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Uganda's State Responsibility under International Law to Safeguard Refugee Children's Right to  
Access Education.

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## **DEDICATION**

I dedicate this dissertation to all refugee children of all nations especially those in rural refugee settlements in Uganda for their endurance and determination to get education. The completion of this dissertation and subsequent award of the qualification is a testament of such determination in the face of adversity. As a simple refugee boy who grew up in Oruchinga Refugee Camp in rural Isingiro District, Uganda, achieving such a milestone of long journey – a journey of life transformation is a true manifestation of potentials many refugee children possess but to harness them is subject to the provision of education rights.

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## **ABSTRACT**

Uganda is Africa's largest refugee hosting country and third in the world with more than 1.25 million refugees as of June 2017. The majority of refugees there are children. Uganda's refugee regime and hospitality date back to the days of World War II, prior to the country's independence, when it hosted refugees from European countries. Since then, the country has generously continued to open its borders to anyone seeking international protection and assistance mainly from the conflict affected countries in the East, Horn and Great Lakes Region of Africa. In compliance with the 1951 UN Convention and its 1976 Protocol Relating to the Status of Refugees and the OAU 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, Uganda enacted the Refugees Act No.21 of 2006 and the Regulations Act of 2010 to effectively manage refugee needs. The increase in the number of refugees in Uganda amidst the limited resources at its disposal poses serious challenges in meeting its international obligation to safeguard the rights of refugee children's access to education.

This thesis examines the country's responsibility under international law to protect, promote and fulfil the right to access education for refugee children, particularly aimed at understanding the challenges of provision of education to strengthen multi-level response. Research finds international and regional instruments sufficient for the protection and guarantee of education for children. However, the main refugee treaties fail to adequately provide the right to education for refugee children. The UN Convention Relating to the Status of Refugees has provision for education rights but makes no reference to refugee children while the OAU 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa provides neither the right to education nor rights to children specifically.

The analysis of Uganda's policy and laws on safeguarding refugee children's right to education revealed glaring shortfalls. The laws fail to provide adequate protection to refugee children's education rights. Notwithstanding the existence of an enabling legal and policy framework in Uganda that ensures access to education for nationals, refugee children continue to face legal and structural barriers in accessing post-primary education. The paper shows that both international and national laws guaranteeing the right to education for refugees limits the extent to which it is exercised. At national level, this is not only discriminatory but also inconsistent with the provisions of the Constitution of Uganda relating to education and child rights.

## **ACRONYMS**

ACHPR - African Charter on Human and Peoples' Rights

CEDAW - Convention on Elimination of All Forms of Discrimination Against Women

CESCR - Committee on Economic, Social and Cultural Rights

CoA - Country of Asylum

CRC - Convention on the Rights of the Child

DRC – Democratic Republic of Congo

USh – Uganda Shilling

EFA - Education for All

EXCOM- Executive Committee of the UNHCR

GoK – Government of Kenya

GoU - Government of Uganda

ICCPR- International Covenant on Civil and Political Rights

ICESCR -International Covenant on Economic, Social and Cultural Rights

IDPs - Internally Displaced Persons

IHRDA - Institute for Human Rights and Development in Africa

MDGs -Millennium Development Goals

NDP -National Development Plan

NGO – Non-Governmental Organisation

OAU - Organisation of the African Unity

OAU Charter - The Charter of the Organisation of the African Unity

OPM - Office of the Prime Minister

PTA -Parents and Teachers Association

SDGs - Sustainable Development Goals

STA -Settlement Transformative Agenda

UDHR - Universal Declaration of Human rights

UN - United Nations

UNEBC - Uganda National Examinations Board

UNESCO - United Nations Educational, Scientific and Cultural Organization

UNHCR - United Nations High Commissioner for Refugees

UNICEF – United Nations Children's Fund

UPE -Universal Primary Education

USE –Universal Secondary Education

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## CHAPTER ONE

### 1.0 Introduction

#### 1.1 Background

According to the United Nations High Commissioner for Refugees (UNHCR), the number of forcibly uprooted persons worldwide had risen to 65.6 million by the end of 2016.<sup>1</sup> Of these, 22.5 million individuals were refugees, 40.3 million were Internally Displaced Persons (IDPs) and 2.8 million were asylum seekers.<sup>2</sup> This massive increase in the number of forcibly displaced was as a result of persistent persecution, violent conflict, and generalised violence or human rights violations.<sup>3</sup> More than half of all displaced persons are children below the age of 18, including 75,000 unaccompanied or separated children.<sup>4</sup> Eighty four per cent of the world's refugee population under UNHCR mandate is hosted in developing countries.<sup>5</sup> In addition, UNHCR 2015 statistics revealed that, on average, refugees are spending more than 20 years in exile,<sup>6</sup> which is a substantial period of time considering that children constitute more than half of the refugee population globally. The 20 years' period accounts for the entirety of one's childhood which is a substantial portion of an individual's productive years.

To put this into perspective; according to UNHCR, about 50 per cent of refugee children attend primary school, only 25 per cent have access to secondary education, and only one per cent of refugees under UNHCR mandate are enrolled for higher education.<sup>7</sup> Quality education is vital because helps refugees regain their dignity and build hope for the bright future; it minimises level of risk and vulnerability of being victims of abuses and exploitation.<sup>8</sup> Quality education must be child-centred, child-friendly, empowering and include development of personality and talents

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2016' 21 June 2017 at 5 available at <http://www.refworld.org/docid/594aa38e0.html>, accessed on 29 July 2017.

<sup>2</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2016' op cit note 1 at 2.

<sup>3</sup> Ibid at 6-7.

<sup>4</sup> Ibid at 2.

<sup>5</sup> Ibid.

<sup>6</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2015' 20 June 2016 at 20.

<sup>7</sup> UN High Commissioner for Refugees (UNHCR) 'Missing out: refugee education in crisis' September 2016 at 8-11, 20-21 & 30-31.

<sup>8</sup> CRC Art 29 provides that education shall aim at developing the child's personality, talents, mental and physical abilities to the fullest extent and to prepare his or her active adult life in a society.

beyond school.<sup>9</sup> Education further provides refugees with life skills for self-reliance as well as holistic childhood development. Refugee children's power and ability to claim and enjoy the rights of an informed and responsible citizen and to transform their societies depend squarely on their access to quality education that encourages their participation and critical thinking taught with values of peace and human dignity.

UNHCR's Annual Global Trends report shows that Uganda was home to 477,200 refugees in 2015, which increased to 940,800 by the end of 2016.<sup>10</sup> This number has continued to rise as a result of political uproar in Burundi and civil war in the northern neighbouring South Sudan. As of May 21, 2017, Uganda was hosting more than 1.25 million refugees, of which 75 per cent are from South Sudan,<sup>11</sup> and 60 per cent are children.<sup>12</sup> Most of the other refugees are from Democratic Republic of Congo, Burundi, Somalia, Sudan, Rwanda, Ethiopia and Eritrea among others.<sup>13</sup>

The high number of refugee children in Uganda shows that there is a need to guarantee them basic rights. Among these is the right to education,<sup>14</sup> particularly because some of them spend their entire childhood as refugees. As a result, some international treaties specifically provide for refugee children's right to education.<sup>15</sup> It can also be construed that all these conventions, by virtue of the requirement of non-discrimination on the basis of nationality, guarantee refugee children the right to education just like other children.<sup>16</sup>

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<sup>9</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education* 17 April 2001, CRC/GC/2001/1 at para 2.

<sup>10</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2016' op cit note 1 at 15.

<sup>11</sup> Uganda: Emergency update on South Sudan situation for inter-agency weekly May 15-21, 2017 available at <http://reliefweb.int/report/uganda/uganda-emergency-update-south-sudan-refugee-situation-inter-agency-weekly-15-21-may>, accessed on 1 June 2017.

<sup>12</sup> A child is defined by the UN Convention on the Rights of the Child and the Constitution of Uganda as any person below the age of eighteen years.

<sup>13</sup> The Office of Prime Minister, Department of Refugees 'Uganda's statistics package April 2017: refugees and asylum seekers in Uganda by country of origin and location' at 2 available at <https://ugandarefugees.org/category/policy-and-management/refugee-statistics/?r=48>, accessed on 4 June 2017.

<sup>14</sup> UN High Commissioner for Refugees (UNHCR) op cit note 6 at 2.

<sup>15</sup> CRC Art 18 provides for the enjoyment of all rights guaranteed to every child within the State's jurisdiction without discrimination of any kind including on the basis of nationality, among other grounds. The African Children's Charter, Art 23 provides direct protection of refugee children. Refugee Children are entitled to 'receive appropriate protection and humanitarian assistance to enjoy enshrined rights and in other international human rights treaties to which the States are Parties.'

<sup>16</sup> Any kind of discrimination is prohibited under CRC Art 2(1); African Children's Charter Art 3 and ACHPR Art 18(1).

The evolution of the protection of children's rights phenomenon can be traced back during the formation of League of Nations.<sup>17</sup> Under that organisation's framework, the Committee for the Protection of Children was formed in 1919. Subsequently, in 1924, the League adopted the first international treaty concerning child rights, the Geneva Declaration of the Rights of the Child.<sup>18</sup> Later, in 1947, the UN Children's Emergency Fund<sup>19</sup> (currently the UNICEF) was created to respond to thousands of children that were affected by World War II in Europe. As a result of attaining the status of a permanent international organisation in 1953, UNICEF's mandate was expanded to developing countries through several crosscutting programmes in education, health, water, and food.<sup>20</sup>

The adoption of the Declaration of the Rights of the Child by the UN General Assembly in 1959 was another milestone for child rights that paved the way for the establishment of an international legally binding treaty for the protection of children's rights.<sup>21</sup> Thirty years later, in 1989, the Convention on the Rights of the Child was unanimously passed by the UN General Assembly.<sup>22</sup> The adoption of Resolution 44/25 by the UN General Assembly followed the creation of a working group within the Human Rights Commission under the Economic and Social Council in 1979 to draft the Convention on the Rights of the Child. The 1989 CRC remains a landmark for the rights of children. It enshrines the economic, social and cultural rights of children. The CRC has since become an internationally binding treaty after its entry into force on September 2, 1990. Subsequently, the Organisation of African Unity adopted its continental charter, the African Charter on the Rights and Welfare of the Child July 1990.

Refugee children are forced to flee from their country of origin and by virtue of the suddenness of their flight, in most scenarios, they become traumatised and some are without accompanying adults. Fortunately, in Uganda, the majority of them are granted refugee status on the *prima facie*

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<sup>17</sup> The League of Nations was formed in 1924 by the Havana Charter. This institution was subsequently replaced by the United Nations (UN) in 1945.

<sup>18</sup> League of Nations 'Geneva Declaration of the Rights of the Child Adopted 26 September 1924' available at <http://www.un-documents.net/gdrc1924.htm>, accessed on April 17, 2017.

<sup>19</sup> UN General Assembly establishment of an International Children's Emergency Fund on December 11, 1946.

<sup>20</sup> See UNICEF 'Annual report 2015' at 13.

<sup>21</sup> United Nations General Assembly, *Resolution 1386 (XIV) of November 20, 1959 (Declaration on the Rights of the Child)*. This declaration marked the first major international consensus on the fundamental principles of children's rights.

<sup>22</sup> United Nations General Assembly, *Resolution 44/25 on the Convention on the Rights of the Child*, 20 November 1989

basis by virtue that they are coming from the conflict-prone neighbouring countries of Democratic Republic of Congo and South Sudan – so they are not subjected to individual status determinations.<sup>23</sup>

Uganda is a signatory to numerous international and regional treaties that bind her to protect, promote and fulfil the enshrined legal provisions of human rights for refugees. Uganda is a Party to the 1951 UN Convention Relating to the Status of Refugees<sup>24</sup> and its succeeding 1967 Protocol<sup>25</sup> and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>26</sup> which all together form the international refugee law. Uganda has similarly ratified other international instruments namely: the 1948 UN Universal Declaration of Human rights (UDHR);<sup>27</sup> the 1960 UN Educational, Scientific and Cultural Organisation (UNESCO); the Convention Against Discrimination in Education;<sup>28</sup> the 1966 UN International Covenant on Civil and Political Rights (ICCPR);<sup>29</sup> the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>30</sup> the 1989 UN Convention on the Rights of the Child (CRC);<sup>31</sup> the 1979 UN

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<sup>23</sup> All asylum seekers of South Sudanese, Burundi and Congolese origin are granted refugee status by the government of Uganda upon their entry and declaring of the intension to seek international protection in Uganda. See <http://reporting.unhcr.org/node/5129>, accessed on June 1, 2017.

<sup>24</sup> UN General Assembly ‘Convention Relating to the Status of Refugees (hereafter refugee Convention), 28 July 1951’ United Nations, Treaty Series, vol. 189 at 137. It entered into force on 22 April 1954. The Republic of Uganda ratified the Refugees Convention on 27 September 1976.

<sup>25</sup> UN General Assembly ‘Protocol Relating to the Status of Refugees 31 January 1967 United Nations, Treaty Series, vol. 606 at 267. It entered into force on 4 October 1967. The Republic of Uganda ratified the Protocol on 27 September 1976.

<sup>26</sup> Organisation of African Unity (OAU), ‘Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention")’ 10 September 1969, 1001 U.N.T.S. 45. It entered into force on 20 June 1974. The Republic of Uganda Ratified the OAU Refugee Convention on 24 July 1987.

<sup>27</sup> UN General Assembly, ‘Universal Declaration of Human Rights (UNDHR)’ 10 December 1948 217 A (III). Entered into force on 22 May 1962.

<sup>28</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), ‘Convention against Discrimination in Education’ 14 December 1960 available at <http://www.refworld.org/docid/3ae6b3880.html>, accessed on 1 June 2017).

<sup>29</sup> UN General Assembly, ‘International Covenant on Civil and Political Rights’ 16 December 1966 United Nations, Treaty Series, vol. 999 at 171. Entered into force on 23 March 1976. The Republic of Uganda ratified ICCPR on 21 September 1995

<sup>30</sup> UN General Assembly, ‘International Covenant on Economic, Social and Cultural Rights (Hereafter ICESCR)’ 16 December 1966 United Nations Treaty Series vol. 993 at 3. Entered into force on 3 January 1976. The Republic of Uganda ratified the ICESCR on 21 April 1987.

<sup>31</sup> UN General Assembly, ‘Convention on the Rights of the Child (hereafter CRC)’ 20 November 1989 United Nations, Treaty Series, vol. 1577 at 3. Entered into force on 2 September 1990. The Republic of Uganda ratified CRC on 16 September 1990.

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>32</sup> and the 2006 UN Convention on the Rights of Persons with Disabilities.<sup>33</sup>

In addition to these international instruments, Uganda has signed and ratified a number of regional human rights treaties. These include the 1981 African Charter on Human and Peoples' Rights (ACHPR),<sup>34</sup> the 1990 African Charter on Rights and Welfare of the Child (African Children's Charter),<sup>35</sup> and the 2003 Protocol to the ACHPR on the Rights of Women in Africa (the Maputo Protocol).<sup>36</sup>

In an effort to enhance the effective compliance with the above willingly adopted binding human rights instruments, the country enacted the 2006 Refugee Act 21 and the Children (Amendment) Act 2016, among other domestic human rights legislations. Through the above international and regional human rights instruments, Uganda willingly accepted to protect, promote and fulfil the human rights of refugees, including children, without any kind of discrimination, provided the concerned person(s) is/are within its territorial jurisdiction.<sup>37</sup>

The Government of Uganda is praised for its generous open-door policy towards refugees.<sup>38</sup> Although there are various refugee rights guaranteed under the international, regional and national

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<sup>32</sup> UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination Against Women (hereafter CEDAW)' 18 December 1979 United Nations Treaty Series vol. 1249 at 13. Entered into force 3 September 1981. The Republic of Uganda ratified CEDAW on 21 August 1985.

<sup>33</sup> UN General Assembly, 'Convention on the Rights of Persons with Disabilities' 13 December 2006 New York USA A/RES/61/106 Annex I. Entered into force on 3 May 2008. The Republic of Uganda ratified it on 25 September 2008.

