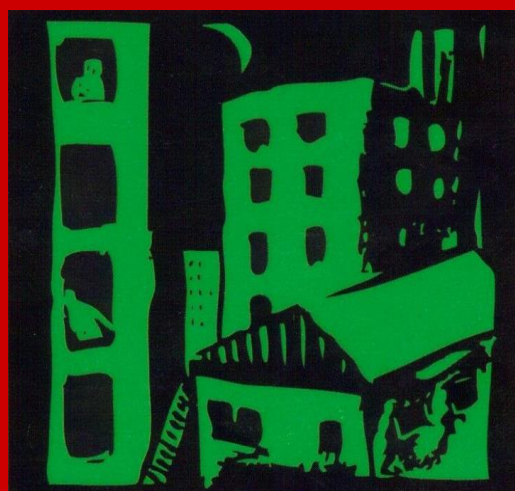
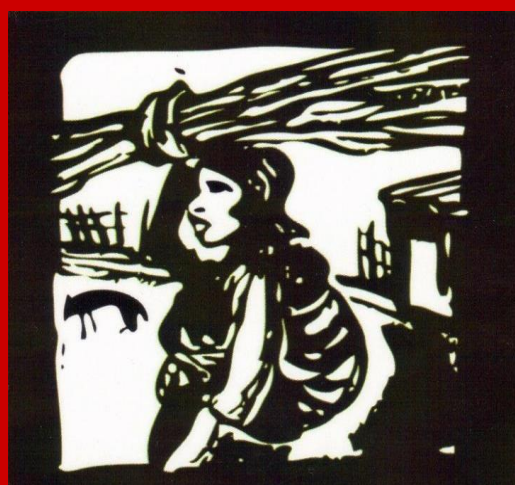


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## The right to education of the refugee girl affected by armed conflict in Kenya: insights from the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child

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### ABSTRACT

*The African Charter on the Rights and Welfare of the Child provides for the protection of children in all environments. Areas that have*

*experienced armed conflict have made the child susceptible to human rights violations including violence through sexual offences and violation of civil and political as well as socio-economic rights. An evaluation of all human rights violations cannot be done comprehensively. This article takes a thematic turn and evaluates the aspects of the right to education of the refugee girl child. It sets the tone by reflecting on the normative framework of the right to education of the refugee child at the international, regional and national levels. This is followed by a discussion of the violation of this right in situations of conflict and host States like Kenya. Drawing on the jurisprudence of the African Committee on the Rights and Welfare of the Child, insights on the improvement of the enjoyment of this right are engaged. A conclusion and recommendations follow.*

**Keywords:** Armed conflict, charter, committee, education, girl child, refugee convention, Kenya.

## 1 INTRODUCTION

Statistics on the global trends on children in armed conflict show that nine out of ten child victims of sexual violence are girls.<sup>1</sup> The number of children affected by these conflicts has risen from 200 million in early 1995 to 415 million in 2018.<sup>2</sup> Other reports from the United Nations show that a total of 49 000 children were recruited into armed groups between 2005 and 2016.<sup>3</sup> The right to education has been referred to as the lifeline of a child affected by armed conflict.<sup>4</sup> This is because it helps the child to remain focused even during the conflict. The African Committee of Experts on the Rights and Welfare of the Child (Committee) has taken a lot of strides in protecting the child affected by armed conflict. Concerning armed conflict, the Committee has aggressively pushed for a preventive, situational or contextual approach that deals with the protection in areas of conflict. This is evident from strategic appointments, such as, of a Special Rapporteur on Children Affected by Armed Conflict,<sup>5</sup> a child protection and social welfare officer for Children Affected by Armed Conflict (CAAF), and a consultant to spearhead the drafting of a General Comment on Article 22.<sup>6</sup> These initiatives, however, emphasise the protection of the child in the physical context of armed conflict. There is a need for a reflection on the protection beyond situations of armed conflict.

The challenge that forms the problem in this article is the lack of clarity on the extent to which governments respect the refugee's right to education. The challenges

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<sup>1</sup> Save The Children "Children in conflict at highest risk of violence since records began" 13 February 2020 *Global* available at <https://bit.ly/31tQ1tp> (accessed 21 October 2020).

<sup>2</sup> Save The Children "The War on Children" (2018) available at <https://bit.ly/31tQ1tp> (accessed 19 October 2020).

<sup>3</sup> See generally Save The Children (2018).

<sup>4</sup> UNICEF (The United Nations International Children's Emergency Fund) "Education in emergencies" available at <https://www.unicef.org/education/emergencies> (accessed 21 October 2020) (UNICEF (2020)).

<sup>5</sup> African Union (AU) "Resolution on the Appointment of a Special Rapporteur on Children and Armed Conflict" December 2017 available at <https://bit.ly/35yMoDR> (25 October 2020).

<sup>6</sup> Information received following an interview with the Committee Secretariat 10 August 2019.

that a refugee girl child faces often start with the violation of the right to education especially in situations of conflict. The violation may arise through abduction following attacks on schools, or the informed choice by the girl or her family to discontinue going to school.<sup>7</sup> The African Charter on the Rights and Welfare of the Child (Charter)<sup>8</sup> has guided States concerning the protection of the rights of this (girl) child in situations of conflict, tension and strife.<sup>9</sup> The challenges to the right to education of these girls do not stop in areas of conflict but continue to the new areas to which they move to find refuge or safety. While some countries allow for integration into society, others use an encampment policy.<sup>10</sup> With a focus on Kenya, this article evaluates the extent to which the State Party upholds international law and a child-based approach to the protection of the refugee girl child's right to education. If such a study is not done, it will be a missed opportunity to reflect on insights that could be harnessed from Kenya's experience to improve the right to education of refugees.

## 2 THE NORMATIVE FRAMEWORK OF THE REFUGEE GIRL'S RIGHT TO EDUCATION

The right to education is provided for under international, regional and national laws. This part looks at this in the context of both international and regional law paying heed to the normative framework concerning the refugee girl child. The evaluation of national law (as will be shown in Part 3 below) engages aspects of ensuring that host States continue to provide for the rights of refugees in their territories.

### 2.1 International law

The Universal Declaration of Human Rights (UDHR) provides for the right to basic education.<sup>11</sup> At its core, Article 26 underscores three major principles regarding the right to education. First, that the right to education is provided freely for the elementary stages of education.<sup>12</sup> Secondly, education has to be directed at the holistic development of an individual using a human rights approach.<sup>13</sup> Thirdly, that parents

<sup>7</sup> According to Save the Children (2018), a notable case was the kidnapping of 276 girls from a school in Chibok, Nigeria, by insurgents in 2014.

<sup>8</sup> African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990).

<sup>9</sup> See General Comment 22 on Children in Situations of Armed Conflict, Tension and Strife by the African Committee on the Rights and Welfare of the Child available at <https://www.acerwc.africa/general-comments/> (accessed 23 October 2020).

