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# IMPLEMENTING THE CHILDREN’S RIGHTS AGENDA IN KENYA: TAKING STOCK OF THE PROGRESS, HURDLES AND PROSPECTS

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[More than twenty years after] the signing of the United Nations Convention on the Rights of the Child, we are still failing children. Around the world, millions of children continue to suffer widespread and severe violations of their rights. Why? Often, because of the way governments allocate resources and make policy decisions. These governments, as “duty-bearers” responsible for delivering children’s rights, together with donors and civil society, need to do much more to promote and safeguard children’s wellbeing.

— Save the Children<sup>1</sup>

## INTRODUCTION

Over various epochs of human history the issue of children’s living situations has been constantly highlighted as one warranting special attention. A number of international and regional human rights instruments — including, the Universal Declaration of Human Rights (“Universal Declaration”),<sup>2</sup> the Declaration on the Rights of the Child (“UN Children’s Declaration”),<sup>3</sup> the United Nations Convention on the Rights of the Child (“Convention on the Rights of the Child”),<sup>4</sup> and the African Charter on the Rights and Welfare of the Child (“Children’s Charter”)<sup>5</sup> — have taken cognizance of the natural vulnerability of children to hunger and malnutrition, physical

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1. SAVE THE CHILDREN, MAKING CHILDREN'S RIGHTS A REALITY 1 (2009), available at [http://www.savethechildren.org.uk/en/docs/Policy\\_Brief\\_Making\\_childrens\\_rights\\_reality.pdf](http://www.savethechildren.org.uk/en/docs/Policy_Brief_Making_childrens_rights_reality.pdf).

2. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25(2), U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter Universal Declaration], (“Motherhood and childhood are entitled to special care and assistance”).

3. Declaration of the Rights of the Child, G.A. Res. 1386, pmbl., U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959) [hereinafter UN Children’s Declaration] (“[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care . . .”).

4. United Nations Convention on the Rights of the Child, pmbl., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child] (“Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration[.]”).

5. African Charter on the Rights and Welfare of the Child, pmbl., O.A.U. Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter Children’s Charter] (“Recognizing that the child, due to the needs of his physical and mental development[,] requires particular care with regard to health, physical, mental, moral and social development . . . [.]”).

and emotional abuse, exploitation, and traumatization.<sup>6</sup> The expected result of the recognition of children's vulnerability has been the formal evolution and crystallization of an agenda to protect the rights and welfare of all children, what we shall hereinafter refer to as "the children's rights agenda" (or "the agenda").

The agenda, presented for improvement at global, regional, and national levels, calls for special safeguards and care for children, including appropriate legal protection.<sup>7</sup> In a nutshell, it implies the need to ensure for every child *health, education, equality, and protection*. For the subscribing States, implementation of (at least, the minimum core of) this agenda is mandatory, not optional.

Be that as it may, as shall be discerned later in this essay, the reality in Kenya depicts an appalling situation; an overwhelming majority of the over 20 million children within the country's jurisdiction face various forms of socio-economic, cultural, legal, and political challenges. Yet Kenya subscribes to the agenda, both at the international level of the United Nations ("UN") and the regional level of the African Union ("AU"), having signed nearly all of the key human rights instruments relating to the agenda, as well as a vast majority of the general human rights treaties.<sup>8</sup> Undoubtedly, this rightly places Kenya in focus for review of her status in implementing the agenda for all children on her soil, whether Kenyan or otherwise.

This essay inquires into issues touching on the implementation of the children's rights agenda in Kenya; it inquires whether the nation

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6. See, e.g., UN Children's Declaration, *supra* note 3, at pmbl. (recognizing that children require "special safeguards and care, including appropriate legal protection, before as well as after birth...."); Convention on the Rights of the Child, *supra* note 4, at pmbl. (recognizing the UDHR's commitment to providing "special care and assistance" to children); Children's Charter, *supra* note 5, pmbl. (recognizing the critical situation of children in Africa due, in part, to socio-economic and cultural factors, including armed conflicts, exploitation, and hunger; the "unique and privileged" position of the child in African society; and the need for special safeguards and care to protect children's "health and physical, mental, moral and social development").

7. See, e.g., UN Children's Declaration, *supra* note 3, at pmbl. (recognizing the need for "appropriate legal protection" for children).

8. See *infra* notes 99-112 and accompanying text (listing international and regional human rights instruments affecting children's rights that have been ratified by Kenya).

is adequately implementing the agenda for the millions of children within her jurisdiction. Thus, we shall delve into an assessment of the various achievements registered by Kenya in an attempt to actualize the agenda for all children within her jurisdiction, the challenges encountered in this respect, as well as the prospects in the current order and the foreseeable future. Undoubtedly, this discourse makes the essay relevant to the Award's chosen theme for the year 2011 — *The Rights of Children and International Human Rights Law*.

Before we delve into any substantive discussions on the subject, it is imperative for us to define some of the key terminologies running through the entire strand of this essay. Our point of departure would be to appreciate that *a child is any person under the age of 18 years*. This is the understanding reflected in Kenya's *New Constitution* ("New Constitution")<sup>9</sup> and the *Children's Act* ("Children's Act"),<sup>10</sup> as well as the *Children's Charter*,<sup>11</sup> though the *Convention on the Rights of the Child* apparently introduces leeway for a lesser threshold.<sup>12</sup> Flowing from this conceptualization, and the general conceptualization of the notion of human rights, *children's rights* shall be understood as the human rights of children — the wide continuum of rights inherent in every child, by dint of his or her membership in the human family.

## II. THE CHILDREN'S RIGHTS AGENDA: GLOBAL AND REGIONAL PERSPECTIVES

### A. MEANING AND SCOPE OF THE AGENDA

For subscribing States, the children's rights agenda implies the obligation to ensure realization of four basic entitlements for all children within their jurisdiction: *health, education, equality, and protection*.<sup>13</sup> At the UN level, the agenda is succinctly summed up in

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9. See CONSTITUTION, art. 260 (2010) (Kenya).

10. See *The Children's Act*, No. 8 (2001) KENYA GAZETTE SUPPLEMENT No. 23 § 2 (Kenya) [hereinafter *Children Act*].

11. See *Children's Charter*, *supra* note 5, art. 2.

12. See *Convention on the Rights of the Child*, *supra* note 4, art. 1 (defining a child as "every human being below the age of eighteen years *unless, under the law applicable to the child, majority is attained earlier.*") (emphasis added).

13. See G.A. Res. S-27/2, ¶¶ 7(3)-7(7), U.N. Doc. A/RES/S-27/2 (Oct. 11,

*A World Fit for Children*,<sup>14</sup> the final product of the General Assembly's Special Session on Children ("UN Special Session"). Held May 8-10, 2002, the UN Special Session was the first ever General Assembly session exclusively dedicated to children, and including them as participants. This is the platform on which the UN International Children's Emergency Fund ("UNICEF") operates.<sup>15</sup>

At the African level, the desire to forge a regional agenda formally surfaced as early as July 1979, when the Sixteenth Ordinary Session of the Assembly of the defunct Organization of African Unity ("OAU") (Monrovia, Liberia, July 17-20, 1979) adopted the *Declaration on the Rights and Welfare of the African Child* ("OAU Children's Declaration"),<sup>16</sup> which later shaped the drafting of the Children's Charter.<sup>17</sup> Together with the region's other human rights instruments, the Charter establishes the regime on which the regional agenda is anchored. Particular mention must also be made of the Cairo Declaration and Plan of Action on Children ("Cairo Declaration"),<sup>18</sup> which was adopted by the First Pan-African Forum for Children: Africa Fit for Children (Cairo, Egypt, May 28-31, 2001). The *Cairo Declaration*, encompassing the earlier efforts of the OAU Children's Declaration, was named "African Common Position," and was the primary basis of Africa's contribution to the

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2002) (calling upon all members of society to commit to eradicating all forms of discrimination affecting children; to achieve equality; to care for every child through securing children's good health; to educate all children and implement free, compulsory primary education; and to protect children from all forms of harm, exploitation, and war).

14. *Id.*

15. UNICEF was established to address the plight of less fortunate children. See Establishment of an International Children's Emergency Fund, G.A. Res. 57 (I), ¶ 1 (Dec. 11, 1946) (creating the fund to benefit children of countries affected by aggression, to assist children in countries presently receiving assistance from the United Nations Relief and Rehabilitation Administration, and to promote children's health generally).

16. Declaration on the Rights and Welfare of the African Child, O.A.U. Doc. AHG/ST.4 (XVI) Rev. 1 (Jul. 20, 1979) [hereinafter OAU Children's Declaration].

17. Children's Charter, *supra* note 5, pmb. ("Recalling [that] the Declaration on the Rights and Welfare of the African Child . . . recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child, . . . [and reaffirming] adherence to the principles of the rights and welfare of the child contained in the declaration . . .").

18. Pan-African Forum for Children, *The African Common Position as Africa's Contribution to the United Nations General Assembly Special Session on Children*, May 28-31 (2001).

UN Special Session.<sup>19</sup>

## B. KEY NORMATIVE ARRANGEMENTS

### 1. Normative Foundations of the Agenda at the UN

Since the advent of UNICEF, based on the UDHR's *universalist* platform, the UN has developed various instruments relevant to the agenda, some declaratory, others legally-binding. The principal instruments are: the UN Children's Declaration;<sup>20</sup> the Convention on the Rights of the Child;<sup>21</sup> the Convention on the Elimination of Discrimination against Women ("CEDAW");<sup>22</sup> the Declaration on the Protection of Women and Children in Emergency and Armed Conflict;<sup>23</sup> the World Declaration on the Survival, Protection and Development of Children;<sup>24</sup> the Declaration on the Elimination of

19. *Id.* ¶¶ 4-5 (reaffirming OAU's commitment to the African Charter on the Rights and Welfare of the Child as well as to the Convention on the Rights of the Child).

20. The UN Children's Declaration is the first normative arrangement to put the children's rights agenda squarely within the UN human rights system. See Nigel Cantwell, *The Origins, Development and Significance of the United Nations Convention on the Rights of The Child*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES"* 19, 19 (Sharon Detrick, ed., 1992) (explaining that the declaration has its origins in the Geneva Declaration of the Rights of the Child, promulgated in 1924 by the now defunct League of Nations, and heavily built on the 1923 proposal of the non-governmental organization Save the Children International Union ("SCIU")).

21. For insights into the legislative history of the Convention on the Rights of the Child see generally U.N. HIGH COMM'R FOR HUMAN RIGHTS, *LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD* (Vol. I 2007).

22. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, pmbl., art. 5(b), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW] (emphasizing that men, women, and society must share responsibility in children's upbringing and education).

23. See Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter Declaration on the Protection of Women and Children] (calling upon contracting States to protect civilian women and children in periods of armed conflict and condemning acts such as attacks on civilians and chemical warfare that particularly affect vulnerable women and children).

24. The Declaration was adopted by the World Summit for Children, which took place in New York, September 29-30, 1990. *A Promise to Children*, UNICEF, <http://www.unicef.org/wsc/>. It commits to "give every child a better future" by taking political action and giving high priority to children's rights.

Violence against Women;<sup>25</sup> the Beijing Declaration and Platform of Action;<sup>26</sup> the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Palermo Protocol”);<sup>27</sup> and the UN Special Session Outcome Document.

In addition, the system boasts of a plethora of instruments with a general bearing on the agenda, including: the Genocide Convention;<sup>28</sup> the UN Refugee Convention;<sup>29</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”);<sup>30</sup> the International Covenant on Civil and Political Rights (“ICCPR”);<sup>31</sup> the International Covenant on Economic, Social and Cultural Rights (“ICESCR”);<sup>32</sup> the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment

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25. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmbl., U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49, (Dec. 20, 1993) (“Concerned that some groups of women, such as . . . female children . . . are especially vulnerable to violence.”).

26. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, ¶¶ 6, 9, 23, 27, 29, 31-34, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1, ¶¶ 2, 39 (1995) (including “girls” in the declaration that focuses on implementation of women’s human rights and acknowledging that “[t]he girl child of today is the woman of tomorrow.”).

27. The Protocol supplements the United Nations Convention against Transnational Organized Crime. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25, Annex II (Jan. 8, 2001) [hereinafter Convention Against Transnational Crime].

28. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) (Dec. 9, 1948), art. 2(e) U.N. Doc. A/3/260, 78 U.N.T.S. 277 (including the forcible transfer of children of one group to another “with intent to destroy . . . a national, ethnical, racial, or religious group” in the definition of genocide).

29. United Nations Convention on the Status of Refugees, G.A. Res. 428 (V) (Jul. 28, 1951), U.N. Doc. A/5/20, 189 U.N.T.S. 150 [hereinafter UN Refugee Convention].

30. International Covenant on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, art. 5, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter ICERD] (reaffirming the principle of equality for all people).

31. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 23(4), U.N. Doc. A/6316, (Dec. 16, 1966) [hereinafter ICCPR] (ensuring protection of children in the case of marriage dissolution).

32. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 10(3), U.N. Doc. A/6316, (Dec. 16, 1966) [hereinafter ICESCR] (“Special measures of protection and assistance should be taken on behalf of all children and young persons . . .”).

or Punishment (“Torture Convention”);<sup>33</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“ICRMW”);<sup>34</sup> the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (“OP-CRC-AC”);<sup>35</sup> the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (“OP-CRC-SC”);<sup>36</sup> and the International Convention on the Rights of Persons with Disabilities (“ICRPD”).<sup>37</sup>

## 2. *Normative Foundations of the Agenda in Africa*

The African regional agenda, like the international agenda, is premised on a host of instruments, some declaratory and others legally-binding. In order of their adoption, these include: the 1969 Convention Governing the Specific Aspects of the Refugee Problems in Africa (“OAU Refugee Convention”);<sup>38</sup> the 1979 OAU Children’s Declaration, which laid the basis for the evolution and crystallization of the agenda in Africa<sup>39</sup>; the African Charter on Human and Peoples’ Rights (“Banjul Charter”);<sup>40</sup> the 1990 Children’s Charter, the principal instrument relating to the protection and promotion of

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33. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51, (Dec. 10, 1984) [hereinafter Torture Convention].

34. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, arts. 17, 44-45, U.N. Doc. A/45/158, (Dec. 18, 1990) [hereinafter ICRMW] (directing States to consider the effect of detaining migrant workers on their children and families, and requiring States to facilitate education for migrant workers’ children).

35. Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/263 (Mar. 16, 2001) [hereinafter OP-CRC-AC].

36. G.A. Res. 54/263, Annex II, U.N. Doc. A/54/263, (Mar. 16, 2001).

37. International Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 7, U.N. Doc. A/61/106 (Jan. 24, 2007) [hereinafter ICRPD](requiring states to take measures to ensure the human rights of children with disabilities, take their best interests into account, and allow them to freely express their views).

38. Convention Governing the Specific Aspects of Refugee Problems in Africa, O.A.U. Doc. CAB/LEG/24.3 (Sept. 10, 1969).

39. OAU Children’s Declaration, *supra* note 16.

40. African (Banjul) Charter on Human and Peoples’ Rights, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (June 27, 1981) [hereinafter Banjul Charter].

the rights and welfare of children in Africa;<sup>41</sup> the Tunis Declaration on AIDS and the Child in Africa;<sup>42</sup> the Grand Bay Declaration and Plan of Action;<sup>43</sup> the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (“Abuja Declaration”);<sup>44</sup> the 2001 Cairo Declaration and Plan of Action, which constitutes the continent’s common position on children;<sup>45</sup> the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”);<sup>46</sup> the 2004 Solemn Declaration on Gender Equality in Africa;<sup>47</sup> the Decision on Accelerating Action for Child Survival and Development in Africa to Meet the Millennium Development Goals (“MDGs”);<sup>48</sup> the 2006

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41. Children’s Charter, *supra* note 5. *See generally* Thoko Kaime, *The Foundations of the Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account*, 3(1) AFR. J. LEG. STUD. 119, 121-32 (2009) (examining the culture-based critiques of the universalist human rights framework by focusing on the African Children’s Charter and its contextualization of children’s rights within the African socio-political context by emphasizing African children’s role as “inheritors and keepers of African cultural heritage”); Amanda Lloyd, *Evolution of the African Charter of the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet*, 10 INT’L J. OF CHILDREN’S RIGHTS 179, 180-85 (2002) (explaining that the Children’s Charter holds African countries to higher standards and obligations than does the UN Convention on the Rights of the Child and specifically takes cultural, historical, social, and economic factors unique to Africa into account while also looking to the UN system for inspiration).

42. O.A.U. Doc. AHG/Decl. 1 (XXX) (Jun. 15, 1994). The Declaration, wherein the OAU Member States expressed their collective and individual commitment to protect children, was adopted by the thirtieth session of the OAU Summit in Tunis, Tunisia held May 13-15, 1994. *Id.*

43. O.A.U. Doc. CONF/HRA/Decl.(I) (Apr. 16, 1999). The Declaration and Plan of Action were adopted by the First Ministerial Conference on Human Rights in Africa in Grand Bay, Mauritius held April 12-16, 1999. *Id.*

44. O.A.U. Doc. OAU/SPS/ABUJA/3 (Apr. 27, 2001) [hereinafter Abuja Declaration]. The Declaration was adopted by the African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases in Abuja, Nigeria held April 24-27, 2001. *Id.*

45. *The African Common Position as Africa’s Contribution to the United Nations General Assembly Special Session on Children*, *supra* note 18.

46. Maputo Protocol, 1 AFR. HUM. RIGHTS L. J. 40, CAB/LEG/66.6 (2005) [hereinafter Maputo Protocol]. The Protocol, which supplements the Banjul Charter, was adopted by the Second Summit of the AU Assembly in Maputo, Mozambique held July 8-11, 2003. *Id.*

47. O.A.U. Doc. Assembly/AU/Dec.12 (III) (Jul. 8, 2004). The Declaration was adopted by the Third Summit of the AU Assembly in Addis Ababa, Ethiopia held July 6-8, 2004. *Id.*

48. O.A.U. Doc. Assembly/AU/Dec.75 (V) (Jul. 5, 2005). The Decision, which

Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children;<sup>49</sup> and, the Convention on the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”).<sup>50</sup>

### C. A ROLL-CALL OF MAJOR GUARANTEES

#### 1. *Guarantees Common to the Two Systems*

At the confluence of the global and regional human rights systems, there are a plethora of civil, socio-economic and cultural guarantees for all children.<sup>51</sup> These include guarantees relating to: equality and non-discrimination;<sup>52</sup> entitlement to name, registration, and

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called on AU Member States to accelerate the pace of implementing the MDGs (for children), was adopted by the Fifth Summit of the AU Assembly in Sirte, Libya held June 28-July 5, 2005. *Id.*, ¶4.

49. O.A.U. Doc. EX.CL/313 (X), Annex IV (Nov. 23, 2006). The Plan was adopted by the Ministerial Conference on Migration and Development in Tripoli, Libya held November 22-23, 2006. *Id.*

50. African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Oct. 23, 2009) [hereinafter Kampala Convention]. The Convention, adopted by the Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa in Kampala, Uganda, held October 19-23, 2009, is intended to provide safeguards for the protection of individuals from, and in, all forms of displacement. See *id.*, pmb. (“Affirming our primary responsibility and commitment to respect, protect and fulfill the rights to which internally displaced persons are entitled, without discrimination of any kind[.]”). See generally Allehone Mulugeta Abebe, *The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges*, 29(3) REF. SURVEY Q. 28 (2010) (focusing on the Convention’s role as the first legal instrument dealing with internal displacement as well as the African Union’s consideration of the continent’s unique context, providing insights into the Convention’s drafting history, and discussing its provisions).

51. See MICHAEL WABWILE, LEGAL PROTECTION OF SOCIAL AND ECONOMIC RIGHTS OF CHILDREN IN DEVELOPING COUNTRIES: REASSESSING INTERNATIONAL COOPERATION AND RESPONSIBILITY 15-19 (2010) (finding that children’s rights have become part of international norms through conventions such as the Convention on the Rights of the Child, ICESCR, and through regional human rights systems in Europe and Africa). For a general insight into economic, social and cultural rights applicable to all ages, see Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 21-40 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2001).

52. See ICCPR, *supra* note 31, arts. 3, 26 (commanding equal protection under the law free from any form of discrimination in order to ensure enjoyment of all civil and political rights guaranteed in the ICCPR); ICESCR, *supra* note 32, art. 3 (“State Parties to the present Covenant undertake to ensure the equal right of men

acquisition of nationality;<sup>53</sup> protection from all forms of degradation, exploitation, violence, and abuse;<sup>54</sup> protection from harmful

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and women to the enjoyment of all economic, social and cultural rights set forth in the [ICESCR]"); CEDAW, *supra* note 22, art. 15 (according women's equality with men before the law, particularly in civil matters such as contracts, property administration, in legal proceedings, and deeming any instruments restricting women's legal capacity void); Convention on the Rights of the Child, *supra* note 4, art. 2 (calling on State Parties to protect each child from discrimination or punishment based upon factors such as race, sex, religion, political opinion, disability, status, and expressed opinions or beliefs of the child's parents and family members); ICRPD, *supra* note 37, arts. 3(b), 3(g), 5 (applying principles of non-discrimination and equality between men and women for people with disabilities); Banjul Charter, *supra* note 40, arts. 2, 3 (assuring individuals of equal protection before the law and enjoyment of rights without discrimination of any kind); Children's Charter, *supra* note 5, art. 3 ("Every child shall be entitled to enjoyment of the rights and freedoms recognized . . . in this Charter irrespective of the child's and his/her parents' . . . race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."). See generally Maputo Protocol, *supra* note 46 (recognizing the principle of non-discrimination enshrined in other international human rights instruments and calling on Member States to combat every form of discrimination against women).

53. See ICCPR, *supra* note 31, arts. 24(2), 24(3) (requiring each child to be registered immediately after birth and given a name, and granting each child the right to acquire a nationality); Convention on the Rights of the Child, *supra* note 4, art. 7 (stating that each child has the right to a name, nationality, and, to the extent possible, to know his parents and receive their care); ICRMW, *supra* note 34, art. 29 ("Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality"); Children's Charter, *supra* note 5, art. 6 (requiring States to ensure that their constitutional legislation recognizes principles allowing children to acquire the nationality of the State in which they are born if they are not granted a nationality by any other State).

54. See ICCPR, *supra* note 31, arts. 7, 8 (demanding that no one be subjected to slavery; torture; or cruel, inhuman, or degrading treatment, particularly medical or scientific experimentation); Convention on the Rights of the Child, *supra* note 4, arts. 19, 32(1), 34, 37(a) (protecting children from physical, mental, and sexual violence; economic exploitation and hazardous work environments; and torture or other cruel, inhuman, or degrading treatment or punishment); ICRMW, *supra* note 34, arts. 10, 11 (protecting migrant workers and their families from cruel and inhuman treatment or punishment, including slavery or compulsory labor, but noting that the latter protection does not preclude hard labor as part of a criminal sentence); ICRPD, *supra* note 37, arts. 15, 16 (calling on States to take measures to prevent persons with disabilities from being subjected to cruel and inhuman treatment, exploitation, violence, and abuse, both within and without the home, and including gender-based aspects of abuse, in part through educating families and caregivers on how to recognize such abuse); Banjul Charter, *supra* note 40, art. 5 (prohibiting all forms of degradation, particularly slavery, engagement in the slave trade, and torture, and guaranteeing every person the right to human dignity);

practices, including sale, trafficking, and abduction;<sup>55</sup> enjoyment of the highest (or best)<sup>56</sup> attainable standard of health;<sup>57</sup> education (and training opportunities);<sup>58</sup> participation in cultural life;<sup>59</sup> and,

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Children's Charter, *supra* note 5, arts. 15, 16, 27-29 (protecting children from economic exploitation both in formal and informal employment sectors, in part through minimum wages and regulations of hours and work conditions; requiring States to take action to protect against child abuse and torture through legislative, administrative, social, and education means; demanding protection of children against sexual exploitation, drug abuse, trafficking, and the use of children for begging).

55. See Convention on the Rights of the Child, *supra* note 4, art. 35 ("State Parties shall take all appropriate national, bilateral and multilateral measures to prevent abduction of, the sale of or traffic in children for any purpose in any form"); CEDAW, *supra* note 22, art. 6 (requiring States to take measures protecting women against trafficking and prostitution); Banjul Charter, *supra* note 39, art. 5; Children's Charter, *supra* note 5, arts. 21, 29 (protecting children from harmful practices, particularly noting child marriage, and the sale, trafficking, and abduction of children); Maputo Protocol, *supra* note 46, art. 5 (calling on State Parties to condemn all harmful practices against women and girls by creating public awareness of harmful practices, prohibiting the medicalization of female genital mutilation and all other forms of violence against women, providing support to victims of such practices, and protecting women and girls who are at risk of being subjected to such violence).

56. The threshold of "the highest attainable standard" is used within the UN circles, while that of "the best attainable standard" is used in the African context. Compare Convention on the Rights of the Child, *supra* note 4, art. 24(1) ("State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health . . ."), with Children's Charter, *supra* note 5, art. 14(1) ("Every child shall have the right to enjoy the best attainable state of physical mental, and spiritual health.").

57. See Convention on the Rights of the Child, *supra* note 4, art. 24(1) ("States Parties shall strive to ensure that no child is deprived of his or her right to access [the highest attainable standard of] health care services"); ICRPD, *supra* note 37, art. 25 ("States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation"); Banjul Charter, *supra* note 40, art. 16(1) ("Every individual shall have the right to enjoy the best attainable state of physical and mental health."); African Charter, *supra* note 5, art. 14(1) (guaranteeing children the "best attainable state of physical, mental, and spiritual health"); Maputo Protocol, *supra* note 46, art. 14 (calling upon State Parties to ensure women's right to health, "including sexual and reproductive health," such as choosing the number of children they have, methods of contraception, and whether to make use of family planning education).

