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# Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law

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## Summary

*This paper reflects the results of a study, the main objective of which was to investigate the practical treatment of unaccompanied minor refugees in Ghana and South Africa, and to explore whether such treatment is in accordance with existing international norms and standards for the protection of refugee children. The study focused on the realisation of children's socio-economic rights in order to measure treatment. The paper seeks to address the obstacles which prevent the proper treatment of unaccompanied minor refugees, and to make recommendations as to how the international community can better regulate the treatment of unaccompanied minor refugees. In essence, this paper aims to investigate whether there is a discrepancy between the rights of child refugees acknowledged in international law, and the situation of unaccompanied minor refugees in practice and, if so, how this can be remedied. The paper seeks to show, through the case studies of Ghana and South Africa, that unaccompanied minor refugees are, to a certain extent, lost in the system.*

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## 1 Introduction

According to the office of the United Nations High Commissioner for Refugees (UNHCR), the world's refugee[1] problem is one of the most complicated issues before the international community today.[2] According to several estimates, there are millions of refugees in Africa who are vulnerable to abuse and who, therefore, need to be protected in order to ensure that their human rights are not violated. Certain groups of refugees, most particularly children, require special protection as a consequence of their exceptional vulnerability.[3] More than half the world's refugees are children, and some of these children are unaccompanied minors.[4] Unaccompanied minor refugees (UMR) require special protection because of their personal situation and their immediate need for nurturing and care. Unaccompanied minors are defined as children, as defined in article 1 of the Convention on the Rights of the Child (CRC),[5] who have been separated from both parents, as well as from other adults who have a legal or customary duty to care for the child.[6] According to Ressler *et al*, 'unless special assistance is provided, unaccompanied children are dependent on the chance charity of others, which can fall short of even minimal care and protection'.[7]

Refugees are entitled to all the rights and freedoms contained in international human rights instruments, as well as to the protection provided for in guidelines, conventions and policies which specifically address the problem of child refugees.[8] There is, however, concern that child refugees, particularly UMR, are abused and exploited as a result of insufficient protection, and that existing protections are not properly implemented and enforced. There is also a concern that the international law of the child, at the point where principles move into practice, is incomplete and narrowly defined.[9] Although legal instruments which

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1 For the purposes of this study, the term 'refugees' also refers to asylum seekers and, to the extent applicable, illegal immigrants.

2 http://www.unhchr.ch/html/menu6/2/fs20.htm (accessed 20 August 2008).

3 C Nicholson 'A first call on available resources for child refugees in South Africa' (2005) 38 *De Jure* 71.

4 Nicholson (n 3 above) 72.

5 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

6 General Comment No 6 (2005) Committee on the Rights of the Child 'Treatment of unaccompanied and separated children outside their country of origin' (para 7); http://www.ccrweb.ca/uam.htm (accessed 28 August 2008).

7 EM Ressler *et al Unaccompanied children: Care and protection in wars, natural disasters, and refugee movements* (1988) 4.

8 Arts 3(1), 20 & 22 CRC and arts 4 & 23 African Charter on the Rights and Welfare of the Child.

9 GS Goodwin-Gill 'Protecting the human rights of refugee children: Some legal and institutional possibilities' in J Doek *et al* (eds) *Children on the move: How to implement their right to family life* (1996) 97.

offer protection to children do exist, these instruments may not be broad enough and may not be implemented sufficiently at the national level. According to Ressler *et al*:[10]

> Unaccompanied children have existed in virtually every past war, famine, refugee situation and natural disaster ... on the basis of past and present experience, it is certain that the future will produce its share of unaccompanied children as well.

## 2 International and regional law

UMR are entitled to protection under international law, more specifically, under international human rights law, international refugee law and various regional instruments.[11] These laws provide the framework[12] within which decisions and actions taken on behalf of UMR should take place.[13]

### 2.1 Rights of the child

CRC is an international human rights instrument which entered into force in September 1990, and which contains the largest number of international standards concerning the treatment of children. Although it is not specifically a refugee treaty, its provisions directly affect and apply to refugee children, as article 1 of CRC provides that the provisions of the Convention are granted to all persons under the age of 18.[14] The standards set by CRC are comprehensive as they cover most aspects of a child's life. Although the realisation of some social welfare rights, such as health, education and an adequate standard of living, is subject to a state's financial capability, the non-discrimination clause in CRC ensures that whatever benefits are given to children who are citizens of a state must also be given to children who are refugees in the territory of the state.[15] The 'near-universal ratification'[16] of CRC has ensured that CRC standards have been agreed to and accepted by most countries of the world. It is also important to consider regional

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10 Ressler *et al* (n 7 above) 3.

11 http://www.unhcr.org/excom/EXCOM/43bce4782.pdf (accessed 22 September 2008).

12 Ressler *et al* (n 7 above) 3.

13 http://216.239.59.104/search?q=cache:MdSYBD9a1qIJ:www.savethechildren.net/arc/files/c_sepchil.pdf+Key+concept:+Action+for+the+Rights+of+Children+(ARC)+Separated+children+%E2%80%93+December+2004+Foundations.&hl=en&ct=clnk&cd=1&gl=gh (accessed 22 August 2008).

14 http://216.239.59.104/search?q=cache:SzafmD-qv6AJ:www.unhcr.org/cgi-in/texis/vtx/protect/ opendoc.pdf%3Ftbl%3DPROTECTION%26id%3D3b84c6c67+Refugee+Children:+Guidelines+on+Protection+and+Care&hl=en&ct=clnk&cd=1&gl=gh (accessed 22 August 2008).

15 As above.

16 As above.

African law. The African Charter on the Rights and Welfare of the Child (African Children's Charter) entered into force in 1999.[17] The African Children's Charter has many similar provisions to CRC, and has specific provisions referring to the socio-economic rights of refugee children on the continent.

### 2.2 Refugee law

International and regional refugee law do not specifically refer to the rights of refugee children. The 1951 UN Refugee Convention and 1967 Protocol, which have been acceded to by both Ghana and South Africa,[18] make no distinction between adults and children with regard to their socio-economic rights. Article 22 of the UN Convention does, however, set standards that are of special importance to children. It states that refugees must receive the 'same treatment' as nationals in primary education, and treatment at least as favourable as that given to non-refugee aliens in secondary education. The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa has no article that specifically refers to refugee children.

### 2.3 The United Nations High Commissioner for Refugees

The UNHCR has issued numerous policies and guidelines concerning refugees, some of which focus on the treatment of child refugees, and UMR in particular.[19] According to Ressler *et al*, these policies 'constitute a broad body of substantive rules for decisions on the issue of care and placement of the unaccompanied children falling within the agencies' jurisdiction'.[20] They are important as they constitute part of the 'legal framework which has come to influence the treatment of unaccompanied children'.[21] The UNHCR Guidelines on Refugee Children were first published in 1988. They were initiated by the 1987 Note on Refugee Children, which finally drew a distinction between refugee adults and refugee children.[22] The Guidelines were then updated in 1994 in light of the 1993 UNHCR Policy on Refugee Children. Central to these Guidelines is the acknowledgment of the need that refugee children have for special care and assistance and, as such, the Guidelines recognise that

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17 http://www.africa-union.org/child/6th%20meeting/WORKSHOP-CONCEPT%20NOTE.pdf (accessed 23 April 2009).

