



Unaccompanied Foreign Migrant Children in South Africa¹

This is one in a series of topical guides developed for PAN: Children that provides key information on the current state of affairs in South Africa related to the topic and highlights practical guidance, lessons learnt and case studies (both national and international) that will be helpful in policy development dialogue and knowledge sharing.

1. International and regional instruments protecting unaccompanied foreign migrant children

South Africa has a constitutional obligation to consider international law and to prefer an interpretation of domestic legislation that is consistent with international law over any other interpretation.¹ It is with this in mind that the following instruments aimed at the protection of unaccompanied foreign migrant children must be applied.

- 1.1 The African Charter on the Rights and Welfare of the Child (African Union, 1999)
- 1.2 The United Nations Convention on the Rights and Welfare of the Child (United Nations, 1990)
- 1.3 The United Nations Committee on the Right of the Child's General Comment on the Treatment of Unaccompanied and Separated Children outside their country of origin (United Nations, General Comment no.6 (2005),CRC/GC/2005/6)
- 1.4 The United Nations Guidelines for Alternative Care of Children (United Nations, Resolution 64/12 of 24 February 2010)
- 1.5 The 1951 Convention on the Status of Refugees (United Nations General Assembly)
- 1.6 The 1954 Convention on the Status of Stateless Persons (United Nations General Assembly)

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- 1.7 The 1961 Convention on the Reduction of Statelessness (United Nations General Assembly)
- 1.8 The 1948 Universal Declaration on Human Rights (United Nations General Assembly)
- 1.9 Refugee Children: Guidelines on Protection and Care (UNHCR 1994)
- 1.10 Guidelines on Policies and Procedures dealing with unaccompanied children seeking asylum (UNHCR 1997)
- 1.11 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Organised Crime (United Nations General Assembly)
- 1.12 The International Labour Organisation Convention 182 on Child Labour

International law protection for unaccompanied migrant children is anchored on the aforementioned provisions.

Before proceeding to a discussion of the situation of unaccompanied foreign migrant children in South Africa, it is essential to define the categories of children that this topical guide is concerned with. Unaccompanied foreign migrant childrenⁱⁱ are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.ⁱⁱⁱ These children are distinguished from separated children, who are children who have been separated from both parents, or from previous legal or customary care-givers, but not necessarily from other adult relatives. These may include children accompanied by other adult family members.^{iv} Both categories of children would have left their country of origin and crossed an international border to reach their country of destination. The focus of this topical guide is on unaccompanied foreign migrant children – within this category, there are two further sub-categories: (i) unaccompanied children who have asylum claims or have refugee status, and (ii) unaccompanied children who are migrants for other reasons such as economic migrants, who may not have asylum claims.

A glance at the aforementioned international law treaties indicates that unaccompanied foreign migrant children who have asylum claims may, at least on paper, enjoy better protection than those unaccompanied minors who do not have asylum claims,^v however, this is not always true in practice. Nonetheless, on the premise that international law promotes non-discrimination and requires that state parties must provide children who are temporarily or permanently deprived of their family environment protection, unaccompanied foreign migrant children with or without an asylum claim should be afforded protection in their country of destination.^{vi}

2. National laws and policies

There is a complex collection of laws that affect unaccompanied migrant children. Some of these laws apply directly – such as the Refugee Act and the Immigration Act – but many other laws impact on them and contain provisions that can be used to assist them. These laws and their application to this group of children are briefly discussed below.

- 2.1 **The Constitution of 1996:** Section 28 of the Constitution guarantees all children in South Africa rights enlisted therein as well as other rights in the Bill of Rights and these rights should also be enjoyed by unaccompanied foreign migrant children who find themselves in South Africa. Importantly, these children also have the right, in terms of section 28(2), to have their best interests considered of paramount importance in all matters concerning them.
- 2.2 **The Children's Act 38 of 2005:** The Children's Act provides for protection of all children in South Africa. The care and protection provisions in the Children's Act are applicable to unaccompanied foreign migrant children as children in need of care and protection. The Children's Act also has provisions for the protection of unaccompanied foreign migrant children who may be victims of trafficking.
- 2.3 **The Child Justice Act 75 of 2008:** The Child Justice Act introduced a criminal justice system designed for children who are accused of criminal offences. The provisions of the Child Justice Act and the protective measures therein apply equally to unaccompanied foreign children who may find themselves on the wrong side of the law (and sets out the principle that detention should be a last resort).

