

International Human Rights Law and the Access of Children of Asylum Seekers to Social Assistance in South Africa

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Abstract

There is a massive presence of asylum seekers in South Africa. Amongst this population are children who need social assistance from the state distributed as 'grants', due to their dependence, vulnerability and developmental requirements. South Africa is a state party to international instruments on human rights and has a regulatory framework including the Constitution which allows for the application of these instruments and guarantees the right to social security for everyone. This article focuses on whether the existing corpus of international instruments on human rights and relevant domestic regulatory frameworks may allow children of asylum seekers the access to social assistance in South Africa. While demonstrating that the access to social assistance for children of asylum seekers is implied under international human rights instruments, the article establishes that this has not found expression in the application of existing legislation on social assistance in South Africa. By deploying an appropriate interpretive approach, courts may respond to this normative gap and thereby assist in guaranteeing the access of these children to social assistance in South Africa.

Keywords: Asylum seekers' children; international human rights law; social assistance; South Africa.

Introduction*

Asylum seeking remains a great challenge in the sub-Saharan Africa region. Being a host nation to asylum seekers from different parts of Africa,¹ according to the Department of Home Affairs 2018 report, South Africa has its fair share of this continental burden.² Without concrete statistics, some reports have shown that by the end of 2018, South Africa had more than a million asylum seekers; ranking the country among the highest globally.³ Asylum seekers are individuals whose claim for refuge has not yet been determined through administrative and legal processes. They share with refugees the feature of a people who have fled their countries, but differ in the sense that while the application and claim of asylum seekers for refugee status have not been determined, refugees are recognised with certain rights under international and national law.⁴ The massive presence of asylum seekers does not exempt their children who have the need for protection and assistance as a result of their dependence, vulnerability and developmental requirements while the asylum seeking application is under consideration.⁵ The general challenges that this group of children faces include a lack of official status documents, ineffective asylum systems, want of shelter, education,

* The article is based on the dissertation submitted by the first author in fulfilment of the award of the LLM Human Rights Degree of the University of Venda. The second and the third authors were the supervisors.

¹ Kaajal Ramjathan-Keogh, 'The Rights of Refugees and Migrant Learners' in Anso Thom, F Veriava, and Tim Fish Hodgson (eds), *Basic Education Rights Handbook – Education Rights in South Africa* (SECTION 27, 2017) 128–139, 132.

² Department of Home Affairs, 'Annual Report 2017/2018 Financial Year' 12 <<http://www.dha.gov.za/files/Annual%20Reports/AnnualReport2017-18.pdf> accessed 5 April 2020.

³ Vikas Pota, 'World Refugee Day: SA has 1 Million Asylum Seekers and Youth Who Care' *Cape Times* (19 June 2017) <<https://www.iol.co.za/capetimes/opinion/world-refugee-day-sa-has-1-million-asylum-seekers-and-youth-who-care-9872864>> accessed 4 April 2020; Siyavuya Mzantsi, 'SA's "Alarming" Asylum Seeker Backlog' *Cape Times* (20 June 2016) <<https://www.iol.co.za/capetimes/news/sas-alarming-asylum-seeker-backlog-2036664c>> accessed 4 April 2020.

⁴ Amnesty International, 'Refugees, Asylum-seekers and Migrants' <<https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants>> accessed 21 December 2020; see also Convention Relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention); (South Africa became a state party on 12 January 1996); Office of the High Commissioner for Refugees, 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol'; and the Refugees Act 130 of 1998.

⁵ United Nations High Commission for Refugees, (Executive Committee of the High Commissioners Programme Forty-fourth Session, Sub-Committee of the whole on International, 23rd Meeting 6 August 1993) UN Doc EC/SCP/82 (UNHCR Policy) para 10; Tariro Washinyira, 'Zimbabweans in Limbo After Giving Home Affairs Asylum Papers' *News24* (7 September 2018) <<https://www.news24.com/SouthAfrica/News/zimbabweans-in-limbo-after-giving-home-affairs-asylum-papers-20180907>> accessed 4 March 2020.

food, and healthcare.⁶ The children of asylum seekers are vulnerable as they cannot work and are dependent on parents who also may not have gainful employment to support the family owing to lack of a work permit.⁷ Their plight is further exacerbated by the reality that asylum seeking applications take considerable time between making an application for protection, and receiving a valid decision on the protection, a development that prevents them from accessing essential services.⁸ Hence, the most immediate need for the survival of children of asylum seekers is social assistance. Social assistance is referred to as ‘a non-contributory, means-tested form of social security delivered as grants’ by the state.⁹

Social assistance is not without a normative basis. There are instruments under the United Nations (UN) and the African Union (AU),¹⁰ and domestic legislation which relate to human rights that are of relevance to South Africa. However, the extent of their relevance and application to asylum seekers’ children in relation to social assistance is not clear. In addition to the Universal Declaration of Human Rights (UDHR) which has attained the standing of ‘customary international law’,¹¹ important instruments under the UN are: the International Covenant on Economic, Social and Cultural Rights

⁶ Johannes Kritzinger and Martin Mande, ‘Theology Disrupted by the Challenge of Refugee Children’ (2016) 72(1) Theological Studies 1–10; IRIN, ‘South Africa’s flawed asylum system’ (30 April 2013) <<https://www.refworld.org/docid/5187a9f74.html>> accessed 3 January 2020>; on the general plight of refugees elsewhere in the world, see Shuvro Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (1st edn, Palgrave Macmillan 2017).

⁷ UNHCR Policy (n 5) paras 10–11.

⁸ Liam Thornton, ‘Augmenting Social Welfare for Asylum Seekers in Ireland’ (2020) *Journal of Social Welfare and Family Law* 2.

⁹ Marina Dodlova, Anna Giolbas and Jann Lay, ‘Non-Contributory Social Transfer Programs in Developing Countries: A New Dataset and Research Agenda’ (2018) 16 *Data in Brief* 51–64; Aislinn Delany, Alejandro Grinspun and Evelyne Nyokang, ‘Children and Social Assistance: An Introduction’ in Aislinn Delany, Selwyb Jehoma and Lori Lake (eds), *South African Child Gauge 2016* (Children Institute 2016) 22–32; South African Human Rights Commission, ‘Media Statement: South African Human Rights Commission calls for Accountability in Respect of Challenges Experienced by Persons with Disabilities and Older Persons in Receiving Social Grants’ (5 May 2020) <<https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2352-media-statement-south-african-human-rights-commission-calls-for-accountability-in-respect-of-challenges-experienced-by-persons-with-disabilities-and-older-persons-in-receiving-social-grants>> accessed 5 July 2020 (South African Human Rights Commission: Social Grants).

¹⁰ On international and regional instruments of relevance to Africa, see generally, Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 9–19; also see respectively Anne Bayefsky, *The United Nations Human Rights Treaties* <<http://www.bayefsky.com/>> accessed 4 March 2020; and African Union, *Human Rights Treaties* <<https://au.int/en/treaties/1164>> accessed 4 March 2020.

