

An Evaluation of the Right to Education of Refugee Children in Kenya

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Abstract

There is a growing standard for the protection of migrants on the global and regional scene. As refugees, children from areas of armed conflict form a vulnerable group that requires close attention. With an emphasis on the right to education, this contribution interrogates the sufficiency of Kenya's legal regime in offering practical safeguards to refugee children as victims of human rights abuses in the host state. First, this study evaluates the position of international and regional law on the protection of refugee children. Secondly, it evaluates Kenya's legislative and policy regime as well as its practices with regard to the education of refugee children. Proposals for reform are made in concluding the paper.

Keywords

Armed conflict; asylum; children; Dadaab; Kakuma; refugee; right to education.

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1 Introduction

An evaluation of the sufficiency of a legal regime requires a contextualisation of the term "sufficiency". Sufficiency refers to something that is "enough to meet the needs of a situation or a proposed end."¹ This lends credence to the fact that a given policy, law or practice should at a bare minimum meet a certain end.² Accordingly, there must be an assessment that elaborates on the ability of a legal regime to deal with the challenges presented in a given situation. The author argues that the sufficiency of a legal regime involves its ability to develop policies which are translated into legislation and followed by good practices that aid the enjoyment of rights. In this study the sufficiency of the legal regime in terms of policy, laws and practice in Kenya is evaluated using the standards of international human rights with a specific emphasis on children's rights law.³ This evaluation is preceded by an analysis of the state of children in armed conflict globally.

The global trends on children in armed conflict show that most conflicts take place in populated areas leading to civilian casualties.⁴ The growing trends in armed conflicts depict an increase from eight armed groups in a civil war in 1950 to 1000 armed groups by 2022.⁵ Central to this high number of armed groups is the protracted nature of the conflicts that affect governance

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¹ "Sufficient" defined in the Merriam-Webster Dictionary (Merriam-Webster Dictionary date unknown <https://www.merriam-webster.com/dictionary/sufficient>). The legal definition in Black's Online Law Dictionary refers to the cogency of evidence to support a party's cause in a court. See Black's Law Dictionary date unknown <https://thelawdictionary.org/evidence/>.

² This should not be conflated with the legal terminology on adequacy and sufficiency. While in law "adequate" does not mean the same as "sufficient", the yardstick here is an honest expectation of a specific outcome in the application of the law. See Golding and Giancaspro 2023 *UWAL Rev* 1-2.

³ As will be shown later, the protection of children's rights in the evolving jurisprudence in the African human rights system includes both international human rights law and international humanitarian law that cuts across refugee law as well. See Art 22 of the *African Charter on the Rights and Welfare of the Child* (1990) (ACRWC), which allows the application of both international human rights law and international humanitarian law in the protection of children affected by armed conflict.

⁴ Epps 2012 *Ga J Int'l & Comp L* 307. Also see Amnesty International date unknown <https://www.amnesty.org/en/what-we-do/armed-conflict/>; UN 2018 <https://www.un.org/press/en/2018/sc13560.doc.htm>.

⁵ UN and World Bank 2017 <https://openknowledge.worldbank.org/handle/10986/2833>; Deyemere 2021 *IRRC* 511.

and state economies.⁶ This often leads to population flight from areas of conflict to host or recipient states.⁷ There has been a downward trend in the number of countries affected by conflict from 66 countries in 1995 to 52 in 2016.⁸ A cautious approach to the preceding position reveals that despite the reduction, the statistics from 2011 to 2016 show a steady increase in armed conflict.⁹ Secondly, the number of children affected by the armed conflict has risen from 200 million in early 1995 to over 375 million in 2022.¹⁰ First, this increase does not present a corresponding reduction in the number of children affected by armed conflict.¹¹ To this end, a global perspective indicates that 1 out of every 6 children is living in conflict areas, accounting for 16 per cent of the world's population.¹² It should be noted further that 21 per cent of these children are in Africa.¹³ Some of the children and other persons in armed conflict seek refuge in other countries.¹⁴ According to the United Nations International Children's Emergency Fund (UNICEF), the countries that receive the highest number of refugees in Africa include Uganda, Sudan and Ethiopia.¹⁵ Kenya is selected for this analysis because it has the best economy in East and Central Africa, yet is one of the countries with the highest number of refugees in Africa,¹⁶ whilst the right to education is selected for analysis due to its position in Kenya's democratic dispensation as a constitutional right.¹⁷ Most of the countries

⁶ This is evident in most failed states, like Somalia, and the failure by some states to have effective control over insurgencies in some of their territories, for instance, the Boko Haram in Nigeria.

⁷ The 2017 report by the UNHCR (UNHCR 2017 <https://www.unhcr.org/uk/figures-at-a-glance.html>) shows that up to 65.6 million people have been forced to move from their homes. Most refugees spend an average of 17 years in exile. See Kirolos *et al* 2018

<https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 15.

⁸ Croicu and Sundberg 2017 dataset in Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 15.

⁹ Aucoin 2017 <https://issafrica.org/iss-today/less-armed-conflict-but-more-political-violence-in-africa>.

¹⁰ See Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 15.

¹¹ Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 15.

¹² Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 15.

¹³ See Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf> 16.

¹⁴ Bendavid *et al* 2021 *The Lancet* 522-532.

¹⁵ According to the United Nations High Commissioner for Refugees, Uganda has over 1.5 million refugees, Sudan has over 1.1 million, and Ethiopia has about 821.300 refugees. See UNHCR date unknown <https://www.unhcr.org/about-unhcr/where-we-work/africa>.

¹⁶ See Nanima 2017 *LDD* 42-67 generally. Most of the refugees are in Kakuma and Dadaab with a few in the main cities like Nairobi and Nakuru.

¹⁷ The *Constitution of the Republic of Kenya*, 2010, Art 53(1)(b).

neighbouring Kenya, such as Somalia, Ethiopia, Sudan and South Sudan have experienced some form of armed conflict at some time. Consequently, this creates inflows by displaced persons from these countries into Kenya.¹⁸ In addition, there is a lot of scholarly work that points to the fact that the enjoyment of the right to education aids the ability to access other rights.¹⁹

It should be recalled that the right to education is premised on the elements of availability, accessibility, acceptability and adaptability.²⁰ Accessibility involves non-discrimination, physical and economic accessibility.²¹ Acceptability relates to the use of culturally relevant curricula and teaching methods.²² Adaptability calls for flexibility that leads to adapting to the needs of changing societies.²³ Furthermore, the state has to ensure the immediate realisation of certain obligations such as the right to basic education.²⁴ The principle of availability requires the existence of institutional infrastructure like buildings, sanitation facilities, safe water, trained teachers, and teaching materials such as textbooks, libraries and computer information technology facilities.²⁵ The *Convention on the Rights of the Child* (CRC) extends the conversation from (only) accessibility to the actual content of the right.²⁶ It is interesting to note that the *African Charter on the Rights and Welfare of the Child* (ACRWC) does not have a General Comment on the right to education. The lack of the same is not a limitation in its working methods since the ACRWC allows for the application of persuasive normative and jurisprudential guidance of international and continental human rights law.²⁷

This study evaluates the sufficiency of Kenya's legal regime regarding the protection of the right to education of refugee children. The study employs a two-staged approach. It sets the scene by offering insights on the right to

¹⁸ Qatamur *Nexus between National Security Concerns* 47, 70.

¹⁹ Chürr 2015 *PELJ* 2417; Sinclair 2001 *Education in Emergencies* 52.