18 http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en (accessed 23 April 2009).

19 Such as the Revised (1995) Guidelines for Educational Assistance to Refugees, or the UNHCR policy on Refugees in Urban Areas (December 1997).

20 Ressler *et al* (n 7 above) 275.

21 Ressler *et al* (n 7 above) 272.

22 CP Cohen 'The rights of the child: Implications for change in the care and protection of refugee children' (1991) 3 *International Journal of Refugee Law* 683.

children are vulnerable, dependent and developing. These Guidelines are intended to guide the staff of the UNHCR and other organisations, as well as governments. According to the UNHCR, they are not merely suggestions but rather tools for reaching policy objectives, and so they cannot be dismissed without good reason.[23] In addition, most of the Guidelines are intended to be universal.[24] They are based on human rights law, as they were created in light of CRC and the notion of human rights. There is thus an obligation under human rights law to follow these Guidelines.[25]

The UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum are also important to consider.[26] Section 7(1) of the Guidelines states that all children seeking asylum, *particularly* if they are unaccompanied, are entitled to special care and protection. In addition, the Guidelines state that every child should have access to education in their asylum country.[27]

### 2.4 Other

The Inter-Agency Guiding Principles on Unaccompanied and Separated Children[28] are intended to guide future action for 'national, international and non-governmental organisations, as well as for governments in their efforts to meet their obligations, and for donors in making decisions on funding'.[29] The Principles seek to ensure that all actions and decisions taken in respect of separated and unaccompanied children are anchored in a protection framework, and that the best interests of the child are respected at all times.[30] General Comment 6 of 2005 on the treatment of unaccompanied and separated children outside their country of origin was adopted by the Committee on the Rights of the Child on 3 June 2005.[31] It identifies the vulnerable situation of unaccompanied and separated children and provides guidance on the protection, care and proper treatment of these children based on the legal framework of CRC, with particular reference to the principles of non-discrimination and the best interests of the child.[32] Finally, General Assembly Resolution 51/77 on the rights of the child, passed in 1996, makes specific reference to the plight of UMR and urged that

23 n 14 above.
24 As above.
25 As above.
26 http://www.unhcr.org/refworld/docid/3ae6b3360.html (accessed 23 April 2009).
27 Sec 7(12).
28 http://www.unhcr.org/refworld/docid/4113abc14.html (accessed 23 April 2009).
29 http://www.icrc.org/web/eng/siteeng0.nsf/html/p1101 (accessed 16 August 2008).
30 n 29 above.
31 http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42dd174b4 (accessed 23 April 2009).
32 n 11 above.

co-ordinated efforts be made by all agencies to address their specific needs as 'the [CRC] itself calls for co-operation in protection, care and tracing of unaccompanied minors, and the Committee on the Rights of the Child attaches great importance to [their] situation'.[33]

## 3 The problem of access to socio-economic rights of unaccompanied minor refugees: The cases of South Africa and Ghana

Despite the existence of legal instruments which provide for special care and assistance in the case of UMR, the plight of UMR has largely been ignored by the international community. Various international instruments touch on the issue, and can be used in advocating for the rights of these children, but there is no specific instrument or body which regulates the treatment of UMR. The UNHCR — the primary actor responsible for the assistance and protection of refugees — has used international law as the basis for specific guidelines to protect refugee children, yet these guidelines are not always followed. They do not constitute 'hard international law' and so there are no sanctions, and few consequences attached to the lack of implementation. According to Ressler *et al*:[34]

> [I]n a number of emergencies, unaccompanied children have been left without food, medical care, shelter ... in these and other instances, relevant national and international law has been ignored and violated by those who have acted or should have acted upon the children.

Although it is clear that the law requiring special care and protection of UMR exists, it is also clear that the law is not always implemented and that many UMR suffer as a result. In addition, the Guidelines and Principles set by agencies such as the UNHCR and CRC are also not always followed: Ressler *et al*[35] have stated that

> [i]n many past emergencies ... policy and programme staff have not been prepared to make these decisions and have been uncertain as to what actions should be taken, and, therefore, some unaccompanied children have received no help at all ... where there has been assistance, it has sometimes been inadequate or misdirected.

This section seeks to demonstrate that maltreatment of UMR does occur. It explains the treatment of UMR in South Africa, a relatively wealthy African state, in a recent refugee emergency. It also explains the treatment of UMR in Ghana, a poorer African state, where refugees have resided in a camp situation for approximately 20 years and the situation is no longer considered an emergency. These two countries

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33 n 11 above.

34 Ressler *et al* (n 7 above) 300.

35 Ressler *et al* (n 7 above) 4.

were chosen in order to demonstrate that in either type of national economy, and in either type of refugee crisis, UMR are still lost in the system, despite the efforts of the parties involved. This section will study the access that UMR have to education, healthcare, food and water, and sanitation and shelter in order to address the realisation of the socio-economic rights of UMR.

## 3.1 South Africa

### 3.1.1 General

According to Landau and Jacobsen, 'since its transition to majority rule in 1994, South Africa has become the destination for tens of thousands of migrants and refugees from across the African continent'.[36] In fact, according to the International Office for Migration, there are more than 125 000 registered refugees in South Africa.[37] Yet many refugees are faced with maltreatment at the hands of the police and South African citizens. Many refugee advocates 'frequently criticise the police and the Department of Home Affairs for their treatment of refugees ... the data indicate that such complaints are justified'.[38] In 2008, the number of refugees entering South Africa drastically increased due to the political crisis in neighbouring Zimbabwe. This influx of Zimbabwean refugees into South Africa was described by government as a 'serious problem' requiring action.[39] In addition, refugees living in South Africa faced increased challenges in 2008 due to the outbreak of xenophobia and xenophobia-related attacks. The UNHCR stated that in May 2008, during a period of only two weeks, more than 17 000 people, including refugees and asylum seekers, were estimated to have fled xenophobic attacks. According to the UNCHR, this group was in urgent need of assistance and protection.

Amongst this group of refugees in South Africa, there are a number of UMR. Lawyers for Human Rights, together with partner non-governmental organisations (NGOs), stated that there are 'a few hundred'[40] living in Musina alone, a town bordering Zimbabwe. In August 2008, a Child Protection Rapid Assessment was carried out in the Musina municipality. The assessment concluded that more than 600 unaccompanied children were living in the town of Musina, more than 200 of whom had arrived in the previous month from neighbouring Zimbabwe. Save the Children's Resource Centre in Musina alone registered

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36 L Landau & K Jacobsen 'Refugees in the new Johannesburg' (2004) 19 *Forced Migration Review* 44.