<sup>34</sup> Organisation of African Unity (OAU) 'African Charter on Human and Peoples' Rights (hereafter ACHPR)' 27 June 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Entered into force on October 2, 1986. The Republic of Uganda ratified ACHPR on 10 May 1986.

<sup>35</sup> Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* OAU Doc.CAB/LEG/24.9/49 (1990) adopted on June 27, (hereafter African Children's Charter). Entered into force on November 29, 1999. The Republic of Uganda ratified African Children's Charter on August 17, 2004.

<sup>36</sup> African Union, 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' available at <http://www.refworld.org/docid/3f4b139d4.html>, accessed on 1 June 2017) (hereafter Maputo Protocol) was adopted by the African Union on 11 July 2003 at its second summit in Maputo, Mozambique and it entered into force in November 2005, The Republic of Uganda ratified the Maputo Protocol on July 22, 2010.

<sup>37</sup> The Children (Amendment) Act, 2016 of the Republic of Uganda, Art 4(1)(j) grants children the right to be treated without discrimination of any kind on the basis of nationality and citizenship among other grounds; Art 4(1)(l) grants additional rights stated in CRC and African Children's Charter that are not specifically mentioned in the Act. The Refugees Act 21 of the Republic of Uganda, Art 32 provides specific rights to refugee children.

<sup>38</sup> The UN Secretary General commended Uganda for her transformative and integrated settlement approach. He referred the Country's refugee policy as an 'inspiration for the region and the wider world' available at <https://www.un.org/press/en/2016/sgsm18365.doc.htm>, accessed on 4 June 2017. Also see Salaiman Momoduin 'Africa most affected by refugee crisis: Ethiopia and Uganda praised for open-door policy' in Africa Renewal

legal instruments, the right to education for refugee children is vital right because it is a fundamental human right itself as well as an enabling right.<sup>39</sup> It is an essential human right for all human beings – young and old; it encourages freedom, empowerment and sustainable development.<sup>40</sup> State Parties under the umbrella of the United Nations and regional bodies agreed on the establishment of an international legal framework to promote and safeguard the right to education within the principles of equality and non-discrimination.<sup>41</sup> In principle, these instruments bind all State Parties to safeguard right to education for everyone without any form of discrimination.<sup>42</sup> Hence, discrimination of any kind on grounds of one's nationality or any other status is outlawed.

## 1.2 Problem Statement

As seen above, Uganda has both international and national obligations to guarantee the right to education for refugee children. As a result, it has a responsibility to implement these obligations and in so doing, guarantee the right to education to refugee children. However, there are challenges to the access to education by refugee children in Uganda.<sup>43</sup> Among other causes of this challenge is the fact that there is a growing number of refugees in the country amidst the limited resources the government and UNHCR dedicate towards education in the refugee settlements.<sup>44</sup> This

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December 2016-March 2017. Available at: <http://www.un.org/africarenewal/magazine/december-2016-march-2017/africa-most-affected-refugee-crisis>, accessed on 4 June 2017.

<sup>39</sup> ICESCR op cit note 30 at Art 13; UDHR op cit note 27 at Art 26; CRC op cit note 30 at Art 28 recognises right to education on basis of equality.

<sup>40</sup> Ibid.

<sup>41</sup> United Nations, *International Covenant on Economic, Social and Cultural Rights* 16 December 1966; United Nations, *Convention on the Right of the Child* 20 November 1989; United Nations *Convention on Elimination of All Forms of Discrimination against Women*, 18 December 1979; United Nations, *Convention on Elimination of All Forms of Racial Discrimination* 21 December 1965; United Nations *Convention on the Rights of Persons with Disabilities* 13 December 2006; United Nations, *International Covenant on Civil and Political Rights*, 16 December 1996 and United Nations, *Convention Relating to the Status of Refugees*, 28 July 1951; regional instruments among others include Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights (Banjul Charter)* 27 June 1987; Organisation of African Unity (OAU) *African Charter on Rights and Welfare of the Child* 11 July 1990 and African Union *African Youth Charter* 2 July 2006.

<sup>42</sup> ICESCR Art 13; CESCR *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10; CRC, *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1.

<sup>43</sup> UN High Commission on Refugees (UNHCR) December 2009 *refugee education in urban settings: case studies from Nairobi, Kampala, Amman, Damascus*. UNHCR Geneva at 20-22.

<sup>44</sup> Ibid at 20.

increases the number of refugee children seeking education services in Uganda who are at different levels of childhood development.

Further, refugee settlements in Uganda are located in rural and remote locations in the country – which further makes it challenging for educators to access the locations.<sup>45</sup> The location of these settlements also means that there is poor infrastructure support to establish schools or educational facilities. Another challenge facing refugee education in Uganda is the problem of language of instruction and communication since the language of instruction in lower levels of education in Uganda is local and English, while some refugees, like those from DRC, Burundi and South Sudan, speak different languages.<sup>46</sup>

The refugee population in Uganda is mostly female headed households, who entirely bear the financial burden of meeting daily family basic needs amidst general poverty, unemployment and high cost of living; hence prioritisation of education needs come last among their urgent needs. Despite Uganda's Universal Primary Education (UPE), parents have to pay for Primary Teachers Association (PTA) funds, uniforms, school feeding, and exam fees, among other needs for the running of school.<sup>47</sup> This is worse in cases of female child headed families and is primarily responsible for school dropouts and low enrolment rates.

This research examines these challenges in light of Uganda's State obligations under the international law, with the aim of offering recommendations on how effectively Uganda – with the support of UNHCR – can protect, promote and fulfil the right to education for refugee children in Uganda.

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<sup>45</sup> The Office of the Prime Minister, Department of Refugees 'Uganda's statistics package April 2017: map showing refugees and asylum seekers in Uganda by location. available at <https://ugandarefugees.org/category/policy-and-management/maps/?r=48> accessed on 9 June 2017.

<sup>46</sup> The majority of refugees from DRC and Burundi speak French while refugees from Sudan speak Arabic.

<sup>47</sup> UN High Commission on Refugees op cit note 43 at 20.

### **1.3 Research questions**

This paper examines Uganda's state responsibility under international and national law to safeguard refugee children's right to education with the aim of answering the following research questions:

- a. Does the Republic of Uganda have international and national law obligations to protect, promote and fulfil the right to education for refugee children?
- b. To what extent has international and national law been effective in addressing the right of refugee children to access education?
- c. What are some of the ways in which the Republic of Uganda can fully implement its international and national law obligation to protect, promote and fulfil the right to education for refugee children in Uganda?

### **1.4 Scope of the study and limitation of research**

Uganda is Africa's largest refugee-hosting country with more than 1.25 million refugees from East, Horn and Great Lakes Region of Africa. The majority of refugees in Uganda are children for whom the right to access education is of great significance in the realisation of other human rights. This paper therefore examines the fundamental right to access education for refugee children in Uganda as the country's obligation under international law. It looks at Uganda's application of international and regional laws as well as previous research findings on how the country accords education rights in the national context.

The paper focuses on the legality of the right to access education for refugee children in Uganda. It further answers questions relating to standards of education refugee children are entitled to, Uganda's state responsibility towards achieving that and in particular, the significance of the country's policies in achieving its international obligations.

Although the views of the child are one of the core principles for the international protection of the child, due to time constraints, this paper did not discuss child participation. It relies on international legal instruments that Uganda has signed and ratified, national laws and judicial decisions and scholars' literature, as well as my childhood life experiences, as a refugee child who

grew up in a refugee camp in Uganda and struggled to acquire education. I also drew on my work experience in Uganda's refugee operation in various capacities including Senior Field Monitoring Officer with responsibilities ranging from emergency response, assessing and identification of protection needs of refugees and asylum seekers to monitoring the implementation of UNHCR programmes in Arua district.

## **1.5 Significance of the study**

The refugee situation is not a new phenomenon to Uganda. Currently, the enormity of the refugee situation in the country as described above has contributed to the depletion of State resources, frustrating its efforts to care for refugees.

This paper explicates the right to education enshrined in various international law Conventions and Uganda's obligation to promote, protect and fulfil refugee children's fundamental right to access education.

This paper examines the extent to which Uganda as a State Party to the 1989 CRC and other legally binding international instruments relating to children has advanced the enjoyment of the right to education for refugee children. To this end, the paper contributes to the existing literature by offering a new understanding on how the State can safeguard refugee children's right to education as a state obligation under international law. Also, by suggesting relevant legislations, amendments and policies which Uganda can use to implement international law down to domestic level, the study differs from, and add to, the existing literature on refugees' right to access education in a sustainable manner.

It is further hoped that, given the recommendations this paper provides, the government of Uganda and UNHCR will enhance their effort to safeguard the fundamental right to access education for refugee children to enable them to realise other human rights, regain dignity and hope for a bright future. The right to access education will enable holistic childhood development essential for the sustainability of livelihoods and the rebuilding of their respective countries of origin.

## **1.6 Research Methodology**

The primary sources used in this research are the Constitution of Uganda, Acts of parliament, judicial precedents, international and regional treaties/conventions.

With regards to secondary sources, I relied on the internet academic sources, reports, journals and books.

## **1.7 The objective**

There is a consensus on the protection of refugee children and modern developed international and regional legal instruments to safeguard their fundamental rights to education, which have been consequently integrated in the Uganda national laws.

The objective of this research paper is to identify and examine various legal instruments that Uganda can use to fulfil the Country's responsibility under the international law in safeguarding refugee children's right to access education. These legal instruments include the international, regional and national legal frameworks that seek to address the right to access education for children in refugee situations.

Lastly, this study is to help to inform the work of the United Nations High Commissioner for Refugees (UNHCR) and its main partner, the government of Uganda through the Office of the Prime Minister (OPM) department for refugees, by strengthening multi-level approaches/responses in Uganda. Recommendations will be provided to the OPM department for refugees and UNHCR's protection work based on the findings.

## **1.8 Literature review**

As stated above, Uganda is Africa's largest refugee-hosting country with more than 1.25 million refugees from East, Horn and Great Lakes Region of Africa. Due to its history in hosting refugees, the country has signed and ratified numerous international and regional treaties that grant refugee rights in general, but more specifically for the purposes of this paper, the right to access education for refugee children.<sup>48</sup> The international protection of refugees is guaranteed by the 1951 Refugee

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<sup>48</sup> Supra.

Convention which gives generic protection to all persons (both adults and children) seeking asylum.<sup>49</sup> Lloyd<sup>50</sup> writes that there were attempts to frame child rights in non-binding declarations such as the Declarations of the Rights of Child adopted 1924 and 1959, covered children's welfare and protection but in practice, children were often denied enjoyment of such rights.<sup>51</sup> Almost 40 years after the 1951 Refugee Convention, the 1989 CRC became the first binding treaty on children's rights and also the first to combine and integrate social, economic and cultural rights with civil and political rights in a single legal instrument.<sup>52</sup> As a result of its focus on several rights which are based on the principles of non-discrimination, participation, survival and development, and the best interest of the child, it contains provisions that apply to every aspect of children's life including those in difficult situations such as refugee children. This makes the 1989 CRC the most comprehensive treaty in the field of human rights.<sup>53</sup> This view is also supported by Lundy and Kilkelly.<sup>54</sup> Under the dispensation of the 1989 CRC, children are the rights holders as opposed to being objects of adult charity.<sup>55</sup> Fottrell<sup>56</sup> emphasised that 'the 1989 CRC raised the child to the status of an independent right holder' and because of that, it has greatly influenced the process of legal reforms across various countries to ensure that child rights are safeguarded by domestic laws.<sup>57</sup>

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<sup>49</sup> The Office of the UN High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country. In more than five decades, the agency has helped an estimated 50 million people restart their lives. Today, it operates in 124 countries around the world. See <http://www.refworld.org/publisher,UNHCR,EXCONC,,50ffbce5d,,0.html>, accessed on 9 April 2017.

<sup>50</sup> Amanda Lloyd 'A theoretical analysis of the reality of children's rights in Africa: an introduction to The African Charter on the Rights and Welfare of the Child' (2002) *African Human Rights Law Journal* 2(1) at 12-13.

<sup>51</sup> Children's rights were contained in the Declaration on the Rights of the Child 1924 and 1959, but they were non-binding, and rarely incorporated into municipal law, thus the impact was rather limited and symbolic. The Declaration was aspirational and framed children's rights in broad terms. See UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV).

<sup>52</sup> Amanda Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: raising the gauntlet' (2002) *International Journal of Children's Rights* 10 at 182.

<sup>53</sup> Rebecca M. Stahl, "Don't forget about me": implementing Article 12 of the United Nations Convention on Right of the Child' (2007) *Arizona Journal of International and Contemporary Law* 24(3) at 804-5.

<sup>54</sup> Laura Lundy & U Kilkelly 'Children's rights in action: using the UN Convention on the rights of the child as an auditing tool' (2006) *Child and the Family Law Quarterly* 18(3) at 335.

<sup>55</sup> Phillip E Veerman *The rights of the child and changing image of childhood* at 184.

<sup>56</sup> Deirdre Fottrell (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (2000) The Hague: Kluwer Law International.

<sup>57</sup> See Uganda (Children (Amendment) Act 2016), South Africa (Children's Act 38, Amended by Children's Amendment Act 41 of 2007).

The extent of state obligations emanating from the duty to provide protection and assistance to refugees including children demonstrates how onerous duties assumed under provisions of the international and regional instruments are.<sup>58</sup> The state obligations go beyond economic and financial implications. In many cases, African nations, and Uganda in particular, hosting a large number of refugees have resorted to confining them in settlements/camps<sup>59</sup> run by international and local Non-Governmental Organisations (NGO). Little emphasis is given to the holistic rights and welfare of the children who find themselves in these dire circumstances.<sup>60</sup> Most of the refugee settlements are established in remote rural areas where there are limited social services, and the few services available are often not compliant with the quality standard. Education is no exception. However, the plight of vulnerable children caught up in a dilemma such as this demands more creative solutions than the mass shepherding of people into rural refugee settlements.<sup>61</sup> It is Uganda's international obligation to which she committed herself as party to the Refugee Convention, CRC, and African Children's Charter to ensure that the rights of refugees (including children) are upheld without prejudice and/or discrimination.

The 1951 Refugee Convention is the cornerstone of international refugee law. As a matter of legality, UNHCR under the Charter of the United Nations<sup>62</sup> holds a special and unique role in providing and coordinating the international protection of refugees under the UN body and with the contracting states to ensure that refugees including children are provided with protection assistance and to seek lasting solutions to their plight.<sup>63</sup>

Article 1 of the 1951 Refugee Convention, as amended by its 1967 protocol, defines a refugee as:

A person who owing to a well-founded fear of being persecuted for the reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.<sup>64</sup>

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<sup>58</sup> Julia Sloth-Nielsen (ed.) *Children's rights in Africa: a legal perspective* (2008) Ashgate at 194

<sup>59</sup> UN High Commissioner for Refugees 'Uganda - refugees and asylum seekers in country (as of 1 February 2016)' available at <http://www.refworld.org/docid/58a3011b4.html>. accessed on 21 March 2017).

<sup>60</sup> Julia Sloth-Nielsen op cit at note 59.

<sup>61</sup> Ibid at 194.

<sup>62</sup> Art 22 of the Charter of the UN (signed 26 June 1945 in San Francisco, entered into force on 24 October 1945).

<sup>63</sup> The preamble of the 1951 UN Refugee Convention.

<sup>64</sup> Art 1 1951 UN Refugee Convention.

In this regard, the protection of refugee children is as important as the protection of refugee adults. The provision ignores the broad range of human rights of children and primarily focuses on the principle of asylum, elementary education or non-refoulement in its articles 1, 22 and 32. Not only is the protection provided an essential premise for the United Nations involvement across many fronts; it provides a measure by which to assess particular actions or policy.