- 2.4 **The Immigration Act 13 of 2002:** This is the primary legislation that provides for immigrants to enter South Africa and contains provisions that allows unaccompanied foreign migrant children to acquire documents that might afford them legal status in South Africa. The Immigration Act clearly provides that unaccompanied foreign migrant children must, as the general rule, not be detained and if they are detained they must be separated from adult detainees.
- 2.5 **The Refugee Act 130 of 1998:** Unaccompanied foreign migrant children may acquire asylum status under the provisions of this Act if they have valid asylum claims. The Refugee Act also states that unaccompanied asylum seeking minors who appear to be in need of care and protection may be referred to the Children’s Court.
- 2.6 **The Prevention and Combating of Trafficking in Persons Act 7 of 2013:** Domesticates the international law on trafficking and is aimed at the prevention and combating trafficking of persons within and across the borders of the Republic. This Act entails detailed provisions for the protection of children who are victims of trafficking and applies to unaccompanied foreign migrant children who are victims of trafficking.
- 2.7 **The Basic Conditions of Employment Act 75 of 1997:** Provides for the minimum age for employment as 15 years of age and prohibits employment that is harmful to children.
- 2.8 **The Social Assistance Act 13 of 2004:** Provides that refugees qualify for social grants and this includes refugee unaccompanied foreign migrant children.
- 2.9 **The South African Schools Act 84 of 1996:** Criminalises the non-enrolment of children of school-going age in a school. However, the Admission Policy to Ordinary Public Schools makes admission to public schools subject to producing status permits.
- 2.10 **The Department of Home Affairs’ Passport Control Instruction No 1 of 2004:** Passport Control No 1 is the policy of the Department of Home Affairs and it is titled “Procedures in respect of unaccompanied minor illegal foreigners” and was issued in

2004 for purposes of providing a policy in terms of which the Department of Home Affairs would treat unaccompanied children on the move.

2.11 The Department of Home Affairs' Standard Operating Procedure: Registering of an Unaccompanied Minor 2007: The Standard Operating Procedures have no implementation date, so the status of the document is unclear. The stated purpose of the SOPs document is that it “describes the procedure to be followed when registering an unaccompanied minor applying for asylum”.

2.12 The Department of Social Development's Guidelines on separated and unaccompanied children on the move outside their country of origin in South Africa: The DSD Guidelines were adopted with the aim to assist their staff in fulfilling their obligations with regard to the treatment of separated and unaccompanied children on the move in South Africa. The DSD Guidelines provides a step-by-step procedure on how unaccompanied foreign migrant children must be dealt with under the care and protection provisions of the Children's Act.

3. Situation assessment of the protection of unaccompanied foreign migrant children in South Africa

3.1 Travel to and entry by unaccompanied foreign migrant children into South Africa

The United Nations High Commission for Refugees notes the increasing number of unaccompanied minors entering South Africa as a major challenge.^{vii} South Africa is a country of destination for a large number of unaccompanied foreign migrant children.^{viii} Children come not only from the Southern Africa region, but also from as far as the Democratic Republic of Congo and Somalia. Children from war-torn or politically unstable regions consider South Africa as one of the countries where they can seek refuge from the turmoil of their country of origin. Others who come from poor countries see it as a place where they can complete school or find employment in order to better their lives.^{ix} The migration by the majority of children moving between Southern African countries appears to be mainly

motivated by the need for better economic opportunities, rather than the fear of persecution from their countries of origin.^x

In many cases the children make the journey to South Africa on their own. Many have had to walk dauntingly long distances. Others catch lifts in the vehicles of strangers. Children travelling in this way are exposed to exploitation and sexual abuse.^{xi} Unaccompanied foreign migrant children are extremely vulnerable and more so when they do not have asylum claims or their claims are ultimately rejected, and they stand to be sent back to their countries of origin.^{xii} Due to the lack of a mechanism for registration and tracking as well as lack of official data on the phenomenon it is unclear what the current number of unaccompanied foreign migrant children in South Africa is.

