meaning of the Convention. 'Rights of custody' as defined in the Convention could, in terms of article 3, arise either by court order or agreement having a legal effect under the laws of the requesting State, and it was not in dispute that both the agreement between the father and mother and the British Columbia Court order incorporating it constituted the basis on which the mother was to retain custody of the child and on which the father was entitled to exercise his right of access. The mother was, however, save for a specific period, in effect only entitled to exercise her rights of custody in British Columbia, and accordingly her failure to return to British Columbia with their child on the latter date constituted a breach of the conditions of her rights of custody as well as a concomitant breach of the father's right of access under the agreement and order. It therefore constituted a wrongful retention of their child by the mother outside British Columbia as contemplated by article 3 of the Convention. Accordingly, the Court found that the Convention was applicable.[110]

The Court held, further, as to (2), that, although the Convention clearly recognised and protected the best interests of the child in the determination of custody matters, it could be argued that it might in certain circumstances require that the child's short-term best interests be overridden in favour of his or her long-term best interests in jurisdictional (as opposed to custody) matters, thereby violating section 28(2) of the Constitution (under which the child's best interests were always paramount). This inconsistency was, however, justifiable under section 36 of the Constitution, given the objectives of the Convention (viz to ensure that the best interests of a child whose custody was in dispute were considered by the appropriate court; to prevent the wrongful circumvention of that forum by the unilateral action of one parent; and to encourage comity between States to facilitate co-operation in cases of child abduction across international borders) and the

110 Par [25].

means sought to achieve those objectives (which were narrowly tailored only to achieve them).[111]

111 Paragraphs [28], [30] - [32] and [35] - [36]. See also J M T Labuschagne 'International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law' (2000) XXXIII **CILSA** 333.

The Court held, further, as to (3), that it was clear that the risk contemplated in article 13 was risk of harm of a grave nature. In the instant case the facts were insufficient to support a finding that the return of the child to British Columbia would involve a risk of the harm referred to in article 13: there was no suggestion that the child would suffer physical harm and it was clear that the psychological harm which it was said she would suffer was not the serious harm contemplated by article 13 but rather the type of harm that all children who were subjected to abduction and court-ordered return were likely to suffer, and which the Convention contemplated and took into account in the remedy it provided. The conclusion that the return of the child to British Columbia did not involve the grave risk of the harm referred in article 13 was supported, inter alia, by the following specific considerations: there were no allegations suggesting that the father had abused his daughter either physically or psychologically; the problems experienced by the child were the natural consequence of the tension and trauma associated with the strained relationship between her mother and father; the child's special needs could be adequately catered for in British Columbia; the Court was entitled to make an appropriate order to address some of the concerns of the mother with regard to her possible arrest in British Columbia, her needs and those of the child pending a determination of the custody and guardianship of the child by the British Columbian Court; and it was not established that, if returned, that the child would suffer psychological harm of a serious nature or would otherwise be placed in an intolerable situation.[112]

The Court held, accordingly, that the mother had failed to satisfy the 'grave risk' requirement and that it was in the best interests of the child that the British Columbian Court should determine the questions relating to her future custody and guardianship. That Court, being already seized of the matter, was clearly in a better position than a South African court to resolve the serious disputes of fact between the mother and father, and could also consider an application by the mother for the permanent removal of the child to South Africa.[113]

22.3.4 **Evaluation and recommendations**

The above decision of the Constitutional Court confirms the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 and gives credence

112 Paragraphs [44] - [47].

113 Paragraph [48].

to the procedures adopted in terms of this Act. However, a comparative analysis of certain foreign legal systems that have made use of the Hague Convention has revealed that changes to **existing rules of practice**, rather than to **law**, and a purposive approach to the Convention as a living, practical part of the law, are necessary for the effective and economically operation of the Convention.[114]

114 Henry Setright, an English barrister specialising in Hague Convention cases, points out in his paper 'The approach to Hague Convention cases in England and Wales' presented at the Reunite Southern African Development Community Conference, 24 - 26 January 2001, Justice College, Pretoria that some cherished and important practices - oral evidence, representation of children, recourse to expert evidence, time allowed for careful and full preparation - which are taken as normal in domestic children's cases, are usually ruled out in cases under the Hague Convention in England and Wales.

One of the most important requirements of the Hague Convention is that a Central Authority be established for each member state. In South Africa, the Family Advocate acts as the central authority.[115] This choice of the Family Advocate as Central Authority presents a potential conflict of interests. The Family Advocate, the appointed protector of children's rights in South Africa, may be obliged to return a child in terms of the Convention in circumstances in which the welfare principle may indicate that this is not the best course of action. Furthermore, the human resources of this office are already stretched to the limit in dealing with matters currently before it. It is also worth recalling that the Commission recommended above that the Director-General : Social Development should be designated the Central Authority for the purposes of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.[116] To prevent confusion and to ensure optimal use of resources, it is recommended that the same functionary should act as Central Authority for the purpose of both Hague Conventions.

We therefore recommend that the Director-General: Social Development be designated as the Central Authority for purposes of the Hague Convention on the Civil Aspects of International Child Abduction. We make this recommendation realising full well that the Department at the moment lacks the capacity and skill to assume this role. We argue that within the broader framework of the comprehensive children's code proposed by the Commission in this paper, that it would provide greater opportunity for specialisation and resource allocation if the Central Authority for all the Hague Conventions was located within the Department of Social Development. In any event, regardless of where the Central Authority is to be placed, it is clear that additional resources will be required as the number of applications for the return of children in terms of this Hague Convention is certain to increase.

However, we also believe that the Office of the Family Advocate should be involved in child abduction cases, albeit in a different capacity. **We believe the Family Advocate should act, as legal representative for the child, in such applications**, very much on the basis assumed in the

115 Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

116 See 22.2.7 above.

Sonderup v Tondelli and another case discussed above.

We have given considerable attention to the defences provided for in Article 13 of the Convention and the shortcomings of the Convention in relation to cases where states parties do not deal effectively with domestic violence. At issue here are chronically violent and obsessive men who pursue their partners relentlessly and are highly skilled at evading the law. Women who try to make a final break from these men frequently end up dead; more often they keep going back home to a nightmare situation in which they at least stay alive. The Hague Convention does not adequately provide for such situations; it too easily requires that the court of jurisdiction in the country of origin sort out the custody issues, given that that may be the very court which failed to protect the mother (and child) from domestic abuse in the first place. **We accordingly recommend strengthening the existing provisions in the Convention to provide for the investigation of a case from within the receiving country, and to apply interim protective measures, before ordering repatriation. It is also recommended that specific provision be made for the right of the child concerned to raise an objection to being returned and for due weight to be accorded to that objection in accordance with the age and maturity of the child.**

We further recommend that consideration be given to exercising the right under Article 26 of the Hague Convention to exclude state liability to cover the costs of Convention proceedings where the child has been abducted from South Africa. In circumstances where a child has been abducted to South Africa the abductor is most likely to be a *peregrinus* and unlikely to have assets in the country, making the recovery of costs in such cases problematic. In circumstances where a child has been abducted from South Africa the abductor is unlikely to return to South Africa to settle any outstanding legal costs and thus the recovery of costs in such cases may also be problematic. The present Regulation 8 to the Hague Convention Act which provides for the recovery from the applicant of the expenses incurred by the Central Authority in bringing about the return of the child seems inadequate.

South Africa needs to introduce certainty into the position regarding cases of parental child abduction which do not fall within the scope of the Hague Convention. The rules that are applied should not distinguish between cases of abduction to or from Convention countries before the implementation date of the Convention and those to or from non-Convention countries. South

African courts should be bound by legislation to apply the principles of the Hague Convention in non-Convention cases. Although the Central Authority and the mechanisms of the Convention would not be available in such cases, the policy to return the child to the jurisdiction from which he or she was abducted should apply. Such an approach is both practical and would ensure certainty in non-Convention cases.

In line with our vision of a single comprehensive children's statute for South Africa, we recommend the incorporation of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 into the new comprehensive children's statute. As was the case with the Hague Convention on Intercountry Adoption, **we recommend that the Hague Convention on Child Abduction be incorporated into our national law as a schedule to the new children's statute**. The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 can then be repealed.

To give effect to the above recommendations we propose the following legal formulation:

INTERNATIONAL CHILD ABDUCTION

Object of part

1. The purpose of this part is to give effect to the Hague Convention on the Civil Aspects of International Child Abduction; to introduce additional measures making the act of parental child abduction a criminal offences; to deal with miscellaneous matters.

Definitions

2. In this Part, unless the context otherwise indicates -

"**Central Authority**" means the Central Authority designated in terms of section 4;
"**Convention**" means the Hague Convention on the Civil Aspects of international Child

Abduction, adopted on 25 October 1980 at The Hague, a copy of the English text which is set out in Schedule yy.

"**Family Advocate**" means the Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act, 1987;

"**Minister**" means the Minister of Social Development acting in consultation with the Minister of Justice;

"**Regulation**" means a regulation made under this Part.

Application of Convention

3. The Convention shall, subject to the provisions of this Act, apply in the Republic.

Central Authority

4. For the purposes of Article 6 of the Convention the Director-General of the Department of Social Development is hereby designated as the Central Authority for the Republic.

Additional powers of the Court

5. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3 of the Convention, the Court may, prior to the making of an order for the return of the child, request the Central Authority to provide a report on the domestic circumstances of the child prior to the abduction.

(2) The Court may, prior to the making of an order for the return of the child, order interim protective relief for the child, the applicant or the defendant.

(3) The Court must, in considering an application in terms of this Chapter of the Act for the return of a child, afford that child the opportunity to raise an

objection to being returned and in so doing must give due weight to that objection in accordance with the age and maturity of the child.

Role of the Family Advocate

6. The Family Advocate shall act on behalf of the child in all applications in terms of this Convention.

Delegation

7. (1) The Central Authority may, subject to such conditions as he or she may impose, delegate or assign any power or duty conferred or imposed upon him or her by or under the Convention to any official with the rank of director or higher in the Department.

(2) The delegation, assignment and conditions imposed shall be in writing.

Regulations

8. The Minister may make regulations -

(a) to give effect to any provisions of the Convention;
(b) prescribing fees, and providing for the recovery of any expenditure incurred, in connection with the application of the Convention.

Repeal

9. The Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 (Act 72 of 1996) is hereby repealed.

° **Making parental abduction a criminal offence**

The Hague Convention on the Civil Aspects of International Child Abduction by definition deals with the civil law aspects related to such abductions. It does not deal with the criminal law aspects of child abduction. **The Commission accordingly considered strengthening the civil law position by introducing addition measures in the new children's statute criminalising the act of parental abduction**.[117] We did this well realising that the criminal law is not the ideal measure to do deal with family law issues, but unfortunately a civil law action and other mechanisms such as mediation do not always have the required effect. It must also be pointed out that the common law offence of abduction is rather limited in scope as the intention in taking a child out of the control of his or her care-taker (custodian) must be to enable someone 'to marry or have sexual intercourse' with that child.[118] If the intention is something else (even if it is of a sexual or indecent character) which excludes marriage or sexual intercourse, there is no abduction, though the person taking the child may, in appropriate circumstances, be guilty of kidnapping,[119] assault or something else.[120] **The Commission also wishes to make it clear that it is not considering abolishing or modifying the common law crime of abduction or kidnapping by the new children's statute**.

The Commission further recommends that, where appropriate, the abductor should be held liable for all costs reasonably incurred by the State or the other parent in locating and

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117 See the paper presented by Caroline Nicholson "The Hague Convention on the Civil Aspects of International Child Abduction, pill or placebo?" at the Reunite Training Seminar on International Child Abduction, 21 - 23 January 1999, Justice College, Pretoria. See also the report of the Scottish Law Commission **Child Abduction**, Edinburgh, February 1987, para 4.4 - 4.8, 4.30; clause 1 - proposed section 6(1); Ireland Law Reform Commission **Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters**, Dublin, 1985, p. 44.

118 Milton **Hunt's South African Criminal Law and Procedure (Volume II: Common-law Crimes)** Cape Town: Juta 1982, p. 575, 583 et seq.

119 Milton **Hunt's South African Criminal Law and Procedure (Volume II: Common-law Crimes)**, p. 509 defines kidnapping as the unlawful and intentional deprivation of the liberty of movement or of custody of a person.

