THE HUMAN RIGHTS OF (IRREGULAR) MIGRANTS:
AN INTERNATIONAL, REGIONAL AND SOUTH AFRICAN PERSPECTIVE (PART 2)

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I. INTRODUCTION

In part 1 of this article[1] I pointed to the fact that some agreement is beginning to emerge internationally that irregular migrants are entitled to certain minimum rights in the migrant receiving country. While parity of treatment between regular and irregular migrants is not envisaged (neither by international and regional instruments dealing with migrant workers[2] nor by the legal and policy frameworks of individual countries), it is nevertheless clear that irregular migrants entitlement to some core rights are now beyond debate. What is less certain is what these core – or minimum rights consist of. In this part of the article, I will draw upon international and regional norms and some significant developments at an individual-country level in order to make certain suggestions as to the content of these core rights in the South African context.

The paper will be structured in the following manner. Parts 2 and 3 of the paper will investigate the de facto and *de lege* position of irregular migrants in South Africa with specific reference to their access to social security- and labour rights as well as a number of socio-economic rights, including health care (part 4) and education (part 5). In addition, the position of cross border traders as well as unaccompanied foreign children will be considered in parts 6 and 7 respectively. Part 8 will contain some concluding remarks.

II. SOCIAL SECURITY

In general, access to social assistance for migrants has always been more problematic than access to social insurance. Because social insurance schemes have to a large extent always presupposed a contract of service with the employer, nationality has not really been an issue, as least where coverage of migrants in a regular situation is concerned.[3] Extending social assistance to migrants, however, has been more controversial. The reason is not difficult to discern: while the origins of social insurance schemes are based upon a reciprocal insurance relation between an insured person and a social insurance institution, the origins of social assistance schemes are based upon the notion of unilateral charitable obligation. In this regard, the prevailing opinion is that 'it [is] not the host-state but the state of origin which [is] responsible for offering support to the needy'.[4] While nationality has gradually been replaced by the condition of territoriality in social security law, the principle has never been fully accepted in the area of social assistance. The two principles are rather intertwined (at least in almost all European countries) where there are links

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1 See Ockert Dupper, 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Pt 1) (2010) 2 *International Journal of Social Security and Workers Compensation*, 61.

2 See, for example, the discussion of the UN Migrant Workers Convention in part 1, ibid.

3 For migrants, the absence of a nationality condition implies that they can be integrated into the social insurance schemes of the host-State. However, migrants nevertheless experience disadvantages in claiming social insurance benefits – disadvantages resulting from the specific legal requirements which may exist in national legislation. These include reduced pension rights as a result of irregular insurance records, problems in accessing benefits abroad, and many others. The solution to these problems can be alleviated by national legislative efforts, but in the end the realisation of effective solutions requires the linking together of national social security schemes on the basis of international agreements. The point is, however, that in principle, nationality has not been a barrier to the extension of social insurance rights to migrants in a regular situation. See G Vonk 'Migration, Social Security and the Law: Some European Dilemmas' (2002) 3 *European Journal of Social Security* 315, 319. In a recent study of selected European countries, it was noted that where social security benefits are based on contributory payments, equal treatment between nationals and migrants is normally ensured. See Ryszard Ignacy Cholewinski *The Legal Status of Migrants Admitted for Employment: A Comparative Study of Law and Practice in Selected European States* (Council of Europe, 2004) 84.

4 Vonk ibid at 320.

between social assistance and the legality of residence.[5] This means that, in practice, usually only those with permanent residence status qualify for social assistance.[6] While some countries simply deny access to social assistance to undocumented migrants, other countries only recognise entitlement to certain forms of minimal aid.[7] However, most countries follow an 'in between approach' in which some (but not all) social assistance benefits are granted to irregular migrants.[8] These benefits usually include non-pecuniary services such as food, clothing, housing as well as assistance benefits for children and minors.[9]

International law does little to improve the position of undocumented or irregular migrants in these instances, and social assistance is also largely excluded from international coordination treaties. For instance, Convention 97 (Migration for Employment Convention (Revised), 1949) specifically allows countries, in their national laws or regulations, to prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds.[10] Extending social assistance to migrant workers has therefore been less straightforward than the extension of social insurance benefits. In most cases, migrant workers are excluded from benefits paid wholly or partly out of public funds, with those in an irregular situation bearing the brunt of this policy decision. While few would deny a country the right to establish a minimum period of residence as a precondition for the receipt of social assistance benefits, it must be acknowledged that migrants pay taxes from the moment of their arrival in the host country, thereby contributing to the financing of the social security system. As the ILO notes, account should be taken of the fact that 'the effective participation of migrant workers in the financing of national social security programmes is not limited to those contributions which may be deducted from wages'.[11] Excluding migrant workers entirely from all tax-funded benefits is a refutation of this contribution, and violates principles of social justice and fairness. Many countries acknowledge this contribution by extending some social assistance benefits to both regular and irregular migrants. However, this is done haphazardly, and, being dependent on national law, inevitably differs from country to country. In the absence of international guidelines, this will continue to be the case. Nonetheless, as we have seen, significant protection has been extended to irregular migrant workers at regional level. The Council of Europe has accepted that irregular migrants who have made social insurance contributions should be entitled to benefit from those payments or at least be repaid the sums contributed, for example if expelled from the country. In addition, social security in the form of social assistance should not be denied to irregular migrants where necessary to alleviate poverty and preserve human dignity. This, as we have seen, may include access to non-pecuniary social assistance benefits in kind, such as food, clothing and housing.

What is the current state of affairs in South Africa? South Africa's social security system is characterised by a strict distinction between social insurance and social assistance.[12] Social insurance usually refers to earned benefits of workers and their families and is often linked to

5 As Vonk ibid at 321 points out, most States require legal residence for the right to social assistance, while immigration law may make the legality of residence dependent upon the condition that the foreigner does not rely upon public funds.

6 E.g., in Germany, the child benefit and the payment for raising children are only available to migrants in possession of a residence permit, but not those holding a temporary residence title. In the United Kingdom, Immigration Rules prevent migrant workers from accessing non-contributory or means-tested benefits (e.g., income-based job seeker's allowance and income support, housing benefit and council tax benefit, family credit, child benefit, and disability allowances). See Cholewinski above n3, 26, 39.

7 See Vonk above n3, 329.

8 One example is that of the Netherlands where, in terms of the so-called 'Linking Act' (*Koppelingswet*), irregular migrants have since 1998 been fully excluded from all public services (secondary or higher education, housing, rent subsidy, facilities for handicapped persons, health care and all social security benefits, including national assistance). However, legal aid, emergency health care and education for children to the age of eighteen years remain accessible to all migrants, including irregular ones. See Paul Minderhoud 'The Dutch Linking Act and the Violation of Various International Non-Discrimination Clauses' (2000) 2 *European Journal of Migration and the Law* 185,186-187.

9 See Paul Schoukens and Danny Pieters, 'Exploratory Report on the Access to Social Protection for Illegal Labour Migrants' (Council of Europe, 2004) 11-12.

10 Art 6(b)(ii).

11 International Labour Organization, *Introduction to Social Security* (ILO, 1989) 159.

12 M P Olivier and E R Kalula 'Scope of Coverage' in M P Olivier et al *Social Security: A Legal Analysis* (LexisNexis Butterworths, 2003) 127.

formal employment.[13] Social assistance is financed through taxes, regulated by legislation and is the exclusive responsibility of the state.[14] Social relief forms part of the social assistance branch of the South African social security system, and entails short-term measures undertaken by the State, and private institutions, to assist persons during individual or community crises that have caused the persons or communities to be unable to meet their most basic needs.

Scope of coverage: Social insurance

The South African social insurance system covers mostly people in formal employment.[15] The self-employed, the informally employed, and several categories of the atypically employed are for all legal purposes excluded from the South African social insurance system – with the notable exception of the Road Accident Fund scheme.

Apart from some exceptions for foreigners with permanent residence status, non-nationals are generally excluded from social security protection in South Africa.[16] The exclusion of migrants in an irregular situation from mainstream social insurance and social assistance benefits is not uncommon. It is generally accepted that non-citizens who are in a country irregularly may be treated differently from citizens and lawful residents.[17] This differentiating treatment is also evident in the sphere of social insurance in South Africa. For example, irregular ('illegal') non-citizens are excluded from the ambit of the Road Accident Fund Act[18], meaning that they are unable to claim compensation from the Fund for any loss or damage suffered as a result of any bodily injuries or death caused by the negligent driving of motor vehicles in South Africa.[19] In general, irregular migrants are excluded from social insurance schemes in South Africa. This includes both unemployment insurance as well as workers' compensation. The reason, as Olivier and Guthrie point out, is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act[20] is not an employee for labour law and, one could add, social security law purposes (for purpose of bringing a case before the labour law adjudicating institutions[21]), as no valid contract of employment exists and such a person cannot be understood to be 'an employee'.[22] Both the Unemployment Insurance Act[23] (UIA) as well as the Compensation for Occupational Injuries and Diseases Act[24] (COIDA) extends benefits only to those who qualify as 'employees'.[25]

In the US Supreme Court decision in *Hoffman Plastic Compounds v. National Labor Relations Board*,[26] the Court refused to extend labour law protection to irregular migrants. The

13 Social insurance contingencies are regulated by individual pieces of legislation. It consists of retirement schemes, health insurance, workmen's compensation, unemployment insurance and the Road Accident Fund (RAF). Only the RAF is not employment based. It is established under the Road Accident Fund Act (RAFA) 56 of 1996. The Fund, which is primarily funded from a compulsory fuel levy, pays out compensation to a third party for any loss or damage suffered as a result of any bodily injuries or death, caused by the negligent driving of motor vehicles.