As an international agency concerned with the protection of refugees, in 1987, UNHCR pursued to include the situation of refugee children within its protection and assistance activities through the agenda of the Executive Committee of UNHCR (hereafter, EXCOM).<sup>65</sup> In its comprehensive conclusion, the EXCOM condemned the violence often committed against refugee children; it reiterated the principle that children must be among the first to receive protection and assistance, recognised that the situation of refugee children gives ‘rise to special protection and assistance problem.’<sup>66</sup> Despite such recognition of the vulnerability of refugee children, the 1951 Refugee Convention, which is the only international refugee legal instrument for refugees, falls short of a specific legal provision for the welfare of refugee children in its Chapter 4.

It is a norm that individual states must amend their domestic laws in order to become a Party to international treaties such as the 1951 Refugee Convention to enable smooth implementation at a local level. In cases where such international instruments are narrow and generic in serious matters concerning specific groups such as children, it sets bad precedence to the governments and bleeds challenges in legal reforms and compliance.

The majority of the refugees in the host states are likely to have access to basic rights such as elementary education unlike other categories of non-nationals like asylum seekers, migrants and illegal aliens.<sup>67</sup> According to Hathaway, state parties often do not extend all rights equally to all persons as obliged under the international law.<sup>68</sup> To a certain degree, states aim to ‘grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he/she is present’.<sup>69</sup> Therefore, while refugee hosting countries have a general obligation of non-

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<sup>65</sup> UNHCR, *Note on Refugee Children*: UN doc. E/SCP/46, 9 July 1987 at para 8.

<sup>66</sup> UNHCR Executive Committee Conclusion No. 47, *Report of the 38<sup>th</sup> Session*: A/AC.96/702, 22 October 1987; see also conclusion No. 59, *Report of the 40<sup>th</sup> session*: UN doc. A/AC.96/737 (1989).

<sup>67</sup> 1951 UN Refugee Convention Art 22(1) explicitly accords the right to elementary education to refugees on equal measure with the nationals of their country of asylum.

<sup>68</sup> Hathaway *The right of refugees under international law* at 722-25.

<sup>69</sup> *Ibid* at 154.

discrimination,<sup>70</sup> rights beyond the core provisions such as the right to life or non-refoulement are granted as a function of the nature and duration of the attachment to the asylum state.<sup>71</sup>

The UNHCR provides guidelines on the protection and care of refugee children<sup>72</sup> that reflect the current state of the international law relating to this group. This can be viewed as recognition that the 1951 Refugee Convention is not comprehensive enough in addressing the problems of refugee children. These guidelines are issued by the UNHCR pursuant to its international protection mandate derived from the *Statute of the Office of the United Nations High Commissioner for Refugees* in conjunction with article 35 of the 1951 Geneva Convention<sup>73</sup> and its protocol.<sup>74</sup> The 1951 Refugee Convention does not address children's concerns directly. However, it has a few set standards that apply to children in the same manner as adults:

A child who has a well-founded fear of being persecuted for one of the stated reasons is a refugee, a child who holds refugee status cannot be forced to return to the country of origin under the principle of non-refoulement, and no distinction is made between children and adults in social welfare and legal rights.<sup>75</sup>

Art 22(1) of the 1951 Refugee Convention sets standards of special consideration for the children; it accords refugee children the right to access elementary education with equal treatment as nationals in the host state. However, access to post-elementary education is limited to favourable treatment as that accorded to alien citizens.<sup>76</sup> This is a clear reflection that, in the inception of the international refugee law, the protection of the world's most vulnerable group – who unfortunately constitute the majority of the world's refugee population – is limited only to elementary education.

Education is an important tool for refugees and asylum seekers' integration into their host state and to maintain links with the country of origin. A refugee's survival depends on his/her ability to adapt, and education for children as well as adults is vital to the assimilation process.<sup>77</sup> Therefore,

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<sup>70</sup> Ibid at 155.

<sup>71</sup> Ibid at 154.

<sup>72</sup> UN High Commissioner for Refugees (UNHCR) 'Refugee Children: Guidelines on Protection and Care' 1994 available at <http://www.refworld.org/docid/3ae6b3470.html> accessed on 6 April 2017.

<sup>73</sup> UN General Assembly 'Convention Relating to the Status of Refugees' 28 July 1951 United Nations Treaty Series vol. 189.

<sup>74</sup> UN General Assembly 'Protocol Relating to the Status of Refugees' 31 January 1967 United Nations Treaty Series vol. 606.

<sup>75</sup> Ibid at 17-18.

<sup>76</sup> Art 22(2) of the 1951 UN Refugee Convention states that 'the Contracting State shall accord to refugees treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education'.

<sup>77</sup> Hathaway op cit note 68 at 584.

in this context, the provisions for a clear and non-discriminatory education system in international, regional and national legal frameworks is important for the well-being of refugees in any refugee hosting country.

The Uganda government, through its Refugees Act 21, emphasises this limitation on how refugee children access education, which is discriminatory in nature.<sup>78</sup> It ignores the importance of post-elementary education in a child's holistic development which the refugee law has failed to clearly recognise as essential. In this regard, the refugee law allows leeway to the state party members to the 1951 Refugee Convention to discriminate against refugee children within their education systems. This is a contradiction and violation of other international legal binding instruments regarding the right to education.<sup>79</sup>

In 2015, there were about 30 million children living outside their country of origin, including 10 million refugee children and one million child asylum seekers.<sup>80</sup> These children were uprooted from their homes, forced to leave behind relatives, familiar surroundings and established social network. They are exposed to high risks of abuses and exploitation given that child headed-households and those of parents with disabilities often assume adult responsibilities including economic duties which exposes them to further risks such as not attending school among others.<sup>81</sup> According to LeBlanc, refugee children are most likely to lack survival amenities and have their basic rights violated and, when resources are scarce, they are the first to suffer harm, including death.<sup>82</sup> The same sentiments are shared by the UN General Assembly in its emphasis that refugee children risk unlawful military recruitment, sexual exploitation and abuse, child labour, denial of access to education and basic assistance, and even death.<sup>83</sup> In response to their heightened vulnerability, it has always been accepted that refugee children require a raised level of protection and assistance in order to find durable solutions for their predicaments.

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<sup>78</sup> Section 32(1) of the Refugees Act 21 of 2006 states as follows: 'Refugee children shall be accorded the same treatment as nationals with respect to elementary education.'

<sup>79</sup> See Articles 28 and 29 of the UN CRC, Article 10 of the CEDAW, Articles 5 and 7 of the ICERD.

<sup>80</sup> UNICEF (2016) *Uprooted: the growing crisis for refugee and migrant children at 18*.

<sup>81</sup> UN High Commissioner for Refugees 'Action for the rights of children: abuse and exploitation' (2001) revision version 04/01 at 12-13.

<sup>82</sup> V LeBlanc 'Implementation of the 1989 Convention on the Right of the Child and the work of the United Nations High Commissioner for Refugees' in E Verhellen (ed), *Understanding children's rights: Collected papers presented at the First International Interdisciplinary Course on Children's Rights* (1996) at 404.

<sup>83</sup> UN General Assembly 2001 at para 6.

However, despite the existence of many refugee children on the African continent and consensus among nations on their vulnerable status, the response on the ground remains mainly focused on life-saving assistance as opposed to holistic human rights protection to guarantee all-inclusive childhood development of which the right to access education is vital for such fulfilment. Ironically, the African human rights system in theory also provides a regional special protection regime for addressing refugee predicaments through the OAU 1969 Refugee Convention and ACHPR. But these instruments do not provide the required special protection to refugee children and, as a result, their protection is left to the vicissitudes of the goodwill of the host states and international organisations; a good example being the failure of the OAU 1969 Refugee Convention to recognise children and education within its provisions.

The adoption of the African Children's Charter in 1990 was a milestone in African history. It also acts as a complement to the 1989 Convention on the Right of the Child in order to enhance the enjoyment of rights of children in Africa,<sup>84</sup> and Uganda in particular subsequent to its ratification.<sup>85</sup> The African Children's Charter has brought fundamental and profound changes in the protection of children in Africa and to the protection of refugee children, in particular, as it includes substantially similar provisions to the Convention on the Right of the Child. Its strength only lies in extending protection to internally displaced children; something that is not clearly covered in the 1989 CRC.

Implementation of the African Children's Charter remains a major problem not only in Uganda but in the entire African continent. Despite the continuous massive refugee problems on the continent and the elegant rules contained in the charter, the African Union is yet to establish a specialised central organ to coordinate refugee issues at the continental level. According to Thoko, the Economic, Social and Cultural Council of the African Union is the organ that deals with social issues and is yet to develop management competence over refugee issues.<sup>86</sup> As a result, the regional interventions to address the plight of refugee children in Africa has been left to international non-governmental organisations while the regional and state initiatives are kept at the minimum.<sup>87</sup>

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<sup>84</sup> Amanda Lloyd op cit note 52 at 182.

<sup>85</sup> Uganda ratified the 1990 African Charter on the Rights and Welfare of the Child (Africa Children's Charter) on 17 August 1994 without any reservations.

<sup>86</sup> Julia Sloth-Nielsen op cit note 59 at 194.

<sup>87</sup> Ibid at 194.

Thoko emphasised that unless legal rights of refugee children are properly recognised and implemented, the only guarantee they will have is the continued hardship of their situation. The lack of consistency, clarity and harmonised approach, specifically regarding the protection of refugee children, manifest in the 1951 Refugee Convention and 1989 CRC has created confusion in the legal interpretation and application to safeguard the rights of refugee children by the host country.

Regionally, the 1969 OAU Refugee Convention guarantees no right to education and makes no reference to children within its provisions. Right to education is not only a fundamental human right, it is an enabling right that is majorly enjoyed by children who form the majority of refugee populations everywhere in world, and Uganda is no exception. The convention, however, permits states hosting refugee children, like Uganda, to choose when and which instrument to apply on refugee children. For the purposes of this paper, the focus will be on Uganda's state responsibility under the international law in safeguarding refugee children's rights to access education and to establish how the country fulfils its international obligation amidst such loopholes prevalent in the international instruments.

Chapter Two below will establish the international and regional human rights legal framework supporting the rights of refugee children to access education. This will be done through examining selected legal instruments for the protection and promotion of rights of children and access to education, to which Uganda is a party, and persuasive judicial interpretation of the right to education in different state jurisdictions.

## **CHAPTER TWO**

### **2.0 International Protection of Refugee Children**

The primary obligation of any sovereign State is to ensure safety and physical protection for its nationals, among them children. But when a State is either unwilling or unable to provide such protection to its people, individuals suffer serious human rights abuses and children are usually the first victims. The consequence of such abuses is that individuals are forced to flee their habitual residence to another country for safety and protection assistance. Generally, the expected government protection to the citizens is either lacking or denied.<sup>88</sup> Hence, the protection of refugees' human rights is the responsibility of international community to ensure respect, protection and prevention of further human rights violations against refugees in the CoA. International refugee law comes in to provide essential protection in a situation where there is every reason to believe that the national protection of human rights is inadequately safeguarded and people have crossed international boundaries in search of such protection.<sup>89</sup>

The phrase 'international protection' covers a range of activities through which rights of refugees are secured. In Africa, international protection of human rights of refugees, including children, is primarily governed by the 1951 UN Refugee Convention and 1969 OAU Refugee Convention as the guiding legal framework for the treatment of refugees and those seeking asylum in the State Parties. The drafters of the 1951 Refugee Convention, in Articles 5 and 6 foresaw the likelihoods of other human rights for refugees which were not explicitly addressed in its present form. Thus, calls for the complements from other treaties such as ICESCR, the CRC, the OAU Refugee Convention and African Children's Charter, among other but still, they are subject to the ratification by Member States as such.

#### **2.1 International legal framework for the protection of refugee children**

As mentioned above, the 1951 Refugee Convention Relating to the Status of Refugees is the cornerstone of the international refugee law but none of its provisions addresses children's concerns directly despite children constituting more than half of all refugees under the mandate of

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<sup>88</sup> S. Guy Goodwin-Gill 'Non-refoulement and the new asylum seekers' 897 26(4) at 901.

<sup>89</sup> James C Hathaway (1991) *The law of the refugee status* at 124.

UNHCR.<sup>90</sup> Article 1, which defines who a refugee is, states that a child is assessed on equal measure with an adult person to determine his/her refugee eligibility claim, hence a child is required to prove his/her well-founded fear of being persecuted for the reasons and grounds provided for by the Convention. However, UNHCR EXCOM, in its para ‘c’ of Conclusion No. 47 of 1987 about refugee children, reiterates that children must be among the first to receive protection and assistance while upholding the principle of the best interest. Furthermore, paragraph ‘h’ recommends that children should be treated as refugees if either of the accompanying parent has been granted a refugee status. It also calls for regular and timely assessment and review of the needs of refugee children to facilitate the provision for their immediate and long-term needs.<sup>91</sup> It is important to note that UNHCR EXCOM conclusion decisions are not legally binding but act as soft law that carries persuasive value. However, given the fact that they are negotiated and agreed upon by refugee hosting States, they should be implemented as binding and in good faith.

Article 22, without directly mentioning children, provides education rights in two ways. Firstly, Article 22(1) requires State parties to accord refugees the same treatment as is accorded to nationals with respect to elementary education. Undoubtedly, children and their best interest are the primary target in this provision. Equally, the UNHCR EXCOM Conclusion No. 47 of 1987 on refugee children emphasised on the education rights for refugee children and subsequently requested State Parties to work in collaboration with the UN Refugee Agency to safeguard access to elementary education of satisfactory quality and respect for refugee children’s cultural values.<sup>92</sup> Hathaway writes that the State obligation to provide primary school education as provided for in 1951 Refugee Convention does not permit any form of discrimination.<sup>93</sup> He emphasised that refugee children are not eligible to greater access to primary education than nationals but also they should not be deprived of admission in favour of nationals.<sup>94</sup> With exception where a contracting State has placed reservation on Art 22(1), the State is under the obligation to share whatever resources and facilities it has to benefit both refugees and national with respect to the provision of quality primary education. Equally, in the circumstances of limited resources, Hathaway reasons

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<sup>90</sup> UNHCR Global Trends 2015 ‘Figures at a glance’ available at <http://www.unhcr.org/afr/figures-at-a-glance.html> accessed on 22 May 2017.

<sup>91</sup> UN High Commissioner for Refugees (UNHCR) ‘Refugee Children No. 47 (XXXVIII) 1987’ October 12, 1987 at para ‘j’.

<sup>92</sup> Ibid at para ‘o’.

<sup>93</sup> Hathaway op cit note 68 at 602.

<sup>94</sup> Ibid.

that refugee children should not to be deprived of their education rights to compensate for the insufficient resources in their Country of Asylum (CoA) but rather address their needs by burden sharing among States.<sup>95</sup>

Secondly, with respect to education other than elementary education, Art 22(2) accords refugees treatment not less favourable than that accorded to foreigners. Equally, UNHCR EXCOM Conclusion No. 47 acknowledges the need of refugee children to pursue further education beyond primary level and recommends UNHCR to ‘provide post-primary education within the general assistance programme’.<sup>96</sup> Hathaway writes that refugees looking for post-elementary education opportunities largely depend on limited scholarship grants provided by UNHCR and its partners. Thus, refugees access to education beyond primary level of education system is limited as clearly demonstrated in UNHCR statistical trend.<sup>97</sup> In some States, equal access right to post-elementary education for refugees is well established but authorities often limit refugee children from accessing education other than elementary education in favour of their citizens.<sup>98</sup> In South Africa, refugees and asylum seekers are often restricted from accessing education while Tanzania limits admission of non-citizens and their access to post-primary education institutions to two per cent.<sup>99</sup> Hathaway writes that challenges refugees face to access education other than primary consist of, recognition of academic credentials, accessing information regarding the available education scholarships, and most detrimentally, disqualification for scholarships on basis of their non-citizenship status in the CoA.<sup>100</sup>

In *Minister of Home Affairs v Watchenuka*,<sup>101</sup> the South African Supreme Court of Appeal nullified unconstitutional prohibition of asylum seekers from accessing education. The Court again held that the preventing asylum seekers from accessing education under the Alien Control Act No. 96 of 1991 and Immigration Act No.13 of 2002 of South Africa was inconsistent with the constitution.

