

**A CRITICAL ANALYSIS OF THE RIGHT TO EDUCATION FOR REFUGEE  
CHILDREN IN GREAT LAKES: THE CASE STUDY OF BURUNDI**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE  
UNIVERSITY OF PRETORIA, IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW (LLM HUMAN  
RIGHTS AND DEMOCRATISATION IN AFRICA)**

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## DECLARATION

I, **Syldie Bizimana**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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## **DEDICATION**

This dissertation is dedicated to you my parents, my late mother Cecile NYOBEWE, my father Damien NDITJE brothers and sisters , my beloved wife Sandrine MUPFASONI and my son Ian Arvin BIZIMANA, your support is engraved in my heart.

For everything you have done to me, I dedicate you this work.

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## LIST OF ABBREVIATIONS

ACHPR:	African Charter on Human and Peoples' Rights (African Charter)
APADE :	Association pour la Paix et le Développement
BINUB :	Bureau Intégrée des Nations Unies au Burundi
CEDAW:	Convention on the Elimination of Discrimination Against Women
CRC. :	Convention on the Rights of the Child
DRC:	Democratic Republic of Congo
ECRE:	European council on refugees and exiles
FAR	Forces Armees Rwandaises :
FHRI:	Foundation for Human Right Initiative
FNL- Palipehutu :	Front National de Libération
ICCPR	International Covenant on Civil and Political Rights
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILO:	International Labour Organisation
JRS:	Jesuit Refugee Service
NGO:	Non Governmental Organisation
NRC:	Norwegian Refugee Council
OAU:	Organisation of African Unity
OAU:	Organisation of African Unity
OCHA:	Office of the Coordinator for Humanitarian Affairs
Para:	Paragraph
RET:	Refugee Education Trust
SERAC:	Social Economic Rights Action Center
TPO:	Transcultural Psychosocial Organization
UDHR:	Universal Declaration of Human Rights
UN:	United Nations (Organisation)
UNDP:	United Nations Development Program

UNESCO: United Nations Education Science and Cultural Organisation

UNHCR: United Nations High Commissioner for Refugees

WFP: World Food Program

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## CHAPTER 1: INTRODUCTION

### 1. 1. Introduction and background of the study

The regional conflicts in the Great Lakes region have continued to affect the lives of millions of people. Many of them have fled and settled in neighbouring countries as refugees. The conflicts in the Great lakes regions are to blame for the refugee crisis in both Rwanda and Burundi.

The conflicts in the Great Lakes region<sup>1</sup> explains the presence of refugees in the area as well as in neighbouring countries such as Uganda and Tanzania

Refugee children are among the most affected. They not only suffer from war or other forms of persecution in their countries of origin, but also continue to suffer human rights abuses in countries of asylum. Thus, they suffer double jeopardy: denial of human rights as refugees and abuses as a vulnerable category of refugees.

The right to education is a fundamental human right.<sup>2</sup> Every individual, irrespective of race, gender, nationality, ethnic or social origin, religion or political preference, age or disability, is entitled to a free elementary education.<sup>3</sup> Article 28 of the Convention on the Rights of the Child binds its signatories to fulfill their obligations in providing education. The refugee status of a child neither negates his/her right to education nor a State's responsibility to provide it.<sup>4</sup> The fact remains that majority of refugee children do not receive basic education. The absence of basic education violates their rights and proves to be a lifelong handicap.

Although all human rights are indivisible, interdependent and interrelated, the right to education is, more than most, closely linked to the realisation of all other human rights.<sup>5</sup> Education is both a human right in itself and an indispensable means of realising other human rights: civil, cultural, economic, political and social. It is the primary vehicle by which economically and socially marginalised people can lift themselves out of poverty and obtain the means to participate fully in national life. Its

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<sup>1</sup> For the purpose of this study, Great Lakes Region refers to ,comprises Burundi , Rwanda and DRC

<sup>2</sup> Art 26 of the Universal Declaration of Human Rights.

<sup>3</sup> See General Comment. No13 on the right to education

<sup>4</sup> Art 22 of the 1951 Convention relating to the Status of Refugees.

<sup>5</sup> Report of Katerina Tomasevski, the former Special Rapporteur on the right to education of the United Nations Commission on Human Rights, 2006

impact is thus felt in the future, as much if not more than in the present. Education benefits societies as well as individuals.

## **1.2 Limitation of the study**

Originally the aim of this study was the exploration of the current situation of the right to education for refugee children in Burundi and Rwanda being the two countries with the highest number of refugees in Africa. However because of lack of information about the refugee situation in Rwanda, this study is limited to analysis of the situation in Burundi. This study then analyses the state of implementation of the international and national legal instrument by the government of Burundi and suggest ways of implementing the existing international and national legal framework.

### **1. 2. Problem statement**

As part of the United Nations Literacy Decade (2003-2012), the Commission on Human Rights urged member states:<sup>6</sup>

- (a) To give full effect to the right to education and to guarantee that this right is recognized and exercised without discrimination of any kind;
- (b) To take all appropriate measures to eliminate obstacles limiting effective access to education, notably by girls, including pregnant girls, children living in rural areas, children belonging to minority groups, indigenous children, migrant children, refugee children, internally displaced children, children affected by armed conflicts, children with disabilities, children with human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) and children deprived of their liberty.

Burundi is signatory to the international human rights instruments providing for the right to education (CRC, UDHR, ICESCR, UNESCO standard, and refugee conventions). It has also constitutions as well as national legislation that guarantee the right to education. The government of Burundi has obligations under international law of providing education to refugee children. However, majority of refugee children do not receive basic education and this is a violation of their rights.

### **1. 3. Objective of the study**

According to article 13 (2) (a) of the ICESCR, primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. It examines whether the

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<sup>6</sup> Commission on Human Rights, Resolution No.23 of 2002.

country have education policies and legislations that cater for refugee children as well as the extent to which such legislations and policies have been implemented to the benefit of refugee children. This study also proposes measures to be taken by the Burundian government in making education accessible to refugee children within their jurisdiction.

#### **1.4. Research question**

The research question of this paper is to find out to what extent refugee children's right to education, in terms of availability, accessibility, acceptability and adaptability, are realised in Burundi.

#### **1.5. Methodology of the study**

The methodology employed in this paper is mainly legal research methodology. Within this domain, library or desk research, including internet research, is exploited most. Interviews were conducted in relation to some specific issues. Then, sites were made to UNHCR offices and some NGO's in the country in order to evaluate reports that exist on the subject and to see how the reality on the ground is.

#### **1.6. Significance of the study**

Due to intensification of conflicts in African countries in general and in the Great Lakes region in particular, more people are fleeing from the conflicts and the plight of refugees is becoming more prevalent in Africa. There is evidence that refugee children are denied the right to education in their country of asylum. There have been serious complaints and cries from refugees and human rights organizations on access by refugee children, to the right to education in their country of asylum.

According to article 13 (2) (a) of the ICESCR, primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. This study evaluates accessibility of the right to education for refugee children in Burundi. It also examines whether the country has education policies and legislation that cater for refugee children as well as the extent to which such legislations and policies have been implemented for the benefit of refugee children.

## 1.7. Literature review

Inquiry of literature reveals that writings contained in reports and books have covered diverse issues relating to refugee children in general. However, many of those writings emphasise issues in general but not on the specific problem which is the right to education for children.

Marc Sommers for instance in his article,<sup>7</sup> examined the peace and education concepts, assumptions and programme for refugee population in general conducted by international humanitarian agencies.

His article is also an investigation of the necessity of teaching peace education to young people among refugee population.

As far as the content and organisation of the right to education in armed conflict is concerned, Jo Boyden and Paul Ryder in their book reached the conclusion that<sup>8</sup>:

children learn not just by absorbing the content of the education but also through the educational process itself. This means that humanitarian and human rights principles, such as respect for peace, individual integrity, equity and non-discrimination, should be applied to teaching and learning methods, education policies, admissions procedures and all other aspects of education.

A number of articles available on the topic analyse the issue of the right to education of refugee children in general. *The Refugee children: Guidelines on protection and care*<sup>9</sup> establishes practical guidelines for states and different actors in the implementation of the rights of the refugee children. It draws round the procedure stages and the content of an effective protection.

It also raises many other principles such as the best interest of the refugee child, the principle of non discrimination and the principle of the participation of the community in the protection issues. Finally, it emphasizes links between children, their family and their community, and links between different aspects of a child's life, such as education and psychosocial well-being.

The 2006 Preliminary Report of Katerina Tomasevski<sup>10</sup>, on the right to education provides a broad content of the right to education in terms of its features, availability,

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<sup>7</sup> M. Sommers , *Peace education and refugee youth* , (2001),Washington DC

<sup>8</sup> J. Boyden & P. Ryder, *Implementing the right to education in Areas of armed conflict*, (1996) Oxford

<sup>9</sup> Refugee Children: Guidelines on Protection and Care *UNHCR GENEVA (1994)*,

<sup>10</sup> See no5 as above

accessibility adaptability and acceptability. Its also gives the situation of the right to education around the world

## **1. 8. Overview of the chapters**

The first chapter introduces the study, identifies the problem and indicates the methodology. The second chapter is an overview of the Great Lakes conflicts as the source of refugee crisis in Burundi; and also analyses the concept of 'refugee children', and their different rights.

The third chapter analyses the legal system of protection of the right to education. In fact, there are two clear issues: the right to education in general and the right to education for refugee children at the international level. It also examined in this chapter the extent of state obligation as far as the refugee rights to education is concerned (accessibility, acceptability, adaptability, availability)

The fourth chapter addresses current education policies in Burundi; the extent to which it accommodates refugee children, and key players and the roles of main actors in fulfilling the right to education of the refugee children in the two countries.

The challenges to and opportunities for implementation of the right to education for refugee children in Burundi is the part of the fifth chapter. The sixth and the last chapter sums up what is discussed in previous chapters and provides recommendations

## **CHAPTER .2 . THE GREAT LAKES REGION AND ITS REFUGEE CRISIS.**

### **2.1 Presentation of the region**

Burundi, Rwanda and Democratic Republic of Congo comprise the region known as Great Lakes. The main lakes in this region are Lake Tanganyika and Lake Kivu, Lake Albert and other small lakes in Rwanda and in Burundi. In this paper, focus is on Burundi on the issue of refugees. However, the problem of refugee people in that region which is one of the oldest in the world has a lot of ramifications. In fact, escaping conflicts, people fled to neighbouring countries like Tanzania, DRC and Uganda. This issue will be discussed later.

The Republic of Burundi, one of the two countries is bordered on the north by Rwanda, on the East and South by Tanzania and on the West by Lake Tanganyika and the Democratic Republic of Congo. It has an area of 27,834 square kilometres and is one of Africa's smallest countries.

The understanding of the refugee problem in Great Lakes region has its root causes in the ethnic conflicts that emerged with independence which is the reason we need to analyse the historical background.