14 A number of social grants are available, including an old-age grant, a disability grant, a foster care grant, a care-dependency grant and a child support grant. See the Social Assistance Act 13 of 2004.

15 Notably compensation for workplace injuries and diseases and unemployment insurance.

16 For example, non-citizens with permanent resident status are entitled to workers compensation in the event of an accident or disease (see See Compensation for Occupational Injuries and Diseases Act 130 of 1993). In terms of the Unemployment Insurance Act (63 of 2001), they will be entitled to benefits, if they are retrenched, become ill or pregnant, or adopt young children.

17 M Olivier and G Vonk (eds), *Comparative Review of the Position of Non-Citizen Migrants in Social Security'* (Report for the South African Treasury, 2004) 63.

18 Road Accident Fund Act 56 of 1996.

19 Olivier and Vonk above n17, 41.

20 13 of 2002.

21 *Moses v Safika Holdings (Pty) Ltd* 2001 22 *ILJ* 1261 (CCMA); *Vundla v Millies Fashions* 2003 24 *ILJ* 462 (CCMA); *Lende v Goldberg* 1983 2 SA 284 (C); *Georgieva-Deyanova v Craighall Spar* 2004 (9) *BALR* 1143 (CCMA); *Maila v Pieterse* 2003 (12) *BALR* 1405 (CCMA) see, however, *Mackenzie v Paparazzi Pizzeria Restaurant obo Pretorius* 1998 *BALR* 1165 (CCMA).

22 M Olivier and R Guthrie 'Extending Social Security Protection to Non-Citizen Workers, in Particular in the Area of Employment Injuries and Diseases: The Quest for Developing a Rights-Based Approach'' (paper presented at the 7th International Conference on Work Injuries Prevention, Rehabilitation and Compensation, Hong Kong, 27-29 June 2006) 10.

23 63 of 2001.

24 130 of 1993.

25 Or a similar term used, such as 'contributor': see section 2(1) of the UIA of 1966 and the similarly worded provision in the UIA of 2001. See also section 1 of COIDA.

26 535 U.S. 137 (2002).

majority of the court[27] held that the labour laws invoked by the worker should not be enforced where they ran counter to the policies of the Immigration Control and Reform Act of 1986. Even though the court did not decide that the worker in question had no rights, it nevertheless expressed the view that workers should not be encouraged by the courts to make claims where they are working contrary to immigration laws. In other words, immigration laws took precedence over labour laws (and, by extension, social security laws). The approach adopted by the majority of the Court in *Hoffman Plastic Compounds* is problematic for at least two reasons. The first is that by excluding irregular migrants from workers' compensation compels workers to seek remedies against employers in tort (or delict). This would run counter to the underlying basis for the workers compensation scheme generally, which is premised on the idea that employers would provide a secure and reliable system of statutory benefits whilst being given the protection from tort action from workers.[28] In addition, it may encourage unscrupulous employers to employ irregular migrants on inferior terms and conditions, knowing that their maltreatment would not attract legal sanction.

Within a year of the U.S. Supreme Court decision, both the Organization of American States Inter-American Court of Human Rights and the International Labour Organization (ILO) issued contrary opinions, affirming equal labour and employment rights for irregular migrants. In an advisory opinion,[29] the Inter-American Court of Human Rights held that the international right to equality before the law requires that all worker protection be equally granted to unauthorized as well as all other workers.[30] In 2003, in response to a complaint filed by the AFL-CIO and the Confederation of Mexican Workers, the International Labour Organization Committee on Freedom of Association ruled that the decision in *Hoffman Plastic Compounds* violated the international right to freedom of association.[31] In the same year, the United Nations Special Rapporteur on the Rights of Non-Citizens issued a report reaching the same conclusion.[32] In 2004, the United Nations Committee on the Elimination of Racial Discrimination issued an interpretation of the International Convention on the Elimination of all Forms of Racial Discrimination holding that the Convention stands for the same principle: equal labour and employment rights for irregular non-citizen workers vis-a-vis citizen workers.[33] In the area of workers' compensation in particular, this rights-based approach to the position of irregular migrants requires treating injured workers without regard to their contractual status but having due regard to their needs following injury. This means that all workers (irrespective of status) should be entitled to rehabilitation and income support following injury.

The recent South African Labour Court decision in *Discovery Health Limited v CCMA & others*[34] supports the international law-position set out above, and implicitly rejects the approach adopted by the US Supreme Court in *Hoffman Plastic Compounds*. In *Discovery Health*, the court extended labour rights to a foreign national whose work permit had expired. The court noted that, although the Immigration Act[35] prohibits the employment of foreign workers without work permits, the only consequence of doing so is that the employer is guilty of a criminal offence. This position rejects a line of decisions that held that a contract is void even if only one party is subject to a criminal penalty.[36] In the new constitutional era, Courts are obliged to interpret all legislation in a way that would 'promote the spirit, purport and objects of the Bill of Rights.'[37] In

27 It was a narrow 5-4 decision.
28 Olivier and Guthrie 'Extending social security protection' above n22, 11.
29 Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).
30 This opinion is discussed in more detail in part 4, *infra*.
31 Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227, GB.288/7 paras. 551-613 (November 2003), available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf.
32 David Weissbrodt, Special Rapporteur, Final Report on the Prevention of Discrimination: The Rights of Non-Citizens, 55th sess, UN Doc. E/CN.4/Sub.2/2003/23 (26 May 2003).
33 UN OHCHR Committee on the Elimination of Racial Discrimination, General Recommendations, http://www2.ohchr.org/english/bodies/cerd/comments.htm
34 *Discovery Health Limited v Commission For Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480 (LC).
35 13 of 2002.
36 See, for instance, *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Lende v Goldberg* (1983) 4 *ILJ* 271 (C)
37 Section 39(2).

interpreting the provisions of the Immigration Act, the Court must ensure that it does not unduly limit the Constitutional right of 'everyone' to 'fair labour practices'.[38] In this regard, the Labour Court reached the opposite conclusion from that arrived at by the US Supreme Court in *Hoffman Plastic Compounds*. In the latter decision, the court held that the extension of labour rights to irregular migrants would undermine the purpose of immigration legislation, which is to discourage illegal immigration. In *Discovery Health*, the court held that the extension of rights to irregular migrants would do the opposite:

> If s 38(1) [of the Immigration Act] were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and … she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA [Basic Conditions of Employment Act], for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them.[39]

Instead of undermining the purpose of the Immigration Act, it would in fact strengthen it. If employers were aware that foreign nationals who do not have work permits had recourse to the rights contained in labour legislation, they would be less likely to breach immigration legislation by entering into contracts with irregular migrants.[40] A contrary interpretation would frustrate the primary purpose of section 23(1) of the Constitution, which is to extend the right to fair labour practices to 'everyone'. This meant that the validity of the contract was not affected by the fact that the employer breached the Immigration Act.

However, the court even went one step further. It held that even if the contract was invalid because the employer had breached the provisions of a statute (as determined in some pre-Constitutional decisions), this did not deprive the irregular migrant of the status of an 'employee' for purposes of labour legislation. This is because the definition of 'employee' in the Labour Relations Act (LRA) must be interpreted against the background of the Constitutional provision that grants the right to fair labour practices to 'everyone'. This provision potentially extends protection 'to other contracts, relationships in terms of a person (sic) performs work or provides personal services to another.'[41] In other words, a contract of employment is not a *sine qua non* for acquisition of the status of 'employee'.

What are the implications of this judgment? The court rejected the conventional view that a person not in possession of a work permit as required by the Immigration Act is not 'an employee' for labour law and social security law purposes as no valid contract of employment

38 Section 23(1).

39 Par 30.

40 Par 33. Studies indicate that in South Africa, migrant workers, particularly irregular migrants, are extremely vulnerable to abuses at work because of their precarious legal situation. Most of the time, they will not try to enforce their rights nor seek redress as this would expose them to the risk of being arrested and deported. There are also indications that some employers deliberately seek undocumented migrants, who are considered to be more 'docile' and 'hard-working'. In some instances, employers threaten to report irregular migrants to the police if they do not 'behave' or if they seek redress for an abuse. In rare but regular cases, employers in commercial agriculture and construction even reported their workers to immigration officers just before payday. See International Federation for Human Rights[FIDH] *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* (2008) 30.

41 *Discovery Health Limited v Commission For Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480 (LC), par 41.

exists.[42] In *Discovery Health*, the court held that the employment of irregular migrants in breach of immigration legislation does not affect the validity of the contract of employment. Even if this view is incorrect, the court held that in light of the Constitutional provision that extends fair labour practices to 'everyone', a valid and enforceable contract of employment is not a necessary requirement of the statutory definition of 'employee'. Even though *Discovery Health* concerned the definition of 'employee' in terms of the Labour Relations Act, it is submitted that its impact will also be felt in other fields where similar definitions are utilised, including in the area of social insurance.