58. See ICECSR, *supra* note 32, art. 13(1) ("The State Parties . . . agree that education shall be directed to the full development of the human personality and the sense of its dignity . . ."); CEDAW, *supra* note 22, art. 10 (requiring States to end discrimination of women to ensure equal access to education, including career and vocational guidance; access to the same curricula, exams, and teachers as men;

protection from the illicit use (and use in illicit production and trafficking) of narcotic drugs and psychotropic substances.<sup>60</sup>

## 2. *Additional Guarantees under the African System*

In the African regional human rights system, the Maputo Protocol, which applies equally to all women on the continent, provides additional guarantees for girls.<sup>61</sup> These include: the right to peace,

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the same opportunities to receive scholarships, educational grants, and to participate in athletics; and specific educational information on family planning and family health); Convention on the Rights of the Child, *supra* note 4, art. 28(1) (recognizing children's right to education and requiring they make "primary education compulsory and free to all"); ICRMW, *supra* note 34, art. 30 ("Each child of a migrant worker shall have the basic right of access to education . . ."); ICRPD, *supra* note 37, art. 24 (recognizing the "right of persons with disabilities to education" and ensuring inclusive education systems for such people); Banjul Charter, *supra* note 40, art. 17(1) ("Every individual shall have the right to education."); Children's Charter, *supra* note 5, art. 11 (guaranteeing children's education as promotion of children's fullest potential through providing free and compulsory basic education, encouraging secondary education, and taking special measures for "female, gifted and disadvantaged children"); Maputo Protocol, *supra* note 46, art. 12 (requiring State Parties to take measures to eliminate discrimination against women and girls in education, eliminate stereotypes referenced in textbooks, protect girls from child abuse, including sexual harassment in educational settings, and to promote literacy amongst girls, education and training for their benefit, and extended matriculation of girls in schools and training institutions).

59. See ICECSR, *supra* note 32, art 15(1)(a) ("The States Parties . . . recognize the right of everyone . . . [t]o take part in cultural life[.]"); Convention on the Rights of the Child, *supra* note 4, art. 30 (stating that children belonging to minority or indigenous groups may not be denied the right to enjoy his or her culture); ICRMW, *supra* note 34, art. 31; (ensuring respect for migrant workers' and their families' cultural identity by prohibiting States from preventing workers from maintaining cultural links to their home country); ICRPD, *supra* note 37, art. 30 (recognizing the rights of persons with disabilities, including children, to take part in cultural life and requiring States to ensure access to cultural materials, including creative forms of cultural expression as well as sporting, recreational, and tourist activities); Banjul Charter, *supra* note 40, art. 17(2) ("Every individual may freely, take part in the cultural life of his community."); Children's Charter, *supra* note 5, art. 12(2) ("States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.").

60. Convention on the Rights of the Child, *supra* note 4, art. 33; Children's Charter, *supra* note 5, art. 28.

61. See Maputo Protocol, *supra* note 46, art. 1(k) (broadly defining "women" to include girls).

which includes the right to a peaceful existence and to participate in the promotion of peace;<sup>62</sup> the right to food security, which encompasses the “right to nutritious and adequate food,” and “access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food”;<sup>63</sup> the right to adequate housing and to “acceptable living conditions in a healthy environment”;<sup>64</sup> and “the right to live in a positive cultural context.”<sup>65</sup>

#### D. A DISCOURSE ON OBLIGATIONS IMPOSED BY THE AGENDA

##### 1. *The Obligations Framework within the UN System*

At the global level, the children’s rights agenda imposes a number of general and specific obligations. Generally, States are under an obligation to recognize and give effect to the protected rights, without distinction of any kind.<sup>66</sup> In the realm of civil rights, this obligation is hardly contentious. However, socio-economic rights have generated much controversy, which stems from the fact that they are to be realized progressively.<sup>67</sup> The leading authority on this point is Article 2(1) of the ICESCR, which obliges each State Party “to take steps . . . to the maximum of its available resources, with a

62. *Id.* art. 10.

63. *Id.* art. 15.

64. *Id.* art. 16.

65. *Id.* art. 17.

66. *See, e.g.*, ICCPR, *supra* note 31, arts. 2, 3 (requiring that each State Party take the necessary steps to adopt measures that will give effect to the rights guaranteed under the ICCPR and to ensure effective remedies without distinction); ICESCR, *supra* note 32, arts. 2(1)-(2), 3 (noting that each State Party should use all available resources, including international assistance, to achieve “the full realization of the rights guaranteed in [the ICESCR]” equally for all people); CEDAW, *supra* note 22, arts. 2, 3 (commanding State Parties to condemn discrimination against women and take immediate action to institute policies ending such discrimination in “political, social, economic, and cultural fields”); Convention on the Rights of the Child, *supra* note 4, art. 2 (stating that States Parties must take all necessary measures to protect children against discrimination).

67. *See generally* Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT’L L. REV. 35 (2006) (highlighting the difficulty and difference in enforcing economic and cultural rights as compared to enforcing civil and political rights, and noting in particular that economic and cultural rights are generally viewed more as a matter of policy than law, involve more complex issues, and are progressively implemented rather than absolutely and immediately guaranteed).

view to achieving progressively the full realization of the protected rights . . . .”<sup>68</sup>

In 1990, the Committee on Economic, Social and Cultural Rights (“CESCR” or “Committee”) had the occasion to examine progressive realization of the CESCR’s provisions. In the culminating General Comment, the committee made a number of significant observations.<sup>69</sup> First and foremost, it opined that incremental progress does not, in any way, imply postponement of the State Party’s obligation to implement the rights; the State has an obligation to move as expeditiously as possible towards the goal of full realization of the rights.<sup>70</sup> Secondly, it observed that, in implementing the rights, the State is under an obligation to, *inter alia*, commit “the maximum available resources” at its disposal,<sup>71</sup> adopt appropriate measures to implement the rights,<sup>72</sup> and refrain from adopting any retrogressive measures, unless the same can be justified in light of the prevailing economic conditions.<sup>73</sup>

Thirdly, the Committee was of the view that every State Party has a “minimum core obligation” to, within its available resources, “ensure the satisfaction of, *at the very least*, minimum essential levels of each [right].”<sup>74</sup> More importantly, it opined that every State Party has “obligations which are of immediate effect” to, among other things, ensure non-discrimination in the enjoyment of rights,<sup>75</sup> guarantee the provision of effective remedies for violations,<sup>76</sup>

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68. ICECSR, *supra* note 32, art. 2(1).

69. U.N. Comm. on Econ., Soc. & Cultural Rts. (CESCR), General Comment No. 3, ¶ 1, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter CESCR General Comment] (noting that Article 2 of the ICESCR “must be seen as having a dynamic relationship with all of the other provisions of the Covenant.”).

70. *Id.* ¶ 9.

71. *Id.* ¶ 10.

72. *See id.* ¶¶ 3-7 (acknowledging that “appropriate measures,” which may include legislative, administrative, financial, educational, and social measures, must be decided by each State, but noting that the final decision of whether all appropriate measures have been taken remains with the Committee).

73. *Id.* ¶ 9.

74. *Id.* ¶ 10 (emphasis added). The Committee stressed that where the State attempts to “attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, *as a matter of priority*, those minimum obligations.” *Id.* (emphasis added).

75. *Id.* ¶ 1.

76. *See id.* ¶ 5 (noting that the right to an effective remedy is guaranteed by

develop performance plans and strategies,<sup>77</sup> and monitor progress of the rights' implementation.<sup>78</sup>

In 1998, the Committee had the opportunity to elaborate further on certain elements of the States Parties' obligations.<sup>79</sup> The following year, it seized yet another opportunity to further elucidate the regime. Addressing itself to the right to adequate food, one of the highly-contentious social rights, it developed the now widely-referenced three-tier framework: it opined that "[t]he right to adequate food, like any other human right, imposes three types or levels of obligations on States Parties: the obligations to *respect*, to *protect* and to *fulfil*."<sup>80</sup>

It suffices to mention that, though developed in reference to the right to adequate food, the above framework applies to all ICESCR rights; the Committee's use of the words "like any other right" tells it all. Further, it can be plausibly argued that the framework may be applied to the relevant provisions in all other UN instruments guaranteeing socio-economic rights for children.<sup>81</sup> In fact, the approach has garnered the express approval of the UN Committee on the Rights of the Child ("CRC"), the oversight mechanism for the UNICEF Convention.<sup>82</sup>

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provisions of the ICESCR and other instruments).

77. *Id.* (suggesting that provisions requiring immediate application of effective remedies, which include judicial remedies in addition to legislative, are inherently self-executing).

78. *Id.* ¶ 11 (noting that even if available resources are inadequate, this obligation still remains).

79. *See generally* E.S.C. Comment 9, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998) (focusing on the domestic application of the ICESCR and finding that although the ICESCR does not explicitly state that judicial remedies are an appropriate means by which to grant the rights guaranteed under the ICESCR, any other means used could be ineffective if not reinforced with judicial remedies).

80. E.S.C. Comment 12, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (emphasis in original).

81. *See* Wabwile, *supra* note 51, at 31-34 (noting the existence of more than one level of obligations to ensure social and economic rights to different individuals and groups of people, and discussing the three-tiered framework as a way to address the rights both on a general level and on a level specifically targeted toward certain groups).

82. *See* C.R.C. Comment 5, ¶¶ 5, 8, U.N. Doc. CRC/GC/2003/5 (Nov. 2003) (agreeing with CESCR's assertion that even when a State's resources are inadequate, the State has an obligation to use all available resources toward realizing the rights guaranteed under the particular convention being implemented).

In addition to the general and specific obligations relating to implementation of the protected rights, the various UN instruments oblige the State Parties to submit periodic reports detailing the measures adopted to give effect to the protected rights, as well as the progress in the realization or non-realization of the rights.<sup>83</sup>

## 2. *The Obligations Framework within the African Regional System*

By and large, the African obligations framework resembles that of the UN, with the prevailing instruments generally obliging the respective States Parties to recognize the protected rights and take those steps necessary to give effect to the rights.<sup>84</sup> Further, some instruments spell out express obligations for the subscribing States. For instance, to ensure full realization of the right to enjoyment of the best attainable state of physical and mental health, the Banjul Charter obliges States Parties to “take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”<sup>85</sup> The Children’s Charter is equally replete with specific obligations for States Parties,<sup>86</sup> as is the Maputo Protocol.<sup>87</sup>

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83. See, e.g., ICCPR, *supra* note 31, art. 40 (on reports to the Human Rights Committee); ICESCR, *supra* note 32, art. 16 (on reports to the Economic and Social Council, then the governing body of the ICESCR); CEDAW, *supra* note 22, art. 18 (on reports to the Committee on the Elimination of Discrimination Against Women, CEDAW); Convention on the Rights of the Child, *supra* note 4, art. 44 (on reports the CRC); ICRPD, *supra* note 37, art. 35 (on reports to the Committee on the Rights of Migrant Workers, CRMW).

84. E.g., Banjul Charter, *supra* note 40, art. 1; Children’s Charter, *supra* note 5, art. 1(1).

85. See Banjul Charter, *supra* note 40, art. 16(2). See also *id.* arts. 18(3), 25 (obligating States to take measures to eliminate discrimination against women, ensure protection of women’s and children’s rights, and requiring that States enact measures “to promote and ensure through teaching, education and publication, respect” for the Charter rights).

86. See, e.g., Children’s Charter, *supra* note 5, arts. 11(3), 15(2), 21(1) (compelling States to take specific measures to progressively ensure the full realization of the right to education, such as providing free basic education and taking measures to encourage regular attendance at schools; requiring States to take legislative and administrative measures to eliminate child labor, taking into account the International Labor Organization’s instruments relating to children; and obligating States to take measures to protect children from harmful socio-cultural practices, particularly those harmful the health or life of the child and those that discriminate against the child on the basis of sex or any other status).