120 R v Motati; R v Buchenroeder (1896) 13 SC 173 at 178; R v Mhlongo 1942 NPD 134. See further F F W van Oosten and J M T Labuschagne 'Die plagiariese en raptoriese misdade' 1978 **De Jure** 32 at 57 - 62.

facilitating the return of the child.

To give effect to the recommendation that parental abduction should be a criminal offence, we propose the enactment of the following statutory offences for inclusion in the new children's statute:[121]

Offence of taking or detaining of child

(1) Subject to subsection (2) below, a person commits an offence, if, without lawful authority or reasonable excuse -

(a) he or she takes a child with the result that the child is removed from the control of any person having lawful control of the child; or

(b) he or she detains such a child with the result that the child is kept out of the control of any person entitled to lawful control of the child.

(2) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that, at the time of the alleged offence, he or she believed on reasonable grounds that the child had attained the age of eighteen years.

(3) For the purposes of this section, a person shall be regarded as having lawful authority -

121 See also the discussion on trafficking of children in section 22.4 below.

(a) who has a right of custody of the child; or

(b) who has a right of access to the child, but only while acting within the scope of that right.

Offence of taking or sending child out of the Republic

2. (1) Subject to subsection (2) below, a person commits an offence if he or she takes or sends a child out of the Republic -

(a) where there is in force in respect of the child an order of a court in the Republic which has the effect of prohibiting the removal of the child by that person (whether named in the order or not) from the Republic or any part of it, or

(b) without the consent of each person who is a parent or guardian or to whom custody has been granted in respect of that child; and

(c) where that person does not first obtain the consent of that court.

(2) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that, at the time of the alleged offence, he or she

(a) did not know that the order referred to in subsection (1) above was in existence;

(b) did obtain the consent of the requisite persons or of the court;

(c) had been unable to communicate with the requisite persons, having taken all reasonable steps, but believed that they would all consent if they were aware of all the relevant circumstances; or

(d) being a parent, guardian or person having custody of the child, had no intention to deprive others having rights of guardianship or custody in

relation to that child of those rights.

(3) For the purposes of this section, a duly authenticated document which purports to be a copy or an extract of an order made, or other document issued, by a court of the Republic shall be deemed to be a true copy or extract unless the contrary is shown, and shall be sufficient evidence of any matter to which it relates.

Construction of references to taking, sending and detaining

3. For the purposes of this Part of this Act -

(1) a person shall be regarded as taking a child is he or she causes or induces the child to accompany, or to join, him or her or any other person or causes the child to be taken;

(2) a person shall be regarded as sending a child if he or she causes the child to be sent; and

(3) a person shall be regarded as detaining a child if he or she causes the child to be detained or induces the child to remain with him or her or any other person.

22.4 Refugee and undocumented immigrant children

22.4.1 Introduction

There is no universal definition of the term 'refugee child'. The term is therefore used to include asylum seekers and displaced children up to the age of eighteen years. There are two broad categories of refugee children: those who enter the country with and remain accompanied by their parents or guardians, and those who are unaccompanied or who became separated from their parents or guardians in the process of flight. Flight itself leaves children open to violence, to disruption of community and social structures and to shortages of basic resources, affecting their physical and psycho-social development.[122]

Globally, children are said to form the largest demographic age group amongst refugees. Despite the lack of comprehensive data, it is estimated that children represent half of the world's forcibly displaced population.[123] South Africa has been fortunate in recent years not to witness the large-

122 Russell S 'Unaccompanied refugee children in the United Kingdom' (1999) 11 **International Journal of Refugee Law** 127.

123 Bhabha, J and W Young 'Not adults in miniature: Unaccompanied child asylum seekers and new US Guidelines' 1999 (11) **International Journal of Refugee Law** 84 at 85.

scale refugee movements faced in many other countries on the continent. Consequently, the number of child applicants has been rather small, but not insignificant.[124]

124 Victoria Mayer, Jacob van Garderen, Jeff Handmaker and Virginia Lee-Ann de la Hunt "'Protecting the most vulnerable': Using the existing policy framework to strengthen protection for refugee children", research paper for the National Consortium on Refugee Affairs, 19 September 2000, p. 4 (hereinafter Mayer et al "Protecting the most vulnerable".

Since the introduction of asylum determination procedures in 1994 up until June 2000, the South African Department of Home Affairs reportedly received a total of 1 693 'child related' applications for refugee status, all of which concerned children accompanied by their parents. Currently, the Department of Home Affairs is dealing with 1700 child related cases. Nearly half of these child applicants come from the DRC (Zaire), Angola, and Somalia. There is currently no way of knowing how many child applicants arrive unaccompanied, since official statistics do not reflect this distinction, although there are some indicators.[125] Mayer et al[126] point to the dramatic and rapid increase in the number of asylum applications which relate to children. Apparently, the increase in applications is partly attributable to an increase in the phenomenon of trafficking in children.

An undocumented immigrant child, on the other hand, can be defined as a child who is unlawfully within the territory of a state other than his or her own, whether because of illicit entry into the state or because of expiry of a legally acquired visa.[127] Undocumented immigrant children can therefore be divided into three broad groups, namely (a) those who enter the country illegally with and remain accompanied by their parents or legal guardians, (b) unaccompanied undocumented immigrant children and those who have become separated from their parents or legal guardians, and (c) children born to undocumented immigrant parents after they enter the country. Due to socio-political and economic instability in the Southern African region, South Africa has seen the influx of some millions of immigrants, many of whom who have entered the country illegally.

Currently, there is no legal protection for undocumented immigrant children under South African law as most do not qualify for asylum-seeker or refugee status. As soon as these vulnerable foreign children do not make it to refugee status, they come under the other, very child-unfriendly legislation. In this regard it has been pointed out that the Aliens Control Act 96 of 1991 and the

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125 Service organisations have reported growing numbers of separated child refugees being found on the streets and in shelters and havens. It appears that many cases of unaccompanied and separated children do not engage with Refugee Reception Officers: Mayer et al "Protecting the most vulnerable", p. 6.

126 "Protecting the most vulnerable", p. 6.

127 South African Human Rights Commission **Undocumented Immigrants**, policy paper, 1997, p. 3.

Immigration Bill 79 of 2001,[128] which will succeed it, are rather xenophobic in their thrust - they are about getting rid of unwanted people of all ages rather than being founded on the rights of children.[129]

Dr Jackie Loffell of the Johannesburg Child Welfare Society points out there are a lot of problems for such children on the ground which would seem to indicate that existing legislation is not adequate to protect them. She says:

> A large group of children who are falling between the cracks in legislation are children of 'undocumented foreigners' who do not qualify for refugee or asylum seeker status. They may have accompanied adults who have illegally entered the country, or have been born to such persons after they come to South Africa. In some cases their parents have died or disappeared. In some cases only one parent is an illegal migrant. These children are in a legally undefined situation which creates great problems for them, although they are in theory given equal protection with South African children under the Constitution. . . . There has been a move from quarters such as the current children's social security lobby that eligibility for grants and basic services should cease to be dependent on possession of an ID document. Of course this does not only affect foreign children but is relevant to abandoned children and many other South Africans. Would it be feasible to prohibit schools and any other essential public service from barring children who do not have these documents? Perhaps this could go with some type of interim provision for temporary authorisations plus an automatic referral to Home Affairs.

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128 As reintroduced in the National Assembly in 2001. Various draft bills were published. See the drafts published in Government Gazette No. 20889 of 15 February 2000 and Government Gazette No. 22439 of 29 June 2001. The draft bill published in Government Gazette No. 22439 of 29 June 2001 was originally introduced as Bill No. 46 of 2001.

129 Dr Jackie Loffell, Johannesburg Child Welfare Society.

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> Another unclear scenario relates to the current dispensation for unmarried fathers. Many mothers who come to us considering releasing their babies for adoption say that the fathers are illegal migrants. They have often disappeared or are known to have returned to their countries of origin. What is the status of such a father in relation to his child born outside of marriage?

Refugee and undocumented immigrant children are regarded as children first and foremost and entitled to the benefit of all the rights accorded to children. This is especially relevant when issues such as the provision of health services, nutrition, shelter and education are discussed. In addition, they have specific needs and rights as refugees[130] and undocumented immigrant children. Protection problems exist in the determination of refugee status, physical protection, the detention and conditions of detention, the accessing of grants, registration and statelessness. Refugee and undocumented immigrant children have special assistance needs in the areas of religious, cultural and recreational activities.[131]

22.4.2 International Framework

Refugee children are recognised in international law as benefiting from special protection. This has been implicitly recognised to an extent by South Africa's Constitution which does not distinguish between children on grounds of nationality. In addition, South Africa has ratified a number of

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130 Position on Refugee Children by the European Council on Refugees and Exiles (November 1996) par 3 (hereafter Position on Refugee Children by the ECRES); Geraldine van Bueren "The Rights of Children with Special Needs" in **The International Law on the Rights of the Child** (1995) 360.

131 Note on Refugee Children (July 1987) par 10.

international treaties impacting upon the rights and welfare of children. Some of these international instruments are discussed below.

22.4.2.1 **The U N Convention on the Rights of the Child, 1989**

The CRC is the most important and comprehensive international instrument dealing with the rights of all children, including refugee children. Article 22 (1) of the CRC focuses on refugee children. It provides for equality in the enjoyment of applicable rights for children recognised as refugees and children seeking asylum.[132] Unless a State has attached a specific reservation, the principle of non-discrimination in Article 2 applies. Van Bueren is of the opinion that Article 22 cannot overcome two of the fundamental weaknesses in the general international legal protection of refugees, namely the failure to capture the evolving growth in the definition of refugee and the absence of a duty on states to provide asylum.[133]

Articles 12 and 13 of the CRC, which enshrine the child's right to freedom of expression and are equally applicable to refugee children, are of particular importance in determining a child's refugee status. Article 13(1) provides the right to freedom of expression that includes non-verbal forms of communication. The fear of persecution may be more accurately assessed when a child is able to

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132 Van Bueren in **The International Law on the Rights of the Child** (1995) 362; Art 22 (1) of the CRC reads as follows: "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 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."

133 Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

express his or her traumatised feelings through a form of communication such as art.[134]

134 Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

The right to freedom of expression includes the right of a child to express his or her views on any judicial and administrative matters affecting such a child.[135] In the determination of a child's refugee status, and in providing durable solutions, the child's views should feature prominently in the decision-making process.[136]

The best interests of the child as a primary consideration requires that durable solutions should be found for refugee children as quickly as possible.[137] It often happens that refugee children find themselves in refugee camps for extended periods of time. One of the consequences is the difficulty they have in exercising their fundamental rights and freedoms.[138] The right to family life is often devalued by the structure and organisation of a refugee camp. Similarly, the right to participate is devalued as they do not have the opportunity to receive information or make decisions themselves.[139] The right to play and to be involved in recreational activities is often overlooked.[140]

The right to a name and registration after birth is very important to a refugee child. States Parties that are also countries of asylum, have the duty to register a child if born in the country of asylum. This can happen through the existing national procedure, or, if not possible, by means of a special procedure for refugees that should contain all the necessary safeguards.[141] This will enable children to establish their date and place of birth as well as their family name and will reduce the risk of abductions or disappearances.[142] The question of nationality is also very important for refugee children. Although it is not clearly stated as such, it is suggested that on a proper interpretation of Article 7(1) of the CRC, a child also has the right to acquire nationality from birth.[143]

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135 Article 12 of the CRC.

136 Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

137 Article 3 of the CRC.

138 Van Bueren in **The International Law on the Rights of the Child** (1995) 365.

139 Van Bueren in **The International Law on the Rights of the Child** (1995) 365.

140 Article 31 of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 365-366.

141 Van Bueren in **The International Law on the Rights of the Child** (1995) 366.

142 Van Bueren in **The International Law on the Rights of the Child** (1995) 366.

143 Van Bueren in **The International Law on the Rights of the Child** (1995) 367.

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The state of asylum carries the responsibility to ensure the safety and security of the refugee child. States Parties have the duty to ensure to the maximum extent possible the survival and development of the child.[144]

144 Article 6(1) of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 368.

Unaccompanied refugee children enjoy additional legal protection. States Parties should provide, as they consider appropriate, co-operation with intergovernmental and non-governmental organisations to trace the parents or other family members in order to obtain information necessary for reunification with his or her family.[145] Losing the support of a family is particularly disruptive of a refugee's sense of self and family reunification is a priority. An application by a child for his or her parents to enter or leave a State Party for the purpose of family reunification must be dealt with by State Parties in a positive, humane and expeditious manner.[146] Furthermore, an unaccompanied child is entitled to special protection and assistance provided by the State, which should ensure alternative care.[147]

22.4.2.2 The African Charter on the Rights and Welfare of the Child (African Charter)

South Africa acceded to the African Charter on 7 January 2000. The areas of protection that are of specific relevance to refugee children are the following:

- Protection against harmful social and cultural practices;[148]
- Free and compulsory basic education and access to secondary education;[149] and
- An enjoinder to States Parties to prevent children from taking part in armed conflict and hostilities.[150]

Article 23 incorporates the broader definition of a refugee in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and further states that provisions relevant to refugee children apply 'mutatis mutandis' to children who are internally displaced 'howsoever

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145 Article 22(2) of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 370-372. See also Article 7 of the CRC.