It is submitted that irregular migrants in South Africa will be entitled to workers compensation under both COIDA and ODMWA (Occupational Diseases in Mines and Work Act). In the light of *Discovery Health*, they are considered to be 'employees' and therefore entitled to the protection offered by the legislation. In determining the amount of benefits, at least one court in the United States has suggested that the benefits should be payable at the rate of equivalent wages in their country of origin. In *Balbuena et al v IDR Realty*,[43] (a tort case for negligence), the New York Supreme Court held that the plaintiff was to be compensated for future lost earnings on the basis of what he could have earned in his native Mexico. The rationale behind this approach is that irregular migrants do not have the (legal) ability to earn in the host country, but do have an ability to earn in their country of origin. However, this decision was overturned on appeal.[44] The criticism of basing the amount of compensation on the equivalent amount the claimant would earn in the country of origin is comprehensively set out by Olivier and Guthrie:

> There are a number of criticisms of this approach. One is that evidence about rates of pay of a worker's home country may be difficult to provide to a court, and an unduly harsh burden to place a plaintiff worker under. This is particularly so where the worker is from a country where there is no comparable job or equivalent position to that which he or she was in at the time of the injury. Further, providing compensation at much reduced rates, equivalent to those of a worker's home country, may further marginalise the illegal worker, who is then faced with the prospect of living in a first world country while injured, yet possibly trying to subsist on third world compensation benefits. It is doubtful whether a "second tier" rate of compensation benefits would necessarily remove the incentive for unscrupulous employers to take advantage of illegal workers. Employers seek out and hire illegal workers, without necessarily checking immigration status. For the illegal worker to then be in effect penalised by only being compensated at a much lower rate would compound the discrimination suffered by the illegal worker.[45]

Proponents of basing the amount of compensation on the equivalent country of origin-rate argue that such an approach would ensures that workers, if injured, do not receive a windfall gain, but rather are paid at the comparable rate of their country of origin. This arguably reduces the incentive for illegal workers to flout immigration controls and seek work where they are unauthorised to do so. However, it is submitted that the deterrent effect of this policy is questionable. It seems unlikely that the remote possibility of being injured at work and then only being compensated at lower rates than those of the 'host' country would be sufficient deterrent to prevent irregular migrants from seeking work.[46]

Remitting the amount of compensation when a worker returns to his or her country of origin should also receive attention. South Africa arguably has the most developed employment injury payment arrangements in the southern African region, where benefits may be remitted through bilateral agreements or through the mines' major recruitment agency, The Employment Bureau of Africa (TEBA), in those countries where it has offices. However, it has been remarked that government corruption in the receiving countries often prevents the payment from reaching the

42 See N Smit 'Employment Injuries and Diseases' in MP Olivier et al (eds) *Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 472.
43 *Balbuena et al v IDR Realty LLC et al* [13 AD3d 285] 2003.
44 *Balbuena v IDR Realty LLC* [6 NY3d 338] 2006.
45 Olivier and Guthrie above n22, 21.
46 Ibid 21, 22.

actual beneficiaries.[47] As Smit argues, 'major reforms are necessary in the field of institutional arrangements and follow-up investigations to ensure enforcement and compliance with remittance agreements.'[48] This call for action takes on particular significance in the light of the *Discovery Health* judgment, which potentially increases the number of beneficiaries who may have to receive their compensation outside South Africa. In the absence of bilateral agreements (or applicable TEBA arrangements), a lump sum *in lieu* of monthly payments should be considered. This should apply in respect of all degrees of permanent or temporary disablement, not only in respect of permanent disablement of 30% or less as is currently the case.[49] The reality is that irregular migrants who claim compensation may face deportation once their status become known, and should not be deprived of the benefit should they be deported to a country with whom no bilateral arrangement in respect of remittances exist. Payment of a lump sum may be the most equitable solution under these circumstances.

Unlike workers' compensation, which is funded from employer contributions paid to the Compensation Fund, unemployment insurance is contributory scheme to which both employees and employers contribute.[50] The question is whether this difference is significant.

In general, there seems to be some differentiation between schemes funded entirely from employer contributions where employers are under an obligation to make such contributions even if they employ irregular migrant workers (in particular schemes covering occupational injuries and diseases) and schemes where the contributions are drawn from both the employer and employees, and where the benefits are explicitly linked with lawfully performed work (such as unemployment insurance schemes).[51] In the case of the former, workers (irrespective of their status) should be entitled to the benefits (as was argued above). In the case of the latter, there is either no entitlement or a limited entitlement, which in practice amounts to the return of the contributions that the irregular migrant may have made.

There is considerable support for the latter position. As Cholewinski argues: 'It is strongly arguable that if irregular migrants make … [social insurance] contributions, they should be entitled to social security benefits or at least a repayment of the contributions made.'[52] This view corresponds with the position adopted by the Council of Europe, and one which they invite all their member states to implement.[53] Support for this can also be found in Article 27(2) of the UN Migrant Workers Convention.[54] Even though the provision is weakly worded on the whole, it appears that the intention was to extend some social security protection to irregular migrants, at least to those benefits to which they have contributed.[55] Article 9(1) of the ILO Convention No. 143 protects the social security rights of migrant workers arising out of 'past employment'. It appears that the wording 'past employment' refers to past periods of legal as well as illegal employment.[56] Finally in this regard, ILO Recommendation 151 stipulates in par 34(1)(c)(ii) that all migrant workers who leave the country of employment should be entitled to 'reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements'.

The import of these international and regional guidelines is that irregular migrants who have made contributions to unemployment insurance in South Africa should at least be entitled to the

47 Elaine Fultz and Bohdi Pieris, *Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions* (ILO/SAMAT (Southern Africa Multidisciplinary Advisory Team) Policy Paper No. 7) (ILO Zimbabwe 1998) 19-20.

48 See N Smit above n42, 473.

49 See Sch 4, items 2, 3, 4 and 5 and s 49 COIDA.

50 S 5(1) of the Unemployment Insurance Contributions Act 4 of 2002.

51 See Ryszard Cholewinski *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe, 2005) 42.

52 Ibid 40.

53 Council of Europe *Human Rights of Irregular Migrants* (Doc 10924, 4 May 2006) par 70. See part 3, *supra*.

54 See discussion in part 4, *supra*.

55 Ibid. Also see Cholewinski *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, above n51, 41.

56 See Nilim Baruah and Ryszard Cholewinski, *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) and ILO (International Labour Office) 2006) 156: 'This provision particularly must be understood for the purpose of acquiring rights to long-term benefits. Within this context, it appears that the wording "past employment" refers to past periods of legal as well as illegal employment.'

return of their contributions.[57] As we have seen in this report, there are certainly legitimate reasons for differentiating between irregular migrants and those in a regular situation, and for extending fewer benefits to the former. This report therefore does not advocate treating irregular migrants who have made contributions to the Unemployment Insurance Fund (UIF) and who become unemployed in the same manner as regular contributors. However, in the light of the international and regional instruments referred to above, it will be difficult to justify depriving them of the contributions they have actually made while employed.

Scope of coverage: Social assistance

In *Khosa and Others v The Minister of Social Development and Others,*[58] the Constitutional Court has held that permanent residents may not be discriminated against vis-a-vis citizens when it comes to access to social assistance. As a result of this judgment, social assistance in South Africa is now available to permanent residents and their children. To access these grants, beneficiaries must comply with a means test. The Constitutional Court made it clear that non-citizens who have temporary resident status are not entitled to the same level of protection as citizens. Presumably, those who find themselves in an irregular situation have even less tenuous links with South Africa and would thus have less of an entitlement to tax-funded benefits than asylum seekers and refugees.

It has already been pointed out in this report that in general, extending social assistance to migrant workers has been more problematic than the extension of social insurance benefits. In most cases, migrant workers are excluded from benefits paid wholly or partly out of public funds, with those in an irregular situation bearing the brunt of this policy decision. While few would deny a country the right to establish a minimum period of residence as a precondition for the receipt of social assistance benefits, it must be acknowledged that migrants contribute to the financing of the social security system through the payment of taxes. Excluding migrant workers entirely from all tax-funded benefits is a refutation of this contribution, and violates principles of social justice and fairness. Many countries acknowledge this contribution by extending some social assistance benefits to both regular and irregular migrants, particularly in the form of emergency health care.[59]

The recently adopted Code on Social Security in the SADC provides that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country.[60] Despite generally restrictive regulation and policy implementation vis-a-vis irregular migrants in South Africa, the White Paper on International Migration[61] recognises that there is no constitutional basis to exclude, in toto, the application of the Bill of Rights on the basis of the status of a person while in South Africa, including irregular migrants.[62] One could, therefore, conclude that even irregular non-citizens in South Africa are constitutionally entitled to core social assistance. This does not necessarily imply monetary support, as long as basic amenities are made available.[63] This position is in line with international best practice, where social assistance benefits often take the form of non-financial services or benefits in kind, such as food, clothing and housing.[64] For example, the Council of Europe urges its member states to provide social insurance in the form of social assistance where such assistance is necessary 'to alleviate poverty and preserve human dignity'.[65]

57 A recent bilateral agreement (signed in June 2004) between the United States and Mexico (the *U.S.-Mexico Social Security Totalization Agreement*) has even gone one step further. In terms of the agreement, anyone who had made contributions to the US Social Security Administration prior to 2004 would have a legal entitlement to benefits associated with these contributions, independent of residence status and work permit status. (See Marius Olivier, 'Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)' (Report commissioned by the World Bank, 2009) 91). However, because of opposition to the agreement, it has not yet been submitted to the US Congress for approval, which is required to give legal effect to the agreement.