²⁰ CESCR 1999 <https://www.refworld.org/legal/general/cescr/1999/en/37937> (General Comment No 13) para 6. See also para 8.

²¹ See Ivanova *et al* 2020 *CEUR Workshop Proceedings* 231.

²² Veriava and Paterson "Right to Education" 114.

²³ See General Comment No 13 paras 6 and 8.

²⁴ See CESCR 1990 <https://www.refworld.org/legal/general/cescr/1990/en/5613> (General Comment No 3) paras 1 and 5.

²⁵ General Comment No 3 para 6(1).

²⁶ The State is obliged to ensure that a child achieves a balanced, human rights-friendly response to the challenges in terms of the education that is provided. Committee on the Rights of the Child 2001 <https://www.refworld.org/legal/general/crc/2001/en/39221> para 3.

²⁷ The ACRWC was adopted on 11 July 1990. Art 46 of the ACRWC allows the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) to draw inspiration from international law on human rights from the *Constitutive Act of the African Union* (2000), the *African Charter on Human and Peoples' Rights* (1981), the *Universal Declaration on Human Rights* (1948) (UDHR), the *Convention on the Rights of the Child* (1989) (CRC), and other instruments adopted by the United Nations (UN) and by African countries and African values and traditions.

education of refugee children in international and regional law. It then evaluates the legislative and policy regime regarding the right to education for refugee children in Kenya. The study thereafter proposes areas for reform.

2 Evaluating the international and regional position on refugees

The global position on refugees can be appreciated by looking at the international treaties and conventions that guide the way that states should deal with refugees, especially children. Kenya is a party to various instruments including the *Convention Relating to the Status of Refugees (Refugee Convention)*,²⁸ the *Protocol Relating to the Status of Refugees (Protocol)*,²⁹ and the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*.³⁰ Other international instruments to which Kenya is a party include the *International Covenant on Civil and Political Rights*,³¹ the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,³² the *African Charter on Human and Peoples' Rights*,³³ and the ACRWC.³⁴ The ACWRC is instructive in the provision of the rights of children in armed conflict, tension or strife.³⁵ The point of interrogation is in the use of Kenya's law, policy and practice in the support that it offers through education to a child traumatised by armed conflict in its territory. While academic voices buttress the fact that refugees have to enjoy rights to the nature and extent that the nationals of the host state enjoy them or better,³⁶ this position is determined by international refugee law and international human rights law that is informed by the child rights'-based approach.³⁷ The situation places a great duty on states to ensure that the rights of refugees are upheld.

This contribution emphasises a discussion on the CRC, the ICESCR, and the ACRWC. By design it does not look at the *Refugee Convention*, the *Protocol*, and the *OAU Convention Governing the Specific Aspects of*

²⁸ *Convention Relating to the Status of Refugees (1951) (Refugee Convention)*.

²⁹ *Protocol Relating to the Status of Refugees (1967) (Protocol)*.

³⁰ *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)*; Rebecca *International Human Rights* 359.

³¹ *International Covenant on Civil and Political Rights (1966)*.

³² *International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)*.

³³ *African Charter on Human and Peoples' Rights (1981)*. Kenya is also a party to the ICESCR. For a complete list of the international instruments to which Kenya is a party, see Kenya Law date unknown <http://kenyalaw.org/treaties/>.

³⁴ *African Charter on the Rights and Welfare of the Child (1990)*.

³⁵ Article 22 of the ACRWC.

³⁶ Kinchin 2016 *IJRL* 252.

³⁷ See the *Convention Relating to the Status of Refugees (1951)*, the ICESCR Arts 13 and 22, and the *Convention on the Rights of the Child (1989)*.

*Refugee Problems in Africa*³⁸ in relation to Kenya. These are dealt with elsewhere and there is no need to repeat the same here.³⁹

2.1 Convention on the Rights of the Child

As a party to the CRC, Kenya has an obligation to accord a conducive environment for all children within her territory to enjoy their rights.⁴⁰ To this extent the right to education is not an exception. The CRC requires governments to promote free and compulsory schooling at the primary level, access to secondary education, and access to tertiary education based on capacity by every appropriate means.⁴¹ In emergencies it may be more difficult to meet these goals but they cannot be ignored.⁴² People displaced by war or calamity need the restoration of the provision of education – they see education as important for the future of their children and of their society,⁴³ because education in emergencies can help to create a sense of normalcy and acts as a tool for therapy for refugee children.⁴⁴

2.2 International Covenant on Economic, Social and Cultural Rights

Kenya is also a party to the ICESCR.⁴⁵ While the aforementioned instrument speaks to the promotion and protection of socio-economic rights, guidance and jurisprudence emanating from the ACRWC reveal that the preservation and protection of educational institutions from attack is necessary.⁴⁶ While this is highly relevant concerning children who are living in countries with actual armed conflict, the affected children who seek refuge in host communities outside their areas of origin require support to recover.⁴⁷ This requires holistic protection against attacks by state security forces and non-

³⁸ *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969). Rebecca *International Human Rights* 359.

³⁹ Nanima 2017 *LDD* 42-67. Also see Nanima 2021 *LDD* 119-145; Nanima "Enjoyment of the Right to Health" 257-268.

⁴⁰ See the 6th and 7th preambular paragraph as well as Arts 20(1), 22(2), 24(2)(c) and (d), 29(1)(e), and 39 of the CRC.

⁴¹ Kamga 2011 *AHRLJ* 171-193; Skelton and Kamga 2017 *Journal of African Law* 419.

⁴² There is an interesting report that calls on donors (not even the state parties) to walk the talk with regard to the provision of education in armed conflict. See Wilson, Majewski and Tebbe 2015 https://www.savethechildren.net/sites/default/files/libraries/DOCS-%23299840-v1-Walk_the_Talk_Review_of_donors_humanitarian_policies_on_education_-_NRC_and_Save_the_Children_Report.pdf.

⁴³ Liddell *et al* 2022 *Australian and New Zealand Journal of Public Health* 647-653.

⁴⁴ Sinclair 2001 *Education in Emergencies* 52.

⁴⁵ See Art 13 of the ICESCR. Also see General Comment No 13.

⁴⁶ ACRWC Art 22. See also ACERWC 2020 https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf.

⁴⁷ Comments by the Special Rapporteur on Children Affected by Armed Conflict on a State visit to the Kingdom of Lesotho, in 2019. ACERWC 2021 https://www.acerwc.africa/sites/default/files/2022-11/Mission_Report_ACERWC_Follow-Up_Lesotho.pdf para 7.8(iii).

state armed groups that target school buildings; violence towards education personnel and students at schools, sexual violence, abduction, and forced recruitment.⁴⁸ This extends to the use of harassment and threats against teachers, parents and students. which culminates in the violation of the right to education.⁴⁹

While various reports underscore the failure of children to go to school during armed conflict,⁵⁰ they largely deal with the non-enjoyment of the right to education in the theatres of actual armed conflict.⁵¹ In juxtaposition, emerging research shows ways in which the right to education for a refugee can take centre stage in various activities in the host states.⁵² It has also been documented that some host states do not accord refugee children the chance to enjoy this right, which makes futile the attempts to ensure that children from areas of armed conflict enjoy this right in other areas.⁵³ This is due to the perception that the provision of education encourages refugees to permanently settle in the host states.⁵⁴ Some states go ahead to deny access to international agencies which offer educational activities to refugee

⁴⁸ The Safe Schools Declaration outlines a set of commitments to strengthen the protection of education from attack and restrict the use of schools and universities as bases for armed forces and groups. See GCPEA date unknown <https://ssd.protectingeducation.org/>.