146 Article 10 of the CRC.

147 Article 20 of the CRC.

148 Article 13 of the African Charter.

149 Article 11 of the African Charter.

150 Article 22 of the African Charter.

caused'.[151]

22.4.2.3 The 1951 U N Convention Relating to the Status of Refugees

151 Article 23(4) of the African Charter.

On an international level refugee status is regulated by the 1951 UN Convention relating to the Status of Refugees. South Africa has ratified this Convention.[152]

The Convention defines a refugee as someone who:

> Owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to it.

The UN definition should be understood to include any person genuinely at risk of serious human rights violations in his or her country of origin, who both needs and deserves protection. There must be a heightened risk to infringe human rights on account of discrimination on the basis of race, religion, nationality, etc. It must moreover be determined that the government in the country of origin either cannot or will not effectively counter the risk to fundamental human rights, in consequence of which there is a need for surrogate protection in South Africa.[153]

To quality for refugee status, children, like adults, must be outside their country of nationality, or, if stateless, outside their country of habitual residence and prove a well-founded fear of persecution for the specified reasons.

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152 Draft Refugee White Paper, published in the Government Gazette No. 18988 dated 19 July 1998, p. 8.

153 Draft Refugee White Paper, p. 8.

Under Article 22 of the Convention there is a duty on State Parties to provide compulsory primary education for refugee children of an equivalent standard to that offered to the State's own nationals. With reference to secondary education, treatment at least as favourable as that given to non-refugee aliens is required. However, States Parties to either the International Covenant on Economic, Social and Cultural Rights or to the CRC are under a duty to make secondary education progressively available to child refugees.[154]

Access to education is complemented by the objectives of education as enshrined in Article 29 of the CRC. The education of a child should be directed towards the development of respect for the child's and parent's cultural identity, language and values, as well as the national values of the state in which the child is living and the country of origin.[155] For refugee children this means that their right to education includes education in their own indigenous culture as well as knowledge of their country of asylum.[156] Education of a refugee child should also be directed towards enabling such a child to live a responsible life in a free society.[157] Such an approach has the potential to overcome a feeling prevalent in refugee children that they are 'takers' rather than 'givers'.[158]

The US Supreme Court ruling **Plyler v Doe**[159] stands as the federal law regarding the admission of undocumented children to public schools in that country. **Plyler** guarantees undocumented immigrant children the right to free education in the United States of America. The Court believed that denying undocumented immigrant children access to education unfairly punished the children for their parent's undocumented status. The Court further states that under current laws and practices, the illegal alien of today may well be the legal alien of tomorrow and that without an education, these undocumented children who are already disadvantaged as a result of poverty, lack of English-speaking ability and undeniable racial prejudices will become permanently locked into

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154 Van Bueren in **The International Law on the Rights of the Child** (1995) 369; Article 28 of the CRC.

155 Article 29(1)(c) of the CRC.

156 Van Bueren in **The International Law on the Rights of the Child** (1995) 369.

157 Article 29(1)(d) of the CRC.

158 Van Bueren in **The International Law on the Rights of the Child** (1995) 370.

159 457 US 202 (1982).

the lowest socio-economic class. Moreover, the Court ruled that these undocumented children are entitled to equal protection under the Fourteenth Amendment. As a result of the ruling, schools may not -

- deny admission to a student on the basis of his or her undocumented status;
- treat a student fundamentally differently from others to determine residency;
- engage in practices that create fear among undocumented students or their families;
- require students or parents to disclose or document immigrant status;
- make inquiries of students or parents that may expose their undocumented status; and
- require Social Security numbers from all students.

Educators are also required not to expose children and their families to the Immigration and Naturalization Service. Fear of exposure, however, leads parents to keep their children from school, and it causes children to worry about being arrested and separated from their parents.[160] The Family Educational Rights and Privacy Act[161] also prohibits schools from providing information to outside agencies that would expose students' citizenship status.

Related to the right to education are religious and cultural rights. Refugee children face two major obstacles. Firstly as they find themselves in a different environment, the country of asylum, they have to learn the culture of that country and secondly they have limited opportunities to learn about and participate in their own cultural practices.[162] Under the 1951 Convention State Parties have the duty to grant refugees the most favourable treatment accorded to aliens with respect to their right to association for cultural and religious activities.[163] Furthermore, States Parties should provide refugees treatment at least as favourable as that accorded to their nationals in relation to religious

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160 James, D C S 'Coping with a new society: The psycho-social problems of immigrant youth' (1997) 67(3) **Journal of School Health** 98 - 101.

161 20 US C. Sec. 1232g (1974).

162 Van Bueren in **The International Law on the Rights of the Child** (1995) 370.

163 Article 15 of the 1951 Status of Refugees Convention.

freedom and the religious education of their children.[164]

Other than the above provisions, and measures to ensure and protect the family, the 1951 Convention does not specifically recognise the needs and special circumstances of refugee children.

22.4.2.4 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

This Convention does not specifically deal with the position of refugee children, but it does provide a broader general refugee definition by adding the following to the 1951 UN Status of Refugees Convention definition:

> The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

164 Article 4 of the 1951 Status of Refugees Convention.

The many children and adults who flee from environmental upheavals such as famine and drought, can claim that these are events 'seriously disturbing public order' and claim refugee status.[165]

South Africa ratified this Convention in 1995.

22.4.2.5 The United Nations High Commission for Refugees (hereafter the UNHCR)

The UNHCR is entrusted with the unique responsibility of promoting and providing international protection to refugees. This body promotes the implementation of the 1951 UN Status of Refugees Convention with regard to unaccompanied minors and relevant principles in the CRC. UNHCR is also involved in the formulation of participating States' policies and legislation. The UNHCR Executive Committee (Excom) as main policy-making body of the UNHCR meets every year in

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165 Van Bueren in **The International Law on the Rights of the Child** (1995) 361.

Geneva. Its decisions and conclusions, although not legally binding on State Parties,[166] provide important guidelines.[167]

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166 NCRA Report (2000) 12.

167 See, for instance, EXCOM Conclusion No 47 (XXII) 1987 where the Executive Committee:

(a) Noted with serious concern the violations of the human rights of refugee children and their special needs and vulnerability within the broader refugee population;
(b) urged States to take appropriate measures to register the births of refugee children born in countries of asylum;
(c) called upon the High Commissioner to ensure that individual assessments are conducted and adequate social histories are prepared for unaccompanied children and children separated from their parents, to facilitate provision for their immediate needs, and the planning and implementation of appropriate durable solutions;
(d) stressed the need for support programmes for disabled refugee children; and
(e) recommended regular and timely assessment and review of the needs of refugee children.

See also EXCOM Conclusion No 59 (XL) 1989 where the Executive Committee:

(a) Called upon UNHCR to promote the best possible legal protection of unaccompanied minors, particularly with regard to forced recruitment into armed forces and to the risks associated with irregular adoption; and
(b) encouraged UNHCR to strengthen its efforts in assisting host country governments to ensure the access of refugee children to education.

and EXCOM Conclusion No 74 (XLV) 1994 where the Executive Committee:

(a) Urged UNHCR, in co-operation with Governments, other United Nations and international and non-governmental organisations, to continue in its efforts to give special attention to the needs of refugee children, ensuring arrangements for immediate and long-term care and which includes health, nutrition and education; and

(b) urged UNHCR in co-operation with Governments, other United Nations and international and non-governmental organisations to give special attention to separated children and to ensure' prompt registration, tracing and family reunion.

22.4.2.6 Refugee Children: UNHRC Guidelines on Protection and Care

The UNHCR formulated the Guidelines on Refugee Children in 1988 in order to facilitate the protection and care of refugee children. As the CRC provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including refugee children, the Guidelines were revised in 1994 to reflect these norms and standards.

22.4.2.7 UNHCR: Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum

Unaccompanied children seeking asylum are extremely vulnerable and have special needs that must be met. Issues such as access to the territory, identification and initial action, access to asylum procedures and interim care and protection are addressed.

22.4.2.8 UNHCR Handbook

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states that the same definition of a refugee applies to all individuals, regardless of their age. The Handbook provides guidelines on the determination of the status of an unaccompanied minor.

22.4.3 National Legislation

22.4.3.1 Introduction

According to the Draft Refugee White Paper,[168] the refugee policy of the South African government is premised upon the two sets of inter-related threshold considerations. On the one hand the policy is constructed so as to reflect but also to enable the fulfilment of the international and constitutional obligations and on the other hand it touches on a number of other directly and indirectly related state

168 Published in Government Gazette No 18988 dated 19 June 1998.

and national interests and priorities. The most important of these priorities concern the migration control objectives,[169] law and order, concerns over gun-running, drug trafficking and racketeering, money laundering and international crime syndicates and cartels, various other aspects of national and state security and social and economic interests, as well as bilateral, regional and international relations.

The main policy positions of the Government are to effect in legal and practical terms the following distinctions:

> The granting of asylum to refugees and their protection in South African territory is a matter fundamentally of securing human rights protection. The Government will provide asylum and refugee protection to those persons who have lost this in their countries of origin, and have fled into, or are forced to remain in South Africa for reasons or circumstances which are recognised in international refugee and human rights law as giving rise to the need for international protection.
>
> The Government does not consider the refugee protection regime to be an alternative way to obtain permanent immigration into South Africa. It does not consider refugee protection to be the door for those who wish to enter South Africa by the expectation for opportunities for a better life or a brighter future. It does not agree that it is appropriate to consider as refugees, persons fleeing their countries or origin solely for reasons of poverty or other social, economic or environmental hardships.

This policy framework forms the basis of the Refugees Act, 1998 (Act 130 of 1998).

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169 See also the White Paper on International Migration, 31 March 1999; the White Paper on Population Policy, March 1998

Mayer et al[170] argue that the current legal framework in South Africa 'provides extensive protection to refugee children, which can and ought to be recognised by those involved with refugees and the asylum determining procedure, and translated into a workable policy'. However, this is not to deny the problems relating to unaccompanied[171] or separated[172] children,[173] or the problems such children face at Refugee Reception Offices or detention centres.[174]

22.4.3.2 **The South African Constitution**

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170 "Protecting the most vulnerable", p. 15.

171 NCRA Guidelines and Recommendations (2000) 6: A child is unaccompanied if no person can be found who by law or custom has primary responsibility for the care of that child.

172 NCRA Guidelines and Recommendations (2000) 6: The term refers to a child who has been separated from his or her parents, either before or during the flight from the country of origin.

173 The Department of Home Affairs has no system in place to keep specific statistics on unaccompanied or separated children or a system to specifically deal with their claims for asylum. A system whereby unaccompanied or separated children can be identified, is also lacking.

174 Mayer et al "Protecting the most vulnerable", p. 7; Lindela Report "At the crossroads for detention and repatriation" by the South African Human Rights Commission, December 2000, par. 4.2.8. The Lindela Repatriation Centre, the largest detention centre for undocumented migrants in South Africa, does not have facilities to keep children separated from adults and has therefore unilaterally decided not to accept anybody under the age of 15 years into the facility.

Under section 27 of the Refugees Act it is recognised that refugees are entitled to the rights set out in Chapter 2 of the Constitution (the Bill of Rights). The Bill of Rights is therefore an important source when the rights of refugee children are discussed.[175]

22.4.3.3 **The Refugees Act 130 of 1998**

The Refugees Act defines a refugee as 'any person who has been granted asylum in terms of this Act'.[176] In terms of section 3 of the Act, a person qualifies for refugee status for the purposes of this Act if that person :

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

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175 In **Larbi-Odam and Others v The Member of the Executive Council for Education (North West Province) and Another** 1998 (1) SA 745 (CC) the Constitutional Court struck down a provincial law which prohibited foreign citizens from being permanently employed as teachers in state schools. The judgment reaffirms the general proposition that all rights contained in the bill of rights, with the exception of those limited to citizens, also provide protection to non South African citizens.