58 *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

59 See discussion in part 4, *infra*.

60 Article 17(3).

61 Of 1999: see GN 529 in *Government Gazette* 19920 of 1 April 1999.

62 Ibid White Paper on International Migration par 2.2 - 2.4.

63 Olivier, *Social Protection for Non-Citizens*, above n 57,17.

64 Cholewinski, above n57, 42.

65 Council of Europe, above n 53, par 67.

What would this 'core social assistance' to irregular migrants in South Africa entail? Social relief payments in South Africa, that is the temporary rendering of material assistance, is aimed at the alleviation of both chronic and transient poverty.[66] It entails short-term measures undertaken by the state and other private organisations to assist persons to meet their most basic needs during individual or community crises. It takes the form of cash, vouchers, food, and even rental payments.[67] It is submitted that irregular migrants should qualify for and be entitled to temporary social assistance should they find themselves in emergency situations. It is also the one form of relief where the provision of identity documentation (which irregular migrants by definition lack) is not a requirement for relief.[68] However, studies indicate that the provision of social relief to destitute non-citizens has been haphazard and inconsistent.[69] It is recommended that the Department of Social Development confirm the eligibility of irregular migrants to emergency social relief, and circulate a clear policy in this regard in order to ensure consistent implementation thereof around the country.

However, a distinction has to be drawn between irregular adult migrants and children in an irregular situation — whether accompanied or unaccompanied. Studies indicate that in South Africa, increasing numbers of women and children are amongst undocumented migrants, and that a growing number of children are entering South Africa through the Zimbabwean and Mozambican border posts.[70] International and regional instruments confirm that children are a particularly vulnerable category of people (in addition to women, the disabled, and the elderly) and this justifies their differential treatment from adults in an irregular situation. For example, the UN Convention on the Rights of the Child provides in Article 2 that the rights set forth in the Convention are applicable to all children *regardless of their status*. In addition, the European Committee of Social Rights found that national measures in France limiting the access of children of irregular migrants to health care provision violated the European Social Charter's provision concerning protection of and assistance to children and young persons.[71] The Committee found it difficult to apply the restrictive personal scope of the Charter to a situation which involved the denial of the fundamental right to health care to a particularly vulnerable group of persons, such as children. The Committee reasoned that it was necessary to interpret limitations on rights restrictively in order to preserve the essence of the right (in this case, the right to health) and to achieve the overall purpose of the Charter. The restriction in this case impacted on the very dignity of the human being and adversely affected a particularly vulnerable group of persons, namely children, who were exposed to the risk of having no medical treatment.[72] The recently adopted Resolution of the Council of Europe reiterates that children are in a particularly vulnerable situation and that they should be entitled to social protection which they should enjoy *on the same footing as national children*.[73]

In the *Khosa* decision, the Constitutional Court confirmed that the vulnerability of children necessitates differential treatment. In its judgment, the court had to deal with the argument that the government should be able to use the non-availability of social grants as a tool to regulate immigration (in the sense that this could be seen as part of the immigration policy of the state that aims to exclude persons who may become a burden on the state and to encourage self-sufficiency). The court rejected this contention and pointed out that the state could develop careful immigration policies in order to ensure that those people who are admitted will not be a burden on the state. In addition, the Court stressed that this particular case concerned the aged and children and that they are unlikely to provide for themselves, meaning that the self-sufficiency

66 See L G Mpedi, G Y Kuppan and M P Olivier 'Welfare and Legal Aid' in M P Olivier et al (eds) *Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 205.

67 Ibid.

68 CoRMSA (Consortium for Refugees and Migrants in South Africa) *Protecting Refugees*, *Asylum Seekers and Immigrants in South Africa* (2008) 47.

69 Ibid. The same study indicates that of the 257 non-citizens identified in the study who had received material assistance from an institution, only seven had received assistance through official government channels. The rest had received assistance from NGOs, religious organisations (churches, mosques, etc), and refugee self-help organisations.

70 International Federation for Human Rights, *Surplus People* above n40, 12.

71 Article 17 of the Charter.

72 *International Federation of Human Rights Leagues (FIDH) v. France*, European Committee of Social Rights, Complaint No. 14/2003 (2004).

73 Resolution 1509 of 27 June 2006 (Doc.10924) par 13.3 (emphasis added).

argument advanced by the government does not hold up in such a case.[74] Nonetheless, the principle that children, because of their vulnerable status, should generally be afforded different treatment from that of adults is not always being adhered to in South Africa. For example, human rights groups have pointed out that undocumented children are treated like adults by law-enforcement personnel in contravention of the South African Constitution and Child Care Act.[75] In the so-called *Lindela* case,[76] the High Court specifically dealt with the state's obligation (in terms of the Child Care Act) to treat unaccompanied foreign children *as children in need of care* through the formal child protection system as opposed to processing them through the immigration system. The Court rejected the government's argument that the Child Care Act does not apply to unaccompanied foreign children and prohibited the Department of Home Affairs to detain any further children in Lindela. It issued a supervisory interdict, which compelled government departments within the so-called social cluster of departments to address the problem collectively, to coordinate action and submit regular progress reports on specified dates to all parties concerned. It has been argued that this judgment effectively extends social assistance support to unaccompanied foreign children.[77] This includes the child-support grant, the foster care grant[78] and the care dependency grant. It is submitted that in the light of South Africa's obligations under the UN Convention on the Rights of the Child (which South Africa has ratified), this should also apply to accompanied foreign children of irregular migrants who may be in need. Article 26 of the Convention provides that 'States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.' It is clear that this right applies to 'every child' irrespective of status. It must be mentioned that, similar to section 27 of the South African Constitution, which guarantees everyone (including children) the right to appropriate social assistance but qualifies it with reference to the state's available resources, the Convention also provides that '(w)ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources …'.[79] This means that the onus will be on the state to prove that the extension of the grant to children in an irregular situation will put particular strain on the state's available resources.

It is submitted that this will be a particularly difficult onus to discharge. In *Khosa*, the State had argued that the extension of social grants to permanent residents would impose 'an impermissibly high financial burden on the state.'[80] In reviewing the reasonableness of citizenship as a criterion of exclusion from social grants in terms of section 27(2), the Court was confronted with a lack of evidence as to 'the numbers [of persons] who hold permanent resident status, or who would qualify for social assistance if the citizenship barrier were to be removed.'[81] However, based on certain assumptions, the Court was able to conclude that the cost of including permanent residents in the system would be only a small proportion of the total cost of social grants.[82] Thus the State was unable to produce convincing evidence to support its argument that the costs of extending social grants to permanent residents would impose an excessively high financial burden on it. Similar considerations may be at play in the case of extending social assistance to children of irregular migrants. Given the significant constraints facing irregular migrants when exercising their rights (such as the legitimate fear of arrest and deportation), it is unlikely that the number of potential beneficiaries will be significant and that the extension of social assistance to them will

74 *Khosa* above n58, par 65.

75 International Federation for Human Rights *Surplus People?* above n40, 12.

76 *Centre for Child Law & Another (Lawyers for Human Rights) v Minister of Home Affairs & Others* 2005 (6) SA 50 (T)) (named after the (notorious) holding camp for refugees in the Gauteng province).

77 Olivier *Social Protection for Non-Citizens*, above n57, 44. In *Khosa*, decided one year earlier, the court also extended social assistance to permanent residents and their children, above n58.

78 The foster care grant requires that both the foster parents and the foster child be resident in South Africa, meaning that citizenship requirement applicable in the case of other grants is in any case not relevant here.

79 Article 4.

80 Para 60.

81 Para 61.

82 Approximately one fifth of the projected expenditure on social grants for permanent residents is in respect of child grants. The unconstitutionality of the citizenship requirement in respect of the child support grant was already conceded by the State. 'The remainder reflects an increase of less than 2% on the present cost of social grants (currently R26.2 billion) even on the higher estimate.' Ibid para. 62.

place an 'excessively high financial burden' on the state. In addition, one of the important principles emerging from the manner in which our courts have enforced socio-economic rights is the particular importance that has been placed on vulnerable groups. The *Grootboom*[83] ,*TAC* and *Khosa* decisions illustrate that the Court has been willing and capable of reviewing budget allocation decisions when these decisions impact negatively on the most desperate and vulnerable in society. In these cases it held that government's unwillingness to expand access to housing, health care and social grants to vulnerable group was unreasonable. It is submitted that the courts will generally be more favourably disposed to interfering in the State's resource allocation priorities in cases where disadvantaged groups (such as children) are deprived of access to essential social resources and services. Finally, the decisions of the Constitutional Court indicate that the Court will not readily accept a defence that there is a lack of available resources where the exclusion of individuals or groups from a government programme constitutes unlawful discrimination or a serious invasion of dignity, which arguably amounts to the denial of social assistance to undocumented children who find themselves in need.

