

# Rights of children with disabilities

implementation of a training on  
human rights in Kakuma refugee camp

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# TABLE OF CONTENTS

TABLE OF CONTENTS .....	II
LIST OF ABBREVIATIONS .....	V
I. Preliminary remarks.....	1
II. Project Overview .....	2
A. Introduction .....	2
A. Project goals .....	3
B. Participants and partners .....	3
D. Selected topic .....	4
E. Structure of the project .....	4
III. Factual research.....	7
IV. Legal research.....	11
A. Introduction .....	11
B. Definitions.....	12
1. Disabilities.....	12
2. Children and their best interests .....	14
3. Refugees .....	15
4. Conclusion.....	16
C. The legal framework .....	17
1. International law in Kenya .....	17
2. Customary law in Kenya.....	18
3. Conclusion.....	19
D. Situations violating the rights of children with disabilities .....	20
1. Hiding children with disabilities at home.....	20
1.1 Right to non- discrimination .....	21
1.1.1. Definition of discrimination .....	21
1.1.2. Reasonable accomodation .....	23
1.1.3. Conclusion.....	25
1.2. Right to full and effective participation and integration in society .....	25
1.2.1. The right to live independently and to be included in the community.....	26
1.2.2. The right to participate in cultural life, recreation, leisure and Sport .....	28
1.2.3. Conclusion.....	30
1.3. Right to education.....	31
1.3.1. Definition and form of education .....	31
1.3.2. The right to inclusive education.....	32
1.3.3. Right in education .....	33
1.3.4. Conclusion.....	34

2.	Violence towards children with disabilities .....	35
2.1.	Penal sanctions .....	36
2.2.	Right to freedom of all forms of violence .....	37
2.3.	Right to psychological integrity.....	39
2.4.	Right to physical or corporal integrity.....	40
2.5.	Conclusion.....	41
2.6.	Positive obligations in situations of violence .....	42
2.6.1.	Prevention.....	42
2.6.1.1.	Right to be included in the community.....	43
2.6.1.2.	Right to non-discrimination .....	44
2.6.1.3.	Right to express her view.....	45
2.6.1.4.	Right to rest, leisure, play participation in recreational activities .....	46
2.6.1.5.	Right to the best attainable state of health.....	48
2.6.1.6.	Conclusion.....	49
2.6.2.	While violence is perpetrated.....	51
2.6.3.	Recovery and reintegration .....	52
2.6.4.	Conclusion.....	54
2.7.	Violence towards girls with disabilities.....	55
E.	Conclusion of the legal research.....	57
V.	Ethical considerations.....	59
A.	Efforts and aims .....	59
B.	Critical review .....	62
C.	Adopted position .....	63
VI.	Training preparation phase.....	65
A.	Risk assessment .....	65
B.	Practical challenges and coping strategies .....	67
1.	Channels of communication .....	67
2.	Training the teachers .....	69
3.	Language.....	71
4.	Flexibility.....	71
5.	Security of students in Kakuma .....	72
6.	Organizational and material aspects .....	73
C.	Planned program of the training .....	73
1.	Didactical considerations.....	73
1.	Program of the training week.....	75
1.1	Monday.....	75
1.2	Tuesday.....	76

1.3	Wednesday .....	77
1.4	Thursday .....	78
1.5	Friday .....	79
2.	Roles of the Kakuma, Kenyatta and Geneva students during the training .....	79
3.	Development of an information sharing tool .....	80
4.	Development of evaluation tools .....	81
VII.	Training implementation phase.....	82
VIII.	Evaluation phase.....	82
A.	Feedback fellow students .....	82
B.	Critical reflections about the project .....	83
IX.	Complement of the project due to COVID-19 .....	85
A.	Human rights considerations .....	85
B.	Academic article .....	87
C.	Crowdfunding .....	87
X.	Summary and final remarks.....	88
XI.	Thanks and acknowledgements.....	93

## LIST OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights of 27 June 1981
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child of 1 July 1990
<b>AU</b>	African Union
<b>CAT</b>	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 10 December 1984
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979
<b>CRC</b>	Convention on the Rights of the Child of 20 November 1989
<b>CRPD</b>	Convention on the Right of Persons with Disabilities of 13 December 2006
<b>HI</b>	Humanity & Inclusion
<b>HRC</b>	Human Rights Council
<b>KCA</b>	Kenyan Children Act of 2001 (revised edition 2010)
<b>KConst</b>	Kenyan Constitution of 2010
<b>KPC</b>	Kenyan Penal Code of 2010 (revised edition 2012)
<b>KJA</b>	Kenyan Judicature Act of 1989 (revised edition 2018)
<b>KPDA</b>	Kenyan Persons with Disabilities Act of 2003 (in revision)
<b>KRA</b>	Kenyan Refugee Act of 2006
<b>KRB</b>	Kenyan Refugee Bill of 2019 (not yet in force)
<b>KRCC</b>	Kakuma Refugee Camp Community – Constitution and Rules
<b>KSOA</b>	Kenyan Sexual Offences Act of 2006
<b>OAU RC</b>	Organization African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of the 10 September 1969
<b>RC</b>	Convention relating the status of refugees of 18 July 1951
<b>UDHR</b>	Universal Declaration of Human Rights of 10 December 1948
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UN CRC</b>	Committee on the Right of the Child
<b>UN CRPD</b>	Committee on the Right of Persons with Disabilities
<b>UN ECOSOC</b>	Committee on the Economic, Social and Cultural Convent
<b>UN Pact I</b>	International Covenant on Economic, Social and Cultural Rights of 16 December 1966
<b>UN Pact II</b>	International Convent on Civil and Political Rights of 16 December 1966
<b>VDPA</b>	Voice for Disabled Persons Association

## I. Preliminary remarks

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This master thesis focuses on the conceptualization, development, and implementation of a training-week to sensitize community elders and zone leaders in the Kakuma Refugee Camp and Kalobeyi Integrated Settlement (Kakuma camp) to the rights of children with disabilities. Due to the COVID-19 pandemic, the training could not take place as planned and had to be postponed to an unknown future date.

This project unites human rights law students from the InZone program in the Kakuma camp, Kenyatta University, and the University of Geneva. It is guided by the legal empowerment aim of a legal clinic. In building a durable project on the combined experiences of different students, it aims to contribute to the practical implementation of human rights in the challenging environment of Kakuma camp.

The training is based on legal research, offering community elders and zone leaders the perspective of international human rights law on the rights of children with disabilities. The research discusses two situations in Kakuma camp identified as in need of attention: the hiding of children with disabilities at home and violence towards them. The research first discusses the right to non-discrimination, the right to full and effective participation and integration in society, and the right to education. The research continues with analysing the right to freedom of all forms of violence, as well as the right to physical and psychological integrity, and goes on to discuss the positive obligations to prevent and stop violence, as well as helping victims reintegrate into society. These positive obligations find their source in the right to full and effective participation and integration in society; the right to non-discrimination; the right of the child to express his/her views; the right to rest, leisure, play and participate in cultural activities; and the right to achieve the best attainable state of health.

To prepare for the training, the teams established channels of communication, developed a system to share the findings of the legal research, and prepared a training-plan for the training week. They assigned roles during the training and organized the required material. As the training could not take place as planned due to COVID-19 pandemic in the first week of May 2020, it was postponed to an unknown future date. In the meantime, the teams developed the project further to include a crowdfunding campaign to support refugee organizations in the camp, as well as to publish an academic article raising awareness about human rights violations there during the pandemic.