176 An asylum seeker, on the other hand, is defined as "a person who is seeking recognition as a refugee in the Republic".

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person described above.

Section 4 of the Act provides for exclusion from refugee status in certain circumstances.[177] The question whether these exclusions also apply to child asylum seekers, is uncertain.[178]

Sections 21-26 of the Act provides for the asylum application process.[179] It sets out the application

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177 The grounds for exclusion are:

(a) the asylum seeker has committed a crime against peace, a war crime or a crime against humanity;
(b) the asylum seeker has committed a serious non-political crime;
(c) the asylum seeker has committed acts contrary to the purposes and principles of the UN or the OAU; or
(d) the asylum seeker enjoys the protection of any other country in which he or she has taken residence.

178 NCRA Report (2000) 16.

179 See also **Parapanov v Minister of Home Affairs and others** (2000) 4 BCLR 393 (W) on the right of a refugee

procedure, the duties of the standing Committee for Refugee Affairs and the Appeal Board. The objective of the procedure is to distinguish genuine asylum seekers from alien migrants, economic migrants and fugitives from justice and to confer on recognised asylum seekers the essential social rights necessary for survival in the country.[180]

The Act read with the Regulations, attempts to deal with applications within 180 days. Provision is made for a preliminary interview with a Refugee Reception Officer and thereafter an oral hearing with a Refugee Status Determination Officer (RSDO). There is also the possibility of an appeal to the Appeal Board on decisions made by the RSDO.

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to be furnished with reasons for rejection of applications for asylum and refugee status.

180 HRC Quarterly Review - Children's Rights and Personal Rights 97.

A distinction is made between accompanied and unaccompanied child asylum seekers. The definition of a dependant includes an unmarried dependent child under the age of 18 years.[181] It follows that an accompanied child's asylum seeker status is dependent on his or her parent's status.[182] In other words, if the child's mother or father is granted refugee status, then in practice the child will also be granted that status. The intention of this policy is to keep families together. The relationship between the principal asylum seeker and the child as dependant must be proven by documentary evidence, and in the absence of such evidence by affidavits or sworn statements to that effect.[183] Any dependants applying for refugee status must appear before a Refugee Status Determination Officer for the hearing.[184]

Although children on their own can apply for asylum status, there appears to be confusion in the treatment of asylum applications brought by children. In some instances, unaccompanied children are told by departmental officials that they cannot obtain assistance as their application needs to be linked to that of their parents or that an application in the name of a child can only be made once that child is 16 years old.[185] Where children are accompanied, their applications are linked to those of their parents. However, the Refugees Act 130 of 1988 specifically provides that an accompanied child can also bring his or her separate asylum application[186] and the parent or guardian must assist

181 Section 1 of the Refugees Act 130 of 1998; regulation 1.

182 NCRA Report (2000) 17.

183 Regulation 16(3).

184 Regulation 16(5).

185 NCRA Report (2000) 7.

186 Regulation 16(1) and sec 33(4) of the Refugee Act 130 of 1998.

the child with such an application.[187] There is no minimum age limit prescribed for making an application.

The status of a dependant of a recognised refugee may change when

187 Section 33 (1) of the Refugees Act 130 of 1998.

(a) his or her parent's status is withdrawn;[188] or

(b) the child's status as dependant ceases to exist.[189]

In these instances, the child may remain in the country and may independently apply for recognition of his or her refugee status.[190]

Section 32 of the Refugees Act addresses the position of unaccompanied children.[191] A child who appears to be in need of care in terms of the Child Care Act 74 of 1983 and who appears to qualify for refugee status under the Act, must be referred to a children's court.[192] The children's court may order that such child must be assisted in applying for asylum.[193]

A child as applicant for asylum has the right to legal representation before the Refugees Status Determination Officer.[194] This is a non-adversarial hearing and the representative may present

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188 Section 36 of the Refugees Act 130 of 1998.

189 Section 23 of the Refugees Act 130 of 1998.

190 Section 33(4) of the Refugees Act 130 of 1998.

191 According to the Draft Refugee White Paper (par. 4.9) the policy is that unaccompanied minor children shall be considered as children in need of care, and therefore subject to the provisions of the Child Care Act, 1983.

192 That is the Children's Court in the district in which he or she was found.

193 Section 32(2) of the Refugees Act 130 of 1998; regulation 3(5), however, stipulates that unaccompanied children who appear to qualify for refugee status **must** be assisted in applying for asylum in accordance with section 32 of the Act.

194 Regulation 10(4).

witnesses, submit other evidence and make a statement or comment on the evidence at the end of the initial hearing.[195]

195 Regulations 10(4) and (5).

Section 29 of the Refugees Act restricts the authorities from detaining any person for a period longer than 30 days without the prescribed approval of a High Court judge.[196] Echoing the Constitution, section 29(2) of the Act requires that a child refugee may only be detained as a measure of last resort and for the shortest appropriate period of time.[197]

A child refugee can quality for return and repatriation in the following circumstances:

- An application for refugee status has been rejected, and all appeal and review procedures have been exhausted;
- The circumstances in his or her country of origin have changed;
- The child voluntarily wishes to return to his or her country of origin. Voluntary repatriation of children is normally facilitated by the UNHCR;
- A child's parents are subject to an order of removal from the country, and the child has been afforded an opportunity to bring an application for refugee status, but has failed to do so.

The involuntary removal of a child may be ordered by the Minister of Home Affairs, provided that due regard has been given to section 33 of the Constitution and international law.[198]

The UNHCR Guidelines states that the best interests of a child must always be the primary consideration when a decision for the return and removal of the child is taken. In addition a child may not be returned unless, prior to the return:

- a parent has been located in the country of origin who can take care of the child, and the parents is informed of all the details of the return; or

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196 See also the Aliens Control Act, 1991 (Act 96 of 1991) which provides the legal ground for the arrest and detention of undocumented migrants in South Africa. The Act is mostly concerned with control of immigration and provides controversial selection processes for who is allowed into the country. See also **Dawood v Minister of Home Affairs** 2000 (8) BCLR 837 (CC).

197 In this regard, the Commission notes with distress that some refugee children are being detained in police cells prior to being admitted to the Lindela Detention Centre.

198 Section 28(2) of the Refugees Act 130 of 1998.

° a relative, other adult care-taker, government agency, or child-care agency has agreed, and is able, to provide immediate protection and care upon arrival.

22.4.3.4 **The Aliens Control Act 96 of 1991**

Unlike the Refugees Act 130 of 1998, the Aliens Control Act does not recognise undocumented immigrant children as a specific vulnerable group. In terms of this Act, undocumented immigrant children are treated the same as their adult counterparts. The following provisions of the Aliens Control Act specifically affect undocumented immigrant children:

° *Prohibited persons in the Republic of South Africa*

Section 39(2) of the Act lists certain persons as 'prohibited persons'. This list includes persons likely to become a public charge; persons deemed undesirable inhabitants or visitors to South Africa; persons living on the earnings of prostitution, certain convicted persons; mentally ill persons; persons afflicted with any contagious, communicable or other disease; and persons who has been removed from the Republic by warrant issued under any law.[199] If an immigration officer suspects that a person is a prohibited person, he or she may issue to such person a provisional permit subject to certain conditions.[200]

° *Manner in which an alien[201] may apply for an immigration permit*

Section 25 of the Aliens Control Act 96 of 1991 regulates the manner in which an alien may apply for an immigration permit and the consideration of such applications. Subsection (5) makes specific

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199 See also clause 23(1) of the Immigration Bill 79 of 2001 in terms of which certain foreigners do not qualify for a temporary or a permanent residence permit. The categories of foreigners involved differ markedly from the list of prohibited persons in section 39(2) of the Aliens Control Act 96 of 1991.

200 Section 10(1)(a) of the Aliens Control Act 96 of 1991.

201 'Alien' is defined as a person who is not a South African citizen.

provision for the authorisation of the issue of an immigration permit to the spouse[202] or dependent child of a person who is permanently and lawfully resident in the Republic. Section 28(2) of the Act empowers the Minister for Home Affairs, if he is satisfied that there are special circumstances justifying it, to 'exempt any person or category of persons from the provisions of section 23'. Section 23 is a provision which prohibits entry into or sojourn in the Republic by an alien who is not in possession of a permit.

202 The Constitutional Court held in **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (1) BCLR 39 (CC) that the provisions of section 25(5) of the Aliens Control Act 96 of 1991 were in conflict with the guarantee against unfair discrimination contained in section 9(3) of the Constitution to the extent that they confer a benefit on spouses of persons permanently and lawfully resident in the Republic while not expressly conferring such benefits on same-sex life partners of such residents. See also **Kohlhaas v Chief Immigration Officer, Zimbabwe and another** 1998 (3) SA 1142 (ZSC).

In **Dawood and another v Minister of Home Affairs and others**[203] the Constitutional Court had the opportunity to consider the effect of section 25(9)(b) of the Aliens Control Act 96 of 1991. In casu the Court declared section 25(9)(b) read with sections 26(3) and (6) of the Act to be unconstitutional[204] as these provisions have the effect of limiting the right of cohabitation of spouses in certain marriages between a South African citizen and a foreign spouse. In respect of the right to family life or the right of spouses to cohabit together, the Court held:[205]

> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.

Given this dicta, and the judgment of Van Heerden J in **Makinana and others v Minister of Home Affairs and another; Keelty and another v Minister of Home Affairs and another**[206] it is hard to imagine that the Constitutional Court will uphold the constitutionality of any law allowing for the separation, on principles similar to that in the Aliens Control Act 96 of 1991, of parents and their children.

° *Prohibition of certain acts in co-operation with, or in respect of, certain aliens*

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203 2000 (8) BCLR 837 (CC). See also **Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others** 2000 (1) SA 997 (C); **Booysen and others v Minister of Home Affairs and others** (CCT 8/2001), judgment delivered on 4 June 2001.

204 The declaration of invalidity was suspended for two years to enable Parliament to correct the inconsistency that resulted in the declaration of invalidity.

205 Per O'Regan, J for the unanimous Court, par [37].

206 2001 (6) BCLR 581 (C).

The Act makes it a criminal offence for anyone to -[207]

(a) employ or continue to employ an illegal alien;
(b) provide instruction or training to such an alien or allow him or her to receive instruction or training;
(c) issue to such an alien a licence or other authorization to conduct any business or to carry on any profession or occupation;
(d) enter into an agreement with such an alien for the conduct of any business or the carrying on of any profession or occupation;
(e) assist, enable or in any manner help such an alien to conduct any business or to carry on any profession or occupation; and
(f) do anything for or on behalf of such an alien in connection with his or her business or profession or occupation.

Thus, the Act makes it illegal for any undocumented immigrant to engage in any form of employment. Undocumented immigrants who have left their countries due to, eg. starvation and who are not in possession of sufficient means will not be in a position to support themselves or their dependants once they get to South Africa. The children of such persons are also at risk of destitution or of being exposed to or involved in illegal activities or to being exploited for prostitution or other forms of child labour.

° *Detention*

207 Section 32 (1) of the Aliens Control Act 96 of 1991.

An illegal immigrant may not be detained for a period longer than 48 hours from the time of his or her arrest and must be informed for the reason of his or her further detention after the first 48 hours in detention, and the detention must be reviewed after a period of 30 days by a judge of the High Court.[208] Despite these statutory requirements, Human Rights Watch found that all of the persons at Lindela Detention Centre in Krugersdorp who had been detained there for more than thirty days were detained without review, in some cases for several months.[209]

° *Removal from the Republic of dependent family members of certain persons*

208 Section 55 of the Aliens Control Act 96 of 1991.

209 Human Rights Watch **Prohibited persons: abuse of undocumented migrants, asylum-seekers and refugees in South Africa** 1998 at 98.