III. LABOUR AND EMPLOYMENT RIGHTS

The exploitation of irregular migrant workers around the world is common. In addition to lower wages, studies indicate that they are also deprived of benefits such as pensions and medical aid. They do not belong to trade unions, and therefore receive little protection from exploitation and are often summarily dismissed.[84] One commentator describes irregular migrants as a 'marginalised underclass who are easily open to abuse':

Devoid of state protection, and denied any rights and entitlements, aliens look for jobs to survive. Because of their illegal status they are forced to accept employment whatever the payment, risk, physical demand or working hours involved. Exploitation of migrant labour carries the risk of social decay, with decreasing wages and deteriorating working conditions ... The creation of such a rightless class also pushes many of them into the criminal underworld, either as a more attractive option or a means of survival.[85]

In the South African context, it has been pointed out that migrant workers, particularly undocumented ones, are more vulnerable to abuses at work because of their precarious legal situation:

> Most of the time, they will not claim their rights nor seek redress as this would expose them to the risk of being arrested and deported … . Some employers deliberately seek undocumented migrants, who are considered to be more 'docile' and 'hard-worker'. In some instances, employers threaten to report them to the police if they do not 'behave' or if they seek redress for an abuse. In rare but regular cases, employers in commercial agriculture and construction even reported their workers to immigration officers just before payday.[86]

Despite the fact that Part II of the Migrants Convention, which is concerned with equality of opportunity of treatment, applies only to migrant workers who are residing *lawfully* in the contracting party concerned; international labour standards in principle underline that all persons in the working environment should be afforded equal treatment regardless of legal status. The recent ILO Plan of Action on Migrant Workers, adopted by the International Labour Conference in June 2004 is unequivocal in this respect:

> Consistent with effective management of migration, due consideration should be given to the particular problems faced by irregular migrant workers and the vulnerability of such workers to abuse. It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that ILO instruments apply to all workers, including irregular migrant workers, unless otherwise stated. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and

83 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

84 Brij Maharaj 'Immigration to Post-Apartheid South Africa' *Global Migration Perspectives No. 1*, (Global Commission on International Migration, June 2004) 9.

85 Maxine Reitzes, 'Alien issues' *Indicator South Africa* (1994), 9.

86 International Federation for Human Rights*Surplus People?* above n40, 30.

> fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily.[87]

This principle was reinforced in September 2003, when the Inter- American Court of Human Rights issued a landmark Advisory Opinion (OC-18) on the legal status and rights of undocumented migrants in response to a request by Mexico. The Court ruled, *inter alia,* that:

Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. ... In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.[88]

The Court thus held that non-discrimination and the right to equality are *jus cogens* that are applicable to all residents regardless of immigration status. Hence, Governments cannot use immigration status as a justification for restricting the employment or labour rights of unauthorized workers. The Court found that Governments do have the right to deport individuals and refuse to offer jobs to people who do not possess employment documents, but held that, once an employment relationship has been initiated, unauthorized workers become entitled to all the employment and labour rights that are available to authorized workers.[89]

While the opinion in OC-18 does not offer any concrete basis for determining which workplace rights should be extended to irregular migrants and which not, it has been argued that the clear import of the decision, at a minimum, is that it extends to workplace protections broadly relating to work actually performed — including workers' compensation, benefits representing worker contributions (relating to, for example, social security, unemployment compensation, or pension funds), and remedies for unfair dismissal.[90] These rights may not be denied to workers performing such work and making such contributions. While the access of irregular migrants to social insurance rights such as workers' compensation and unemployment insurance have already been referred to,[91] this decision also makes it clear that irregular migrant workers should also be entitled to other labour rights such as the right not to be unfairly dismissed.

The recent Labour Court decision in *Discovery Health*[92] has come to a similar conclusion to that of the Inter- American Court of Human Rights in OC-18. Prior to the decision in *Discovery Health*, it was accepted that undocumented migrant workers in South Africa were not entitled to labour law protection because they were not considered to be 'employees'.[93] The court in *Discovery Health* held that the fact that the Immigration Act criminalises the conduct of the employer who employs a worker in contravention of the Act[94] does not impact on the validity of

87 *Report of the Committee on Migrant Workers,* (Report presented at the International Labour Conference 92nd sess, Geneva, 2004) par 28 (available at http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-22.pdf).

88 Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants,* Series A No. 18, paras 133-134 (available from the Court's website at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

89 Ibid par 8.

90 See Sarah Cleveland 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC 18-03' (2005) 99 *American Journal of International Law* 460, 464.

91 See part 4, *supra*.

92 Discussed in some detail in part 4, *supra*.

93 *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 *(CCMA), Mthethwa v Vorna Valley Spar (*1996) 7 (11) SALLR 83 (CCMA).

94 Section 38(1) of the Immigration Act states that '(n)o person shall employ (a) an *illegal foreigner*; (b) a *foreigner* whose *status* does not authorise him or her to be employed by such person; or (c) a *foreigner* on terms, conditions or in a capacity different from those contemplated in such *foreigner's status*'. [original emphasis] Section 49(3) of the

the contract, and, even if it does render the contract invalid, the existence of a valid contract is not a necessary precondition for the acquisition of the status of an 'employee' in terms of the LRA.[95] This means that irregular migrants are in principle entitled to the protection afforded by the LRA, which includes the right not to be unfairly dismissed,[96] the right to fair labour practices and rights related to freedom of association and collective bargaining. However, the form that the relief will take in a case in which an irregular migrant relies on the rights contained in the LRA (or other labour legislation such as the Basic Conditions of Employment Act[97] (BCEA)) may well be affected by the irregularity of the worker's status. While reinstatement and re-employment are the primary remedies afforded to an unfairly dismissed employee in terms of the LRA, it may well be that these will not be an option where it is found that an irregular migrant has been unfairly dismissed. The reason is simple: ordering reinstatement or re-employment will mean that the employer will be required to act contrary to the Immigration Act and be guilty of a criminal offence. In such a case, compensation may be the only viable option.

IV. EMERGENCY HEALTH CARE

The right to emergency care has been called the 'bottom line with regard to access to social benefits for [irregular] migrant workers'.[98] Irregular migrant workers therefore have (or should have) the same right to urgent medical care as regular residents (or workers) in the country.[99] For example, the Convention on the rights of all migrant workers and their families specifies that '[m]igrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.'[100] In practice, however, the manner in which the access to emergency health care is guaranteed as well as what is understood as 'emergency care', differs across countries. Most countries surveyed in a recent study do not question the right to emergency care.[101] However, if it is felt that a person has entered the country with the sole purpose of obtaining free treatment he/she could face charges for the received care. Some countries go one step further: the

same Act states that '(a)nyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine. [original emphasis]

95 This is because the Constitution extends to right to fair labour practices to 'everyone'. See section 23(1) of the Constitution.

96 The LRA defines a dismissal in section 186, *inter alia*, to include the termination by an employer of a contract of employment, with or without notice. The reference to a contract of employment may very well mean that while people employed on invalid contracts may be employees, they may not be able to claim that they have been unfairly dismissed if their employers repudiate their contracts of employment on the basis of their inability to discharge their obligations under that contract. However, in a recently decided case (*State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 7 BLLR 611 (LAC)), the Labour Appeal Court extended the dismissal protection where it was common cause that there was no employment contract between the 'employee' and the 'employer'..

97 75 of 1997.

98 Pieters & Schoukens *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants* Paper presented at the ISSA European Regional Meeting *Migrants and Social Protection* in Oslo (21-23 April 2004). 11. Ursula Kulke 'The Role of Social security in Protecting Migrant Workers: The ILO Approach' " (Paper presented to the International Social Security Association Regional Conference for Asia and the Pacific, New Delhi, India, 21-23 November 2006) 5.

99 In a recent study commissioned by the Council of Europe, it is recommended that the provision of urgent or emergency medical treatment to irregular migrants should be a minimum requirement and that states should take measures to ensure that this right is recognised formally in their laws, to eliminate the practical obstacles to its enjoyment by irregular migrants, and to provide information about its availability. See Cholewinski *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* above n51, 76. This recommendation found its way into the resolution on the rights of irregular migrants adopted by the Council of Europe in 2006 (see par 13.2). The text was adopted by the Parliamentary Assembly of the Council of Europe as Resolution 1509 (2006) on 27 June 2006 (18th Sitting).

100 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, GA Res 45/158, UN OHCHR (18 December 1990), Article 28.