<sup>10</sup> For instance, South Africa adopts an integration approach while Kenya adopts an encampment policy that requires refugees to stay in refugee camps. See the discussion in Kerubo NA (2013). Refugees' Rights vs. Responsibilities: An Analysis of Kenya's Refugee Encampment Policy available at <https://bit.ly/2J6yOjs> (accessed 23 October 2020); Kiama L & Karanja R (2012) Asylum space in Kenya: evolution of refugee protection over 20 years *Forced Migration Review* (25th Anniversary collection) available at <https://bit.ly/2TpZJbR> (accessed 02 January 2021). See also Maina A "Securitization of Kenya's asylum space: origin and legal analysis of the encampment policy" in Schmidt J, Kimathi L & Owiso M (eds) *Refugees and forced migration in the Horn and Eastern Africa: advances in African economic, social and political development* Cham: Springer (2019) 81.

<sup>11</sup> Article 26 of UDHR (1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>12</sup> Article 26(1) of UDHR.

<sup>13</sup> Article 26(2) of UDHR.

(and caregivers) have a role in deciding the kind of education that should be given to their children.<sup>14</sup> This was a departure from the draft presented to the General Assembly for deliberation as the first principle formed part of the conclusive text that was presented to the General Assembly of the United Nations.<sup>15</sup>

While the drafting history is silent on the right of education for refugees, it can be argued that the unqualified right to education in the UDHR extended to all persons regardless of their immigration status in the host countries. This silence was remedied by the adoption of the Convention relating to the Status of Refugees. The relevant Article states :

“1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals concerning elementary education.

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.”<sup>16</sup>

A look at the drafting history of this Article reveals that the adoption of the final text was informed by Article 26 of the UDHR that provided for the unqualified right to education.<sup>17</sup> The wording of the right as “public education” for refugees was informed by the fact that refugees would easily be accorded public education that was generally within the domain of the State to provide.<sup>18</sup> For instance, the representative from the United Kingdom reiterated that higher education was a preserve of schools and universities, most of which were partly private institutions.<sup>19</sup> As such, the meaning of the right to education for all was in the preserve of a State extending the same facilities concerning the right to an education that its citizens enjoyed, to the refugee population. To this end, the right to basic education for the refugees is pretty much provided for. It is also argued that the Convention relating to the Status of Refugees (Refugee

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<sup>14</sup> Article 26(3) of UDHR.

<sup>15</sup> Adopted on 10 December 1948, following the deliberation from 2 to 17 December 1947. These deliberations are reproduced in the United Nations Yearbook on Human Rights for 1947, Part III, p 4312. A look at the alternative text from France and the United States indicated that , at a bare minimum, basic education had to be provided for freely, and without discrimination or conditions attached to it.

<sup>16</sup> Article 22 of the Convention relating to the Status of Refugees (1954) 189 UNTS 150.

<sup>17</sup> See Commentary & the Travaux Préparatoires on the Refugee Convention, 117 available at <https://www.unhcr.org/4ca34be29.pdf> (accessed 21 October 2020).

<sup>18</sup> See generally Commentary & the Travaux Préparatoires on the Refugee Convention, 117 available at <https://www.unhcr.org/4ca34be29.pdf> (accessed 21 October 2020).

<sup>19</sup> See Commentary & the Travaux Préparatoires on the Refugee Convention, 118 available at <https://www.unhcr.org/4ca34be29.pdf> (accessed 21 October 2020).

Convention) is the premise of Article 14 of the UDHR that provides for the right to right to seek and enjoy asylum.<sup>20</sup>

The right to education is provided for in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The relevant provisions of the Article provide as follows:

“1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all.”<sup>21</sup>

Concerning Article 13(1), it appears that the right to education focuses on improving the personality of a human’s right to dignity. It may be argued that if the right to human dignity is a cornerstone of the enjoyment of the right to education, then any attempts to thwart the enjoyment of the right to education may be taken to be a violation of the dignity of the individual.<sup>22</sup> Furthermore, Waldron also argues that the right to dignity extends equally to everyone since status differences like slavery and nobility have been abandoned in favour of the universality of human rights.<sup>23</sup> Human dignity is the inalienable, inherent and intrinsic worth or values of everyone that cannot be equated to a price, a substitute, or a trade-off for anything in the world. In *S v Lawrence*, Judge Albie Sachs stated :

“Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify it’s being penetrated by the state.”<sup>24</sup>

This has been followed in other decisions like *Minister of Home Affairs v Watchenuka* where the Court stated that human dignity has no nationality. It is inherent in all people, citizens and non-citizens alike – simply because they are human.<sup>25</sup> As such, the inalienable nature of human dignity speaks to intrinsic values in each human being that

<sup>20</sup> Article 14 UDHR. See discussion in Khan F “Does the right to dignity extend equally to refugees in South Africa?” (2020) 20(1) *African Human Rights Law Journal* 261 at 261.

<sup>21</sup> The ICESCR (1966) 993 UNTS 3, Art 13.

<sup>22</sup> Waldron J “The dignity of groups” (2008) *Acta Juridica* 1 at 1.

<sup>23</sup> Waldron J “Citizenship and dignity” NYU School of Law, Public Law Research Paper Series No 12-74 (2013) at 24.

<sup>24</sup> *S v Lawrence* 1997 4 SA 1176 (CC) at para 197.

<sup>25</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA).



are priceless and cannot be traded-off.<sup>26</sup> It is further argued that this obligation extends from the State to individuals who are in positions that influence one's enjoyment of other rights like the right to education. To this end, it is argued that when one uses a relational approach to dignity, the neglect of society in dealing with socio-economic disadvantages like the right to education for all is a collective failure to value human dignity.<sup>27</sup> If this is to be measured against the right of a refugee, the Refugee Convention provides for the right to human dignity of a refugee from the definitional protection accorded to the former. The Refugee Convention defines a refugee as a person, who

“[O]wing 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 of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.<sup>28</sup>

Regarding Article 13(2)(a), the drafting history of the ICESCR offers insights on the intention of the drafters concerning the concepts of “compulsory” and “free” for all. Concerning compulsory education, emerging jurisprudence from the Committee of Economic, Social and Cultural Rights indicates that as regards compulsory primary education neither the State nor caregivers are expected to “treat as optional the decision as to whether the child should have access to primary education”<sup>29</sup>. As such, any incidents that defeat the realisation of the right to basic education have to be treated as a State's violation of its positive obligation to provide primary education or of its negative obligation to refrain from denying the enjoyment of the right to education.<sup>30</sup> These obligations are underscored in the three obligations imposed on the State. The obligation to respect requires States to avoid measures that hinder or prevent the enjoyment of the right to education.<sup>31</sup> The obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of the right to education.<sup>32</sup> In addition, this education has to be free of charge. This is an indication that costs that defeat the provision of primary education without charge to the child, parents or guardians, are disincentives and regressive in the enjoyment of the right.<sup>33</sup>

<sup>26</sup> Steinmann R “The core meaning of human dignity” (2016) 19(1) *Potchefstroom Electronic Law Journal* 1 at 1.

<sup>27</sup> Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21(1) *South African Journal on Human Rights* 1 at 13.

<sup>28</sup> Article 1(A)(2) of the Refugee Convention.

<sup>29</sup> General Comment 11 on Primary Education on Article 14 of the ICESCR, para 6.

<sup>30</sup> UNESCO “Right to Education - State obligations and responsibilities” available at <https://en.unesco.org/themes/right-to-education/state-obligations> (accessed 22 October 2020).

<sup>31</sup> See generally UNESCO (2020).

<sup>32</sup> See generally UNESCO (2020).