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<sup>95</sup> Ibid.

<sup>96</sup> UN High Commissioner for Refugees (UNHCR) op cit not 91 at para (p).

<sup>97</sup> Hathaway, *The Rights of Refugees under International Law* at 590-91; UN High Commissioner for Refugees (UNHCR) ‘Missing out: refugee education in crisis’ op cit note 7 at 20-21, 30-31.

<sup>98</sup> Hathaway op cit note 68 at 591.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> *Minister of Home Affairs and Others v Watchenuka and Another* (010/2003) [2003] ZASCA 142.

The right to access to education is explicitly safeguarded and every person is entitled to basic education for both children and adults as well as further education.<sup>102</sup>

Furthermore, the Court emphasised that freedom to study or access education is an inherent component of human dignity and ‘[h]uman dignity has no nationality, it is inherent in all people both citizens and non-citizens...for whatever reason, it must be protected.’<sup>103</sup> Without education, a person is deprived of the potential for human fulfilment.<sup>104</sup>

The Court’s argument in the *Watchenuka* case was based on the right to dignity as provided for in the international law, which equally applies to all children, for whom the denial of right to access education constitutes deprivation of their dignity by the state.<sup>105</sup>

Uganda is a sovereign State, and is under no obligation to comply with the verdicts of a court in another country. Nevertheless, the above verdicts of the South Africa’s Supreme Court of Appeal, carries persuasive authority whose interpretation and application can be used in Uganda’s jurisprudence and at its own discretion.

1951 UN refugee Convention in its Art 6 provides that

any requirements which a particular individual would have to fulfil for the enjoyment of the rights in question, if he or she was not a refugee must be fulfilled by him, with exception of requirements which by their nature a refugee is incapable of fulfilling.

This provision, in some way contradicts Article 22(2) as it provides for the treatment of refugees as aliens in regard to access to post-elementary education, that is, if they can afford it, which by nature of one being a refugee, is most likely not to afford. However, under Article 6 above, if interpreted in good faith<sup>106</sup> countries are obligated to provide refugee children with all child rights prescribed in the CRC and other relevant human rights instruments they signed and ratified on equal measure as accorded to nationals. This includes the right to access education at all levels. In

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<sup>102</sup> Ibid at para 36.

<sup>103</sup> Ibid at para 25.

<sup>104</sup> Ibid.

<sup>105</sup> UNDHR Art 26(2); CRC Art 29(1); ICESCR Art 13(1) provide that education shall be directed to the human personality and the sense of dignity to enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among diversity.

<sup>106</sup> The international law of treaties provides that the international treaties shall be interpreted in good faith and in accordance with the ordinary meaning and the purpose of the treaty. See Art 31(1), (2) of the United Nations ‘Vienna Convention on the Law of Treaties’ 23 May 1969 United Nations Treaty Series vol. 1155 at 331.

simple terms, Art 6 establishes the grounds that refugees can be compared with citizens in the country of asylum on the basis of rights hence, comparative in applying other human rights instruments.

Similarly, Art 5 of the 1951 Refugee Convention provides an opportunity for refugees to benefit from rights other than those enshrined in the present Convention. This means that countries that have consented to other international treaties are bound to afford similar human rights to everybody including refugees without discrimination. Tom Clark writes that pursuant to Art 5 of the 1951 Refugee Convention, refugees are equally entitled to civil, political, socioeconomic among other rights outside their Convention.<sup>107</sup> This permits refugees to enjoy social and economic rights, especially education rights which is more detailed in other State treaties

Although the CRC is not a refugee Convention, it is the only international treaty that provides protection of all rights for every child in a comprehensive manner. CRC provides a wide range rights among other Art 6,<sup>108</sup> Art 12<sup>109</sup> and Art 3(1).<sup>110</sup> It further prohibits any form of discrimination<sup>111</sup> against any human being within the dictates of Art 1.<sup>112</sup> irrespective of citizenship and immigration status or any other status. Thus, the CRC sets normative framework within which all children to enjoy their enshrined rights.<sup>113</sup> Hence, by virtue of signing the CRC, sovereign governments are under the obligation to treat refugees like nationals.

Most of international treaties' provisions on education interpret the right to education from the lenses of public education which is a responsibility of the governments to provide to its people. Thus, to ensure available and accessible of education services at all levels for everyone is the government's responsibility under the international law. With regards to technical and vocational education, Chirwa acknowledges their vital role for the effective preparation of all children for a

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<sup>107</sup> Tom Clark & Francois Crepeau 'Mainstreaming refugee rights: the 1951 Refugee Convention and international human rights law' (1999) *Netherland Quarterly of Human Rights*, Vol.17/4, at 400.

<sup>108</sup> Inherent right to life thus guarantee for the survival and development of the child.

<sup>109</sup> Participation of the child.

<sup>110</sup> Best interest of the child.

<sup>111</sup> Art 2.

<sup>112</sup> A child is any person below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

<sup>113</sup> Janusz Symonides (ed) (2000) *Human rights: concept and standards* Ashgate UNESCO Publishing at 273.

useful occupation but argues that there are no binding obligations imposed on State Parties pursuant to Art 28(1)(d) of CRC.<sup>114</sup>

Nevertheless, Art 29(2) of CRC and Art 13(3) of ICESCR grants parents and guardians permission to choose the type of education for their children. This includes choice of sending their children either to a private or public institution of learning, provided such institution meets the required standards within the predicts of the international law and applicable national legislation<sup>115</sup>.

Article 13(4) of ICESCR requires schools to meet certain education standards established the by the Member State. therefore, to create safe learning environment, countries are required to ensure that all educational institutions, both public and private adhere to certain quality and safety standards.

Another authority which, although not binding, is persuasive and inspirational is from the common law jurisdiction of India.

**Case Study: *Avinash Maherotra v Union of India***<sup>116</sup>

In India, as a result of fire outbreak in the Lord Krishna middle-school of Madras, Tamil Nadu where 93 children were killed and many others injured. It was alleged that more than 900 students were overcrowded in a thatched-roof building with no windows, one entrance and exit.

The Court upheld that that the right to education entails freedom from fear of security and safety,<sup>117</sup> and that the right to education includes the provision of safe schools.<sup>118</sup> The court decided that, no matter where a family seeks to educate its children, the state must ensure that children suffer no harm in exercising their fundamental right to education.<sup>119</sup> Hence the state is under the obligation to ensure that schools provide safe facilities for children. While interpreting the right to education, the Supreme Court of India pronounced that:

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<sup>114</sup> Danwood Chirwa, *The merits and demerits of the African Charter on the Rights and Welfare of the Child*, 10(2) at 163.

<sup>115</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* 8 December 1999 E/C.12/1999/10 para 29.

<sup>116</sup> *Avinash Mehrotra v. Union of India & Others* Writ Petition (Civil) No.483 of 2004 (2009 Supreme Court of India).

<sup>117</sup> *Ibid* at para 39.

<sup>118</sup> *Ibid* at para 32.

<sup>119</sup> *Ibid* at para 31.

Educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child studies in a quality school, and a quality school should certainly pose no threat to a child's safety.<sup>120</sup>

The Court's verdict made no reference to international law but its understanding of education rights resonates well with education provisions prescribed in the international law mainly Art 13(4) of the ICESCR and its General Comment Number 13 Paragraph six of the CESCR on right to education.

The collaboration between States and UN organisations, international and local NGOs is exceptionally encouraged in the efforts to the realization of education rights for children. However, States remain accountable for human rights within their respective borders.<sup>121</sup>

Article 28(1)(a) of CRC directs State Parties to make basic (primary) education free, compulsory and available to all children while Art 28(1)(b) encourages States to progressively make secondary education free, available and accessible for every child without discrimination.

Equally, CRC Articles derive their obligations on education from Art 26(1) of the UDHR and Arts 13 and 14 of the ICESCR. The emphasis is put on the importance of education beyond primary schooling for child development cycle. Such education empowers the development of skills and capacities which are vital for human dignity, understanding and tolerance, self-esteem and confidence.<sup>122</sup> General Comment 13 of the Committee on Economic, Social and Cultural Rights (CESCR) on the right to education provides that education is an enabling right which is significant instrument for every child towards fulfilment other human rights.<sup>123</sup> Hathaway<sup>124</sup> argues that non-discrimination provision is the ultimate assurance to safeguard right to education for refugee children in the CoA. Similarly, all the fundamental rights protected by the Constitution of the Republic of Ugandan are said to emanate from the right to equality and non-discrimination.<sup>125</sup>

Article 2(1) of the CRC applies to all rights enshrined and to all children. It stipulates that:

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<sup>120</sup> Ibid at para 30.

<sup>121</sup> Andrea Cornwall & Celestine Nyamu-Musembi 'Putting the 'rights-based approach'' to development into perspective' *Third World Quarterly* 25.8 (2004) at 1417.

<sup>122</sup> Rahman Javaid *International human rights law: a practical approach* at 396-97.

<sup>123</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 at para 1.

<sup>124</sup> Hathaway op cit note 68 at 123.

<sup>125</sup> Arts 20 and 21 of the Constitution.

State 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 race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

In simple terms, all the rights and freedoms provided for by the CRC are applicable to refugees, asylum seekers, illegal migrant, and children with disabilities, both boys and girls. Thus, Art 2(1) is the supreme establishment that governs and qualifies all substantive rights and freedoms that CRC provides.

CRC provides each and every child with inherent right to life that must be protected by the law.<sup>126</sup> Article 6(2) emphasises States' obligations to uphold this right by ensuring the all-out survival, protection and development of the child. As Thoko Kaime<sup>127</sup> put it, 'the right to life and the right to survival are essentially prerequisites to the enjoyment of any of the rights protected'. These rights cut-across the holistic well-being of the child.

Article 6 articulates the survival and development principle under the CRC which is derived from two separate but interwoven conceptual rights, namely: the right to survival and the right to development. The right to survival comprises of the right to life in its social, economic and cultural aspects, among others.<sup>128</sup> This entails promotion of a life of human dignity. Hence the State's obligation to ensure the right to adequate standards of living for children by adopting policies designed to increase life expectancy and reduce infant mortality, as well as a holistic healthy childhood development.<sup>129</sup> To enable such achievement, the CRC reinforces Art 24 for the protection of basic survival needs including the right to be protected from harmful customs and practices.<sup>130</sup>

On the other hand, the right to development refers to the rights of individuals or groups of people to participate in, contribute to, and continuously enjoy social, economic and cultural development in which all human rights can fully be realised.<sup>131</sup> In the context of international law, the right to

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<sup>126</sup> CRC Art 6(1).

<sup>127</sup> Thoko Kaime (2011) *The Convention on the Right of the Child: a cultural legitimacy critique* Europa Law Publishing at 112-3.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> CRC Art 24(3).

<sup>131</sup> Arts 1 and 2 of the UN General Assembly 'Declaration on the Right to Development' A/RES/41/128 adopted on 4 December 1986.

development encompasses equality of opportunities, resources and justice for everyone. With regard to children specifically, the right to development is not limited to physical needs but goes beyond this to encompass spiritual, moral and social growth.<sup>132</sup> This way, a country has a broader obligation to ensure that children are able to develop their talents and abilities to full potential while preparing them for a responsible life in the society.

Child development rights are prescribed in the CRC through the protection of rights and freedoms that improve development characteristics such as: education rights<sup>133</sup>; rest and leisure; right to play and free participation in cultural life and art;<sup>134</sup> and protection from economic exploitation, work that is likely to endanger or interfere with a child's holistic development.<sup>135</sup> Art 23(2) and (3) of CRC requires government to afford special care and assistance suitable for the well-being of disabled children to empower them to realise social integration, individual development including their cultural and spiritual development.

The inherent right to life encompasses survival and development of every child in a profoundly interdependent manner as clearly demonstrated by substantive procedural provisions of the CRC. The emphasis is that all-inclusive approach should be adhered to in promoting and protecting child rights and welfare. Survival and development rights are similarly vital and governments should endeavour to safeguard all together. Thoko Kaime demonstrates how difficult it would be for the protection children from harmful traditions such as teenage pregnancies, early and forced marriages without providing a girl child with means to get education.<sup>136</sup> Therefore, education plays a central role in the protection of other human rights and holistic childhood development.

## **2.2. Regional legal framework for the protection of refugee children**

African continent has witnessed severe human rights violations way before colonial period to present modern times.<sup>137</sup> The colonial rule, post-independent repressive political systems and the dictatorial regimes have been at the helm of human rights violations and consequently forceful

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<sup>132</sup> Thoko Kaime op cit note 127 at 114.

<sup>133</sup> CRC Art 28.

<sup>134</sup> CRC Art 31.

<sup>135</sup> CRC Art 32.

<sup>136</sup> Thoko Kaime op cit note 127 at 115.

<sup>137</sup> Rahman Javaid op cit note 122 at 235.

displacement of people.<sup>138</sup> The wave of ethnic violent conflicts and civil wars around Sub-Saharan African countries continues to largely contribute to the forceful displacement and refugee movement to the peaceful and stable neighbouring States like Uganda.<sup>139</sup>

The Charter of the Organisation of African Unity (OAU Charter)<sup>140</sup> was primarily formed to secure the continent from colonisation and to preserve the territorial integrity of its newly independent countries. There was thus less commitment to the promotion and protection of human rights of refugees and of those other specific categories of people. However, amidst gross human rights violations across the African continent, it became pertinent for Africa to establish its own regional human rights systems, hence the adoption of the African Charter on Human and Peoples' Rights (ACHPR)<sup>141</sup> at the 18<sup>th</sup> conference of Heads of State and Governments of OAU. ACHPR explicitly provides for civil and political rights, and social economic rights, as well as collective rights, with similarities to those rights enshrined in other international instruments. For instance, it provides for equality before the law<sup>142</sup>, right to equality<sup>143</sup> as well as social economic and cultural rights<sup>144</sup> which include the right to education<sup>145</sup> and the right to participate in cultural life. All rights set forth in the ACHPR must be exercised in accordance with Art 2 which forbids any form of discrimination. It provides:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Therefore, it is essentially required that refugees (children inclusive) in Uganda are provided equal rights as per the dictates of Art 2 of the ACHPR that Uganda is a Party to without reservations.<sup>146</sup>

Similarly, Art 18(3) requires States to extend protection of the child rights without discrimination as provided for in other international human rights treaties. Hence, Uganda as a State Party has a

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<sup>138</sup> A. Bosl & J. Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* at 136.

<sup>139</sup> Rahman Javaid op cit note 122 at 236.

<sup>140</sup> Organisation of African Unity (OAU) 'Charter of the Organisation of African Unity' 25 May 1963 available at <http://www.refworld.org/docid/3ae6b36024.htm>, accessed on 25 May 2017.

<sup>141</sup> Organisation of African Unity (OAU) op cit note 34.

<sup>142</sup> ACHPR Art 3.

<sup>143</sup> ACHPR Art 19.

<sup>144</sup> ACHPR Art 22.

<sup>145</sup> ACHPR Art 17.

<sup>146</sup> The Government of the Republic of Uganda signed and ratified the ACHPR without reservation on 27 May and 18 August 1986 respectively. Hence agreed to be bound its provisions.

duty and obligation to implement provisions enshrined in other international treaties concerning child rights.

In acknowledgement of perpetual refugee difficulties emanating from conflicts around the continent of Africa, the Convention Governing the Specific Aspect of Refugee Problems in Africa<sup>147</sup> was established in 1969 Addis Ababa, Ethiopia. It became the only regional human rights treaty for the protection of refugees in Africa with higher expectations to explicitly deal refugee problems in African context. Unfortunately, it made no specific reference to children notwithstanding that they constitute the majority of forcefully displaced population in Africa. Similarly, the 1969 OAU Refugee Convention grants no right to education in its provisions. However, in its preamble, paragraph one, Member States are alarmed by the ever-increasing refugee population on the continent and are hopeful in finding solutions to the refugee problems to afford them with dignified life. This affirms the position that all human beings shall enjoy fundamental rights and freedoms provided for in the UN Charter and UDHR without discrimination.