Adopting a critical and careful approach to relations of power and domination, the authors were careful to avoid imposing their views on the other participating teams and any privilege regarding their cultural perceptions. Adopting a feminist approach, the authors will address the child always in the female form. Furthermore, the term “persons with disabilities” will be used and considered as respectful towards the concerned persons, according to the terminology used in international conventions, especially the Convention on the Right of Persons with Disabilities (CRPD).

## II. Project Overview

### A. Introduction

In order to complete their academic formation at the University of Geneva, law students must enrol in a seminar and write a master thesis. The University offers a practice-oriented seminar called, “Law Clinic”, focusing on the rights of vulnerable people.<sup>1</sup> One topic of the 2019-2020 Law Clinic was “Applied Human Rights: Implementing a training in Kakuma refugee camp on the rights of children with disabilities”. In the context of this seminar and in close collaboration with InZone,<sup>2</sup> a week-long training on the rights of children with disabilities in the Kakuma camp will be organized. The project unites students from Kakuma camp, Kenyatta University and the University of Geneva.

The Law Clinic of the University of Geneva was formed in 2013 with the aim of discussing human rights from a practical and critical perspective. The Law Clinic offers information to a specific (vulnerable) population about their rights, *inter alia*, by popularising academic research carried out by students (e.g. through an information brochure).<sup>3</sup>

InZone is a project of the University of Geneva, offering, *inter alia*, academic courses for refugees on the basis of a learning ecosystem model specifically developed to be used in refugee camps.<sup>4</sup> InZone has worked in Kakuma refugee camp since 2010.<sup>5</sup>

Kakuma camp was established in 1992 for the “Lost Boys of Sudan”.<sup>6</sup> The camp is located on the outskirts of Kakuma town in the northwest of Kenya, a principal town in Turkana County. It is divided into four camps and one integrated settlement that combines refugees and the local population, the Turkanas.<sup>7</sup> Over 191,500 refugees or asylum seekers live in the camp.<sup>8</sup>

In 2018-2019, the Law Clinic - InZone project “Applied Human Rights” took place for the first time. Students from Geneva, students in Kakuma camp participating in the InZone course “Introduction aux droits de l’homme”, and students from Kenyatta University in Nairobi together created a training week for community elders and zone leaders in Kakuma refugee camp on the subject of children’s rights.<sup>9</sup>

The following work is to be understood as a continuation of the Law Clinic - InZone project “Applied Human Rights”. The COVID-19 pandemic required significant changes to the project and the training could not take place as planned. The situation and its effects on the project will be discussed in detail below.<sup>10</sup>

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<sup>1</sup> <https://www.unige.ch/droit/lawclinic/fr/qui-sommes-nous/presentation/>, last consulted on 17.11.19.

<sup>2</sup> <https://www.unige.ch/inzone/who-we-are/>, last consulted on 17.11.19.

<sup>3</sup> <https://www.unige.ch/droit/lawclinic/fr/qui-sommes-nous/presentation/>, last consulted on 04.04.2020.

<sup>4</sup> CARRON, para. 1.

<sup>5</sup> <https://www.unige.ch/inzone/what-we-do/regions/horn-africa/>, last consulted on 14.06.2020.

<sup>6</sup> UNHCR, Kakuma Refugee Camp and Kalobeyei Integrated Settlement.

<sup>7</sup> UNHCR, Kakuma Refugee Camp and Kalobeyei Integrated Settlement.

<sup>8</sup> UNHCR, Kakuma Refugee Camp and Kalobeyei Integrated Settlement.

<sup>9</sup> <https://www.unige.ch/inzone/what-we-do/news/2019/kenya-lunige-organise-une-semaine-de-formation-aux-droits-de-lenfant/>, last consulted on 04.04.2020.

<sup>10</sup> See *infra*, IX: Further development of project due to COVID-19.

## A. Project goals

The *raison d'être* of a law clinic to contribute to social justice. This project has two goals. First, it aims at the sensibilisation of community elders and zone leaders on the rights of children with disabilities and their situation in Kakuma camp. Second, it pursues the aim of completing the academic formation and practical experience of participating law students in Kakuma camp, from the University of Geneva and Kenyatta University.

Concerning the first goal, a weeklong onsite training was identified by the Kakuma team as the best way to sensitize the elders and leaders on the topic of the rights of children with disabilities. Community elders and zone leaders have an important influence on everyday life in the camp and can benefit from an important moral authority.<sup>11</sup> The training will provide these community elders and zone leaders with the necessary legal background information on the rights of children with disabilities. Such knowledge can be an effective tool to tackle the many stereotypes and problems children with disabilities face in the camp, ultimately improving their living conditions and fighting their exclusion.

Concerning the second goal, the practical experience is intended to allow participating students to apply abstract theoretical legal concepts to a given situation. In line with the idea of a law clinic, the formation of the student is practice-oriented, student-centred, problem-based, and contains interactive learning methods. This includes practical work on real social issues, although supervised by academics and professionals.<sup>12</sup> The aim is for participating students to become informed on topics ranging from the rule of law, access to justice, peaceful conflict resolution, to the solving of social problems.<sup>13</sup> Furthermore, the different environments in which the three student teams operate will allow for a familiarization and sensitization of the other team's circumstances, thereby enhancing international student cooperation.

## B. Participants and partners

The project unites students from the Kakuma refugee settlement (Kakuma team), students from the Kenyatta University in Kenya (Kenyatta team), and students from the University of Geneva (Geneva team). Each team was, at different stages, responsible for different aspects of the training. The Kakuma team consists of ten students<sup>14</sup> who had previously followed the course, "Introduction aux droits de l'homme" of InZone.<sup>15</sup> The Kenyatta University team consists of two students, both part of the Kenyatta University Legal Aid Clinic.<sup>16</sup> Finally, the Geneva team also consists of two students, who are both part of the University of Geneva Law Clinic.<sup>17</sup>

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<sup>11</sup> See *infra*, III : Factual research; WhatsApp discussions with students; Discussions with organizations.

<sup>12</sup> <http://www.encl.org/about-encl/definition-of-a-legal-clinic>, last consulted on 13.12.2019.

<sup>13</sup> <http://www.encl.org/about-encl/definition-of-a-legal-clinic>, last consulted on 13.12.2019.

<sup>14</sup> During the preparation of the training, the Kakuma team was reduced to 7 students due to various reasons.

<sup>15</sup> <https://www.coursera.org/learn/droits-de-lhomme/>, last consulted on 13.12.2019.

<sup>16</sup> <http://ku.ac.ke/lac/index.php>, last consulted on 13.12.2019.

<sup>17</sup> <https://www.unige.ch/droit/lawclinic/fr/>, last consulted on 13.12.2019.



The teams had different responsibilities during the project. The Kakuma team was responsible for the identification of a topic in need of legal attention, the questioning of community elders and zone leaders about their interest in participating in a training on said topic, and all the onsite organizational aspects of the training. Having identified the topic, the Kenyatta team was mainly responsible for research on the rights of children with disabilities from a Kenyan law perspective. Finally, the Geneva team had a coordinating role while also providing legal research from an international law perspective.

During the training on site, external organizations were meant to participate. The opening ceremony was planned to include UNHCR, Humanitarian Inclusion (HI) and Voice for Disabled People Association (VDPA). HI, VDPA and the so-called Mobilizers to participate during the following days of the training. These organizations provided practical information on how dispute settlements are handled in the camp and on the situation of and challenges faced by children with disabilities.