¹¹ Vojin Dimitrijevic, ‘Customary Law as an Instrument for the Protection of Human Rights’ 7 ISPI Working Paper (2006) 8–12; Asbjorn Eide, Gudmundur Alfredsson, Göran Melander and others (eds), *Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 385.

(ICESCR),¹² the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),¹³ the UN Convention on the Rights of the Child (UNCRC),¹⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹⁵ The Convention Relating to the Status of Refugees (Refugees Convention),¹⁶ the Protocol Relating to the Status of Refugees (Refugees Protocol),¹⁷ and the Convention Relating to the Status of Stateless Persons (Stateless Persons Convention) are other instruments of significance.¹⁸ At the AU level, significant instruments are the African Charter on Human and People's Rights (African Charter),¹⁹

¹² International Covenant on Economic and Social Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); South Africa became a state party on 12 January 2015, see OHCHR <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> accessed 4 July 2020.

¹³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 13 UNTS 1249 (CEDAW); South Africa became a state party on 15 December 1995, see OHCHR <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> accessed 4 July 2020.

¹⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); South Africa became a state party on 16 June 1995, see OHCHR <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> accessed 4 July 2020.

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX) (ICERD) vol 660, 195; South Africa became a state party on 10 December 1998, see OHCHR <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> accessed 4 July 2020.

¹⁶ Convention Relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention); South Africa became a state party on 12 January 1996, Office of the High Commissioner for Refugees; see 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' <<https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>> accessed 3 July 2020.

¹⁷ Protocol Relating to the Status of Refugees (entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol); South Africa became a state party on 12 January 1996, Office of the High Commissioner for Refugees, 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' <<https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>> accessed 3 July 2020.

¹⁸ Convention Relating to the Status of Stateless Persons (entered into force 6 June 1960) 360 UNTS 117 (Stateless Persons Convention).

¹⁹ African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 Rev 5, 21 ILM 58 (African Charter); South Africa became a state party on 9 July 1996, African Commission on Human and Peoples' Rights, see 'Ratification Table: African Charter on Human and Peoples' Rights' <<https://www.achpr.org/ratificationtable?id=49>> accessed 4 July 2020.

the African Charter on the Rights and Welfare of the Child (ACRWC),²⁰ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),²¹ and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (OAU Refugee Convention).²² The application of these instruments is, however, problematic in that none of the instruments has specific provision on social assistance, let alone a reference to its application to asylum seekers. Hence, a clear articulation of whether they offer and can shape normative solutions to the social assistance needs of children of the asylum seekers in South Africa, merits consideration.

The domestic legislation which are of relevance to access to social assistance is no less problematic in South Africa. Generally, section 39 1(b) of the Constitution of the Republic of South Africa empowers courts to consider 'international law' in their interpretation of the human rights provisions of the Constitution. Also, in terms of section 233, courts may prefer any reasonable interpretation that conforms with international law while interpreting legislation.²³ However, the absence of a standalone provision in treaties at the international level on asylum seeking and social assistance makes the application of these constitutional provisions quite hazy for children of asylum seekers. Even then, as shall be manifest later, specific instruments such as the Social Assistance Act,²⁴ Children's Act²⁵ and Refugees Act,²⁶ are not supportive. For instance, the Refugee Act distinguishes the status of a refugee already granted asylum in South Africa,²⁷ but is silent on the rights of asylum seekers to social assistance. Also,

²⁰ African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999), OAU Doc CAB/LEG/24.9/49 (1990) (ACRWC); South Africa became a state party on 7 January 2000, see African Charter on the Rights and Welfare of the Child, Status Table, <<https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf>> accessed 4 July 2020.

²¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo 11 July 2003); see Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf> accessed 2 July 2020.

²² OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 10 September 1969) 1001 UNTS 45 (OAU Convention); South Africa became a state party on 15 December 1995, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, see Status List, <<https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>> accessed 4 July 2020.

²³ The Constitution of the Republic of South Africa, 1996.

²⁴ The Social Assistance Act 13 of 2004.

²⁵ The Children's Act 38 of 2005.

²⁶ The Refugees Act 130 of 1998.

²⁷ *ibid* ss 1(iv), (v) and (xv).

asylum seekers and their children are not legally recognised as a group in the Social Assistance Act for social assistance. Literature has not offered much direction on how to respond to these legal problems.²⁸

Against the foregoing backdrop, this article examines the extent of protection afforded to children of asylum seekers to access social assistance under international instruments and domestic law in South Africa. Upon establishing a legislative gap, the article discusses the appropriate interpretive approaches that may assist the courts in responding to the gap around the access of children of asylum seekers to social assistance in South Africa.

International Human Rights Law: Social Assistance and Children of Asylum Seekers in Context

Instruments under the UN and AU dealing with human rights lack a specific provision on the right of asylum seekers' children to social assistance. As social assistance is a core component of social security, however, the argument can be made that it is implicit in the instruments at those two levels on social security rights as they do not distinguish between 'nationals' and 'non-nationals' in their application. At the UN level, social security as a human right is guaranteed by Article 9 of the ICESCR which also urges states to 'recognise [the] right of everyone to social security, including social insurance.' The reference to 'everyone' without distinction can be argued to accommodate assistance in forms including in cash or kind to anyone,²⁹ inclusive of asylum seekers' children who are already disadvantaged due to the circumstance of their status. This thinking reflects the position of the Committee on Economic, Social and Cultural Rights (CESCR), the treaty monitoring body of the ICESCR in its General Comment 19 which urges states parties to provide social protection in the form of schemes to disadvantaged and marginalised groups.³⁰ In particular, as the CESCR affirms, in line with international standards, vulnerable and marginalised individuals and groups including

²⁸ For a general critique of the social security landscape in South Africa, see Marius Olivier, 'Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to improve Bilateral Arrangements within a Multilateral Framework' (2011) 6(1) SADC Law Journal 121 at 131.

²⁹ Linda van Rensburg and Lucie Lamarche, 'Rights to Social Security and Assistance' <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HeynsxBrand_Socio-Economic_Rights_Social_Security__PRINT_.pdf> accessed 5 July 2020.

³⁰ UN 'General Comment 19: The Right to Social Security (Thirty-ninth session, 2007) UN Doc E/C.12/GC/19 (2008) Art 9 para 28 (UN General Comment 19); for literature dealing with social security with reference to the general comment, see Rachel Sabates-Wheeler, Rayah Feldman (eds), *Migration and Social Protection: Claiming Social Rights Beyond Borders* (Palgrave Macmillan 2011).

asylum seekers should have a non-discriminatory ‘access to non-contributory social security schemes, such as reasonable health care and family support.’³¹

Article 23 of the UNCRC affirms ‘the right of every child to social security’ inclusive of ‘social insurance’ and the duty of the state to ensure its realisation. According to the UNCRC, social security related benefits should be granted to children and those responsible for their care based on available resources and the peculiarity of their situations.³² Also, the link can be made that the entitlement to ‘social security’ is necessary for actualising children’s right to life under Article 6 of the UNCRC.³³ The Committee on the Rights of the Child,³⁴ explains that Article 6 of the CRC endorses social security and requires necessary care services to be given to children.³⁵ The reasoning of the Committee is understandable. Although asylum seekers’ children are not categorically mentioned, they fit into the definition of family offered by the Committee as ‘a variety of arrangements that can provide for young children’s care, nurturance and development.’³⁶ That the application of Article 6 does not distinguish nationals from non-nationals is indeed evident in the work of the Committee. For instance, while considering the state report of South Africa, the Committee recommended the need to develop an appropriate legal framework that guarantees for ‘refugee and asylum-seeking children’ their adequate access to all social services, and it raised a similar issue in 2013.³⁷

³¹ UN General Comment 19 (n 30) para. 38.