To significantly address issues affecting children, the establishment of a specialized treaty was eminent under the OAU to complement the ACHPR. Hereafter, the African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted in 1990.<sup>148</sup> This followed the adoption of strategies for the African Decade for Child Survival, Protection and Development 1990-2000<sup>149</sup> by the Council of Ministers of the OAU.

The African Children's Charter is a stand-alone treaty due to its explicit child rights protection as well as its own monitoring and enforcement mechanism, the African Committee of Expert on the Rights and Welfare of the Child (hereafter, African Committee of Experts).<sup>150</sup> The Government of the Republic of Uganda (GoU) became a Party to the African Children's Charter following her

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<sup>147</sup> Organisation of African Unity (OAU) 'Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)' 10 September 1969, 1001 U.N.T.S. 45.

<sup>148</sup> Organisation of African Unity (OAU) op cit note 35.

<sup>149</sup> OAU Council of Ministers of the Organisation of African Unity *Resolution on the Strategies for the Decade for the African Child (1990-2000): Resolution No. CM/Res.1230 (L) of 17-22 July 1989* Addis Ababa, Ethiopia.

<sup>150</sup> African Children's Charter Art 32 establishes the African Committee of Experts to promote and protect the rights and welfare of the Children in Africa. It has the mandate to receive and review reports and complaints concerning State Parties; undertake investigation and interpret the provisions of the African Children's Charter.

signature to treaty on 26 February 1992 and subsequent ratification on 17 August 1994. Hence, undertaking its obligation to promote, protect and fulfil all the enshrined rights in good faith.

The OAU recognises the impact of conflict on children's right to survival and development and subsequently, the future of African Continent.<sup>151</sup> Conflicts are widely recognised as the cause for refugee flows and the subsequent effect on children. Article 22(1) of the African Children's Charter requires State Parties to respect international humanitarian law applicable to the armed conflicts in relation to how they affect children. It is the only African treaty under the OAU to address refugee children directly. Pursuant to the Art 23 of the African Children's Charter Member States are under obligation to:

take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

Therefore, Art 23 above qualifies refugee children in Uganda to benefit from all other rights stipulated in the African Children's Charter not limited to non-discrimination (Art 3); the best interest (Art 4); survival and development (Art 5); name and nationality (Art 6); education (Art 11); children with disabilities (Art 13) and other human rights enshrined in human rights treaties such as CRC to which Uganda is a Party without any reservations<sup>152</sup>.

The African Children's Charter in its Articles 11(1) and 11(3)(a) grants free and compulsory basic education to all children. It further directs signatory Member States to take all appropriate measures with a view of full realisation of right to education.<sup>153</sup> These measures include but not limited to establishing educational facilities, provision trained teachers, learning and teaching materials and all other requirements for the fulfilment this right. With regards to the higher education, Chirwa<sup>154</sup> argues that unlike the ICESCR in its Art 13(2) (c), African Children's Charter provides no binding obligations to the State Parties to progressively offer free higher education.

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<sup>151</sup> Organisation of African Unity(OAU), The Council of Ministers of the OAU *Resolution on the plight of African Children in Situation of Armed Conflicts*, CM/Res.1659 (LXIV). Rev.1, Yaounde, Cameroon, 1 to 5 July 1996 at para 2 of the Preamble.

<sup>152</sup> CRC Arts 2 (non-discrimination); 22 (refugee children); 23 (children with disabilities); 28 (right to education); 29(Aim of education and 31 (leisure, recreation & cultural activities).

<sup>153</sup> African Children's Charter Art 11(3).

<sup>154</sup> Danwood Chirwa op cit note 114 at 162-63.

Equally, Chirwa presents that African Children's Charter failed to provide pre-school education rights which is an important stage where children's attitudes are formed.<sup>155</sup>

The Child rights protection enforcement mechanism, African Committee of Experts on the Rights and Welfare of the Child hereafter called 'the African Committee of Experts' is well established in the chapter two of the African Children's Charter. Whereas its mandate is explicitly defined in Chapter three with respect to promote and protect rights and welfare of African child and in particular to<sup>156</sup>

- i. collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;
- ii. formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
- iii. cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

The African Committee of Experts is also entrusted with the mandate of monitoring the implementation of the African Children's Charter to ensure that the enshrined rights are well safeguarded by the Member States.<sup>157</sup> It is also responsible for the interpretation of the African Children's Charter provisions as well as to interpret the provisions as deemed necessary at the request of a Member State, an Institution of the OAU or any person, group or non-governmental organisation recognised by OAU or Member States.<sup>158</sup>

### **2.3 Case Study:** *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya*

In this case, the Government of Kenya (GoK) was alleged to have violated provisions of the African Children's Charter mainly, Art 11(3) (provision of basic education) and Article 14 (access

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<sup>155</sup> Danwood Chirwa op cit note 114 at 163.

<sup>156</sup> African Children's Charter Art 42(a).

<sup>157</sup> African Children's Charter Art 42(b).

<sup>158</sup> African Children's Chart Art 42(c).

to health services) as further consequence of non-adherence to Arts 6(2), (3) on the right to have a birth registration and to acquire a nationality at birth and Art 3 on non-discrimination.<sup>159</sup>

The African Committee of Experts noted that, denial of the Nubian children's right to acquire nationality by birth had an overall negative impact because it rendered them stateless. Consequently, they failed to benefit from protections and Constitutional rights such as socioeconomic rights granted by the State such as access to healthcare and to education. This is contrary to the best interests of children.<sup>160</sup> Existence of *de facto* inequality in children's access to available educational services and resources was found to be attributed to the children not being granted nationality status.<sup>161</sup> The committee further noted that the Nubian Community had been provided with

[f]ewer schools and a disproportionately lower share of available resources in the sphere of education, as the *de facto* discriminatory system of resource distribution in education had resulted in their educational needs being systematically overlooked over an extended period of time. Their right to education has not been effectively recognized and adequately provided for, even in the context of the resources available for this fulfilment of this right.<sup>162</sup>

The African Committee of Experts upheld that the GoK violated of Articles 6(2), (3) and (4), Article 3, Article 14(2) (b), (c) and (g), and Article 11(3) of the African Children's Charter which it is a party to.<sup>163</sup> Uganda being a State Party to the African Children's Charter under which the African of Experts acquires its powers, is bound by the principles under which the above made verdict, that is, the responsibility to avail educational facilities and all other necessities to fulfil education rights for every child without discrimination.

Nevertheless, the enforcement mechanism of the African Children's Charter has some weaknesses. For instance, Art 44(2) of the African Children's Charter provides that every communication to the African Committee of Experts shall be treated in confidence. The Strict adherence to this confidentiality provision hinders the transparency and monitoring of the African Committee of Experts. Chirwa argues that confidentiality has been used by countries under the disguise of

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<sup>159</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 22 March 2011.

<sup>160</sup> *Ibid* para 46.

<sup>161</sup> *Ibid* para 65.

<sup>162</sup> *Ibid* para 65

<sup>163</sup> *Ibid* para 69.

facilitating an amicable solution to control human rights monitoring mechanisms.<sup>164</sup> Similarly, manifestation of the inefficiency of the African Commission of Human Rights was also attributed to the confidentiality principle among other factors which the African Committee of Experts is not immune to.

## **2.4 Conclusion**

In my opinion, international refugee law, specifically the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention, do not adequately address fundamental rights of refugee children. Both Conventions failed to give explicit reference to children in their provisions and this has extensive implications. These deliberate omissions pave the way for State Party to infringe on rights of refugee children who are ought to be expressly protected by the same law that granted them refugee status. Domestic legislation is frequently revised or rewritten to comply with international law on particular issues, nonetheless if the international law is not explicit, ambiguous or specific, countries then exploit this gap to overstep on rights of individuals or a group since there is no foreseeable accountability for the violations.

Equally, the 1969 OAU Refugee Convention does not provide any right to education. This is not only a fundamental human right, it is equally an enabling right that is largely enjoyed by children who are more than half of the refugee constituency in Africa and the entire world. By these oversights, the 1969 OAU Refugee Convention, which is evidently only African treaty for the protection of refugees on the continent, sets a bad precedent among its Member States in relation to safeguarding the fundamental rights of refugee children in their respective territorial jurisdictions.

Nevertheless, relief for the lacuna in the requirements for international protection of refugees is stated in Arts 5, 6 and 7 of the 1951 UN Refugee Convention which expands the scope for refugees to enjoy and claim other human rights established in other international treaties ratified by the CoA. It implies that without any form of discrimination, refugee children in Uganda are equally eligible to essential child rights, including those prescribed for in other human rights international agreements that Uganda has signed and ratified.

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<sup>164</sup> Danwood Chirwa op cit note 114 at 170

The right to education is an enabling right and its deprivation, especially for refugee children in Uganda, has far-reaching repercussions. Illiterate children are improbable to gain employment and earn livelihoods. This hinders self-sufficiency, subsequently making them fully dependent on international assistance to access their respective essential needs. Furthermore, uneducated children are susceptible to recruitment into criminal activities such as armed militia, which can potentially perpetuate conflict, causing more forceful displacements that subsequently hinder peaceful and sustainable development as well as reconciliation and rebuilding their home countries upon repatriation. Upholding and promoting the right to access quality education for refugees in Uganda is thus a significant concern and it brings into question government's inability or unwillingness to prioritise education for refugee children.

Chapter three looks at a brief history of the refugee regime in Uganda and examines the refugee policy which the country uses to fulfil its international obligation of guaranteeing access to education for refugee children. It also analyses other selected national legislations and policies to ascertain the extent to which refugee children's right to education is guaranteed and fulfilled in Uganda.

## CHAPTER THREE

### 3.0 Refugee children's right to access education in Uganda

#### 3.1 Background to the refugee regime in Uganda

The refugee regime is not a new phenomenon to Uganda; it dates back to the days of great wars, such as the Second World War.<sup>165</sup> Prior to its independence, Uganda hosted thousands of refugees from European countries, namely: Poland, Germany, Italy, Austria, Romania, Bulgaria, Yugoslavia, Hungary and France.<sup>166</sup> Subsequently, for several decades, Uganda has continued to generously host refugees mainly from the conflict-affected countries in the East, Horn and Great Lakes Region of Africa.<sup>167</sup> Since attaining its independence in 1962, the country has been hosting an average of not less than 161,000 refugees per year.<sup>168</sup> Evidently, the open door policy coupled with the increase in conflicts resulting from political instability in the region has seen the number of refugees seeking international protection and assistance in Uganda significantly increase in recent years, while the stays of some are becoming protracted since they cannot return to their countries of origin.

As of December 2015, there were over 477,200 refugees and 35,779 asylum seekers in Uganda in nine host districts located mainly in the northern, southern, and south-western regions of the country.<sup>169</sup> The refugees come from 13 countries, including the Democratic Republic of Congo, South Sudan, Somalia, Rwanda, Burundi, and Eritrea. However, this has significantly changed recently: President Museveni<sup>170</sup> of the Republic of Uganda announced during the Uganda Solidarity Summit on Refugees that his country was hosting 1,271,000 refugees with South Sudanese representing 75 per cent (950,000) of the country's entire refugee population as of June

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<sup>165</sup> *Addressing large movement of refugees and migrants: Statement of Uganda's Minister for Disaster Preparedness, Relief and Refugee*, delivered at UN General Assembly, New York on 19 September 2016.

<sup>166</sup> World Bank 'An assessment of Uganda's progressive approach to refugee management (2016) at 4-5 available at <https://openknowledge.worldbank.org/handle/10986/24736>, accessed on June 27, 2017.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Addressing Large Movement of Refugees and Migrants* op cit note 165 at 2.

<sup>169</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2015' op cit note 6 at 16.

<sup>170</sup> Statement of the President of the Republic of Uganda and Co-Chair of the Uganda solidarity summit on refugees delivered at Kampala Uganda on 23 June 2017, Uganda Solidarity Summit on Refugee available at <https://www.yowerikmuseveni.com/presidents-statement-uganda-solidarity-summit-refugees> (accessed on June 24, 2017).

23, 2017. Sixty per cent of the refugee population constitute children below the age of 18.<sup>171</sup> These figures set Uganda at the top position in hosting the largest number of refugees in Africa and third in the world after Turkey and Pakistan. President Museveni, while acknowledging challenges faced by refugee children in accessing quality education, emphasised the need for all refugee children to obtain quality education because it would help them acquire new skills and regain the time lost during their flight.<sup>172</sup>

The country remains among the world's leading examples of host nations, with a progressive refugee policy. Uganda's refugee law and policy are described more fully in section 3.2 below.

### **3.2 Analysis of Uganda's refugee law and policy on right to education**

Uganda's refugee law and policy are embodied in the Refugees Act 21 of 2006 and Refugees Regulations of 2010. It has been lauded as one of the most generous and progressive in the world. The impressive aspects of Uganda's refugee law and policy are characterised by opening doors to all asylum seekers irrespective of their nationality or any other kind of affiliations,<sup>173</sup> relative freedom of movement and the right to seek employment,<sup>174</sup> providing *prima facie* asylum during mass influx,<sup>175</sup> giving a piece of land to every refugee family for residential and agricultural use,<sup>176</sup> and access to social services such as education.<sup>177</sup>

In general, Uganda has a good legal framework for protecting the right of access to education. This right is protected and guaranteed to all children by the Constitution, and, as can be seen above, the regional and international treaties ratified by Uganda in which refugee children's right to education is protected and can be claimed.

Uganda has an inclusive and ambitious set of education policies aimed at ensuring the realisation of basic education for all children in accordance with Article 30 of the Constitution. However, the

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<sup>171</sup> Uganda Solidarity Summit on Refugees 'Translating New York Declaration Commitments into Action: Requirements for a Comprehensive Refugee Response in Uganda (June 22-23, 2017)' at 4. Available at <http://solidaritysummit.gou.go.ug/sites/default/files/UgandaComprehensiveRefugeeResponse20June2017.pdf> (accessed on 24 June 2017).

<sup>172</sup> Statement of the President of the Republic of Uganda op cit note 170.

<sup>173</sup> Sections 4, 25 and 29(1)(b) and (c) Refugees Act 21 2006.

<sup>174</sup> Sections 29(1)(e), 30 Refugees Act 21 2006 and Rule 64 of the Refugees Regulations 2010.

<sup>175</sup> Section 25 Refugees Act 21 2006.

<sup>176</sup> Rule 64 the Refugees Regulations 2010.

<sup>177</sup> Section 29(1)(e) and 30 Refugees Act 21 2006.

major concerns are about the quality of the basic education being offered, especially in rural areas, and whether Uganda is prioritising education to citizens over fulfilling its obligation to provide education to all, including refugee children, according to international law.

### **3.2.1 Education rights under the Constitution of the Republic of Uganda**

Education as a human right in Uganda is guaranteed by Article 30 of the Constitution of the Republic of Uganda and Article 34 which specify that every child is entitled to basic education. Jointly, the State and parents have a shared constitutional obligation to ensure all children have access to basic education.<sup>178</sup> As a result, the right to education as stipulated in these articles applies to all children without discrimination of any kind, including discrimination on the basis of refugee status. In addition, Art 34(2)(b) of the Constitution protects *all* children from social or economic exploitation and any other practice that is likely to interfere with their fundamental right to education. The Constitution also provides for the equality and entitlement to the same protection of all persons.<sup>179</sup> Similarly, no child shall be denied education, health or any other social or economic benefit by the reason of religion or other beliefs.<sup>180</sup> Hence the protection of the right to education for refugee children in Uganda is well safeguarded under the supreme law of the country<sup>181</sup> on a non-discriminatory basis in all respects.

To operationalise the Constitutional provisions on the protection of children and education in Uganda, the Children's Statute (amendment) was adopted in 2016 and the Education (pre-primary, primary and post-primary) Act in 2008.

### **3.2.2 The fundamental right to education under the Children's (Amendment) Act 2016 of Uganda.**

Every child in Uganda is to be treated 'without discrimination of any kind, irrespective of his or her race...nationality or social origin, citizenship, gender, disability if any, political or social opinion, property or any other condition.'<sup>182</sup> Hence, discrimination against a child on the basis of

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<sup>178</sup> Art 43(2)(a) of the Constitution of the Republic of Uganda.