37 http://www.polity.org.za/article.php?a_id=134092 (accessed 14 September 2008).

38 Landau & Jacobsen (n 36 above) 45.

39 http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_2158024,00.html (accessed 15 September 2008).

40 E-mail from an employee at Lawyers for Human Rights, South Africa, 1 October 2008.

60 new unaccompanied children from Zimbabwe in two months,[41] and the Centre for Positive Care, a local NGO, has registered over 1 000 unaccompanied children from Zimbabwe since it opened its doors in 2004.[42] Ninety-two percent of these unaccompanied children were found to be living on the streets or in other dangerous places, such as the bushes, and yet services for these children were found to be *ad hoc* and reactive as opposed to proactive.[43] There is therefore no doubt that UMR do exist in the current refugee emergency in South Africa.

### 3.1.2 Education

Legally, child refugees living in South Africa are entitled to an education; however, many do not gain access to state schools. Thirty-five percent of children who enter South Africa as refugees do not attend school due to the problems of school fees, schools being under-resourced, and the language in which the school operates.[44] At eight refugee sites established in Cape Town, children have had no access to education.[45] In Johannesburg, there are 110 children who have been denied access to state schools. They are currently enrolled at a school which runs classes in the afternoons for refugee children who otherwise would have no education at all.[46] The school is run by a group of civil society organisations.

In the Child Protection Rapid Assessment for UMR conducted in 2008, it was established that the lack of access to education was a recurrent issue. Apparently refugee children were asked to provide documents, such as birth certificates, as a pre-condition to their enrolment, documents which UMR seldom had. Even when UMR do enrol, school drop-out rates are high, partly because of language barriers but mainly because, in the absence of adequate care structures, unaccompanied children need to earn an income to survive.[47] In urban and rural areas alike, schools do not have the capacity or space to accommodate the large number of new arrivals from Zimbabwe and need support and

41 Child Protection Rapid Assessment Musina Municipality Limpopo Province, South Africa, August 2008.

42 As above.

43 As above.

44 http://www.sagoodnews.co.za/education/school_offers_hope_to_child_refugees.html (accessed 15 September 2008).

45 http://64.233.183.104/search?q=cache:QXnKvsPVZ4J:www.tac.org.za/community/files/file/xenophobia/MEMORANDUM%2520TO%2520THE%2520MINISTER%2520OF%2520EDUCATION%2520FROM%2520THE%2520JOINT%2520REFUGEE%2520LEADERSHIP%2520COMMITTEE%2520OF%2520THE%2520WESTERN%2520CAPE.pdf+Memorandum+to+the+Minister+of+Education+from+the+Joint+Refugee+Leadership+Committee+of+the+Western+Cape+24+July+2008.&hl=en&ct=clnk&cd=1&gl=gh (accessed 15 September 2008).

46 n 44 above.

47 n 41 above.

training if they are to fulfil their constitutional obligation to provide basic education to all children.[48]

### 3.1.3 Healthcare

For UMR arriving from Zimbabwe, there is one public hospital and one clinic in Musina, as well as a presence of *Médecins Sans Frontières* (MSF) in townships and farming areas.[49] Access to healthcare facilities for unaccompanied children was not a major issue in theory, although many had never tried to access these in practice. Children who had used the facilities reported having been treated adequately and receiving the drugs they needed. Many children said that language barriers posed a problem and that they were too scared of deportation to access any government service.[50] MSF has reported that only accompanied South African children report for consultations as there is a problem with reaching unaccompanied children.[51]

### 3.1.4 Food and water

UMR who were displaced in South Africa were sheltered in sites set up around the country. Yet some of these sites were not provided with food, and other sites which were provided with food did not necessarily provide appropriate food.[52] According to a human rights advocate working in South Africa, 'it took a few days for management to realise that different religions could not eat certain foods'.[53] For the UMR entering South Africa from Zimbabwe, access to food was also a problem. In Musina there were numerous feeding schemes making feeding available to unaccompanied children. Nevertheless, securing access to food was mentioned as a problem by some children, especially girls working on neighbouring farms, who do not benefit from feeding schemes and are only provided with food when there is work available.[54] Although there are certainly projects in place to feed UMR, it must be noted that they are all run by civil society and faith-based organisations and not by the South African government nor the UNHCR; and that they are not sufficient to address the nutrition needs of all the UMR living in northern South Africa.[55]

48 As above.
49 As above.
50 As above.
51 As above.
52 n 40 above.
53 As above.
54 n 41 above.
55 As above.

### 3.1.5 Sanitation and shelter

There is a chronic shortage of shelter for refugees in South Africa, both for UMR entering the country and UMR displaced due to xenophobia. Hundreds of children are left with no access to shelter at all and have to sleep in the streets or in the bush. Not only are these shelters insufficient in the number of UMR that they cater for, but also due to the fact that they only provide shelter for boys.[56] Regarding UMR who have been displaced within South Africa, sites have been set up around the country to accommodate the refugees but still there are refugees, specifically UMR, who are left without shelter. In Cape Town, 150 refugees were at one point living on the street, even though 15 community halls in the province were already housing refugees.[57] Displaced refugees in Cape Town, Salt River and Muizenberg are currently living in mosques, NGO offices and accommodation paid for by NGOs, yet there is an increasing likelihood that, due to the lack of funds, these groups will 'end up sleeping outside in the cold and rain'.[58] Another problem is that refugees already in sites are at risk of being evicted from the sites, or having the sites closed down by the government. In August 2008, the Department of Home Affairs requested refugees in Johannesburg shelters to sign a document which stated that refugees who registered at camps would lose their rights to social assistance. Those who questioned the documents, or refused to sign them, were immediately sent to the Lindela deportation centre. It is, however, illegal to deport refugees, and so the group were released on the side of the highway with no money.[59] In addition, hundreds of refugees and asylum-seekers at the Klerksoord temporary shelter sought answers from the United Nations (UN) and government after the tents in which they had been living were removed with no warning and no government or UN officials were visible on site.[60] These cases illustrate the disregard with which the right to shelter of refugees is considered in South Africa.

## 3.2 Ghana

### 3.2.1 General

Buduburam is a refugee camp that was established in 1990. It is located just west of the town Kosoa, 30 miles from the capital city of Accra. It was founded on 140 acres of land, which initially was

56 As above.

57 http://www.mg.co.za/article/2008-06-12-cape-officials-to-meet-on-refugee-crisis (accessed 14 September 2008).

58 http://www.tac.org.za/community/node/2343 (accessed 4 October 2008).

59 http://www.lhr.org.za/news/2008/refugees-make-mistake-knowing-their-rights-business-day (accessed 14 September 2008).