³² UNCRC (n 14); also see Mary Mokotong, ‘The Action of Dependents from a Comparative and an African Perspective’ (Unpublished Doctoral Thesis, UNISA 2018) <http://uir.unisa.ac.za/bitstream/handle/10500/25627/thesis_mokotong_mm.pdf?isAllowed=y&sequence=1> accessed 3 July 2020; Trevor Buck and Michael Wabwile, ‘The Potential and Promise of Communications Procedures under the Third Protocol to the Convention on the Rights of the Child’ (2013) 2(2) International Human Rights LR 205.

³³ Trynie Boezaart, ‘Building Bridges: African Customary Family Law and Children’s Rights’ (2013) 6(4) International J of Private L 395.

³⁴ Established under Art 43(1) of UNCRC (n 14).

³⁵ UN, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Art 44 para 1(a) of the Convention (adopted by the Committee on the Rights of the Child at its 22nd meeting (first session) on 15 October 1991) para 19; also see Jorge Contesse, ‘Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection (Inter-Am. Ct. H.R.)’ (2017) 56(5) International Legal Materials 839.

³⁶ UN ‘General Comment No 7: Implementing Child Rights in Early Childhood’ (2005) UN Doc CRC/C/GC/7/Rev.1 para 15; also see Maryanne Theobald, ‘UN Convention on the Rights of the Child: “Where are we at in Recognising Children’s Rights in Early Childhood, Three Decades on ...?”’ (2019) 51 International J of Early Childhood 251.

³⁷ Concluding Observations of the Committee on the Rights of the Child, South Africa, UN Doc CRC/C/15/Add.122 (2000) para 35 <<http://hrlibrary.umn.edu/crc/southafrica2000.html>> accessed 10 May 2020; Theobald (n 36).

Article 2 of the ICERD prohibits ‘all forms of racial discrimination’ and guarantees equality of all without distinction.³⁸ In terms of Article 5(e)(iv), social security and social services are to be enjoyed without discrimination.³⁹ Conceivably, where children of citizens are entitled, the exclusion of children of asylum seekers from access to social assistance will constitute discrimination on the ground of nationality. The jurisprudence of the Committee on the Elimination of All Forms of Racial Discrimination (CERD), which monitors the implementation of the ICERD,⁴⁰ reinforces this reasoning. In *A.M.M. v Switzerland*,⁴¹ the CERD explains that although the Convention admits that categorisation into citizens and non-citizens may be inevitable, no domestic legislation should apply in a manner that discriminates against a nationality.⁴² This signifies that distinguishing between deserving nationals and non-nationals for social assistance purposes is unacceptable under the ICERD.

Article 14(2)(c) of CEDAW confers on women the right to benefit directly from ‘social security programmes’. The exclusion of children of asylum seekers from social security and assistance benefits may not only worsen their precarious status,⁴³ it is also discriminatory of their status and that of their mothers. The Committee to Convention on the Elimination of All Forms of Discrimination Against Women, the implementing body for CEDAW reinforces this position in its recommendation.⁴⁴ It affirms the need for ‘food, housing, water, sanitation, health services including sexual and reproductive services, education, economic activities’, and urges states to ensure their realisation for women and girls who are asylum seekers so that they can live in decent conditions.⁴⁵ In particular, the Committee urges states parties to be gender sensitive not only all through the entire asylum-seeking process, but also while implementing domestic legislation on asylum.⁴⁶

³⁸ ICERD (n 15); also see Egon Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’ (2008) 15(4) International and Comp L Quarterly 996.

³⁹ *ibid.*

⁴⁰ Article 8(1) of ICERD (n 15).

⁴¹ *Communication No. 50/2012, A.M.M. v Switzerland*, opinion adopted on 18 February 2014 para 8.5.

⁴² *ibid* para 8.5.

⁴³ Bryan Fanning and Angela Veale, ‘Child Poverty as Public Policy: Direct Provision and Asylum Seeker Children in the Republic of Ireland’ (2010) 10(3) Child Care in Practice 241.

⁴⁴ Article 17 (1) of CEDAW (n 13).

⁴⁵ CEDAW, ‘Statement of the Committee on the Elimination of Discrimination against Women (CEDAW) on the Refugee Crises and the Protection of Women and Girls’ (adopted on 20 November 2015 during its sixty second session) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_7845_E.pdf> accessed 8 May 2020.

⁴⁶ *ibid* 2.

Instruments such as the Refugees Convention,⁴⁷ Refugees Protocol,⁴⁸ and the Stateless Persons Convention,⁴⁹ which apply generally to refugees relate to social assistance of children of asylum seekers. These instruments forbid discrimination on the ground of one's national status. This signifies that even if not refugees, children of asylum seekers as non-nationals should enjoy rights on par with refugees to the extent that the latter are accorded similar benefits. For instance, Article 24(1)(b) of the Convention which, subject to permissible limitations, urges states to guard against discriminatory treatment regarding social security.

At the AU level, 'the right to social security' is not stipulated under the African Charter, but, other rights exist which impliedly accommodate specific contingencies of social security.⁵⁰ For instance, Article 16 of the African Charter formulates 'the right to health' and urges states to adopt enabling measures for its protection, while Article 18(1) places a duty on the state parties to protect the family as the natural unit and basis of society and to protect the physical health and morale of the family. Potentially, social assistance to those who are sick and disadvantaged can constitute envisaged measures under Article 18(1). The significance of these provisions to the access of children of asylum seekers to social assistance is evident at least in state reporting,⁵¹ and individual complaints,⁵² which are means for enforcing the Charter provisions in Africa.⁵³

Regarding the state party reporting procedure, the African Commission on Human and Peoples' Rights (African Commission), which is the monitoring body of the African Charter,⁵⁴ established the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons. The mandate of that mechanism includes the formulation of an appropriate normative framework at the domestic level as well as awareness creation about applicable international and regional instruments.⁵⁵ The Special Rapporteur has considered the plight of asylum seekers,⁵⁶ and called on African

⁴⁷ Refugee Convention (n 16).

⁴⁸ Refugee Protocol (n 17).

⁴⁹ Stateless Persons Convention (n 18).

⁵⁰ On a discussion of social security in Africa, see Nsongurua Udombana, 'Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39(2) Cornell Intl LJ 181.

⁵¹ Article 62 of the African Charter (n 19).

⁵² Article 55 of the African Charter (n 19).

⁵³ Article 47 of the African Charter (n 19).

⁵⁴ Article 30 of the African Charter (n 19).