<sup>179</sup> Art 21 of the Constitution of the Republic of Uganda.

<sup>180</sup> Art 34(3) of the Constitution of the Republic of Uganda.

<sup>181</sup> Art 2(1) of the Constitution of the Republic of Uganda states that the constitution is the supreme law of the land and any law inconsistent with it is void to the extent of inconsistency.

<sup>182</sup> Section 4(j) of the Children's (Amendment) Act of 2016.

his or her refugee status is prohibited. Furthermore, under section 6, the Children's Act of 2016 prohibits exposure of a child to any customary or cultural practice that is harmful to his or her wellbeing, education or social-economic development and further imposes a term of imprisonment and/or fine subject to a conviction of a person who is culpable of contravening the provisions of section 6.

### **3.2.3 Education Act 13, 2008**

The Education Act 13, 2008 provides that 'basic education shall be provided and enjoyed as a right by all persons'.<sup>183</sup> This legislation does not discriminate children, thus safeguards refugee children's right to access education. Section 4(1) of the Education Act enjoins the State, parents or guardian and other stakeholders to jointly be responsible for the provision of education and training.

Section 9(1) of the Education Act prohibits anyone from imposing any levy charges for the purposes of education in any primary or post-primary institutions implementing a universal free education program. Only collection or voluntary contributions or payments to contain a state of emergency or any urgent matter concerning the school are permitted by section 9(2). However, pursuant to section 9(3), no child can be sent away from the school or denied access to education due to failure to pay any contribution stipulated in section 9(2). Any person in breach of section 9 commits an offence under the Education Act and is liable to conviction and risks a fine and/or imprisonment.<sup>184</sup>

Despite the Education Act being explicit on free basic education, pupils are still charged fees to sit for a national examination at the end of education cycle (seven-year primary and four-year secondary education cycles system) administered by UNEB.<sup>185</sup> Equally, some schools charge extra fees in the form of fees for feeding, registration and development;<sup>186</sup> but President Museveni condemned such practice, terming it illegal and a burden to the parents and guardians. He stressed

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<sup>183</sup> Section 4(2) Education Act 13 of 2008.

<sup>184</sup> Section 9(4) Education Act 13 of 2008.

<sup>185</sup> Uganda National Examinations Board: Fees for 2017PLE, UCE & UACE. CF/UNEB/24 issued on 4 April 2017. See Cecilia Okoth 'UPE Schools still charge exam fees' *The New Vision* 12 June 2014 available at: [http://www.newvision.co.ug/new\\_vision/news/1341618/upe-schools-charge-exam-fees](http://www.newvision.co.ug/new_vision/news/1341618/upe-schools-charge-exam-fees) accessed on 26 July 2017.

<sup>186</sup> Jessica Sebano ' Museveni warns UPE School on charging fees' *The Daily Monitor* 7 September 2015, available at <http://www.monitor.co.ug/News/National/Museveni-warns-UPE-schools-charging-fees/688334-2860488-juouu5/index.html> accessed on 25 August 2017.

that ‘the government put money into Universal Primary Education(UPE) to ensure all pupils get free basic education.’<sup>187</sup> He further warned that culprits will be arrested and charged in courts.<sup>188</sup>

The UNEB fee mentioned above results in many children being forced to drop out of schools before completing the seven-year cycle of primary and four-year-cycle of secondary education systems, both under free UPE and USE, because they cannot afford the fees and other related costs, such as photographs and fees for mock examinations.<sup>189</sup> In 2012, *New Vision* paper revealed that over one million children who enrolled for primary one in 2006 under the free UPE program did not complete the cycle, representing a 71 per cent dropout rate.<sup>190</sup>

### **3.2.4 The Refugees Act 21, 2006 and 2010 Refugees Regulations of Uganda.**

The 2006 Refugees Act and the 2010 Refugees Regulations encapsulate fundamental principles and freedoms of refugee protection in Uganda among others: the right to engage in agriculture, industry, and business; to practice one’s profession; to access formal and informal employment opportunities; and pertinent for the purposes of this paper, the right to economic, social, and cultural benefits, including access to elementary education.<sup>191</sup> Equally, East African Community nationals who are refugees are entitled to all the rights and privileges normally enjoyed by East African Community citizens as conferred by the East African Community Treaty of Cooperation and its Protocols,<sup>192</sup> thus protecting refugees from Burundi, Kenya, Rwanda, South Sudan, Tanzania in Uganda

Among other grounds, for one to qualify for refugee status in Uganda under the Refugees Act, 2006, they must meet the test under section 4 which stipulates that, *inter alia*,

owing to ... events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, that person is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality.

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Cecilia Okoth ‘UPE Schools still charge exam fees’ *The New Vision* 12 June 2014 available at [http://www.newvision.co.ug/new\\_vision/news/1341618/upe-schools-charge-exam-fees](http://www.newvision.co.ug/new_vision/news/1341618/upe-schools-charge-exam-fees) accessed on 26 July 2017.

<sup>190</sup> Francis Kagolo, ‘UPE: Staggering 71% drop-out rate so far’ *The New Vision* 10 November 2012, available at: [http://www.newvision.co.ug/new\\_vision/news/1309819/upe-staggering-71-drop-rate](http://www.newvision.co.ug/new_vision/news/1309819/upe-staggering-71-drop-rate) accessed on 26 July 2017.

<sup>191</sup> Sections 29(1) (e) and 30 Refugees Act 21 of 2006.

<sup>192</sup> Section 9 Refugees Regulations of 2010.

The Refugees Act, 2006 provides specific rights to the recognised refugees, and children in particular, and for the purposes of this paper, every refugee child has the right to enjoyment of the rights and freedoms enshrined in other international and regional instruments without discrimination.<sup>193</sup> Section 32(1) specifically accords refugee children access to elementary education in equal measure as nationals hence enabling refugees to benefit directly from the free UPE program. For the purpose of clarity, section 2 interprets elementary education to mean basic primary education. However, section 29(1) (e) par 3, subjects refugees seeking education other than elementary education to the same treatment accorded to aliens in similar circumstances (that is, if they can afford it); hence legally, refugee children are ineligible for the free USE program.

### **3.3 Relevance of education for refugees and its transposable impact on other sectors**

The World Bank argues that human capital is a key driver of economic growth and prosperity of any nation.<sup>194</sup> It asserts that no society can achieve its potential without equal participation of its people which requires investment in human capital through education.<sup>195</sup> Human capital is a model that involves not only the overall availability of a labour force, but also education skills. To ensure growth and economic development, investment in education is imperative. This applies not only to refugees' ability to contribute to the economic development of their host country but, more importantly, upon return to their respective countries of origin, as highlighted by President Museveni in his emphasis on the need for refugee children to obtain quality education in order to acquire new skills.<sup>196</sup>

Quality education is part of Uganda's major development policy agenda as set in the Sustainable Development Goals (SDGs),<sup>197</sup> thus, improving access to education has been one of the policy goals for Uganda. Economists at the World Bank have argued that a lack of a qualified labour force constrains economic growth, inclusive poverty and dependency reduction in Uganda.<sup>198</sup> The GoU, in cooperation with development partners, including UNHCR and World Bank, agreed that

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<sup>193</sup> Refugees Act 21 of 2006 of the Republic of Uganda Art 32(2).

<sup>194</sup> *The World Bank Annual Report 2016* at 18.

<sup>195</sup> *Ibid.*

<sup>196</sup> Statement of the President of the Republic of Uganda op cit note170.

<sup>197</sup> Clarence Tsimpo, Alvin Etang & Quentin Wodon, Education and Health Services in Uganda: Quality of Inputs, User Satisfaction and Community Welfare Levels (June 2017) *Policy Research Paper 8116* at 2.

<sup>198</sup> *Ibid.*

education should receive priority, hence inclusion of refugees in the second National Development Plan (NDP) through the Settlement Transformative Agenda (STA), which contains government's comprehensive refugee response approach.<sup>199</sup>

In recognition of the relevance of education and its transposable effect, and pursuant to the Constitution provisions on education, the GoU has implemented various policies to improve both the supply and the demand for education services. In order to improve access to education, a set of policies has been implemented, among others: building and renovation of schools; purchase of adequate instructional materials; training, hiring and retaining of teachers; combatting of teachers' absenteeism and curriculum change.<sup>200</sup> Other notable national policies and actions which safeguard access to education for children in Uganda include the Universal Primary Education (UPE), Universal Secondary Education (USE) and tuition programmes.<sup>201</sup>

World Bank economists argue that Uganda's education reforms succeeded in increasing access and enrolment but systems seem not to have been ready to accommodate the increasing education services demand<sup>202</sup> for both nationals and the ever-increasing number of refugees. Limited financial and human resources coupled with the increase in demand for education has led to overcrowding and overstressing the available physical infrastructure.<sup>203</sup> This has led to a compromise on good quality education service in the country with the World Bank emphasising the importance of quality of service delivery in sustaining economic growth.<sup>204</sup>

According to the World Bank, the propensity of teachers absconding from their teaching duties in rural poor areas is high, especially in the north and eastern regions of Uganda<sup>205</sup>. This is attributed to the fact that schools in these regions are located in hard-to-reach-and-hard-to-stay areas due to limited infrastructural development such as access roads, safe water, buildings, etc.<sup>206</sup> The majority of refugees are settled in rural settlements and most of these are in the northern region

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<sup>199</sup> Uganda Solidarity Summit on Refugees op cit not 171 at 10.

<sup>200</sup> Clarence Tsimpo, Alvin Etang & Quentin Wodon op cit note 197 at 2.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Clarence Tsimpo, Alvin Etang & Quentin Wodon op cit note 197 at 6.

<sup>206</sup> Ibid.

where refugee children's right to access education is guaranteed in public schools under the UPE program.

The World Bank survey reports suggest that the majority of teachers in public schools in Uganda are absent from classroom teaching, which affects pupils' educational achievement significantly.<sup>207</sup> It has been confirmed that the more days a teacher is absent from the classroom, the more likely pupils will perform below standards in tests.<sup>208</sup>

Furthermore, in rural areas and the northern region where most refugee children are enrolled for education, teachers' knowledge of the subjects they teach and the pedagogical skills to transform their knowledge into meaningful teaching were lower than elsewhere.<sup>209</sup> Refugees residing in rural settlements are provided access to basic social services and section 30 of the Refugees Act on freedom of movement enables them to participate in economic activities and social interaction among themselves and their host communities. However, refugees remain vulnerable because of underlying poverty and vulnerabilities stemming from weak basic social services and poor infrastructure in the country.

The GoU and UNHCR, in 2009, adopted a policy of integrated services whereby both refugees and their host community benefit from social services provided by either or both the GoU, UNHCR and their partners. In practice, primary education is provided free within the settlements by the GoU under the UPE program while UNHCR and international partners handle school infrastructure, equipment, recruitment and compensation of teaching staff.

Despite the education law reforms and general improvement of the education sector, concerns still exist about low levels of enrolment in the higher grades, the large number of dropouts, the low transition rate to secondary schools, the insufficient number of trained teachers and the poor quality of education, hidden costs to the free education policy, and regional disparities in access to and full enjoyment of the right to education.<sup>210</sup> The CRC Committee in 2005 also noted with great

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<sup>207</sup> Ibid.

<sup>208</sup> Mary Finlayson, *The Impact of Teacher Absenteeism on Student Performance: The Case of the Cobb County School District* (2009) *theses and Capstone Projects* paper 4 at 31.

<sup>209</sup> Clarence Tsimpo, Alvin Etang & Quentin Wodon op cit note 197 at 16.

<sup>210</sup> UN Human Rights Council *Summary: (Universal Periodic Review): Uganda / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1*, 22 July 2011, A/HRC/WG.6/12/UGA/3 at para 79.

concern the poor living conditions, high dropout rates among refugee girls from fourth grade onwards, inadequate sanitary materials for refugee girls attending schools and lack of reproductive health education.<sup>211</sup>

Although the Ugandan government adopted free UPE and USE policy to guarantee children's right to education, challenges in ensuring that all refugee children receive the best form of education still exist. These include overcrowded class rooms, high teacher/pupil ratio at about 1:150,<sup>212</sup> lack of inclusive education for children with disabilities, escalating school dropout rates, and lack of transitions for refugee children joining Ugandan post-primary institutions and schools.<sup>213</sup> Furthermore, deteriorating quality of primary and secondary education is a result of insufficient allocation of funds to meet the material and professional conditions of staff and to provide specialised trained staff to address the special needs of refugee students<sup>214</sup>

Furthermore, the challenge of curriculum remains because study materials and language of instruction in Uganda are different to those of the refugee's countries of origin. This is contrary to what is required in terms of Art 11 (2) (c) and (e) of the African Children's Charter. Post-primary education requires tuition and other school-related costs which refugees are unable to afford because they remain dependent on support given by UNHCR and its partners, which can assist only a very small number of students compared to the number completing primary education level and those who arrived in Uganda at post-primary education levels.

Notwithstanding the existence of an enabling legal and policy framework in Uganda that ensures access to education, refugee children in particular continue to face legal and structural barriers in accessing post-primary education. The law that guarantees rights of refugees in Uganda limits the extent to which the right to education is exercised,<sup>215</sup> since refugees are still subjected to section 29(1) (e) Par 3 of the 2006 Refugees Act which excludes them from the same treatment as

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<sup>211</sup> UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: concluding Observations, Uganda* 23 November 2005, CRC/C/UGA/CO/2 at para 61.

<sup>212</sup> The Uganda Solidarity Summit on Refugees op cit note 171 at 10.

<sup>213</sup> Lutheran World Federation Republic of Uganda Joint Submission to the UN Universal Periodic Review: 26<sup>th</sup> Session of the UPR Working Group 31 October -11<sup>th</sup> November 2016 Refugees and Post Conflict Communities at 4.

<sup>214</sup> UN Human Rights Council, *Summary: (Universal Periodic Review): Uganda / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1*, 22 July 2011, A/HRC/WG.6/12/UGA/3 at para 79.

<sup>215</sup> Section 29(1) (e) para 3 of the Refugees Act 21 2006.

nationals. The GoU submits that refugees enjoy free access to USE schools,<sup>216</sup> however, in addition to legal limitations, the realities on the ground relating to very low transition for refugee children joining secondary schools prove otherwise – there are hardly any secondary schools<sup>217</sup> in most rural settlements to accommodate the demand. The majority of refugee children come from families already burdened with poverty, whose parents or guardians can neither afford the high cost of secondary education nor afford vocational training. This has stalled their fundamental right to education and constitutes a continued denial of access to post-primary education for refugee children, which is not only discriminatory but also contrary to the provisions of the Constitution of Uganda.

Section 29(h) of the Refugees Act provides refugees with free access to courts of law, including legal assistance under applicable laws of Uganda. However, there are no available judicial case laws on the interpretation of the fundamental right to education for refugees, hence the effectiveness of the current laws and policies regarding the accessibility of education rights for refugee children remain untested despite the visible structural challenges they continue to face.

### **3.4 Conclusion**

Education is a fundamental human right for all children under international law and more importantly, it is safeguarded by the Constitution of the Republic of Uganda. This chapter displays that despite the education law reforms and general improvement of education sector in Uganda, especially the adoption of free UPE and USE program to guarantee children's right to education, the right to education for refugee children remains subordinate to that enjoyed by their counterpart Ugandan nationals.

The Refugees Act accords refugees the right to education, but limits the extent to which such right is to be exercised by subjecting refugees to the treatment similar to that accorded to foreigners. Contrary to international law, Uganda considers no special protection to the education rights for refugee children despite circumstances of their refugee status, dependence and other vulnerabilities. This has far-reaching consequences, such as high dropout rates among the refugee

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<sup>216</sup> Uganda Solidarity Summit on Refugees op cit note 171 at 6.

<sup>217</sup> Ibid at 11.

children, lack of transition for refugee children joining secondary school, and overall deteriorating quality education in refugee settlement schools.

Chapter Four looks at legal framework gaps within the international, regional and national laws as well as policies to identify specific challenges refugee children face in accessing education in Uganda.