3.2 Reasons unaccompanied foreign migrant children migrate to South Africa

Unaccompanied foreign migrant children are extremely vulnerable when crossing borders.^{xiii} Many of these children are motivated by the hope of a better life in their country of destination.^{xiv} Children migrate because of poverty, hunger, lack of educational opportunities in their countries of origin or, in some cases, the death of parents or caregivers.^{xv} War and political unrest also contribute to the number of unaccompanied migrant children who journey to South Africa.^{xvi} Some of the unaccompanied foreign migrant children have a sense of duty and want to work in order to contribute to their families' livelihood, but this makes the children vulnerable to dangerous and exploitative labour practices.^{xvii}

3.3 Inadequacy of response to unaccompanied foreign migrant children

(i) Access to the care and protection system

In *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) the court directed state authorities to bring unaccompanied foreign children before a children's court and place them in a place of safety pending the court order. According to the court, failure to follow this process was a breach of children's fundamental rights. This case was important because it made it clear that unaccompanied foreign migrant children cannot be sent back to their countries of origin without a children's court process first determining

whether they are in need of care and protection, and determining what solution will be in their best interests.

The Children's Act 38 of 2005 is a significant piece of legislation for the promotion and protection of children's rights. The preamble to the Children's Act expressly recognises the duty on the State to respect, protect, promote and fulfil the rights of children under section 28 of the Constitution.^{xviii} Chapter 9 of the Children's Act provides for the identification and treatment of children who are in need of care and protection. In terms of section 150 of the Children's Act unaccompanied foreign migrant children may be found to be in need of care and protection after a Children's Court inquiry. However, despite the abovementioned court case and the legal provisions, in practice the majority of unaccompanied foreign migrant children do not access the child care and protection system. The two main reasons for this are, firstly, that some children do not wish to be under the care and protection system as it may limit their freedom of movement and their ability to earn money.^{xix} Secondly and more disheartening is the failure by some professionals tasked with assisting unaccompanied foreign migrant children to access the care protection system on their behalf.^{xx}

(ii) Protecting the right to Education

Unaccompanied Foreign migrant children are entitled to education on the same terms as South African children. Section 5(1) of the SA Schools Act 84 of 1996 states that '[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way'. Paragraph 19 of the Admission Policy of Ordinary Government Schools states that the admission policy applies equally to learners who are non-citizens. However, practice indicates that unaccompanied foreign children are sometimes excluded from schools on account of lack of status documentation.^{xxi} A recent court order of the North Gauteng High Court enabled a group of separated foreign children to access education and also resulted in an order that the Minister of Basic Education must review the Admission Policy to Ordinary Government Schools to make it clear that refugee and asylum seeking children should be allowed access even when they do not have status documents, with their status to be clarified and dealt with by the Department of Home Affairs.^{xxii} At the time of writing the Minister has not complied with that court order. Nevertheless, all unaccompanied

foreign migrant children should have access to education regardless of their legal status for the duration of their displacement.^{xxiii}

(iii) Protection against child labour

South African law does not allow children to work until they are 15 years old or have completed Grade 9. Section 141 of the Children's Act provides for the protection of children against the worst forms of child labour as well as general child labour and such children may, in terms of section 150(2)(a) be found in need of care and protection. Many of the unaccompanied children are older than 15 years, but such children are also subject to the care and protection system, so there is legal uncertainty about whether a child who is living without any adult supervision should be permitted to subsist by working.^{xxiv} If they are asylum seekers it may be argued that, like adult asylum seekers, they are permitted to work. However, if they are economic migrants they would not be permitted to work without the necessary work permits. South Africa's National Child Labour Programme of Action includes specific references protecting refugee and other migrant children against child labour.^{xxv}

(iv) Inaccessibility of status documents

The majority of unaccompanied foreign migrant children lack the documentation that would legalise their status in South Africa.^{xxvi} Section 32 of the Refugee Act states that any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care, must forthwith be brought before the Children's Court for the district in which he or she was found. Furthermore, the Children's Court may order that such a child be assisted in applying for asylum in terms of the Refugees Act.^{xxvii} This approach has proven to be ineffective in enabling unaccompanied foreign migrant children to access asylum permits as the majority of the children are not able to access the care and protection system through the Children's Court process.^{xxviii} Furthermore, the social workers in the care and protection system know little or nothing about the asylum application system, so even if such children do access the care and protection system, it is common that no further steps are taken with regard to their refugee status.^{xxix} They simply drift in the care and protection system with no documentation

until they are due to write the matriculation exam or until they are due to be discharged from the system.^{xxx}

Where the asylum claims of unaccompanied foreign children have been rejected they must be provided with assistance to challenge those rejections through the refugee appeals board, and must not be deported until all their remedies have been exhausted. Even then, a Children's Court process must determine whether there is any family member or caregiver to be reunified with, and proper plans for reunification must be made.