⁵⁵ AU, 'Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa', The African Commission on Human and Peoples' Rights meeting at its 36th Ordinary Session (Dakar, Senegal 2004).

⁵⁶ AU 'Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa since its Creation' report by

states that have not yet done so to draft domestic legislation on asylum seekers to ensure their protection. There are activities by the African Commission that have focused on the plight of the asylum seekers which are of importance to South Africa. For instance, the African Commission advised the government of South Africa to ‘take appropriate administrative measures to ensure the speedy consideration of the applications for asylum seekers.’⁵⁷ In the Concluding Remarks to the combined second report on South Africa adopted in 2016, the African Commission commended South Africa for its efforts on asylum seekers and refugees, but, advised on the need to address xenophobic attacks and intolerance against asylum seekers and foreigners.⁵⁸ South Africa was further enjoined to review and amend its laws, in relation to the settlement of refugees.⁵⁹

About individual complaints, no specific communication alleging the violation of rights of children of asylum seekers to social assistance has been brought before the African Commission against South Africa. However, there is evidence that such a communication is possible against state parties to the African Charter. For instance, in *Organisation Mondiale Contre la Torture v Rwanda*, a communication brought by asylum seekers, the African Commission noted that Article 12(3) of the African Charter allows ‘a general protection of all those who are subject to persecution, that they may seek refuge in another state.’⁶⁰ This position shows that the case for children of asylum seekers to access social assistance falls within the scope of a general protection envisaged by the African Commission.

The Maputo Protocol offers specific measures for protecting asylum-seeking and refugee women.⁶¹ It has provisions that can respond to various contingencies of social assistance of children of asylum seekers. In terms of its Article 20(2), subject to their resources and conditions, states parties should assist ‘parents and other persons responsible for the care of children.’ In light of these provisions, assisting children of asylum seekers with social assistance is an indirect way of helping their parents and, more importantly, it serves perfectly the purport of Article 20(2) of the ACRWC which

Maya Sahli-Fadel (52nd Ordinary Session of the African Commission on Human and Peoples’ Rights Yamoussoukro, Côte d’Ivoire 9 to 22 October 2012).

⁵⁷ Concluding Observations, 38th ordinary session of the African Commission, 21 November to 5 December 2005, Banjul, The Gambia, para 30 <http://www.achpr.org/files/sessions/38th/conc-obs/1st-1999-2001/achpr38_conc_staterep1_southafrica_2005_eng.pdf> accessed 10 April 2020.

⁵⁸ Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples’ Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa, (Adopted by the African Commission on Human and Peoples’ Rights at its 20th Extra-Ordinary Session held from 9 to 18 June 2016, in Banjul, Islamic Republic of The Gambia) para 41.

⁵⁹ *ibid* para 57.

⁶⁰ *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 31.

⁶¹ Maputo Protocol (n 21) Arts 4, 10 and 11.

has the protection of the child as the focus of assistance. The treaty monitoring body of the ACRWC,⁶² the African Children's Committee, featured the social assistance of children of asylum seekers in its 'promotional' and 'protective' mandate.⁶³ In terms of its 'promotional' mandate, there is no reported work on South Africa, but, the Committee has recommended the need to take care of refugees and displaced children in Kenya,⁶⁴ Rwanda,⁶⁵ and Tanzania.⁶⁶ This development signifies that the Committee will not be averse to making a similar pronouncement in relation to other countries including South Africa if confronted with the same issue in their reporting exercise.

The 'protective' mandate of the Committee has also not yet been tested on the situations of children of asylum seekers regarding access to social assistance, however, there is relevant jurisprudence that it is within the application of the ACRWC. As an illustration, *Nubian Children in Kenya v Kenya*,⁶⁷ offers useful insight into issues of 'nationality' and 'statelessness' which are no less important to the groups. This is more so as discrimination in the context of social assistance is often justified on the ground of non-nationality. In the *Nubian* case, nationality was allegedly denied to Nubians who have lived in Kenya for more than a century. Due to the denial of Kenyan nationality, they could not enjoy basic services.⁶⁸ While affirming that the situation is in violation of the provisions of the ACRWC, the Committee agreed on the fatal consequence of a lack of 'nationality' on access to the socio-economic rights of children.⁶⁹ In terms of social assistance to children of asylum seekers, this decision of the Committee is important considering that the rationale behind the case for social assistance to children of asylum seekers is to enhance their socio-economic welfare and prevent discriminatory practices by states based on non-nationality in asylum seekers' host nations.

It is clear from the above discussion that the normative development at the UN and AU levels support the access of children of asylum seekers to social assistance. It remains to be examined to what extent South Africa, as a state party to the abovementioned

⁶² Chapter 2 of the ACRWC (n 20).

⁶³ On the discussion of these mandates in the context of African human rights system, see Viljoen (n 10).

⁶⁴ Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child.

⁶⁵ Recommendations par le Comité Africain D'Experts sur les Droits et le Bien Etre De L'Enfant au Gouvernement du Rwanda.

⁶⁶ Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

⁶⁷ *Communication 002/2009. Nubian Children in Kenya v Kenya*.

⁶⁸ *ibid* para 46.

⁶⁹ *ibid*.

instruments, affords children of asylum seekers protection to access social assistance in the country.

South Africa's Legislative Framework: The Gap

As indicated in the preceding section of this article, South Africa has ratified the ICESCR,⁷⁰ CERD,⁷¹ CEDAW,⁷² CRC,⁷³ Refugee Convention,⁷⁴ Refugee Protocol,⁷⁵ African Charter,⁷⁶ the ACRWC,⁷⁷ the Maputo Protocol,⁷⁸ and OAU Refugee Convention,⁷⁹ which are relevant to social assistance and asylum seekers. These instruments are applicable based on the constitutional provision of section 39(1)(b) whereby courts 'must consider international law' in issues pertaining to the Bill of Rights. This is buttressed by section 233 of the Constitution which urges the Court to 'prefer any reasonable interpretation of the legislation that is consistent with international law.'⁸⁰ These constitutional provisions signify that 'international law' is important to the work of courts in South Africa. In *Glenister v President of the Republic of South Africa*, Ngcobo J noted:⁸¹

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law ... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.⁸²

Hence, based on the above, the implicit recognition of access of asylum seekers' children to social assistance at UN and AU levels should influence South Africa's law and jurisprudence while dealing with the plight of this group. It also connotes that, at the very least, the application of domestic legislation should conform with this implicit position in international human rights law regarding access of asylum seekers' children

⁷⁰ ICESCR (n 12).

⁷¹ ICERD (n 15).

⁷² CEDAW (n 13).

⁷³ CRC (n 12); for a discussion of its application in South Africa's context, see Ursula Kilkelly and Ton Liefwaard, 'Legal Implementation of the UNCRC: Lessons to be Learned from the Constitutional Experience of South Africa' (2019) 52 De Jure 521.

⁷⁴ Refugee Convention (n 16).

⁷⁵ Refugee Protocol (n 17).

⁷⁶ African Charter (n 19).

⁷⁷ ACRWC (n 20).