87. See, e.g., Maputo Protocol, *supra* note 46, arts. 2, 3, 5 (requiring States to

In October 2001, in its widely-cited decision in the *SERAC* ("Ogoni") case,<sup>88</sup> the African Commission on Human and Peoples' Rights (ACHPR) drew from the CESCRC's philosophy to hold that Banjul Charter imposes four layers of duties on every State Party: *the duty to respect, the duty to protect, the duty to promote, and the duty to fulfill*.<sup>89</sup> In expounding these responsibilities, the Commission opined that the duty to *respect* requires the State Party to refrain from doing anything that would jeopardize realization of rights;<sup>90</sup> the duty to *protect* requires the State Party to ensure "an effective interplay of laws and regulations" to enable full realization of the rights;<sup>91</sup> the duty to *promote* requires the State Party to "promot[e] tolerance, rais[e] awareness, and . . . [build] infrastructures;"<sup>92</sup> and the duty to *fulfill* implies a "positive expectation on the part of the State to move its machinery towards the actual realisation of the rights."<sup>93</sup>

It must be noted that, as a corollary to the obligation to ensure realization of the protected rights, all the African human rights instruments oblige their respective States Parties to submit periodic reports detailing progress in the implementation of the rights.<sup>94</sup>

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take legislative, institutional, and other appropriate measures to eliminate discrimination against women, such as amending their constitutions to include equality between men and women; integrating a gender perspective in policy decisions; compelling States to adopt measures protecting the dignity of women and protecting women from all forms of violence; and necessitating that States take measures to eliminate all harmful practices that negatively affect women's human rights, by taking actions such as creating public awareness and educational outreach programs on discrimination against women and prohibiting all forms of female genital mutilation).

88. *The Soc. and Econ. Rights Action Ctr. & Ctr. for Econ. and Soc. Rights v. Nigeria*, Comm. No. 155/96, 30th Ordinary Session, The Gambia (Oct. 13-21, 2001).

89. *Id.* ¶ 44.

90. *Id.* ¶ 45 (adding that the State "should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.").

91. *Id.* ¶ 46.

92. *Id.* (noting that doing so ensures that individuals may enjoy all human rights as well as exercise such rights and freedoms).

93. *Id.* ¶ 47.

94. *See, e.g.*, Banjul Charter, *supra* note 40, art. 62 (on reports to the ACHPR); African Charter, *supra* note 5, art. 43 (on reports to the African Committee of Experts on the Rights and Welfare of the Child, ACERWC); Maputo Protocol, *supra* note 46, art. 26 (on reports in accordance with article 62 of the Banjul Charter).

## E. BASIC PRINCIPLES OF THE AGENDA

Whether at the global or regional level, the children's rights agenda is premised on four fundamental principles which, if taken as a whole, provide the basic yardstick by which all State actions have to be judged.<sup>95</sup> These are:

- *the principle of non-discrimination* — which, implying that all rights universally apply to all children, obliges the State to protect children from all forms of discrimination in the enjoyment of the protected rights;<sup>96</sup>
- *the “best interests” principle* — which requires all persons and State authorities to, consider the best interests of the child as a primary consideration in all actions or measures directed at the child;<sup>97</sup>

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95. See Deirdre Fottrell, *Children's Rights, in A HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 167, 173 (Angela Hegarty & Siobhan Leonard, eds., 1999) (discussing the four principles underlying the Convention on the Rights of the Child: the “best interests of the child” as the first consideration in all matters, the duty of States to ensure a child's opinions are considered, the importance of being cognizant of a child's evolving capacities, and guaranteeing the Convention's rights to all children without discrimination); GERALDINE VAN BUEREN, *INTERNATIONAL DOCUMENTS ON CHILDREN* 451-53 (1998) (describing the “triangle of rights” underlying the Convention on the Rights of the Child: “the ‘best interests’ rule, non-discrimination, and the right to participate . . . reinforce each other to [encourage the] the survival and development of children”); see also GERALDINE VAN BUEREN, *INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 38-51 (1995) (pointing out the Convention on the Rights of the Child's failure to include children's equality before the law, but noting this “lacuna is not fatal” to the non-discrimination clause because the provision prohibits “all forms of discrimination” against children, and finding that the “best interests” of the child and the evolving capacities of the child “are umbrella principles underlining the exercise of all the rights in the Convention”).

96. Convention on the Rights of the Child, *supra* note 4, art. 2; Children's Charter, *supra* note 5, art. 3. See generally BRUCE ABRAMSON, *ARTICLE 2: THE RIGHT OF NON-DISCRIMINATION* (2008) (focusing on the Convention on the Rights of the Child's non-discrimination article through comparison to other prohibitions of discrimination, examining the scope of the article, as well as discussing the justiciability and application of the article's specific grounds for discrimination); CURTIS F. DOEBBLER, *THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL LAW* (2007) (exploring non-discrimination as applied to all people, not solely children, and noting its presence in almost every human rights instrument to protect against discrimination on grounds such as race, gender, nationality, age, social status, and disability).

97. Convention on the Rights of the Child, *supra* note 4, art. 3(1) (emphasis added); Children's Charter, *supra* note 5, art. 4 (requiring that the best interests of

- *the principle of survival and development of the child* — which obliges the State “to ensure, to the maximum extent possible, the survival, protection and development of the child;”<sup>98</sup> and
- *the principle of participation* — which entitles every child who is able to express his or her own views to do so in all matters touching on the child’s rights and welfare.<sup>99</sup>

### III. IMPLEMENTING THE CHILDREN’S RIGHTS AGENDA IN KENYA: AN INVENTORY OF THE ACHIEVEMENTS

#### A. NORMATIVE ACHIEVEMENTS

##### 1. *Subscription to a Majority of Global and Regional Instruments*

Kenya subscribes to a plethora of global and regional instruments relating to children’s rights. At the UN level, she is party to a host of

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the child be *the* primary consideration) (emphasis added). See generally Joachim Wolf, *The Concept of the ‘Best Interest’ in Terms of the UN Convention on the Rights of the Child*, in THE IDEOLOGIES OF CHILDREN’S RIGHTS 125-134 (Michael Freeman & Philip E. Veerman eds., 1992) (analyzing whether the “best interest” concept in the Convention on the Rights of the Child is legally binding, and concluding that the “best interest” concept can only be seen to some extent as a “coherent legal concept shaped by contextual relations and different categories of individual human rights and State obligations” because the concept still requires further development).

98. African Charter, *supra* note 5, art. 5(2); Convention on the Rights of the Child, *supra* note 4, art. 6(2); see also PHILIP E. VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD 3-10, 189-91 (1992) (exploring the history of the concept of “childhood” and arguing that ideas concerning the rights of the child depend upon the prevailing “image of childhood”, which affects the way their human rights are protected, and noting the grave issue of child mortality, particularly in developing countries).

99. Convention on the Rights of the Child, *supra* note 4, art. 12; Children’s Charter, *supra* note 5, art. 7 (referring to this “freedom of expression”). See Louise Ehlers & Cheryl Frank, *Child Participation in Africa*, in CHILDREN’S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 111-128 (Julia Sloth-Nielsen, ed., 2008) (examining the success of efforts to implement child participation in Africa, taking account of the ethics of child participation and whether such efforts have actually allowed African children to engage with the daily problems they face such as poverty, conflict, HIV/AIDS, and government corruption, which make recognizing children’s rights more difficult).

legally-binding instruments including: the CEDAW;<sup>100</sup> the UNICEF Convention;<sup>101</sup> the OP-CRC-AC;<sup>102</sup> the UN Refugee Convention;<sup>103</sup> the ICERD;<sup>104</sup> the ICCPR and the ICESCR;<sup>105</sup> the Torture Convention;<sup>106</sup> the Palermo Protocol;<sup>107</sup> and the ICRPD.<sup>108</sup>

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100. CEDAW, *supra* note 22. Kenya acceded to the Convention on March 9, 1984, over two years after the treaty entered into force. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Convention on the Elimination of All Forms of Discrimination Against Women* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

101. Convention on the Rights of the Child, *supra* note 4. Kenya signed the Convention on January 26, 1990, and ratified it on July 30, 1990. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Convention on the Rights of the Child* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

102. OP-CRC-ACG.A. Res. 54/263, *supra* note 35. Kenya signed the Protocol on September 8, 2000 and ratified it on January 28, 2002. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en).

103. UN Refugee Convention, *supra* note 28. Kenya acceded to the Convention on May 16, 1966. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Convention Relating to the Status of Refugees* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg\\_no=V~2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en).

104. ICERD, *supra* note 30. Kenya acceded to the treaty on September 13, 2001, three decades after it entered into force. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: International Convention on the Elimination of All Forms of Racial Discrimination* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en).

105. ICCPR, *supra* note 31; ICESCR, *supra* note 32. Kenya acceded to the two covenants on May 1, 1972. ICCPR, *supra* note 31; ICESCR, *supra* note 32; United Nations, *Status of Conventions: Multilateral Treaties Deposited with the Secretary General, Status of Conventions: International Covenant on Civil and Political Rights* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en); United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: International Covenant on Economic, Social and Cultural Rights* (July 24, 2011), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

106. Torture Convention, *supra* note 33. Kenya acceded to the treaty on

Subscription to these instruments is buttressed by the various General Assembly resolutions on the subject which, at least morally, bind Kenya.

At the regional level, Kenya is party to at least four instruments relevant to the agenda: the OAU Refugee Convention,<sup>109</sup> the Banjul Charter,<sup>110</sup> the Children's Charter,<sup>111</sup> and the Protocol establishing the Arusha-based African Court on Human and Peoples' Rights (ACtHPR) ("Ouagadougou Protocol").<sup>112</sup> The various decisions,

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February 21, 1997, close to a decade after the treaty entered into force. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (July 29, 2012), UNITED NATIONS TREATY COLLECTION,

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-9&chapter=4&lang=en).

107. Convention Against Transnational Crime, *supra* note 27. Kenya ratified the Protocol on January 5, 2005. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-12-a&chapter=18&lang=en).

108. ICRPD, *supra* note 37. Kenya signed the treaty on March 30, 2006 and ratified it on May 19, 2008. *Id.*; United Nations, *Multilateral Treaties Deposited with the Secretary General, Status of Conventions: Convention on the Rights of Persons with Disabilities* (July 29, 2012), UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-15&chapter=4&lang=en).

109. Convention Governing the Specific Aspects of Refugee Problems in Africa, O.A.U. Doc. CAB/LEG/24.3, *supra* note 38. Kenya signed the Convention on September 10, 1969 but only ratified it on June 23, 1992. *Id.*; African Union, *List of Countries Which Have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (Nov. 11, 2009), available at [http://www.au.int/en/sites/default/files/6refugee\\_Problems\\_in\\_Africa\\_0.pdf](http://www.au.int/en/sites/default/files/6refugee_Problems_in_Africa_0.pdf).

110. Banjul Charter, *supra* note 40. Kenya acceded to the Charter on January 23, 1992. *Id.*; African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights* (Apr. 2, 2010), available at [http://www.au.int/en/sites/default/files/93African\\_Charter\\_on\\_Human\\_and\\_Peoples\\_Rights.pdf](http://www.au.int/en/sites/default/files/93African_Charter_on_Human_and_Peoples_Rights.pdf).

111. Children's Charter, *supra* note 5. Kenya acceded to the Charter on July 25, 2000. *Id.*; African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child*, available at [http://www.au.int/en/sites/default/files/96Welfare\\_of\\_the\\_Child.pdf](http://www.au.int/en/sites/default/files/96Welfare_of_the_Child.pdf).

112. Protocol to the African Charter on Human and Peoples' Rights on the

declarations, and plans of action adopted within the OAU/AU framework intensify Kenya's duties under each instrument.

## 2. *Constitutional Entrenchment of Children's Rights*

Unlike the Old Constitution, which made no mention of children, let alone their rights, the New Constitution, in addition to the general rights relevant to the children's rights agenda,<sup>113</sup> elaborately guarantees a number of specific rights for young people.<sup>114</sup> More importantly, it entrenches the "best interests" principle.<sup>115</sup>

## 3. *Legislation on Children's Rights*

Kenya has adopted much legislation touching on the children's rights agenda. The most important is the Children Act, which domesticated the UN Convention on the Rights of the Child and the Children's Charter.<sup>116</sup> In addition to restating safeguards for the rights and welfare of children,<sup>117</sup> the Act — which consolidates the

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Establishment of an African Court on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG//66/5 (Jan. 10, 1998). Kenya ratified the Protocol on April 2, 2004. *Id.*; African Union, *List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, available at <http://www.au.int/en/sites/default/files/992achpr.pdf>.

113. For instance, the New Constitution recognizes, among others, the right to life (art. 26); the right to equality and non-discrimination (art. 27); the right to "a clean and healthy environment" (art. 42); the right to the "highest attainable standard of health" (art. 43(1)(a)); the right to "accessible and adequate housing, and to reasonable standards of sanitation" (art. 43(1)(b)); the right "to be free from hunger" (art. 43(1)(c)); the right "to clean and safe water in adequate quantities" (art. 43(1)(d)); and the right "to social security" (art. 43(1)(e)). CONSTITUTION, arts. 26, 27, 42, 43(1)(a)-(e) (2010) (Kenya).

114. These include the right to a name and nationality (art. 53(1)(a)); the right to education, including "free and compulsory basic education" (arts. 43(1)(f), 53(1)(b)); the right to "basic nutrition, shelter and health care" (art. 53(1)(c)); the right "to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor" (art. 53(1)(d)); the right "to parental care and protection" (art. 53(1)(e)); and the right "not to be detained, except as a measure of last resort" (art. 53(1)(f)). *Id.* arts. 43(1)(f), 53(1)(a)-(f).