Furthermore, the InZone management team on site in Kakuma was supposed to organise logistics and provide additional support as required. Also, the Geneva team was always in close contact with its supervisors from the Law Clinic and InZone.

## D. Selected topic

The topic, “rights of children with disabilities”, was proposed by the Kakuma team because some students work with children with disabilities and were thus aware of situations where they were becoming victims of human rights violations. In collaboration with the responsible persons of the Law Clinic and InZone, they identified this topic as needing immediate attention.

Agreeing on the need to offer community elders and zone leaders training on the rights of children with disabilities from an international and Kenyan law perspective, the Geneva team had to further narrow down the topic for their legal research. In close collaboration with the Kakuma and Kenyatta students, two specific situations have been identified: the issue of parents hiding their children with disabilities at home and violence towards them.

## E. Structure of the project

The project can be divided into four main phases. During the first phase, the Geneva team undertook the necessary factual and legal background research. After conducting factual background research (III), legal research about the rights of children with disabilities in international law was conducted (IV), while adopting an approach sensitive to relations of power and domination (V). During the second phase, the training on site was organized (VI). This preparation phase was to be followed by the implementation phase (VII), covering the period when the training at Kakuma camp was meant to take place. During the final evaluation phase (VIII), it was intended to critically review the project and provide a conclusion.

Due to restrictions resulting from the COVID-19 crisis, this thesis will present mostly what was meant to take place and what had been organized up to this point. A critical evaluation of the

planned activities will nevertheless be presented, although the concrete transmission to the training's targeted audience could not be achieved.

During the first phase of the project, the factual and legal background research, the Geneva team's aim was to understand the scope of the project fully and to gather background information on Kakuma camp, Kenya, and the refugee context in East Africa. At the same time, the Kakuma students conducted interviews with community elders and zone leaders to identify the topics needing to be treated during the training. This was a big challenge due to issues arising from the inherent difficulties of living in a refugee camp (high transport costs, heavy rains resulting in floods that impeded movement, etc.). Nevertheless, the Kakuma team conducted 10 interviews, providing important information about the needs on site. In order to develop an inclusive approach towards the project in accordance with the Law Clinic's goals, the Geneva team received preliminary training<sup>18</sup> on challenges that refugees in Kakuma face and how to cope with some of the practical questions that might arise while communicating with the other teams on WhatsApp, or during the training in Kakuma.

Two legal research projects served as the academic basis for the onsite training. One was done by the Geneva team as an analysis of the rights of children with disabilities according to international law (IV). The other research by the Kenyatta students analyses the rights of children with disabilities in Kenyan law.<sup>19</sup> After having identified the topics for the training by following the Kakuma team's suggestions, both teams faced the difficulty of determining an adequate structure for their legal research.

Following the Law Clinic's guidelines and aims, the training focuses on the legal empowerment of local communities by encouraging discussions between the participants of the training on solutions to problematical situations for vulnerable populations.<sup>20</sup> As legal empowerment is a key element throughout the whole project, it is important to underline the typical criteria to achieve the empowerment goal.<sup>21</sup> Those criteria are, *inter alia*, the emphasis on strengthening the capacities of disadvantaged people, the selection of issues and strategies adapted to the situation of the targeted populations, the appreciation of informal systems of justice, as well as traditional community organization.<sup>22</sup> Legal empowerment aims to avoid replicating northern imports.<sup>23</sup> Contrary to classical academic legal redactions that merely treat abstract rights, the Kenyatta and Geneva teams had to rethink and adapt the structure of their research to provide legal answers to concrete problematical situations.

During the second phase, the training preparation phase, the training had to be planned and organized. A risk assessment of the training-week allowed the teams to consider and prepare for eventualities.<sup>24</sup> Several practical obstacles had to be overcome, such as the development of functioning channels of communication, allowing the distribution tasks and a constant academic exchange on the legal dimension of the project.<sup>25</sup> A detailed program of the training

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<sup>18</sup> Consisted of several sessions between the author of this thesis and different members of InZone and the Law Clinic.

<sup>19</sup> See *infra*, annex A: Legal redaction Kenyatta team.

<sup>20</sup> GOLUB, p. 25.

<sup>21</sup> The United Nations Secretary-General defines it as "the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors", cf. PURKEY, p. 264.

<sup>22</sup> GOLUB, pp. 25-26.

<sup>23</sup> GOLUB, p. 26.

<sup>24</sup> For a critic of this risk management following the COVID-19 crisis, see *infra*, VI, A : Risk assessment.

<sup>25</sup> See *infra*, VI, B : Practical challenges and coping strategies.

week had to be developed, considering didactical aspects and the different roles of the students.<sup>26</sup> Also, an information sharing tool to summarize the results of the training week for the participants and the broader public in line with the empowerment thought had to be set up.<sup>27</sup> Finally, an evaluation tool had to be prepared.<sup>28</sup>

For the third phase, the implementation phase, two core activities were planned. First, the training week in Kakuma refugee camp was meant to take place and second, the information-sharing tool was to be finalized with inputs from the training participants. The recognition of these inputs is aligned with the Law Clinic's goal to value the knowledge of local communities.

Finally, the fourth and last phase - the evaluation phase - should have been dedicated to critically assess the project as a whole and suggest improvements for the next students participating in the "Applied Human Rights" course. However, due to the COVID-19 pandemic, only the research and preparation phases could be evaluated.

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<sup>26</sup> See *infra*, VI, C: Planned program of the training.

<sup>27</sup> See *infra*, VI, D: Development of an information sharing tool.

<sup>28</sup> See *infra*, VI, E: Development of evaluation tools.

### III. Factual research

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In order to have a better understanding of the situation on the ground, the Geneva team had to undertake in depth factual research as soon as the project had started. Gathering the information presented in this section was challenging. There is a lack of academic research concerning local power structures or the area of influence of community elders and zone leaders in Kakuma camp. There is also a lack of accessible information directly addressed to vulnerable groups, such as children with disabilities, about their rights. The lack of academic and group-oriented information can be understood as a symbol of the inequalities between northern and southern law clinics.<sup>29</sup>

In Geneva for example, a law clinic has existed since 2013 and now has the human and financial resources to regularly publish brochure, articles, and organize conferences and other interventions to inform vulnerable populations about their rights and to promote their empowerment.<sup>30</sup> No universities (to our knowledge) have organized similar projects for vulnerable groups in Kakuma camp. This lack of information was especially challenging for the Kenyatta and Geneva teams not living in Kakuma camp. Therefore, an exchange with the Kakuma team as a source of information for this research was of capital importance, as were interviews conducted by the Kakuma team with community elders and zone leaders. The collected key information is summarized as follows.