⁷⁸ Maputo Protocol (n 21).

⁷⁹ OAU Refugee Convention (n 22).

⁸⁰ On the utility of the provision, see Aeyal Gross, 'The Constitution in Reconciliation and Transitional Justice: Lessons from South-Africa and Israel' (2004) 40 Stanford J of Intl L 47.

⁸¹ *Glenister v President of the Republic of South Africa and Others* (2011) (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

⁸² *ibid* para 97; also see Mokorong (n 32).

to social assistance. However, an examination of the existing domestic legislative framework indicates that this is in fact not the case.

South Africa's legislation of relevance to the access of children of asylum seekers to social assistance are the 1996 Constitution,⁸³ Refugees Act,⁸⁴ Children's Act,⁸⁵ and the Social Assistance Act.⁸⁶ Potentially, there are some general and positive provisions in these instruments dealing with children and socio-economic rights which confer on the children of asylum seekers the right to social assistance, however, major gaps remain in South Africa regarding the plight of these children that are incompatible with the position under international human rights law. For instance, section 28(1)(c) of the Constitution guarantees a cluster of socio-economic rights that includes social security.⁸⁷ The stipulation of eighteen years in section 28(3) as the age of a child regardless of birth or nationality signifies that children of asylum seekers in South Africa are not barred from benefitting from the rights. Section 28(1)(b) also reinforces this position by guaranteeing everyone 'essential levels of health care services, food, and other social services necessary for their survival and proper development.' The realisation of these provisions can be limited only by a 'reasonable and justifiable' enactment applicable 'in an open and democratic society based on human dignity, equality and freedom.'⁸⁸ Since any law so justified is expected to respect human rights, the logical conclusion that follows is that the access of asylum seekers' children to social assistance should not be limited by the application of any law that defeats the purpose of their right.

There are several provisions within the Children's Act that reflect international human rights standards regarding an acceptable manner of treating children in South Africa. The Act provides for 'partial care', 'early development', 'alternative care', 'foster care', 'youth care Centre's' and 'drop-in Centre's of children'.⁸⁹ In line with international standards on the human rights of children, the Act confirms the paramount nature of the

⁸³ The Constitution of South Africa (n 23).

⁸⁴ The Refugees Act (n 26).

⁸⁵ The Children's Act (n 25).

⁸⁶ The Social Assistance Act (n 24).

⁸⁷ Also see, South African Human Rights Commission: Social Grants (n 9).

⁸⁸ The Constitution of South Africa (n 23); see also Van Rensburg (n 29).

⁸⁹ The Children's Act (n 15); on foster care in relation to children and youth, see Candice Fortune, 'An Overview of the Foster Care Crisis in South Africa and its Effect on the Best Interests of the Child Principle: A Socioeconomic Perspective' (A research paper submitted in partial fulfilment of the requirements for the degree of Magister Philosophies in Structured Law with the Faculty of Law at the University of the Western Cape, 2016) <<https://core.ac.uk/download/pdf/84690625.pdf>> accessed 4 July 2020; also see Eibe Riedel (ed), *Social Security as a Human Right Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2007).

‘best interest of the child’ standard.⁹⁰ It requires all levels of governance to deploy resources maximally towards the implementation of measures indicated in the Act.⁹¹ Other far-reaching provisions include the protection of vulnerable individuals and groups of children. For example, relevant authorities should be notified of children including unaccompanied, abandoned or orphaned children that need protection and care.⁹² The Children’s Act therefore governs the way in which children in need of protection and care should be treated.⁹³

The foregoing provisions, however, are not adequately supported by the provisions of more specific legislation, a development that falls short of the international standard of expectation. For instance, section 32 of the Refugees Act deals with the position of unaccompanied children and mentally disabled persons. It covers the situations of children who may qualify for refugee status, but whose need status is uncertain. Courts can assist such children with an order that supports their asylum processing.⁹⁴ Nonetheless, the foregoing provisions are not only cumbersome, they do not clarify the rights of children of asylum seekers to social assistance while their application is under consideration. The requirement for a court order is unnecessary or at best discriminatory in that children of South African nationality are not subject to similar procedure. Even if sufficiently empowered economically to pursue such court option, considering the likelihood of delay in court proceedings, the potential of such a court order to timeously respond to the plight of asylum seekers’ children for social assistance is remote. Consequently, the inference that can be made from the reading of the foregoing provisions of the Refugees Act is that children of asylum seekers are treated differently and side-lined from having access to child social grants due to their ‘asylum-seeking status’.

Similarly, the Social Assistance Act which governs the allocation of social grants, among others, does not hold promise for children of asylum seekers in need of social assistance in South Africa. Yet, it is the pillar instrument on social assistance. The more recent Social Assistance Act provides for the ‘payment of a child support grant, care dependency grant, foster child grant, disability grant, older person’s grant, war veterans grant, a grant-in-aid, and social relief of distress.’⁹⁵ At the heart of the social assistance regime is the payment of social grants which is administered by the South African Social

⁹⁰ On the general meaning of the principle, see Margaretha Reyneke, ‘The Best Interests of the Child in School Discipline in South Africa’ (PhD thesis Tilburg University, 2013) <<http://scholar.ufs.ac.za:8080/xmlui/handle/11660/2563>> accessed 3 July 2020.

⁹¹ Section 1 of The Children’s Act (n 15).

⁹² Section 150(1) The Children’s Act (n 15).

⁹³ The Children’s Act (n 15) ss 151–152.

⁹⁴ Refugees Act (n 26) s 32 (1) and (2).

⁹⁵ Social Assistance Act (n 24) ss 6–13.

Security Agency.⁹⁶ In terms of the Social Assistance Act, in collaboration with the Minister of Finance, social grants are made available by the Minister of Social Development from moneys appropriated by parliament.⁹⁷ The grants which are directly relevant to children are the ‘child support grant’, ‘care dependency grant’ and ‘foster child grant’.⁹⁸

There are various disempowering eligibility conditions regarding access to social assistance by asylum seekers’ children. In addition to specific requirements pertaining to each of the three grants mentioned, other applicable grounds are that a person:⁹⁹

- a. Is resident in the country;
- b. Is a South African citizen, permanent resident or refugee;
- c. Complies with any additional requirements or conditions prescribed (such as means testing and identity verification); and
- d. Applies for social assistance in the proper form.

In light of the above provisions, a key condition that excludes asylum seekers’ children from benefiting from the social assistance system is the requirement that a person must be a South African citizen, permanent resident or refugee. Asylum seekers and their children are not included in the Act or the system itself as they do not form a part of any of the categories prescribed by law. The implication of the requirement is that the social security rights of asylum seekers’ children are systematically infringed—a development that is inconsistent with the position of international human rights law as discernible in instruments such as the ICESCR, the CEDAW, the UNCRC, and the CRWM. It also infringes on the non-discrimination principle of the African Charter,¹⁰⁰ and is incompatible with the ACRWC which calls upon states parties to provide within their means and conditions social security including social assistance to care for children.¹⁰¹

The approach of courts in South Africa is difficult to predict in that there is a lack of reported cases on asylum seekers’ children. In a few cases dealing with asylum seekers, the Court has largely relied on the provision of the domestic legislation without more. For instance, a lack of reference to international human rights law is evident in *Ahmed*

⁹⁶ South African Social Security Agency Act 9 of 2004.