#### **2.1.1 The historical background of the conflict in Great Lakes Region**

The population in Burundi is composed of three major ethnic groups <sup>11</sup>Hutu, Tutsi and Batwa); all of them share the same language, culture and history.

According to academicians and historians, the original inhabitants of Rwanda and Burundi were the Twa, (a pygmy people who now make up only 1% of the population) While the Hutu and Tutsi are often considered to be two separate ethnic groups, scholars point out that they speak the same language, have a history of intermarriage, and share many cultural characteristics.

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<sup>11</sup> However, the definition of an ethnic group can not be applied to the Burundi context In fact except some differences with the batwa group actually known as indigenous people, in Burundi, the three groups share the same territory, culture and language.



Traditionally, differences between the two groups were occupational rather than ethnic. Agriculturalists were considered as Hutu, while the cattle-owning elite were identified as Tutsi. According to the definition of Europeans, Tutsi are tall and thin, while Hutu are short and square, but those were and still are stereotypes because even now it is not easy to make a clear differentiation or identification. Since independence, repeated violence has increased ethnic tensions between the groups. From 1896 to 1916, the territory known as Ruanda-Urundi was under German authority as a part of German East Africa. After the First World War, and the defeat of Germans, the region became a Belgian League of Nations' mandate. After in 1946 the mandate changed into the UN Trust Territory.

The Germans applied indirect rule and maintained the local and traditional authority whereas the Belgians used the policy of '*divide at impera*' literally divide and rule.

In fact, the Belgians exacerbated ethnic tension and division by giving privileges to Tutsi and discriminating against the Hutu. Most educated children were Tutsi. However, the situation changed when the elite of the two countries, young people who had been to school, started fighting for independence. Then the colonialists saw in this an opportunity of setting Hutu against the Tutsi and 3 years before independence 1959, for the first time for instance in Rwanda, ethnic murders occurred. Thousands of Tutsi were killed and many of them were forced into exile. When Ruanda became the independent nation of Rwanda on July 1, 1962, it was under Hutu rule.<sup>12</sup>

The situation was a little bit different in Burundi where Prince Louis Rwagasore who led the country to independence maintained unity of the people and ethnic conflicts were to start later after his death.

### **2.1. 2 The cyclic violence**

When Burundi became independent in 1962, it adopted a constitutional monarchy. Independence ushered in a period of serious destabilisation and inter-ethnic strife in the region. Large-scale massacres took place in 1965, 1972, 1988, and 1992.

As stated above, the first massacres in Rwanda took place in 1959. Thereafter, almost in a regular manner, killings of the Tutsi became a habit. In the 1960s, 1970s, 1980s and early 1990s massacres of Tutsi were common. Between April and July

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<sup>12</sup>< <http://www.gov.rw/government/historyf.htm> >accessed on 11<sup>th</sup> September 2007

1994, over 1 million Rwandese people, mainly Tutsi and some Hutu opposition were killed by the genocidal regime.

### **2.1.3. The problem of refugees in the Great Lakes**

This paper is about the problem of refugees in Burundi. In Burundi, according to the country's origin, we found refugee from DRC, Eastern part of Congo and most of them are banyamulenge. They are regrouped into two main camps, Gasorwe in Muyinga and Gihinga in Mwaro, Also we found some refugees from Rwanda.

From 1959 and during the conflicts that occurred later in Rwanda, the population of Tutsi was targeted, causing hundreds of thousands of deaths, and a population of almost two million Rwandese people in the diaspora for almost four decades.

The First Republic, under President Grégoire Kayibanda, institutionalised discrimination against Tutsi and periodically used massacres against this targeted population as a means of maintaining the status quo. Some Rwandese groups in the Diaspora attempted, without success to stage a comeback through armed means. Finally in 1991, RPF, a Rwandese front waged a civil war from Uganda and took power in Rwanda after the genocide of Tutsi by the Hutu government. Thousands of Tutsi refugee returned to their country. However millions of Hutu, among them, genocide perpetrators fled the country to Burundi, Tanzania and DRC. Even now many of them are still there.

The situation in Burundi was different. In fact, the period between 1959 and 1972 had been characterised by cyclic ethnic violence and reprisals. While Tutsi fled the country in Rwanda and sought refuge in neighbouring countries, in Burundi it was Hutu who became refugees.

The refugees' people that are to be found in Rwanda and Burundi are from the Eastern part of DRC. The refugee problem in that region of DRC is linked somehow with ethnic conflicts.

The conflict in Eastern DRC has numerous causes. There are various economic and political issues ranging from the military and economic strategies of western power and neighbouring countries; the weak nature of the state in DRC, the historical relationships between ethnic groups, and conflict over the country's natural resources such as diamonds, gold, cobalt, and cassiterite.

After the First World War, Belgian colonialists took Rwandan farmers into parts of Eastern DRC such as Masisi to provide necessary labour for the newly created agricultural and mining centers. These are presently referred to as Banyamulenge who are unwanted in DRC.

In the North Kivu, a wave of ethnic violence erupted in March 1993 and was exacerbated by the arrival of millions of Hutu refugees from Rwanda and the settling of ex- Armed Forces of Rwanda (Ex-FAR and Interahamwe militia.) The coalition of Hutu refugees, ex-FAR, Interahamwe militia created a new front against, 'Tutsi Congolese, kinyarwanda speaking, banyamulenge.'<sup>13</sup> With the different civil wars that DRC has known, the Congolese rwandophone were targeted, consequently they sought refuge in Burundi and Rwanda.

In conclusion the source of refugees in that region is the cyclic ethnic conflict between the two main ethnic groups, the problem of refugee in Great Lakes needs to have a solution through a regional approach because it has regional ramifications.

## **2.2 The concept of refugees**

In general, the term 'refugee' is often used to refer to anyone who has been forced to leave his or her home. The New Shorter Oxford English Dictionary (1993) defines a 'refugee' as a person driven from his or her home to seek refuge, especially in a foreign country, from war, religious persecution, political troubles, natural disaster...<sup>14</sup> However, in strict legal terms, refugee as status has a specific and limited definition.

The first definition of the term 'refugee' was given by the Statute of the UNHCR and the 1951 UN Refugee Convention<sup>15</sup>.

According to the 1951 UN Refugee Convention and its 1967 Protocol, a refugee is:

any person who owing to a well-founded fear of being persecuted for 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

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<sup>13</sup> Chris Huggins, Herman Musahara, Prisca Mbura Kamungi, Johnstone summit Oketch and Koen Vlassnroo , *Conflict in the Great Lakes region. How is it linked with land and migration?* in <[http:// www. odi.org. uk](http://www.odi.org.uk)> accessed on 11<sup>th</sup> September 2007

<sup>14</sup> G. S, Goodwin-Gill, *The Refugee in International Law*, Second Edition(1996),3

<sup>15</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 *U.S.T.* 6223,189 *U.N.T.S.* 137(Hereinafter the 1951 Convention)

of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.<sup>16</sup>

Concerned by the effects of the liberation movements in several countries in Africa during the struggle of independence, the OAU members created the *OAU Convention Governing the Specific Aspects of Refugee Problem in Africa*<sup>17</sup> and extended the definition given by the 1951 Convention to include people who have been forced to flee their homes, nation because of 'external aggression, occupation, foreign domination or events seriously disturbing public order.'<sup>18</sup>

The OAU Convention added important principles to international refugee law by giving a broader definition of what constitutes a refugee by affirming that granting of asylum should always be a peaceful and humanitarian act (not a way to hurt an opponent state). Also, this Convention prescribes a duty on refugees to abstain from subversive activities. The 1951 Convention also includes 'exclusion clauses', which stem from the understanding that the commission of some types of crimes justifies the exclusion of the perpetrators from the benefits of refugee status.

Under Article 1(f), refugee status under the 1951 Convention does not apply to persons to whom there are 'serious reasons' for considering they have committed the following crimes:

- a) Crimes against peace, war crimes and crimes against humanity;
- b) Serious non-political acts;
- c) Acts contrary to the purposes and principles of the United Nations.

Thus, if one of the exclusion clauses applies, the applicant can not claim a refugee status in terms of international standards even if the other requirements are fulfilled.<sup>19</sup> Burundi acceded to the Convention on 19 July 1969 and to the 1967 Protocol on 15 March 1971 and became state party to the OAU Convention on 31 October the same year.

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<sup>16</sup> Article 1(A) (2) of the 1951 UN Refugee Convention read together with Article 1(2) & (3) of the 1967 Protocol Relating to the Status of Refugees.

<sup>17</sup> The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969(OAU Doc CAB/LEG/24.3), adopted on 10 September 1969 and entered into force on 20 June 1974 (Hereinafter the 1969 Convention).

<sup>18</sup> 1969 Convention on the Specific Aspects of the Refugee Problems in Africa, art 1, paragraph 1.

<sup>19</sup>Magdalena Sep.lveda,Theo van Banning,Gudr.n D. Gudmundsd.ttir,Christine Chamoun,and Willem J.M. van Genugten *Human Rights reference handbook*, University for Peace,third edition, San Jose (2004) p. 345

In acceding to this Protocol, the Government of the Republic of Burundi entered the following reservations:

1. The provisions of article 22 are accepted, in respect of elementary education, only
  - (a) In so far as they apply to public education, and not to private education;
  - (b) On the understanding that the treatment applicable to refugees shall be the most favourable accorded to nationals of other States.
2. The provisions of article 17 (1) and (2) are accepted as mere recommendations and, in any event, shall not be interpreted as necessarily involving the régime accorded to nationals of countries with which the Republic of Burundi may have concluded regional, customs, economic or political agreements.
3. The provisions of article 26 are accepted only subject to the reservation that refugees:
  - (a) Do not choose their place of residence in a region bordering on their country of origin;
  - (b) Refrain, in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals.

In regard to national legislation, the question of refugees was first dealt with in Decree /Law no1 /23 of 1982 for Regulating, Admission to Burundi, Establishment and Removal of Aliens. Article 27 provides that foreigners can be recognised as refugees if they meet conditions required by International conventions to which Burundi is a party. Also the Decree/law contains some provisions regarding expulsion of refugees. However the Decree/Law contains no provisions regarding such matters as education, employment or social security for refugees. This is a contradiction of the provisions of International Conventions protecting refugees.<sup>20</sup>.

This Decree /Law was repealed by the Decree/Law 1/1007 of 20 March 1989. It also deals with the same subject of Regulation of admission, Establishment, residence, and removal of Aliens and was completed by a Ministerial order n°530 / 166 of July 10, 1989 fixing measures of execution of the aforesaid Decree/Law.

The Decree/Law does not have particular provisions regarding asylum seekers. However, it has provisions on refugees and stateless persons which are provided for in Articles 20 to 25 and Article 30.