115. *See id.* art. 53(2).

116. *See* Children's Act, *supra* note 10, at pmb1.

117. *See id.* ¶¶ 3-22 (safeguarding children's rights such as the rights to life; non-discrimination; education; health care; name and nationality; leisure and recreation; privacy; and protection from violence, abuse, child labor, harmful cultural practices such as female circumcision or child marriage, sexual

hitherto fragmented legislation on children<sup>118</sup> — provides for a number of critical issues, including: parental responsibility;<sup>119</sup> judicial orders protecting children;<sup>120</sup> foster care;<sup>121</sup> and proceedings relating to child criminal offenders.<sup>122</sup>

Other legislation with a general bearing on the children's rights agenda in Kenya are: the Persons with Disabilities Act (“Disability Act”),<sup>123</sup> which establishes safeguards for the rights and welfare of all persons with disabilities (“PWDs”);<sup>124</sup> the Sexual Offences Act,<sup>125</sup> which aims to protect all persons from sexual violence;<sup>126</sup> and the Refugees Act,<sup>127</sup> which provides safeguards for the rights and welfare of all refugees in Kenya.<sup>128</sup>

#### 4. Policies and Programs Touching on the Agenda

In the last five years or so, Kenya has come up with a number of official policies and programs touching on various aspects of the agenda. In the health sector, for instance, the Ministry of Public Health waived maternity fees in all public health facilities in July 2006, thereby making maternal health services afforded to all.<sup>129</sup> In September 2006, the Ministry launched the *Komesha Malaria, Okoa Maisha* (Swahili for “Stop Malaria, Save Lives”) initiative, which seeks to intensify malaria control through free provision of mosquito nets to families in malaria-prone regions.<sup>130</sup> Since June 2007 the

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exploitation, drugs, and torture).

118. See *id.* § 200 (repealing laws from the Sixth Schedule to be replaced with the Children's Act).

119. *Id.* §§ 23-29.

120. *Id.* §§ 113-17.

121. *Id.* §§ 147-53.

122. *Id.* §§ 184-94.

123. The Persons With Disabilities Act, No. 14 (2007), KENYA GAZETTE SUPPLEMENT No. 11.

124. *Id.* § 6 (including protection of the rights of children with disabilities).

125. The Sexual Offences Act, (2007) Cap. 3 (Kenya).

126. *Id.* pmbl.

127. The Refugees Act, (2010) Cap. 13 (Kenya).

128. *Id.* § 16(1)(a) (extending rights guaranteed in those international conventions binding Kenya to refugees within its borders).

129. See Jabu Tugwana, *Waiving maternity fees improves prospects for Kenyan women and children*, UNICEF (Jan. 8, 2007), [http://www.unicef.org/infobycountry/kenya\\_42384.html](http://www.unicef.org/infobycountry/kenya_42384.html).

130. See *Current Control Strategy*, DIV. OF MALARIA CONTROL (July 20, 2011), <http://www.nmcp.or.ke/section.asp?ID=5> [hereinafter *Current Control Strategy*].

government, in collaboration with UNICEF, has been running the Child-Mother Health and Nutrition Weeks initiative. Under its popular *Malezi Bora* (Swahili for “Good Nurturing”) banner, the initiative seeks to promote routine integrated healthcare for children under five years old (“under-fives” or “U5s”), expectant women, and lactating mothers.<sup>131</sup> On November 4, 2009, on the sidelines of the Fifth Pan-African Malaria Conference, the Ministry launched the *National Malaria Strategy, 2009-2017*.<sup>132</sup>

Remarkable achievements have also been made in the education sector. For instance, in January 2003, the government introduced the Free Primary Education (“FPE”) program, which benefitted over 7.6 million children by 2006.<sup>133</sup> In January 2005, the government issued Sessional Paper No. 1 of 2005, outlining its policy on education, training and research.<sup>134</sup> Later in July, the Kenya Education Sector Support Program 2005-2010 (“KESSP”) <sup>135</sup> was adopted as a sequel to the Paper.<sup>136</sup> In 2006, the government adopted the Early Childhood and Development Policy (“ECD Policy”).<sup>137</sup> Then, in July 2009, it

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131. See, e.g., Jane Kariuki, *Malezi Bora 2010: Another Boost to Maternal and Child Survival in Kenya*, UNICEF (May 4, 2010), [http://www.unicef.org/kenya/reallives\\_5713.html](http://www.unicef.org/kenya/reallives_5713.html) (reviewing Malezi Bora Weeks, and noting that the event has provided healthcare to hundreds, if not thousands, of women and children).

132. *National Malaria Strategy 2009-2017*, DIV. OF MALARIA CONTROL (July 2009), available at [http://www.c-hubonline.org/sites/default/files/resources/main/Kenya\\_National\\_Malaria\\_Strategy\\_2009-2017.pdf](http://www.c-hubonline.org/sites/default/files/resources/main/Kenya_National_Malaria_Strategy_2009-2017.pdf).

133. See WORLD BANK & UNICEF, ABOLISHING SCHOOL FEES IN AFRICA: LESSONS FROM ETHIOPIA, GHANA, KENYA, MALAWI, AND MOZAMBIQUE 127, 131-36 (2009) (summarizing the impact of FPE on increasing Kenyan student enrollment in public primary schools).

134. See, e.g., PARLIAMENT OF THE REPUBLIC OF KENYA, SESSIONAL PAPERS, [http://www.parliament.go.ke/index.php?option=com\\_content&view=article&id=107&Itemid=92](http://www.parliament.go.ke/index.php?option=com_content&view=article&id=107&Itemid=92) (last updated June 11, 2010).

135. KENYA MINISTRY OF EDUC. SCI. & TECH., KENYA EDUCATION SECTOR SUPPORT PROGRAMME ii, iii (2005), available at <http://www.education.go.ke/Documents/asp?docID=42>.

136. *Id.*

137. MINISTRY OF EDUCATION, NATIONAL EARLY CHILDHOOD DEVELOPMENT POLICY FRAMEWORK vi, 1 (2006), available at <http://www.education.go.ke/Documents/asp?docID=866> (relaying that the ECD policy framework “provides a co-ordination mechanism and explicitly defines the role of parents, communities, various Government ministries and department, development partners and other stakeholders in the provision of ECD services.”).

also adopted the Special Needs Policy.<sup>138</sup> More recently, in January 2010, the government launched the Mobile Schools Program, targeting pastoralist children who would otherwise not have made it to the formal schools.<sup>139</sup>

Additional achievements have been registered at the Office of the Vice President and Ministry of Home Affairs. For instance, in 2004 the Ministry launched a cash transfer program to provide cash directly to families to care for orphans and vulnerable children ("OVCs").<sup>140</sup> In 2005, the Department of Children's Services ("DCS") formulated a draft National Policy on Orphans and Vulnerable Children.<sup>141</sup> The Department has also developed guidelines on child participation.<sup>142</sup> Finally, in 2009, the Ministry formulated a draft National Social Protection Policy.<sup>143</sup>

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138. MINISTRY OF EDUCATION, THE NATIONAL SPECIAL NEEDS EDUCATION POLICY FRAMEWORK, forward (2009), available at <http://www.education.go.ke/Documents/asp?docID=527> (outlining the Special Needs Education Policy Framework, which aims "to improve the quality and access to education provided to children with special needs" so as to increase the participation of people with special needs in national development in general).

139. See Ashley Seagar, *Kenya's Nomads Welcome Mobile Schools*, THE GUARDIAN (Jan. 20, 2010), <http://www.guardian.co.uk/business/2010/jan/20/kenya-mobile-schools-initiative> (explaining that "mobile schools" allow students to break up their lessons throughout the day so as to accommodate their need to help their families with chores at home). But see Will Ross, *Taking the School to Kenya's Nomads*, BBC (Mar. 25, 2010), <http://news.bbc.co.uk/2/hi/8574563.stm> (noting that some are hesitant to welcome the new "mobile schools," fearing their impact on village society).

140. By 2008, the program was active in 17 districts, benefiting about 30,000 OVCs. REPUBLIC OF KENYA & UNICEF, REVIEW OF PROGRESS TOWARDS THE WORLD FIT FOR CHILDREN +5 GOALS IN KENYA 34 (2007) [hereinafter WFFC+5 REPORT]. By 2010, this number was expected to rise to at least 300,000. *Id.*

141. OFFICE OF THE VICE-PRESIDENT AND MINISTRY OF HOME AFFAIRS OF THE REPUBLIC OF KENYA, DRAFT NATIONAL POLICY ON ORPHANS AND VULNERABLE CHILDREN (2005) available at <http://anppcan.org/old/new/resources/anppcan/draft%20national%20policy%20on%20orphans%20and%20vulnerable%20children.pdf>; see National Plan of Action for Orphans and Vulnerable Children 2007-2010, MINISTRY OF GENDER, CHILDREN AND SOCIAL DEVELOPMENT, available at [www.ovcsupport.net/s/library.php?id=942](http://www.ovcsupport.net/s/library.php?id=942).

142. The Right to Participation Pillar, NATIONAL COUNCIL FOR CHILDREN'S SERVICES, <http://www.nccs.go.ke/database/index.php/glossary/category/id/6> (last visited July 30, 2012).

143. See generally *Social Protection Policy*, MINISTRY OF GENDER, CHILDREN AND SOCIAL DEVELOPMENT, <http://www.gender.go.ke/index.php/About-Us/social-protection-policy.html>.

## B. INSTITUTIONAL FRAMEWORK

Over the years, the government has established a number of institutions to implement the children's rights agenda. For instance, in the spirit of implementing the Children Act, in 2002 it set up the children's courts,<sup>144</sup> the National Council for Children's Services ("NCCS"),<sup>145</sup> and a revamped Department of Children's Services.<sup>146</sup> In December 2002, the government established the Kenya National Commission on Human Rights ("KNCHR"),<sup>147</sup> the country's quasi-judicial national human rights institution, whose jurisdiction complements that of other courts and government functions.<sup>148</sup> The Ministry of Gender, Children and Social Development was established in 2008 and serves as the focal point for implementation of the children's rights agenda in Kenya.<sup>149</sup>

Other relevant institutions include the National Commission on Gender and Equality ("NCGE"), which is charged with, *inter alia*, ensuring gender mainstreaming in all aspects of national development,<sup>150</sup> and the National Council for Persons with Disabilities ("NCPWD"), which is charged with promoting of the rights of persons with disabilities and mainstreaming of disability

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144. The Children's Act, *supra* note 10, § 73.

145. *Id.* §§ 30-33.

146. *Id.* § 37(1).

147. The Kenya National Commission on Human Rights Act, No. 9 (2002), KENYA GAZETTE SUPPLEMENT No. 22 § 3(1) (establishing the Commission as "the successor to the Standing Committee on Human Rights.").

148. *See id.* §§ 16, 32(a) (clarifying the functions of the Commission, noting that the Commission may make policy recommendations to Parliament, and barring the Commission from investigating any matter pending before a court or tribunal, and matters between the Kenyan Government and other governments or international organizations). The Commission has since been elevated to a constitutional commission, courtesy of the advent of the new constitutional dispensation. *See* CONSTITUTION, art. 59 (2010) (Kenya) (establishing the Kenya National Human Rights and Equality Commission ("KNHREC"), whose establishment was intended to merge the country's human rights commissions).

149. GOV'T OF KENYA MINISTRY OF GEND., CHILDREN AND SOC. DEV., *Ministry's Mandate*, available at <http://www.gender.go.ke/index.php/About-Us/ministrys-madate.html> (last visited July 31, 2011).

150. The NCGE replaced the National Commission on Gender and Development ("NCGD"), which was charged with, *inter alia*, ensuring gender mainstreaming in all aspects of national development. *See* National Commission on Gender and Development Act, No. 13 (2003) (repealed), KENYA GAZETTE SUPPLEMENT No. 13 § 6(1).

issues into all aspects of national development.<sup>151</sup>

Regardless of their success, the establishment of these institutions is, in itself, one step forward in building the requisite web of institutional framework for implementation of the children's rights agenda in Kenya.

#### IV. IMPLEMENTING THE CHILDREN'S RIGHTS AGENDA IN KENYA: TAKING STOCK OF THE KEY CHALLENGES

##### A. SOCIO-ECONOMIC CHALLENGES

###### 1. *Ethnicized Violence and Armed Conflicts*

Today, one of the issues gravely affecting children in Kenya is ethnicized violence and conflicts. For instance, amidst the enduring cycles of violent cattle rustling and the attendant armed reprisals, generations of people living in Kenya's pastoral areas do not know what it is like to live in peace.<sup>152</sup> More importantly, since the first multi-party elections in December 2002, the advent of every electioneering period has meant untold grief for many, blighted by ethnicized violence. The climax came in the aftermath of the hotly contested December 2007 elections.<sup>153</sup>

Sadly, as ethnic conflict continues to grip the nation, the enduring cycle of violence has meant untold sufferings for children. On one hand, they are *victims*, suffering in a number of obvious ways: brutal killings; loss of caregivers; deterioration of food security and health conditions, especially for HIV positive children on anti-retroviral

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151. See The Persons With Disabilities Act, No. 14 (2007), KENYA GAZETTE SUPPLEMENT No. 11 § 6 (imparting on the Government the responsibility to allow persons with disabilities to "achiev[e] the full realization" of rights guaranteed to the general population).