<sup>33</sup> CESCR General Comment 11 on Primary Education on Article 14 of the ICESCR, para 7.

Furthermore, emerging jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) requires that a State Party adhere to the minimum core standard concerning the nature of its obligations under the ICESCR.<sup>34</sup> It is argued that a subjective standard has to be engaged to establish the extent to which States Parties have adhered to this standard.<sup>35</sup> In brief, this standard requires that the country use its available resources to meet the socio-economic rights of individuals within its territory. To this end, a State's discharge of its minimum core obligation calls for an evaluation of the constraints on its resources.<sup>36</sup> Secondly, the State Party has to show the steps taken to utilise its available resources to uphold the right to education.<sup>37</sup> The progressive realisation of the right to education is thus informed by the steps taken in the adoption of legislative, judicial, administrative, financial, educational and social measures.<sup>38</sup>

The steps that a State Party takes to realise this right are subject to evaluation in the light of the steps taken to have the progressive realisation of the rights over time.<sup>39</sup> This calls for an interpretation that embraces flexibility concerning a State's obligations other than deliberate retrogressive measures.<sup>40</sup>

To this end, the right to education is informed by four essential features, namely, availability, accessibility, acceptability and adaptability.<sup>41</sup> Availability requires that educational institutions and programmes have the requisite infrastructure like buildings, trained teachers, materials such as textbooks, libraries and information technology facilities.<sup>42</sup> Accessibility requires that education is accessible to all persons including vulnerable groups,<sup>43</sup> within safe physical reach, and affordable to them.<sup>44</sup> As

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<sup>34</sup> CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2 para 1 of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23).

<sup>35</sup> CESCR General Comment No 3 para 10.

<sup>36</sup> CESCR General Comment No 3 para 10.

<sup>37</sup> CESCR General Comment No 3 para 10.

<sup>38</sup> CESCR General Comment No 3 paras 3, 5, 7 & 8.

<sup>39</sup> CESCR General Comment No 3 para 9.

<sup>40</sup> See generally Chenwi L "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" (2013) 46(3) *De Jure* 742 at 744-745. Compare the Charter, 1990, CAB/LEG/24.9/49, published 11 July 1990, which engages the progressive realisation qualification under Art 11(3)(3) on children's right to education. See *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* Communication 002/2009.

<sup>41</sup> CESCR General Comment 13 paras 6(1), (2), (3) & (4). Report by the Special Rapporteur on the right to education E/CN.4/1999/49, para 50.

<sup>42</sup> CESCR General Comment 13 para 6(1).

<sup>43</sup> Children are taken to be a vulnerable group of persons under the South African Constitution of 1996.

<sup>44</sup> This refers to the child's ability to enrol and attend school. This was upheld in *Centre for Child Law & others v Minister of Basic Education & others* [2012] 4 All SA 35 (ECG) and in *Adam Legoale v MEC for Education, North West* (NW High Court, Mafikeng) unreported case no 499/11.

such, there has to be immediate physical accessibility of the right.<sup>45</sup> Also, acceptability takes on the form and substance of education through curriculum development that leads to a culturally appropriate education.<sup>46</sup> Adaptability requires flexibility in education to adapt to the perceptions and the needs of a dynamic society.<sup>47</sup>

The right to education under the ICESCR is immediately realisable.<sup>48</sup> This is an indication that the obligation to ensure that enjoyment of education is immediately realisable without any iota of discrimination.<sup>49</sup> The position of the right to education of the child is also underscored in the Convention on the Rights of the Child. It covers three basic aspects : the right to free basic education, the use of disciplinary measures that do not violate the rights of the child, and the need for international co-operation in the provision and enjoyment of the right.<sup>50</sup> It is argued that the provision of this right herein and the provision of the same right in the Refugee Convention is an indication that the refugee girl child's right to education has adequately been provided for in the international human rights architecture. The question that one turns to now is whether the normative frameworks on this right are evident in Africa's human rights system. As such , the article now turns to the position of the right to education of the refugee girl child in Africa.

### **2.2 The African Human Rights System**

The African Human Rights System is informed by various human rights instruments, such as, the African Charter on Human and Peoples' Rights, the Protocol to the Establishment of the African Court on Human and People's Rights, and the Charter. These instruments provide for three major human rights bodies : the African Commission on Human and Peoples' Rights, the African Court of Human and People's Rights, and the Committee on the Rights and Welfare of the Child. The overarching factor in this evaluation is the extent to which they provide for the right to education of the refugee child.

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<sup>45</sup> UNESCO Convention against Discrimination in Education, 429 UNTS 93 (1962), the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, (1980)1249 UNTS 13, the International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (1969), the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169) available at [https://www.zaerv.de/59\\_1999/59\\_1999\\_2\\_s\\_543\\_592.pdf](https://www.zaerv.de/59_1999/59_1999_2_s_543_592.pdf) (accessed 6 November 2019).

<sup>46</sup> General Comment 1 para 6(c). See *Governing Body of Rivonia Primary School v MEC of the Department of Education Gauteng Province* [2012] 1 All SA 576.

<sup>47</sup> General Comment 13 para 6(d). See generally Skelton A "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) 46(1) *De Jure* 1 at 1- 23, where she evaluates these "four As" as crucial aspects of the right to education. See *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

<sup>48</sup> See generally CESCR General Comment 13. See also General Comment 3 para 1 available at <https://www.refworld.org/docid/4538838e10.html> (accessed 6 November 2019).

<sup>49</sup> CESCR General Comment 13 paras 31, 41, 43, 51 & 52.

<sup>50</sup> Article 28 of the Convention on the Rights of the Child, E/CN.4/RES/1990/74.



The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) reiterates the protection of refugees in Africa.<sup>51</sup> It calls upon States to grant asylum, and it states that they

“... use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality”.<sup>52</sup>

Furthermore, the Convention extends the definition of a refugee as underscored in the Refugee Convention. It states that a refugee includes individuals fleeing their country of origin or nationality due to “external aggression, occupation, foreign domination or events seriously disturbing public order”.<sup>53</sup> The biggest inadequacy of the OAU Refugee Convention is its failure to use the language of rights or to adopt a human rights approach in the protection of asylum seekers and refugees.<sup>54</sup> It is argued that it retained important rights implications through elaboration in subsequent instruments.<sup>55</sup>

In particular, the OAU Refugee Convention called upon States to grant asylum, thereby indicating that the child refugee is entitled to protection. However, the mode of protection that takes on a human rights approach is saved by the African Charter on Human and People’s Rights (ACHPR) that provides that every individual has a right to education<sup>56</sup> and the right to seek asylum.<sup>57</sup> The right to education has subsequently been engaged in *Free Legal Assistance Group & others v Republic Democratic of Congo* where the Commission recommended that the closure of universities and secondary schools following gross mismanagement of resources amounted to a violation of the right to education. In *Law Offices of Ghazi Suleiman v Sudan*, the African Commission did not hear the Communication due to the non-exhaustion of local remedies. The right to basic education has also received continued normative protection through its soft laws. To this end, the Resolution on the right to education by the African Commission calls on States Parties to guarantee the full scope of the right to education, including

“[t]he opportunity for all children to enjoy free and compulsory primary education without distinction by progressively providing adequate financial and other resources in their education budget”.<sup>58</sup>

It also calls for

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<sup>51</sup> (1969) 1001 UNTS 45.