The definition of what constitutes a refugee and a stateless person is given in Article 20 which conforms to international standards. The procedure of acquiring or seeking refugee status is provided for by articles 20 and 22. During the process, the ministry

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<sup>20</sup> This point will be developed in the next chapters

in charge can take some administrative or any provisional measures regarding protection of the asylum seekers (see article 23 of the Decree law)

It is indicated that the process of seeking refugee status may or may not be successful; however the asylum seeker can not be turned back (non-refoulement principle).<sup>21</sup>

Like the Decree, the Ministerial order does not contain any particular provisions on refugee or stateless persons, except it clarifies the specificities of the ID card of the refugees and stateless persons and the duration of validity.<sup>22</sup>

The last Decree Law follows essentially the pattern of the earlier one and there are no provisions regarding education, employment or social security. The 1989 Decree law established an advisory Commission for Aliens. One of the functions given to the commission was to give advice on the grant or loss of refugee status. Moreover, the documentation indicated that the issue of refugees had been dealt with by an ad hoc committee.<sup>23</sup>

However, the problem remains absence of a specific legal instrument for determination of refugee status. In order to fill the gaps between national legislation and international standards, a comprehensive law which clearly determines the status and the extent to which a refugee can be protected is about to be adopted by parliament.

### **2. 3. The concept of refugee children and their rights**

In legal terms, every refugee under the age of 18 is a refugee child, 'unless', under the law applicable to the child, majority is attained earlier.<sup>24</sup>

Refugee and migrant children are among the world's most vulnerable populations and are at particular risk of abuse when they are separated from their parents and other caregivers. They not only suffer from war or other forms of persecution in their countries of origin, but also suffer human rights abuses in countries of asylum.

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<sup>21</sup> Art 30 of the Decree/Law 1/1007 of 20 March 1989

<sup>22</sup> See art 13 and 15 of The Ministerial order n°530 / 166 of July 10, 1989

<sup>23</sup> Ivor C. Jackson, *The refugee concept in group situation*, Kluwer law international(1999) , 198

<sup>24</sup> See art 1 of the Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

Three interrelated factors contribute to the special needs of refugee children: they are their dependency, their vulnerability and their developmental needs (i.e. their requirements for healthy growth and development at different ages).<sup>25</sup>

The rights of refugee children are not different from those of other refugees. However, the international instruments that govern refugee protection in general and children in particular set some standards. Neither the 1951 Refugee Convention nor the 1967 Protocol (Relating to the Status of Refugees), nor the AOU convention make the distinction between children and adults.

The legal basis of the protection of the children can also be found in other instruments such as the Convention on the Rights of the Child.<sup>26</sup>

Whereas the European Council on Refugees and Exiles (ECRE) defines a child as every person below the age of 18. It refers to a "refugee child" as every child who is :

- seeking refugee status or other international protection,
- considered a refugee in accordance with applicable international or domestic law and procedures, whether unaccompanied or accompanied by his or her parents or by any other adult, or who is
- forced to flee across an international border (as a result, for example, of war, civil war or generalised violence).<sup>27</sup>

The 1951 Convention and its protocol set standards that apply to children in the same way as to adults:

- (1) a child who has a "well-founded fear of being persecuted" for one of the stated reasons is a "refugee",
- (2) a child who holds refugee status cannot be forced to return to the country of origin (the principle of non-refoulement), and (3) no distinction is made between children and adults in social welfare and legal rights.

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<sup>25</sup> see note as above 9 ( 2)

<sup>26</sup> In fact the status of refugee of a child does not prevent him from enjoying the protection of his rights provided by the other legal instruments

<sup>27</sup> See ECRE , European council on refugees and exiles, position on refugee children ,November 1996 found at < [http://www.ecre.org/topics/ecres\\_refugee\\_agenda\\_for\\_europe](http://www.ecre.org/topics/ecres_refugee_agenda_for_europe)>accessed on 25 August 2007

### 2.3.1. Determination of refugee status<sup>28</sup>

The 1951 Convention and 1967 Protocol relating to the Status of Refugees define a refugee regardless of age, and make no special provision for the status of refugee children.

Applying the criterion of "well founded" fear of persecution to children does not normally give rise to any problem when, as in majority of cases, they are accompanied by one or both of their parents. Determining refugee status of unaccompanied children is more difficult and requires special consideration.<sup>29</sup>

Depending on the law of the State, a child seeking asylum may be granted:

Refugee status for having a "well-founded fear of being persecuted," as defined in the 1951 Convention and the 1967 Protocol;

Refugee status as defined in the 1969 OAU Convention or the 1984 Cartagena Declaration;

If the refugee claim is denied, the child might be permitted to stay with an immigration status granted for another humanitarian reason, or receive a rejection or deportation order.

Regardless of what law a child may be seeking asylum under, there will be a procedure to determine the claim. The three basic methods are:

(1) **Group determination.** This is the case when the state grants refugee status to a group of persons resulting from a refugee movement. Each child in the group would automatically receive refugee status.

(2) **Determination based on an adult's claim.** That is the case when the head of a household is granted refugee status: the common practice of States is to grant refugee status to the dependents, and

(3) Determination based on the child's own claim.<sup>30</sup>

However the only provision which contains some specificity regarding refugee children is the right to education. Under article 22 of the CRC, refugee children must receive the 'same treatment' as nationals in acquiring primary education, and treatment at least as favourable as that given to non-refugee aliens in secondary education.<sup>31</sup>

In spite of the absence of provisions relating to refugee children in the refugee convention, the assistance of that vulnerable group can find its legal basis in other

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<sup>28</sup> See note 23 as above

<sup>29</sup> As above

<sup>30</sup> see note 25 as above

<sup>31</sup> See no 22 as above.



treaties which deals with the rights of children. The 1989 Convention on the Rights of the Child (CRC) which sets the most standards concerning children is one such treaty.

It is true that the CRC is not a refugee convention; however, refugee children can be protected and assisted through this convention because being refugees does not prevent them from enjoying rights that are recognised and protected by the CRC. In fact, all CRC rights are to be granted to all persons under 18 years of age (art. 1) without discrimination of any kind (art. 2).<sup>32</sup>

The Convention on the Rights of the Child provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including those who are of concern to UNHCR. Moreover, as a United Nations convention, it constitutes a normative framework for reference to the UNHCR's action.<sup>33</sup>

### **2.3.2. Some rights of refugee children**

Analysis of the CRC convention shows a range of rights protecting children such as right to health, right to education and even political rights. The conditionality of the state's financial capability govern realisation of socio-economic rights such as rights to health (art. 24), education (art. 28), and to an adequate standard of living (art. 27) also called 'progressive rights'. However by application of the principle of non discrimination, the State should not treat differently citizens and non citizens including refugee children. We have to notice that some of the standards are specific, for example the articles on juvenile justice (arts. 37 and 40), adoption (art. 21) and family rights (arts. 5, 9 and 14.2).

The CRC is an important tool of advocacy to UNHCR for refugee children's rights. In fact, even when a State has not ratified the CRC, UNHCR still advocates its observance because its standards are universal. UNHCR also applies the CRC to its own work by using the rights as guiding principles. The UNHCR Policy on Refugee Children states, 'as a United Nations convention, (the CRC) constitutes a normative frame of reference for UNHCR's action' (para. 17). One of the guiding principles in the Policy states, 'In all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary

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<sup>32</sup> Art 1 and art 2 of the CRC

<sup>33</sup> *UNHCR Policy on Refugee Children* presented to UNHCR Executive Committee, October 1993 as Document EC/SCP/82

consideration' (para. 26 (a))<sup>34</sup>. When a State is a party to the CRC, but not to any refugee treaty, then the CRC may be used as a primary basis for protecting refugee children.

In 1990, the World Summit for Children adopted a Declaration and Plan of Action. The goals of the World Summit set important standards towards health and education. As follow up, States are encouraged to develop national plans of action, which should include refugee children under the category of "children in especially difficult circumstances." Although the Declaration and Plan are not treaty standards, their widespread acceptance has been a major step forward.<sup>35</sup>

Regarding their particular status and condition as refugees and as children, refugee children have rights that must be protected. The list is not exhaustive and can be enriched by any other rights that the child may be entitled to and relevant for the enjoyment of his childhood for his best interest. These rights are not specific to refugee children but are common to all refugees. The rights of refugee children are however emphasised because of children's vulnerability

### **2.3.2.1. The right to access to a territory**

As a refugee or an asylum seeker, access to a territory must be granted to refugee children in any host state.

### **2.3.2.2. Right to guardianship**

One of the most important needs for an unaccompanied refugee child is a guardian that can assume parental responsibility in the absence of natural parents or relatives.

### **2.3.2.3. The right to family tracing, contact and reunion**

Refugee children have a right to family. NGOs in charge of the children are obliged to take steps to help in tracing family members of refugee children and ensure reunification with their families.

### **2.3.2.4. The right to health care**

The special condition of a refugee child requires that medicare and psychological services are availed to refugee children on the same standard available to children of the host country.

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<sup>34</sup> See note 25 as above

<sup>35</sup> As above

### **2. 3 .2. 5. The right to education**

The international legal instrument that protects the right of refugees states that a refugee child has the same right to education as other children of the same age within the territory of the host state; this includes the period during which an asylum claim is examined.

The right to education must fulfil international standards set forth by those instruments (availability, acceptability, accessibility and adaptability).

### **2. 3 .2. 6. Other social assistance**

This amounts to promotion of the physical and psychological environment and social integration of refugee children. The refugee children are also entitled to any other social assistance which should be based firmly upon their rights and needs as both refugees and children.<sup>36</sup>

### **2. 3. 3. Refugee children and the UNHCR**

Refugee children are a policy priority of the Office of the United Nations High Commissioner for Refugees (UNHCR). In its activities of protection and assistance, several documents provide the framework:-

- 1951 Convention relating to the Status of Refugees
- 1967 Protocol relating to the Status of Refugees
- 1989 Convention on the Rights of the Child (CRC), and its Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography
- 1993 UNHCR Policy on Refugee Children
- 1994 Refugee Children: UNHCR Guidelines on the Protection and Care

UNHCR believes that protection and care of children is an integral part of all activities for refugees, which can best be addressed using an integrated approach. Working for refugees also means working with refugees. Therefore, by using a rights and community-based approach and applying participatory assessment, refugees should actively participate in all operations from the beginning. In programming, the refugee community should be involved in such a way that all groups are represented: women, men, older persons, and people with disabilities, girls and boys, including adolescents, regardless of background and capacity. Thus, protection and care of

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<sup>36</sup> See note24 as above

refugee children is not only the responsibility of States and humanitarian organizations, but of the refugee community as a whole.<sup>37</sup>

In that regard, UNHCR has identified five main global priority issues: separation from families and caregivers, sexual exploitation, abuse and violence, military recruitment; education and specific concerns of adolescents.

In certain regions, there may be additional issues of importance which require special attention, such as birth registration, detention of children, trafficking or child labour.