152. See, e.g., KENYA HUMAN RIGHTS COMM'N, THE FORGOTTEN PEOPLE REVISITED: INSECURITY IN MOYALE AND MARSABIT DISTRICTS 45-73 (2000)[hereinafter FORGOTTEN PEOPLE REVISITED] (revealing stories of ethnic-based violence throughout Kenya in the 1990s).

153. See generally OFFICE OF GOVERNMENT SPOKES PERSON, REPORT OF THE COMMISSION OF INQUIRY INTO THE POST-ELECTION VIOLENCE (2008) [hereinafter CIPEV Report] (claiming the "violence that shook Kenya after the 2007 general elections was unprecedented [and] by far the most deadly and the most destructive violence ever experienced in Kenya").

("ARV") treatment;<sup>154</sup> disruption of education activities;<sup>155</sup> sexual violence and physical assault;<sup>156</sup> and uprooting from their homes.<sup>157</sup> On the other hand, children have been frequently cited as *perpetrators* of violence: many have been recruited into tribal-based militias to kill, torture, sexually assault, and commit many other horrendous acts violating the rights of innocent civilians, including their fellow children.<sup>158</sup>

## 2. Poverty and Economic Injustice

Sometime in 1969, the slain Kenyan lawmaker Josiah Mwangi Kariuki ("Kariuki) described Kenya as "a nation of 10 millionaires and 10 million beggars."<sup>159</sup> Kariuki appeared to be speaking prophetically of the current times; more than ever before, his words echo resoundingly as Kenya gradually transforms into a society in which only the fiercest survive. It is vividly clear that over the years the country's apparent economic gains have only benefitted a few elites, while condemning the vast majority into the vicious cycle of poverty. Today, about 50 percent of Kenyans live in abject deprivation,<sup>160</sup> with no clear prospects of recovery.<sup>161</sup> Consequently,

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154. See Human Rights Watch, *Kenya: Make HIV Treatment for Children a Priority* (Dec. 16, 2008), <http://www.hrw.org/en/news/2008/12/15/kenya-make-hiv-treatment-children-priority> (describing local health facilities' failures to provide consistent supplies of anti-retroviral treatment to children and the way in which post-election violence has exacerbated the problem).

155. See Juliette Otieno & Pamella Sittoni, *Following Post-election Conflict, Thousands of Children Miss the First Day of School*, UNICEF (Jan. 24, 2008), [http://www.unicef.org/infobycountry/kenya\\_42663.html](http://www.unicef.org/infobycountry/kenya_42663.html) (reporting that thousands of children missed the first day of school due to post-election violence and that the first day of class was used as a day to share experiences rather than engage in normal classroom activities).

156. CIPEV Report, *supra* note 153, at 237 ("[T]he Commission heard tales of family members being forced to stand by and witness their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed: innocent victims contracting HIV AIDS after being sexually assaulted because the breakdown of law and order and the deteriorating security situation kept them from accessing medical care soon enough to prevent it.").

157. *Id.* at 351 (noting that post-election violence displaced around 350,000 people).

158. *Id.* at 33-35 (describing the susceptibility of unemployed Kenyan youth to gang recruitment).

159. Biography of J.M. Kariuki, MAKINGOFANATION.COM, <http://makingofanation.com/biographies/jm-kariuki> (last visited June 26, 2011).

160. According to the UN Development Program ("UNDP"), with a human

many parents and guardians are unable to meet the basic needs of children in their care.

In light of this, it is hardly surprising that about thirty percent of Kenyan girls have turned to abhorrent commercial sex work,<sup>162</sup> with hundreds of thousands joining the club of “street children.”<sup>163</sup> More importantly, poverty is emerging as one of the key drivers of child sale and trafficking in the country; it is not uncommon for desperate parents to sell their children for as little as 12,000 Kenyan Shillings (about USD 128).<sup>164</sup>

### 3. *The Enduring Culture of Corruption*

Over the years, corruption has been deeply embedded in Kenya's public life. Recently, the corruption of Kenyan officials was the subject of leaked U.S. cables.<sup>165</sup> The country has a bribery index of 31.9 percent,<sup>166</sup> and a Corruption Perceptions Index (“CPI”) score of

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development index of 0.470, Kenya ranks 128th globally out of 169 countries ranked and fifteenth in Africa out of fifty-one countries ranked. U.N. Dev. Program, *Kenya: Country Profile of Human Development Indicators*, <http://hdrstats.undp.org/en/countries/profiles/KEN.html> (last visited July 30, 2012) [hereinafter Kenya: HDI Profile].

161. *Compare* Kenya: Progress by Goal, MDG MONITOR, [http://www.mdgmonitor.org/country\\_progress.cfm?c=KEN&cd=404](http://www.mdgmonitor.org/country_progress.cfm?c=KEN&cd=404) (last visited July 30, 2012) (outlining poverty goals for reduction in poverty metrics by 2015), *with* Kenya: HDI Profile, *supra* note 160 (showing Kenya is far from achieving target reductions in many poverty metrics).

162. Chris Niles, *Poverty Drives Kenyan Girls into Sex Work*, UNICEF (Nov. 24, 2008), [http://unicef.org/infobycountry/kenya\\_46571.html](http://unicef.org/infobycountry/kenya_46571.html).

163. WFFC+5 REPORT, *supra* note 140, at 29.

164. Stella Mwangi, *Want to Buy a Child? Bring Sh12,000*, THE STANDARD, <http://standardmedia.co.ke/InsidePage.php?id=2000020273&cid=4> (last visited July 30, 2012) [hereinafter *Want to Buy a Child?*] (describing an undercover operation that exposed a nineteen-year-old mother trying to sell her newborn baby because she could not afford to care for him); *see also* Currency Conversion from 12,000 Kenyan Shillings to U.S. Dollars on August 30, 2011, XE, <http://www.xe.com> (use “Universal Currency Conversion”).

165. *See* U.S. Embassy Nairobi, *Visas Donkey: Corruption 212(F) Visa Denial* (Sep. 1, 2009), *available at* <http://wikileaks.ch/cable/2009/09/09NAIROBI1829.html> (revealing numerous corruption allegations against Henry K. Kosgey, a long-serving Kenyan politician); U.S. Embassy Nairobi, *Visas Donkey: Corruption 212(F) Visa Revocation* (Sep. 1, 2009), *available at* <http://wikileaks.ch/cable/2009/09/09NAIROBI1830.html> (describing how Amos Wako, Kenya's Attorney-General, reportedly benefited from official corruption in the government while using his position to frustrate the anti-corruption crusade).

166. *See* TRANSPARENCY INT'L – KENYA (TI-KENYA), EAST AFRICAN BRIBERY

2.1 on a scale of 1-10, with 10 being the least corrupt.<sup>167</sup>

Kenya's prevalent corruption, which has for long plagued the country's economy,<sup>168</sup> has had an immense impact on various aspects of the nation's socio-economic life.<sup>169</sup> For instance, millions of children have been denied a chance at education as public funds are embezzled with reckless abandon;<sup>170</sup> healthcare continually deteriorates as vital infrastructure suffers neglect;<sup>171</sup> and, more importantly, an overwhelming proportion of Kenyans have been condemned to the curse of chronic poverty, and continue to languish in abject deprivation, misery, and socio-economic inequality.<sup>172</sup>

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INDEX 2010 14 (2010). The "bribery index" is a global tool utilized by TI to measure the extent and magnitude of bribery in a country, taking into account, for instance, the likelihood of encountering bribery-demand situations, as well as the prevalence, severity, impact, and frequency of bribery.

167. TRANSPARENCY INT'L, GLOBAL CORRUPTION PERCEPTIONS INDEX 2010 3 (2010), <http://www.transparency.org>. (establishing the CPI, the degree to which corruption is perceived to exist among public officials and politicians, measured on a scale of 0 to 10, with the lowest score denoting higher corruption).

168. *See generally* MICHELA WRONG, IT'S OUR TIME TO EAT: THE STORY OF A KENYAN WHISTLE-BLOWER (2009) (narrating the experiences of the once-exiled former Kenyan anti-corruption czar, Mr. John Githongo).

169. *See generally* Magdalena Sepúlveda Carmona & Julio Bacio-Terracino, *Corruption and Human Rights: Making the Connection*, in CORRUPTION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES 25-50 (Martine Boersma & Hans Nelen eds., 2010) (linking government corruption to a State's ability to meet its human rights obligations).

170. *See generally* Martine Boersma, *Corruption as a Violation of Economic, Social, and Cultural Rights: Reflections on the Right to Educate*, in CORRUPTION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES 51-90 (Martine Boersma & Hans Nelen eds., 2010) (concluding that treaty bodies ought to adopt more stringent anti-corruption measures to advance the cause of human rights).

171. *See e.g.*, Catherine Karong'o, *Healthcare in Kenya Ailing*, CAPITAL NEWS (May 7, 2010), <http://www.capitalfm.co.ke/news/newsPrint.php?newsID=8369>. (reporting that the Kenyan Medical Services Minister admits that hospitals and health services lack essential equipment and do not meet the needs of the population, and noting that the situation could be improved in part by strengthening government accountability mechanisms). *See generally* Brigit Toebes, *Health Sector Corruption and Human Rights: A Case Study*, in CORRUPTION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES 91-124 (Martine Boersma & Hans Nelen eds., 2010) (providing a general insight into the connection between corruption and the right to health, and arguing that greater transparency will help improve the health sector).

172. Kenya: HDI Profile, *supra* note 160.

#### 4. Food Insecurity

Over the last two decades, Kenya's ability to feed its population has been troublesome.<sup>173</sup> Today, Kenya's Global Hunger Index ("GHI") score is 19.8, bordering on "alarming."<sup>174</sup> The ongoing crisis has largely been driven by disasters,<sup>175</sup> as well as the chronic poverty and economic injustice. Culture has equally played a significant part in driving the crisis, thanks to the characteristic child-feeding practices among the pastoral communities,<sup>176</sup> not forgetting the practice of keeping livestock for pride.<sup>177</sup>

For children, the spiraling crisis has meant various forms of suffering. First and foremost, deaths, high levels of malnourishment, and malnutrition-related ailments have become *déjà vu*, especially among the U5s. Every year, in the face of recurrent disasters, millions of children in the country face hunger and malnutrition, with the global acute malnutrition ("GAM") rates in the pastoral regions stubbornly remaining well above the World Health Organization's ("WHO") emergency threshold of 15 percent.<sup>178</sup> The crisis has also harmed education in the affected areas.<sup>179</sup> Given the perennial food

173. John Gachiri, *Food Security in Kenya at Lowest Ebb in 20 Years*, BUSINESS DAILY (Oct. 15, 2009), <http://www.businessdailyafrica.com/Company%20Industry/-/539550/672276/-/u5yhu2z/-/index.html> (noting that for two decades, Kenya's ability to feed its citizens has often been described as "alarming").

174. INT'L FOOD POLICY RESEARCH INST., 2010 GLOBAL HUNGER INDEX: FOCUS ON THE CRISIS OF CHILD UNDERNUTRITION (Oct. 2010) (defining the GHI, a multidimensional statistical tool utilized to describe the state of hunger situation in countries, and noting that countries with GHI's of 20.0-29.9 are considered as having an "alarming" GHI, while Kenya's present ranking, 19.8, is considered to be "serious").

175. WFFC+5 REPORT, *supra* note 140, at 9, 27.

176. See *Kenya: The Role of Culture in Child Nutrition*, IRIN (Dec. 18, 2009), <http://irinnews.org/printreport.aspx?reportid=87454> (reporting on the tradition of introducing male babies to camel's milk first to encourage their development as herders, who are allocated more resources).

177. See *e.g.*, *id.* ("[People refuse] to sell so as not to be viewed as poor or to look cowardly. If, as a leader, you sold off your cows during the drought, people may refuse to vote for you.").

178. *Kenya: Malnutrition Crisis in Northwest*, IRIN (June 26, 2011), <http://www.irinnews.org/printreport.aspx?reportid=85306> (noting that Kenya's GAM is as high as 28.2 in one region); *Kenya: Malnutrition Levels in Northwest Stubbornly High*, IRIN (Sep. 13, 2010), <http://irinnews.org/printreport.aspx?reportid=90458> (noting that several regions have GAMs levels higher than twenty-five percent).