60 http://www.iol.co.za/index.php?art_id=nw20081006172807464C184214 (accessed 4 October 2008).

intended to serve 3 000 refugees only.[61] Despite its size, the camp soon became home to approximately 42 000 refugees, although this number is now significantly reduced due to UNHCR efforts to encourage resettlement and repatriation.[62] As a result, the refugees live in an environment of poor sanitation, overcrowded and under-resourced schools, expensive and limited access to healthcare, and a lack of vocational opportunities.[63] Most of the refugees in Buduburam are Liberians who fled to Ghana during the 18 year-long civil war in their country. The camp is characterised by dirt roads, cinder-block houses, sporadic electricity and very little running water.[64] As a result of this poor environment, many of the hundreds of unaccompanied children living in the camp are uneducated and often work as child labourers.[65] It is clear that there are many 'orphans and children without guardians'[66] living in Buduburam, but it is unclear what the exact figures are as the children are being resettled, repatriated, reunited with family, or they are simply lost within the system. Reverend Osei-Agyemang stated in 2004 that there were 214 children in the camp who had been separated from their parents as a result of the conflict in Liberia, as well as a group of 569 children who 'accompanied their parents to Ghana, but were abandoned, and had to fend for themselves as a result'.[67] An employee of an orphanage at the camp has stated that 'there are so many of them [UMR], but it is difficult to trace them all'.[68] There is an official UNHCR list of unaccompanied and separated children which, as of 2003, showed that there were at least 700 separated and unaccompanied children between the ages of one and 20 at the camp.[69] The Liberian Welfare Council believes, however, that this list is not complete as many more UMR exist and are simply not documented.[70]

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61 http://www.brcinternational.org/ (accessed 15 September 2008).

62 Personal observations, August–October 2008.

63 n 61 above.

64 http://www.childrenbetterway.org/ (accessed 15 August 2008).

65 In Buduburam, there are children who earn a living by pushing rented wheelbarrows full of goods for shopowners. These children are often orphans with nowhere to sleep, and no money or time to attend school. ('Children push wheelbarrows to survive in Buduburam' *The Vision* 21 May 2007; 'Survival of the fittest: Pushing wheelbarrows to live in Buduburam' *The Vision* 4 August 2007).

66 LS Nyan 'Teacher volunteers for Buduburam' (2004) 1 *ExileNews* 6.

67 AA Dulleh 'Child rights abuses at Buduburam' (2004) 1 *ExileNews* 7.

68 Interview with employee at ARCH, 3 October 2008, ARCH premises, Buduburam camp.

69 Interview with social welfare officer, 26 September 2008, Social Welfare Office, Buduburam camp.

70 'Survival of the fittest' (n 65 above).

### 3.2.2 Education

There are numerous schools in Buduburam, both at primary and secondary level (although there are notably fewer secondary schools),[71] which provide the children in the camp with education. Education is not free, however, and most families cannot afford to pay the tuition fees.[72] The UNHCR built the Buduburam Senior Secondary and the Buduburam Junior Secondary School in the camp, but they handed over management of the school to the Liberian Welfare Council, and the fees are now too expensive for most refugees. CBW has built a school, which is the cheapest in the camp, but it only caters for up to the end of grade 9 level.[73] Even where children are able to attend school, the quality of their education is questionable. Existing classrooms are overcrowded, with the student/classroom ratio sometimes being as high as 130:1, although usually it is 50:1. There are inadequate instructional materials, a lack of school administration, a student/teacher ratio of approximately 90:1, and more than 70% of the teachers are untrained.[74]

In 2004 it was reported that 4 000 school-going children in the camp were not attending a school due to a lack of funds,[75] and this figure must clearly incorporate UMR. Statistics for the 2003/2004 year showed that almost half of the children who had enrolled in schools dropped out 'due to the inability ... to pay school fees'.[76] Following the survey, the UNHCR committed itself to absorb 2 000 registered children into schools located in the camp, and to give similar assistance to the remaining 2 000 children after their registration.[77] The challenge to attend school is the greatest for UMR: They can rarely afford to go to school and, as a result, spend their time trying to earn money, or become involved in adult activities.[78]

> Many kids living on their own ... are vulnerable to exploitation and varying types of abuses, including child labour, prostitution and crimes ... wayward children as young as 10 are seen pushing wheelbarrows while others, especially girls, go around [washing] clothes for a living.

Even UMR living in foster families may battle to attend school, as their foster parents receive no financial assistance in respect of the UMR.[79]

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71 'How Liberians live on the camp at Buduburam in Ghana' *The Perspective* 14 June 2004.

72 http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323915/k.E6B9/Education.htm (accessed 27 September 2008).

73 Interview with employee at CBW, 29 August 2008, CBW Offices, Buduburam camp.

74 n 71 above.

75 AA Dulleh '4000 children out of school at Buduburam' (2004) 1 *ExileNews* 6.

76 n 71 above.

77 Dulleh (n 75 above) 6.

78 n 71 above.

79 n 69 above.

Despite the high cost of education in the camp, NGOs and the UNHCR are attempting to send as many refugee children as possible, including UMR, to school. Claims are that there is one tuition-free school in the camp, namely the Carolyn A Miller Elementary School.[80] This study, however, is unable to confirm that this school does indeed provide free education, and some residents in the camp dispute this claim.[81]

### 3.2.3 Healthcare

'The healthcare system in the camp is grossly inadequate at best and terrible at worst.'[82] There is no free healthcare in the camp, and the healthcare which is provided at a fee is generally inadequate. Adequate healthcare is of great importance to the refugees in Buduburam. Statistics show that one in four children dies before the age of five, as 'the camp is plagued by waterborne diseases, malnutrition, malaria, and untreated sexually transmitted diseases'.[83] The UNHCR has reported that by 2004, 1 438 children were identified as suffering from micronutrient deficiencies, with 225 children seriously malnourished.[84] Despite this fact, the lack of funds means that people who need medical attention often go without it.[85] Regarding the UNHCR clinic in the camp, 'residents see the clinic and its modern facilities as mere cosmetics intended to paint a good picture of the camp and UNHCR authorities'.[86] Despite this, it is reported that 95% of the children under five in the settlement have been vaccinated against measles.[87] Breast-feeding is generally promoted and the use of bottles discouraged, and children have been trained in basic personal hygiene.[88]

In a system where healthcare is not readily accessible, UMR often suffer. An officer at the Department of Social Welfare has stated that the UNHCR clinic in the camp has offered free treatment for UMR since 2004,[89] and an official at the National Catholic Secretariat stated that if a child is recommended to the clinic by Social Welfare as a UMR in need

80 Interview with employee at UNHCR, 7 October 2008, UNHCR offices, Accra.

81 Interview with employee at ARCH, 3 October 2008, ARCH premises, Buduburam camp and Interview with employee at CBW, 29 August 2008, CBW offices, Buduburam camp.

82 n 71 above.

83 http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323909/k.C2D4/Medical.htm (accessed 27 September 2008).