⁴⁹ ACERWC 2020 https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf.

⁵⁰ ACERWC 2016 https://www.acerwc.africa/sites/default/files/2022-09/Study_on_the_impact_of_armed_conflict_and_crises_on_children_in_Africa_ACERWC_FINAL_ENGLISH_0.pdf; UNICEF date unknown <https://www.unicef.org/children-under-attack>; Human Rights Watch 2016 <https://www.hrw.org/report/2016/06/09/education-deficit/failures-protect-and-fulfill-right-education-through-global>.

⁵¹ In addition, this can be seen in the disconnect between the provisions that deal with children in armed conflict and refugee children in the *Refugee Convention*. See Art 22 of the ACRWC.

⁵² Reports indicate that Kenya allows international organisations to be directly invested in the provision of facilities for the right to education in refugee camps. Nanima 2017 *LDD* 43.

⁵³ Nanima 2017 *LDD* 43.

⁵⁴ See a South African perspective on this position in Mkwanzani *Exploring the Lives and Educational Aspirations*. This position is, however, from a country that, to a great extent, receives economic refugees, other than those from areas of armed conflict. In addition, South Africa's integration policy (contrary to Kenya's encampment policy) fuels this trend. In addition, this argument should be made in the light of the economic advantages that the refugees add to the host nation. For such insights, see Kwamboka *Economic and Socio-Cultural Impact of Refugees*; Kourdour and Andersson 2017 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC\(2017\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC(2017)1&docLanguage=En); World Bank 2018 <https://www.worldbank.org/en/news/feature/2018/09/27/in-kenya-refugees-are-opening-up-frontiers-the-pull-of-investing-in-underserved-areas>; Miller 2018 <https://www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.4.pdf>; and Ndege 2018 <https://www.unhcr.org/news/latest/2018/5/5aeb1c264/study-finds-refugee-businesses-play-vital-role-local-economy.html>.

children.⁵⁵ To its credit, Kenya does not deny access to refugees by IGOs/NGOs.⁵⁶ It is arguable however, that Kenya leaves the practical implementation of the right to education (especially in the refugee camps of Dadaab and Kakuma) to the IGOs/NGOs. Questions about the immediate realisation of the refugee's right to basic education come to the fore.

In the context sketched above, it has been recommended that refugee camps should take part in appropriate educational activities for specific kinds of refugees such as young children and adolescents.⁵⁷ Armed conflict drives children into exile, where the State Party remains mandated to ensure that they enjoy their rights. The author has taken a conscious decision not to engage in a consideration of how the right to education is dealt with in armed conflict.⁵⁸ Conversely, this paper interrogates how Kenya supports the provision of the right to education for refugee children, considering their possible traumatic experiences in their countries of origin.

The Committee on Economic, Social and Cultural Rights (CESCR) requires that the right to education be progressively realised.⁵⁹ In its General Comment, the right to education is recognised as a human right that provides an indispensable tool that empowers individuals, improves their status and aids them to recognise other rights.⁶⁰ To this end the CESCR expects States Parties to observe the minimum core standard concerning their obligations under the ICESCR.⁶¹ Such states are expected to use a subjective standard to indicate the progressive steps that are taken to realise the right to education in the light of their available resources.⁶² It should be noted that these steps include legislative, judicial, administrative, financial, educational and social measures.⁶³ Unfortunately, while this is not done, Kenya is not the only culprit here. Other countries with higher constitutional standards where the right to education is immediately realisable still stifle the refugee child's right to education.⁶⁴ For instance, in South Africa the Department of Basic Education has turned away refugee children from attending school for want of study permits.

⁵⁵ Machel 1996 <https://childrenandarmedconflict.un.org/1996/08/1996-graca-machel-report-impact-armed-conflict-children/> para 196.

⁵⁶ Lebson 2013 *International Migration* 133-148.

⁵⁷ Singh *et al* 2021 <https://pmnch.who.int/resources/publications/m/ite>. Also see UNHCR 1994 <https://www.refworld.org/pdfid/3ae6b3470.pdf> 115.

⁵⁸ This discussion is beyond the scope of this study.

⁵⁹ General Comment No 13 paras 6(b)(iii), 43 and 44.

⁶⁰ General Comment No 13 para 1.

⁶¹ General Comment No 3 para 10.

⁶² General Comment No 3 para 10. See Fukuda-Parr, Lawson-Remer and Randolph 2008 https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1361&context=econ_wpapers 7.

⁶³ General Comment No 3 paras 3, 5, 7 and 8.

⁶⁴ See Washinyira 2019 <https://www.groundup.org.za/article/refugee-children-turned-away-cape-schools/>.

It should be recalled that the right to education is governed by the principles of availability, accessibility, acceptability and adaptability.⁶⁵ This is a crucial safeguard against discrimination based on one's status in the enjoyment of the right to education.⁶⁶ While the issue of discrimination has always been raised in the context of Kenyan society, it is important to consider how refugees are impacted in a host nation. This change of focus will contrast the required situation with the usual positive realisation of the right to education in terms of the accessibility of the right.⁶⁷ This delves into the concept of acceptability of the form and substance of education in the light of its cultural, social and psychological appropriateness for refugee children.⁶⁸

The question is whether the ICESCR, the CRC and the *Refugee Convention* provide adequate protection of the rights of refugee children who are from areas of armed conflict, tension and strife.⁶⁹ An approach that does not give children from areas of conflict an opportunity to enjoy their rights does not signal the accountability of the host state in relation to the position of the child.⁷⁰ The improvement of the refugee child's enjoyment of the right to education in host states has to a great extent been left to CSOs such as Plan International and Save the Children. This has led to (an appreciated) engagement of this cause by the CSOs and other non-State Party agencies like the United Nations High Commissioner for Refugees (UNHCR) and UNICEF.⁷¹ In addition, some organisations offer protection to children

⁶⁵ Paragraphs 6(1), (2), (3) and (4) of General Comment 13. See *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomasevski* UN Doc E/CN.4/1999/49 (1999) para 50, which sets out the "four essential features that primary schools should exhibit, as availability, accessibility, acceptability and adaptability." The General Comment requires that the welfare principles are the guiding feature in the application of these principles. See General Comment 13 para 7.

⁶⁶ Willems and Jonas 2018 *European Educational Research Journal* 219-232.

⁶⁷ Also see the *UNESCO Convention against Discrimination in Education* (1960), the relevant provisions of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979), the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), the CRC and the *ILO Indigenous and Tribal Peoples Convention*, 1989 (No 169).

⁶⁸ Other international positions on refugees can be established in the *Global Compact for Safe, Orderly and Regular Migration* UN Doc A/RES/73/195 (2018), the *New York Declaration for Refugees and Migrants* (2016) and the position of the UDHR.

⁶⁹ It is on this basis that Art 22 of the ACRWC, which points to the use of both IHL and IHRL remains a critical pillar in the promotion and protection of the rights of the child affected by armed conflict in and beyond areas of conflict, tension and strife.

⁷⁰ It is not disputed that there are good frameworks that exist, such as UNICEF and UNESCO 2007 https://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf; UNHCR 1993 <https://www.unhcr.org/en-lk/excom/scip/3ae68ccc4/unhcr-policy-refugee-children.html>.