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<sup>37</sup> See the Summary Note , *UNHCR's Strategy and Activities concerning Refugee Children*, Geneva, October 2005

## CHAPTER 3. THE LEGAL BASIS OF PROTECTION OF THE RIGHT TO EDUCATION AND DIFFERENT ACTORS' OBLIGATIONS.

### 3.1. The concept of the right to education

#### 3.1. 1 Historical development

Prior to the age of enlightenment in Europe, education was primarily the responsibility of parents and the church. Education started to be considered a public matter and state responsibility with the emergence of the modern secular state around the 16<sup>th</sup> and 17<sup>th</sup> centuries with the great contribution of eminent philosophers such as John Locke and Jean Jacques Rousseau through their writings. Actually, the right to education is recognised and protected by most national constitutions or other legal instruments around the world.<sup>38</sup>

The human right to education can be characterised as an 'empowerment right'. In fact, the enjoyment of many civil and political rights (the freedom of information, freedom of expression, the right to vote and to be elected, and many others) depends on at least a minimum level of education. In the same way, socio economic and cultural rights such as the right to choose work, to receive equal pay for equal work, etc, can only be exercised in a meaningful way after a minimum level of education has been achieved.

The denial, as well as violation of the right to education, damages people's capacity to develop their own personalities, to sustain and protect themselves and their families and to take part adequately in social, political and economic life. On society-wide scale, the denial of the right to education harms the cause of democracy and social progress and by extension, international peace and human security. Education is more than just learning how to read, to write and to calculate, the Latin origin of the word itself is 'to *lead somebody out*'.<sup>39</sup>

Education is imperative for promotion of human rights; it is both a human right in itself and an indispensable means of realising other human rights. It is the precondition for enjoyment of many economic, social and cultural rights.<sup>40</sup> Civil and political rights and

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<sup>38</sup> Understanding Human Rights, Manual on Human Rights Education, *Human Security Network*, Graz Austria (2003.) 176

<sup>39</sup> As above 175

<sup>40</sup> See note 17 as above 291

social rights such as the right to vote, access to public service, economic and cultural rights can only be fully exercised with a minimum level of education.

The right to education has been recognised and endorsed by many international instruments as one of fundamental human rights. Hence, it should be free and accessible at least on primary level. It is also a relevant tool of protection of children especially against various forms of exploitation, such as slavery, trafficking and recruitment into military forces. In fact the process of education helps children to learn about the way society functions, their duties and their rights.

Furthermore, education builds personal self-reliance and provides for the 'human capital' needed for future reconstruction and economic development of areas of origin or settlements. Appropriate education builds foundations for social cohesion, peace and justice. Disrupted education means that a generation of young people may miss out on education altogether and become a drain on the economy or social fabric of a country as well as become a force for future conflict.

### **3. 2 .The right to education under international law**

Most international declarations and instruments define education as a basic right<sup>41</sup>. The right to education has a solid basis in international human rights law. It has been recognised by several international legal instruments. On the international level, the right to education is provided by the 1948 Universal Declaration of Human Rights as a right belonging to everyone.<sup>42</sup>

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children.

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<sup>41</sup>Education Field guidelines *UNHCR* Geneva (2003) <found at <http://www.unhcr.org/cgi-bin/texis/>> accessed on 25 August 2007

<sup>42</sup> See the art 26 of the UDHR

The right to education is also provided by particular or specific conventions dealing with particular groups of people, such as women, children or refugees. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits any form of discrimination against women regarding the right to education and states parties to the convention shall take appropriate measures to eliminate discrimination and ensure equality.

Some measures to be taken are for instance:<sup>43</sup>

- a) The same conditions for career and vocational guidance.
- b) Access to the same curricula, the same examination, and teaching staff.
- c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education
- d) The same opportunity to benefit from scholarships and other study grants.
- e) The reduction of female students' dropout rates.
- f) The same opportunities to participate actively in sports and physical education.
- g) Access to specific educational information

The 1989 Convention on the Rights of the Child go beyond simple recognition of the right to education and recommends some measures to state parties. In general, the convention provides in general for four different kinds of rights.<sup>44</sup>

- Survival rights such as the right to adequate living standards and health care.
- Developmental rights such as the right to education the right to play and leisure, the right to take part in cultural activities, the right to freedom of thought and religion.
- Protection rights such as the protection from exploitation (being used for someone else's gain) protection from cruelty, and protection against being separated from the family.
- Participation right such as the freedom to express the child's opinion and have a say in the matters that affect her/his life.
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Like CEDAW, the CRC restates prohibition of any kind of discrimination 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,

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<sup>43</sup> See art 10 of the CEDAW

<sup>44</sup> Education Towards a rights Culture in Uganda , a paralegal reference handbook , *Foundation for Human right initiative*(FHRI), Kampala (2002)127

birth, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members, or other status.<sup>45</sup>

Apart from this general prohibition of discrimination, state parties also have the obligation of making the right to education available, accessible and adaptable to all. Lastly, education shall aim at developing the child's personality, talents and mental and physical abilities to the fullest extent. Education should prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and cultural background and values of others.<sup>46</sup>

Regarding public education for refugee children, the 1951 Convention Relating to the Status of Refugees states again prohibition of discrimination against this vulnerable group.

In addition to the aforementioned, contracting States 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 and in particular, regarding access to studies, recognition of foreign school certificates, diplomas and degrees, remission of fees and charges and award of scholarships.<sup>47</sup>

We have to note that regarding emergency situations, much emphasis has been put on education as one of the priorities of any humanitarian intervention. In this respect two issues have emerged.

First, a recognition that individuals do not forfeit their right to education during emergencies and that education cannot remain '*outside*' mainstream humanitarian debate, but must be seen as a priority humanitarian response; secondly, a broad-based desire and commitment to ensure a minimum level of quality, access and accountability for education in situations of crisis.<sup>48</sup>

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<sup>45</sup> Art 2 of CRC

<sup>46</sup> Art 28 and 29 of CRC

<sup>47</sup> Art 22 of the 1951 Convention Relating to the Status of Refugees

<sup>48</sup> Education in Emergencies, Chronic Crises and Early Reconstruction found at <http://www.ineesite.org> accessed on 12<sup>th</sup> September 2007



On the regional level, there is the European Convention on human rights and fundamental freedoms (art 2 of the first protocol), the American Convention on Human rights (article 13 of the additional protocol), the African Charter on Human and Peoples' Rights (article 17) and the African Charter on the Rights and the Welfare of the Child, which besides the rights recognised for children, imposes duties on them.<sup>49</sup>

### **3.3 . Features that a primary education should exhibit. <sup>50</sup>**

The right to education is one of the social, economic and cultural rights. Regarding this category of rights, article 2 of the ICESCR provides that they shall be progressively realised according to availability of state resources. The fact that the full realisation of most economic, social and cultural rights can only be achieved progressively, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible.

Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realisation of the rights in question. Moreover the State cannot use the 'progressive realization' provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognised in the Covenant because of different social, religious and cultural backgrounds.<sup>51</sup>

Depending on conditions prevailing in a given state party, education in all its forms and at all levels shall exhibit the following interrelated and essential features: availability, accessibility, acceptability and adaptability.<sup>52</sup>

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<sup>49</sup> The ACRWC was born out of the feeling by African member states to the UN that the drafting of the CRC missed important socio-cultural and economic realities of the African experience. A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 The International Journal of Children's Rights 179. in Benjamin Jonas LLM dissertation., Pretoria (2006)

<sup>50</sup> These features has been set out by the Special Rapporteur on the right to education Ms. Katarina Tomaševski, in her preliminary report submitted in accordance with Commission on Human Rights resolution 1998/33 , see (E/CN.4/1999/49, para. 50).

<sup>51</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.

<sup>52</sup> General Comment on the right to education no .13(1999)

### 3. 3.1. Availability.

Considering that right to education is a right that is to be enjoyed by everyone, the obligation of a state, even if its resources are limited, must extend to at least primary education<sup>53</sup> This condition requires two components: free and compulsory education. The duty to provide compulsory and free primary education is undoubtedly a prerequisite for realising the right to education. It is true that to ensure that primary schools are available for all children requires considerable political and financial commitment and most of the time states especially, developing countries do not have enough resources to provide this.<sup>54</sup> If however, international human rights law obliges it to be the provider of last resort.<sup>55</sup>

If the intake capacity of primary schools is below the number of primary-school aged children, legal provisions on compulsory education will not be translated into practice and access to education will remain a need or a wish rather than a right.<sup>56</sup>

### 3. 3.2. Accessibility

The second feature that the right to education must exhibit is to be accessible for all without any discrimination. Non-discrimination is not subject to progressive realization but has to be secured immediately and fully.<sup>57</sup>

This characteristic has three dimensions.<sup>58</sup>

**Non-discrimination** - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination).

**Physical accessibility** - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme).

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<sup>53</sup> Note no 51 As above

<sup>54</sup> A UNESCO/UNICEF pilot survey of primary schools in the least developed countries has revealed that electricity or piped water is an exception rather than a rule, while many children finish primary school without ever having seen a single textbook in their mother tongue see Schleicher, A., et al., "*The conditions of primary schools: A pilot study in the least developed countries. A report to UNESCO and UNICEF*", Paris, 1995 cited in Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomaševski,

<sup>55</sup> See note 36 as above

<sup>56</sup> See note 52 as above

<sup>57</sup> As above

<sup>58</sup> See note 51 as above

**Economic accessibility** - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education.

Accessibility of education poses some challenges around the world in terms of prohibition of discrimination in all its forms, with regard to refugee children and asylum seekers, children with disabilities, girls or family life.

Similarly, the ILO's experience in moving children from labour to school has demonstrated the advantage of shifting from the prohibitive and condemnatory approach to a human-rights-promoting investment.<sup>59</sup> Another threat is the spread of conflicts and early marriage in many regions particularly in Africa. When pregnant girls or young mothers are denied the right to go to school, making this right accessible needs more than a legal framework or availability of educational institutions. It entails a huge campaign of sensitisation or mobilization of teachers, parents, community leaders and pupils themselves. The Charter on the Rights and Welfare of the African Child requires States to ensure that girls who become mothers before completing their primary education 'have an opportunity to continue with their education on the basis of their individual ability'.<sup>60</sup>

The affirmative obligation to ensure equal access to educational institutions encompasses both physical and constructive access. Physical access to institutions is especially important for the elderly and disabled. Constructive access means that exclusionary barriers should be removed for example by elimination of stereotyped concepts of the role of men and women from textbooks and educational structures as provided by article 10 of CEDAW.<sup>61</sup>

### **3. 3.3 Acceptability**

This amounts to the form and substance of education, including curricula and teaching methods being acceptable, and in every state party, minimum educational standards as may be approved by the State (see art. 13 (3) and (4)) of the CRC.

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<sup>59</sup>The Memorandum of Understanding between the Bangladesh Garment Manufacturers and Export Association with UNICEF and the ILO of 4 July 1995, and the Partners' Agreement to Eliminate Child Labour in Soccer Ball Industry in Pakistan between the Sialkot Chamber of Commerce and Industry, the ILO and UNICEF of 14 February 1997 in Ms. Katarina Tomaševski's preliminary report.