The camp, established in 1992, is located in a semi-desertic place on the A1 highway on the north-western bank of the Tarach River in Turkana county.<sup>31</sup> Originally designed for around 80,000 refugees,<sup>32</sup> the camp today has more than 190,000 inhabitants. They mainly come from South Sudan (57,7%), Somalia (18,1%), the Democratic Republic of Congo (6.6%), and Ethiopia (5.5%).<sup>33</sup> Children are a big part of the refugee population and represent 58% of the camp's inhabitants.<sup>34</sup> The percentage of people with disabilities was 12.2% in 2013 in the Turkana county.<sup>35</sup> Poverty is very present, and 87.5% of the population in the county is considered to live under the poverty threshold.<sup>36</sup> It is mandatory for the camp's inhabitants to remain in the camp; travelling is only possible with a movement pass, issued for a maximum duration of 30 days.<sup>37</sup> Also, Kakuma's inhabitants are not allowed to apply for work permits, only for alien cards, and under certain conditions, for business licences.<sup>38</sup>

Kakuma camp is administered by the Refugee Affairs Secretariat, which manages the security aspects, and the UNHCR that manages the daily aspects.<sup>39</sup> Since 2012, regular elections take place to choose zone leaders.<sup>40</sup> They represent the different cultural groups living in the camp

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<sup>29</sup> BONILLA, p. 6.

<sup>30</sup> The brochures are accessible under the following link: <https://www.unige.ch/droit/lawclinic/fr/>.

<sup>31</sup> VEMURU/OKA/GENGO/GETTLER, p. 21.

<sup>32</sup> VEMURU/OKA/GENGO/GETTLER, p. 24..

<sup>33</sup> UNHCR, Kakuma camp and Kalobeyi Settlement Briefing kit, May 2019.

<sup>34</sup> UNHCR, Child Protection Strategy Kakuma Refugee Camp, August 2017.

<sup>35</sup> UNHCR, Country Report, Kenya – Kakuma Refugee Camp, p. 1.

<sup>36</sup> UNHCR, Country Report, Kenya – Kakuma Refugee Camp, p. 1.

<sup>37</sup> GUYATT/DELLA ROSA/SPENCER, p. 5; CARRON, para. 2; see art. 12 para 3, art. 14 lit. c of the Refugees Act of 2006.

<sup>38</sup> GUYATT/DELLA ROSA/SPENCER, p. 5.

<sup>39</sup> CARRON, para. 3.

<sup>40</sup> CARRON, para. 3.

and they have, under UNHCR supervision, certain management functions in aspects concerning daily life.<sup>41</sup> However, the elected zone leaders do not enjoy much power in the decision- and policy-making processes of the camp.<sup>42</sup> On the other hand, refugee communities keep to a certain extent their own societal structures to organize many important aspects of daily life.<sup>43</sup> Elders play an important role in this regard, especially when it comes to solving conflicts, where they benefit from large powers.<sup>44</sup>

As there are many different ethnicities living in the camp, a lot of different practices and perceptions towards children with disabilities exist. In certain communities, it is believed that disability is caused by God as a gift.<sup>45</sup> In other communities, disabilities are considered the result of a curse, bad karma or a sin, either committed in a previous life or by family members.<sup>46</sup> Such negative attitudes and beliefs stigmatize children with disabilities.<sup>47</sup> They are considered as mad or incapable. These attitudes constitute an often insurmountable barrier to their integration in the community and results in social exclusion.<sup>48</sup> Ignoring the capacities of children with disabilities is ignoring them as persons and making them feel powerless and not valued.<sup>49</sup>

By addressing the training to zone leaders and elders, this project aims to rely on well-established structures and recognized moral leadership. One of the most important roles of community elders and zone leaders concerns the peaceful cohabitation of communities.<sup>50</sup> Community elders and zone leaders regularly take on the role of decision makers, especially in proceedings involving litigation, and they do help in maintaining a certain harmony inside the community.<sup>51</sup> This is especially important in the context of a refugee camp, where the formal justice system of the host state is difficult to access.<sup>52</sup>

Parallel systems of justice are therefore common in refugee camps, possibly because of a lack of trust<sup>53</sup> or other obstacles such as costs, language barriers, the need of legal representation, delays in having a final decision, or problems with enforcement.<sup>54</sup> Particularly relevant are the sanctions coming from official forms of justice - mostly fines or prison penalties - that may not match with the reconciliation or reparation goal aimed for by communities when trying to solve disputes with the advice of an elder or a zone leader.<sup>55</sup> It is acknowledged that parallel forms of justice handle the vast majority of litigation arising in many communities.<sup>56</sup> Such

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<sup>41</sup> CARRON, para. 3.

<sup>42</sup> <https://twitter.com/KanereNews/status/1201450546881712128>, last consulted on 13.12.2019.

<sup>43</sup> CARRON, para. 4 ; WhatsApp discussion with students; Discussion with organizations.

<sup>44</sup> CARRON, para. 4 ; WhatsApp discussion with students.

<sup>45</sup> WhatsApp discussions with students; Discussion with organizations.

<sup>46</sup> MC CLAIN-NHLAPO, p. 105.

<sup>47</sup> WhatsApp discussions with students; Discussions with organizations.

<sup>48</sup> UNHCR, Working with Persons with Disabilities in Forced Displacement, p. 12; Interviews with community elders and zone leaders.

<sup>49</sup> Interviews with community elders and zone leaders.

<sup>50</sup> WhatsApp discussions with students; Discussions with organizations.

<sup>51</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 17.

<sup>52</sup> PURKEY, p. 267.

<sup>53</sup> COLLIOU, p. 34; UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 17.

<sup>54</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 18.

<sup>55</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 18.

<sup>56</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 17.

parallel forms of justice are recognized in the Constitution of Kenya (KConst), even though they are of a customary nature and consequently not necessarily in writing.<sup>57</sup>

The African Commission on Human and Peoples' Rights qualifies such parallel forms of justice as "traditional justice".<sup>58</sup> Those are community-level dispute resolution mechanisms with non-state origins, based on lasting cultural and historical foundations.<sup>59</sup> As the procedural and substantive law applied in traditional forms of justice is of a customary nature, questions concerning procedural guarantees might be raised.<sup>60</sup> In effect, as stated in para. 4 of the Dakar Declaration on the Right to a Fair Trial in Africa, traditional forms of justice should not be exempt from the provisions of the African Charter on Human and Peoples' Rights (ACHPR), relating to a fair trial.<sup>61</sup> This concerns in particular art. 7 of the ACPHR, which guarantees the right to be heard, the right to have access to a court, the right of being presumed innocent, as well as the right to defence. Those guarantees cannot always be fulfilled in traditional systems of justice.<sup>62</sup> Besides, it is questionable whether discrimination is not being reinforced by traditional forms of justice by reproducing certain power relations in communities.<sup>63</sup>

Nonetheless, justice and peaceful cohabitation can be achieved through recognized systems of traditional justice.<sup>64</sup> In Kakuma, a complex system of dispute resolution mechanisms through zone leaders and elders exists, relying on the above discussed elements of traditional justice.<sup>65</sup> According to exchanges with Kakuma inhabitants, it is indeed common – but not systematic – to solve a litigation in the camp by first discussing the disagreement between the concerned persons.<sup>66</sup> Then, on the advice of other members of the community, the parties of a dispute would go to the community elders if the concerned persons belong to the same community, as an preliminary attempt to conciliate the parties.<sup>67</sup> If this is not sufficient to solve the dispute, or if the parties cannot agree to find an elder to discuss their dispute, the parties would go to a community leader.<sup>68</sup> Should after discussions with members of the community and the community leader the situation still remain unresolved, the parties would go to official organizations, such as the UNHCR, the Refugee Affairs Secretariat or the police.<sup>69</sup>

For a problem or dispute arising in relation to a child's situation in particular, the parties would try to discuss the problem first with the child's parents. Then, if it is not solved, they would bring the problem before an elder or a zone leader if they belong to different communities,

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<sup>57</sup> See Legal redaction, *infra* p. IV.C.2: Customary law in Kenya; nevertheless in Kakuma camp some communities do have written customary rules such as the Congolese.