179. *Dry Spell Could Keep Students Out of School, Warns Minister*, DAILY

insecurity, the Office of the United Nations Humanitarian Coordinator in Kenya recommended that 720,000 school children be added to the UN World Food Program (“UN/WFP”) school feeding program (“SFP”) and that 252,000 be added to the “extended meals” plan.<sup>180</sup>

### 5. Health-Related Challenges

For millions of children in Kenya, fulfillment of the right to the best or highest attainable standard of health still remains a pipe dream, thanks to the enduring health crisis. Various indicators reveal a worrying situation, whose picture is painted by unreasonably high morbidity and mortality rates among children, especially the U5s. For instance:

- Nationally, only about 40 percent of births occur with skilled attendance.<sup>181</sup>
- Overall, only 57 percent of Kenya’s population has access to safe water. This portends a serious health challenge for all, especially children.<sup>182</sup>
- The immunization coverage is below the targeted rate of 85 percent.<sup>183</sup>
- The under-five mortality rate (“U5MR”) remains

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NATION (Jan. 9, 2011), <http://allafrica.com/stories/printable/201101100001.html> (explaining that a drought has forced students to relocate with their families to areas that have water, thereby preventing them from going to school). *But see Kenya: In and Out of School in Samburu*, IRIN (Nov. 10, 2009), <http://irinnews.org/printreport.aspx?reportid=86968> (describing a more complex relationship between hunger and education, noting that while on one hand it can be disruptive by forcing children to move to towns with food, on the other hand school attendance may increase when food is scarce because of school-provided meals).

180. Office of the U.N. Humanitarian Coordinator in Kenya, *Kenya Humanitarian Update Vol. 65* (Oct. 17-Nov. 15, 2010).

181. *Child Survival a Major Challenge*, UNICEF (last visited June 26, 2011), <http://unicef.org/kenya/health.html> [hereinafter *Child Survival Challenge*].

182. UNICEF, HUMANITARIAN ACTION REPORT 2009 85 (2009); *see also* U.N. Comm. on the Rts. of the Child (CRC), Concluding Observations, Kenya, ¶ 47(c), U.N. Doc. CRC/C/KEN/CO/2 (Jun. 9, 2007) [CRC Concluding Observations] (noting that the lack of access to clean water poses a direct threat to children’s survival).

183. WFFC+5 REPORT, *supra* note 140, at 22.

unreasonably high at 128 deaths per 1,000 live births,<sup>184</sup> with huge regional disparities.<sup>185</sup>

- About 1.2 million children have been orphaned by AIDS,<sup>186</sup> while about 180,000 children under the age of 14 live with the HIV virus.<sup>187</sup>
- Though ARV drugs are provided free in all public and mission health facilities, only a very small percentage of children living with HIV have access to the life-saving treatment.<sup>188</sup>
- Exclusive breastfeeding is a rare practice in the country; currently, only about 32 percent of children aged below six months benefit from the practice, which is believed to boost immunity against diarrhea, acute respiratory infections and other diseases.<sup>189</sup>

#### 6. Harmful Socio-Cultural Practices

The ordinary Kenyan girl faces a myriad of challenges pointing at discrimination and marginalization. From the very moment of her birth, she confronts a society which values her existence less than that of boys simply because she is a girl. In addition, she is constantly subjected to a host of harmful practices, including female genital mutilation (“FGM”),<sup>190</sup> and early and forced marriage.<sup>191</sup>

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184. Kenya: HDI Profile, *supra* note 160.

185. See E.S.C. Concl. Obser. 1, ¶ 32, UN Doc. E/C.12/KEN/1 (Sept. 7, 2006) [hereinafter CESCR Concluding Observations] (noting that North Eastern and Coastal Provinces exhibit higher infant and under-five mortality rates than the rest of Kenya).

186. U.N. AIDS, 2010 REPORT ON THE GLOBAL AIDS EPIDEMIC 186 (2010).

187. *Id.*, at 182.

188. See HUMAN RIGHTS WATCH, A QUESTION OF LIFE OR DEATH: TREATMENT ACCESS FOR CHILDREN LIVING WITH HIV IN KENYA 54-56 (2008) (noting that in the Rift Valley region, only 5% of affected children could access the medicine); CRC Concluding Observations, *supra* note 171, ¶¶ 51-52 (concluding that government funding for antiretroviral medication is insufficient).

189. Pamela Sittoni, *Kenya Reports on Situation of Children and Women and on the Eve of the Day of the African Child 2010 Celebrations*, UNICEF (Sep. 9, 2010), [http://www.unicef.org/kenya/reallives\\_3839.html](http://www.unicef.org/kenya/reallives_3839.html); U.S. AGENCY FOR INT'L DEV., UNDERSTANDING NUTRITION DATA AND THE CAUSES OF THE MALNUTRITION IN KENYA: A SPECIAL REPORT BY THE FAMINES EARLY WARNING SYSTEMS NETWORK 9-10 (2006).

190. C.A.T. Concl. Observ. 1, ¶ 27, UN Doc. CAT/C/KEN/CO/1 (Nov. 21,

Equally worrying is the educational status of girls, as many school-age girls in rural areas have yet to benefit from the FPE program.<sup>192</sup>

For those enrolled, challenges in retention, completion, and transition to secondary schools exacerbate the situation. Even more worrying is the fact that the agenda is largely viewed as “Western,” with the mainstream attitude depicting children as “needy recipients of protection.”<sup>193</sup>

### 7. *Child Sale, Trafficking, and Prostitution*

Human trafficking is another contemporary problem in Kenya, with damning evidence that the country is fast growing as a source, transit, and destination country for trafficked persons, a majority of whom are children.<sup>194</sup> These modern day slaves, mainly children, end up in Western countries as prostitutes, where they are exploited at will. Poverty is arguably one of the major drivers of the problem; the looming high poverty has exacerbated the breeding of the vice.<sup>195</sup>

Closely intertwined with child sale and trafficking is the ever-creeping problem of child prostitution and pornography. The vice manifests itself in two forms. First, there is the ordinary commercial sex work, which, though prevalent in virtually every Kenyan town, has hardest hit the region of Nyanza. There, the concept of *jaboya* (Dholuo for “fish-for-sex”) is fast evolving and crystallizing along

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2008) [hereinafter CAT Concluding Observations].

191. *E.g.*, Geoffrey Kamadi, *Kenya: Prolonged Drought Drives Surge in Forced Marriages*, ALERTNET (Mar. 8, 2010), <http://www.trust.org/alertnet/news/prolonged-drought-drives-surge-in-forced-marriages/> (establishing that forced marriages still occur in Kenya, in some cases in exchange for financial assistance during droughts).

192. *See* Benjamin Miundi, *4 Million Children Out of School, Says Report*, DAILY NATION (Sept. 1, 2010), <http://in2eastafrika.net/4-million-children-out-of-school-says-report/> (noting a report that revealed that a majority of those surveyed that confessed to not attending school (3.4 million) were female).

193. *Making Children's Rights a Reality*, SAVE THE CHILDREN (2009), [http://www.savethechildren.org.uk/en/docs/Policy\\_Brief\\_Making\\_childrens\\_rights\\_reality.pdf](http://www.savethechildren.org.uk/en/docs/Policy_Brief_Making_childrens_rights_reality.pdf).

194. *E.g.*, CESCR Concluding Observations, *supra* note 175 at ¶ 24 (expressing concern over the lack of statistics on the number of persons reported to be trafficked through Kenya).

195. *Want to Buy a Child?*, *supra* note 164 (reporting on a woman caught in a sting operation trying to traffic her child and who claimed she did so because she could not afford to keep him).

the beaches of Lake Victoria, thanks to the region's poverty.<sup>196</sup> There is also "sex tourism." With tens of thousands of children continually falling prey to pedophiles, Kenya is globally ranked as the tenth most preferred destination for sex tourists.<sup>197</sup> The Coast has been worst hit. With hungry pedophiles freely roaming the pristine beaches, up to 30 percent of teenagers are reportedly involved in casual sex for cash.<sup>198</sup> Sadly, parents and guardians have been reported to permit and even encourage children befriending the preying sex tourists, a reality compounded by the fact that workers at the tourist facilities also engage in pimping.<sup>199</sup>

### 8. *The Drug Menace*

Over the last decade or so, Kenyan children have lived with the evolving problem of drug and substance abuse; despite the bold entitlement to protection under the Children Act,<sup>200</sup> they have suffered both as abusers and traffickers of illicit drugs and substances.<sup>201</sup> The problem has adversely affected the physical,

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196. See KENYA: *Sex for Fish: Ooko\* and Pamela\* – Snapshot of a Jaboya Relationship*, AFRICAN PRESS INT'L, (Feb. 9, 2010), <http://africanpress.wordpress.com/2010/03/12/kenya-sex-for-fish-ooko-and-pamela-snapshot-of-a-jaboya-relationship/> (explaining the socio-economic realities in Kisumu, where fishermen often have multiple *jaboya* partners).

197. Njoki Ndung'u, *We Need Bold Messages to Keep Pedophiles at Bay*, THE STANDARD (Nov. 13, 2010), <http://www.standardmedia.co.ke/columnists/InsidePage.php?id=2000022272&cid=491&>. See, e.g., KENYA: *Booming Tourism Boosts Juvenile Sex Trade*, IRIN (July 17, 2006), <http://www.irinnews.org/report.aspx?reportid=59664> (describing the atmosphere of sex tourism in Kenya and how poverty drives the girls who freely engage in the trade).

198. UNICEF, REPORT ON THE EXTENT AND EFFECT OF SEX TOURISM AND SEXUAL EXPLOITATION OF CHILDREN ON THE KENYAN COAST vii (2006); see Dann Okoth, *Inside Secret World of Child Sex Trade*, *The Standard*, (Sept. 3, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000017604&cid=4> (accessed Nov. 18, 2010) (exposing the process of negotiating for sex in Mombassa).

199. Cf. Ndung'u, *supra* note 197 (implying Kenya's comparative lack of action against sex trafficking creates implicit support for the practice).

200. Children Act, *supra* note 10, at § 16 ("Every child shall be entitled to protection from the use of [any drugs] that may be declared harmful by the Minister responsible for health and from being involved in their production trafficking or distribution.").

201. See Michael Chepkwony, *How Drug Traffickers Use Street Children as Couriers*, THE STANDARD (Jul. 19, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000013850&cid=458&> (revealing that children participate in drug trafficking in Eldoret in exchange for small payments of food and drugs).

mental and spiritual health of children, and has limited the impact of all investments in education. The traffickers are influential personalities, including parliamentarians, and corruption hinders efforts to reduce the drug trade's threat to children's rights.<sup>202</sup>

## B. LEGAL AND POLITICAL CHALLENGES

### 1. *Non-Subscription to (and Non-Ratification of) Critical Instruments*

A review of the prevailing regimes reveals that Kenya is conspicuously absent from the lists of States Parties to a number of instruments critical to the children's rights agenda. The situation presents itself in at least three different faces. First, in a characteristic phobia, Kenya has yet to subscribe to the existing individual complaints procedures — as of January 17, 2011, she had not signed any of the protocols establishing these mechanisms. At the UN level, despite being party to the parent instruments, she has yet to accede to: the Optional Protocol to the ICCPR (“OP1-ICCPR”),<sup>203</sup> the Optional Protocol to the CEDAW (“OP-CEDAW”),<sup>204</sup> the Optional Protocol to the Torture Convention (“OP-CAT”),<sup>205</sup> and the Optional Protocol to the CRPD (“OP-ICRPD”);<sup>206</sup> and has yet to sign the Optional Protocol to the ICESCR (“OP-ICESCR”).<sup>207</sup>

At the regional level, like all other States Parties to the Ouagadougou Protocol, save for Burkina Faso, Kenya has yet to enter a formal declaration under Article 34(6) recognizing the

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202. See Caroline Wafula, *Six MPs Named in Drug Baron Scandal*, DAILY NATION (Dec. 23, 2010), <http://www.nation.co.ke/News/politics/Six+Kenya+MPs+named+in+drug+baron+scandal/-/1064/1077186/-/13g28vsz/-/index.html>; *Revealed: Drug Networks and Politics in Kenya*, DAILY NATION (Dec. 23, 2010), <http://www.nation.co.ke/News/politics/Drug+networks+and+politics+in+Kenya/-/1064/1077824/-/12128m/-/index.html> (describing how corruption has frustrated authorities' efforts to fight the drug trade through violence and loss of work for those officers attempting to do their jobs).

203. International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) (Dec. 16, 1966) [hereinafter ICESCR].ICCPR, *supra* note 31; ICESCR, *supra* note 32.

204. G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

205. G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Jan. 9, 2003).

206. G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

207. G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Mar. 5, 2009).

competence of the ACtHPR to entertain petitions from individuals. The practical implication of this reality is that Kenya is denying individuals within her jurisdiction the opportunity to obtain justice internationally, should she violate their rights.