<sup>60</sup> Art 11(6) of the African Charter on the Rights and Welfare of the Child

<sup>61</sup> See no 36 as above

The special rapporteur of the right to education, Katarina Tomasevki stated in her report that:

'the state is obliged to ensure that all schools conform to the minimum criteria which it has developed as well as ascertaining that education is acceptable both to parents and to children.'

Respect for parental freedom to have their children educated in conformity with their religious, moral or philosophical convictions has been affirmed in all general human rights treaties and is continuously subjected to litigation. The European Commission on Human Rights found that human rights law "requires the State actively to respect parental convictions within public schools."<sup>62</sup>

The issue of language of instruction is also one of the key elements regarding acceptability of education. Art 27 ICCPR only states that the practice of a language shall not be denied but remains silent on the issue of instruction in the mother tongue.

The European Court of Human Rights has affirmed the right of States to determine the official language of the country which is the language of instruction in public schools but denied that there was a right to education in a language of one's choice.<sup>63</sup>

States have been required to respect the right of minorities to set up their own schools in minority languages since the time of the League of Nations. In 1919, the precedent was set by Poland in affirming, alongside education in minority languages in public schools, the right of citizens who were members of minorities to establish, manage and control schools at their own expense "with the right to use their own language and to exercise their religion freely therein."<sup>64</sup> That right was reaffirmed by the Permanent Court of International Justice.<sup>65</sup>

From the rights of the child perspective, an ideal primary school should be child-friendly, based on the right of the child "

to be curious, to ask questions and receive answers, to argue and disagree, to test and make mistakes, to know and not know, to create and be spontaneous, to be recognized and respected; the importance of a vision of primary school in which all the rights of the child are

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<sup>62</sup> See European Court of Human Rights, *The Belgian Linguistic Case*, Judgment of 23 July 1968, Series A, vol. 6, p. 31, in Ms. Katarina Tomaševski's Preliminary report.

<sup>63</sup> See note 59 as above.

<sup>64</sup> Article 8 of the Polish Minorities Treaty of 1919, reproduced in *Protection of Linguistic and Racial Minorities by the League of Nations*, Geneva, 1927

<sup>65</sup> Permanent Court of International Justice, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B, No. 64

fully implemented is to define the ultimate goal to be attained, without which a precise definition of the full realization of the right to education remains impossible'.<sup>66</sup>

The importance of a vision of primary school in which all the rights of the child are fully implemented is to define the ultimate goal to be attained, without which a precise definition of the full realization of the right to education remains impossible.

### **3. 3.3. Adaptability**

For the right to education to be adaptable means that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings and the best interest of the children shall be the primary consideration in all action concerning this right.<sup>67</sup> A balance between the exposure of children to the local and global community is complemented by their need to familiarize themselves with their own as well as foreign cultures. The International Commission on Education for the Twenty-first Century singled out as the first pillar upon which education should be founded "learning to live together by developing an understanding of others and their history, traditions and spiritual values."<sup>68</sup>

Normally, what a child learns in school should be determined by his or her future needs as an adult. This means that the educational system should remain adaptable, taking into account the best interest of the child, as well as social development and advancement, both nationally and internationally.<sup>69</sup>

### **3. 4. The right to education for refugee children**

For refugee children, the role of protection played by the right to education is more emphasised. In fact, being 'uprooted' does not negate a child's right to education nor a State's responsibility to provide it. The 1951 Convention relating to the Status of Refugees reaffirms in art. 22, responsibility of the government of the country of asylum to provide education for refugees.

The 1951 Convention guarantees refugee children the right of access to 'elementary education.' Article 22 states that they should be accorded the same treatment as is

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<sup>66</sup> Hammarberg, T., *A School for Children with Rights*, Innocenti Lectures, UNICEF International Child Development Centre, Florence, (1997). 19

<sup>67</sup> See note 51 as above

<sup>68</sup> UNESCO, *Learning: The Treasure Within: Report to UNESCO of the International Commission on Education for the Twenty-first Century*, UNESCO Publishing, Paris, (1996) 22.

<sup>69</sup> See note 36 as above

accorded to nationals of the host country with respect to elementary education. Other international legal instruments also stress that access to quality education is essential to the protection of children and women. The 1948 Universal Declaration of Human Rights first established the right to free and compulsory education at elementary level. The Declaration also called for professional and technical education to be made available.<sup>70</sup>

In order to reinforce children's right to education, UNHCR is advocating for application of the 1989 Convention on the Rights of the Child (CRC), which calls for States to make primary education compulsory and free for all, and to encourage the development of accessible secondary and alternative education. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) calls for basic education to be made available to those who have not received or completed primary education.

The fact remains that the majority of refugee children do not receive basic education. There are so many obstacles that prevent refugee children from receiving the education. Sometimes refugee children are denied education because host governments are not providing or cannot provide universal primary education for their own children. Poor infrastructure, inadequate resources and a lack of trained teachers are common limitations. Consequently, the quality of education may be poor, the hours limited and school materials lacking. Sometimes, the education provided is not in the refugee children's mother tongue. In some situations, refugee children have none or very limited, access to post-primary education or other types of training, without which their prospects for attaining economic self sufficiency can be severely hampered. To ensure that refugee children have opportunity of education, UNHCR Field Offices, in collaboration with host governments and partner agencies, must try to overcome such obstacles.

### **3. 4. The obligation of actors in the right to education**

The fact of being a state party to any convention brings obligations and duties. As far as the right to education is concerned, there are general obligations vis-à-vis protection, promotion and fulfilment of the social, economic and cultural rights on the one hand and obligations regarding some category of vulnerable groups such as children, refugee and asylum seekers, girls and/or people with disabilities on the other .

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<sup>70</sup> , Challenges and objectives, Technical Support Section, Division of operational Services, *The UN refugee Agency, Education strategy 2007-2009 Policy UNHCR Geneva* , June 2007

As far as socio- economic and cultural rights in Africa are concerned, the landmark decision in this regard is in *Social Economic Rights Action Center (SERAC) and Another v Nigeria*<sup>71</sup> where the Commission stated:

'It would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights- both civil and political rights and social and economic rights-generate at least four levels of duties for a state that undertakes to adhere to the rights regime; namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts.'

The obligation concerning the right to education is not exclusively the burden of the state party but also for different actors which can be divided into governments on one hand, and Non-Governmental Organisations and Non-State entities on the other. These different actors have to promote and assist the full implementation of the right to education.

### **3. 4. 1. States parties obligations on the right to education**

The basic framework of governmental obligations is outlined by a series of explicit guarantees of the right to education. The essential role of the State is to set educational strategy, determine and enforce educational standards, monitor the implementation of the strategy and put in place corrective action. Neither educational strategy nor educational standards are necessarily informed by the right to education; "education" and "human rights" are often separated both in law and in practice, while "gender" is often yet another separate category.<sup>72</sup> As developed below, the ICESR provides for progressive realisation in accordance with available resources. However, it also imposes general obligations on states parties obligations that have to be immediately fulfilled so as to prevent any kind of discrimination (art 2.(2)), the obligation to take steps towards (art 2(1)) full realisation of the right to education.<sup>73</sup>

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<sup>71</sup> (2001) *AHRLR* 60 (ACHPR 2001) para 43-44.

<sup>72</sup> See Ms. Katarina Tomaševski's preliminary report Para. 42.

<sup>73</sup> See the Committee's General Comment 3, para. 1 and para.2

The Committee's General Comment 3, para. 9 shed light on the use of the term progressive realisation, which seems to deprive States parties' obligations of all meaningful content.<sup>74</sup>

Like other human rights, the right to education imposes three types or levels of obligations on States parties: obligations to respect, protect and fulfil.

- **The obligation to respect** prohibits the state from acting in contravention of recognised rights and freedoms, interfering with or constraining the exercise of such right and freedoms. States must, *inter alia*, respect the liberty of parents to choose private or public schools of their children and to ensure the religious and moral education of their children.<sup>75</sup>

In general, this level of obligation requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.<sup>76</sup>

- **The obligation to protect** requires states to take steps with "all appropriate means, including particularly the adoption of legislative measures" such as judicial remedies with respect to rights which may, in accordance with national legal system, administrative, financial, educational and social measures, prevent and prohibit violation of individual rights and freedoms by third persons. States should ensure that private schools do not apply discriminatory practices to, or inflict corporal punishment on pupils.<sup>77</sup>

This obligation also requires states:

- a) to prevent violations of rights by any individual or non-state actor;
- b) to avoid and eliminate incentives to violate rights by third parties;

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<sup>74</sup> It means that states have a continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13 of ICESCR

<sup>75</sup> see note 36. 177

<sup>76</sup> Maastricht Guidelines on Violations of Economic, Social And Cultural Rights, Maastricht, January 22-26, 1997.

<sup>77</sup> See note.39 as above



and c) to provide access to legal remedies when violations have occurred in order to prevent further deprivations.<sup>78</sup>

Finally, the obligation to fulfil in the ICESCR can be considered as an obligation to achieve the progressive realisation of the right. This level of obligation requires the state to take positive measures to ensure, for persons, opportunities to obtain satisfaction of basic needs as recognised in human rights instruments, which cannot be secured by personal efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect of civil and political rights.

Besides the general obligations, States parties have specific obligations regarding the right to education. States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13 (1).<sup>79</sup> They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is in fact, directed to the educational objectives set out in article 13 (1).

In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education.

Finally states parties are obliged to establish 'minimum educational standards' to which all educational institutions established in accordance with article 13 (3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards<sup>80</sup>.

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<sup>78</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, the Nature of states parties' obligations, (fifth session, 1990), U.N. doc. E/1991/23, annex 3 at 86 (1991)

<sup>79</sup> There are numerous resources to assist States parties in this regard, such as UNESCO's Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13 (1) is to "strengthen the respect of human rights and fundamental freedoms"; in this particular context, States parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education cited at n.24 of General Comment No. 13 (1999) on the right to education para 49.about the state's parties obligations and violations .

<sup>80</sup> For additional information on the states obligation see the Articles 2 (1) and 23 of the IESCR, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action.

### **3. 4. 1. Obligations for other actors to right to education.**

As mentioned above, implementation of the right to education is not solely the burden of the state party to the international legal instrument protecting the right to education. This is also the task of many other actors such as Non – governmental organisations or non states entities. Some of them have as one of their duties, the protection of the right to education (UNHCR, UNICEF, UNESCO, NRC, JRS, INEE, etc...) .The Preamble of the Universal Declaration of Human Rights proclaims that:

‘Every individual and every organ of society [...] shall strive by teaching and education to promote respect for these [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among other peoples of territories under their jurisdiction.’

This obligation is universal and concerns all - state and non-state - actors. Because the primary responsibilities and obligations in the field of human rights enjoyment remain with the state, it cannot relieve itself of these obligations by ‘delegating’ human rights obligations to non-state entities or, for that matter, international organisations. This does not however, mean that non-state entities do not have responsibilities, both in a positive and in a negative sense: abstaining from violating human rights in general and the right to education in particular on the one hand and contributing to human rights compliance on the other.