<sup>52</sup> Articles 2(1) & (2) of OAU Refugee Convention.

<sup>53</sup> Article 1(2) of OAU Refugee Convention.

<sup>54</sup> Bekker G “The protection of asylum seekers and refugees within the African regional human rights system” (2013) 13(1) *African Human Rights Law Journal* 1 at 1.

<sup>55</sup> See Bekker (2013) at 1.

<sup>56</sup> African Charter on Human and Peoples Rights (1981) 1520 UNTS 217 Article 17.

<sup>57</sup> Articles 12(3) & 23(2)(a) of ACHPR.

<sup>58</sup> Resolution on the Right to Education in Africa - ACHPR/Res.346(LVIII)2016.

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“... the provision of high quality and appropriate educational programmes that serve the needs of all sectors of society, and in particular girls, vulnerable children such as children with disabilities, refugee children, migrant children, street children, internally displaced children, pregnant children and children from marginalised communities”.<sup>59</sup>

The resolution also requires States to ensure that

“... privatisation in education does not exacerbate discrimination against children, in having access to and quality in education, particularly girl children, vulnerable and marginalised children”.<sup>60</sup>

While these provisions are appreciated, they lack the touch of the right to education for the refugee child in detail. To this end, the ACHPR provides various critical aspects of the right to education. First, it provides for the right to education which has to be directed towards respect for the human rights of the child in international law, and preservation of positive African morals, traditional values and cultures, among other reasons.<sup>61</sup> Secondly, this right has to be free and compulsory for primary education.<sup>62</sup> Thirdly, it also calls for chastisement or disciplinary measure that imbue humanity and with respect for the inherent dignity of the child.<sup>63</sup>

The ACHPR is silent on whether the rights of the child therein are limited to only the citizen in a given country. This potentially dangerous position is resolved by Article 45 that provides :

“The Committee [on the Rights and Welfare of the Child] shall draw inspiration from International Law on Human Rights, particularly from the provisions Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.”<sup>64</sup>

It is argued that since the ACHPR allows its Committee to apply other pieces of international law to protect the child, then it may be said that this enables the application of other laws like the Refugee Convention, and the ICESCR.

In addition, the ACHPR calls for a child rights based approach that engages four principles that have to be used in dealing with matters affecting a child. First, this approach engages the best interests principle as the yardstick for measuring all the actions, laws and policies of a State affecting children. According to this principle, all actions concerning the child should take full account of his/her best interests. The best interest of the child is “the” primary consideration by which to measure all actions, laws

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<sup>59</sup> Resolution on the Right to Education in Africa - ACHPR/Res.346(LVIII)2016.

<sup>60</sup> Resolution on the Right to Education in Africa - ACHPR/Res.346(LVIII)2016.

<sup>61</sup> Articles 11(1) & (2) of ACHPR.

<sup>62</sup> Article 11(3) of ACHPR.

<sup>63</sup> Article 11(5) of ACHPR.

<sup>64</sup> Article 46 of ACHPR.

and policies that affect children.<sup>65</sup> Further, in determining who must apply the “best interests” principle, the phrase “in all actions” (concerning the child) as used in the ACHPR provides significant guidance. This principle has been referred to in all the General Comments adopted by the ACHPR.<sup>66</sup>

Secondly, the principle of non-discrimination asserts the State’s obligation to protect children from any form of discrimination and to take positive action to promote their rights, meaning that all rights apply to all children without exception.<sup>67</sup> This has been reiterated in the jurisprudence of the Committee. The third principle is the need to uphold the right to life, survival and development of the child. It is proposed that this term is interpreted broadly to include physical, mental, emotional, cognitive, social and cultural development of the child.<sup>68</sup> This is an indication that the literal definition of the right to life is not sufficient on its own- thus calling for a broad approach that speaks to other aspects that would affect the child’s development.<sup>69</sup> Fourthly, the child based approach requires that children are heard and their views considered in any matters that affect them.<sup>70</sup> This extends to according due weight to the considerations of children whose capacities have evolved.<sup>71</sup>

### 2.3 Kenya’s national regime on the right to education

The Constitution of Kenya 2010 (Constitution) provides that “every child has a right to free and compulsory basic education”.<sup>72</sup> This is underscored by the basic right to education,<sup>73</sup> that calls for the progressive realisation of this (socio-economic) right.<sup>74</sup> Article 21 provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.<sup>75</sup> The Courts have held that it is not enough for the government to claim that it is doing its best to meet its obligations and in terms of the

<sup>65</sup> In contrast, the Convention on the Rights of the Child states that the best interest of the child is ‘a’ primary consideration. The article ‘a’ indicates that in determining on issues which consist of the child’s interest, the best interest principle may not be the only principle to be consulted.

<sup>66</sup> Some of the notable examples include the General Comment on Article 22; children in situations of conflict, paras 24-30; and General Comment No 1 (Art 30 of the Charter) on “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” 2013, paras 22-24. All General Comments are available at [www.acerwc.africa/general-comments](http://www.acerwc.africa/general-comments) (accessed 23 October 2020).

<sup>67</sup> Article 3 ACHPR.

<sup>68</sup> Article 5 ACHPR.

<sup>69</sup> See General Comment on Art 6 of the Charter: “Right to birth registration, name and nationality” para 16.

<sup>70</sup> General Comment on Art 6 of the Charter: “Right to birth registration, name and nationality” paras 21 to 22.

<sup>71</sup> Article 7 ACHPR. See also CESCR General Comment 12 of the Convention on the Rights of the Child on Child Participation. See also CESCR General Comment on Art 22 paras 31 & 41.

<sup>72</sup> Constitution of the Republic of Kenya, 2010, art 53 (1)(b).

<sup>73</sup> Article 43(f) of the Constitution.

<sup>74</sup> Article 21 of the Constitution.

<sup>75</sup> Article 21(2). This has been upheld in *MMM v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR at para 17.

availability of resources.<sup>76</sup> It has to demonstrate concrete policy measures, guidelines and the progress made by the Government towards the realisation of economic rights and particularly the right to education.<sup>77</sup>

This is an indication that all children in Kenya (including refugees) are entitled to this right. Kenya is obliged from a constitutional and theoretical perspective to take measures, including affirmative action programmes, to ensure access to relevant education and training.<sup>78</sup> This presents the question about the expected nature or quality of education from Kenya for refugee children. The Constitution further provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>79</sup> This right has been interpreted to refer to all persons including refugee children- leading to the interpretation that the right to education is protected by Article 27. The question that arises is whether Articles 53(1)(b), on the right to education, and 27, on the right to equality, collectively accord a refugee child merely a place to go to school, or provide for an “adequate” education.<sup>80</sup> This question perceives the shift in emphasis from the enjoyment of the right to education in armed conflict to areas where refugees are expected to enjoy it.<sup>81</sup> The recognition of the right in situations of emergency is that it paves the way for the future of children and their society and offers a sense of normalcy.<sup>82</sup> Concerning the right to education, the Refugee Act states:

“Subject to this Act, every recognized refugee and every member of his family in Kenya— (a) shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party.”<sup>83</sup>

This is an indication that a refugee may enjoy the right to education like any other child in Kenya, provided the international laws that govern this child have been duly ratified or signed by Kenya.