Secondly, despite appending her signature, Kenya has yet to ratify a number of instruments, such as the OP-CRC-SC, which Kenya signed on September 8, 2000. At the regional level, the anomaly extends to the Maputo Protocol, which Kenya signed on December 17, 2003. Finally, she has yet to accede to a number of treaties in force. For instance, as of January 17, 2011, she has not acceded to the Genocide Convention or the ICRMW.

## 2. *Poor Treaty Reporting Record*

Kenya has continually performed dismally in fulfilling her reporting obligations under the various treaties to which she is party. For instance, in the realm of the UN Convention on the Rights of the Child, she only submitted her initial report to the CRC on January 13, 2000, more than seven years after it was due (September 1, 1992). The second periodic report was submitted on September 20, 2005, eight years after it was due (September 1, 1997). With three periodic reports (third, fourth and fifth) due by September 1, 2012, and the initial report for the OP-CRC-AC already overdue (due on February 28, 2004), only time will tell if she will ever have a clean slate. Kenya is also behind in reporting under the CEDAW<sup>208</sup> and the ICRPD.<sup>209</sup> Based on Kenya's past reporting record, it would be a forlorn wish to expect Kenya to submit these reports on time, as required by the various treaty oversight bodies.

At the African regional level, Kenya's record has not been any better. For instance, with respect to the Banjul Charter, she submitted her first report (which combines all overdue reports as at the date of submission) in September 2006. With respect to the Children's

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208. See U.N. Secretary-General, *Status of Submission and Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, as at 31 August 2006*, Doc. A/61/38 (Aug. 31, 2006) (documenting that Kenya has failed to submit its first six CEDAW reports on time).

209. As of January 28, 2011, Kenya's initial report to the Committee on the Rights of Persons with Disabilities ("CRPD"), which was due on June 18, 2010, had not been submitted.

Charter, the initial report to the African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”), which was due on July 25, 2002, was only submitted in 2006.

### 3. *Hollow Political Commitments*

Successive governments have failed to take the children’s rights agenda seriously, with children’s issues appearing only in rhetorical election campaign manifestos, official speeches and paper-based guarantees. The clearest evidence is the government’s failure to reasonably allocate resources at its disposal. For instance, while the budgetary allocation for education and health rose over the years, the rise has not been commensurate with the country’s increase in revenue; overall, expenditures in the two sectors constitute only 7 and 2 percent of the country’s Gross Domestic Product (“GDP”), respectively.<sup>210</sup> This practice conflicts with Kenya’s international commitments.<sup>211</sup> Nevertheless, Kenya has spent a significant amount of money on the Department of Defense, even though the state is not at war.<sup>212</sup>

In light of this reality, it is hardly surprising that Kenya has not met many of the tenets of the children’s rights agenda. For instance: the children’s courts have been largely restricted to urban centers, with regular magistrates doubling to sit on children’s courts; basic infrastructure continually dilapidates, especially in the education and health sectors; high infant and under-five mortality rates remain due to the inadequate measures adopted by the government to address the problem; access to sanitation and clean, sufficient, reliable, and affordable drinking water has remained a mirage for many; the country continually suffers “brain-drain”, as thousands of her trained health and education professionals move out of the country in search of greener pastures; and thousands of displaced children still languish in tented camps that dot various parts of the country.

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210. Kenya: HDI Profile, *supra* note 160.

211. See Abuja Declaration, *supra* note 44, at ¶ 26 (committing at least fifteen percent of the national budget to improve the health sector).

212. See, e.g., Commodity Trade Statistics Database, U.N., <http://comtrade.un.org/db/dqBasicQueryResults.aspx?px=H2&cc=93&r=404&y=2009> (last visited July 30, 2012) (showing that Kenya imported arms and ammunitions worth over USD 48 million in 2009 alone).

## V. IMPLEMENTING THE CHILDREN'S RIGHTS AGENDA IN KENYA: PROSPECTS AND THE WAY FORWARD

### A. IMPLEMENTING THE CHILDREN'S RIGHTS AGENDA IN KENYA: PROSPECTS

#### 1. *The Advent of the New Constitutional Dispensation*

The entry into force of the New Constitution on August 27, 2010 heralds immense prospects in the implementation of the children's rights agenda in Kenya. The new dispensation embodies a number of positive inroads that can potentially benefit children in Kenya. For instance, the Constitution entrenches children's rights in the Bill of Rights;<sup>213</sup> recognizes the position of international law in the Kenyan legal system;<sup>214</sup> explains the obligations of the State;<sup>215</sup> clarifies the implementation modality for socio-economic rights, with the principle of "progressive realization" vividly featured;<sup>216</sup> establishes comprehensive judicial and quasi-judicial enforcement mechanisms;<sup>217</sup> and, allows representative actions to enforce the protected rights.<sup>218</sup>

#### 2. *The Goodwill of Donors and Partners*

Over the years, especially after the historic December 2002 elections, various donors and partners have supported various programs touching on the children's rights agenda, such as the FPE

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213. CONSTITUTION, art. 53 (2010) (Kenya).

214. *Id.* arts. 2(5)-(6) (declaring that Kenyan law incorporates international law).

215. *Id.* arts. 21(1)-(4) (conferring on the State the obligation to "address the needs of vulnerable groups within society, including . . . children," and to "enact and implement legislation to fulfil [sic] its international obligations in respect of human rights and fundamental freedoms.").

216. *Id.* art. 20(5) (noting that the state must "ensur[e] the widest possible enjoyment of [rights or fundamental freedoms] having regard to the prevailing circumstances" in the event that the "State claims that it does not have the resources to implement" those rights or freedoms).

217. *Id.* arts. 23(1), 59(2)(g), 165 (revamping the role of the High Court, which has traditionally been Kenya's "Human Rights Court," and establishing a new-look national human rights institution, the Kenya National Human Rights and Equality Commission ("KNHREC")).

218. *Id.* arts. 22, 59(3) (affirming that individuals have the right to bring claims alleging the violation of human rights and fundamental freedoms).

program,<sup>219</sup> the OVCs Cash Transfer program,<sup>220</sup> the *Malezi Bora* initiative (supported by UNICEF), and the *Komesha Malaria, Okoa Maisha* program.<sup>221</sup> It must also be emphasized that the DCS has particularly enjoyed undulating partnership and collaboration with various entities, including UN specialized agencies, bilateral development agencies, and organizations dealing with children's issues.<sup>222</sup>

### 3. *The Role of the Private Sector and the Civil Society*

Over the last three decades or so, a number of non-state actors ("NSAs") have remained vital in implementation of the children's rights agenda. The NSAs have been particularly instrumental in areas like rights protection, rights education and awareness, research and documentation, as well as provision of basic education, health care, and humanitarian services.

### 4. *Advances in Medical Research*

Kenyan scientists have been working round the clock to find cures to various diseases. So far, research on malaria, one of the major killers of children in Kenya, has made remarkable progress; by 2015,

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219. See Henry Maina, *Kenya: How to End Plunder of Education Budget in Schools*, NAIROBI STAR (July 8, 2011), <http://www.nairobistar.com/opinions/others/30901-how-to-end-the-plunder-of-the-education-budget> (claiming the FPE program is supported by the Department for International Development ("DfID"), Canadian International Development Agency ("CIDA"), Japan International Cooperation Agency ("JICA"), World Bank, African Development Bank, and Concern International).

220. The program is currently supported by, among others, UNICEF, DfID, and the World Bank. See *Cash Transfer Programme for Orphans and Vulnerable Children*, MINISTRY OF GENDER, CHILDREN, AND SOCIAL DEVELOPMENT, <http://www.gender.go.ke/index.php/Divisions/cash-transfer-programme-for-orphans-and-vulnerable-children.html> (accessed Sept. 5, 2011).

221. The program is supported by, among others, the U.S. President's Malaria Initiative ("PMI") and Population Services International ("PSI"). See, e.g., THE PRESIDENT'S MALARIA INITIATIVE KOMESHA MALARIA COMMUNITIES PROGRAM SECOND ANNUAL REPORT OCTOBER 2011 (2011), available at [http://www.pmi.gov/countries/contracts/mcp/merlin\\_year2\\_kenya.pdf](http://www.pmi.gov/countries/contracts/mcp/merlin_year2_kenya.pdf).

222. See Partners and Collaborators, NATIONAL COUNCIL FOR CHILDREN'S SERVICES, [http://www.nccs.go.ke/index.php?option=com\\_content&view=article&id=47&Itemid=58](http://www.nccs.go.ke/index.php?option=com_content&view=article&id=47&Itemid=58) (accessed Sept. 5, 2011) (providing a full list of supporters).

the country could develop a malaria vaccine.<sup>223</sup> The vaccine, Kenya's first, and the world's most clinically advanced malaria vaccine candidate, is being prepared by the Kenya Medical Research Institute ("KEMRI") and the U.S. Center for Disease Control ("CDC").<sup>224</sup>

#### B. TOWARD A KENYA FIT FOR CHILDREN: THE WAY FORWARD

On the basis of the achievements, challenges, and prospects presented, this paper recommends that to improve the situation of children in the country, the government has to

- (a) sign, accede to, or ratify the relevant global and regional instruments relating to the agenda, in particular the OP-CRC-SC and the Maputo Protocol;
- (b) ensure proper dissemination and implementation of the principles and standards of child rights law, in particular the rights-based approach to programming for children;
- (c) improve its treaty reporting record (in particular, clear the backlog of pending reports to the various global and regional treaty oversight mechanisms);
- (d) invest sufficiently in routine assessments of the situation of children in Kenya, especially those in poor rural households;
- (e) energize the national anti-corruption crusade;
- (f) take concrete steps to meaningfully address the immediate problems facing children, including food insecurity, poverty, violence, discrimination and other harmful cultural practices, child trafficking and prostitution, and drug abuse and trafficking;
- (g) scale up protection of children from the HIV/AIDS scourge, participating in programs such as the recently-launched

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223. Walter Menya & Stella Cheron, *Kenya Closer to Vaccine Against Killer Disease*, DAILY NATION (Apr. 26, 2010), <http://www.nation.co.ke/News/Kenya%20closer%20to%20vaccine%20against%20killer%20disease/-/1056/907264/-/view/printVersion/-/uax19m/-/index.html>.

224. *Id.*; Walter Menya, *Malaria Vaccines Trials Launched in High Risk Regions*, BUSINESS DAILY (July 20, 2009), <http://www.businessdailyafrica.com/Company%20Industry/-/539550/626442/-/view/printVersion/-/mk3nn7/-/index.html>.

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UNICEF “Mother-Baby Pack” initiative<sup>225</sup> to enhance prevention of mother-to-child transmission (“PMTCT”);

- (h) integrate children’s rights issues in national plans for the implementation of the MDGs and the Vision 2030;<sup>226</sup>
- (i) invest in strengthening the capacity of judicial and administrative institutions charged with the protection of the rights and welfare of children in the country, while also improving and sustaining synergy between these institutions; *and*
- (j) effectively sustain linkage and collaboration and partnership with local and international donors and partners.

## CONCLUSION

This essay has modestly assessed whether Kenya is on track in implementing the children’s rights agenda. It has done so by presenting the achievements registered, the challenges in the lives of Kenyan children, and the prospects for implementing the agenda in the country. The culminating discussions have revealed that, despite many positive developments, there is a disconnect between theory and practice; realization of the relevant rights is still largely a pipe dream for many young people. We have seen that implementation of the agenda in Kenya faces a myriad of challenges. These can only be addressed through profound socio-economic, political, and cultural changes. On this basis, the recommendations this paper provides

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225. See generally UNICEF’s *Innovative Mother-Baby-Pack Launches in Kenya*, UNICEF (Oct. 28, 2010), [http://www.unicef.org/infobycountry/kenya\\_56667.html](http://www.unicef.org/infobycountry/kenya_56667.html) (describing the Mother-Baby-Pack, a portable pack of preventative drugs to inhibit mother-to-child transmission of HIV/AIDS); Michael Klaus, *Mother-Baby Pack Launched to Prevent HIV Transmission in Kenya*, UNICEF (Nov. 1, 2010), [http://www.unicef.org/infobycountry/kenya\\_56694.html](http://www.unicef.org/infobycountry/kenya_56694.html) (documenting the launch of Mother-Baby packs in Nyanza and Rift Valley and announcing the goal of eliminating mother-baby transmission of HIV by 2013).

226. Vision 2030 is a highly anticipated development blueprint which seeks to, *inter alia*, establish Kenya as a just and cohesive society in which all individuals enjoy equitable social development by 2030. Launched on June 10, 2008, it is currently steered by a fully-fledged secretariat based in the Ministry of Planning, National Development and Vision 2030. See generally *Kenya Vision 2030: The Popular Version*, [http://www.ku.ac.ke/images/stories/docs/kenya\\_vision\\_2030\\_abridged\\_version.pdf](http://www.ku.ac.ke/images/stories/docs/kenya_vision_2030_abridged_version.pdf) (providing an abridged version of Kenya’s developmental blueprint).

seek to improve Kenya's chances of fully implementing the agenda for children within her jurisdiction.