## CHAPTER FOUR

### 4.0 Limitations within the international and national legal frameworks on safeguarding the right to education for refugee children

This chapter looks at legal framework gaps within the international, regional and national laws as well as policies that limits access to education for refugee children. This helps to identify specific challenges refugee children face in accessing education as one of their fundamental rights in Uganda.

#### 4.1 Limitations in the international legal framework

The fundamental right to education is guaranteed by the UDHR,<sup>218</sup> CRC,<sup>219</sup> ICESCR,<sup>220</sup> 1951 UN Refugee Convention,<sup>221</sup> African Children's Charter,<sup>222</sup> the UNESCO Convention against Discrimination in Education of 1960, and other international instruments. To realise the right to education globally, in 1990, the international community committed to achieving UPE for every child by 2000 through the Education for All (EFA) campaign.<sup>223</sup> This was reaffirmed at the international conference on education in 2000<sup>224</sup> after the first EFA campaign failed to achieve its goal. The conference opted to set new targets to be achieved by 2015 which were incorporated in the millennium goals.<sup>225</sup> Furthermore, because of continued shortfalls in achieving EFA, education was integrated in the Sustainable Development Goals (SDGs) to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.<sup>226</sup>

In the refugee context, as a signatory to the 1951 UN Convention and its 1967 Protocol Relating to the Status of Refugees, the GoU is obliged to follow the Convention's rules and regulations in

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<sup>218</sup> UDHR Art 26.

<sup>219</sup> CRC Arts 28 & 29.

<sup>220</sup> ICESCR Arts 13 & 14.

<sup>221</sup> 1951 UN Refugee Convention Art 22.

<sup>222</sup> African Children's Charter Art 11.

<sup>223</sup> World Conference on Education for All: Meeting Basic Learning Needs. (1990). *World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990.*

<sup>224</sup> UNESCO, Dakar Framework for Action, Education For All: *Meeting Our Collective Commitments*. Adopted by the World Education Forum Dakar, Senegal 26-28 April 2000

<sup>225</sup> UNESCO EFA Global Monitoring Report, Education For All 2000-2015: achievements and challenges at 75.

<sup>226</sup> UN General Assembly 'Transforming our World: The 2030 Agenda for Sustainable Development' *United Nations, A/RES/70/1* of 25 September 2015 at 17.

dealing with refugees. The 1951 Convention was amended by the 1967 protocol to broaden its scope in terms of lifting geographical limitations, yet remains inexplicit on the right to education for refugee children. Thus, the Convention remains incompetent to manage the present realities of refugee movements which are flooded with children. Today, more than ever before, the refugee situation is no longer temporary because of increasing cases of refugees staying in protracted exile for up to 20 years or more.<sup>227</sup> The majority of refugees today are children who are more vulnerable than adults or their counterpart nationals but the Convention provisions does not make a single reference to them. Whether this was a deliberate decision by the drafters or not, it has far-reaching consequences on the human rights of refugee children because the 1951 Convention is the primary authority on matters concerning refugees – other international treaties come in second as complements. The UNHCR EXCOM has specific conclusions that provide guidance on refugee children issues. Although these conclusions are very important in providing guidance and interpretations, they have no binding authority on any contracting States or even on the UNHCR, which is a lead refugee protection organisation; they are soft laws that carry only persuasive value.

CRC is not a refugee Convention. Although it affords special protection to children because of their dependence and vulnerability, it has no authority over the protection and management of refugee problems. Hence, there is a legal challenge for refugee children to claim the rights under the law or the 1951 UN Convention that does not recognise them.

In Uganda and other countries alike, legislation was enacted (specifically the Children (Amendment) Act in the case of Uganda) to comply with the CRC to enable their children to claim the universal child rights locally. On the other hand, Uganda enacted the Refugees Act and Regulations Act in compliance with the 1951 Convention and 1969 OAU Convention under which refugees in Uganda can legally claim enshrined rights. However, the two refugee treaties fail to adequately provide the right to education for refugee children: for instance, the UN Convention Relating to the Status of Refugees has provision for education rights but makes no reference to refugee children, while the OAU 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa does not provide any right to education or to children specifically. Hence,

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<sup>227</sup> UN High Commissioner for Refugees (UNHCR) 'Global trends: forced displacement in 2015' op cit note 6 at 20.

Uganda cannot be held legally accountable for any violations regarding the refugee child rights which the refugee conventions themselves do not provide.

International law is explicit about the purpose of education and the specific provision of primary education. It directs States to make primary education free, compulsory and available to all.<sup>228</sup> Refugee children are provided with the right to access primary education like nationals in their CoA.<sup>229</sup> Therefore, refugee children cannot be accorded primary education greater than that received by nationals in the CoA even if what is being provided infringes international law or is contrary to the provision of free and compulsory primary education.

The provision of secondary education or post-primary education is State-sympathetically articulated under the international law and imposes no obligation on the State. States are not 'bound', they are only 'encouraged' to develop different forms of secondary education (including vocational education), make it available and accessible to every child, and take appropriate measures in case of need by making it free or offering financial assistance. Further, UNHCR is requested by the UNHCR EXCOM Conclusion No. 47, par. 'P' to consider provision of post-primary education within the general assistance programme. Therefore, it can be said, on the basis of this paragraph, that it is not a contracting State's obligation to provide post-elementary education to refugees since UNHCR is invited to take such obligation under its international protection mandate. As a result, UNHCR has come up with the policy guideline to safeguard the rights of refugees to education.<sup>230</sup> However, if a State takes it upon itself to make secondary education available and free, refugees will remain ineligible pursuant to Art 22(2) of the 1951 UN Convention which directs the CoA to accord the right to education other than elementary under the same conditions as foreigners.

Art 22(2) of the 1951 UN Convention constitutes another limitation on refugees' access to education. The limitation is implicit in that access to post-elementary education for foreigners is dependent on their ability to pay. Furthermore, it was ironic for the drafters to have incorporated refugees with foreigners in according them access to post-elementary education. Ideally foreigners

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<sup>228</sup> See CRC Art 28(1)(a); ICESCR Art 13(2)(a); African Children's Charter Arts 11(1) and 11(3)(a).

<sup>229</sup> Art 22(1) of the 1951 UN Refugee Convention.

<sup>230</sup> UNHCR 'Education: field guidelines' (February 2003) available at <http://www.unhcr.org/40586bd34.pdf>, accessed on 17 August 2017.

or aliens live in a country other than theirs by choice and still enjoy the protection of their home governments – contrary to the refugee situation. Thus, equating them for the enjoyment of such a fundamental right while under different protection situations has led to discrimination against refugees in the CoA.

To sum up, the African Children’s Charter in its Art 23 requires Uganda to take all appropriate measures to ensure that a refugee child receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in it and in other international human rights instruments to which the States are party. Hence refugee children are accorded, among other rights, education<sup>231</sup> and non-discrimination<sup>232</sup> as prescribed in the African Children’s Charter. However, the principal African Union refugee treaty, the OAU 1969 Refugee Convention which seeks to address refugee problems in Africa did not only fail to recognise education needs for refugees, but also provides no protection provision for refugee children. Thus, the African regional legal framework for refugees sets a bad precedent among its Party States in relation to safeguarding the fundamental rights of refugee children and, particularly, the right to education.

## **4.2 Limitations in national laws and policies**

In Uganda, Art 30 of the Constitution<sup>233</sup> guarantees the right to education for ‘all persons’ and, as stated in above, to operationalise this provision, the country enacted its Education (Pre-Primary, Primary and Post-Primary) Act of 2008 which further led to the adoption of UPE and USE programmes in 1998 and 2007, respectively.

The GoU’s explicit policy refers to ‘quality education’, ‘every child’, ‘accessible’ and ‘equitable’, among other words that address human rights concerns about non-discrimination, accessibility and relevance of education. The choice of language in the Education Act highlights the commitment of the GoU to pursuing education objectives to make education accessible to all children in Uganda using the human rights approach. However, pursuant to section 5(2) of the Education Act, it is evident that education has not been made free because parents and guardians of children are required to contribute scholastic materials, uniforms, lunch, and transport, as well as pay

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<sup>231</sup> African Children’s Charter Art 11.

<sup>232</sup> African Children’s Charter Art 2.

<sup>233</sup> The Constitution of Uganda Arts 30 & 34.

examination fees (including the UNEB fee for the national examinations). Equally, parents are required to participate in ‘community support’ which includes contributions in form of building materials and labour to schools while public schools in urban centres remain permitted to charge a fee for the payment of water, electricity and phone bills.<sup>234</sup> Thus the cost barriers to the accessibility of both primary and secondary education in Uganda remain high, hindering indigent parents from keeping their children in schools. This explains the high dropout and low primary school completion rates, as well as low transition to secondary education.<sup>235</sup> Of the children enrolled in school, millions drop out before completing a full cycle and without having gained most basic skills. CESCR's General Comment 11 on Article 14 reveals that school fees and other access costs constitute hindrances to the enjoyment of the right to education and subsequently jeopardise its realization.<sup>236</sup> Furthermore, indirect costs, such as uniforms or compulsory levies on parents hinder the right of access to basic education.<sup>237</sup>

The GoU offers the free UPE programme to all children in line with the Children’s Act and the Constitutional alignment with the country's international obligation to make primary education free and compulsory to all children. The Centre for Health, Human Rights and Development<sup>238</sup> maintains that GoU has a responsibility not only to pay tuition fees for all enrolled primary school learners but also to provide and improve infrastructure of schools, including expansion of classrooms, sanitation facilities, and teachers' accommodation facilities, as well as instructional materials such as textbooks.

Furthermore, in compliance with international law, particularly with respect to ICESCR and CRC provisions,<sup>239</sup> GoU adopted free education for lower secondary (ordinary level) education for every child by abolishing tuition fees for lower public secondary schools (USE) but the Refugees Act subjects refugee children to the same treatment as foreigners.<sup>240</sup> Thus, refugee children are not eligible to benefit from free USE pursuant to the section 29(1)(e) Par 3 of the Refugees Act.

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<sup>234</sup> Centre for Health, Human Rights and Development *Universal primary education, human rights and the right to health: an assessment of the policy and practice in Uganda* at 17-18.

<sup>235</sup> *Ibid* at 18.

<sup>236</sup> UN Committee on Economic, Social and Cultural Rights (CESCR). *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)* 10 May 1999 E/1992/23.

<sup>237</sup> *Ibid*.

<sup>238</sup> Centre for Health, Human Rights and Development *op cit* note 234 at 19.

<sup>239</sup> CRC Art 28(1)(b); ICESCR Art 13 (2)(b).

<sup>240</sup> Refugees Act Section 29(1)(e) para 3.

International law requires Uganda to make secondary education generally available and accessible to every child.<sup>241</sup> Although in practice, refugee children are not prohibited from entering both public and private schools provided they can afford it; the availability of secondary schools remains a major challenge especially in the rural refugee settlements. Most refugee settlements in Uganda are situated in rural districts with limited education services.<sup>242</sup> Most secondary schools are situated in town/urban centres, several kilometres away from settlements making them less accessible to refugee children. Access to the available nearby secondary schools in some settlements require students to have accommodation either in the school or nearby area, hence there are costs for transport, boarding (accommodation) and meals in addition to tuition.

For students to be eligible for secondary education, they must complete year seven of the primary education system and pass the national Primary Leaving Examinations (PLE). Furthermore, free USE is only available for those students who score above a set benchmark in their PLE.<sup>243</sup>

All children are required to register to sit for PLE at a predetermined cost commonly known as the 'UNEB fee' by the Ministry of Education administered by the Uganda National Examinations Board (UNEB).<sup>244</sup> Children whose parents or guardians cannot afford to pay the UNEB fee are automatically forced to drop out of school without any documentation for all the years they have spent in school and are not eligible to enrol in any other formal education system in the country. In practice, admission to post-primary institutions requires one to have documentation from UNEB certifying the completion of primary education. Although this affects all children, both refugees and nationals, the effect is felt more acutely among the refugee children due to dependence in the refugee situation. Refugee children also drop out of school before completing primary seven because of challenges related to feeding, transport costs, PTA fees, purchase of uniform and scholastic material needs since their parents or guardians are impoverished and cannot afford these responsibilities prescribed in section 5(2)(c) of the Education Act.

Furthermore, while both the Constitution and the Education Act require the government to make primary education free and compulsory, this is yet to be fulfilled. Education in Uganda is a shared

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<sup>241</sup> CRC Art 28(1)(b); ICESCR Art13 (2)(b).

<sup>242</sup> Clarence Tsimpo, Alvin Etang & Quentin Wodon op cit note 197 at 6.

<sup>243</sup> Meital Kupfer *Accessibility and quality of education for refugees: a case study of Kyangwali Refugee Settlement* at 7.

<sup>244</sup> *Uganda National Examinations Board: Fees for 2017PLE, UCE & UACE. CF/UNEB/24* issued on 4 April 2017.

responsibility between the government and parents/guardians pursuant to Art 43(2)(a) of the Constitution. The UPE programme requires parents to meet the school requirement costs necessary for children to attend school and learn. However, UPE provides no guidelines on the consequences for parents or guardians who fail to comply with their obligations to send their children to school. As a result, the programme has largely remained voluntary as there has been no penalisation of parents/guardians whose children dropped out of school.<sup>245</sup>

Equally, since the inception of universal education in Uganda, the government has yet to fulfil its commitment to paying for every child enrolled in public UPE and USE. According to the Centre for Health, Human Rights and Development,<sup>246</sup> the GoU has been paying US\$ 1,500 per child per academic term to primary schools, contrary to its commitment of US\$ 7,560 per child. This amount has been described as ‘hardly enough to repair one desk in a school.’<sup>247</sup> In acknowledging funding gaps before the National Parliament of Uganda, the Ministry of Education<sup>248</sup> submitted that the education sector is generally underfunded and has greatly affected the quality of education provided, particularly under the UPE programme.

To sum up, several national barriers to education exist in Uganda, among them, distances to schools and their poor condition in the rural areas, and the various costs associated with schooling, together with the cost of sitting the exams that provide access to education beyond elementary. While the barriers to education affect all children to some degree, as we shall see below, refugee children are most seriously affected because of their parents’ lack of resources, particularly in the rural areas where most of them are located.

### **4.3 Practical barriers to accessing education**

As we have seen, refugee children in Uganda have the right to education provided for by the International Conventions, national legislation and common law. The most pressing question, however, is how refugee children in Uganda can effectively access that right as enshrined. As we saw in the previous section, barriers to access education for refugee children in Uganda include

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<sup>245</sup> Centre for Health, Human Rights and Development, op cit note 234 at 35.

<sup>246</sup> Ibid at 20-21.

<sup>247</sup> Ibid.

<sup>248</sup> Ministry of Education, Science, Technology and Sports *Ministerial policy statement Financial Year 2015/2016* presented by Maj. (Rtd.) Alupo Jessica Rose Epel (MP) to parliament for the budget debate, April 2015.

school fees and related costs, limited schools in settlement areas, and language difficulties. It is the responsibility of the GoU to remove these barriers for both nationals and refugees alike without any form of discrimination to make the rights in theory become rights in practice. The practical barriers under discussion below are not based on my empirical research, they are drawn from the existing research done in Uganda.

### 4.3.1 High cost of educating a child

When citizens of any nation struggle to access socioeconomic rights, refugees are more likely to face greater difficulties due to their dependence because of limitations that come with their refugee status. Despite the introduction of free UPE and USE programmes which target impoverished communities, indigent parents (including refugees) continue to face a range of financial and non-financial constraints in sending their children to school. Costs of education (outlined above) include transport, uniforms, lunch and PTA and exam fees. Generally, the cost of sending children to school has remained too high for indigent parents.<sup>249</sup>

In response to the UNHCR EXCOM request, UNHCR is yet to turn attention to the provision of post-primary education within the general assistance programme.<sup>250</sup> Hathaway<sup>251</sup> writes that refugees seeking post-primary education, especially in developing countries, including Uganda, primarily depend on limited scholarship opportunities by UNHCR and its partners. UNHCR statistics<sup>252</sup> clearly demonstrate how access to post-primary education has continued to be a big challenge for refugee children. UNHCR efforts in this regard have fallen short as it is yet to transition from an emergency system of funding to multi-year or long-term funding to allow sustainable planning and quality programming of education for refugee children.<sup>253</sup> This has been

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<sup>249</sup> Lisa Huylebroeck & Kristof Titeca 'Universal secondary education (USE) in Uganda: blessing or curse? The impact of USE on educational attainment and performance.' In Reyntjens, F., Vandeginste, S. and M. Verpoorten (eds) *L'Afrique des Grands Lacs: Annuaire 2014-2015*. Antwerp: University Press Antwerp at 21.