101 *Exploratory Report* 11.

irregular migrant in need of urgent care can be treated by a medical doctor; however the patient is, in such a situation, obliged to refund the costs for the delivered health care. This is the case, for example, in Sweden and Turkey. In those countries, irregular migrants are thus not entitled to subsidized care.[102]

As far as the definition of emergency care is concerned, the authors of the report referred to above assert that there seems to be shift from a strict interpretation of urgent care (essential treatment, which cannot reasonably be delayed until the patient returns to his/her country) to a more flexible one evolving towards 'necessary care' on the basis of which doctors consider regular follow-ups and vaccinations also to be part of 'urgent treatments'. In addition to such outpatient and hospital care which is urgent or otherwise essential even if continuous, there is common understanding that irregular migrants should be covered for the following: medical programmes which are preventive or which safeguard individual and collective health; maternity coverage; health coverage of minors; vaccinations foreseen by public health law; diagnosis, treatment and prevention of infective diseases; and activities of international prevention.[103] This is in keeping with a more integrated concept of health care and in line with the conclusions of the United Nations Committee on Economic, Social and Cultural Rights (ICESCR) which has stated that 'States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services …'. [original emphasis][104]

It has been pointed out that providing health care to irregular migrants is not only in the best interests of the irregular migrant, but also benefits the host state.[105] Studies indicate that the health status of irregular migrants often worsens subsequent to their arrival in the host states. This means that the exclusion of irregular migrants from health care services may undermine the effectiveness of disease prevention within the host state, in particular in respect of communicable diseases. Such policies put the whole population at risk. This means that 'it is also in the host state's self interest to provide effective access to health care for irregular migrants.'[106] However, even when such care is available, lack of knowledge of their rights often prevent irregular migrants from benefiting from the health care available. For example,

> [I]n 2004, *Médecins Sans Frontières* visited and interviewed 770 seasonal farm workers in Italy, 51.4% of whom were in an irregular situation and 23.4% were asylum-seekers. 40% had become ill during their first 6 months in Italy and 93% after 19 months. The most common problems identified were infectious diseases, skin problems, intestinal parasites, and mouth, throat, and respiratory infections including tuberculosis. However, 75% of the refugees, 85.3% of asylum-seekers, and 88.6% of irregular migrants were not benefiting from any health care.

The study concludes that this primarily resulted from an 'unawareness of their rights.'[107]

In South Africa, section 27(1)(a) of the Constitution provides that everyone has the right to have access to health care services. This right has been extended to refugees and asylum seekers, and includes free access to anti-retroviral treatment.[108] In addition, section 27(3) of the

102 Pieters & Schoukens *Exploratory Report* 11.

103 Pieters & Schoukens *Exploratory Report* 11.

104 See UN, ESCOR [Economic and Social Council Official Record], ESC Committee, 22nd Session, Geneva, 25 April-12 May 2000, General Comment No. 14 (2000). The right to the highest attainable standards of health, UN Doc. E/C.12/2000/4 (11 August 2000) para 34.
The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN CESCR, 22nd sess, Agenda Item 3, UN Doc E/C. 12/2000/4 (11 August 2000), para 34.

105 See Sylvie Da Lomba 'Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England' in Barbara Bogusz et al (eds) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Martinus Nijhoff, 2004), 366-7.

106 Ibid.

107 The Fruits of Hypocrisy: History of Who Makes the Agriculture…Hidden, Rome, Medici Senza Frontiere Onlus, 2005 as cited in International Organization for Migration, *Migration and the Right to Health: A Review of European Community Law and Council of Europe Instruments* (2007) 7.

108 The Department of Health issued a directive in September 2007 that refugees and asylum seekers, including those without documentation, should have equal access to antiretroviral treatment (ART) at all public health providers. See CoRMSA *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* above n68, 38, 40.

Constitution provides that 'no one may be refused emergency medical treatment.' This means that under South African law, everyone – regardless of nationality or legal status – is entitled to emergency medical treatment. Unlike the general right to access to health care services, the right to emergency care is not subject to the qualifications of 'progressive realisation' and 'available resources'.[109] The question as to what constitutes emergency medical treatment arose in the case of *Soobramoney v Minister of Health, KwaZulu-Natal*.[110] The Court held that emergency medical treatment must be provided in the following circumstances:[111] (i) there must be a sudden or unexpected event or catastrophe; (ii) this event must be of a passing nature and not continuous;[112] (iii) the event must lead to a person requiring medical attention or treatment; (iv) to the extent such treatment is necessary and available, it must be provided.[113] Section 27(3) is therefore included in the Constitution to ensure that

> [a] person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.[114]

It is submitted that one of the important consequences of the decision is that no one who satisfies the court's criteria can be refused treatment. In light of the split between private and public health care in South Africa, this arguably places an obligation on private health-care providers to offer emergency medical treatment to individuals even if they lack health insurance.[115] However, the de facto situation in South Africa is a far cry from the norm established in the *Soobramoney*-decision:

According to numerous accounts, migrants find it hard to access health services and facilities, even for emergency cases. They may be faced with medical staff who keep them waiting for abnormal lengths of time, provide them with exams and treatment which are below the minimum standards, verbally abuse them, treat them with little sensitivity and attention to their pain or specific conditions, have them pay outpatient fees, or deny them access to hospitals either straightforwardly or on the claim that they do not have adequate documentation.[116]

However, section 27 is not the only provision dealing with a right concerning health. Section 28(1)(c) of the Constitution provides that children have the right to 'basic health care services' as well as to basic nutrition, shelter and social services.[117] Unlike the right to health care services in section 27(1)(a), this right is not subject to the internal limitations of 'progressive realisation' and 'available resources.' The section reinforces the notion contained in international and regional instruments that children are a particularly vulnerable group, and thus require differential treatment. Section 28(1), however, must be read in context. Subsection (b) ensures that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. This means that the parents or the family of a child have primary responsibility for providing health care (and nutrition and shelter) to their children. Only if they are unable to do so, the child can turn to the state for support.[118] This means that if a parent can afford medicine and other components of health care, then it is her/his duty to provide them.[119] This position is in line with the manner in which the United Nation's Committee on the

109 See sections 27(1) and 27(2) of the Constitution.

110 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

111 This summary is taken from David Bilchitz 'Health' in S Woolman (ed) *Constitutional Law of South Africa* (2005), 56A-17.

112 In *Soobramoney*, the Court excluded renal dialysis from the definition of 'emergency medical treatment', stating that the term is not meant to cover ongoing treatment for chronic illnesses for the purpose of prolonging life. See *Soobramoney* above n 110, para 13.

113 *Soobramoney* ibid paras 18-21, 39, 51.

114 *Soobramoney* ibid para 20.

115 David Bilchitz 'Health' in S Woolman (ed) *Constitutional Law of South Africa* (2005), 56A-18.

116 International Federation for Human Rights *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* above n40, 6. Also see the studies referred to in Migrant Health Forum *Challenges to the Successful Implementation of Policy to Protect the Right of Access to Health for all in South Africa* (Report, 3 June 2008) 6.

117 The latter rights will be dealt with separately, *infra.*

118 *Minister of Health and others v. Treatment Action Campaign and Others* 2002 (10) BCLR 1075 para 79.

119 Ibid para 76.

Rights of the Child (UNCRC) has interpreted the Convention on the Rights of the Child, namely that the state is placed under an obligation to provide for children whose parents are unable to do so.[120] The Council of Europe urges its member states to extend health care to certain vulnerable groups of irregular groups, including children, on equal terms with national children.[121] Reference has already been made to the finding of the European Committee of Social Rights in *International Federation of Human Rights League v. France*,[122] in which the Committee determined that in light of the fact that medical care is a prerequisite to the preservation of human dignity, any legislation or practice denying such treatment to a particularly vulnerable group of persons, such as children – even if those children are unlawfully present there – cannot be justified under the European Charter.

To summarise: it is clear that emergency health care (as defined in *Soobramoney*) is (or should be) available to irregular migrants. In respect of health care services to (irregular) children, the position seems to be that although the parent is the primary provider of health care, the state must step in when the parent is unable to provide fully for the needs of the child. It has been argued that despite the absence of the familiar internal limitations of 'progressive realisation' and 'available resources', all the socio-economic rights contained in section 28 should be read in the light of other socio-economic rights and thus subject to the same limitations.[123] This means that in the absence of parental provision, health care should be extended to (irregular) children subject to all the requirements of progressive realisation and available resources. In *Treatment Action Campaign (TAC)*, the Constitutional Court held that the failure of the government to provide universal access to anti-retroviral therapy in the public health sector to prevent mother-to-child transmissions of HIV constituted a breach of section 27 of the Constitution (the right of access to health care). However, the Court also indicated, albeit implicitly, that it would have reached the same conclusion had the matter been determined according to the state's obligation under section 28 of the Constitution. In the court's view, the provision of Nevirapine to prevent transmission of HIV could be considered 'essential' to the child.[124] The needs of the children, the Court stated, were 'most urgent'.[125] The cost of the treatment was patently within the means of the state as the budget for HIV/AIDS had been substantially augmented.[126] In this regard, General Comment No 14 of the Committee on Economic, Social and Cultural Rights (CESCR) is instructive. It establishes a set of core obligations in respect of the right to health, and provides, inter alia, that states should 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.'[127] This Comment treats core obligations as strict non-derogable obligations, emphasising that a state 'cannot, under any circumstances whatsoever, justify its non-compliance with core obligations'.[128] Thus, a state cannot attribute failure to comply with a lack of resources.[129]

V. EDUCATION

The right to education is entrenched at both the international and regional level as a fundamental human right.[130] At a minimum, these instruments stress that access to primary or elementary education should be free to all children without any distinction whatsoever.[131] The Convention on

120 See Adrian Friedman and Angelo Pantazis 'Children's Rights' in S Woolman (ed) *Constitutional Law of South Africa* (2004) 47-11.

121 See Resolution 1509 (2006) of 27 June 2006 (18th Sitting), para 13.2.

122 Above n72..

123 See Adrian Friedman and Angelo Pantazis 'Children's Rights' in S Woolman (ed) *Constitutional Law of South Africa* (2004) 47-13.

124 *Minister of Health and others v. Treatment Action Campaign and Others* above n118, Para 78.