If a warrant is issued for the removal from the Republic of a person who is the head of the family, any other member of such family who is not a South African citizen may be included in such a warrant for removal from the Republic.[210]

The Aliens Control Act 96 of 1991 is under review and will be repealed if the Immigration Bill 2001 becomes law. This Bill was reintroduced in Parliament in late 2001. The Bill does not have a particular child focus and there is hardly any recognition that the officials involved could be dealing with children or that any special consideration for children might be necessary. Specific issue related to the Bill is discussed below.[211]

22.4.3.5 **The South African Citizenship Act 88 of 1995**

There are three main forms of South African citizenship, namely citizenship by birth, descent or naturalisation. Only citizenship by birth is relevant for purposes of this discussion. In terms of the South African Citizenship Act, the following categories of children are South African citizens by birth:

- a child who is born in the Republic on or after the date of the commencement of the Act[212] provided that at the time of his or her birth, one of his or her parents had been lawfully admitted to the Republic for permanent residence therein and his or her other parent was a South African citizen;[213]

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210 Section 48 (1) of the Aliens Control Act 96 of 1991.

211 See paragraphs 22.4.3.6, 22.4.3.7 and 22.4.3.8 immediately below.

212 Section 2(1)(b) of the South African Citizenship Act 88 of 1995.

213 Section 2(2)(b) of the South African Citizenship Act 88 of 1995.

· a child born in South Africa who is not a South African citizen, and who is adopted in terms of the Child Care Act, 1983 by a South Africa citizen;[214]

214 Section 2(4)(a) of the South African Citizenship Act 88 of 1995.

- a child born in South Africa who is not a South African citizen and who does not have the citizenship or nationality of any other country or who has no right to such citizenship or nationality (a stateless child),[215] and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992.[216]

However, the South African Citizenship Act does not make provision for children of undocumented immigrants who have been abandoned and whose citizenship status is unknown to acquire South African citizenship.

22.4.3.6 **The Child Care Act 74 of 1983**

The Child Care Act is a primary source of protection for refugee and unaccompanied children found to be in need of care.[217] The Children's Court, the procedures followed in Court and the orders that can be made, play a very important role in the protection and care of unaccompanied children.[218] However, unlike the Refugees Act 130 of 1998, neither the Aliens Control Act 96 of 1991 nor the Immigration Bill 79 of 2001 gives recognition to the fact that undocumented immigrant children may be in need of care and therefore entitled to the protective measures provided by the Child Care Act, 1983.

The Immigration Bill 79 of 2001 makes it a criminal offence for any person to knowingly aid, abet, assist, enable or in any manner help an illegal foreigner or a foreigner inter alia by providing instruction or training to such person or by harbouring him or her, which includes providing overnight accommodation.[219] The question is then who is going to be prepared to risk educating and sheltering a destitute (foreign) child.

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215 Section 2(4)(b)(i) of the South African Citizenship Act 88 of 1995. Conclusive proof that the child has no other citizenship or claim to any other citizenship is required.

216 Section 2(4)(b)(ii) of the South African Citizenship Act 88 of 1995.

217 NCRA Report (2000) 18.

218 See sections 11, 12, 13 and 14 of the Child Care Act.

219 Clauses 45(i) and (viii).

22.4.3.7 The Social Assistance Act 59 of 1992

Under the Social Assistance Act, the Department of Social Development can pay a foster care grant to a foster parent who is taking care of a child without a parent or guardian, or whose parent or guardian cannot be traced. Any person is entitled to a foster care grant if he or she is the foster parent and the foster parent and the child are resident in the Republic and comply with the prescribed conditions.[220]

Section 39(2)(a) of the Aliens Control Act 96 of 1991 stipulates that any person who is likely to become a public charge by reason of infirmity of mind and body, or because of lack of sufficient means to support himself or herself or his or her dependants brought into the Republic, shall be a prohibited person. This provision is echoed in clause 24(1)(a) of the Immigration Bill, 2001 which states that foreigners 'who is or is likely to be or become a public charge' may be declared 'undesirable', justifying deportation. Undocumented foreign children are very likely to fall in this category should application be made for any form of social assistance.

22.4.3.8 South African Schools Act 84 of 1996

The South African Schools Act 84 of 1996 makes it compulsory for all learners from the age of seven to the age of 15 years to receive a basic education. Although refugee and undocumented immigrant children have the right to receive basic education, schools tend to be unco-operative as regards allowing entry to child asylum-seekers. Refugee children are being denied access to schools based on the endorsement: 'Not entitled to work or study' on the permits of their parents whilst the application for asylum is pending. After much lobbying, the National Consortium on Refugee Affairs managed to get the Department of Home Affairs to exclude children from this provision. However, it is not certain whether all schools are aware of this. Even if children are admitted, they

220 Section 4A of the Social Assistance Act.

struggle with language issues[221] and school fees,[222] and often display behavioural problems associated with traumatic experiences.

221 Especially with children from French and Portuguese speaking backgrounds.

222 The UNHRC partly contributes to the school fees of refugee children. Discussion with Ms Joyce Tlou of the National Consortium of Refugee Affairs on 19 April 2001.

'Illegal foreigners',[223] including illegal foreign children,[224] will be in an even worse position should the Immigration Bill 79 of 2001 be adopted. In terms of clause 42(1) of this Bill, no person employed by or associated with any type of learning institution shall provide training or instruction to an illegal foreigner, a foreigner whose status does not authorise him or her to receive such training or instruction, or to a foreigner on terms, conditions or in a capacity different to those contemplated in such foreigner's status. Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence punishable by a fine not exceeding R25 000.[225]

22.4.4 Comparative analysis and evaluation

The characteristics of the legal status accorded to asylum seekers vary from country to country. In the Netherlands, for example, there are currently three 'categories' of legal status accorded to asylum seekers.[226] Furthermore, the granting of status varies not only according to situation (e.g. 1951 Convention status versus alternative 'humanitarian-based' status), but also age. In particular, unaccompanied minors who apply for asylum (AMA's)[227] are, on a pre-determined country basis, often granted a special form of status[228] giving them temporary residence in the country while their asylum applications are being considered, a process that can take many years. This temporary status

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223 In terms of the Bill, an 'illegal foreigner' means a foreigner who is in the Republic in contravention of the Immigration Act and includes a prohibited person.

224 The Immigration Bill, 2001, makes no specific provision for illegal foreign children.

225 Clause 52(4) of the Immigration Bill, 2001.

226 The first is 'A status', accorded in terms of the 1951 Refugee Convention, which comes with an unlimited residence permit. In the case of 'A status', refugees are immediately granted the same rights as Dutch citizens, and can eventually become citizens themselves. The second, 'C status', relates to Article 3 of the European Convention on Human Rights, granting indefinite residence on 'humanitarian grounds'. This status grants fewer rights, but eventually builds into a permanent status, and can also lead to citizenship. Finally, there is 'F status', a temporary status renewable annually, and leading to 'C status' if the applicant is not able to return to his or her country of origin within three years. This is set to change. In terms of the proposed Immigration Act, currently before the Dutch parliament, all three 'categories' would be merged into a single, temporary status, which is later 'readjusted' according to the grounds on which one is finally determined to reside in the Netherlands. See also Joanne van Selm 'Asylum in the Netherlands: A hazy shade of purple' (2000) 13 **Journal of Refugee Studies** 74 at 77.

227 In the Netherlands, such persons are referred to as 'Alleenstaande Minderjarige Azielzoekers' or AMA's.

228 This status is called 'AMA-vtv' - vtv meaning 'vergunning tot verblijf'.

grants AMA's residence, not entitling them to work, for a period until they reach the age of 18 years, whereupon they continue in the procedure as an adult applicant. Their application for political asylum is separately considered on the basis of 1951 Convention status or, alternatively, in terms of non-Convention status (e.g. in terms of Article 3 of the European Convention on Human Rights).[229]

° **Age determination**

In accordance with international guidelines, in the Netherlands, age and capacity issues are very important. From the point of view of eligibility for 'AMA-vtv', it must be established that the applicant is younger than 18 years. If the government questions this, then an investigation into their age is conducted, through a simple medical test. This test involves an x-ray of the applicant's shoulder area. If the applicant's collarbone is not yet wholly fused, then it is presumed that the applicant is younger than 18 years of age. The converse also applies.

229 Determination of Article 3 status is roughly equivalent to the grounds on which one is recognised in South Africa as a refugee under the 1969 OAU Refugee Convention.

In the United Kingdom, provided an immigration officer make an initial identification, the unaccompanied refugee child is referred to a children's panel, which acts as a liaison in the early stages of the procedure. In the Netherlands, a child is referred to 'De Opbouw' organisation, which provides a guardian / social worker for the child. This person is specially trained to assist refugee children. The United States, on the other hand, does not statutorily require the appointment of an individual to act as guardian and / or representative, though new guidelines as least provide the possibility for adults other than the legal representative to participate in the adjudicating process.[230]

In the Mayer et al 'Guidelines and recommendations for protecting refugee children' it is recommended that should a formal age determination need to be made, the child should be referred to the District Surgeon for an independent medical examination. This age assessment should encompass both physical appearance and psychological maturity. The use of a medical examination should take place after the informed consent of the child has been obtained. Mayer et al also argue that special care and attention should be given to asylum seekers who are between the ages of 18 and 21 years, as their asylum application may be based on events that took place while they were under the age of 18.

° **Assistance in applying for refugee status**

230 US Department of Justice, Immigration and Naturalisation Services **Guidelines for Children's Asylum Claims**, 10 December 1998.

Unlike other countries, including the USA where it is reported that 'the majority of children receive minimal legal information',[231] in the Netherlands legal advice is provided to all unaccompanied asylum-seeker minors (AMA's) in connection with their application for political asylum. In the event that an applicant receives a negative decision, they are legally entitled to appeal, and are provided with a lawyer free of charge.

While there is a *right* to legal representation for asylum seekers in Britain[232] and in the USA, *access* to competent legal advice tends to be limited. The Netherlands fare better. The Dutch Bar Association has, in association with an independent legal training institute, approved a certified course. This training is complemented by legal help desks operated by NGO's such as the Dutch Refugee Council and Amnesty International, providing expert advice to lawyers.

In South Africa, the children's court making an order related to a separated child is entitled to make an order that the child be assisted in applying for asylum.[233] Although this is a useful provision, Mayer et al[234] suggest that consideration should be given to empowering the children's court to appoint a (temporary) guardian ad litem to an unaccompanied or separated minor asylum seeker or refugee. Such person would be appointed in addition to a care-giver or custodian and would assume full parental responsibility for that child in the absence of the biological parents, and would provide psycho-social support to the child through the status determination process and thereafter. In addition, Mayer et al[235] recommend that an unaccompanied or separated child should obtain free legal assistance for the status determining process. The authors say it should be the responsibility of the Refugee Reception Officer to make sure that the child has obtained legal representation. However, it is crucial that unaccompanied and separated children are assisted with their applications

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231 Human Rights Watch **Slipping through the cracks: Unaccompanied children detained by the US Immigration and Naturalization Services** New York 1997, p. 27.

232 Simon Russell 'Unaccompanied refugee children in the United Kingdom' (1999) 11 **IJRL** 126 at 146.

233 Section 32 of the Refugees Act 130 of 1998. However, it is not clear from the Refugees Act, 1998, or from the regulations, who should be appointed to provide this assistance.

234 **"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 12.

235 **"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 14.

as the reception officer records the evidence given by the child, and also makes an assessment as to credibility.

° **The use of a support person**

The asylum determination procedure takes place in a hostile environment in any country, particularly in South Africa where limited resources and an over-stretched staff mean that applicants are usually forced to wait in large rooms with other asylum applicants, waiting for their interview before a (frequently uniformed) immigration officer. In advising child asylum seekers through what is a particularly hostile procedure, legal practitioners in other countries have recognised the importance of both providing an additional 'trusted adult' for unaccompanied child asylum seekers, and ensuring that decisions are made quickly. Mayer et al[236] state that it is not appropriate for a child refugee to be interviewed without the assistance of an adult.[237] Child refugee applications should therefore be prioritised, though not at the expense of making a good decision.[238]

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236 **"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 14.

237 The UNHCR document **Refugee Children - Guidelines on Protection and Care** states that arrangements should be made 'to have a trusted adult accompany the child during the interviewing process, either a family member of the child, a friend or an appointed independent person'.