<sup>250</sup> UN High Commissioner for Refugees (UNHCR), *Refugee Children No. 47 (XXXVIII) - 1987*, 12 October 1987 para 'p' No. 47 (XXXVIII) - 1987 available at: <http://www.refworld.org/docid/3ae68c432c.html> (accessed 21 August 2017)

<sup>251</sup> Hathaway op cit note 68 at 590-91.

<sup>252</sup> UN High Commissioner for Refugees (UNHCR) 'Missing out: refugee education in crisis' op cit note 7 at 20-21.

<sup>253</sup> UN High Commissioner for Refugees (UNHCR) 'UNHCR reports crisis in refugee education' 15 September 2016 available at <http://www.unhcr.org/afr/news/press/2016/9/57d7d6f34/unhcr-reports-crisis-refugee-education.html>, accessed on 21 August 2017.

long overdue, given the fact that the refugee situation has changed from being temporary to a protracted one with refugees staying in exile for 20 years.

### 4.3.2 Language

Hathaway<sup>254</sup> pronounces that the preservation of the mother tongue in the context of education is of great importance to many refugee families, particularly in the initial grades, because it keeps the possibility and hope of repatriation to their countries of origin alive. Uganda hosts refugees from more than 13 countries and faces the integration of children from different systems of education, and some of their countries of origin use different languages as mode of instruction. This poses some serious challenges for refugee learners to cope with a multilingual education system in Uganda where lower classes (grades one to three) are mandated to use local languages as the language of instruction, and English for grade four onwards.<sup>255</sup> The use of local languages helps to develop a sense of respect for, belonging to, and pride in, native cultures and values. Thus, the policy is well envisioned and is good for national children and Uganda as a nation. It also helps refugees to integrate easily in the host communities. Furthermore, this is compliant with CRC Art 29(1)(C) and Art 11(2)(c) and (e) of the African Children's Charter in a national context. However, this is counterproductive in the refugee context because refugee children must adapt to learning native languages of their host communities as well as English, which in some cases, differs from the language of instruction in their countries of origin.<sup>256</sup> Equally it is against the UNHCR EXCOM Conclusion No. 47 of 1987 on refugee children which seeks to safeguard refugee children's access to primary education that is of quality and respects their cultural values.

In the refugee settlements where numerous languages from different countries and ethnic background are spoken, it is difficult to find a common language that all learners and teachers can easily understand in addition to English, the official language.<sup>257</sup> Kupfer Meital<sup>258</sup> writes that national (Ugandan) teachers feel more aligned with fellow Ugandan children and exhibit some

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<sup>254</sup> Hathaway op cit note 68 at 584.

<sup>255</sup> Barbara Trudell *The impact of language policy and practice on children's learning: Evidence from Eastern and Southern Africa* (2016) UNICEF at 82.

<sup>256</sup> Most refugees from DRC and Burundi speak French while refugees from Sudan and South Sudan speak Arabic in addition to ethnic languages.

<sup>257</sup> Meital Kupfer op cit note 243 at 24.

<sup>258</sup> Ibid at 25.

preference for national children over refugees. The Lutheran World Federation<sup>259</sup> argues that there has been recruitment and inclusion of refugee teachers from within the refugee communities which has subsequently played a significant role in bridging numerous indirect and invisible gaps to ensure education continuity for refugee children. Nevertheless, the direct discrimination in terms of remuneration between refugee teachers and Ugandan nationals remains a concern that needs to be addressed.<sup>260</sup>

In Uganda, like many other countries around the world, the English language is associated with economic growth. It enables progress into tertiary institutions and it is a common language in the working world in Uganda. Therefore, the ability to speak English is vital for refugees in Uganda.

In my opinion, adaptation to the education system in Uganda through learning the native languages of refugees' respective host communities and English, is of great importance for refugees' holistic social and economic integration. However, it also diminishes refugees' hopes and possibilities of repatriation because the more refugees integrate into the host communities, especially the children, the more they lose links with their respective countries of origin – often refugees acquire new skills that are not compatible with their countries of origin's socio-economic conditions.

### **4.3.3 Insufficient teaching staff**

The GoU target for the teacher-pupil ratio is 1:45<sup>261</sup> but in refugee settlement schools, overcrowded classrooms have become rampant with a high teacher-pupil ratio of about 1:150.<sup>262</sup> A high teacher-pupil ratio hinders teachers from paying enough attention to individual pupils – pupils have less access to teachers, which in the long run leads to higher dropout rates and poor performance of pupils. This situation is attributed to several factors including the country's high population growth, estimated at three per cent, coupled with ever-increasing number of refugees. This has increasingly increased pressure on already limited resources and facilities. For instance, analysis of Uganda's annual budgetary allocation to the education sector *vis-a-vis* the inflation and incremental enrolment rates revealed a steady decline between 2010 and 2015.<sup>263</sup> Thus, stagnation

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<sup>259</sup> Lutheran World Federation op cit note 213 at 4.

<sup>260</sup> Ibid.

<sup>261</sup> National Planning Authority *Pre-primary and primary education in Uganda: access, cost, quality and relevance* at 6, available at: <http://npa.ug/wp-content/uploads/NDPF5-Paper-3172015.pdf> accessed on 20 August 2017.

<sup>262</sup> Uganda Solidarity Summit on Refugees op cit note 171 at 10.

<sup>263</sup> National Planning Authority op cit note 261 at 10.

both of teachers' wages and recruitment of new teachers have occurred despite the clear existence of gaps.<sup>264</sup>

#### **4.3.4 Inadequate educational facilities**

The country's high population growth coupled with a significantly rising number of refugees has had a direct impact on school enrolment rates which need subsequent matching of educational facilities. The National Planning Authority<sup>265</sup> reveals that the increase in enrolment is not being matched by increased required educational facilities. For instance, in 2014, the pupil-classroom ratio stood at 61:1 for public primary schools against the targeted 1:45 teacher-pupil ratio, implying a shortage of significant numbers of classrooms.<sup>266</sup> The Uganda Solidarity Summit on Refugees in 2017 highlighted that all districts in Uganda are short of secondary schools.<sup>267</sup> Hence, many children remain idle due to lack of access to secondary education facilities. While this affects all children, refugee children who reside in rural refugee settlements are worse off than nationals. According to the Summit,<sup>268</sup> there is a shortage of 'staff accommodation, classroom blocks; secondary schools and vocational schools' in refugee hosting districts.

#### **4.4 Conclusion**

This chapter finds substantial international and regional instruments for the protection of education for children. However, the main refugee treaties fail to adequately provide the right to education for refugee children. The UN Convention Relating to the Status of Refugees has provision for education rights but makes no reference to refugee children, while the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa neither provides the right to education nor rights specifically to children. The UN Convention Relating to the Status of Refugees provides refugees with inconsistent treatment in the CoA; it accords refugees the same minimum standards of treatment enjoyed by other foreign nationals in each host country, and at the same time, in some cases such as education, the same treatment as nationals.

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<sup>264</sup> Ibid at 10-11.

<sup>265</sup> National Planning Authority op cit note 261 at 6-7.

<sup>266</sup> National Planning Authority op cit note 261 at 6.

<sup>267</sup> Uganda Solidarity Summit on Refugees op cit note 171 at 11.

<sup>268</sup> Uganda Solidarity Summit on Refugees op cit note 171 at 11.

Uganda has performed extremely well in its generous open-door policy towards refugees and asylum seekers by keeping its borders open, and accords refugees' rights and freedoms as enshrined in the 1951 UN Convention and 1969 OAU Refugee Convention. However, the country's policies and laws on safeguarding refugee children's right to education reveal glaring shortfalls. The laws fail to provide adequate legal protection to refugee children's education rights. But this could be attributed to the inexplicit provisions of the Conventions governing refugees. Laws in Uganda have not been explicitly reformed, thus exhibit inconsistent provisions that hinder refugee children from equal access to education.

Notwithstanding the existence of an enabling legal and policy framework in Uganda that ensures access to education for nationals, refugee children continue to face legal and structural barriers in accessing post-primary education. The law that guarantees the right to education for refugees limits the extent to which it can be exercised. This is not only discriminatory but also inconsistent with the provisions of the Constitution of Uganda relating to education and child rights.

Lastly, resources amidst the growing number of refugees and rapid population growth in Uganda have not been matched with facilities equal to the growth to make education available, affordable and accessible to all children as prescribed by the international law.

The subsequent chapter discusses the possible remedies to the above challenges and presents them as policy suggestions to the relevant stakeholders, mainly to the GoU and UNHCR.

## CHAPTER FIVE

### Remedies and Conclusion

The UN Convention Relating to the Status of Refugees was adopted on the basis that a refugee situation is temporary but this has since changed since more refugee children spend their entire childhood in exile. Currently, the refugee experience is increasingly lengthy in duration with many refugees staying in exile for longer than 20 years on average– with very few refugees able or willing to repatriate to their countries of origin. This simply signals the need for shifting the approach from survival or lifesaving interventions to multi-year or long-term interventions to tackle the present realities of the refugee situation. Education, particularly post-elementary, has a vital role in supporting and shaping the future of both short- and long-term refugees.

Education is not only a gateway for knowledge, but also for prospects; it is extremely vital to maintain refugee children’s hope and wellbeing in Uganda and the entire world. Empowering self-reliant strategies such as community-based schools, and developing secondary and tertiary educational prospects can create a positive attitude towards a bright and sustainable future. The High Commissioner for UN Refugee Agency, Filippo Grandi, emphasises the need to think beyond basic survival assistance noting that ‘education enables refugees to positively shape the future of both their countries of asylum and their home countries when they one-day return’.<sup>269</sup> Similarly, President Museveni of the Republic of Uganda<sup>270</sup> acknowledges challenges refugee children in Uganda face in accessing quality education, and emphasised the crucial need for all refugee children to receive quality education. He cited Rwandese refugees as a point of reference: ‘[W]hen the refugees came from Rwanda, some of them were young, like Paul Kagame [current president of Rwanda], but later because of the education, they went back and changed their countries.’<sup>271</sup>

To streamline and strengthen Uganda’s international obligation commitment under the international law, government should consider numerous policy reviews, among others: enactment and instituting an absolute free education policy to eliminate indirect costs of education for refugee children, such as school uniforms, school meals and exams among others; addressing indirect discrimination faced by refugee teachers in remuneration; and finally, amendment of the Refugees

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<sup>269</sup> UN High Commissioner for Refugees (UNHCR) ‘UNHCR reports crisis in refugee education’ op cit note 253.

<sup>270</sup> Statement of the President of the Republic of Uganda op cit note 170.

<sup>271</sup> Ibid.

Act and education policies to guarantee access to post-elementary education by the refugee children. Similarly, there is a need for greater coordination between the Office of the Prime Minister (OPM), Department of Refugees and Ministry of Education both at national and district local government levels in order to regularly identify policy challenges refugee children face in accessing education.

While UNHCR is not an education specialist agency, it recognises education as ‘a core component of its international refugee protection and durable solutions mandate’,<sup>272</sup> and acknowledges that many refugee children do not have the access to education guaranteed by the international law. Furthermore, the quality of education provided to the refugee children in refugee settlements is not of a sufficient standard to guarantee personal capacity development and, subsequently, is inconsistent with the aim of education as prescribed in the CRC,<sup>273</sup> ICESCR<sup>274</sup> and African Children’s Charter.<sup>275</sup>

UNHCR’s strategic education intervention is emergency-centred, but it aims at promoting access to quality education for refugees by increasing enrolment of refugee children to access quality primary education as well as expansion of secondary education.<sup>276</sup> This is achieved through development of strong partnerships with Ministries of Education in the refugee hosting countries as well as with a selection of partners who have technical expertise in the education sector.<sup>277</sup> It also advocates for equal access for refugees to national education systems.<sup>278</sup> Noting that recognition of education rights under the various international treaties that Uganda is a party to – the Constitution, Children’s Act and Education Act – can go a long way towards improving access to education for refugees in Uganda. Subsequently, amendments to the discriminatory provisions under the Refugees Act No.21 of 2006 would by law permit refugees to access education in the country at all levels and on equal measure with nationals. Many refugees have no personal funding to aid their access to post-elementary education, and by law are not eligible for USE or any financial assistance from the government pursuant to section 29(1)(e) Par 3 of the Refugees Act

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<sup>272</sup> UN High Commissioner for Refugees (UNHCR) ‘UNHCR Education Strategy, 2012-2016’ 28 February 2012 available at <http://www.unhcr.org/afr/5149ba349> accessed on 26 August 2017 at 7.

<sup>273</sup> CRC Art 29.

<sup>274</sup> ICESCR Art 13(1).

<sup>275</sup> African Children Charter Art 11(2).

<sup>276</sup> UN High Commissioner for Refugees op cit note 272 at 8.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid at 32.

as articulated in the previous chapters, despite the Constitution of Uganda granting the right to education to all children without discrimination.

Sawahel<sup>279</sup> writes that to achieve success, UNHCR education strategy requires increasing numbers of scholarships for refugee learners through partnership with donors, foundations and academic institutions. Furthermore, ensuring continuity and sustainable education necessitates breaking down barriers to access to education for refugees at all levels of schooling.<sup>280</sup> Furthermore, UNHCR should fully comply with EXCOM Conclusion No. 47 of 1987 which directs the provision of post-primary education for refugees under UNHCR general programme assistance. Thus, UNHCR should consider establishing a long-term education funding strategy to enhance its education response programme in a more sustainable manner than depending on emergency-centred funding for education.

UNHCR should lobby States to consider adoption of an additional protocol that is a refugee child rights centred to reflect the present trend of refugee movement whose children form the largest constituency globally.

Lastly, because they constitute the majority of the refugee population globally and also considering their levels of vulnerability in society, in my opinion, children's rights need to be at the core of UNHCR interventions. The right to education for refugee children is vital for their holistic childhood development. It enables them to positively shape their future and that of the CoA, and keeps hope and possibilities for their repatriation alive.

To conclude, this thesis analysed Uganda's responsibility under international law to protect, promote and fulfil the right to access education for refugee children, and particularly aimed at understanding the challenges of provision of education to strengthen multi-level responses. It finds that, despite the country's open-door policy and generosity towards refugees, refugee children continue to face several challenges in accessing education including, among others, legal limitations, long distances to schools, lack of secondary schools and general poor conditions of educational infrastructure in the rural settlements, high costs associated with schooling including

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<sup>279</sup> Wagdy Sawahel 'Improving access to higher education for refugees' *University World News* 227 20 Jun. 2012. Issue No. 227.

<sup>280</sup> *Ibid.*

costs of sitting for exams that provide access to education beyond elementary. In addition, some refugee children in Uganda are faced with a language barrier and education curriculum that is not relevant to their cultural and country of origin's social-economic situations.

Lastly, the fundamental right to education is an enabling right. Failure to fulfil it, particularly for refugee children, has far reaching implications not only to the individual children but also to their families and the wider society. Illiterate children are highly improbable to get employment for their livelihoods, which frustrates self-sufficiency, making these children to remain exclusively dependent on international assistance to fulfil their day-to-day essential needs. Furthermore, uneducated children who are not attending school are susceptible to recruitment into criminal activities like armed militia, which potentially perpetuates conflict thus causing more displacements which subsequently hinder peace and sustainable development. Safeguarding the right to access quality education for refugees is therefore a fundamental concern in Uganda that needs to be prioritised and addressed accordingly.

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