Section 31(2)(b) of the Immigration Act empowers the Minister, after consultation with the Board, to grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision. This section appears to be a useful mechanism to allow unaccompanied foreign migrant children a route for being able to stay in South Africa, especially those who have been here for several years in the care system, and for whom reunification with family members in their countries of origin is not an option. However, in practice the mechanism is not often successfully utilised.

Where the refugee system and the Immigration Act fail to provide status documentation for unaccompanied foreign migrant children, the children are at an increased risk of becoming stateless,^{xxxi} even where they may have been in the South African care and protection system.^{xxxii}

(v) Unlawful arrest, detention and deportation of unaccompanied foreign migrant children

Section 34 permits immigration officers to arrest an 'illegal foreigner', without the need for warrant, and to deport him or her. This section also allows an immigration officer to detain the 'illegal foreigner' pending his or her deportation. However, tucked away in an annexure to the law is a provision that provides protection of children from detention, which seems to have been added as an afterthought. Article 1(d) of Annexure B of the Immigration Regulations^{xxxiii} provides for the minimum standards of detention which provides that unaccompanied minors should not be detained, but that if detained they are to be kept separately from adults and in accommodation appropriate to their age.

Despite the aforementioned provisions and the fact that the Children's Act's care and protection provisions are applicable to unaccompanied foreign migrant children, these children are still subject to unlawful detentions and deportations. Case law has also made it clear that unaccompanied foreign migrant children should not be detained on account of their status.^{xxxiv} In a recent unreported case the North Gauteng High Court ordered the South African Police and the Department of Home Affairs to release two Zimbabwean children who had been arrested and detained on account of their lack of documentation.^{xxxv} The court order made it clear that such children must undergo a Children's Court process in order to determine the appropriate solution to their circumstances.^{xxxvi}

Where unaccompanied foreign children are charged in South Africa with crimes that are unrelated to their status, they must be dealt with in terms of the Child Justice Act.

(vi) Overall lack of implementation of rights

All children in South Africa are, regardless of their legal status, entitled to the protection of all the rights encompassed in the Bill of Rights of the Constitution. However, the legal framework alone cannot ensure that unaccompanied foreign migrant children are protected in South Africa. Research indicates that unaccompanied foreign migrant children are frequently denied access to basic rights and are treated inconsistently by service providers.^{xxxvii} Advocacy, training and the consolidation of clear procedures are gaps that need to be addressed by both government stakeholders and the non-governmental service providers who work with unaccompanied foreign migrant children.^{xxxviii}

3.4 Key innovations necessary for the better protection of unaccompanied foreign migrant children in South Africa

It is recommended that the provision of services to unaccompanied foreign migrant children be considerably strengthened through the following measures:

- (i) A proper mechanism for the Identification, Documentation, Tracing and Reunification of unaccompanied foreign migrant children. This should include identification of key role players and the provision of resources to ensure that this process is not subject to delays;

- (ii) Unaccompanied foreign migrant children should not be arrested, detained and deported on account of their status, without a Children's Court inquiry first being carried out; and detention should be last resort and minimum time period where it happens
- (iii) Development of a comprehensive protocol for the management of unaccompanied foreign children with special reference to children's court proceedings, obtaining Home Affairs documentation, and the placement of such children in alternative care. This should include training of all the professionals who work on matters of unaccompanied foreign migrant children.
- (iv) The National Department of Social Development should consider seeking UN technical assistance to assist with the further development of services for this group of children, particularly in relation to the family tracing and reunification process which requires cross-border co-operation.
- (v) The Department of Home Affairs should consider the granting of permits for permanent residence that can be issued in terms of section 32(1)(b) of the Immigration Act to all unaccompanied foreign children who have been found in need of care and protection by the Children's Court and who cannot return to their countries of origin. The relevant officials in the Department of Home Affairs should consult with the Department of Social Development and other interested parties to discuss this recommendation and its practical implications, such as the required forms, the possible waiver of some of the prescribed requirements and appropriate time frames.
- (vi) Access to education should be realised through amendments to the Admission Policy to Ordinary Public Schools in order to make it clear those unaccompanied foreign migrant children, including those who do not have asylum status, should be admitted into schools regardless of their status and lack of documentation.
- (vii) The use of creative alternative care options should be considered in the case of unaccompanied foreign children, such as cluster foster care and independent living programmes. The development of suitable models should be pursued urgently.