238 Mayer et al "Protecting the most vulnerable", p. 24.

° **Citizenship**

The Fourteenth Amendment of the US Constitution confers citizenship on those born within the United States. The relevant part of the Fourteenth Amendment reads as follows: '[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'. While adopting the English common law concept of territorial birthright citizenship, the US has never definitely articulated its position of children born to illegal immigrants. Social and political controversy over the influx of illegal immigrants in the US have increased activity aimed at altering the doctrine of territorial birthright citizenship. The US is further faced with the constitutional dilemma of whether children of illegal immigrants fall within the Fourteenth Amendment definition of a citizen. Based on the plain text of the Fourteenth Amendment, the status of children born to illegal immigrants appears settled in favour of conferring citizenship on these children. Case law does not definitely state that children born to illegal immigrants are to be recognised as citizens. Neither, does case law definitely state the converse position - that these children are not US citizens. This ambiguity has led to legislative efforts seeking to define the scope of the Citizenship Clause by narrowing it to exclude children born in the US to illegal immigrants. It is argued that such an endeavour must fail as Congress has no power to define what a clause in the Constitution means - that power is left to the Supreme Court alone. Thus, Congressional efforts to abandon the Fourteenth Amendment territorial birthright citizenship will be unconstitutional.[239]

22.4.5 Recommendations

From the Mayer et al research it is clear that there is no specific policy for refugee children, especially unaccompanied children.[240] Such a policy is clearly required that should provide for a

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239 Houston M R W 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants' (May 2000) 33(3) **Vanderbilt Journal of Transnational Law** 693 - 738. The United Kingdom has abolished pure territorial birthright citizenship, thus denying citizenship to children of illegal immigrants. A major exception to this is that new born infants found abandoned in the United Kingdom are invested with citizenship.

240 NCRA Report (2000) 4.

sharing of responsibilities by the various government departments and that involve civil society organisations.[241] The Mayer et al document **"Protecting the most vulnerable": Guidelines and recommendations for protecting refugee children** is a very useful starting point in this regard. It is also clear from the Mayer et al research that the existing limited service provision is not well co-ordinated.[242] Service organisations, for example, report that there are growing numbers of separated child refugees found on the streets, in shelters and in havens.[243] On the other hand, many unaccompanied or separated children are not being identified by immigration officials, Home Affairs structures or welfare authorities.[244] However, the Mayer et al research[245] also concedes that **'the current legal framework in South Africa provides extensive protection to refugee children'**.

In view of the above, South Africa's international obligations, the impact of the Bill of Rights and legislative framework provided in the Refugees Act, the following conclusions are drawn and recommendations made:

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241 NCRA Report (2000) 4.

242 NCRA Report (2000) 21.

243 NCRA Report (2000) 6 -7.

244 NCRA Report (2000) 6 -7.

245 "Protecting the most vulnerable", p 15.

° **The Commission accepts the need for developing a realistic and morally appropriate refugee policy on the basis discussed above**. In this regard we support the Guidelines and Recommendations for Protecting Refugee Children as proposed by Mayer et al.[246]

° **Given the rights and obligations[247] of refugees enumerated in Chapter 5 of the Refugees Act 130 of 1998, and given the fact that these rights and obligations also apply to refugee children, it is not necessary to specifically include similar provisions to this effect in the new children's statute**. In this context it is worth pointing out that refugees enjoy full legal protection, which includes the rights set out in the Bill of Rights and the right to remain in South Africa in accordance with the provisions of the Refugees Act;[248] that public schools and health facilities and the social security system may not discriminate against refugee children on the basis of nationality;[249] that refugee children are entitled to the same basic health services and basic primary education which ordinary South African receive from time to time;[250] that the detention of refugee children must be used only as a

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246 The Mayer et al proposals are also supported by the National Consortium on Refugee Affairs.

247 One of the major obligations of refugees is to abide by the laws of South Africa. See section 34 of the Refugees Act 130 of 1998.

248 Section 27(b) of the Refugees Act 130 of 1998.

249 Section 27(b) of the Refugees Act 130 of 1998, read with sections 9, 27, 28 and 29 of the Constitution, 1996, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the National Education Policy Act 27 of 1996, the Health Act 63 of 1977, and the Social Assistance Act 59 of 1992.

250 Section 27(g) of the Refugees Act 130 of 1998.

measure of last resort and for the shortest appropriate period of time;[251] that a refugee must be issued with an identity document;[252] that a refugee may apply for a travel document,[253] etc.

251 Section 29(2) of the Refugees Act 130 of 1998.

252 Section 30 of the Refugees Act 130 of 1998.

253 Section 31 of the Refugees Act 130 of 1998.

° The way in which applications for asylum should be handled when the subject is a child, the manner in which and the circumstances under which refugees and refugee children in particular are detained, the treatment of refugees at the detention facilities, the grounds for refugee status,[254] etc. are matters that need to be covered in detail in the Refugees Act, the regulations to that Act, and policy instruments related thereto. **We therefore do not regard it necessary to provide for such specifics in the new comprehensive children's code**.

° Any child who appears to qualify for refugee status and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, must forthwith be brought before a children's court.[255] This injunctive in the Refugees Act allows the protective measures provided for in the Child Care Act to be activated. The needs of that particular refugee child in need of care will then determine the appropriate welfare response. Provided it is understood that this should also be the case under the new children's statute, **we believe this issue related to unaccompanied refugee children is adequately dealt with in the Refugees Act**.

In order to afford greater protection to refugee and undocumented immigrant children, and to make it very clear that the Commission regards the new children's statute as the ultimate word in areas where there may be uncertainty as to the rights of children, **the Commission would like to propose the inclusion of the following basic protection measures for foreign children into the new children's statute**:

(a) No public health care facility or school may exclude a child on the basis of nationality, immigration status, or lack of identification documentation;
(b) An order of the children's court is sufficient basis for access to a state grant, rendering ID documents of whatever description unnecessary;[256]

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254 The Commission recommends below that section 3 of the Refugees Act 130 of 1998 be amended to include the following as grounds for refugee status: female genital mutilation, forced child marriages, and child slavery.

255 Section 32 of the Refugees Act 130 of 1998.

256 For refugee and undocumented immigrant children to receive social assistance, a 13-digit identification

document or an official document from the country of origin is needed. In the absence of such documentation, refugee and undocumented immigrant children are denied the social assistance most needed for their survival. The Department of Home Affairs has issued since 2 May 2001 13-digit, maroon in colour, refugee identity documents. The Department of Home Affairs should in the absence of any documentation needed for the granting of social assistance to refugee and undocumented immigrant children, issue temporary 13-digit identification documentation to such children.

(c) An asylum-seeker may be recognised at least as an interim care-giver for a refugee or undocumented immigrant child, in keeping with the policy that the child should stay within the refugee community as far as possible, and should be entitled to retention order fees on the basis of whatever form of identification he or she possesses;

(d) No child (refugee or undocumented) may be repatriated without proper arrangements for his or her reception and care in the receiving country being in place as per the UNHRC guidelines for refugees;[257]

(e) In tracing family members of refugee children and in taking steps to facilitate contact between refugee children and family members, there must be cooperation in efforts made by the UNHCR and by other competent intergovernmental or non-governmental organizations which work with the UNHCR;

(f) An adult assistant (support person) must be present when an asylum-seeking or refugee child is interviewed by the authorities;

(g) Provision that a child who has appeared before the children's court as a refugee child in need of care must again appear before that court for ratification or rejection of any decision to move or deport that child;

(h) In instances where the age of an asylum-seeker or undocumented immigrant is in dispute and there are no identification documents to confirm that he or she is indeed under the age of 18 years, the Commission recommends that a commissioner of child welfare should be allowed to estimate the age on the basis of available information. However, should a formal age determination need to be made, the child should be referred to the District Surgeon for an independent medical examination. The age assessment should encompass both physical appearance and psychological maturity. However, the use of medical examination should be avoided in cases where consent from the applicant is lacking, or if it might violate the physical or cultural integrity of

257 See paragraph 22.4.3.3 above where this requirement is discussed in the context of the Refugees Act 130 of 1998.

the child;

(i) Refugee and undocumented immigrant children should not be detained, except as a measure of last resort and for the shortest possible period. Further, unaccompanied or separated refugee and undocumented immigrant children should not be detained with adults. If a family with children are detained, the Commission recommends that the children should not be separated from their family;

(j) Assistance to and harbouring of illegal foreign or foreign children in need of care shall not constitute a criminal offence.[258]

The Commission also recommends that the following amendments to the Refugees Act 130 of 1998:

(a) The amendment of section 3 to include the following as grounds for refugee status: a well founded fear of being subjected (in the 'home' country) to (a) female genital mutilation; (b) a forced child marriage; (c) forced (military) conscription and armed conflict; (d) child slavery, and (e) child trafficking.[259]

(b) The amendment of section 32 to provide that any child who appears to qualify for refugee status and who is in need of care and who therefore has appeared before a children's court, must again appear before that children's court to confirm any decision to remove, return or deport such a separated or unaccompanied child.

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258 In other words, assistance will not constitute a breach of section 45(viii) of the Immigration Bill 79 of 2001. To give effect to this recommendation, the provision in the new children's statute can stipulate that assistance to an illegal foreign child or a foreign child in need of care may be given in terms of the new children's statute 'notwithstanding the provisions of any other Act'.

259 See section 22.5.4 below.

(c) The amendment of section 28(3) to provide that a child, who is a dependant of a refugee who has been ordered to leave the Republic and who may bring an asylum application in his or her own name, shall be regarded as an unaccompanied child. This will entitle such a child to the protection measures embodied in the current section 32 of the Refugees Act 130 of 1998.

Unaccompanied or separated child asylum-seekers are in a more vulnerable position than those accompanied by their parents. **The Commission therefore recommends that the relevant authority or official must as soon as possible refer an *unaccompanied* or separated child asylum-seeker, *as a child in need of care*, to social services who should immediately make arrangements for the child to appear in the children's court**.[260] Further, if an authority or official is of the opinion that an **accompanied** asylum-seeker child is a child in need of care, it must refer the case to social services for further investigation. However, an accompanied child should not be removed from his or her family, unless there are grounds for removal in terms of section 14(4) of the current Child Care Act, 1983. **The Commission further recommends that border authorities, the police, officials at Refugee Reception Offices, etc. should be trained in the proper and appropriate treatment of refugee children, including the referral of such children to the relevant welfare structures**. Such training should include strategies and techniques for the recognition of unaccompanied and separated refugee children. For example, when interviewing an asylum-seeker applicant, the Refugee Status Determination Officer can start by asking whether the applicant is caring for any child other than his or her own, or knows, of any families caring for children other than their own. This information should be shared with the relevant welfare structures who could take steps to assist such children. Referral of unaccompanied and separated children to social services must take place before any application for refugee status is processed as the wellbeing of these children is the primary concern. This will also give the children's court a chance to order that the unaccompanied or separated child be assisted with his or her asylum application.

The Commission recommends that the asylum applications brought by unaccompanied or separated children, and families with children should be received and processed as a priority.

260 As is provided for by section 32 of the Refugees Act 130 of 1998.

Proper guidelines on how to interview asylum-seeker children should be established. Guidelines should include the following:[261]

- what the nature of the interview should be (formal/informal);
- how questions should be asked;
- that the child should be allowed to express his or her views freely and that due weight should be given to such views;
- where a child asylum-seeker can not express him/herself in English, a competent interpreter must be made available to the child;
- that interviewers must be sensitive to cultural and gender factors;
- that allowance must be made for the fact the children are not able to present evidence with the same degree of precision as adults and do manifest their fears differently from adults;
- that children seeking asylum usually suffer from post traumatic stress disorder which can have an effect on their testimony.

Sadly, the Aliens Control Act 96 of 1991 and the Immigration Bill 79 of 2001 lacks a child focus and compare poorly to the Refugees Act 130 of 1998. The Immigration Bill 79 of 2001 gives no recognition that the officials involved could be dealing with children or that any special consideration for them might be necessary. Particularly worrisome are provisions such as clause 47 in the Immigration Bill. Clause 47 provides that when possible, any organ of state in any sphere of government, except health care facilities, must endeavour to ascertain the status or citizenship of the persons receiving its services and must report to the Department of Home Affairs any illegal foreigner, or any person whose status or citizenship could not be ascertained. The organ of state

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261 See **"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 15 -17.

must inform the illegal foreigner or the person with the uncertain status or citizenship through public notices or directly of this reporting obligation. Given the existing difficulties inter alia with 13-digit identification numbers and the accessing of foster care grants, the exclusion of children from schools on the basis of nationality, etc., the Commission warns that illegal foreign children or children of uncertain citizenship will face massive risks of being detained and of being deported should the Immigration Bill 2001 become law in its present form.