The role of the United Nations agencies for instance, including at country level, through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realization of article 13. Coordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all actors concerned, including various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their cooperation for the implementation of the right to education at national level, with due respect to their specific mandates, and building on their respective expertise.<sup>81</sup>

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<sup>81</sup> General Comment No. 13 (1999) on the right to education para.60 about obligations of actors other than states parties.

## CHAPTER 4: THE CURRENT SITUATION OF THE RIGHT TO EDUCATION AND THE ROLES OF DIFFERENT ACTORS

The previous chapters dealt with the concept of the right to education in general and about refugee children in particular as provided by international legal instruments. This chapter consists of an analysis of the current situation of this right to education in Burundi, the protective legal framework and how it is implemented. It will also analyse the role of main actors involved in Burundi

### 4.1 The current situation of the right to education in Burundi.

The situation of the right to education in Burundi is like in most developing countries especially in Africa. According to a recent survey conducted by a national coalition for education 'Barekebige' literally 'let them learn', the rate of school attendance is 1, 5% in public and private pre-primary school.<sup>82</sup> In primary school, the statistics was from the period between 1999 -2000, 75% for boys, against 59 % for girls. The recent measure taken by the President for free and compulsory education in primary school has reduced the disproportion between the two categories.

Actually, the 2005-2006 report reveals that the is 105,9% for boys and 96,7% for girls. The national average of education is 101, 1%, but even there are many variations and differences among regions. The main challenges faced in implementation of the right to education are lack of resources, qualified teachers and poor salary<sup>83</sup>. There is also the problem of infrastructure.<sup>84</sup> .Besides those general

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<sup>82</sup> Published in <<http://www.arib.info>> On the right to education accessed on 18/09/07

<sup>83</sup> The profession is seen in Burundi as the one with the lowest salary among civil servants. That the reason most of newly graduated young professionals do not want to pursue in the career. The report says 78 % of those teachers wanted to quit the teaching career.

<sup>84</sup> "At least 391 primary schools were destroyed as a result of the conflict – more than 25% of the total number. Other schools were damaged while in use as temporary shelters for the displaced. May is still being used for housing for the displaced. Furniture and textbooks have also been destroyed. Burning and looting of schools was used as a rebel tactic as late as January 2000. [...]

The psychological effects of the conflict on children are considerable, with many manifesting clinical symptoms of trauma. [...] In the country as a whole, the number of single parent families doubled after the crisis. Many children have lost other close relatives too. In a survey of 2,770 children carried out by UNICEF, over 2,500 reported witnessing acts of violence; 93% showed signs of troubled behaviour see Jackson 2000, pp.9-10)

problems, there are other problems such as discrimination, that are faced by some category of people such as: orphans, children with disabilities, street children, children from indigenous communities such as Batwa.

According to the report of OCHA:<sup>85</sup> 'current estimates indicate that approximately 550,000 children between 7-12 years of age do not attend school.' While the decision of the newly elected Government to abolish primary school fees is both welcome and necessary, in the short to medium term, it will place further strain on an already over-stretched educational infrastructure. On a positive note, the 2005-2006 School Year has seen a 50% increase in enrolment for 1st grade in all provinces, compared to the period 2004-2005.

In the current school year, the most critical priorities are addressing extremely limited school capacities and teacher shortages in all Burundian provinces, as well as maximising access for 1st graders."<sup>86</sup> UNICEF also points out other challenges linked to the recent measure of the president on free education:

'The declaration of free primary education in Burundi has doubled enrolment, bringing with it the massive need for qualified teachers, desks, books, uniforms, teaching manuals, blackboards, classrooms, water supplies for schools and separate latrines for pupils. In addition, there are existing challenges in the retention of children in school, particularly girls, and in the reduction of geographical and cultural disparities in the access to education.'<sup>87</sup>

## **4.2 Legal framework of the right to education**

In Burundi, the right to education is constitutional. In fact, the 2005 Constitution provides:<sup>88</sup>

Every citizen has the right to the equal access to the instruction, to the education and to the culture.

The State has the duty to organize public education and to promote the access for all.

However, the right to private schools is guaranteed in conditions fixed by the law

In addition, the Republic of Burundi is a state party to the main conventions that provide for protection of the right to education. ICCPR (May 1, 1990), ICESCR, (May

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<sup>85</sup> OCHA, 2006 report

<sup>86</sup> See no 3 as above

<sup>87</sup> See UNICEF 2006 , see also UNICEF, 6 Feb 2006, In Burundi, the promise of universal primary education struggles with limited resources

<sup>88</sup> See art 53 of the Constitution of Burundi 8th March, 2005

I, 1972), CEDAW (January, 8 1992), CRC,( July 30, 1990). African Charter, (28 July 1989.)

Burundi is also a state party to the 1951 Convention Relating to the Status of Refugees (1951 Convention), its 1967 Protocol, and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, but maintained reservations to the 1951 Convention's rights to work, education, freedom of movement, and residence. The 2005 Constitution recognizes the right of asylum, prohibits unlawful extradition (specifically listing prosecution for genocide as a legal ground for extradition), and extended to all foreigners constitutional and the legal protection to persons and property. The 1989 Entry and Residence Law and its implementing ordinance define refugees according to "the international conventions on the matter to which Burundi is a party" and prohibited their *refoulement*.

It gives asylum seekers only eight days from entry to apply, but includes a right of appeal and 30 days to leave the country after rejection.<sup>89</sup> In conclusion the legal framework exists, but the problem is implementation of these rights.

#### **4.3 The concept of refugees and their legal protection in Burundi**

The presence of refugees in Burundi is the result of the conflict situation in Great Lakes as discussed in the first chapter of this paper. Actually, Burundi hosts three main groups of refugees: refugees from DRC (28,339), Rwanda (270) and others (from Somalia, Uganda, and Ethiopia, ( 58). As far as refugee camps are concerned, Burundi hosts three sheltering over 11, 500 refugees, 4,664 refugees living in Musasa Transit Centre (Ngozi province) where there are waiting for full registration and transfer to a refugee camp. Other refugees are scattered in urban areas.<sup>90</sup>

The figure of refugees is as follows:-

- Asylum seekers : 7,614 : 32%
- Kinama/ Gasorwe(Muyinga province, North –East ) : 9,275 refugees mainly Congolese .: 38%
- Gihinga( Mwaro in the centre) : 2,497 mainly Congolese: 10%
- Giharo( Rutana, South- East): 218 : Rwandese refugees.: 1%

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<sup>89</sup> United States Committee for Refugees and Immigrants, *U.S. Committee for Refugees and Immigrants World Refugee Survey 2007 - Burundi*, 11 July 2007. Online. UNHCR Refworld, Available at: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4696387b5> >[accessed 1 October 2007]

<sup>90</sup> See UNHCR Burundi fact sheet August 2007

Urban refugees : 4,464 : 19%

### **Specific statistics for children (between 0-17years)**

- Kinama / Gasorwe camp: 7470 children on the total of 9275(80,5% )among them ; 5507 (59,3% )are between 5-17 years .
- Gihinga: 1385 children on the total of 2 497(;55,5% )among them 1004 (40,2%) are between 5-17 years
- Giharo: 113 on the total of 218(55,8%) among them 76 (34,8%) are between 5-17 years
- Urban refugees 2393, total of 4,464( 53,6%) among them 2021 (45,3% )are between 5-17 years
- Asylum seekers: 4364 on the total of 7,614(57,3%) among them 3490 (45,8%) are between 5-17 years.

According to the above information, the refugee population is mainly composed of young people between 0-17 years and majority of that population should benefit from the right to education.

It should be also mentioned that refugees from DRC are in two groups: the first group is composed of refugees that fled because of conflicts in Eastern part of DRC (South Kivu), whereas the second one is composed of people who came into Burundi for other reasons but now cannot go back to DRC because of the conflict and are seeking for humanitarian assistance. However, the UNHCR provides only assistance to persons who live in refugee camps. As far as legislation in terms of protection of refugees is concerned, there is no comprehensive legal instrument protecting refugees.<sup>91</sup>

#### **4.3.1 International legislation**

The first legal instrument of reference in that area is the 1951 Convention Relating to the Status of Refugees (1951 Convention), its 1967 Protocol. The second text is 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>92</sup>

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<sup>91</sup> However a general law on refugee and asylum seekers is about to be adopted by the Parliament

<sup>92</sup> For more information see the Chapter 2 of this paper

### **4.3.2 National legislation protecting refugees and asylum seekers**

In regard to national legislations, the question of refugees was dealt with firstly in Decree /Law no1 /23 of 1982 for Regulating, Admission to Burundi, Establishment and Removal of Aliens. The Decree/Law contains some provisions in regard to expulsion of refugees in its article 31 when a refugee has violated public order or national security. However, the Decree/Law contains no provisions regarding such matters as education, employment or social security for refugees.

That Decree /Law was repealed by another – the Decree/Law 1/1007 of 20 March 1989 (Decree/Law). It covers regulation of admission, resettlement, residence, and removal of aliens and was complemented by a Ministerial order n°530 / 166 of July 10, 1989 fixing measures of execution of the aforesaid Decree/Law. There are also many other national instruments for technical application of basic legal protection of refugees such as Ministerial order n°215/331 of 16 April I 2004 on appointment of members of the Consultative Commission for Aliens, Decree n°100/087 of 13 June 1997 on the reorganisation of airspace, borders and migrations, Ministerial order n°530/808/CAB of 26 May 2003 on the creation of the position of Refugee Camp Administrator.

As far as institutions are concerned, the organ in charge of refugee issues is a Consultative Commission under the control of the Ministry of Home affairs and security. Members of the Commission are appointed from different ministries (Justice, foreign affairs, home affairs, work, trade and investment, Intelligence directorate). The Commission has competence to examine status of refugees and to consider applications, conduct public hearings and provide advisory opinion to the Home affairs ministry on the granting or not of refugee status.

### **4.4 The implementation of the right to education for refugee children in Burundi before 1994**

The question of refugees in Burundi is not a new concept. The oldest refugees in Burundi were from Rwanda and fled after the Rwandan Social Revolution of 1959.<sup>93</sup> Many refugee children attended schools with nationals even if there was an attempt of building a 'Rwandan school,' but the entire curriculum was based on Burundian

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<sup>93</sup>See the historical aspect of the conflict in Rwanda, most of the refugees were Tutsi, and they returned to Rwanda in 1994 with the victory of RPF and the establishment of the new government.

educational system.<sup>94</sup> The purpose of the school was to help many students who had not been admitted to public schools. In fact, there was a government educational policy that was limiting refugee's access to secondary education.<sup>95</sup>

Some saw through that policy as a discrimination of refugee children and others saw a kind of incentive or encouragement to refugee children to get better performance. Rwandan refugee children were among the best in schools.

As far as the curriculum was concerned, there was no particular aspect providing for refugee children. This situation prevailed until 1994. This is a clear violation of international standards on the right to education.