- (viii) Where unaccompanied foreign migrant children who do not have an asylum claim are to be reunified with families in their country of origin are to be repatriated, there is a need for a detailed, coordinated and properly funded process that will ensure safe repatriation and reunification.

4. Guidelines and advice on the design, implementation, monitoring and evaluation of policy and programme interventions for unaccompanied foreign migrant children

- 4.1 The **National Social Development Children's Act Practice Note No 2 of 2011** has made it very clear that all foreign children whether documented or not who are reported to be in need of care and protection must be treated or assisted like South African children who are in need of care and protection. All the provisions of the Children's Act apply to foreign children.^{xxxix}
- 4.2 The International Organisation for Migration (IOM) has developed **Guidelines on the Protection of Unaccompanied Migrant Children** which emphasise the principles of non-discrimination, best interests, non-refoulment, child participation and confidentiality.^{xl}
- 4.3 **The South African Police Services Draft Standard Operating Procedures on Unaccompanied and Separated Children** provide a comprehensive framework that sets out the rights of the children and the practical steps that members must take when they are dealing with unaccompanied foreign migrant children. However, these Standard Operating Procedures are not yet in operation.^{xli}
- 4.4 **The Department of Social Development has developed Draft Standard Operating Procedures** for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa. The Draft Standard Operating Procedures expand on the existing DSD Guidelines and provide a rights based approach that will ensure that unaccompanied foreign migrant children's challenges in relation to the care and protection system are addressed. These Standard Operating Procedures should be adopted urgently.^{xlii}

- 4.5 Save the Children UK's South Africa Programme developed a [Best Interests Determination Toolkit](#), containing a best interest assessment form and a durable solution recommendation matrix. It also serves as a training manual in their use.^{xliii}
- 4.6 The Gauteng Department of Social Development and Non-governmental organisations have established an **Unaccompanied Minors Forum** that meets monthly in order to discuss and strategise on challenges they face in relation to the protection of unaccompanied foreign migrant children in the Gauteng Province.^{xliv}
- 4.7 The International Detention Coalition's **Captured Childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention** documents the negative impacts of migration detention on children and also provides a detailed policy framework on child-sensitive approaches in relation to assessment and placement.^{xlv}

5. Case studies

- 5.1 In 2005 Lawyers for Human Rights found 80 unaccompanied foreign children at the Lindela Repatriation Centre, together with adults. They were due to be deported, and the method of deportation at the time involved simply dropping the children at the other side of the border, perhaps thousands of kilometres from their homes. The Centre for Child Law, represented by Lawyers for Human Rights, urgently approached the High Court to stop the deportation and to appoint a curator to investigate the circumstances and protect the children's interests. The curator's report resulted in the children being transferred to a child and youth care centre, children's court processes were initiated, and the children were all provided with legal representation. The judgment in this case (*Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) S 50 (T)) then became the model for the management of unaccompanied children and established the idea that they could not be repatriated without a children's court process having first been carried out. The process through the Children's Court is aimed at determining each individual child's circumstances in

order to ascertain what would be the solution that would best serve that particular child's interests.