The Commission urges Parliament to at least consider excluding schools, social welfare facilities, and the children's courts, as is the case with health care facilities, from the obligation to ascertain the status or citizenship of their clients and to report illegal foreign children and children of uncertain status to the Department of Home Affairs as is required by clause 47 of the Immigration Bill. These children are already extremely vulnerable and the possibility of being convicted and fined up to R75 000 will deter even the most courageous welfare organisation or school from accepting such children, if only for a night.

The Commission further urges Parliament to provide in the new Immigration Bill that any *accompanied* illegal foreign child found under circumstances which clearly indicates that such a child is a child in need of care as contemplated in the Child Care Act, 1983, must immediately be brought before the children's court for the district in which he or she was found.[262] However, an accompanied undocumented immigrant child should not be removed from his or her family, unless there are grounds for removal in terms of section 14(4) of the Child Care Act, 1983. **Where the child is *unaccompanied*, we recommend that such child automatically qualify as a child in need of care.** Such child must be referred to the Department of Social Development or an agency who should immediately make arrangements to bring the child before the children's court. The obligation to refer an accompanied or unaccompanied / separated undocumented immigrant should also be placed on schools and health services who have first contact with the child. Also, border officials should be trained on the treatment of and how to detect whether an undocumented immigrant child is a child in need of care, including the referral of such

262 See section 32(1) of the Refugees Act 130 of 1998.

children to the relevant welfare structures.

Neither the South African Constitution nor the South African Schools Act limits the right to basic education to citizens. South Africa is also a party to various international instruments that guarantee basic education to 'every' child. However, parents of undocumented immigrant children may not admit their children to schools due to fear of arrest and / or deportation. In order to ensure that non-South African children regardless of their status enjoy the right to basic education, **the Commission recommends that, similarly to the federal position in the United States, schools should not deny admission to learners on the basis of their undocumented status. Neither should schools report the undocumented status of children and that of their parents to the authorities. The Commission further recommends that service providers that provide services to which undocumented immigrant children have a right may not report the undocumented status of the children and that of their parents to the authorities**. This will ensure that undocumented children will not be hesitant to access services such as health care due to fear of arrest.

With regard to citizenship, the Commission is of the view that no refugee or undocumented immigrant child should be vested with South African citizenship, unless it is proved that the child has no right to acquire the citizenship of his or her parents' country of origin or any other citizenship,[263] or that acquiring South African citizenship would be in the best interests of the child concerned. This recommendation should prevent statelessness and is based on the fact that a child in terms of South African law has the right to acquire a national identity.[264]

Research conducted by Human Rights Watch and the South African Human Rights Commission[265] indicates that detention conditions at the Lindela Detention Centre do not meet minimum

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263 See also Raylene Keightley 'The child's right to a nationality and the acquisition of citizenship in South African law' (1998) 14 **SAJHR** 411.

264 Article 7 of the CRC; section 28(1)(a) of the Constitution, 1996.

265 **Lindela : At the crossroads for detention and repatriation**, Johannesburg December 2000; 'Access to Justice - Focus on refugee and asylum seekers' March 2001 **HRC Quarterly Review**; Jonathan Klaaren 'South African Human Rights Commission Report on Treatment of Persons Arrested and Detained under the Aliens Control Act' (1999) 15 **SAJHR** 131.

requirements in a number of important areas. **The Commission therefore recommends that the Department of Home Affairs, as the government agency under whose authority undocumented immigrants are detained, should take primary responsibility to ensure compliance with minimum standards at this Centre.** This will ensure that children who are detained with their parents at Lindela and other detention facilities that may be established in future, live in conditions that will not hamper their development or impair their health.

22.5 Trafficking of children across borders[266]

22.5.1 Introduction

The Commission deals with the issue of trafficking in children (for purposes of sexual exploitation) under the umbrella term 'Commercial sexual exploitation of children' in its Discussion Paper on **Sexual Offences: The Substantive Law**.[267] The Discussion Paper has a particular focus on sexual abuse. It is pointed out that the trafficking in persons is an ill-defined concept[268] at best but may be considered the brokered movement of persons across state lines or borders. The Commission further points out that the tendency to define trafficking as broadly as possible often leads to the obfuscation of different legal concerns with regard to the sexual exploitation of children.

For present purposes, however, the definition used in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000, will suffice. It defines "trafficking in persons" as follows:[269]

> (b) "Trafficking in persons" means 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

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266 On the issue of commercial sexual exploitation, see also 6.4.8 and 13.9 above.

267 Project 107: Sexual Offences, August 1999, par. 3.7.11.1.

268 A fundamental problem in responding to the issue of trafficking is the lack of a precise and coherent definition. See also Marjan Wijers and Lin Lap-Chew "Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution", report submitted to the UN Special Rapporteur on Violence against Women, April 1997.

269 Article 3(a).

> 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 purpose of exploitation. Exploitation includes, 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.

With regard to the trafficking of children, the article further states that:

> (b) 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.

'Trafficking in persons' must be distinguished from the exploitation[270] and smuggling of persons. Smuggling is the procurement of illegal entry of a person into a state of which that person is not a national.[271]

22.5.2 **The trafficking of children in South Africa**

Little is know as to the true extent of trafficking of children in South Africa. However, recent research by Molo Songololo, a child rights based organisation in Cape Town, indicates that the trafficking of South African children is predominantly an in-country phenomenon.[272] According to the study, most of these children are trafficked within the vicinity of the place of origin. Girl children are the primary targets, although boy children have also been identified as victims. Girl children range in age from four to seventeen years. The study finds that parents and local (criminal) gangs are the primary traffickers of children, sometimes in collusion with each other: Traffickers in South Africa are thus predominantly locals. The Molo Songololo report states that:[273]

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270 For the importance of maintaining this distinction, see 22.5.4 below.

271 See the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime, 2000 (not yet in force) for a definition.

272 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 2, chapter 5.

273 **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 38.

> The in-country trafficking of children takes place between provinces from city to city and rural areas to cities. It can also take place within provinces from rural to urban areas. Several sources identified the traffic of children from KwaZulu Natal to Gauteng and the Western Cape and from the Eastern Cape to Gauteng and the Western Cape. If this is a fair reflection of the inter-provincial traffic in children then it would be reasonable to assume that Gauteng and the Western Cape are provinces of destination and the Eastern Cape and KwaZulu Natal are provinces of origin.
>
> The most commonly reported trafficking routes however are those that do not need long distances to travel. These are indicated by the trafficking of children from informal settlements in the north of Johannesburg to the northern suburbs of Johannesburg. In areas where gangs operate children can be abducted and held captive in their own community as in the case of informal settlements in Johannesburg and several unconfirmed reports of a similar situation in Mitchell's Plain, in Cape Town.

According to the Molo Songololo report, with regard to the cross-border trafficking of children, traffickers have been identified as foreign. Those involved in the trafficking operations from Eastern Europe have been identified as the Russian Mafia, Bulgarian syndicates and individual South African and Bulgarian agents. Besides the traffic from Eastern Europe reports also indicate the traffic of children from Southeast Asia, especially from Thailand and Taiwan. Children from Thailand are typically girls between the ages of 15 and 17 and are trafficked primarily to escort agencies in Gauteng and Cape Town. With regard to children from the rest of Africa being trafficked to South Africa, the report states that indications are that children as young as seven are being trafficked from Zambia, Senegal, Kenya, Tanzania, Uganda, Ethiopia, Angola and Mozambique.

The Molo Songololo report states that the causal factors that give rise to the increase in the phenomenon lie primarily in the economic situation in South Africa. This together with related phenomena such as the breakdown in extended and nuclear families, which is often accompanied by changes in cultural attitudes and practices, places children at risk. The report also identifies the demand for sex with children as another primary cause.

The Molo Songololo report also provides a sketch of the nature of the trafficking of children for the purpose of sexual exploitation and states that trafficking typically assumes the following six forms:

- Strangers, individuals and others who are linked to (criminal) gangs or syndicates forcibly recruit children to work in the sex industry.
- Parents or relatives coerce children to engage in sex work from their homes or the homes of sex exploiters.
- A child is forced to submit to sexual exploitation by a family acquaintance or a person in authority or through a person in authority.
- The trafficking of children into the sex industry by children already in the industry.
- Through the advertisement in the media for teenage girls of working age for work in the hospitality or film industry.
- The cross-border trafficking of children by organised crime syndicates and individuals.

In conclusion, the Molo Songololo report recommends inter alia that legislation be developed to prohibit the trafficking of persons for any exploitative purpose.[274] We will return to this issue after an analysis of the existing measures available to combat the trafficking of children.

22.5.3 Trafficking in persons and the South African legal system

International instruments to combat trafficking in children and women date back to 1904 with the League of Nations' International Agreement for the Suppression of the White Slave Traffic[275] and its subsequent 1910 International Convention for the Suppression of the White Slave Traffic.[276] During the course of the twentieth century the League of Nations and its successor the United Nations adopted a number of international instruments related to trafficking.

South Africa has signed and or ratified a number of these international instruments to combat trafficking in persons. Amongst these are the UN Slavery Convention (1926), the Convention for

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274 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 99, Chapter 8.

275 Amended by Protocol of 3 December 1948.

276 Amended by Protocol of 3 December 1948.

the Suppression of the Circulation of, and Traffic in, Obscene Publications (1923 - amended by Protocol of 12 November 1947), the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949), the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the African Charter on Human and People's Rights (1981), the CRC (1989), the African Charter on the Rights and Welfare of the Child (1990), the Optional Protocol to the Convention on the Rights of the Child (not yet in force), the UN Convention against Transnational Organized Crime (2000 - not yet in force), the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime (2000, not yet in force), the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime (2000, not yet in force). All these instruments prohibit explicitly or implicitly trafficking in persons and oblige member states to take legislative or other measures in this regard.

Although South Africa has no specific anti-trafficking legislation, the following statutory legal measures (in addition to certain common law offences)[277] can be used by law enforcement authorities (or the child itself in the case of domestic violence) to prosecute offences relating to the trafficking of persons, to provide relief, or to protect the victims of trafficking.[278]

22.5.3.1 **Child Care Act, 1983**

Section 50A(1) of the Child Care Act, 1983 prohibits the 'commercial sexual exploitation' of children. It reads as follows:[279]

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277 Such as abduction and kidnapping.

278 For a discussion of the relevant provisions of the Aliens Control Act, 1991 and the Refugees Act, 1998, see 22.3 and 22.4 above.

279 The provisions on the commercial sexual exploitation of children in the Child Care Act, 1983, as set out in the Child Care Act Amendment Bill, 1999, are critically analysed by the Commission in the Discussion Paper on **Sexual Offences: The Substantive Law**. The existing provisions in the Child Care Act, 1983 dealing with commercial sexual exploitation are dealt with in 6.4.8 above.

> Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.

'Commercial sexual exploitation' is defined in the Act as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person'.[280] Procurement of a child for purposes other than to perform a sexual act with that child for reward is not covered by this provision.

22.5.3.2 **The Basic Conditions of Employment Act, 1997**

280 Section 1.

The Basic Conditions of Employment Act, 1997 makes it an offence for any person to employ a child under the age of 15 or who is under the minimum school-leaving age.[281] The Act also prohibits the employment of a child in any kind of work that is inappropriate for the age of that person and that places at risk the child's well-being, education, physical or mental health, or spiritual, moral and social development.[282] It can certainly be argued that children forced by traffickers or any other person to work in the sex industry or other forms of hazardous employment are in situations that endanger their well-being, physical or mental health, or spiritual, moral or social development.[283] Molo Songololo therefore argues that any form or method of trafficking for the purpose of children's sexual exploitation should automatically be regarded as forced labour and therefore be prosecutable under section 48 of this Act.[284]

22.5.3.3 **Domestic Violence Act, 1998**

The Domestic Violence Act, 1998 (Act 116 of 1998) recognises a broad range of "domestic relationships"[285] in which violence can occur, including the parent of a child or persons who have or had parental responsibility for that child as well as persons who share or recently shared the same residence with the child. In addition, the definition of "domestic violence" allows for the inclusion of a variety of forms of abuse, intimidation, harassment, as well as "any other controlling or abusive behaviour". By applying for a protection order, the provisions of the Act can be used to protect the child from further abuse and violence in situations where the child is forced to submit to sexual exploitation by a family acquaintance or where parents or relatives coerce children to engage in sex work from their homes or the homes of sex exploiters.[286]

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281 Section 14(1) of the Act.

282 Section 14(2) of the Act.

283 Molo Songololo report **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 86.

284 **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 86.