84 n 71 above. The actual number is expected to be considerably higher.

85 n 71 above.

86 As above.

87 As above.

88 Results of a questionnaire posed to a volunteer who lived in Buduburam for three months working with refugee children, and to an employee of an NGO operating in Buduburam for the welfare of refugee children.

89 n 71 above.

of free treatment, the child receives free treatment.[90] Yet a resident in the camp, who is aware of issues affecting UMR, stated that 'everyone pays for everything, including the first consultation. UMR pay too, unless they are in an orphanage, then the orphanage pays.'[91] In addition, a newspaper article reported an unaccompanied minor in the camp as stating that 'mosquitoes are eating me up and I get sick sometimes ... I go to the clinic, but they ask for US $10 ... so I have to push wheelbarrows to get money to get better.'[92] It is therefore unclear whether the principle of free treatment for UMR has been implemented.

### 3.2.4 Food and water

Food is the most pressing need facing refugees.[93] 'In Buduburam, very few children ever get the luxury of a full and satisfying meal ... tiny portions of rice are just about the only thing that any of them ever get to eat.'[94] Most refugees can only afford one meal a day, often consisting of small onions and peppers, and perhaps one small piece of dried fish.[95] Even children who do get fed are not always given food of sufficient nutritional value to help build a healthy immune system. 'In Buduburam, the combination of starvation and disease kills one in four children under the age of five.'[96]

The availability and adequacy of water in Buduburam pose a serious problem. The UNHCR does not provide residents in the camp with water,[97] and running water has only been introduced into the camp very recently (May 2008)[98] by the UNHCR and Point Hope, but it is not free as refugees have to pay for it per bucket.[99] Apparently the refugees are being charged the 'lowest possible price', but even this is sometimes too much.[100] Even where there are working taps, drainage around water points is inadequate.[101] Because of its cost, many refugees cannot afford to pay for water from commercially-operated

90 Interview with employee at NCS, 6 October 2008, National Catholic Secretariat, Accra.

91 Interview with camp resident B, 26 September 2008, CBW guest house, Buduburam camp.

92 n 70 above.

93 n 73 above.

94 http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323913/k.844F/Feed_A_Child.htm (accessed 27 September 2008).

95 Personal observations, 26 September 2008.

96 n 94 above.

97 n 71 above.

98 http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323927/k.8D2A/Living_Waters.htm (accessed 27 September 2008).

99 n 73 above.

100 n 98 above.

101 n 88 above.

mobile tankers or for potable water in plastic sachets, and so 'this leaves a considerable number of refugees without safe water'.[102]

### 3.2.5 Sanitation and shelter

There are not enough rubbish bins in Buduburam to handle the volume of garbage generated by the thousands of refugees who reside in the camp. In response to the obvious need for a refuse system, CBW has provided the camp with numerous rubbish bins.[103] Yet there is still litter all over the camp, with children playing in mounds of garbage. When it rains, litter is often swept into the water supply of the camp.[104] 'The inescapable filth in the camp contributes to the spread of disease and despair.'[105] According to an article written by Saah Charles N'Tow in *The Perspective* in 2004,[106] the two main sanitation problems facing the residents of the camp are limited or no latrine facilities and poor refuse collection and the lack of a functional waste management system. There are inadequate and unaffordable toilet facilities for refugees.

The UNHCR has identified various gaps in its services to refugees, including the need for additional toilets, fumigation, additional refuse collection points and the establishment of a waste disposal system and the distribution of soap to needy refugees. By 2004 the UNHCR had yet to address these gaps, and it is clear that by 2008 soap was still not being distributed to needy refugees.[107] The general cleanliness of the camp is unsatisfactory, with certain areas of the camp prone to flooding. Children in the camp have not been sensitised to, or involved in, the cleaning and maintaining of sanitary facilities.[108] Residents in Buduburam pay for the use of public toilets, but in principle children under the age of 12 should not pay. Despite this, there are rumours that these children are still being made to pay.

## 4 Obstacles to implementation

Numerous obstacles to the full realisation of the socio-economic rights of UMR exist. The first obstacle concerns the law. In Ghana there are insufficient protections embodied in legislation, which results in an inferior system of protection for UMR. In South Africa the protections exist to some extent in law, yet the law is not always properly implemented. In addition, international law fails to expressly provide for the

102 n 71 above.
103 n 73 above.
104 http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323919/k.22A2/Sanitation.htm (accessed 27 September 2008).
105 As above.
106 n 71 above.
107 n 73 above.
108 n 88 above.

protection of the rights of UMR. The second obstacle is the lack of financial resources. The parties involved in the protection of UMR often lack the necessary funds to adequately address their socio-economic needs. The third obstacle is presented by the limited capacity of the parties involved. Addressing the needs of UMR requires co-operation between various parties, but these parties sometimes lack the resources, regulation or direction to participate effectively, or to co-operate sufficiently. These three obstacles to the implementation of the socio-economic rights of UMR are addressed in detail below.

### 4.1 Legal obstacles

There are legal obstacles within both South African and Ghanaian domestic law. Firstly, the protections of the rights of UMR in South African law are extensive. These rights are expressly protected in the Constitution, in legislation, as well as in case law. The Refugees Act[109] came into effect in 2000, and includes special provisions for unaccompanied children.[110] Section 27 of the Act outlines the rights and obligations of refugees and asylum seekers. Both the Constitution and the Refugees Act guarantee and recognise the right of 'everyone' to access healthcare; refugees, asylum seekers and undocumented persons are therefore equally protected.[111] There is currently a Refugees Amendment Bill[112] which will incorporate the above-mentioned provisions of the Children's Act into the Refugees Act.[113] In the case of *Centre for Child Law v Minister of Home Affairs,*[114] the Court declared that all unaccompanied foreign children found in need of care should be dealt with in accordance with the provisions of the Child Care Act,[115] and the South African government is directly responsible for the socio-economic and education needs of unaccompanied foreign children in South Africa, including the needs of refugee children. In the case of *Bishogo v The Minister of Social Development*,[116] it was held that there

109 Act 130 of 1998.

110 http://hrw.org/reports/2005/southafrica1105/4.htm (accessed 3 October 2008); see sec 32(1).

111 Sec 27(g) Refugees Act & sec 28(1)(c) Constitution.

112 The Refugees Amendment Act 33 of 2008 was assented to by the President of the Republic of South Africa on 26 November 2008. Sec 21A, as inserted into the Refugees Act by the Amendment Act, deals with the provision of care to unaccompanied children.

113 Sec 21A.

114 2005 (6) SA 50 (T).

115 This has been replaced by the Children's Act 38 of 2005. The Children's Act is a far-reaching and progressive piece of legislation which requires in sec 151(1) that children regarded as in need of protection and care should be brought to the attention of the relevant authorities.