- 5.2 In Johannesburg in 2010 there was a stand-off between the church minister of the Central Methodist Church and officials of the Department of Social Development over a group of 56 unaccompanied foreign boys and girls, the majority of whom were Zimbabwean. An application to the High Court resulted in the appointment of a curator *ad litem*, whose task was to consult with the children, consider their situation, and make resolutions. The Curator's report identified problems in the system and made wide reaching recommendations for a systemic change, as well as responding on a case-by-case basis in relation to the children. The children were permitted to remain at a building owned by the Methodist church, under the legal protection of the curator until a solution was found for each individual child. The case-by-case approach that facilitated tracing of family members, resulted in some of the children being reunified with their family members in South Africa and some in their country of origin. This process crystallised the fact that many unaccompanied foreign migrant children could, if a concerted effort was made by the relevant officials, be reunified with family members.
- 5.3 Save the Children in South Africa has established a **cross border coordination working group between South and Zimbabwe** as well as South Africa and Mozambique to effectively advocate for safer migration and repatriation of children. Work is also done with community based organisations and government institutions to improve the quality of care, support and protection services for children on the move.^{xlvi} This will ensure that where unaccompanied foreign migrant children are to be repatriated to their country of origin this can be done with the necessary safeguards in place.

6. References

ⁱ Section 39(1)(b) and 233 of the Constitution of 1996.

ⁱⁱ Also referred to as unaccompanied minors.

ⁱⁱⁱ Inter-agency guidelines on unaccompanied and separated children (2004) available at <http://www.unhcr.org/4098b3172.html> (accessed on 21 July 2014).

^{iv} Ibid.

^v Article 22 of the UNCRC and article 23 of the ACRWC detail the the protection and assistance that children who seek refugee must be provided with in their country of destination.

^{vi} Article 20 of the UNCRC and article 25 of the ACRWC.

^{vii} UNHCR Operation in South Africa, Lesotho and Swaziland Fact Sheet (2014) available at <http://unhcr/524d7689.pdf> accessed on 20 July 2014.

^{viii} “Children on the move: Protecting unaccompanied migrant children in South Africa and the region” (2007) Save the Children UK available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/2665.pdf> accessed on 19 July 2014.

^{ix} Schreier T “Critical challenges to protecting unaccompanied and separated foreign children in the Western Cape: Lessons learned”, The University of Cape Town Refugee Rights Unit available at http://www.rcusa.org/uploads/pdfs/Working_Papers_4_of_2011.pdf accessed on 19 July 2014.

^x Elphick R and Amit R “Border Justice: Migration, access to justice and the experiences of unaccompanied minors an survivors of gender-based violence in Musina” (2012) African Centre for Migration and Society available at <http://www.migration.org.za/uploads/docs/report-36.pdf> accessed on 20 July 2014.

^{xi} Elphick R and Amit (2012).

^{xii} Elphick R and Amit (2012).

^{xiii} See the discussion on Gumagumas (“scavengers”) and malaishas (“human smugglers”) who prey on unaccompanied foreign migrant children in Juska A et al “The plight of Zimbabwean refugee minors in South Africa: A call for comprehensive legislative action” (2010) Denver Journal on International Law and Policy available at <http://djil.org/wp-content/uploads/2011/08/Juska.pdf> accessed on 25 July 2014.

^{xiv} “Children on the move: Protecting unaccompanied migrant children in South Africa and the region” (2007).

^{xv} Ibid.

^{xvi} Ibid.

^{xvii} “Children on the move: Protecting unaccompanied migrant children in South Africa and the region” (2007).

^{xviii} Skelton A “Regional Policy Review Report and Guidelines” (2014) Save the Children available at http://resourcecentre.savethechildren.se/sites/files/documents/regional_policy_review_report_and_guideline_1103214.pdf accessed on 25 July 2014.

^{xix} “Children on the move: Protecting unaccompanied migrant children in South Africa and the region” (2007). Elphick R and Amit (2012) also indicate that unaccompanied foreign migrant children in Musina particularly come and go as they please and do not attend school.

^{xx} Schreier T (2011).

^{xxi} Elphick R and Amit (2012). See also Baatjes I et al “The Education Rights of Migrants, Refugees and Asylum Seekers in South Africa” (2012) Centre for Education Rights and Migration available at http://www.fhr.ofg.za/files/6713/8595/8897/The_Education_Rights_of_Migrants_Refugees_and-Asylum_Seekers_in_South_Africa_Research_Report.pdf accessed on 28 July 2014.

^{xxii} *Mubake and others v Minister of Home Affairs and Others* (72342/2013) North Gauteng High Court, Pretoria.

^{xxiii} General Comment on The treatment of unaccompanied and separated children outside their country of origin, 6 of 2005 at para 40 and 41 available at <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> accessed on 28 July 2014.