⁷¹ See Save the Children date unknown <https://www.savethechildren.org/content/dam/usa/reports/ed-cp/hear-it-from-the-teachers-refugee-education->

through the application of humanitarian aid rather than human rights law.⁷² While international human rights law (IHRL) involves principles such as respect for human dignity, the right not to be tortured, non-discrimination and the right to be treated equally without regard to one's status,⁷³ it is argued that international humanitarian law (IHL) operates in areas of humanitarian crisis on account of the emergencies that unfold. Therefore, it follows that State Parties and other parties to a conflict use the principles of distinction, the principle of military necessity, the principle of proportionality and preventing unnecessary suffering to the end that the child is accorded the best protection under IHL, IHRL or both.⁷⁴ While this is applauded, it may not offer solutions that indubitably deal with the rights of children because the use of IHL in particular does not embrace the child rights-based approach. Rather, children may also be victims of a war and be counted as casualties.⁷⁵ It is argued that in instances of humanitarian crisis, there should be an intersection with IHRL leading to a commonality in the protection of human dignity and life.⁷⁶ It is proposed that the States Parties use both IHL and IHRL in humanitarian situations that are part of or arise out of armed conflict.⁷⁷

2.3 The African Charter on the Rights and Welfare of the Child

The use of complementarity between IHRL and IHL under Article 22 of the ACRWC allows for the use of the principle of the best protection of the rights of a child in instances of both humanitarian and human rights law.⁷⁸

report.pdf; Right to Education date unknown <https://www.right-to-education.org/page/understanding-education-right>.

⁷² For instance, the International Committee of the Red Cross (ICRC) engages humanitarian principles to a great degree in offering logical solutions to children in armed conflict. See Mack and Pejic 2008 https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf 9.

⁷³ These principles also embrace the human rights-based approach that includes participation, accountability, non-discrimination and equality, empowerment and legality: UNSDG date unknown <https://bit.ly/3PYreb9>.

⁷⁴ ICRC date unknown <https://casebook.icrc.org/glossary/fundamental-principles-ihl>.

⁷⁵ Under the ACRWC the child rights-based approach includes the use of the principle of the right to non-discrimination (Art 3, ACRWC), the right to life, survival and development (Art 4(1), ACRWC), the best interest principle (Art 5, ACRWC) and the right to participation (Arts 4(2) and 3, ACRWC).

⁷⁶ Moeckli *Human Rights and Non-Discrimination* 92.

⁷⁷ See ACERWC 2020 https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf.

⁷⁸ See Kellenberger 2003 <http://www.icrc.org/web/eng/siteengO.nsf/html/5rfgaz>. See also Hathaway *et al* 2012 *Minn L Rev* 1897.

The use of both IHRL and IHL is not far-fetched as various human rights bodies recognise the vulnerable position of a child in armed conflict.⁷⁹ For instance, the ACERWC uses Article 22 of the ACRWC to protect children in such situations, while the CRC uses Article 28 to guide the child's enjoyment of the right to education in armed conflict. There is a development of jurisprudence regarding Article 22 such as general comments, concluding observations, and decisions.⁸⁰ This is extended to the recognition of other jurisprudence that addresses issues of armed conflict, which could be used in the promotion and protection of the rights of the child.⁸¹ This has notably included continental studies by the ACERWC, other international and domestic jurisprudence,⁸² academic commentaries, *travaux préparatoires*⁸³ of various instruments, and soft law instruments, to aid its interpretation of Article 22.

It is expected that the trend highlighted above will gradually embrace principles of IHL, United Nations Security Resolutions,⁸⁴ the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*,⁸⁵ and policy decisions by the African Union (AU) Peace and Security Council.⁸⁶ Beyond the African regional space is the CRC and its *Optional Protocol on the Involvement of Children in Armed Conflict*.⁸⁷ The CRC provides for the protection of the rights of a child in armed conflict through the use of other jurisprudence such as the *Rome Statute* on the conscription of children under 15 years old into national forces,⁸⁸ and the

⁷⁹ See ACERWC 2020 https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf.

⁸⁰ The most recent is the ACEWRC's development of a General Comment on Article 22: Children and Armed Conflict.

⁸¹ See ACERWC 2020 https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf.

⁸² ACERWC date unknown https://reporting.acerwc.africa/sites/default/files/2022-06/Sierra%20Leone_Concludig%20Observation%20final_English.pdf.

⁸³ This refers to documentary evidence of the negotiation, discussions, and drafting of a final treaty text. It may also be referred to as negotiating or drafting history. See Dalhousie University Libraries date unknown <https://dal.ca.libguides.com/c.php?g=257217&p=3894998>.

⁸⁴ *UN Security Council Resolution 1261* UN Doc S/RES/1261 (1999); *UN Security Council Resolution 1314* UN Doc S/RES/1314 (2000); *UN Security Council Resolution 1379* UN Doc S/RES/1379 (2001); *UN Security Council Resolution 1460* UN Doc S/RES/1460 (2003); *UN Security Council Resolution 1539* UN Doc S/RES/1539 (2004); *UN Security Council Resolution 1612* UN Doc S/RES/1612 (2005); *UN Security Council Resolution 1882* UN Doc S/RES/1882 (2009); *UN Security Council Resolution 1998* UN Doc S/RES/1998 (2011); *UN Security Council Resolution 2068* UN Doc S/RES 2068 (2012).

⁸⁵ UNICEF 2007 <https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf>.

⁸⁶ AUC 2014 <http://www.peaceau.org/uploads/au-operational-guidance-note-on-children-in-ddr.pdf>.

⁸⁷ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) Arts 1, 2 and 3.

⁸⁸ CRC Art 39; *Rome Statute of the International Criminal Court* (1998) Art 2(b)(xxvi).

ILO Convention 182 on the Elimination of the Worst Forms of Child Labour (ILO Convention 182).⁸⁹ Other organisations include UNICEF⁹⁰ and the UNHCR.⁹¹

The foregoing approaches are commendable, but they do not offer direction on how to protect the rights of a child who has migrated from a territory of armed conflict to a safer space. To illustrate this, the current scope of Article 22 relates to the need to ensure that the rights of a child are upheld during armed conflict. The extension of the application of Article 22 seems to point to suggestions that States Parties should apply it in instances of emergency or in situations that require that the rights of vulnerable children are not violated.⁹² This assertion does not offer instruction on how to deal with refugee children. It is yet to be seen how the rights under Article 22 of the ACERWC can be used to extend protection to a child who has migrated from a background of armed conflict to the host state or territory. Consider a hypothetical situation where child X from territory A (affected by armed conflict, tension or strife) moves to territory B (the host state or territory). The question is how this child can enjoy his or her rights (guaranteed under Article 22) to the same extent or better in the rather peaceful host state or territory.⁹³ While international law recognises the rights of refugees and persons seeking asylum, there is rather a disconnect when it comes to how the rights accorded under the implementation and setting of Article 22 can be integrated into an area where the refugee child settles. The author is not aware of any jurisprudence in international law that directs the host nations to ensure that a child affected by armed conflict is accorded the requisite protection as though he is in an area of armed conflict.⁹⁴ In this context, an engagement with the principle of the child's best interest may lead to some insights. This principle guides all matters affecting children, regardless of their status.⁹⁵ Various interpretations which are beyond the scope of this

⁸⁹ *ILO Convention 182 on the Elimination of the Worst Forms of Child Labour* (1999) Arts 2 and 3.

⁹⁰ See UNICEF date unknown <https://www.unicef.org/>.