<sup>58</sup> Article S, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), quoted in UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 12.

<sup>59</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 12.

<sup>60</sup> COLLIOU, pp. 41, 44.

<sup>61</sup> Adopted by the African Commission on Human and Peoples' Rights, quoted UNHCR, Human Rights and Traditional Justice Systems in Africa, p. 44.

<sup>62</sup> For a further analysis, see UNHCR, Human Rights and Traditional Justice Systems in Africa, pp. 48 ss.

<sup>63</sup> UNHCR, Human Rights and Traditional Justice Systems in Africa, pp. 61 ss.

<sup>64</sup> PURKEY, p. 267; United Nations High Commissioner for Refugees (UNHCR), Human Rights and Traditional Justice Systems in Africa, pp. 19, 27.

<sup>65</sup> InZone preliminary training.

<sup>66</sup> WhatsApp discussions with students.

<sup>67</sup> WhatsApp discussions with students; Discussions with organizations.

<sup>68</sup> WhatsApp discussions with students; Discussions with organizations.

<sup>69</sup> WhatsApp discussions with students; Discussions with organizations.

and ultimately before the child protection service.<sup>70</sup> It is typical that family disputes or juvenile issues fall under the competence of traditional forms of justice.<sup>71</sup> Concerning problematic situations in which a child bearing disabilities is believed to have been cursed, witchcraft is typically of relevance for parallel forms of justice.<sup>72</sup>

Due to their implication and role in traditional dispute-solving mechanisms, zone leaders and elders enjoy a considerable moral authority among the communities.<sup>73</sup> Thanks to this authority, they might be able to significantly influence negative perceptions that communities might have about children with disabilities and help solving situations in which children have been victims of exclusion and harassment.<sup>74</sup> As community elders and zone leaders are the first addressees in case of a litigation involving a child, raising their awareness on the rights of children with disabilities is a way to ensure that the child's best interest is assessed in problematical situations.<sup>75</sup>

By relying on community elders and zone leaders as primary addressees and, more importantly, as primary transmitters of the key messages of the training, this project aims to overcome a major challenge faced by many advocacy or sensibilisation campaigns in practice: successful implementation on the ground.<sup>76</sup> It is important to note that customary mechanisms are often more available to children and their families because of the conciliation component being aimed at when bringing a dispute involving a child into a traditional form of justice.<sup>77</sup> Nevertheless, expressing the concern that customary practices may involve human rights violation, especially concerning corporal punishment towards children,<sup>78</sup> the sensitization and training of zone leaders and elders about certain international and national rules is of paramount importance in achieving the protection of the child's best interests in dispute resolutions in Kakuma camp.

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<sup>70</sup> UNHCR, *Human Rights and Traditional Justice Systems in Africa*, p. 21; as for the situation in Kakuma, discussions with organizations.

<sup>71</sup> UNHCR, *Human Rights and Traditional Justice Systems in Africa*, p. 20.

<sup>72</sup> UNHCR, *Human Rights and Traditional Justice Systems in Africa*, p. 21.

<sup>73</sup> COLLIU, p. 43

<sup>74</sup> COLLIU, p. 43; Interview with community elders and zone leaders.

<sup>75</sup> COLLIU, p. 43.

<sup>76</sup> PURKEY, p. 263.

<sup>77</sup> UNHCR, *Human Rights and Traditional Justice Systems in Africa*, p. 69.

<sup>78</sup> UNHCR, *Human Rights and Traditional Justice Systems in Africa*, p. 69.

## IV. Legal research

### A. Introduction

This legal research's main purpose is to provide the Geneva team with the necessary background information to successfully conduct a training week in Kakuma camp. The structure of this legal research will be oriented towards solving practical problems on site. Similarly, every chapter summarizes the main findings in the form of bullet points at the end. Acknowledging that such a practice is not necessarily in line with academical writing, it seems nevertheless justified by the need to vulgarize some key points, thereby enhancing the legal empowerment effects of this project.

The onsite training will be thematically structured in this research. It first discusses some key terms (B) and the applicable international and Kenyan legal frameworks (C). Then, two challenges, as identified by the Kakuma team, will be discussed from a legal perspective: the problem of children being hidden at home (D.1.) and violence towards them (D.2.). In the end, a summary of the findings will be presented (E.).

Given the wide scope of the topic, "children with disabilities' rights", and bearing in mind the desired practical dimension of this project, the Geneva team deliberately did not treat certain aspects. The Geneva team always had to consider in what areas community elders and zone leaders have an actual influence and where it therefore makes sense to offer them international law principles as a tool to fight the challenges facing children with disabilities in the camp.

Interviews with community elders and zone leaders showed that many negative clichés around children with disabilities exist in the camp.<sup>79</sup> Children with disabilities are regularly considered as incapable or inferior.<sup>80</sup> This leads to exclusion from the community and makes these children vulnerable to various forms of discrimination, neglect, violence and abuse,<sup>81</sup> thus reinforcing their inferior position in society.<sup>82</sup>

Such violence can originate from strangers, but also from persons belonging to their own community.<sup>83</sup> Generally, the lack of appropriate health care and special assistance for children with disability further exacerbates the situation of exclusion.<sup>84</sup> Unmet needs of children with disabilities in the camp lead to physical and psychological barriers, which widen the gap between children with disabilities and other children, increasing the risk of discrimination.<sup>85</sup>

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<sup>79</sup> Interviews with community elders and zone leaders.

<sup>80</sup> Interviews with community elders and zone leaders.

<sup>81</sup> For children in general but can be taken over for children with disabilities, REYNAERT/ROOSE pp. 37-38; Women's Refugee Commission, Disability Inclusion. Translating Policy into Practice in Humanitarian Action, p. 2; Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>82</sup> UNHCR, Working with Persons with Disabilities in Forced Displacement, p. 4; World Vision Kenya, UNHCR Geneva, Women's Refugee Commission, UNHCR Kenya, Film Aid, Danish Refugee Council (DRC), Norwegian Refugee Council (NRC), National Refugee Youth Consultation. Summary Report, 2<sup>nd</sup>-5<sup>th</sup> May 2016, p. 6.

<sup>83</sup> UNHCR, Working with Persons with Disabilities in Forced Displacement, p. 19.

<sup>84</sup> MIRZA, p. 24.

<sup>85</sup> MIRZA, p. 24.



Children with disabilities therefore face multiple discriminations.<sup>86</sup> This situation makes them easy targets for violent behaviour, as they are often perceived as incapable of defending themselves.<sup>87</sup> The lack of access to rehabilitation services exacerbates their vulnerability.<sup>88</sup> Not considering children with disabilities as capable is connected to the widespread and general denial of their rights, isolation from the community, and violence towards them.<sup>89</sup>

An important challenge for the Geneva team when writing this research was the reconciliation between international legal norms and local traditions and practices. An example is the potential conflict between the local traditional conception of a child and her best interests versus the child's rights in international law.<sup>90</sup> As the child's best interests are dynamic to the framework of traditions,<sup>91</sup> the concept of the child's best interests has to be flexible and take into account cultural differences.<sup>92</sup> Even though tradition plays an important role in social cohesion, it should not serve as an excuse to infringe upon the provisions of the international legal framework and shall not be an excuse for the denial of the rights of children with disabilities.<sup>93</sup>

## B. Definitions

Although there are various definitions of persons with disabilities, respectively of a child, international instruments do not give a definition of children with disabilities. Therefore, this research reviews those definitions in order to underline some characteristics that need to be emphasized when speaking of the rights of children with disabilities. The legal consequences of the analysed characteristics will be discussed in their practical dimension in concrete situations to focus on discussing solutions to specific challenges.