^{xxiv} “Children on the move: Protecting unaccompanied migrant children in South Africa and the region” (2007).

^{xxv} The National Child Labour Programme of Action for South Africa, Phase Three (2013-2017) available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/child-labour-programme-of-action-for-south-africa/2013/childlabourprog2017.pdf> accessed on 20 October 2014.

^{xxvi} Ramjathan-Keogh K et al “Towards the ratification of the Statelessness treaties” (2011) LHR available at http://www.lhr.org.za/sites/lhr.org.za/files/towards_ratification_of_the_statelessness_treaties_-_lhr_0.pdf accessed on 21 July 2014

^{xxvii} Section 32(2) of the Refugee Act.

^{xxviii} Schreier T (2011). The Refugee Amendment Act 33 of 2008, which is yet to be put into operation, provides for a process where unaccompanied foreign migrant children who seek asylum would be issued with asylum permits on entry into South Africa and then be referred to the Department of Social Development. This approach was ordered by the High Court in the case of *Shaafi Dahahir Abdulahi and Others v Minister of Home Affairs and Others* (26572/2001) North Gauteng High Court, Pretoria, where an asylum seeking Somalian child was unable to access the care and protection system and this resulted in him being arrested for lack of documentation.

^{xxix} Schreier T (2011).

^{xxx} Ibid.

^{xxxi} Ramjathan-Keogh K et al(2011) describe the two categories of statelessness as *de jure* where a person is one who is not recognised as a national by any State under the operation of its laws. *De facto* statelessness or where a person meets a State's legal requirements for citizenship, but is either unable to meet its administrative requirements; is otherwise denied citizenship documents or consular protection; or voluntarily renounce their country's protection.

^{xxxii} Schreier T (2011).

^{xxxiii} Article 1(d) of Annexure B to the Immigration Regulation 28(5) as contemplated in section 34(1)(e) of Act 13 of 2002.

^{xxxiv} In *Lawyers for Human Rights v Minister of Safety and Security and Others* (5824/2009), North Gauteng High Court, the detention of unaccompanied minors at the Soutpansberg Military Grounds (SMG) was found to be unlawful as it contravened sections 28(1) (g) and 28(2) of the Constitution, the Child Care Act, Children's Act, the regulations in the Immigration Act.

^{xxxv} *Centre for Child Law v Minister of Home Affairs and Others* (61398/13), North Gauteng High Court, Pretoria.

^{xxxvi} Ibid.

^{xxxvii} Palmary I "For better implementation of migrant children's rights in South Africa" (2009) UNICEF available at http://www.unicef.org/southafrica/SAF_resources_migrantchild1.pdf accessed on 20 October 2014.

^{xxxviii} Palmary (2009).

^{xxxix} National Department of Social Development Children's Act Practice Note No 2 of 2011 available at <http://www.lexisnexis.co.za/pdf/Childrens-Act-Practice-Note-2-of-2011.pdf> accessed on 28 July 2014.

^{xl} IOM Guidelines on the Protection of Unaccompanied Migrant Children (2011) available at http://www.iom/jahia/webdav/site/myjahiasite/shared/mainsite/events/documents/Unaccompanied_children.pdf accessed on 28 July 2014.

^{xli} Authors obtained the a copy of the Draft Standard Operating Procedures from the UN Protection Working Group that is hosted by the UNHCR and have it on file.

^{xlii} A copy of the Draft Standard Operating Procedures was obtained by the authors from the National Child Care and Protection Forum that is hosted by the Department of Social Development.

^{xliii} Available at <http://resourcecentre.savethechildren.se/library/best-interests-determination-children-move-toolkit-decision-making> accessed on 28 July 2014.

^{xliv} See CorMSA Newsletter (2012) available at <http://www.cormsa.org.za/wp-content/uploads/2008/06/2nd-CoRMSA-Newsletter-February2012-edited.pdf> accessed on 28 July 2014.

^{xlv} Corlett D et al "Captured Childhood" (2012) Melbourne International Detention Coalition available at http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report.pdf accessed on 25 July 2014.

^{xlvi} "Child Protection: Children on the Move" (2013) Save the Children available at <http://savethechildren.org.za/.../Programme%20Overview%202013%20%20Child%20Protection%20-%20Children%20on%20the%20Move.pdf> accessed on 25 July 2014.

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