⁹¹ *The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) (the *Optional Protocol*) is the core instrument that provides for the non-recruitment or use of children in armed conflict.

⁹² See comments from South Africa at the 32nd session of the ACERWC, November 2018, in Addis Ababa on the proposed extension of the application of Art 22, and measures for humanitarian situations to national emergencies: Republic of South Africa 2018 <https://reporting.acerwc.africa/sites/default/files/2022-09/South%20Africa%201st%20Periodic%20Report%20Eng.pdf>.

⁹³ This question arose when the ACERWC visited Lesotho regarding the promotion and protection of children affected by armed conflict in countries at peace. See ACERWC 2021 https://www.acerwc.africa/sites/default/files/2022-11/Mission_Report_ACERWC_Follow-Up_Lesotho.pdf para 7.8(iii).

⁹⁴ Most of the literature pertains to the normative guidance under Art 22 of the ACERWC, Art 39 of the CRC and Arts 1, 2 and 3 of the *Optional Protocol*.

⁹⁵ This principle has been around since the early 19th century. See *Commonwealth v Briggs* 33 Mass (1864) 205, where the Court stated that "in the case of a child

study have been accorded to the use of the best interests principle. This, notwithstanding the author's adoption of the interpretation of the ACERWC, which sees the best interests principle as a "gap-filling" provision that offers solutions that fill both objective and subjective gaps.⁹⁶

The relevant article of the ACRWC provides that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."⁹⁷ The phrase: "[i]n all actions concerning children" is interpreted widely to include all actions that directly or indirectly affect children. A similar position is taken in the *African Charter*, which states that the best interest of the child is "the" primary consideration.⁹⁸ In contrast, the CRC goes beyond the provision of a declaratory nature of the best interests principle. It uses the word "shall" as an unqualified affirmation that requires State Parties to take affirmative action to provide for the child. In addition, some of the jurisprudence of the Committee of the CRC emphasises the "best interests" as firstly a substantive right where the best interests are assessed as a primary consideration when different interests are being considered.⁹⁹ Secondly, the jurisprudence emphasises the "best interests" as a "fundamental, interpretative legal principle", and thirdly as a "rule of procedure" in the assessment and determination of the best interests of the child.¹⁰⁰ To this end the best interests principle may offer guidance as a gap-filling tool that identifies the failure of a host nation in upholding the rights of a child. Despite its importance, there is no indication that it has addressed the disconnect between the enjoyment of rights under Article 22 and the refugee child in a host state. This paper focusses on the provision of the right to education as being in the child's best interest. It is important to fall back on the national position and practice of Kenya to establish how it has grappled with its duties under international refugee law.¹⁰¹

3 Kenya's position on refugee children's right to education

The evaluation of Kenya's position is done in four phases; the constitutional and legislative provisions, the court decisions, the national policies on education, and finally the practices that follow.¹⁰²

of tender years, the good of the child is to be regarded as the predominant consideration."

⁹⁶ Tostensen *et al Supporting Child Rights* 59.

⁹⁷ Article 4(1) of the ACRWC.

⁹⁸ Article 5 of the ACRWC.

⁹⁹ Committee on the Rights of the Child 2013 <https://www.refworld.org/docid/51a84b5e4.html> (General Comment 14) para 6.

¹⁰⁰ General Comment 14 para 6(b).

¹⁰¹ General Comment 14 para 6.

¹⁰² To understand the way Kenya deals with refugee children, it is important to evaluate the constitutional underpinnings of the right to education and the rights of refugees

3.1 *The constitutional and legislative framework*

The *Constitution of Kenya, 2010* (the *Constitution*) provides that "every child has a right to free and compulsory basic education."¹⁰³ A close reading of the plain text in this provision indicates that it contains no reference to the citizenship or status of a child.¹⁰⁴ It would follow that as long as the child is in Kenya, he or she is entitled to this right. Kenya is expected, from a constitutional and theoretical perspective, to take measures, including the provision of affirmative action programmes, to ensure that the children access relevant education and training.¹⁰⁵ This raises a question about the nature or quality of education refugee children in Kenya can expect to receive.

The *Constitution* has neither a provision that grants access to education nor a provision that grants equal access to educational institutions. It should be recalled, however, that it provides for the right to equality thus:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.¹⁰⁶

This right has been interpreted to refer to all persons, including refugee children.¹⁰⁷ This leads to the assumption that the right to education is protected by Article 27. The question that then arises is whether Articles 53(1)(b) on the right to education and 27 on the right to equality collectively accord a refugee child merely a place in a school or an "adequate" education.¹⁰⁸ This question presupposes a shift in emphasis from the enjoyment of the right to education in areas of armed conflict to the same in areas where children take refuge.¹⁰⁹ The recognition of the right to education in situations of emergency secures the future of children and offers them a sense of normalcy.¹¹⁰ In addition, it also restores hope and offers psychosocial support such as life skills and disease prevention.¹¹¹

from a domestic perspective and juxtapose them against the current policy and practice.

¹⁰³ Article 53(1)(b) of the *Constitution of the Republic of Kenya, 2010* (the *Constitution*).

¹⁰⁴ Article 53(1)(b) of the *Constitution*.

¹⁰⁵ Article 55(a) of the *Constitution*.

¹⁰⁶ Article 27 of the *Constitution*.

¹⁰⁷ *Samow Mumin Mohamed v Cabinet Secretary, Ministry of Interior Security and Co-Ordination* [2014] eKLR 2 para 16.

¹⁰⁸ A similar question is raised by Chürr 2015 *PELJ* in the context of South Africa's constitutional right to education for children.

¹⁰⁹ Sinclair 2001 *Education in Emergencies* 52.

¹¹⁰ Sinclair 2001 *Education in Emergencies* 52.

¹¹¹ Sinclair 2001 *Education in Emergencies* 52.

The *Constitution*¹¹² and the *Refugees Act*¹¹³ provide that a recognised refugee and his/her family are entitled to the rights and subject to the obligations contained in the international instruments to which Kenya is a party. This is an indication that until Kenya recognises a refugee as an individual, his or her claim to be a refugee is of no consequence.¹¹⁴ However, it should be emphasised that this contribution focuses on the position of a refugee child concerning the enjoyment of the right to education. Consequently, the point in issue should be the definition accorded to a refugee, and not the legal status of the refugee child.¹¹⁵ Since Kenya is a party to the *Refugee Convention*, the refugee in Kenya is entitled to enjoy the rights therein; including the right to education.¹¹⁶ The notable point of departure concerning the enjoyment of the right to education outside a designated refugee camp is where an adult refugee applies for a travel document to enable his or her child to pursue education outside the camp.¹¹⁷

3.2 Kenya's Education for Sustainable Development Policy

Kenya's Education for Sustainable Development Policy does not contextualise the refugee child.¹¹⁸ The policy enables Kenya to meet its international commitments, about the goals and objectives of the Sustainable Development Goal (SDG) 4, which obliges parties to provide for education for all children.¹¹⁹ Some of the positive attributes of this policy are the insightful emphasis on the *Constitution's* prioritisation of Sustainable Development as a National Goal.¹²⁰ The application of the policy can be

¹¹² Articles 19(3)(a) and (b) and 21(1) of the *Constitution*.

¹¹³ *Refugees Act* 13 of 2006 s 16(1).

¹¹⁴ *Refugees Act* 13 of 2006 s 16(1).

¹¹⁵ This is based on the position that the recognition of the status of a person as a refugee is a process that differs from one country to another. What is instructive to consider is whether a person's status is in line with the definition of a refugee under the *Refugee Convention*.