⁹⁷ Social Assistance Act (n 24) s 4.

⁹⁸ Social Assistance Act (n 24) s 8.

⁹⁹ Social Assistance Act (n 24) s 5.

¹⁰⁰ Article 2 African Charter (n 19).

¹⁰¹ Article 20(2) African Charter (n 19).

v Minister of Home Affairs.¹⁰² In that case, without a reference to international human rights law, the Constitutional Court validated the provisions of Regulation 9(1) and (2) which require asylum seekers to make an application for temporary residency at the South African consulate in their country of origin,¹⁰³ and where not possible, to apply for an exemption.¹⁰⁴ Yet, the decision acknowledges the challenges of asylum seekers, in particular, that they may lack the financial status to travel to their countries of origin for that purpose.¹⁰⁵

Since rights are at the centre of refusing and approving applications of asylum seekers, the regulation directing that an application should be made in such a manner compounds the plight of asylum seekers and undermines their status as holders of rights. It has no regard for the best interest of their children. Indeed, the directive flies in the face of section 233 of the Constitution which urges the court to reflect on international law while interpreting legislation. It signifies that this may not be an option of court even where it is confronted with the issues around the right of children of asylum seekers to social assistance. To assist the children of asylum seekers, how then may courts in South Africa through its interpretive function respond to the foregoing gap?

Courts' Interpretive Approach as a Response

Generally, the application of international human rights law should shape the approach of courts in interpreting the right of children of asylum seekers to social assistance in South Africa.¹⁰⁶ Operationalising these provisions is key to addressing the legislative gap, but, the relevant issue to which the discussion must turn is the appropriate approaches that courts should prefer in operationalising the provisions in a manner that responds to the plight of children of asylum seekers in need of social assistance in South Africa. To operationalise the ICESCR provisions more effectively, the CESCR through its General Comment 3 identifies two approaches for interpreting socio-economic rights: the minimum core and reasonableness approaches.¹⁰⁷ These models can serve as outlets for the application by courts in South Africa of the international human rights law standard on the plight of asylum seekers' children. There is robust literature on the application of the two approaches,¹⁰⁸ but, it is important to examine how they may guide

¹⁰² *Ahmed and Others v Minister of Home Affairs and Others* 2019 ZACC 24.

¹⁰³ Immigration Regulations, 2014 published under Government Notice R413 in GG 37697 (22 May 2014) hereinafter 'Regulations'; see also *ibid* para 53.

¹⁰⁴ Section 31(2)(c) of the Immigration Act 2002 (Act No 13 of 2002).

¹⁰⁵ Section 22(5) of the Refugees Act (n 26); also in *Ahmed* (n 102) para 59.

¹⁰⁶ Sections 39(10)(b) and 233 of the Constitution (n 23).

¹⁰⁷ UN 'General Comment No 3: The Nature of States Parties' Obligations' Fifth Session of the Committee on Economic, Social and Cultural Rights (adopted 14 December 1990) Art 2, para 1 of the Covenant) (UN General Comment No 3).

¹⁰⁸ John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' (Research Paper 2017) 1–32 <<https://openknowledge.worldbank.org/handle/10986/29144>> accessed 3 May

the courts in the context of the right of children of asylum seekers to social assistance. It should be noted from the onset that the General Comment grounds obligations of state on the notion of non-discrimination.¹⁰⁹ This signifies that the normative content of General Comment 3 applies without discrimination to both nationals and non-nationals.

The CESCR endorses the minimum-core model which it describes as the ‘assessment’ of the extent to which the activities of a state meet ‘minimum essential levels of right’.¹¹⁰ According to Tasioulas, the minimum-core model aims at assisting a state with limited resources to prioritise compliance with human rights obligations associated with socio-economic rights.¹¹¹ It focuses on the minimum entitlement and duties in a given state.¹¹² Despite the critique that it is limited in its application,¹¹³ ‘negative duties’ and ‘positive obligations’ are involved in the meaning of the ‘core’.¹¹⁴ According to the Constitutional Court in *Government of the Republic of South Africa v Grootboom*,¹¹⁵ the minimum core model is useful to establish whether minimum measure is deployed by the state to address the plight of the most vulnerable group of people.¹¹⁶

The vulnerable group of people in this context can include children of asylum seekers who need social assistance and lack of access to social grants, not only due to their dependent nature but owing to their peculiar position as non-citizens and non-permanent residents. Based on a minimum-core approach, one would argue that courts can deem the exclusion of children of asylum seekers from the key domestic legislation on social

2020; Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010); Katharine Young, ‘Conceptualising Minimalism in Socio-economic Rights’ (2008) 9(2) ESR Review 6; Fons Coomans, ‘Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court’ <http://www.zaerv.de/65_2005/65_2005_1_a_167_196.pdf> accessed 13 January 2020.

¹⁰⁹ UN General Comment No 3 (n 107) para 1.

¹¹⁰ UN General Comment No 3 (n 107) paras 4 and 10.

¹¹¹ Tasioulas (n 108) v.

¹¹² Fons Coomans, ‘In Search of the Core Content of the Right to Education’ in Danie Brand and S Russel (eds), *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Protea Book House 2002) 166–167.

¹¹³ Sisay Alemahu Yeshanew, ‘Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples’ Rights: Progress and Perspectives’ (2011) 11(2) African Human Rights LJ 321.

¹¹⁴ Juan Ochoa-Sánchez, ‘Economic and Social Rights and Truth Commissions’ (2019) 23(9) The Intl J of Human Rights 1470; Chidi Odinkalu, ‘Back to the Future: The Imperative of Prioritizing Protection of Human Rights in Africa’ (2003) 47(1) Journal of African L 1–37; Gustavo Arosemena, ‘Retrieving the Differences: the Distinctiveness of the Welfare Aspect of Human Rights from the Perspective of Judicial Protection’ (2014) 16(3) Human Rights Review 239.

¹¹⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) (*Grootboom*).

¹¹⁶ *ibid* para 31.

assistance as a breach of the negative obligations of non-discrimination, requiring a positive duty of a state to set out a legal and policy framework for realisation of access of children of asylum seekers to social assistance. Therefore, with relevant information as may be required by the Court, the core minimum approach may be relevant and applicable towards the access to social assistance by asylum seekers' children. It is a strong tool that the court may avail itself to prioritise not only their protection but the access of asylum seekers' children to social assistance.