125 Ibid.

126 Ibid para 120.

127 *The Right to the Highest Attainable Standard of Health* above n104, para 43.

128 Ibid, para 47.

129 See Charles Ngwena and Rebecca Cook 'Rights Concerning Health' in Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2005) 107, 117.

130 For a list see Faranaaz Veriava and Fons Coomans 'The Right to Education' in Danie Brand and Christof Heyns (eds) ibid 57, 58.

131 For example, see UDHR, Article 26; ICESCR, Article 13; UN Convention on the Rights of the Child (20 November 1989; UN Doc. A/RES/44/25) Articles 2 and 28(1)(a); UNESCO Convention against Discrimination in Education (14 December 1960; 429 UNTS 93), Article 4(a); UN Convention on Migrant Workers, Article 30.

the Rights of the Child calls upon States Parties to 'recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all…'.[132] It further provides that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's … status', which would include unlawful status.[133] South Africa has ratified this Convention.[134] Article 13 ICESCR stipulates that the right to education is to be enjoyed by 'everyone'. There are no qualifications preventing non-nationals from benefiting from this right.[135] In its General Comment on the right to education, the ESC Committee confirms that 'the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of their legal status*'.[136] Although mainly concerned with civil and political rights, the European Convention on Human Rights (ECHR), as noted in part 3 above, also provides for a right to education. The first sentence of Article 2 of the First Protocol to the ECHR stipulates unequivocally that '[n]o person shall be denied the right to education'. When read in conjunction with Article 14 ECHR (the non-discrimination clause), this provision clearly applies on a non-discriminatory basis to both nationals and non-nationals who are within the territory of a contracting party unless there is an objective and reasonable justification for the differential treatment. The Council of Europe's position is reflected in the resolution recently adopted on the position of irregular migrants:

All children have a right to education extending to primary school level and also to secondary school level in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved.[137]

In South Africa, section 29(1)(a) of the Constitution provides that '(e)veryone has the right to a basic education…'. The obligations engendered by this section are distinguishable from the other socio-economic rights in the Constitution. As we have seen, the rights to social security and health care services, for example, are qualified to the extent that they are made subject to 'progressive realisation' and 'available resources'. 'The right to basic education … is by contrast unqualified and is therefore an absolute right'.[138] As Woolman and Bishop write, '(b)asic education is not a good that can be made gradually available to more people "over time"', nor is it 'contingent on the availability of resources'.[139] This is confirmed by Veriava and Coomans:

> From a textual reading of section 29(1)(a), when compared to these other socio-economic rights in the Constitution, the unqualified and absolute nature of the right to basic education requires a standard of review higher than that used in respect of the qualified rights to determine the extent of the state's obligations in respect of the right to basic education. It is submitted that the state implement measures to give effect to the right as a matter of absolute priority.[140]

For purposes of determining the extent of the protection afforded by section 29(1)(a), the meaning of the terms 'everyone' and 'basic education' have to be examined. In *Minister of Home Affairs v Watchenuka & Another*,[141] the Supreme Court of Appeal (SCA) extended the meaning of 'everyone' to include asylum seekers. *In casu*, the Court struck down regulations which prohibited asylum seekers from studying in South Africa. The SCA held that it could never be reasonable or justifiable to deny education to a child lawfully in the country to seek asylum. The

132 Art 28.
133 See art 2(1). Also see UNCHR Report 33-34.
134 On 16 June 1995 (without entering any reservations).
135 In this regard, see also Article 3(e) UNESCO Convention against Discrimination in Education, which explicitly requires states parties '[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals'.
136 UN, ESCOR, ESC Committee, 21st Session, *General Comment No. 13, The right to education (Art. 13),* UN Doc. E/C.12/1999/10 (1999), para 34 (emphasis added).
137 Para 13.6.
138 See Faranaaz Veriava and Fons Coomans 'The Right to Education' above n130, 62.
139 Stu Woolman & Michael Bishop 'Education' in S Woolman (ed) *Constitutional Law of South Africa* (2007) 57-10.
140 See Faranaaz Veriava and Fons Coomans 'The Right to Education' above n130, 63.
141 2004 (4) SA 326 (SCA).

general prohibition on study by asylum-seekers was therefore an unjustifiable limitation on section 29(1).[142] In addition, Article 27(g) of the Refugees Act[143] also extends the right to refugee children. It provides that refugees as well as refugee children are 'entitled to the same … basic primary education which the inhabitants of the Republic receive from time to time'. In light of the *Khosa* decision, 'everyone' will arguably also include permanent residents. However, two prominent academic commentators on the right to education have argued that 'everyone' in section 29(1)(a) should be extended to every child in this country, irrespective of status. Woolman and Bishop write that 'everyone' means exactly that, namely that the guarantees contained in section 29(1)(a) 'are not limited [to] citizens or even permanent residents'.[144] It is important to reiterate, they argue, 'that there will seldom, if ever, be a reason to refuse a child access to education, even if she is only in the country temporarily'. This means that children in an irregular situation should also benefit from a right to basic education in South Africa. However, this view is directly contradicted by the provisions of the Immigration Act, which provides in section 39 (1) that '(n)o learning institution shall knowingly provide training or instruction to an *illegal foreigner*' or 'a *foreigner* whose status does not authorise him or her to receive such training or instruction by such person' [original emphasis]. In addition, section 42 (1) provides that '… no person, shall aid, abet, assist, enable or in any manner help an *illegal foreigner* … [by] providing instruction or training to him or her, or allowing him or her to receive instruction or training' [original emphasis]. It is submitted that in light of the arguments presented above, and in light of South Africa's international obligations under the Convention on the Rights of the Child, these provisions are extremely vulnerable to Constitutional challenge.

The question that still needs to be answered is what exactly 'basic education' entails. The meaning of 'basic education' has yet to be determined by South African courts. However, the consensus among academic commentators is that it must include both essential learning tools such as literacy, oral expression, numeracy, problem-solving skills and basic learning content such as knowledge, skills, values and attitudes.[145] This means that what constitutes basic education in the South African context cannot be arbitrarily defined in terms of age or the completion of a particular level of schooling but should be determined in accordance with the educational interest to be achieved by the guarantee of the right. The meaning 'should therefore be wider than that of only primary education, or compulsory education in terms of the South African Schools Act … and should include secondary education, without which an individual's access to the full enjoyment of other rights … would be severely limited.'[146] Such a purposive understanding of the term is also in line with position adopted by the Council of Europe, which extends the right to both primary and secondary education to children in an irregular situation.

However, as is the case in respect of the provision of health care, the de facto situation in respect of the provision of basic education to non-citizens in South Africa differ markedly from the norms established by international law as well as the relevant Constitutional provision. Various reports indicate that school principals are increasingly requiring birth certificates before registering children for school, which essentially deny children born to irregular migrants their right to a basic education. Those who have managed to attend school without a birth certificate are then excluded from writing the senior certificate (matric) exam, for which a birth certificate is a requirement.[147] Another barrier relates to the de facto requirement that migrants pay school fees, which contradicts the South African Schools Act's prohibition on refusing admission to schools based on the parents' inability to pay.[148]

142 Section 19 of the South African Schools Act explicitly states that the Act applies equally to learners who are not citizens of South Africa or whose parents hold temporary or permanent residence permits.

143 130 of 1998.

144 See Stu Woolman & Michael Bishop 'Education' in S Woolman (ed) *Constitutional Law of South Africa* (2007) 57-22.

145 See Faranaaz Veriava and Fons Coomans 'The Right to Education' above n130, 63.

146 Ibid. In terms of section 3(1) of the Schools Act, it is compulsory for a learner to attend school from the age of seven until the age of fifteen or of the ninth grade, whichever comes first. Also see Stu Woolman & Michael Bishop 'Education' in S Woolman (ed) *Constitutional Law of South Africa* (2007) 57-18.

147 See Tara Polzer 'Identity Documents and Service Provision in Border Areas – Facilitating Local Development' Discussion Brief: National Department of Home Affairs (University of Witwatersrand, Forced Migration Studies Programme, (June 2007) 15.

148 Section 5(3)(a) provides that 'no child may be prevented from going to school because their fees cannot be paid'. See Loren B. Landau 'Decentralization, Migration, and Development in South Africa's Primary Cities' in Aurelia

It was mentioned earlier that the right to a basic education contained in section 29(1)(a) of the Constitution is not conditional upon the availability of resources (as is the case in respect of other socio-economic rights such as access to health and social security discussed above). However, this does not preclude the State from raising resource constraints under section 36 of the Constitution in order to justify a limitation of the right to a basic education.[149] This means that the often-heard argument that the existing educational infrastructure cannot incorporate the 'flood'[150] of foreign children should they be granted access to schools may very well make its appearance in Court as part of the State's justification-argument. If so, it needs to be pointed out that a study compiled by the Migrant Rights Monitoring Project indicates that the numbers of foreign children in the school system represent a trickle rather than a flood. According to the study, '[o]nly 15% of surveyed non-citizens had school-age children with them in South Africa. The percentage among undocumented migrants was even lower (6%)'.[151] Thus, since migrants are not evenly distributed around the country, but tend to be concentrated in certain urban areas and in the border regions, 'it is important to recognise and address the challenges for schools in those areas, but not to assume that the entire school system is overwhelmed.'[152]

VI. THE IMMIGRATION ACT AND CROSS-BORDER TRADERS.

National and regional economic policy initiatives, particularly the SADC Free Trade Protocol, indicate that South Africa (along with other countries in the region) view regional trade as part of the solution to the region's economic problems and a tool to promote regional integration and development as well as to alleviate poverty. Yet, as Peberdy points out, current trade policies have paid little attention to the activities of small entrepreneurs (who are primarily women) who are involved in what is called informal cross-border trade and who are also part of the movement of goods and capital through the region.[153] These traders primarily consist of two categories: In the first place, the most numerous traders are those:

> who travel to South Africa for short periods (1-4 days) to buy goods (usually from formal sector retail and wholesale outlets and farms) to take back to their home country to sell. These goods are sold in markets, on the street, and to formal sector retail outlets and to individuals.