116 Unreported Transvaal Provincial Division Case 9841/2005.

should not be a bar on refugees accessing social services, whether the bar be direct or indirect.[117]

From the foregoing it is evident that the legal framework in South Africa adequately addresses the plight of UMR. Yet the law is not always adequately implemented. In a 2000 report commissioned by the UNHCR on the development of health and welfare policies for refugees in South Africa,[118] there was concern that there is a lack of uniformity amongst government departments in dealing with UMR.[119] For example, the Children's Court in Johannesburg was not aware that it had jurisdiction over refugee children.[120] In addition, Home Affairs personnel at the Johannesburg Refugee Reception Office have been accused of not assisting minors.[121] In the workshop summary of a recent strategy workshop,[122] it was recorded that refugee children were not receiving support; there was no uniformity in the manner in which the Children's Court managed foster applications; and officials had poor management in government offices. The legal framework in South Africa for addressing UMR is extensive, yet the poor implementation of these laws is an obstacle to the realisation of the rights of UMR.

In Ghanaian law, there is a notable lack of references to the situation of UMR, or to refugee children in general. There is no specific reference to the rights of refugees in the 1992 Constitution. The Refugee Law of 1992 does not specifically mention UMR. The Children's Act 560 of 1998[123] makes no reference to the situation of refugee children. The only reference to refugees is in section 3, which states that no child shall be discriminated against because he or she is a refugee. In summary, there is no law in Ghana which sets out the rights of UMR or establishes what policy or guidelines will guide involved parties in the protection and treatment of UMR. This gap in the legal framework governing refugee children in Ghana certainly obstructs and inhibits the proper realisation of the rights of UMR living in the country.

Concerning the legal protection of UMR under international law, Goodwin-Gill states that 'neither the 1951 Convention nor CRC, so

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117 Children's Amendment Bill — public hearings in Gauteng, Braamfontein Recreation Centre, October 2006, submission by Lawyers for Human Rights.

118 In January 2000, the Community Agency for Social Enquiry was commissioned by the UNHCR to undertake research to understand the existing situation, including an assessment of capacity and obstacles to the implementation of government health and welfare policy at national and provincial level, to examine government policies and practices regarding social service provision, and to develop guidelines to facilitate the implementation of government policy.

119 Workshop Summary: ACESS KwaZulu-Natal Provincial Review and Strategy Workshop 20-21 April 2006.

120 http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/2001/dha.pdf (accessed 20 October 2008).

121 As above.

122 n 119 above.

123 http://www.mowacghana.net/files/childrens_act.pdf (accessed 29 April 2009).

far as they address the situation of children as refugees, provides an entirely satisfactory legal basis'.[124] Yet, international law must address the protection of refugees, as it is the role of international law to substitute its own protection for that which the country of origin or the host country is unable to provide.[125]

### 4.2 Financial obstacles

A lack of financial resources constitutes another obstacle to the implementation of the socio-economic rights of UMR. That much was evidenced by interviews conducted with an official at the UNHCR, Accra, and an officer at the Liberian Welfare Council in the Buduburam camp.[126] The UNHCR officer noted that the gaps which still exist in the treatment and protection of UMR in Ghana exist largely because of limitations of funding.[127] The officer at the Liberian Welfare Council in Buduburam camp, who works directly with issues affecting children, has stated that there are insufficient funds to help the children.[128] It is interesting to note that in discussions with various stakeholders, many concluded that the UNHCR is not spending enough of their money. They have the necessary funds but do not spend them wisely.

### 4.3 Capacity of parties involved

#### 4.3.1 Government

Sovereign states have primary jurisdiction over UMR in their territory.[129] Governments in host countries are therefore under an obligation to ensure that UMR in their jurisdiction are protected and treated according to international standards.[130] In many countries, host governments fulfil this obligation by mandating the Department of Social Welfare, or its equivalent, to care for UMR.[131] For example, in Ghana there is a branch of the Department of Social Welfare in the Buduburam camp catering for the needs of UMR.[132] This branch has assisted UMR by formalising informal fostering arrangements which existed prior to

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124 GS Goodwin-Gill *The refugee in international law* (1996) 257.

125 Goodwin-Gill (n 124 above) 207.

126 Interview with officer at Liberian Welfare Council, 6 October 2008, Liberian Welfare Council Office, Buduburam camp and interview with employee at UNHCR, 7 October 2008, UNHCR offices, Accra.

127 n 80 above.

128 n 70 above.

129 Ressler *et al* (n 7 above) 207.

130 Ressler *et al* (n 7 above) 300: 'The obligations for the care and protection of unaccompanied children fall in the first instance to the authorities of the state where the children are located.'

131 Interview with Camp Manager, 26 September 2008, Camp Manager's Offices, Buduburam camp.

132 Interview with officer at Liberian Welfare Council, 6 October 2008, Liberian Welfare Council Office, Buduburam camp.

Social Welfare's involvement, and they have, in conjunction with the UNHCR, set up a Fostering Committee to arrange formal fostering for the remaining UMR.[133] Yet, the work of the Department of Social Welfare alone is not sufficient. Prompt responses to refugee situations from governments are vital. Yet, in Ghana, a branch of the Department of Social Welfare was only established in Buduburam in 2003, many years after the camp itself was established.

In 2007, Jacob van Garderen, a human rights lawyer in South Africa, stated that 'despite the small number of refugee children in the country, the South African authorities are struggling to provide them with the necessary protection and assistance'.[134] A problem encountered is that not all parties are aware of the rights of refugees and of the responsibilities of the South African government. It is the role of the government to ensure that departments mandated to protect the rights of child refugees are equipped to do so. Winterstein[135] claims that refugee children's welfare in South Africa is not being seen to properly due to bureaucracy and social obstacles, such as too few social workers.[136] In her Master's dissertation, Livesey states that in a 2004 International Refugee Day speech, the Deputy-Director of Refugee Affairs of the South African government noted that South Africa needed to look for ways to provide material support to vulnerable groups, including children,[137] and Livesey deduces from this that the South African government acknowledges that not enough is being done to assist vulnerable refugee children.[138] Governments are responsible for providing social workers, for reducing unnecessary bureaucracy and for finding ways to fulfil their legal obligations to UMR.

It is also the duty of governments to ensure that the rights of refugees and the responsibilities of government departments are fulfilled. Regarding access to healthcare in South Africa, the 'general inability amongst health officials at all government levels to differentiate between different groups of foreigners and their respective rights to healthcare services' remains an obstacle.[139] As of 2000, there was no uniform policy of the National Health Department indicating whether identification documents are required for primary healthcare access, and there was also evidence that administrative assistants in hospitals were not aware of a national agreement that a series of documents

133 n 69 above.

134 http://www.mg.co.za/article/2007-07-09-out-of-harms-way (accessed 27 October 2008).

135 'South African legal system fails refugee children' *Sunday Independent* 26 June 2005.

136 TK Livesey 'A survey on the extent of xenophobia towards refugee children' unpublished LLM dissertation, University of South Africa, 2006 27.