In fact, the 1951 Convention relating to the Status of Refugees reaffirms in article 22 the responsibility of the government of the country of asylum to provide education for refugees in respect of their culture and identity. The same article 22 states that states should accord the same treatment as accorded to nationals of the host country with respect to elementary education. According to the three obligation of respect, protecting and fulfilling, as said in our previous discussion, the ICESR prohibits the state from acting in contravention of recognised rights and freedoms, interfering with or constraining the exercise of such right and freedoms. States must *inter alia* respect the liberty of parents to choose private or public schools of their children and to ensure the religious and moral education of their children.<sup>96</sup> Furthermore, it requires states to take appropriate measures regarding respect of the right to education.<sup>97</sup> This protection is also provided by the CEDAW under article 10.

The 1989 Convention on the Rights of the Child goes beyond simple recognition of the right to education and recommends measures for state parties to fight against every kind of discrimination.<sup>98</sup>

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<sup>94</sup>In 1980, an association of Rwandese people in diaspora built a secondary school: Lycee St Albert actually known as Lycee de l'Amitie wich was a private institution.

<sup>95</sup>In fact, for Rwandan refugee children to be admitted to secondary education, he has to pass the national exam after completing his primary education with a higher score than national (60% whereas national was taken with 50%). Interview of Murangira Froduald on 23 september 2007)

<sup>96</sup> See no 36 as above p. 177

<sup>97</sup> As above

<sup>98</sup> See the art 2 of CRC, and the Committee's General Comment 3, para. 1 and para.2



Finally, we have discussed that education should prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and the cultural background and values of others.<sup>99</sup>

In respect of these provisions, it may be concluded that Burundi was violating international instruments duly ratified by it. However, the responsibility of the Burundian government seems to be diminished by three reasons. First by its reservations to the 1967 Protocol relating to the Status of Refugees, Second, international instrument emphasize more than on primarily education not on secondary. Third, the right to education, like other socio-economic and cultural rights, is progressively realisable<sup>100</sup>

### **1. Reservations to the 1967 Protocol relating to the Status of Refugees,**

In acceding to this Protocol, the Government of the Republic of Burundi entered some reservations.<sup>101</sup> The government was using this argument by saying that refugee children can not benefit a favourably treatment regarding the right to education. Following this, we believe that if refugee children can not be treated favourably than nationals, at least they should be treated as nationals. If not, it amounts to discrimination,

### **2. Secondary education**

It is true that international legal instruments emphasise primary education. However, according to article 13(2) (b) of ICESR, secondary education 'shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.' The phrase "generally available" signifies firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be

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<sup>99</sup> See art 28 and 29 of CRC

<sup>100</sup> Interview with the Ministry of Home Affairs and security advisor in charge of refugee matters, Colonel Didace Nzikoruriho. On 27<sup>th</sup> September 2007

<sup>101</sup> Art 22 of the 1967 Protocol states that 1. 'The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. For the reservations see Chapter 2.

2. The Contracting States 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 and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation, the phrase "every appropriate means" reinforces the point that States parties should adopt varied and innovative approaches to delivery of secondary education in different social and cultural contexts.<sup>102</sup> Subsequently, by adopting a different policy towards refugee students<sup>103</sup> the government failed to fulfill and promote the right to education for this category of people.

### **3. The progressive realisation of socio- economic and cultural rights**

The ICESR provides for progressive realisation of rights in accordance with available resources. However, it also imposes general obligations on states parties that have to be immediately fulfilled so as to prevent any kind of discrimination (art 2(2)), the obligation to take steps towards (art 2(1)) full realisation of the right to education.<sup>104</sup>

The Committee's General Comment 3, para. 9, sheds light on the use of the term 'progressive realisation,' which seems to deprive States parties' obligations of all meaningful content.<sup>105</sup>

As discussed before, the fact that the full realisation of most economic, social and cultural rights can only be achieved progressively does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realisation of the rights in question. Furthermore, the State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance, nor can the State justify derogations or limitations of rights recognised in the Covenant because of different social, religious and cultural backgrounds.<sup>106</sup>

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<sup>102</sup> See General Comments No 13.

<sup>103</sup> See No 15 above

<sup>104</sup> See the Committee's General Comment 3, para. 1 and para.2

<sup>105</sup> It means that states have a continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13 of ICESCR.

<sup>106</sup> See Maastricht guidelines

This argument provided by the government to explain the situation is not convincing and the Burundian government should be held responsible for violations that occurred during that period.

#### **4.4 The current situation of the right to education (1994- 2007)**

This period has been characterised by many changes in terms of refugee and asylum seekers' issues. In fact, the years 1993 and 1994 saw the beginning point of the civil war that is still going on in Burundi. This erupted after the assassination of President Ndadaye Melchior. It was followed by a long period of political instability and the genocide in Rwanda. It is also during this period, precisely after the Rwandan genocide and the establishment of a new government in Rwanda, that saw thousands of Rwandan refugees that had been in Burundi since 1959, go back to their country.

Two years later, in 1996, the war in DRC started and brought with it thousands of refugees seeking protection and assistance in Burundi up to now.

It is true that in terms of legal protection, legal instruments are still the same.<sup>107</sup> But in terms of the right to education, there have been positive developments. The current situation of the right to education can be analysed according to different category of refugees and their location. There are two main group of refugees: The first group is of refugees living in camps (Kinama/Gasorwe, Gihinga and Giharo also in the Centre of transit of Musasa and the second group is the one formed by urban refugee.

##### **4.4.1. The right to education in refugee camps (Gihinga and Gasorwe)**

The two refugee camps are mainly populated by refugees from DRC.

**Gasorwe refugee camp** : The refugee camp holds a the total of 9275 persons of which 5507(59,3% )are between 5-17 years and only 2445 children are attending schools among them 539( 32,7%).are in secondary school

**Gihinga refugee camp** : With a total of 2 497 of whom 1004 ( 40,2%) are between 5-17 years and only 832 (60%) children are attending schools among them 368 are in secondary school

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<sup>107</sup> The obstacles of not having an comprehensive legal instrument will be discussed in the next chapter

<sup>108</sup> Source interview with UNHCR officials 24 September 2007.

If we analyse the number of refugee children living in the two camps and number of children enrolled in school; we conclude that there are still so many children that are not benefiting from basic education.

As far as the quality of the education in camps is concerned, education is ensured by Government of DRC through UNHCR High commission in Burundi. In fact, teachers are chosen among refugees and the school curriculum is the same as the one in their country of origin (DRC) and no school fees are required. Educational follow-up, inspection, supervision, seminars and trainings for teachers to ensure a quality education has been provided by the 'Groupe Scolaire Congolais'<sup>109</sup> since 2002.

In fact, it is a result of an agreement between UNHCR and the DRC Embassy in Burundi that UNHCR accepted to rehabilitate school infrastructures and the school accepted to ensure assessment and monitoring of the educational system in refugee camps. It is noteworthy that UNHCR also facilitates education fact finding missions from DRC, to come to Burundi for national exams and for routine inspection missions. Besides, the general mandate of assessment, the school chooses the best pupils among those in the camps and enrolls them in GSC as an encouragement.<sup>110</sup> These pupils are assisted by UNHCR in terms off accommodation, school materials and other requirements.

#### **4.4.2 The right to education for urban refugees.**

As a result of an agreement between the government of Burundi and the UNHCR High Commission in Burundi, only refugees who accepted to be settled into refugee camps receive assistance and protection. Even if UNHCR does not provide any assistance for them, there are some NGOs considered as implementing partners of the UNHCR, which provide assistance and protection for this group of refugees. Since 1997, the Jesuit Refugees Services has been providing assistance to a certain group of Congolese urban refugees. A certain number of primary schools have been built on the Kiyange site. However, a limited number of refugee children are attending school. The school was not made exclusively for refugees but also for other vulnerable children such as indigenous people from the Batwa ethnic group. Then the program followed by the school was the Burundi educational one using the national language.

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<sup>109</sup> 'Le Groupe Scolaire Congolais' is a secondary Congolese school under the responsibility of the DRC Embassy in Burundi and it follows Congolese educational programme

<sup>110</sup> According to the officials in UNHCR, they were 53 pupils in 2006 (interview conducted on 24 September 2007 at UNHCR High Commission, Bujumbura Office.

As far as secondary education is concerned, there is a limited number of pupils (around 30 pupils) who attend public schools and are accommodated together. They receive assistance from JRS in form of food, accommodation, scholastic materials and fees, security and psychological assistance.<sup>111</sup> Unfortunately, JRS is no longer in charge of urban refugees and its activities have been taken over by Handicap International (French section). However, the structure and assistance given to refugees in general, and refugee children remain unchanged.

Apart from this sole example, there is no other structure of assistance for urban refugees, many of whom do not have refugee status. In addition, it may be said that refugee rights are violated by the government and the UNHCR in regard to the general requirements of refugee protection and particularly the fulfilment of the right to education. This is because the government and the UNHCR only recognise people that accept to be settled into refugee camps as refugees. Those who decide to live outside the camps cannot claim any assistance or protection provided for refugees.<sup>112</sup>

#### **4.4.3. Main actors in the implementation of the right to education for refugee children in Burundi**

There are different partners in charge of refugee issues. The party primarily responsible for protection and assistance of refugee and asylum seekers in a given country is the host state. By being a state party or ratifying different legal instruments protecting refugees, a state accepts to be bound by them.<sup>113</sup> As far as the right to education is concerned, the essential role of the State is to set educational strategy, determine and enforce educational standards, monitor implementation of the strategy and put in place corrective action.<sup>114</sup>

#### **4. 1. 4 The Government of Burundi**

In this case, the obligation of the Government of Burundi, besides the general obligation of assistance and protection of refugees, is to ensure that the right to education is guaranteed for refugee children. However, the government argues that it is not able to fulfill this right to its nationals, so it cannot be held responsible for its

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<sup>111</sup> A tutor or a monitor have been appointed and is responsible for all needs of the group. This person is considered as a liaison between the groups the JRS.

<sup>112</sup> Interview see no 16 as above

<sup>113</sup> For the different obligation of a state party, see the 3thrd chapter.

<sup>114</sup> See Ms. Katarina Tomaševski's preliminary report Paragraph 42.

limited intervention towards refugees. This is not a plausible argument; at least the legal protection framework should be available for this category of people and it is not a matter of availability of resources but a matter of political will.

In terms of legal protection, even if there are some loopholes, the government of Burundi possesses a complete legal tool for protection of refugees. Ordinarily, the government of Burundi is in charge of determination of refugee status and provision of space for refugee camps. It is also responsible for security within refugee camps.

#### **4.4 2 The UNHCR**

The role of the United Nations agencies, including at country level, through the United Nations Development Assistance Framework (UNDAF), is of special importance to the realisation of article 13. Coordinated efforts for the realisation of the right to education should be maintained to improve coherence and interaction among all actors concerned, including the various components of civil society.<sup>115</sup>

The UNHCR, one of United National agencies, has been in Burundi since 1960. One of its main activities was and still is to provide assistance for refugees in Burundi. In 2006, UNHCR had a branch office in Bujumbura, a sub-office in Ruyigi and field offices in Musinga and Makamba.