The application of international law in Kenya is provided for in the Constitution. The relevant provision states that the general rules of international law, such as customary international law, form part of the law of Kenya.<sup>84</sup> Further, it provides that “[t]he general rules of international law shall form part of the law of Kenya...any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.<sup>85</sup> Kenya is a signatory to the Refugee Convention, the International

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<sup>76</sup> *Mitubell Welfare Society vs. The Attorney General & 2 Others* Petition No 164 of 2011.

<sup>77</sup> *MMM v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR at paras 14-28.

<sup>78</sup> Article 55 (a) Constitution of the Republic of Kenya.

<sup>79</sup> Article 27 Constitution of the Republic of Kenya.

<sup>80</sup> A similar question is raised in the context of South Africa’s constitutional right to education for children.

<sup>81</sup> See Education & Conflict available at <https://bit.ly/35C9xVI> (accessed 23 October 2020).

<sup>82</sup> See generally Education & Conflict available at <https://bit.ly/35C9xVI>.

<sup>83</sup> Section 16(1)(a) Refugee Act 13 of 2006.

<sup>84</sup> Article 2(5) Constitution of the Republic of Kenya.

<sup>85</sup> Article 2(6) Constitution of the Republic of Kenya.

Covenant on Civil and Political Rights (ICCPR) and the ICESCR, the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, and the Charter.<sup>86</sup> In addition to the call for the progressive realisation of the right to education as required under the ICESCR, a child based approach under the Charter. The question thus is, to what extent has Kenya provided for the progressive realisation of the right to education, using a child based approach.

Answers to this question can be evident in both the normative and practical settings of the right to education in Kenya. In the normative context, Kenya has to enable laws that require that basic education is free and compulsory for all. To this end, the Basic Education Act of 2013 provides for the implementation of the right to free and compulsory basic education.<sup>87</sup> Article 28 provides :

“(1) The Cabinet Secretary shall implement the right of every child to free and compulsory basic education.

(2) The Cabinet Secretary shall in consultation with the National Education Board and the relevant County Education Board provide for the establishment of—

(a) pre-primary, primary and secondary schools, mobile schools, and adult and continuing education centres, within a reasonably accessible distance within a county.”<sup>88</sup>

Furthermore, no public school shall charge or cause any parents to pay tuition fees for or on behalf of any pupil in the school.<sup>89</sup> It is discernible that Articles 28 and 29 are based on the implementation of the right to education for all children regardless of whether they are in a refugee camp or not. This implementation is guaranteed by the call for non- discrimination of the right to basic education, on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age, and disability.<sup>90</sup> This is in accordance with the Children’s Act that provides for the statutory progressive realisation of the right to basic education. The Act states :

“(1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.

(2) Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.”<sup>91</sup>

<sup>86</sup> For a detail of all the international and regional laws to which Kenya is a party, see <http://kenyalaw.org/treaties/treaties/types/Covenants> (accessed 25 October 2020).

<sup>87</sup> Basic Education Act 14 of 2013, part IV.

<sup>88</sup> Article 28 Basic Education Act 14 of 2013.

<sup>89</sup> Article 29 Basic Education Act 14 of 2013.

<sup>90</sup> Article 30 Basic Education Act 14 of 2013.

<sup>91</sup> Children’s Act 8 of 2001, arts 7(1) &(2). See also Fact Sheet on the right to education in Kenya available at <https://bit.ly/3kvPej0> (accessed 23 October 2020).

Furthermore, the Cabinet Secretary has a statutory mandate to consult with the national and county boards of education on the provision of free education. It is further argued that the government has a statutory commitment to provide for the right to basic education under Article 39. The Article states that the government is obliged to

- “(a) provide free and compulsory basic education to every child;
- (b) ensure compulsory admission and attendance of children of compulsory school age at school or an institution offering basic education”<sup>92</sup>.

Kenya’s normative framework is also alive to a child based approach that recognises the use of the four principles that aid the enjoyment of the rights of the child. To this end, the Children’s Act requires Kenya to uphold the right to survival and development of the child.<sup>93</sup> It also calls on all public and private institutions to uphold the best interests of the child as a primary consideration.<sup>94</sup> Furthermore, the Children’s Act declares that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.<sup>95</sup> In addition, it calls for the participation of the child in selected activities, such as cultural and artistic activities.<sup>96</sup> This is a rather limited approach to what the Charter provides. However, there are regulations made under the Children’s Act like the Children’s (Charitable Institutions) Regulations that allow for the disabled child’s participation in children’s participation in education,<sup>97</sup> and willing participation in religious activities.<sup>98</sup>

From the foregoing it is evident that refugees in Kenya can enjoy the right to education following the provisions in the Constitution and the stated legislation. The legislation also provides for a child based approach that embraces the four principles to be engaged in all matters concerning children. Besides, the right to education is unqualified and this calls for an implementation that ensures the enjoyment of the right to education. The only yardstick is that the child is within the bounds of Kenyan territory. As earlier indicated, the practical aspect of the enjoyment of the right has to be measured in the context of the extent to which Kenya has provided for the progressive realisation of the right to education, using a child based approach.

### **3 VIOLATION OF THE RIGHT TO EDUCATION**

The foregoing Part has shown that the various international and regional laws , once holistically applied, can lead to the protection of the refugee girl child’s right to

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<sup>92</sup> Article 39 Basic Education Act 14 of 2013.

<sup>93</sup> Article 4(1) Children’s Act 8 of 2001.

<sup>94</sup> Article 4(2) Children’s Act 8 of 2001.

<sup>95</sup> Article 5 Children’s Act 8 of 2001.

<sup>96</sup> Article 17 Children’s Act 8 of 2001.

<sup>97</sup> Children ( Charitable Children’s Institutions ) Regulations 2005, reg 12(1)(b) available at <https://bit.ly/3ktlyC0> (accessed 24 October 2020).

<sup>98</sup> See reg 13.



education. It is yet to be seen how this right has been interpreted. Before this is done, it is important to analyse the violations of the right to education in places of armed conflict and host States.

### 3.1 Violation of the right in areas of armed conflict

According to the United Nations International Children's Emergency Fund (UNICEF), between 2014 and 2018, there were reports of attacks on schools in 87 countries.<sup>99</sup> Other parallel statistics show that approximately half of an estimated 35 million refugee children that have been forcibly displaced globally, attend primary school.<sup>100</sup> It is estimated that girls are approximately 2.5 times more likely to drop out of school in areas riddled with conflict than boys.<sup>101</sup> In areas where education has continued in the thick of the conflicts, the quality of the education provided is with an average of 1:70 teacher to pupil ratio.<sup>102</sup> In instances where the children have moved away from their areas as a result of insecurity, the most affected countries have been South Sudan, Nigeria, Central African Republic, and Mali.<sup>103</sup> This movement only means that their right to education is greatly curtailed.<sup>104</sup> For instance, in South Sudan, 72 per cent of primary-school-aged girls do not attend primary school, while in Kenya girls form a paltry 38 per cent of refugee girl children who attend school.<sup>105</sup> Furthermore, Guinea Bissau has reported that 45 per cent of school-age children do not have access to school because there is no infrastructure, and no qualified or motivated teachers.<sup>106</sup>

According to UNICEF, only 28 per cent of children aged 7 to 12 are enrolled in schools, and only 12 per cent of girls have completed primary school, in comparison with 18 per cent of boys.<sup>107</sup> A similar position is evident in Liberia where half a million children do not attend school, and the enrolment of girls still lags far behind that of boys.<sup>108</sup> The consequential effects of the violation of the right to education have led to other grave violations, like the subjection of girls to sexual violence following their recruitment into armed forces as cooks and "wives".<sup>109</sup> A majority of the girls from Burundi and Libya, who were recruited, were sexually abused by men on both sides of

<sup>99</sup> See generally UNICEF (2020).