The reasonableness model helps to ascertain the extent to which socio-economic measures taken by a state is defensible.¹¹⁷ Upon an assessment of some of the judgments of the Constitutional Court, Liebenberg argues that a 'reasonable' measure will consider 'short, medium and long-term needs' of people and accommodate those without economic resources to pay for services.¹¹⁸ This is perhaps poignantly reflected in *Grootboom*, where in explaining the reasonableness model, the Constitutional Court observed that 'a society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.'¹¹⁹ In coming to the position in *Grootboom*, the analysis of the Court is particularly useful on the responsibilities of parents vis-à-vis the obligations of the state on the right to social security. The court read the provisions of section 28(1)(b) and (c) together, and in doing so, noted that the Constitution contemplates that the obligation to provide necessities of life such as nutrition and shelter to children, for instance, is first on their parents or family. Interventions by the state, however, come into play where parental or family care is lacking.¹²⁰ Hence, the focus on the obligation of state towards the children of asylum seekers and its reasonableness is pertinent considering that their parents often lack the necessary work permit. Even if they apply for one, the long period it takes to receive an outcome leaves children without much care.

Thus, despite its weaknesses relating to burden of proof of unreasonableness on the litigant,¹²¹ the reasonableness approach is essential and very much relevant in addressing the plight of asylum seekers' children regarding social assistance. The fact that the Social Assistance Act of 2004 provides for child social grants to citizens, permanent residents and refugees, only creates a systematic exclusion of asylum seekers and their children from benefiting from such facility. Thus, a question of reasonableness of such exclusion arises, considering the general constitutional and international obligations of South Africa on social security rights for asylum seekers' children. As

¹¹⁷ Malcom Langford, 'The Justifiability of Social Rights: From Practice to Theory' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 3 and 43.

¹¹⁸ Liebenberg (n 108) 151–157.

¹¹⁹ *Grootboom* (n 115) para 44.

¹²⁰ *Grootboom* (n 115) para 77.

¹²¹ Coomans (n 112) 182.

earlier enunciated, international human rights instruments are supportive of the right of access of children of asylum seekers to social assistance, hence, failure at the domestic level to accommodate this recognition in its framework and practice constitutes an unjustifiable or unreasonable conduct on the part of the state.

Traces of careful consideration of minimum core and reasonableness approaches that are relevant to the situation of children of asylum seekers can be found in *Khosa v Minister of Social Development*,¹²² a case that focuses majorly on the exclusion from social grants of foreign nationals who are permanent residents in South Africa. In that case, the applicants although Mozambican nationals are permanent residents in South Africa, contended before the Constitutional Court that the Social Assistance Act of 1992, which restricted social assistance grants to South African citizens, was unconstitutional. The applicants argued that the exclusion of all non-citizens from the social grant scheme is incompatible with the state's obligations under section 27(1)(c) of the Constitution to offer access to social security to 'everyone'. It was their argument that in so far as the exclusion limited their right to equality, it was unfair under section 9 of the Constitution, and unjustifiable under section 36 of the Constitution. They further submitted that the exclusion infringed the rights that children have under section 28 of the Constitution.¹²³ On their part, the respondents justified the exclusion, arguing that the requirement of citizenship is necessary for differentiation purposes as the obligation of the state is first toward its citizens. They further argued that permanent residents are expected to be self-sufficient, hence, their exclusion is only temporary and agrees with accepted practice in other parts of the world which uses a similar approach to create an incentive for permanent residents to naturalise.¹²⁴ The court considered the state's minimal obligation towards its vulnerable populations and the adverse impact of excluding permanent residents from its application.¹²⁵ It also considered the reasonableness of their exclusion.¹²⁶ Mokgoro J held that the inclusion of a right to social security to everyone was necessary due to the value that the society attaches to human beings and the fact that they should be afforded basic needs.¹²⁷ Consequently, the court concluded that excluding permanent residents from social assistance grants is unreasonable and unjustifiable.¹²⁸ It was following this decision that the words 'permanent resident' or 'refugees' was added in the Social Assistance Act of 2004.¹²⁹

¹²² *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

¹²³ *Khosa* (n 122) paras 38–39.

¹²⁴ *Khosa* (n 122) paras 54–58.

¹²⁵ *Khosa* (n 122) para 49.

¹²⁶ *Khosa* (n 122) para 85.

¹²⁷ *Khosa* (n 122) para 52.

¹²⁸ *Khosa* (n 122) para 85.

¹²⁹ Social Assistance Act (n 24) s 5.

Nonetheless, with their category not specifically mentioned in the legislation, it remains unclear whether the children of asylum seekers can access social assistance.

Arguably, the submissions made by the applicants in the *Khosa* case are useful in supporting the claim of the children of the asylum seekers and aligning the state with international standards on the protection of the right of children of asylum seekers to social assistance. First, in so far as section 27(1)(c) of the Constitution on the right to social security applies to ‘everyone’ without distinction or discrimination, and section 28(1)(c) provides to ‘every child’ the right to social services, children of asylum seekers are eligible under the Constitution. Such reasoning agrees with the provision of section 7(1) of the Constitution which affirms that the Bill of Rights applies to ‘all people’ in South Africa, a position further confirmed by the court in *Khosa*.¹³⁰ Second, children of asylum seekers are vulnerable groups, in a worse legal position than children of permanent residents, who were a subject of focus in the *Khosa* decision. They are neither permanent residents nor refugees, yet, they are foreign nationals whose plights are worsened by their inability to earn a living themselves and dependent on parents who lack proper documents to also earn a living. The court in holding that permanent residents should not be excluded in the *Khosa* case indicated that the applicants in the matter were destitute children and aged in need of social assistance, and were deserving of constitutional protection.¹³¹ Hence, they are qualified under section 27(1)(c) that guarantees the right to social assistance for anyone who are unable to support themselves and their dependents.¹³² In coming to that decision, the court relied on *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* which identified that foreign citizens are a minority in all countries, and have little political weight.¹³³ Consequently, at the very least, on the basis of their vulnerability and on the strength of similar provisions of the Constitution, it can be argued that the state’s minimum obligation towards the children of asylum seekers should include the provision of social assistance.

Third, it would seem unreasonable and unfair under section 9 of the Constitution dealing with equality, and unjustifiable under section 36 of the Constitution regarding limitation grounds to exclude the children of asylum seekers from social assistance. Regarding the test of unreasonableness, the court in the *Khosa* case, considered the negative impact of the exclusion and how it interplays with other rights of the Constitution. The court recognised that it may be necessary to differentiate between groups and peoples for the purposes of allocating benefits and enhance effective delivery of social services.

¹³⁰ *Khosa* (n 122) para 47.

¹³¹ *Khosa* (n 122) para 74.

¹³² *Khosa* (n 122) para 65.

¹³³ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

However, such differentiation must not be arbitrary nor must it reflect a bare partiality,¹³⁴ to satisfy the provision of section 27(2) which calls for reasonable legislative and other measures to achieve the progressive realisation of the right to social security. It then rejected the respondents' arguments that differentiation was justifiable because it was temporary,¹³⁵ or in line with practice elsewhere or that to do otherwise will impose high financial burden on the state.¹³⁶ The court reasoned that in so far as the law excludes all non-citizens who are destitute, without regard for their immigration status, it lacks a proper distinction between non-citizens already part of the society and those who have not, hence, it is unfair. Concerning the respondent's submission on financial implication for the state, the court ruled that the cost of including permanent residents in the system will be only a small proportion of the total cost.¹³⁷ The court also tested the differentiation and exclusion using the section 36 provision of the Constitution dealing with the limitation clause, which allows for reasonable limitation that is justifiable in an open and democratic society bearing in mind factors including the following:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose¹³⁸

It then concluded that such exclusion of children is neither justifiable nor reasonable in terms of section 36 of the Constitution.¹³⁹

Following the reasoning of the court, exclusion of children of asylum seekers will be unreasonable in the sense that it will be inconsistent with section 28(2) of the Constitution which regards the best interest of the child to be paramount. Even if it is admitted that the immigration of such children is not yet documented because their application is still under determination, it is in their best interest that they be catered for pending the determination of their application. Also, in terms of the section 36 limitation clause, excluding the children of asylum seekers will be unreasonable because by its

¹³⁴ *Khosa* (n 122) para 53.