For management of its activities, UNHCR is working closely with national authorities, implementing and operational partners, donors and sister UN agencies to facilitate the return and reintegration of Burundian refugees, and to aid refugees and asylum seekers in Burundi. Together with Burundian authorities, UNHCR coordinates humanitarian assistance, repatriations and reintegration with WFP, UNICEF, UNDP, BINUB and OCHA.

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<sup>115</sup> See General Comment No. 13 (1999) on the right to education para.60 about obligations of actors other than states parties.

### 4.4 3. Implementing partners and their contributions

The Preamble of the Universal Declaration of Human Rights proclaims that:

'Every individual and every organ of society [...] shall strive by teaching and education to promote respect for these [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among other peoples of territories under their jurisdiction.'

Following the argument, the duty to provide or to protect human right is not only the task of state parties or UN specialised agencies, but for everyone. As far as refugee protection is concerned, the UNHCR as a coordinating agency is working with several NGOs in Burundi. These includes: *Action Contre la Faim* (France), African Centre for the Constructive Resolution of Disputes, African Humanitarian Action, *Association des femmes juristes*, *Comunità Impegno Servizio Volontariato*, *Conseil pour l'éducation et le développement*, *Croix Rouge Burundaise*, *Fédération Nationale des Coopératives d'Epargne et de Crédit du Burundi*, International Rescue Committee, Jesuit Refugee Services, *Ligue Iteka*, *Association pour la Paix et le Développement ( APADE)*, Transcultural Psychosocial Organization – Health Net International, World Outreach Initiatives, *Deutsche Gesellschaft für Technische Zusammenarbeit*, Norwegian Refugee Council, Handicap International (France). For instance, the NGO, Refugee Education Trust (RET), helps with infrastructure to address the problem of lack of classrooms. Whereas, Norwegian Refugee Council (NRC) is interested in education, camps management, Transcultural Psychosocial Organization (TPO), is providing psychological assistance, Jesuit Refugee Service (JRS) and Handicap International (France), education for urban refugees etc...

## **CHAPTER 5 CHALLENGES AND OPPORTUNITIES OF THE IMPLEMENTATION OF THE RIGHT TO EDUCATION IN BURUNDI.**

### **5. 1. Opportunities of national legislation**

The national legislation for refugees is a complete document and meets international standards. In fact, anyone who satisfies requirements for refugee status can be considered a refugee.<sup>116</sup> In other words, the main opportunities of national legislation are the existence of a complete legal framework (both national and international) for the protection and assistance of refugees and the existence of a range of institutions to refer refugee matters to.

### **5. 2. General challenges regarding refugee and asylum seekers**

#### **5. 2.1. Unpredictable political environment in Burundi**

The period from 1993 which coincided with the beginning of the civil war brought with it a chronically unstable political landscape.<sup>117</sup> The consequences of this situation is the difficulty of implementing a stable and effective system of governance, which has also had great impact on the fruition of a national policy on refugees.

#### **5. 2. 2 The everlasting instability of the region<sup>118</sup>**

The Great Lakes region is one of the most troubled in Africa. The civil war in Burundi and DRC, the existence of different rebel groups in DRC (FNL, Interahamwe and Ex-FAR), is a permanent source of conflict and plight of refugees in the region. The refugee situation has become a regional problem whose solution requires, could be a regional approach through the new regional organisation, the East African Community.

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<sup>116</sup> See art 20 of the Decree/Law of 20 March 1989.

<sup>117</sup> Since 1993 , Burundi had had 7 Presidents of Republic

<sup>118</sup> See also the second chapter on the source of conflicts in Great Lakes Region



### **5. 2. 3. The absence of a national comprehensive legal instrument that protects refugees.**

The problem is not absence of a legal framework (the government of Burundi has ratified most international instruments on refugees that can be used to handle refugee issues); it is absence of a comprehensive text of reference.

### **5. 2. 4 The absence of a comprehensive institution for the protection of refugees**

There are so many institutions on national level that deal with issues of refugees and asylum seekers. Besides this, the question of competence and relationship between these institutions is also another challenge.

### **5.2.6 The confusion and lack of information for refugees and asylum seekers and the role of different actors<sup>119</sup>**

Refugees and asylum seekers are not aware of the different competences of refugee actors, especially between the UNHCR and the Government. The problem of lack of information or ignorance is perceptible when a refugee crisis or any other problem arises .In that event they camp near UNHCR offices.

### **5. 3. Particular challenges as regards the right to education**

Although education has been recognised as a universal human right by various international legal instruments ratified by Burundi, the right to education is still facing some challenges for its full fulfillment.<sup>120</sup>

#### **4. 3.1. Livelihoods and disintegration of families**

Even though international and national laws provide that education should be free at the primary level, in practice. Children often face challenges in joining or continuing school attendance. In many cases, school fees, basic necessities such as health care and food; and related costs of schooling prevent them from attending. Parents

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<sup>119</sup> In fact when there is a refugee crisis or a problem among refugee , they camp near the UNHCR offices

<sup>120</sup> Also some of those challenges are shared with the UNHCR as a leading organisation for the coordination of all actions about refugees. For more information see The Education Field Guidelines which can be found on UNHCR's website: <<http://www.unhcr.org/cgi-bin> >

cannot afford these costs that are essential to the realisation of the right to education. Moreover, children are often needed to contribute to family income. The consequence of the situation is that they cannot continue to attend classes and benefit from the right protected by law. This situation is worse for orphans, when elder children turn into heads of families. Child-headed households are of particular concern as the taking on of parental responsibilities aggravates children's protection risks.<sup>121</sup>

### **5. 3. 2. Safe Learning Environment and Quality Education**

In camp settings, there are additional constraints related to safety and quality of education. In many cases, there is lack of qualified teachers (education is imparted by other refugees). Also lack of equipment, infrastructures, furniture, teaching material and text books impede quality of education. There are also other situations where the concentration of traumatized children and children associated with armed conflicts also brings major pedagogical, disciplinary and protection challenges. Additionally, despite the protection provided by the state, refugee camps are not necessarily safe.<sup>122</sup>

### **5. 3. 3. Post educational opportunities**

Another obstacle which limits refugees' access to education is lack of post-primary educational opportunities. In fact, most refugee children are from poor families and they have to support the family after attaining 'basic education.' They have to work. This is also true for many children who were separated from their parents or are unaccompanied. They have to work for their survival. Few of those who complete primary school are able to be enrolled in secondary schools or in technical schools. In addition, those who have completed their education, have low chances of getting employment. In fact most of the time, the job market is protected for nationals (even nationals are on the dole). Studying in different educational systems in the host country does not help them to easily integrate into environments quite different from theirs.

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<sup>121</sup> See also report on the high commission's five global priority issues for refugee children, EC/57/SC/CRP.16 , Executive Committee of the High Commission's programme, 6 June 2006

<sup>122</sup> We can recall the attack by FNL rebel movement of Gatumba refugee camp on 13 August 2004

#### **5. 3. 4. Lack of continuity of education services**

Disruption of children's education is another challenge. When children are exiled, their education in their country of origin is interrupted. During their stay in Burundi, many children benefit from facilities to exercise their right to education. However, as long as the refugee status is a temporary situation (none could be a refugee for ever), the repatriation process constitutes another interruption of their education and most of the time, access to school is not guaranteed during their return for many reasons. For instance local schools may not have the capacity to integrate the children.

In conclusion, the main challenges faced in implementation of the right to education are mainly lack of resources, qualified teachers and low salary. There is also the problem of infrastructures. Besides these general problems, there are problems related to a kind of discrimination that is faced by some category of people such as orphans, children with disabilities, street children, children from indigenous persons such as Batwa, or those considered as pupils of the 'second zone' <sup>123</sup>

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<sup>123</sup> The results for the 1998 Burundian National Examination were received during the reporting period. Out of 1,233 students [from Tanzanian camps] only 46 pupils (3.7 per cent) passed with marks above 50 per cent. The general performance of the primary schools was very poor due to lack of textbooks and qualified teachers. Other problems reported were poor conditions of the schools, the environment and funding. (UNHCR, 1999) see also: Learning for a Future: Refugee Education in Developing Countries, United Nations High Commissioner for Refugees 2001.

## **CHAPTER 6 CONCLUSION AND RECOMMENDATIONS**

### **6.1. CONCLUSION**

The right to education is a human right and more than a right in itself, it is also a tool of protection of vulnerable groups like refugee children against early marriages, child abduction, armed conflict, and sexual abuse. However, it has become a theoretical right for many and a privilege for some. By signing many instruments protecting refugee children and their rights in general and the right to education in particular, the government of Burundi have accepted to comply and be bound by them.

This study discovered that the problem now in Burundi is absence of legal framework of protection but the implementation of the provisions contained in legal instruments. A considerable step has already been taken in that regard, but a lot needs to be done for the improvement of the rights to education for refugee children. Refugee children will never fully enjoy their right to be educated as long as this right is considered as a burden for a host country or a private matter or an exclusive task of UNHCR. Hence, the International community especially the UNHCR should increase their cooperation with government and prioritise and ensure fulfilment of the right to education.

### **5. 2 RECOMMENDATIONS**

As far as legal framework for protection of the right to education is concerned, the government of Burundi should adopt a comprehensive instrument that deals with refugee matters. A comprehensive body to be responsible for refugee issues should be established.

Durable solutions through regional integration should be explored in order to eradicate conflicts in the Great Lakes and limit massive movement of people.

Preparatory work and exchange of information both in and between the country of asylum and the country of origin should be available for refugees to ensure voluntary repatriation.

Sensitisation to create awareness among the community on the priority of the right to education should be promoted among refugees.

Education programming should incorporate some local community teachers and administrators (non-refugee personnel), both as resources and as beneficiaries of training and professional development.

In places where children in the host community do not have access to education, assistance should be provided to them in order to avoid imbalance.

Special measures should be adopted for children with special needs (hearing and visually impaired, mentally handicapped, specific learning difficulties).

The UNHCR and implementing partners should have enough personnel and resource to adequately provide education for refugee children. Furthermore, donors and government officials, partners in the implementation of the right to education should be enlightened about the benefits of supporting education during emergencies, and on how to avoid envisioning education exclusively as a post-emergency development activity<sup>124</sup> by providing adequate resources.

Coordination with national educational officials (both from the country of origin and the host country) and educational actors should be improved on different issues such as curriculum, post -primary education, job opportunities, and infrastructure.

Finally in all actions regarding the right to education, the best interest of the child should be priority.

**Word count: 17794**

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<sup>124</sup> M. Sommers, (1999). *Emergency education for children*. Mellon Foundation/MIT, 1999 Cambridge .See <<http://web.mit.edu/CIS/www/migration/pubs/mellon/1children.html>> Accessed on

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