¹¹⁶ *Refugees Act* 13 of 2006 s 16.

¹¹⁷ Section 34(1), (2)(b) and (4) of the *Refugees Act* 13 of 2006 enables a refugee to ensure that his or her child can access educational institutions outside the camps.

¹¹⁸ Kenya, Ministry of Education 2017 <https://www.education.go.ke/sites/default/files/2022-05/Education-for-Sustainable-Development-Policy-for-the-Education-Sector.pdf>.

¹¹⁹ Kenya, Ministry of Education 2017 <https://www.education.go.ke/sites/default/files/2022-05/Education-for-Sustainable-Development-Policy-for-the-Education-Sector.pdf>. It emphasises the constitutional right to education of every Kenyan child in Kenya and the use of SDG 4. This is something of a disconnect with the constitutional provision on the right to education for all. While the policy acknowledges the constitutional right to education and the various international and regional instruments to which Kenya is a party, it does not refer to the refugee population.

¹²⁰ Kenya, Ministry of Education 2017 <https://www.education.go.ke/sites/default/files/2022-05/Education-for-Sustainable-Development-Policy-for-the-Education-Sector.pdf> 2.

seen in the statistics on child enrolment. According to Kenya's Ministry of Education, the report for 2020/21 indicates that there was an increase in enrolment from 9.2 million children in 2020 to 10.3 million in 2021.¹²¹ This marked an increase in the Gross Enrolment Rate of 1.1%.¹²² While these figures are enviable, they do not reflect refugee children, which is a consequence of an education policy that does not consider refugees in the budgeting and implementation of their right to education.¹²³ A report by the UNHCR states that there has been an increase in refugee enrolment in primary schools whereby out of 437,920 child refugees, over 164,000 refugee learners are enrolled in early childhood, primary and secondary schools, which implement the Kenya national curriculum along with recent education reforms.¹²⁴ While a detailed discussion of the policy is beyond the scope of this contribution, the author argues that the national policy on education presents a disconnect with the constitutional provisions on the right to education due to the lack of deliberate inclusion of the refugee child in analysing the holistic provision of the right to education. It is therefore instructive to look at the national laws of Kenya on refugees to gain insights therefrom.

There is little guidance from the courts on how the right to education of child refugees should be handled. The author is not aware of any case that has solely and decisively dealt with the question of the quality of education that a refugee child should enjoy. A discussion of some of these cases follows.

The case of *Kituo Cha Sheria v Attorney General* raises the issues of the Government directive with regard to the right to freedom of movement, the prohibition of discrimination, the need to guarantee equality and effective protection before the law, and not the education of refugee children.¹²⁵ In *Samow Mumin Mohamed v Cabinet Secretary, Ministry of Interior Security and Co-Ordination*,¹²⁶ the Court interrogated the constitutionality of another directive with reference to the rights to equality and freedom from discrimination, human dignity, freedom and security of the person, and privacy. Other rights included the right to freedom of movement and residence, the right to own property, the right to fair administrative action

¹²¹ ZOE Talent Solutions 2023 <https://zoetalentsolutions.com/educational-statistics-for-kenya/>.

¹²² ZOE Talent Solutions 2023 <https://zoetalentsolutions.com/educational-statistics-for-kenya/>.

¹²³ This position is reflected in earlier reports. See Republic of Kenya 2015 <https://www.treasury.go.ke/wp-content/uploads/2021/05/Education-Sector-Report-2.pdf>.

¹²⁴ UNHCR 2023 https://www.unhcr.org/sites/default/files/2023-09/2023-UNHCR-EDU_Report-screen%5B78%5D.pdf 4.

¹²⁵ *Kituo Cha Sheria v Attorney General* [2013] eKLR 2.

¹²⁶ *Samow Mumin Mohamed v Cabinet Secretary, Ministry of Interior Security and Co-Ordination* [2014] eKLR 2.

and the right to a fair hearing. The case of *Coalition for Reform and Democracy (CORD) v Republic of Kenya (CORD)*¹²⁷ questioned the constitutionality of the then enacted *Security Laws (Amendment) Act*. In addition, in *Refugee Consortium of Kenya and NT v the Attorney General, Cabinet Secretary Ministry of Interior and National Coordination, Commissioner Refugee Affairs and Cradle-Children Foundation (as an Interested Party)*,¹²⁸ the court reiterated the principles in the UNHCR Guidelines on Refugees, which recognise that the difficulties an adult may face are aggravated when a child has to face them.

In passing, some cases have hinted at the vulnerable state of the refugee child, and the need to engage in steps that address the safety and well-being of the refugee child.¹²⁹ The courts have also recognised that the refugee child is in the category of vulnerable persons recognised under Article 20(3) of the *Constitution*.¹³⁰ This redirects the discussion to an analysis of the *Constitution*, the legislature and the national policy framework on education. In light of the *Constitution* and the identified disconnect between the legislative and policy framework, it is important to reiterate that the refugee child has a right to education.¹³¹ It is therefore prudent to visit refugee settings to establish how the children are accorded the right to education. Kenya has two major refugee camps that have been used to ensure that the refugees stay in camps. One camp is Dadaab in Turkana County, while the other is Kakuma, in the Garissa County.¹³² In addition, Kenya maintains that the UNHCR is responsible for the care of refugees.¹³³ While this creates an immense burden on the stakeholders to ensure that refugees enjoy their rights, it does not accord a conducive environment for the maintenance of refugee protection and security.¹³⁴ The lack of a deliberate effort to offer various services, such as the provision of

¹²⁷ *Coalition for Reform and Democracy v Republic of Kenya* [2015] eKLR 2.

¹²⁸ *Refugee Consortium of Kenya and NT v the Attorney General, Cabinet Secretary Ministry of Interior and National Coordination, Commissioner Refugee Affairs and Cradle-Children Foundation (as an Interested Party)* High Court Petition 382 of 2014 para 46.

¹²⁹ *Refugee Consortium of Kenya and NT v the Attorney General, Cabinet Secretary Ministry of Interior and National Coordination, Commissioner Refugee Affairs and Cradle-Children Foundation (as an Interested Party)* High Court Petition 382 of 2014 para 46, where the court reiterated the principles in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, which recognises that in addition to the difficulties that a person faces as an individual, this unfortunate position is extrapolated where the person is a child. See UNHCR 2019 <https://www.unhcr.org/fr-fr/en/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

¹³⁰ *Kituo Cha Sheria v Attorney General* [2013] eKLR 2.

¹³¹ Article 20(3) of the *Constitution*.

¹³² Nanima 2017 LDD 54.

¹³³ Nanima 2017 LDD 54.

¹³⁴ Nanima 2017 LDD 54.

education through teacher deployments or the use of a specialised curriculum affects the optimal enjoyment of the refugee child's right to education.¹³⁵

3.3 The nature of education in the camps

There are practical indications that the schools in the refugee camps of Kakuma and Dadaab are different from the national schools.¹³⁶ There are critical questions concerning the quality of the education provided and the decisions that the teachers implement concerning the methods and practices of teaching.¹³⁷ This raises questions like how do teachers teach refugee students in Dadaab and Kakuma refugee camps? What challenges do they face? The answers to these questions are evident in empirical studies that have sought responses to these questions. It is well documented that the teachers in the camps lack teaching materials and textbooks.¹³⁸ The author is not aware of any research into or steps that have been taken to deal with the various challenges that are faced by the three distinct age groups of children (below 3, 5-11 and 12-17 years).¹³⁹ It is argued that this adds to the intricacies of the provision of education to refugee children. Regarding the first question, teachers try to follow the national curriculum as handed down by the Republic of Kenya.¹⁴⁰ However, the challenges that the refugees present affect their ability to teach effectively.¹⁴¹ A look at the second question suggests that recommendations need to be made to ensure that despite the challenges that the learners face, the teachers may be empowered to improve their teaching in the refugee camps.