137 M Mashele 'Home in exile: Rebuilding refugee lives in South Africa' International Refugee Day speech (2004).

138 Livesey (n 136 above) 24.

139 n 120 above.

could be accepted from refugees instead of an identification document. In addition, there is evidence that asylum seekers and refugees are expected to put down a deposit, similar to that required of tourists, before receiving hospital care.[140] Although provincial departments have the ability to provide short-term social relief to refugees through the national Social Relief Fund, it is not clear whether this is a known practice amongst Social Services officials.[141] Governments need to disseminate information about the rights of refugees to all government departments and officials to ensure that the rights which are provided for UMR are indeed being implemented.

A host government cannot adequately address the needs of UMR alone. According to Ressler *et al*, 'national authorities may fulfil their duty by inviting an international or voluntary organisation to assume full or partial responsibility for the care, protection and placement of the children'.[142] Governments should request assistance, for example, by inviting the UNHCR to participate and creating an environment in which NGOs can act. Where governments do not do so, the rights of UMR may be undermined. In South Africa there was confusion recently regarding the role of the UNHCR in the country, and there were allegations that the South African government had not invited the UNHCR to act.[143] This confusion ultimately hampered the realisation of the rights of refugees in the country.

Finally, another obstacle to the implementation of the rights of UMR is corruption and bribery within government offices. This corruption is remarked upon in Livesey's Master's dissertation: Harris[144] is reported to state that corruption and fraud are common within the asylum-seeking process in South Africa, and that foreigners who are entitled to be in South Africa often have to pay extra for the processing of their documents and to secure their status. This corruption undoubtedly affects UMR in Africa who rely on assistance from government officials for their very livelihood.

### 4.3.2 The United Nations High Commissioner for Refugees

According to Goodwin-Gill, 'today, most states clearly want the UN to assume responsibility for a broad category of persons obliged to flee their countries'.[145] The UNHCR is indeed a body that can assume such responsibility: It is 'not only a forum in which the views of states may be represented; it is also, as a subject of international law, an actor in the

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140 As above.

141 As above.

142 Ressler *et al* (n 7 above) 301.

143 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=90903&sn=Detail (accessed 22 October 2008).

144 B Harris 'A foreign experience: Violence, crime and xenophobia during South Africa's transition' (2001) 5 *Violence and Transition Series* in Livesey (n 136 above).

145 Goodwin-Gill (n 124 above) 213.

relevant field whose actions count in the process of law formulation'.[146] The UNHCR has legal personality, and as such can be held accountable for the exercise of its responsibility. According to a Liberian journalist, the UNHCR is 'the lead organisation providing material assistance and protection to the refugee community'.[147] Material assistance entails food, shelter, medical aid, education and other social services.[148] The mandate of the UNHCR involves the material assistance and legal protection of refugees. The protection of UMR falls within this general mandate.[149] Yet the UNHCR's assistance to and protection of UMR are also required more specifically by the UN General Assembly in Resolution 35/187, which highlights the competence of the UNHCR to 'take necessary measures of care' for refugee children.

In Ghana, the UNHCR focuses on the welfare of UMR in the Buduburam camp. They have held workshops on issues relevant to the physical protection of UMR, and have hosted a Child Protection Officer from Geneva who worked specifically with UMR.[150] The UNHCR has a Child Panel Committee which works with the Department of Social Welfare.[151] There is also a Best Interests Determination Committee which was revised in 2007.[152] This Committee deals with issues concerning children, and involves interviewing UMR and making recommendations. It is possible, however, for this Committee to lose sight of UMR once they are placed with foster families. In addition, there are no child protection officers who work from the Accra branch of the UNHCR. The UNHCR has not established an orphanage in the camp, and has no direct project with unaccompanied children.[153]

The UNHCR is best placed to respond to the needs of UMR and, in fact, the UN has recognised its role in responding.[154] Despite its mandate and vital role in the support of UMR, the UNHCR faces 'substantial political, financial, and logistical challenges'.[155] It cannot achieve the full care and protection of UMR on its own. In both South Africa and Ghana, the UNHCR does not sufficiently address the needs of UMR and, as such, it cannot be expected to achieve protection of UMR without assistance.

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146 Goodwin-Gill (n 124 above) 216.

147 n 71 above.

148 http://www.dfa.gov.za/foreign/Multilateral/inter/unhcr.htm (accessed 1 October 2008).

149 Ressler *et al* (n 7 above) 269.

150 n 131 above.

151 n 69 above.

152 n 73 above.

153 As above.

154 The UNHCR has a *de facto* responsibility for the care and protection of the children; it must follow its guidelines and implement its principles, as well as principles of international law.

155 http://www.hrw.org/campaigns/crp/promises/ (accessed 20 August 2008).

### 4.3.3 Non-governmental organisations

Co-operation between parties in response to the refugee crises is crucial. NGOs play a large and important role in such responses. Indeed, 'protection concerns reveal a commonality of interest, effective protection demands a purposeful degree of co-operation, by no means limited to states'.[156] Although there is little regulation or oversight of their participation in these responses, the research for this article revealed that NGOs provide UMR with tangible assistance and support. In fact, the UNHCR recognises the importance of an NGO presence in refugee crises, and recognises the need for it to solicit support from these organisations. In Ghana, NGOs that wish to work in refugee camps inform the UNHCR of their goal, and they are sometimes informally monitored by the UNHCR.[157] An NGO presence is not only vital in emergency refugee situations, but also in the long-term protection of and assistance to refugee settlements,[158] and a limited NGO presence reduces the assistance and protection offered to UMR. Thus it can be deduced that, although not the case in South Africa or Ghana, where there is no active NGO presence in a refugee situation, UMR may suffer.

NGOs operate with little external oversight or regulation. Apart from informal monitoring from the UNHCR, the work of NGOs seems to be largely independent, particularly in Ghana, where personal observations demonstrated that NGOs operate with little oversight. This can create problems where the operations of such organisations do not act in the best interests of UMR. A potential obstacle thus highlighted in this is the lack of oversight of programmes of NGOs which work with UMR, and the negative effect this may have on UMR when the programmes are disadvantageous to the children.