<sup>100</sup> See generally UNICEF (2020).

<sup>101</sup> See generally UNICEF (2020).

<sup>102</sup> See generally UNICEF (2020).

<sup>103</sup> ACERWC "Mapping Children on the Move within Africa" 17 March 2019 available at <https://www.acerwc.africa/Latest%20News/mapping-children-on-the-move-within-africa/> (accessed 23 October 2020).

<sup>104</sup> For instance, in Burkina Faso, there were reports of few learners going to school because of the fear of jihadists. This led to movements to areas of safety. See report available at <https://bbc.in/2FYMDzh> (accessed 25 October 2020).

<sup>105</sup> See generally ACERWC (2019).

<sup>106</sup> ACERWC "Continental study on the impact of armed conflict on children" (2017) at 55 & 62 available at <https://bit.ly/3e0LHXz> (accessed 23 October 2020).

<sup>107</sup> See ACERWC (2017) at 55.

<sup>108</sup> See ACERWC (2017) at 62.

<sup>109</sup> See ACERWC (2017) at 62.

the conflict.<sup>110</sup> The infliction of sexual violence on these children only exacerbates the effects of the conflict and which go beyond a simplistic notion of “just” missing school.

The violation of the right to education has been punctuated by attacks on educational institutions. For instance, in Mali, it was established that 130 government schools were attacked, looted and destroyed by armed forces.<sup>111</sup> In Nigeria, the Boko Haram attacked a boarding school in 2014 and abducted 276 girls.<sup>112</sup> In Somalia, the ongoing conflict and civil fragility have had a catastrophic effect on education, with the national school enrolment rate being at around 42 per cent, of which only one-third are girls.<sup>113</sup>

### 3.2 Violation of the right in Kenya

Kenya has adopted the encampment policy that requires refugees to settle in camps. This policy started around 1991 after Kenya received an influx of refugees from Somalia and Sudan.<sup>114</sup> It called for the reception of refugees into distant refugee camps.<sup>115</sup> Most of the refugees ended up in Dadaab or Kakuma camps, under the responsibility of the United Nations High Commissioner for Refugees (UNHCR).<sup>116</sup> This policy was recognised in principle under the Refugee Act.<sup>117</sup> The heightened application of the encampment policy took centre stage in 2012 following the terrorist attack at the Westgate Shopping Mall in Nairobi.<sup>118</sup>

Some of the notable challenges that the girls still face when they are in host States include the failure to enjoy the right to education,<sup>119</sup> and health care.<sup>120</sup> Besides, most

<sup>110</sup> See ACERWC (2017) at xviii.

<sup>111</sup> See ACERWC (2017) at xxi.

<sup>112</sup> This was the abduction of the Chibok children from their school in April 2014. ACERWC (2017) at 2.

<sup>113</sup> See ACERWC (2017) at xxix.

<sup>114</sup> Nanima RD “An evaluation of Kenya’s parallel legal regime on refugees, and the courts’ guarantee of their rights” (2017) 21 *Law, Democracy and Development* 42 at 49.

<sup>115</sup> See Nanima (2017) at 49.

<sup>116</sup> Verdirame G “Field report: human rights and refugees: the case of Kenya” (1999) 12(1) *Journal of Refugee Studies* 54 at 67. See also Maina A “Development of refugee law in Kenya” (2016) *World Policy Blog* 29 March 2016 available at <http://www.worldpolicy.org/blog/2016/03/29/development-refugee-law-kenya> (accessed 21 October 2020).

<sup>117</sup> Refugee Act 13 of 2006, ss 11, 16 and 17.

<sup>118</sup> Kenya Security Laws (Amendment) Act 2014. For a detailed discussion of the policy and the new law, see generally Nanima (2017).

<sup>119</sup> In Kenya, for instance, the challenges to education include the inadequate number of schools in the refugee camps, and the language problem where particular children (like those of Somali origin) need teachers who understand their dialect. See JM Bellino & S Dryden-Peterson “Inclusion and exclusion within a policy of national integration: refugee education in Kenya’s Kakuma Refugee Camp” (2018) 40(2) *British Journal of Sociology of Education* 222 at 222-238.

<sup>120</sup> Health care remains a challenge in instances where there are inadequate health care facilities. In Kenya, for instance, the Dadaab Refugee Camp has four hospitals, and one stand-alone maternity centre. In Kakuma, the health centres are temporary structures with inadequate facilities that emphasise primary other than preventive health care. This is exacerbated by the continued referral of

refugee children face psycho-social issues such as the traumatic experiences following the armed conflict.<sup>121</sup> Research at Kakuma Camp indicated that the refugees suffer from hopelessness, fear, sadness, anger, aggression and worry.<sup>122</sup> This is due to the failure to fit into the new environment. Other challenges are logistical in terms of the need to obtain teachers who can teach the children in a language they understand.<sup>123</sup> These challenges make the enjoyment of the right to education a daunting task for the refugee girl child in Kenya. This is exacerbated by some of the cultural stereotypes that some refugee communities hold. There are reports of parents and caregivers desiring the girl child to be married off once she is 14 years of age.<sup>124</sup> Unless such information is passed on to the United Nations Refugee Officers, these girls miss the chance to go to school.<sup>125</sup> Such a situation is contrary to the best interest of the child who is not expected to be married before attaining the age of majority.<sup>126</sup> To this end, as long as it is a child marriage, the child's participation as regards his or her evolving capacity is not considered because they are a minor.<sup>127</sup>

Furthermore, the policy reiterates the Constitution's recognition of marginalised groups as people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27. It suffices to note that the government's identification of marginalised groups according to this policy does not include refugees.<sup>128</sup> The recently adopted policy on Education in Emergencies qualifies emergencies as perennial disasters informed by fires, floods and epidemics that disrupt peoples' livelihoods, and by extension learning

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cases to Nairobi which is approximately 720 km away (Google Maps, 2019), making provision of health care services expensive and inconvenient.

<sup>121</sup> Some of the teachers in the camps have experienced this. See Save the Children, "Here it from the teachers: Getting refugee children back to learning." 13- 17 available at <https://bit.ly/2HysTmL> (accessed 23 October 2020).

<sup>122</sup> Horn R "A study of the emotional and psychological well-being of refugees in Kakuma Refugee Camp, Kenya" (2010) 5(4) *International Journal of Migration, Health and Social Care* 20 at 20-32.

<sup>123</sup> Some of the teachers in the camps have experienced this. See Save the Children, "Here it from the teachers: Getting refugee children back to learning" available at <https://bit.ly/2HysTmL> (accessed 23 October 2020).