### 1. Disabilities

The CRPD defines persons with disabilities in art. 1 as *“those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”*. A person with disabilities is conceived as a subject with rights, not as an object of medical interventions as it used to be in the past.<sup>94</sup> The human rights model of disability requires to see a person

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<sup>86</sup> VUCKOVIC-SAHOVIC, p. 43; SABATELLO, p. 327.

<sup>87</sup> MC CLAIN-NHLAPO, p. 105; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 31.

<sup>88</sup> SABATELLO, p. 329.

<sup>89</sup> Women's Refugee Commission, Disability Inclusion. Translating Policy into Practice in Humanitarian Action, p. 2.

<sup>90</sup> BREEN, pp. 4, 22, 24, 85; UN CRC, General comment No. 13, para. 12.

<sup>91</sup> BREEN, p. 1.

<sup>92</sup> BREEN, p. 86.

<sup>93</sup> BREEN, p. 9; Bearing in mind especially harmful practices such as corporal punishment, female genital mutilations, amputations, binding, scarring, burning, branding, degrading initiation rites, forced marriage, honour crimes or payback violence, cf. UN CRC, General comment No. 13, para 29.

<sup>94</sup> VUCKOVIC-SAHOVIC, p. 40; MERCIER, p. 27; UN CRPD, General comment No. 7, para. 17 and its references; UN CRPD, General comment No. 6, para. 2.

with disabilities not as passively receiving healthcare, but as a subject of rights which they can claim.<sup>95</sup> No impairment shall therefore be an excuse for the denial or restriction of rights.<sup>96</sup>

Another particularity of the definition based on the human rights model is that disability is defined through its context, which is dynamic, instead of a pure definitive medical condition.<sup>97</sup> A person is perceived as disabled only because of her interaction with an environment in which she has to evolve.<sup>98</sup> According to the World Health Organisation's definition of persons with disabilities, which is not binding, a disability is the result of incapacities due to certain deficiencies, combined with a social context and the inadaptation of the persons to the society standards.<sup>99</sup> It is therefore a concept evolving in the function of barriers, which can be architectural, attitudinal or structural.<sup>100</sup>

There are two main models about these persons' rights.<sup>101</sup> The *Disability creation process*<sup>102</sup> and the *International classification of functioning, disability and health*<sup>103</sup> have in common that they define disability as the interaction between the person and her environment, and as an impairment, leading to limitations and restrictions.<sup>104</sup> Since this project aims to be as inclusive as possible and considering that neither the CRPD, nor the Convention on the Rights of the Child (CRC) define every single type of disability (disability can be physical, sensory, psychosocial, intellectual, etc.), this research will avoid such limiting descriptions of disabilities and understand disability as an interaction between the person and her environment.

In Kenyan law, the legal definition of disability is different from the international definition. In Kenyan law, a "*disability*" means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation" as defined in section 2 of the Kenyan Persons with Disabilities Act (KPSDA). This definition is narrower than the one used on the international level, since it implies a "*physical, sensory, mental or other*" impairment. The result of the impairment is an impact on "*social, economic or environmental participation*". This definition seems not to adequately recognize the dynamic dimension of the definition of disability.<sup>105</sup> The definition seems to be based on a medical diagnosis rather than considering disability as the result of the interaction between the person and her environment in a given context.

The Kenyan Children Act (KCA) defines children with disabilities as "*suffering from a physical or mental handicap which necessitates special care for the child*" (section 2 KCA). The principle that a disability is defined through the environment has been abandoned in this definition. The definition focuses solely on the special assistance required, considering the child as an object of a medical diagnosis, who passively receives welfare and healthcare, underlining her condition as an object of charity instead of the subject of rights. This definition does not take

<sup>95</sup> SABATELLO, p. 331; DEGENER p. 10; SEATZU, p. 87; UN CRPD, General comment No. 6, para. 8.

<sup>96</sup> DEGENER p. 10; UN CRPD, General comment No. 6, para. 9.

<sup>97</sup> Working with Persons with Disabilities in Forced Displacement, p. 5.

<sup>98</sup> MERCIER, p. 32.

<sup>99</sup> MERCIER, p. 34.

<sup>100</sup> DEGENER p. 13; Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>101</sup> MERCIER, pp. 32-33.

<sup>102</sup> <https://ripph.qc.ca/en/hdm-dcp-model/the-model/>, last consulted on 05.11.2019.

<sup>103</sup> <https://ripph.qc.ca/en/hdm-dcp-model/definition-of-handicap/>, last consulted on 05.11.2019.

<sup>104</sup> <https://ripph.qc.ca/en/hdm-dcp-model/definition-of-handicap/>, last consulted on 05.11.2019 ; World Health Organization Geneva, Towards a Common Language for Functioning, Disability and Health, <https://www.who.int/classifications/icf/icfbeginnersguide.pdf?ua=1>, p. 2, last consulted on 05.11.2019.

<sup>105</sup> For more details, see the Kenyatta team's legal redaction in annex A.

into account the international developments considering the child as a subject of rights. The definition considers the child as disabled because of a medical condition instead of pondering her social interactions with her environment. However, courts tend to interpret this definition within the same scope than the definition flowing from international conventions.<sup>106</sup>

## 2. Children and their best interests

The internationally recognized definition of a child can be found in art. 1 CRC as every human being “*below the age of eighteen years*” (same in art. 2 of the African Charter on the Rights and Welfare of the Child (ACRWC), also taken up into internal Kenyan law in section 2 KCA). The international definition focusing on age is an expression of the lack of consensus about how children can be defined, except in terms of chronology.<sup>107</sup> It is assumed that children bare certain qualities which are, among others, a “*physical and mental immaturity*” that implies “*special safeguard and care*” (CRC Preamble), therefore requiring a particular palette of rights.<sup>108</sup> Immaturity, in this context, englobes experience, knowledge about the world and the personal self, independence about decisions and self-control.<sup>109</sup> Because children lack these abilities, they are consider as especially vulnerable and therefore in need of special protection.<sup>110</sup> Families are the primary caregiver for a child, but stigma may arise in a family, emphasising the potential need of intervention and support,<sup>111</sup> even if harm is done to the child within the family.<sup>112</sup> This greater level of interventionism, which consecrate the tendency of understanding the child not as property of her parents anymore, is concretized by the expression, “*the best interests of the child*”.<sup>113</sup>

The traditional paradigm of perceiving a child as a pure object of protection also tends to change in order to understand her as a unique individual with distinct needs and interests.<sup>114</sup> This perception flows from the concept of dignity and requires the recognition of children as rights holders who can claim the fulfilment of their rights.<sup>115</sup> While interpreting children’s rights, the best interests of the child must benefit from major attention because “*in all actions concerning children, it shall be a primary consideration*” (art. 3 CRC). Art. 4 ACRWC takes up this definition, with a small difference showing that the ACRWC is meant to go further in children’s protection: best interests “*shall be the primary consideration*”. The best interest is not only one element among others, but the first consideration that guides all the provisions.