285 A domestic relationship is not only formed between married couples, but also between people who are dating or family members related by consanguinity, affinity or adoption.

286 See 22.5.2 above.

22.5.3.4 The Prevention of Organised Crime Act, 1998

The Prevention of Organised Crime Act, 1998 (Act 121 of 1998) introduces measures to combat organised crime, money laundering and criminal gang activities. As we have seen, cross-border trafficking of children by criminal gangs is one of the forms trafficking of children typically assumes.[287] The Act makes it an offence for any person to actively participate in or be a member of a criminal gang or to wilfully aid and abet any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang, or to threaten to commit, bring about or perform any act of violence; or to participate in any criminal activity by a criminal gang or with the assistance of a criminal gang; or to threaten any person with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence.[288]

This section would therefore allow for the prosecution of gangs and individual gang members in communities who traffic children for purposes of sexual exploitation in exchange for 'protection' and survival. This, it will be recalled, is one of the forms which trafficking of children in South Africa typically assumes.[289]

22.5.3.5 The Sexual Offences Act, 1957

Section 9(1) of the Sexual Offences Act, 1957 (Act 23 of 1957) provides for prosecution of a parent or guardian of any child under the age of 18 years who permits, procures or attempts to procure such child to have 'unlawful sexual intercourse', or to commit any immoral or indecent act, with any person other than the procurer, or to reside in or to frequent a brothel; or orders, permits, or in any way assists in bringing about, or receives any consideration for, the defilement, seduction, or prostitution of such child. This provision covers the form of trafficking described in the Molo Songololo report where parents or caregivers coerce and force their children to engage in sex work.

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287 See 22.5.2 above.

288 Section 9(1) (a), (b) and (c).

289 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 94; see 22.5.2 above.

Section 10 of the Act covers the situation where persons forcibly recruit children to work in the sex industry. It reads as follows:

> Any person who-
>
> (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
>
> (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
>
> (c) procures or attempts to procure any female to become a common prostitute; or
>
> (d) procures or attempts to procure any female to become an inmate of a brothel; or
>
> (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,
>
> shall be guilty of an offence.

Section 12 of the Sexual Offences Act, 1957 creates an offence which is aimed at persons taking or detaining any female against her will to or in or upon any house or place or brothel with the intent that any male have unlawful sexual intercourse with that female. Where the female is under the age of sixteen years it is deemed in terms of this section that she has been taken thereto or detained therein or thereon against her will.[290] There is a further provision that says that a person shall be deemed to detain a female in or upon a house or place or in a brothel in terms of this section if such person withholds from the woman any clothes or other property such as her passport or travelling

290 Section 11(2)(a) of the Sexual Offences Act, 1957.

documents.[291]

Section 12A of the Sexual Offences Act, 1957 provides that any person who, with intent or while he or she reasonably ought to have foreseen the possibility that any person may have unlawful sexual intercourse, or commit an act of indecency, with any other person for reward, or performs for reward any act which is calculated to enable such other person to communicate with such other person, shall be guilty of an offence. This rather broad provision can be used against brokers who place clients in contact with persons trafficked into the sex industry.[292]

Section 13 of the Sexual Offences Act, 1957 is aimed at the prohibition of activities related to abduction. It allows for the prosecution of any person who takes or detains or causes to be taken or detained any unmarried person under the age of 21 years out of the custody and against the will of the parent or guardian with the intent to have or allow unlawful sexual intercourse with such abducted person.

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291 Section 11(3) of the Sexual Offences Act, 1957.

292 See also the presumption created by section 21(4) of the Sexual Offences Act, 1957.

As pointed out earlier,[293] the Commission also addresses the issue of commercial sexual exploitation of children in its Discussion Paper on **Sexual Offences: The Substantive Law**.[294] Clause 12 of the draft bill accompanying the Discussion Paper makes it an offence for any person to intentionally offer or engage a child for purposes of the commercial sexual exploitation of that child, while clause 13 makes it an offence for any person to intentionally **facilitate**, in any way, the commercial sexual exploitation of a child. In addition, clause 13(2) makes it an offence for any parent, guardian or caregiver to intentionally **allow** the commercial sexual exploitation of a child. The terms 'facilitate' and 'allow' are not defined in the draft bill.

In order to deal with trafficking as an offence that is linked to another offence (i.e. the commercial sexual exploitation of children), the Commission recommended in the Discussion Paper on **Sexual Offences: The Substantive Law** that the trafficking or transporting of a child, for the purposes of commercial sexual exploitation, from the place where the child usually is resident to another destination, whether within the country or abroad, be included in the definition of commercial sexual exploitation.[295] The Commission also recommended in that Discussion Paper that the phenomenon of commercial sexual exploitation of children be regulated in terms of the new sexual offences legislation and not the Child Care Act, 1983.[296]

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293 See 22.5.1 above.

294 Discussion Paper 85, August 1999. The issue of commercial sexual exploitation of children is one area of overlap between the two investigations where no convenient dividing principle could be devised. See the minutes of the joint meeting of the Project Committees on Sexual Offences and the Review of the Child Care Act held in Durban on 22 October 1999.

295 Discussion Paper 85, par 3.7.11.6. This recommendation is not embodied in the definition of 'commercial sexual exploitation' as contained in the draft Bill to the Discussion Paper.

296 Discussion Paper 85, par 3.7.10.2.

This recommendation of the Commission has been criticised by Molo Songololo.[297] It says:

> [T]he inclusion of trafficking as part of the definition of commercial sexual exploitation would not allow the South African legal and justice systems to deal with trafficking as an offence. Section 13(1) of the proposed Draft Bill provides for the prosecution of anyone who directly or indirectly facilitates the commercial sexual exploitation of a child and it can be argued that trafficking directly and indirectly facilitates the commercial sexual exploitation of children. To view traffickers as mere facilitators of the commercial sexual exploitation of children places them in the same category as taxi drivers who transport children from a brothel to a sex exploiter's house. The difference in the two types of transportation is that traffickers create the supply for the industry in the prostitution of children as well as the use of children in pornography whereas taxi drivers would transport children to the place where the sexual exploitation will occur.

297 Submission dated 29 March 2001.

Citing Trijntje Koonstra[298] and the definition of 'trafficking in persons' in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime, 2000, Molo Songololo argues that it is important to distinguish between trafficking and sexual exploitation. With regard to the latter, it is pointed out that the definition in the UN Protocol restricts trafficking to the illicit transportation or transfer of persons through coercive measures that has as its primary objective to deliver such persons into situations that will exploit their labour or services.

Molo Songololo concludes by saying that the Sexual Offences Act should make the trafficking of children for sexual purposes a specific and separate offence, in keeping with the definition of 'trafficking in persons' of the UN Protocol to Prevent, Suppress and Prevent Trafficking in Persons, Especially Women and Children. Further, it is argued that the inclusion of trafficking, as part of the definition of commercial sexual exploitation of children, would exclude the possibility of

298 **Background study on Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women** (Dutch Foundation Against Trafficking in Women, 1996), p. 15.

prosecutions for trafficking for sexual exploitation.[299]

299 In a separate submission, prepared by Natasha Distiller for SWEAT, an NGO focussing on sex workers, it is pointed out that legislation that criminalises sex work in an attempt to deal with the trafficking in women facilitates the continued abuse of sex workers, trafficked or otherwise: "We [SWEAT] are not arguing that women, men or children who suffer extreme labour exploitation or slavery-like conditions do not deserve immediate and extensive legal aid, nor that criminals who facilitate such abuse should not be most severely punished. However, inaccuracies about the trafficking in women result in further harm to sex workers, especially if they result in more stringent legislation against sex work, which runs the risk of happening when trafficking is sensationalised in the sex industry and not addressed in its broader labour context."

There is considerable merit in the submission made by Molo Songololo and **we are persuaded that there is a need to include a general provision on the trafficking of children in the new children's statute**.[300] We therefore abandon the idea of including trafficking in children under the definition of commercial sexual exploitation as originally suggested in the Discussion Paper on **Sexual Offences: The Substantive Law**. However, we still hold that the provisions on criminalising the commercial sexual exploitation of children belong in the new sexual offences act and not the new children's statute.[301] This does not, however, preclude a cross-reference to the commercial sexual exploitation of children in the new children's statute. Children who have been subjected to commercial sexual exploitation are also entitled to special protection measures in the new children's statute as a subcategory of children in need of special protection.[302]

22.5.4 Evaluation and recommendation

South Africa is regarded as a country of destination rather than a country of origin for trafficked children. South Africa is a signatory to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime and has assumed the obligation to facilitate the safe return of a victim of trafficking to his or her country of origin. All State Parties to the Protocol must ensure the safe return of their nationals and must render further assistance, such as medical and psychological

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300 See also our recommendations on the new offences related to the taking or detaining and taking and sending of a child out of the Republic in 22.3 above.

301 At its meeting held in Pretoria on 19 and 20 January 2001, the Project Committee on the Review of the Child Care Act decided to concentrate on providing protective and preventative measures for children subjected to commercial sexual exploitation as a special subset of children in especially difficult circumstances. The Project Committee on Sexual Offences agreed to focus on the criminal law aspects of commercial sexual exploitation.

302 See Chapter 13 above.

assistance, to victims of trafficking. South Africa thus needs to build the requirements of the Protocol into domestic legislation.

In cases where South Africa is the country of origin and in order to comply with the Protocol, it is recommended the new children's statute should stipulate that -

° **South Africa should facilitate and accept, without undue or unreasonable delay and with due regard for the safety of that person, the return of a South African child or a child who at the time of entry into the territory of the receiving State (country of destination) had permanent residence in South Africa, and who has been the victim of trafficking;**

° **South Africa should at the request of another State Party to the Protocol, without undue or unreasonable delay, verify whether a child who is a victim of trafficking is its national or had the right of permanent residence in its territory at the time of entry into the territory of that other State Party;**

° **In order to facilitate the return of a South African child or a child who at the time of entry into the territory of the receiving State had permanent residence in South Africa who is without proper documentation and who is a victim of trafficking, South Africa must issue, at the request of the receiving State, such travel documents or other authorisation as may be needed to enable the child to travel to and to re-enter South Africa**.

In order to ensure the safe repatriation of victims of trafficking to their countries of origin and their reintegration into the community, it is recommended that South Africa should conclude bilateral or multilateral agreements with the major countries that are not Parties to the Protocol and whose children are trafficked to South Africa or to which South African children are being trafficked. Further, the appropriate authorities of the country of origin should be notified

whenever a victim of trafficking, who is a national of that country, is in the territory of South Africa. This can be done through the embassy of such country. It is recommended that the Department of Social Development should serve as the appropriate authority in South Africa.

The Commission recommends that section 3 of the Refugees Act 130 of 1998 be amended to provide that children who have been trafficked to South Africa and who are afraid to return to their country of origin due to a well-founded fear that they may be trafficked again or that their lives may be in danger should qualify for refugee status.[303]

303 See also 22.4.5 above.

From the above it is clear that various forms of trafficking for purposes of commercial sexual exploitation can be prosecuted in terms of the Child Care Act, 1983 and the Sexual Offences Act, 1957. However, it must be realised that not all forms of trafficking happen for purposes of commercial sexual exploitation and for this reason the call[304] for the introduction of legislation that will prohibit the trafficking of persons for any exploitative purpose is supported. **However, the Commission is of the opinion that a general provision on trafficking in children should clearly distinguish between trafficking in children and the commercial sexual exploitation of children**.

Because our mandate is related to children and their protection, we limit ourselves to trafficking in children, as opposed to trafficking in persons in general. However, the Commission wishes to make it plain that the prohibition on trafficking in children it is about to propose is not limited to trafficking for purposes of sexual exploitation only, but extends to the protection of children trafficked for **any** purpose. We also wish to make it clear that the envisaged new prohibition on the trafficking of children should not be seen to abolish or modify any of the common law offences relating to the abduction or kidnapping of children.

The Commission accordingly recommends the inclusion of the following provisions in the new children's statute:

Trafficking in children

Any person who trafficks in children shall be guilty of an offence.

(a) '**Trafficking in children**' means the recruitment, transportation, transfer, harbouring or receipt of a child 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

304 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 99, recommendation 2.1.

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over a child, for the purpose of exploitation.

(b) Exploitation shall include the commercial sexual exploitation of children (as defined in the new sexual offences act), forced labour or services, any form of illegal (child) labour, slavery or practices similar to slavery, servitude or the removal of organs.