¹³⁵ *Khosa* (n 122) para 55.

¹³⁶ *Khosa* (n 122) para 60.

¹³⁷ *Khosa* (n 122) para 62.

¹³⁸ The Constitution of South Africa (n 23) s 36.

¹³⁹ *Khosa* (n 122) paras 80, 136.

very nature, the right to social security aims at addressing the need of vulnerable populations including such category of children. A differentiation that seeks to exclude non-citizens serves no fair purpose as it can only deny rights and leave the children of asylum seekers with no other viable option. The nature and extent of such differentiation is also unfair because it literally leaves the children of asylum seekers uncared for while they await the determination of their application, a process that often takes long. Such limitations worsen the condition of the children and therefore serve no positive purpose on the welfare of the children of asylum seekers. It is difficult to imagine, let alone, argue for less restrictive means of limiting the access of children of asylum seekers to social assistance because such means would be just as damaging to the constitutional protection of their right. For instance, in the *Khosa* case, even the respondents admitted that exclusion of children from social benefits cannot be justified.¹⁴⁰ Hence, to justify their exclusion using the limitation clause under the section 36 provision will render redundant the provision of section 28(1)(c) of the Constitution on the right of every child to social services.

Finally, following the approach in the *Khosa* case, when confronted by asylum seekers' claim, it is possible for the court to make an order invalidating such section of the Social Assistance Act of 2004, limiting access to social assistance to only 'citizens', 'permanent residents' and 'refugees', and reading in children of asylum seekers to the provision. It may, however, in accordance with the provision of section 172(1)(b)(ii) of the Constitution also make a time-bound order suspending the declaration of invalidity for the provision to allow the competent authority such as the parliament to correct the defect. While the former option will urgently deal with the precarious situation of the children of asylum seekers, the latter will afford the parliament an opportunity to deliberate more carefully on the subject and ensure other interests involved are appropriately addressed. In doing so, the parliament can reflect more thoroughly on the state minimum obligation and reasonable measures to ensure the protection of vulnerable groups in relation to the right to social security. Taking either of the approaches agrees with section 27(2) of the Constitution which requires the state to take reasonable legislative measures within its resources to achieve progressive realisation of the right to social security.

Conferring on the children of asylum seekers the right to social assistance is in line with the approach in other jurisdictions where the state makes general efforts to improve the living conditions of asylum seekers pending the determination of their application. In Ireland, for instance, since 2000, the government introduced a system known as 'direct provision' which not only accommodates asylum seekers in collective centres but pays

¹⁴⁰ *Khosa* (n 122) para 136.

them a weekly direct provision allowance.¹⁴¹ They are also entitled to meals generally provided in a canteen, or sometimes through provision of food to self-cater in shared kitchens.¹⁴² These provisions are made while they await the outcome of their application which ordinarily takes place within six months.¹⁴³ Although situations are not exactly the same in Australia, asylum seekers living in the community may also be able to access the Asylum Seeker Assistance Scheme (ASAS) or the Community Assistance Support Program (CASP). The scheme and programme are funded by the Immigration Department of Australia.¹⁴⁴ The above examples show that it is possible to accord asylum seekers, in particular, their children, the right to social assistance. While states differ in terms of the resources they command, South Africa may adopt some of the measures in addressing the plight of children of asylum seekers. Such a choice is necessary in order to align with the acceptable international standards regarding the provision of social assistance to the children of asylum seekers.

Conclusion

The plight of children of asylum seekers is a constant subject of focus in international human rights law and commentaries on South Africa. Whether and how its existing framework of law can address the plight of this group is the focus of this article. As has been demonstrated, no provision specifically allows the children of asylum seekers to access social assistance under international human rights law. However, its existence can be implied from a combined reading and reflection on existing instruments and works of treaty-monitoring bodies. Considering its constitutional recognition of the application of international law, the development on the international human rights instruments on access to social grants should shape the response to the plight of children

¹⁴¹ Thornton (n 8); DSCFA (Department of Social, Community and Family Affairs), 'Supplementary Welfare Circular 00/04 on Direct Provision and Income Maintenance for Asylum Seekers' (10 April 2000) <<https://exploringdirectprovision.ie/wp-content/uploads/2019/10/1004-00-SWA-Circular-04-of-2000-SW.pdf>> accessed 21 December 2020; Government Decision S180/20/10/0122A, 'Asylum, Refugee and Immigration Matters (8 February 2000)' <<https://exploringdirectprovision.ie/wp-content/uploads/2019/10/0105to2209-04-SW-JUST.pdf>> accessed 21 December 2020.

¹⁴² Oonagh Buckley, 'Statement on the System of Direct Provision and the International Protection Application Process' (Deputy Secretary General, Department of Justice and Equality: Joint Committee on Justice and Equality, Oireachtas, Irish Parliament Dublin 19 June 2019) <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/submissions/2019/2019-06-19_opening-statement-oonagh-buckley-deputy-secretary-general-department-of-justice-and-equality_en.pdf> accessed 20 December 2020.

¹⁴³ Liam Thornton, 'For Just Six Months: Establishing Direct Provision Accommodation Centres' (13 November 2019) <<https://exploringdirectprovision.ie/2019/11/05/for-just-six-months-establishing-direct-provision-accommodation-centres/>> accessed 20 December 2020.

¹⁴⁴ ASRC, 'Do Asylum Seekers Receive More Welfare than Ordinary Australians?' <<https://asrc.org.au/resources/fact-sheet/asylum-seeker-financial-support/>> accessed 20 December 2020.

of asylum seekers in South Africa. However, this is in fact not yet the case in that domestic legislation, in particular, the Social Assistance Act still excludes asylum seekers, especially, their children, from its scope of application. Despite this gap, the application of the ‘minimum-core’ and ‘reasonableness’ approaches may assist functionaries of government in ensuring the access of children of asylum seekers to social assistance in South Africa. As has been shown, there are bases for the approaches. Children of asylum seekers are covered by the constitutional protection of the right of ‘everyone’ and ‘every child’ to social security and social services in South Africa. They are vulnerable groups and it would seem unfair and unreasonable to rely on limitation clauses to exclude them. It is possible for the court to make orders such that can initiate a legal reform that will deal more robustly with the protection of the right of children of asylum seekers and thereby align the state with international standards on social assistance to children of asylum seekers in South Africa.

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