Kenyan law takes this concept up, first in art. 53 cl. 2 of the KConst which acknowledges best interests as of “*paramount importance in every matter concerning the child*”. Then, section 4 para. 2 KCA concretizes that “*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative*

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<sup>106</sup> SABATELLO, p. 331.

<sup>107</sup> BREEN, p. 18; ARCHARD/TOBIN p. 23, 38.

<sup>108</sup> ARCHARD/TOBIN, p. 23.

<sup>109</sup> ARCHARD/TOBIN, p. 39.

<sup>110</sup> ARCHARD/TOBIN, p. 39; BREEN, p. 16; Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110; BESSON/KLEBER, pp. 47-48.

<sup>111</sup> UN CRC, General comment No. 13, para. 3 lit. h.

<sup>112</sup> BREEN, p. 16.

<sup>113</sup> BREEN, p. 42.

<sup>114</sup> UN CRC, General comment No. 13, para. 3 lit. c.

<sup>115</sup> UN CRC, General comment No. 13, para. 3 lit. b.

bodies” and the best interest must be “a primary consideration”. Internal law has taken up the CRC vocabulary, aligning itself with the internationally recognized definitions.

The best interest of the child has to be considered in every proceeding, policy, program or project connected to or having an impact on children.<sup>116</sup> It requires an analysis of to what extent every decision may affect the child and her best interests,<sup>117</sup> by ensuring the full enjoyment of her rights and development.<sup>118</sup> The criteria that need to be considered in the assessment of these best interests are the opinions of the child and her family, her particular situation, her need for continuity, and the risk of harm to her.<sup>119</sup> Considering her particular situation, one has to take into account her individual characteristics, such as age, sex, level of maturity (which implies a physical, emotional, cognitive and social development assessment),<sup>120</sup> experience, disability, socio-cultural context, the group to whom she belongs and the relationship with her family.<sup>121</sup>

The best interest of the child principle is aimed at the complete physical, psychological and social well-being of the child.<sup>122</sup> It has to be adapted on a case-by-case basis and to be interpreted individually to find the optimal state for each child, excluding an average expectation.<sup>123</sup> One has to intervene in the family if a child needs protection, yet has to preserve her autonomy.<sup>124</sup> Therefore, if a child is known to be in a particular situation of vulnerability, an individual vulnerability assessment is required to determine if she is exposed to further harm.<sup>125</sup> As for a child with disabilities, the disability constitutes a criterion of the vulnerability assessment, to which other individual characteristics have to be added. An analysis of the special assistance required, once it is determined that a child with disabilities is in a situation of vulnerability, will be made, while discussing violence towards children with disabilities.<sup>126</sup> The children with disabilities’ conception constantly aims for a balance between the recognition of their vulnerability requiring special protection and acknowledgement of their autonomy, which ensures their right to self-determination.<sup>127</sup>

### 3. Refugees

Kakuma camp is a special environment since the children with disabilities living there are likely to be refugees or asylum seekers,<sup>128</sup> and therefore potentially even more vulnerable

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<sup>116</sup> EEKELAAR/TOBIN, p. 78; UN CRC, General comment No. 13, para. 3 lit. f.

<sup>117</sup> United Nations High Commissioner for Refugees (UNHCR), *Refugee Children. Guidelines on Protection and Care*, pp. 21-22.

<sup>118</sup> UN CRC, General comment No. 14, para. 4.

<sup>119</sup> BREEN, p. 45; EEKELAAR/TOBIN, p. 95.

<sup>120</sup> UN CRC, General comment No. 14, para. 83.

<sup>121</sup> UN CRC, General comment No. 14, para. 48.

<sup>122</sup> LLOYD, p. 37; VON SCHORLEMER/SCHULTE-HERBRÜGGEN, p. 200.

<sup>123</sup> VON SCHORLEMER/SCHULTE-HERBRÜGGEN, p. 200; UN CRC, General comment No. 13, para. 3 lit. c; UN CRC, General comment No. 14, para. 32; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 and No. 22, para. 28.

<sup>124</sup> BREEN, p. 16.

<sup>125</sup> UN CRC, General comment No. 14, para. 76.

<sup>126</sup> See *infra*, pp. 34 ss.

<sup>127</sup> About refugees or asylum seekers children in general, see. ARNOLD, pp. 62, 173.

<sup>128</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, *Research Manual Kakuma Refugee Camp*, p. 3.

and exposed.<sup>129</sup> A refugee is defined in international law as “every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (art. 1 RC, art. 1 para. 1 Organization African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU RC)). This refugee definition includes “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (art. 1 para. 2 OAU RC). This second paragraph of the OAU RC embraces situations that would not be included in the RC; therefore it is broader.

In Kenyan law, the Kenyan Refugee Act (KRA) defines a refugee as “such person — (a) being outside of his or her country of nationality and owing to a well-founded fear of being for reasons of race, religion, nationality, membership of a particular social group or political opinion who is in Kenya and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or country of nationality or the country of habitual residence; (b) not having a nationality and being outside the country of his or her former habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is in Kenya and is unable or, owing to such fear, unwilling to return to the country of his or her habitual residence; (c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his or her country of origin or nationality is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality” (section 3 para. 1).

#### 4. Conclusion

The above review of the various definitions provides a framework for formulating a concept of the term, "children with disabilities", to be used during the training week in Kakuma camp. In this sense, disability is not to be understood as a definitive medical diagnosis but fluctuant to the environment. For children under the age of eighteen years, their best interest is the primary consideration in all actions concerning them. A proper individual assessment of the best interest is based on many criteria, including the one of disability, and should lead to adapted and individual measures for the concerned child. Persons with disabilities might be especially vulnerable because of their disability, age, refugee- and social status, etc.

Children with disabilities should be considered as rights holders, enjoying all their rights and freedoms on an equal basis with others and enjoying recognition of their dignity, integrity, and equality. Each situation discussed in the following keeps in mind this special vulnerability of children with disabilities, while considering them capable of being actors in their own lives.

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<sup>129</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 31.

Definitions:

- Disability:
  - o is not a definitive medical diagnosis
  - o is fluctuant to children with disabilities' impairments and their interactions with their environment
- Best interests of the child:
  - o individual assessment in every decision or situation which has an impact or an effect on the child
  - o aims to determine what the interests of the child are and to give them a primary consideration in order to enhance the development of the child
  - o shall take into account the individual situation: age, sex, level of maturity, experience, disability, socio-cultural context, group, family, etc.
- refugee: the term is understood in the following in accordance with the OAU RC
- children with disabilities in Kakuma might face multiple discriminations based on their age, disability, social status, additionally to individual characteristics
- children with disabilities are subjects of rights that they can claim

## C. The legal framework

This research relies on several international and national law sources.<sup>130</sup> The interplay of international and customary law in Kenya will mainly be discussed in terms of the legal research of the Kenyatta team.<sup>131</sup> Only a short overview will be provided.