The first challenge is that the placement of a learner in a particular school, either a national or a refugee school, intensifies the child's awareness of his/her status as a national or a refugee.¹⁴² This is because the learner can often speak only a foreign language which is not a language of instruction. One Nazri, a refugee in a national school, states that in the national schools the learners would identify as refugees persons who kept to themselves or spoke about having teachers from other countries such as Somalia.¹⁴³

¹³⁵ Wanzala and Muritya 2018 <https://nation.africa/kenya/newsplex/kenya-s-education-system-is-among-the-most-inclusive-of-refugees-study-shows-111172>.

¹³⁶ These differences are highlighted in the discussion that follows.

¹³⁷ Nanima 2017 *LDD* 54.

¹³⁸ Mendenhall *et al* 2015 *Journal on Education in Emergencies* 104.

¹³⁹ It is argued that, to a great extent, an engagement that effectively deals with the different age groups is key to having an effective education system that caters for children. See Mendenhall *et al* 2015 *Journal on Education in Emergencies* 104.

¹⁴⁰ Wanzala and Muritya 2018 <https://nation.africa/kenya/newsplex/kenya-s-education-system-is-among-the-most-inclusive-of-refugees-study-shows-111172>.

¹⁴¹ UNHCR 2017 <https://data2.unhcr.org/en/documents/download/65138>.

¹⁴² Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁴³ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

Consequently, she had to take on a different identity in the school setting, which resulted in her experiencing more agreeable behaviour by the other pupils.¹⁴⁴ The right to equality and freedom from discrimination in the enjoyment of the right to education is violated on account of one's status as a refugee or asylum seeker. It also raises the question of the responsibility of the stakeholders to ensure that children coming from areas of armed conflict are not subjected to trauma at educational institutions.¹⁴⁵

The second challenge is that there is a difference in the quality of education between the classes in a refugee camp in Kenya and the national schools in terms of resources and infrastructure.¹⁴⁶ While Kenyan children or the children who can afford the national schools enjoy a better education, the issue of the quality of education in a national school is still evident.¹⁴⁷ Refugee children are affected in that they receive a lesser quality of education than children who are not in the camps. It is asserted that education as a humanitarian response is accorded little attention, after the provision of the child's basic needs.¹⁴⁸ This could be because the violation of the right to education is not looked at as life-threatening, as is the violation of the right to life or the right not to be subjected to cruel, inhuman and degrading treatment.¹⁴⁹ In addition there is literature that explains the role of education in armed or humanitarian emergencies in various approaches such as its role in complex emergencies, such as education and conflicts, education as a right, education and the SDGs, or education and equality.¹⁵⁰ This creates various excuses that may be used to justify the nature of education that a refugee child receives. For instance, the provision of "poor-quality" education may be due to different approaches to the teaching system from one country to another. A good example is the use of sharia law in the education curriculum in one country and a secular system in another.¹⁵¹

A third challenge is the language of instruction, especially where there are no teachers for the refugee children from the country of origin.¹⁵² It is admitted that this places the host State in a rather difficult situation, where the adoption of a policy that requires training refugee teachers to teach

¹⁴⁴ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁴⁵ Nanima "Remarks by the Special Rapporteur".

¹⁴⁶ Bellino and Dryden-Peterson interviewed a refugee child who gave an account of the schools in the camps and the national schools: the classrooms in national schools were not so crowded, teachers arrived on time, and the students learned; the schools in the camps were crowded, the teachers were not motivated and as such the teaching of the children was compromised.

¹⁴⁷ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁴⁸ Wright *Case of Refugee Education in Kenya* 24.

¹⁴⁹ Anderson *et al* 2011 *Journal of International Humanitarian Legal Studies* 84-126.

¹⁵⁰ Burde *et al* 2017 *Review of Educational Research* 619-658.

¹⁵¹ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁵² Mendenhall *et al* 2015 *Journal on Education in Emergencies* 122.

refugee children would be impractical. Nevertheless, various issues affecting refugees in Kenya can be dealt with in a manner that points to the positive realisation of the right to education for the refugee child.¹⁵³

4 Conclusion and recommendations

The *Constitution* and the *Refugee Act* provide for the right to education in a general continuum. The guarantees to the provision of this right are evident in the recognition of other rights such as the right to equality and freedom from discrimination as well as the recognition of the rights of refugees. One may question the blanket recognition of refugees' rights under the *Refugee Act*.¹⁵⁴ This is settled by the constitutional recognition of the application of international law that has been ratified by Kenya.¹⁵⁵ It is averred that the Kenyan domestic legislative provisions in themselves cannot be sufficient to ensure that refugee children enjoy and realise their right to education as Kenyan citizens do, and per the dictates of international law to which Kenya is a signatory. The true enjoyment and realisation of a right is possible only when the black letter of the law is imbued with and given life by the spirit of the law – that is, its implementation. The *Constitution* provides for the right to education for everyone in Kenya, while the *Refugees Act* provides that refugees or persons seeking refugee status in Kenya shall enjoy the right.¹⁵⁶ Therefore, the gaps in realising the rights per Kenyan laws are to be found in the application of the rights and the deficiencies in the national policy on education. As discussed earlier, the silence of the policy on the education of refugee children and the corresponding statistics that show the enrolment of children in Schools outside the refugee camps indicate inadequate application and implementation of the law and policy. This is because the enjoyment of the rights of refugees is by and large relegated by the Kenya to IGOs and NGOs like the UNHCR and not the State Party itself.¹⁵⁷

In addition to the above, there is a shift from the progressive to the positive realisation of the right to education for children. While progressive realisation inculcates the need for the country to report on the steps taken to improve the provision of the right to education over time, positive realisation contextualises the steps taken to improve the enjoyment of the

¹⁵³ The question of the positive realisation of the right to education for children in armed conflict is an ongoing debate. Insights from the discussions at the various sessions of the African Committee indicate that the ACERWC advocates the positive rather than the progressive realisation of social and economic rights. See Nanima "Contextualising the Socio-Economic Rights of the Refugee Child" 139-164. It is right to assert that the issue of positive realisation extends to the refugee camps where these children end up.

¹⁵⁴ Section 16 of the *Refugees Act* 13 of 2006.

¹⁵⁵ Article 2(6) of the *Constitution*.

¹⁵⁶ See part 3.1 above.