<sup>124</sup> Ocharo F "Life in Dadaab: being a head teacher in Kenya's massive refugee camp" available at <https://bit.ly/2TCTQbz> (accessed 23 August 2020).

<sup>125</sup> Such matters have been reported a couple of times in both camps. See Ocharo F "Life in Dadaab: being a head teacher in Kenya's massive refugee camp" available at <https://bit.ly/2TCTQbz> (accessed 23 August 2020).

<sup>126</sup> Mezmur BD "Happy 18th birthday to the African Children's Charter: not counting its days but making its days count" (2017) 1 *African Human Rights Yearbook* 125 at 125-149. See also the Joint General Comment of the ACHPR and the ACERWC on Ending Child Marriage, 2017 available at [acerwc.africa/general-comments](https://acerwc.africa/general-comments) (accessed 23 October 2020).

<sup>127</sup> This distinction portrays the African Children's Charter's position concerning the definition of a child as a straight-18 position in art 2.

<sup>128</sup> A Policy Framework for Education: Aligning Education and Training to the Constitution of Kenya (2010) and Kenya Vision 2030 and beyond, 38 available at <https://bit.ly/37DjZPD> (accessed 23 October 2020).

in schools.<sup>129</sup> To this end, the Ministerial Report on education in emergencies only refers to refugees if they were returning from exile to Kenya.<sup>130</sup> This inequality in the recognition of marginalised groups that does not extend to the status of the person as a refugee or asylum seeker is an indication of the limited engagement of the principle of the right to survival and development of the child.<sup>131</sup> Any government policies and programmes which would have benefited the refugee girl child are technically defeated by the exclusionary criteria that inform the descriptors of marginalised groups.

Most of the policies on education do not embrace the refugee question. Kenya's Vision 2030 has the Basic Education Infrastructure Policy that calls for the establishment of the Basic Education Infrastructure. As of 2014, this policy envisioned the construction and rehabilitation of 46 000 classrooms and 92 000 toilets at the Early Childhood Development Level.<sup>132</sup> It also called for the rehabilitation of 3 000 classrooms in 1 500 primary schools, and construction of 60 new classrooms in special needs schools and 10 new classrooms in existing rescue centres.<sup>133</sup> Other national initiatives, like the UWEZO scheme that successfully targeted the improvement of education for girls and women across 70 districts, were not extended to [girl] refugees.<sup>134</sup> None of these developments were provided for any of the refugee camps. Not only did this hamper any progressive realisation of the right to education of the refugee girl but it connoted continued discrimination against the refugee girl child in policy engagement.

Furthermore, there are few schools in the camps and this usually has an effect on the provision of education for the children.<sup>135</sup> For instance, according to the UNHCR, there are 22 primary schools in Dadaab Camp with a classroom ratio of 1 teacher per 100 learners and a desk ratio of 1 desk for seven learners.<sup>136</sup> The learner enrolment shows that more boys go to school than girls.<sup>137</sup> The enrolment rate shows that out of 98 185 children only 40 852 (accounting for 42 per cent of the children in the camp) go to school.<sup>138</sup> An evaluation of the numbers shows that only 15 519 girls (33 per cent of the number of girls in the camp) go to school.<sup>139</sup> This is a low figure compared to the 25 333 boys (49 per cent of the number of boys in the camp).<sup>140</sup> This continues to

<sup>129</sup> Education in Emergency Policy, 2018 available at <https://bit.ly/37HtSeY> (accessed 23 October 2020).

<sup>130</sup> Report on the vulnerable and marginalised groups, available at <https://bit.ly/37Gvp4V> (accessed 26 October 2020).

<sup>131</sup> This is contrary to the spirit and purpose of art 27 of the Constitution 2010.

<sup>132</sup> Fact Sheet on the right to education in Kenya, at 9.

<sup>133</sup> Fact Sheet on the right to education in Kenya, at 9.

<sup>134</sup> Syomwene A "Women education and economic development in Kenya: implications for curriculum development and implementation processes" (2015) 6(15) *Journal of Education and Practice* 38 at 39.

<sup>135</sup> The two main refugee camps in Kenya include Dadaab and Kakuma.

<sup>136</sup> UNHCR "Briefing note on education in Dadaab refugee camps Version: 13 September" (2020) available at <file:///C:/Users/s2000156/Downloads/337.pdf> (accessed 25 October 2020).

<sup>137</sup> See generally UNHCR (2020).

<sup>138</sup> See generally UNHCR (2020).

<sup>139</sup> See generally UNHCR (2020).

<sup>140</sup> See generally UNHCR (2020).

translate into a lower quality of education for refugees than for other children. A report by Forced Migration Review indicates that the lack of development for refugee teachers (that is, teachers who are themselves refugees) affects the quality of education they pass on to the learners.<sup>141</sup> Statistics indicate that 72 per cent of refugee teachers only have secondary school qualifications and they rely heavily on their own experience to teach. This places them way below the desired qualifications of a primary teacher in Kenya.<sup>142</sup> The policy updates on the successes of the Ministry of Education are silent on progress in the refugee camps.<sup>143</sup> This shows a lack of engagement that speaks to the progressive realisation of the right to education of the girl child in refugee camps.

From the foregoing, the limited constitutional framework has been amplified in the silence of the education policies on education for refugees. Besides, the challenges that affect the refugee girl from the areas of conflict ought to be dealt with when she is in a host State. Any challenges to this only exacerbate an already unfortunate situation. It is yet to be seen how the emerging jurisprudence from the Committee of Experts on the Rights and Welfare of the Child can offer insights to improve the plight of the refugee girl child's situation.

#### **4 JURISPRUDENCE FROM THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD**

The ACHPR established the Committee to monitor the implementation of their obligations by the States Parties.<sup>144</sup> The Committee is obliged to promote and protect the rights of the child through the collection of documents, to assess the situation on the continent and make recommendations thereafter, and to formulate principles to inform the protection and promotion of the rights of the child.<sup>145</sup> In the execution of its mandate, the Committee receives State Party Reports and evaluates them to offer recommendations through Concluding Observations, considers individual Communications, and carries out investigative missions.<sup>146</sup> Other activities that the Committee may be involved in include organising conferences and studies to aid engagement with its mandate. This Part looks at the Communication procedure, the State Reporting mechanism, and the use of investigative missions.

States Parties are obliged to submit initial and periodic reports for consideration by the Committee.<sup>147</sup> The Committee then examines the matters of contention that speak to

<sup>141</sup> Source available at <https://bit.ly/2HxU9Bt> (accessed 23 October 2020).

<sup>142</sup> It is desired that the teacher should be a Kenyan citizen with a PTE Certificate (P1 certificate) or a Bachelor of Education degree in primary education from a university recognized by the government of Kenya. See <https://bit.ly/2HxUleZ> (accessed 23 October 2020).

<sup>143</sup> This is in accordance with the government position that matters relating to the refugee population are left to the UNHCR.

<sup>144</sup> Article 45 ACHPR.

<sup>145</sup> Article 42 ACHPR.

<sup>146</sup> The discussion of these three aspects follows.