## 5 Recommendations and conclusion

### 5.1 Summary of findings

This article set out to investigate the treatment of UMR in Ghana and South Africa by examining their access to socio-economic rights such as education, shelter, food and water, as well as healthcare. The results of this investigation show that UMR are among the most vulnerable in any refugee situation, and that their socio-economic rights are not being fully realised in either country, for various reasons. This study also analysed the obstacles to the full implementation of the rights of UMR. Firstly, it was found that existing international conventions do not adequately address the plight of UMR and there is, therefore,

156 Goodwin-Gill (n 124 above) 229.
157 n 80 above.
158 n 120 above.

a critical need to fill this gap in the protection of the socio-economic rights of UMR. This can be achieved by creating an international convention which focuses on the situation of child refugees, including UMR, and with which state parties must comply in their treatment of UMR within their territories. It was also found that domestic law and policies in Ghana and South Africa do not sufficiently provide for national mechanisms for the regulation of the treatment of UMR. In South Africa, this is due to the poor implementation of the existing laws and a lack of policy on the matter. In Ghana, it is due to a lack of legislation or a policy framework regarding child refugees in general, and UMR in particular. This can be remedied by the adoption of policies, and the amendment of legislation to allow for the proper protection of the rights of UMR. In addition, the study found that the interested parties operating in refugee situations, including the UNHCR, governments and NGOs, cannot achieve the full protection of UMR when acting alone, as individually they lack the capacity or resources to do so. This can be remedied by co-operation between states and between the interested parties. Such co-operation is vital for full and far-reaching protection of UMR. It can also be achieved by initiating changes within the UNHCR in order to resolve the capacity-related inadequacies of the organisation.

## 5.2 Conclusion

The article focuses on the treatment which UMR receive in Ghana and South Africa, and whether this is in accordance with international and regional legal standards set out in human rights instruments, refugee instruments and UNHCR Guidelines and Principles. As a study of the relevant international and domestic law revealed, there is certainly a gap between the rights provided for UMR in South Africa and Ghana, and the realisation of these socio-economic rights guaranteed in the law. This article has proposed reasons for the lack of implementation of the rights, including financial reasons, and inadequacies in both the law and the implementation of the law. Recommendations are now made on how these obstacles to implementation can be remedied. These recommendations will explore the creation of a new international instrument. Whether or not these particular recommendations are implemented, it is clear that some action *must* be taken in order to protect the rights of UMR. States and other actors, such as the UNHCR, are required to respect the human rights of all people, including UMR, and they are under a duty to ensure that the human rights of UMR are not violated. This article concludes that the international community, and indeed the African community, must place a greater focus in the future on the situation of UMR, and on the achievement of the human rights of UMR in order to ensure that they are no longer 'lost in the system'.

### 5.3 Recommendations

#### 5.3.1 An international instrument

A new international instrument needs to be created with a focus on the treatment of, protection of and assistance to child refugees, including UMR. The principles for such protection and treatment already exist in the international arena, as outlined above, but they need to be translated into 'hard' law — law which has consequences for non-compliance. It is recommended that this convention should make provision for a regulatory body with the power to conduct on-site visits and investigations into state parties' treatment of its child refugees. Although ratification of this instrument would create an additional responsibility for states, this is not a justification for failure to create the instrument, as every international instrument which a state ratifies creates obligations on the state, and yet this has not prevented states from ratifying numerous important treaties and conventions. The proposed international convention should require governments to work with civil society in their protection of child refugees in order to encourage greater inter-party co-operation.

Although creating such an instrument may not be without challenges, it is submitted that in this case the existing conventions are clearly insufficient. Thus, even if attention were to be given to properly implementing existing instruments, as opposed to creating a new one, the result would still leave gaps in the protection of child refugees. The existing 'soft' law, in the form of inter-agency guiding principles and UNHCR Guidelines, offers a better prospect of protection than the existing conventions, but should be transformed into legal obligations rather than simply guiding principles.

#### 5.3.2 Domestic laws and policies

This article examines the gaps in domestic policies and laws in South Africa and Ghana, and recommends that comprehensive policies and laws be created or amended to be brought in line with international guidelines and principles of protection for refugee children. It is recommended that all states need to create policies and domestic laws, possibly drawing on the UNHCR Guidelines and Inter-Agency Guiding Principles, which provide for the treatment of UMR within their territories. The European Council on Refugees and Exiles has called on states to develop policies which 'take account of the special needs of unaccompanied children ... in the provision of suitable care'.[159] This position is endorsed and it is recommended that states domesticate international standards of protection, either contained in a new international instrument or in the UNHCR Guidelines and Inter-Agency

[159] European Council on Refugees and Exiles 'Position on refugee children' (1997) 9 *International Journal of Refugee Law* 76.

Guiding Principles, through domestic legislation or policy. In addition, it is recommended that priority be given in budget allocations to the realisation of the socio-economic rights of refugee children, particularly UMR.[160]

In the case of South Africa, it is recommended that the country should formulate clear and detailed policy guidelines, the implementation of which could be monitored by the national Human Rights Commission. A human rights advocate in South Africa has recommended that the country develop a comprehensive policy framework to protect and assist UMR.[161] This recommendation was made in response to the recent case of the Donkakim family,[162] in which the court found that 'the procedures to determine the asylum applications of unaccompanied children in South Africa were inadequate and fell short of international guidelines'.[163] This study endorses this recommendation. Policies which are implemented should recommend an interdepartmental policy initiative which deals specifically with the access of child refugees to health and welfare services. It is imperative that such policies require the dissemination of information on the legal status of UMR in a country, for example to the police services, medical officers and educators in the country.[164] In addition, the study proposes that such policies address the activities of NGOs and regulate their assistance of UMR.

It is further recommended that all states adopt suitable policy frameworks. Any policy formulated by states should be in the form of an interdepartmental policy initiative which specifically deals with the access of child refugees to socio-economic services. This is because the provision of social services to UMR generally requires an integrated approach, based on the co-operation of different government departments, and so any policy adopted in this area should be interdepartmental in character.[165]

In the case of Ghana, it is recommended that legislation needs to be drafted and passed which directly addresses the needs of child refugees, including UMR. Refugee legislation should be amended to explicitly provide for the protection of UMR.[166] Even in South Africa, where legislation addresses the situation of UMR, it has been suggested that the government should review existing legislation which adversely affects services for children.[167]

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160 Concluding observations made by the Committee on the Rights of the Child regarding Ghana's initial report 1997 (para 31).

161 n 134 above.

162 Unreported case Pretoria High Court (2006).

163 n 134 above.

164 n 120 above.

165 As above.

166 http://www.hrw.org/reports98/sareport/#_1_7 (accessed 23 October 2008).

167 n 119 above.

### 5.3.3 International and regional responsibility

It is vital for the international community, comprising of states and UN bodies, to co-operate in their response to refugee situations, regardless of the country in which the crisis exists. Indeed, Goodwin-Gill notes that 'every state is bound by the principle of international co-operation',[168] so not only is it recommended, but it is an international principle which binds states. Such co-operation may help address the financial limitations of individual parties in response to the refugee crises. In Africa, particularly, it is recommended that all African states act as partners in responding to refugee situations and, as such, co-operate in the care and assistance of child refugees, particularly UMR. This co-operation would be in line with the principles of the African Union, to which all but one African state belong, which promote African unity, brotherhood and co-operation,[169] as well as article 23 of the African Children's Charter, which requires states to co-operate with existing international organisations in their efforts to protect and assist children.

[168] Goodwin-Gill (n 124 above) vii.

[169] Arts 3(a) & (e) Constitutive Act.