¹⁵⁷ Nanima 2017 *LDD* generally.

right through deliberate, practical steps. For instance, the use by partners such as the UNHCR of teachers who are able to provide instruction in the language that the refugee child understands is positive realisation. To this end the use of the principles of availability, accessibility, acceptability and adaptability is the framework for progressive realisation. The aforementioned four principles are not adequately realised.¹⁵⁸ For instance, the failure to provide availability is evident in the lack of adequate institutional infrastructure and human and teaching resources.¹⁵⁹ The principle of accessibility is upheld minimally in positive realisation due to the taking of deliberate steps to ensure that the refugee child benefits.¹⁶⁰ While affordability indicates that the provision of education is within the financial reach of vulnerable groups,¹⁶¹ the quality of this education does not assist the traumatised refugee child.¹⁶² The child has been affected by armed conflict, yet the new environment in the camp does not offer psychological, psychosocial or mental support for the child.¹⁶³

While the constitutional and legislative framework embraces the right to education, the practical solutions to the enjoyment of this right to education are limited by the failure in progressive realisation. As such, the lack of available, acceptable, accessible and affordable education affects the enjoyment of the right. The lack of emerging jurisprudence from the courts and the closed nature of the Education for Sustainable Development Policy do not favour refugees.¹⁶⁴ The insufficiency of the legislative and policy frameworks suggests that there are three challenges in the practice of the provision of the right to education in the Dadaab and Kakuma camps.¹⁶⁵

¹⁵⁸ Paragraphs 6(1), (2), (3) and (4) of General Comment 13. See *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomasevski* UN Doc E/CN.4/1999/49 (1999) para 50.

¹⁵⁹ General Comment 13 para 7.

¹⁶⁰ General Comment 13 para 7.

¹⁶¹ Children are taken to be a vulnerable group of persons under the *Constitution of the Republic of South Africa*, 1996. See *South Africa's Centre for Child Law v Minister for Basic Education* 2012 4 All SA (ECG); *Adam Legoale v MEC for Education, North West* (North West High Court, Mafikeng) (unreported) case number 499 of 11 (10 August 2011).

¹⁶² Paragraphs 6(1), (2), (3) and (4) of General Comment 13. See *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomasevski* UN Doc E/CN.4/1999/49 (1999) para 50. Katarina Tomasevski sets out the "four essential features that primary schools should exhibit, as availability, accessibility, acceptability and adaptability." The General Comment requires that the welfare principles are the guiding feature in the application of these principles. See General Comment 13 para 7.

¹⁶³ This remains a challenge in the light of the statistics that show that the traumatised child may, on average, stay in the camp for 17 years. Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf>.

¹⁶⁴ See part 3.2 above.

¹⁶⁵ This position, unfortunately, poses the risk of refoulement to the refugees and their children due to their failure to have an education. Such contemporary global

These include the stigmatisation that follows the identification of the learners as refugees, the poor quality of the education provided in the camps, and the pedagogical decisions taken (such as the language of instruction) in the methods and practices of teaching offered.¹⁶⁶

From the foregoing, it is recommended that there should be a structural integration of the right to education from the refugee camp setting to the formal setting to ensure a socio-cultural experience of identity transformation.¹⁶⁷ This means that the curriculum should not only benefit a child who is not a refugee. Rather, the curriculum should envisage that different languages and different models of the appointment of teachers, especially in host communities, is an important part of the provision of education across the country. This would ensure that the stigma that arises due to the identification of a child as a refugee would be dealt with. To achieve this, the Government should start rethinking its encampment policy as it concretises the continued stigmatisation of the refugees based on their status.¹⁶⁸ There is no doubt that this integration would place the refugees in a position to continue contributing to the economy of the country as they seek better services.¹⁶⁹ The refugee children would also be able to attend better schools as they move with the parents to better neighbourhoods or communities.

The application of the right to education should start from the deliberate effort by the Ministry of Education to monitor its implementation in the refugee camps. This is in line with Kenya's obligation to ensure the promotion and protection of the right to education for all children in its territory. The monitoring could be a dual effort with the UNHCR and other bodies that work with refugees so that this is reflected in the national annual reports. Considering the trauma that the child from armed conflict goes through, it is prudent that the government partners with NGOs and CSOs to offer counselling to help the children deal with the traumatic experiences. Due to the statistics that a refugee may stay in the host state for up to 17 years, it would be in the best interest of the refugee child that such measures are taken. To this end, an empirical study that is geared towards the identification of the needs of children in the various age brackets has to be done.¹⁷⁰

conversations are evident at AsiaNews 2019 <http://asianews.it/news-en/Caritas-Lebanon:-like-the-Palestinians,-Syrian-refugees-forgotten-by-the-international-community-46561.html>.

¹⁶⁶ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁶⁷ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁶⁸ Cannon and Fujibayashi 2018 *African Security Review* 20-41.

¹⁶⁹ Bellino and Dryden-Peterson 2018 *British Journal of Sociology of Education* 222.

¹⁷⁰ Kirolos *et al* 2018 <https://www.savethechildren.it/sites/default/files/files/uploads/pubblicazioni/war-children.pdf>.

It is acknowledged that the shift from the progressive to the positive realisation of the right to education for children is affected by logistical challenges. At its core, progressive realisation relates to the steps that the country takes to improve rather than regress in the provision of this right. A systematic shift should start with the use of a positive realisation of the right to education in a manner that engages the principles of progressive realisation. This would be the first step to ensure the accessibility of the right, in terms of which Kenya would move from positive to progressive realisation.¹⁷¹ This would help in motivating stakeholders to lobby for improvement in the availability of education and the affordability of enjoyment of the education through the provision of improved institutional infrastructure and human and teaching resources where the refugee children live. The need for this move is based on initiatives that have been embraced by other states such as Turkey and regional economic communities such as the European Union, which has committed to ensuring access to education to the six hundred and forty-five thousand (645 000) Syrian refugee children now living in Europe.¹⁷²

Kenya should also draw insights from the African Union's use of the Peace and Security Council Disarmament, Demobilisation Reintegration Capacity (DDR) programme.¹⁷³ The DDR Programme helps to prepare refugee children to be re-integrated in their communities. The preparation should involve the child, the community of origin (that will receive the child), and support from the officers in the camps to prepare them. However, the DDR Programme also highlights some of the key aspects that lead to the traumatic experiences of children, such as the need to protect children separated from their families and to protect children in the hands of the enemy during armed conflict. Other such issues include preventing children from being deprived of their liberty, protecting them from being recruited to participate in hostilities; and taking special measures to shelter them from the effects of the hostilities. Refugee children who are affected by these traumatic experiences should be dealt with as though they were still in areas of armed conflict. In this regard, a study of the use of DDR programming on such children, of monitoring and of modes of accountability should be undertaken. This would improve the quality of the educational programmes offered to the traumatised refugee children.

¹⁷¹ See ACRWC Art 1. It does not distinguish between civil and political rights on the one hand and socio-economic rights on the other. Kenya, as a State Party, is expected to adhere to the provisions of Art 1 of the ACRWC.

¹⁷² 3.5 million Syrian refugees in Turkey struggle with access to education: ANSA 2019 <https://www.infomigrants.net/en/post/15842/3-5-million-syrian-refugees-in-turkey-struggle-with-access-to-education>.

¹⁷³ AUC 2014 <http://www.peaceau.org/uploads/au-operational-guidance-note-on-children-in-ddr.pdf> 9-10.

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List of Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AU	African Union

AUC	African Union Commission
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CSO	civil society organisation
DDR	Disarmament, Demobilisation and Reintegration
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GCPEA	Global Coalition to Protect Education from Attack
ICECSR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IRRC	International Review of the Red Cross
IGO	international government organisation
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IJRL	International Journal of Refugee Law
ILO	International Labour Organisation
JAL	Journal of African Law
LDD	Law, Democracy and Development
MDGs	Millennium Development Goals
Minn L Rev	Minnesota Law Review
NGOs	non-governmental organisation
OAU	Organisation of African Unity
PELJ	Potchefstroom Electronic Law Journal
SDG	Sustainable Development Goal
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNSDG	United Nations Sustainable Development Group
UWAL Rev	University of Western Australia Law Review