In the second place, they include:

> traders who travel to South Africa for longer periods (1week to 2 months) who carry goods to sell in informal and retail markets. The profits are then invested in buying goods which are then taken back to their home countries for sale in informal and formal sector markets.[154]

Studies indicate that cross border traders represent a significant part of regional migrants to South Africa.[155]

Wa Kabwe-Segatti and Loren Landau (eds) *Migration in Post-Apartheid South Africa: Challenges and Questions to Policy-Makers* (Agence Française de Développement, 2008) 163, 189.

149 Stu Woolman & Michael Bishop 'Education' in S Woolman (ed) *Constitutional Law of South Africa* (2007) 57-14.

150 See Jonathan Crush, Vincent Williams and Sally Peberdy, *Migration in Southern Africa*: *A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration* (Global Commission on International Migration, 2005) 12.

151 The study is referred to in CoRMSA *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* above n68, 45.

152 Ibid. 46

153 See Sally Peberdy, *Hurdles to Trade? South Africa's immigration Policy and Informal Sector Cross-border Traders in the SADC* (paper presented at SAMP[Southern African Migration Project]/LHR[Lawyers for Human Rights]/HSRC[Human Sciences Research Council] workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002) 35.

154 Ibid36.

155 'According to a recent study by the Southern African Migration Project conducted at major border posts with all South African neighbours except Namibia and Botswana, "of the 6 millions border crossings in a year, 30-50% are by small–scale traders"', (reported in 'Immigration: What it's Doing to South Africa', *Financial Mail* (Johannesburg), 16 February 2007, 36.

However, to many cross-border traders, the eligibility barriers to enter South Africa seem insurmountable, and have encouraged irregular entry into South Africa.[156] While the Immigration Act introduced cross-border permits which allow multiple entries for 'a *foreigner* who is a *citizen* of a *prescribed foreign country* with which the *Republic* shares a *border …'* [original emphasis][157] these permits do not authorise the holders of such permits to trade.[158] 'Besides, while the 2002 Immigration Act established that these permits could be granted even to people who did not hold a passport but were registered with the DHA [Department of Home Affairs], this possibility has been removed by the 2004 amendment of the Act'.[159] Technically, these cross-border permits do not allow cross-border traders to participate in street trade in South Africa, which leaves them vulnerable to arrest by police and Home Affairs officials. More often it seems it leaves them vulnerable to corrupt officials who elicit bribes rather than arrest them.[160] This inappropriate permit regime relating to informal cross-border trade necessitates an urgent response from the authorities in South Africa. At the moment, 'no country in the region has a specific visa which allows cross-border traders to cross legally but with access to markets'. However, as Peberby points out,

> certain countries have instituted formal and informal bi-lateral agreements which allow traders to move more freely across certain borders at certain times (and even on certain days). However, these are not uniformly applied and often only affect local cross-border traders and specific border posts.[161]

It is submitted that – at a minimum – the introduction of a specific permit that would make allowance for this important form of migration should be investigated in order to remove the conditions that currently engender corruption and encourage irregular migration.

VII. DETENTION AND DEPORTATION OF FOREIGN UNACCOMPANIED CHILDREN FROM SOUTH AFRICA

The political and economic instability in countries in the Southern African region – in particular in Zimbabwe – has led to a significant increase in the number of unaccompanied foreign children entering South Africa.[162] A recent study conducted by the Forced Migration Studies Programme in border towns such as Musina and Komatipoort and urban centres like Johannesburg 'indicates that children as young as seven years old are migrating alone, primarily from neighbouring countries such as Zimbabwe, Mozambique and Lesotho'.[163] These children are often exploited, suffering at both the hands of smugglers (whom they have to bribe to cross the border) and, once in South Africa, at the hands of South African police, who often treat unaccompanied foreign children like adults by detaining them alongside adult irregular migrants at repatriation centres; or who simply drop them off 'at the borders of Mozambique, Zimbabwe and other countries without [any] attempts to reunite these children with their families or to reintegrate them into society'.[164]

However, in 2004, The Pretoria High Court (as it was then known) held that the legal protections applicable to South African children, contained in both the Constitution and the Child Care Act of 1983, apply equally to unaccompanied foreign children present within South Africa's borders. In the so-called *Lindela* case,[165] the High Court held that unaccompanied foreign

156 Olivier *Social Protection for Non-Citizens* 100.

157 Section 24.

158 International Federation for Human Rights *Surplus People?* above n40, 19.

159 Ibid. This impacts negatively on many citizens of neighbouring countries (in particular Zimbabweans) who are not in possession of passports and who are unable to obtain one expeditiously from their various home-administrations.

160 Sally Peberdy, *Hurdles to trade? South Africa's immigration policy and informal sector cross-border traders in the SADC* above n153, 43.

161 Ibid, 45-46.

162 CoRMSA *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* above n68, 62. Research conducted by the International Federation of Human Rights revealed that 900 unaccompanied children entered South Africa at Beitbridge border post (between South Africa and Zimbabwe) in 2006 and that 400 did so during the first two months of 2007. See International Federation for Human Rights *Surplus People* above n40, 12.

163 Ibid.

164 CoRMSA *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* above n68, 21, 62; International Federation for Human Rights *Surplus People?* above n40, 24.

165 *Centre for Child Law & Another (Lawyers for Human Rights) v Minister of Home Affairs & Others* above n76.

children should be treated *as children in need of care* in terms of the formal child protection system as opposed to being processed through the immigration system. Thus, whenever a foreign child is found in need of care, such child must be placed in a place of safety, his or her personal circumstances investigated by a social worker and a Children's Court inquiry opened, conducted and finalized. This is the same procedure that applies to South African children. As Olivier points out, this particular and, until now, unusual remedy in the South African constitutional context clearly illustrates the need for an intersectoral and integrated national policy framework on the treatment of unaccompanied foreign children in South Africa.[166] Unfortunately, there still appears to be no proper government policy or procedure providing for the lawful and dignified deportation of children from South Africa.[167] In this regard, the South African government would do well to heed the words of a select committee of the British House of Lords:

> Governments need to manage migration in a way that controls illegal immigration effectively. But in doing so they must not forget that they are dealing with people, most of whom are motivated simply by a better life for themselves and their families, and in devising measures to control illegal immigration they must ensure that they scrupulously observe their human rights obligations.[168]

VIII. CONCLUDING REMARKS

Around the world, irregular migrants are often excluded from basic social rights. Exclusionary laws and policies often rest upon and convey the idea that irregular migrants themselves are primarily responsible for their precarious situation.[169] However, such policies tend to overlook national and international macro-economic factors that give rise to irregular migration such as demand for cheap and flexible workforce within 'black markets' of host countries combined with the extreme poverty in the countries of origin.[170] These factors certainly characterise irregular migration in the SADC region. Evidence suggests that there is a synergy in the region between dire economic circumstances in the migrant-sending countries and high demand for the cheap and easily disposed of labour that undocumented migrants can offer in certain sectors of the economy of the migrant receiving countries.[171]

Few would go so far as to argue that irregular migrants should enjoy the full range of socio-economic rights extended to regular migrants, or that there should be no distinctions drawn between these two groups. Host states have a sovereign right to devise their immigration policies and control immigration within their borders, and to differentiate between those who entered the host state in an irregular fashion or whose sojourn in the host state is tainted with irregularity, and those whose status is regular. However, as indicated earlier, developments at the international and the regional level, as well as legal and policy developments in a number of individual countries around the world, indicate that we may begin to see a movement away from an approach that focuses exclusively on the security aspects of irregular migration (i.e. on measures to combat irregular migration) to a more nuanced approach that also places significant emphasis on the human rights of irregular migrants. Consensus is beginning to emerge that irregular migrants are entitled to certain minimum rights in the migrant receiving country. It is hoped that the specific recommendations made in this paper will go some way towards making those core rights a reality in South Africa.

166 Marius Olivier, 'Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)' (Report commissioned by the World Bank, 2009) 68.

167 CoRMSA *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* above n68, 21.

168 Select Committee on the European Union, *A Common Policy on Illegal Migration*, House of Lords Paper No 187, Session 2001-02 (2002) 17.

169 See Sylvie Da Lomba 'Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England' above n105, 365.

170 Ibid.

171 Alice Bloch 'Gaps in Protection: Undocumented Zimbabwean Migrants in South Africa' Migration Studies Working Paper Series No. 38, (University of the Witwatersrand Forced Migration Studies Programme July 2008) 8.