<sup>147</sup> Article 43 ACHPR.

the enjoyment of the rights of children in the domestic sphere.<sup>148</sup> The Recommendations of the Committee are informed by the extent to which they conform to the obligations under the Charter.<sup>149</sup> In Kenya's first periodic report to the Committee, it was noted that Kenya had to take steps to adopt a non-discriminatory and inclusive approach that provides for effective access to education for both stateless and abandoned children.<sup>150</sup> In its Concluding Observations on South Africa's initial report, the Committee noted that access to basic services by asylum seeking, migrant, and refugee children and their parents or caregivers depends on the possession of valid refugee or asylum seeker documentation issued by the Department of Home Affairs (DHA).<sup>151</sup> Furthermore, the Committee urged that all the necessary measures be taken to ensure that asylum seeking, migrant, and refugee children are not discriminated against based on unnecessary barriers to accessing various services including access to basic education.<sup>152</sup> The issue of inclusive education has been raised by the Committee before, and the evaluation in the foregoing Part reveals that nothing has been done to realise this inclusiveness.

The Committee may receive Communications on any matter covered by the Charter from any person, group or Non-Governmental Organisation recognised by the African Union.<sup>153</sup> The State Party can account for the violation of the rights of children.<sup>154</sup> The jurisprudence points to low usage of the Communications procedure of the Committee. Since its inception, the Committee has handed down only 10 decisions, in contrast with over 300 decisions by the African Commission on Human and Peoples' Rights.<sup>155</sup> The Committee has adopted the principle of due diligence by the States Parties in ensuring

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<sup>148</sup> Sloth-Nielsen J & Mezmur BD "Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child" (2010) 10(2) *African Human Rights Law Journal* 534 at 538.

<sup>149</sup> Sloth-Nielsen J & Mezmur BD "Out of the starting blocks: the 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child" (2009) 9(1) *African Human Rights Law Journal* 336 at 340.

<sup>150</sup> Concluding Recommendations by the ACERWC on Kenya's first periodic Report on the Status of implementation of the African Charter on the Rights and Welfare of the Child, para 43, available at <https://bit.ly/3oulRyY> (accessed 23 October 2020).

<sup>151</sup> The ACERWC's Concluding Observations on South Africa's initial State Report on the Status of implementation of the African Charter on the Rights and Welfare of the Child, para 22, available at <https://bit.ly/3otwvHo> (accessed 23 October 2020).

<sup>152</sup> The ACERWC's Concluding Observations on South Africa's initial State Report on the Status of implementation of the African Charter on the Rights and Welfare of the Child, para 22, available at <https://bit.ly/3otwvHo> (accessed 23 October 2020).

<sup>153</sup> Article 44(1) ACHPR.

<sup>154</sup> Alston P, Tobin J & Darro M *Laying the foundations for children's rights: an independent study of some key legal and institutional aspects of the impact of the Convention on the Rights of the Child* Florence, Italy : UNICEF (2005) at 33-34.

<sup>155</sup> IHRDA Case law analyser available at <http://caselaw.ihrda.org/> (accessed 19 December 2019).



that children enjoy their rights.<sup>156</sup> The use of the due diligence standard guides States Parties on how to uphold their obligations under the Charter.<sup>157</sup> In principle, the due diligence of the respondent State is assessed by the result achieved following measures taken to address the violations of the rights of the child.<sup>158</sup> Thus, where a Communication is brought against Kenya concerning the violations that arise against the girl child as a result of the encampment policy, it is not enough that Kenya shows the existence of policies that point to the protection of the rights of the refugee. Kenya would have to practically demonstrate the extent to which the policies have actively spoken to the enjoyment of the right to education concerning the child rights based approach. It is argued in the light of the foregoing discussion that Kenya would face an uphill task to prove that it upheld its human rights concerning the right to education of the refugee girl child. It is argued that principle offers an objective directive that a State may adopt to fulfil its obligations. A look at *Mauritania* and *Cameroon* shows that due diligence is result oriented requiring the State to present steps to uphold the rights of the victim, other than general abstract steps that are based on an attempt to uphold its obligations.<sup>159</sup>

The Committee may also carry out investigative missions to assess the extent to which States Parties implement their obligations under the Charter.<sup>160</sup> This procedure enables the Committee to obtain information about the monitoring of the (non-) implementation of the Charter by States Parties.<sup>161</sup> These investigative missions may be initiated by the Committee or at the request of a State Party.<sup>162</sup> Examples of some of the successful investigative mission are those that have been carried out in Tanzania, South Sudan, Sahrawi Arab Republic and the Central African Republic.<sup>163</sup>

## 5 CONCLUSION

The normative framework of the right to education for the refugee girl child in international and regional law reiterates the progressive realisation of the right to education using a child rights based approach. This position is normatively provided for by Kenya's constitutional and statutory regimes that underscore the two positions. The point of departure is the existence of the encampment policy that deviates from the constitutional standard of equality before the law of all persons in all spheres of life

<sup>156</sup> See *Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon* Communication 006/Com/002/2015 and *MRGI and another v Mauritania* Communication 007/Com/003/2015 on the use of due diligence and the best interests' principle.

<sup>157</sup> *Mauritania* (2015) at paras 47-58; *Cameroon* (2015) at paras 46-57.

<sup>158</sup> *Mauritania* (2015) paras 47-58; *Cameroon* (2015) paras 46-57.

<sup>159</sup> *Mauritania* (2015) paras 47-58; *Cameroon* (2015) at paras 46-57.

<sup>160</sup> Article 45(1) ACHPR.

<sup>161</sup> Thompson B "Africa's Charter on Children's Rights: a normative break with cultural traditionalism" (1992) 41(2) *The International and Comparative Law Quarterly* 432 at 443.

<sup>162</sup> Guidelines on the Conduct of Investigations (2018) Guideline 4(1), available at <https://bit.ly/2JahI90> (accessed 23 October 2020).

<sup>163</sup> Missions/Country visits available at <https://www.acerwc.africa/missions-country-visits/> (23 October 2020).

including the enjoyment of the right to education. This policy concretises discrimination by creating a refugee community that is excluded from the rest of Kenyan society. The great policies and initiatives by the government are curtailed from affecting the refugee because of their exclusiveness to the citizen population. This creates the “Kenyan” and the “other community”, where the enjoyment of their rights is informed by their status before the legal regime.

As a consequence all the trauma, the challenges that the girl child faces cannot be solved by this legal regime. Thus, the constitutional and policy limitations exacerbate the challenges that a refugee girl child continues to face in attempting to enjoy the unqualified right to education. On a lighter note, the Committee ought to impress on Kenya to drop the use of the encampment policy in light of its limitations, using the reporting mechanism, the complaints procedure or the investigative missions. While for State reporting and an investigative mission, the Committee requires the input of the State or a complainant, it can undertake an investigative mission to Kenya to collect evidence to inform its decision. It is argued that the due diligence principle can be used to improve the enjoyment of the right to education by refugees.

It is recommended that the Committee should exercise its mandate to inform due reform in Kenya’s refugee regimes to cater for the holistic enjoyment of the right to education. Further, that this should be effected through its Recommendations on the State Reports or through the initiation of Investigative Missions. Civil Societies have to play a bigger role through the filing of alternative reports to enable the Committee to have an informed position of the state of the implementation of the rights of the child. The Committee should engage in campaigns to popularise its activities to enable more persons to access the Committee for remedies.

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