### 1. International law in Kenya

Traditionally, there are two systems for applying international law on a national level. The monistic theory considers international and national law as being part of one single conception of law; hence international law, upon acceptance by a state, is simply incorporated into the national legal framework with automatic effect.<sup>132</sup>

In a dualist system, international and national law are considered as two separate systems and international law needs to be translated (e.g. by an act of the legislative) into national law to have an effect.<sup>133</sup> Kenya has adhered for a long time to a dualist system, but in 2010, this changed with the adoption of the new constitution to a monistic system.<sup>134</sup> Kenya's Constitution now states that "*the general rules of international law shall form part of the law of Kenya*" (art. 2 cl. 5 KConst). However, the exact meaning of this provision is unclear given that

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<sup>130</sup> The CRC and the CRPD are among the most cited, given their immediate link to this re-search's topic. Furthermore, the UDHR, the UN Pact I, as well as the UN Pact II will often be cited. Considering that Kenya is part of the AU, the ACHPR and the ACRWC will also often be referred to. On the national level, the KConst, the KPDA, the KCA and the KPC will be quoted. Finally, regular reference will be made to the KRCC.

<sup>131</sup> See *infra*, annex A: Legal redaction Kenyatta team.

<sup>132</sup> BOAS, p. 112.

<sup>133</sup> BOAS, p. 120.

<sup>134</sup> KABAU/NJOROGE, p. 293.

the constitution claims at the same time to be “*the supreme law of the Republic*” (art. 2 cl. 1 KConst), therefore leading to a norm collision. Kenyan legal scholars have different interpretations as to whether international law supersedes the constitution or not.<sup>135</sup> It is generally accepted thought that international human rights treaties signed by Kenya are directly applicable in Kenyan law,<sup>136</sup> leading to the conclusion that the rights embedded in international human rights treaties like the CRC and CRPD must be applied.

The ACHPR, as a characteristic and unlike most other human right treaties,<sup>137</sup> imposes direct duties on individuals (see art. 27, 28 and 29 ACHPR). Individual duties are considered to originate from the specific African civilisation and philosophy of community responsibility.<sup>138</sup> Especially interesting is art. 28 ACHPR in the context of this research, imposing a duty on individuals to “*respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance*”. Art. 28 ACHPR imposes a duty on individuals to respect each other’s rights and promote good neighbourliness, an important obligation given that perpetrators of human rights violations regularly are private persons.<sup>139</sup> Even though the justiciability of the individual duties in the ACHPR is contested, they are generally accepted.<sup>140</sup> The duty in art. 28 ACHPR is completed by the guarantee that “*the rights and freedoms of each individual shall be exercised with due regard to the rights of others*” (art. 27 para. 2 ACHPR) and that “*all peoples shall be equal; they shall enjoy the same respect and shall have the same rights*” (art. 19 ACHPR). Also art. 19 and 27 ACHPR are directed towards individuals.<sup>141</sup>

These articles emphasise the perception of a person as an element of society, whose rights have to be protected.<sup>142</sup> The community to which a person belongs has obligations towards her and in return, the person has obligations towards her community to ensure social cohesion.<sup>143</sup> These individual duties and obligations also concern community elders and zone leaders. The controversial discussions about the horizontal and vertical effects of international human rights law extends beyond the scope of this research. The overall aim of this project to sensitize community leaders on the rights of children with disabilities and their potential role in the protection of this vulnerable group seems to justify a rather wide interpretation of the vertical effects.

## 2. Customary law in Kenya

The Kenyan legal system is special because not only international, but also African customary law must be harmonized with national law. Customary law plays an important role in the Kenyan legal system.<sup>144</sup> Under Kenyan law, culture is recognized as the foundation of the nation, and the state promotes the expression of culture in the Constitution (art. 11 KConst).

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<sup>135</sup> KABAU/NJOROGE, p. 299.

<sup>136</sup> KABAU/NJOROGE, p. 303.

<sup>137</sup> QUASHIGAH, p. 119.

<sup>138</sup> OUGUERGOUZ, p. 378.

<sup>139</sup> OUGUERGOUZ, p. 403.

<sup>140</sup> QUASHIGAH, p. 128.

<sup>141</sup> AINETTER, p. 16; ETEKA YEMET, p. 68.

<sup>142</sup> AINETTER, p. 16.

<sup>143</sup> AINETTER, p. 16 ; OLOWU p. 17.

<sup>144</sup> See III : Factual research.

Communities therefore have the freedom to practice their traditional customs in civil law cases if it is “*not repugnant to justice and morality or inconsistent with any written law*” (section 3 para. 2 Kenyan Judicature Act). From this norm results the prohibition of any custom inconsistent with any written law and consequently with the constitution or international human rights law.<sup>145</sup> This is important, as violations of children’s rights are regularly explained by custom.<sup>146</sup>

As already discussed,<sup>147</sup> it must be noted that in Kenya, traditional systems of justice are applied in parallel to the state system. In fact, the traditional system is even preferred by most persons within Kakuma camp as it reflects the customs and cultures of the inhabitants.<sup>148</sup> The traditional system of justice is tolerated by the law (art. 159 cl. 2 lit. c KConst). Nevertheless, traditional justice systems must respect the constitution and therefore international law.<sup>149</sup>

### 3. Conclusion

The main sources of international law for this research and training are the CRC and CRPD. Even though it is disputed on what level international law is to be situated within the Kenyan legal system, it is generally accepted that international human rights law is directly applicable to domestic law. International human rights law is therefore to be considered in any legal procedure, as well as in traditional procedures applying customary law. The ACHPR imposes direct duties on individuals, especially concerning the right to non-discrimination. Even though the vertical effects of international human rights law are disputed, it seems justified in this context, as the training is considered sensibilisation on international human rights. It should be emphasised again at this point that for an in-depth analysis and discussion of the relation between international, national, and customary law in Kenya, the legal research of the Kenyatta team should be consulted.<sup>150</sup>

#### The legal framework:

- CRC and CRPD are the most pertinent international law sources for the training
- even though the hierarchy of international law in the Kenyan framework is disputed, international human rights law is directly applicable in Kenya
- even though the vertical effects of international human rights law are controverse, the aim of the training as a sensibilisation on human rights justify a rather broad interpretation of the vertical effects
- the ACHPR imposes specific duties on individual, prohibiting violations of international human rights law

<sup>145</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 21.

<sup>146</sup> Interviews with community elders and zone leaders; WhatsApp discussions with students.

<sup>147</sup> See III: Factual research.

<sup>148</sup> KARIUKI, African Traditional Justice Systems, p. 7, available at: <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf>, last consulted on 06.12.2019.

<sup>149</sup> KARIUKI, African Traditional Justice Systems, p. 9, available at: <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf>, last consulted on 06.12.2019.

<sup>150</sup> See *infra*, annex A: Legal redaction Kenyatta team.



## D. Situations violating the rights of children with disabilities

The following two situations in Kakuma camp were identified by the Kakuma team as needing legal attention. After a first introduction to the identified situations and the resulting problems, the violation of the different rights of the child with disabilities are discussed.

### 1. Hiding children with disabilities at home

The problem of parents or caregivers hiding children with disabilities at home was several times expressed by community elders and zone leaders as an urgent issue in need of attention.<sup>151</sup> Hiding a child with disabilities at home potentially violates several of the child's rights as embedded in international law. In the following case, three of the most important of these rights will be analysed: the right to non-discrimination (4.1.1), the right to full and effective participation and inclusion in society (4.1.2), and the right to education (4.1.3).

These three rights have been chosen for several reasons. First, they are considered to contribute significantly to the enjoyment of other human rights (multiplier rights).<sup>152</sup> Second, violations of the right to full and effective participation and inclusion in society and the right to non-discrimination occur mainly due to the cohabitation in a given community, an area where community elders and zone leaders have actual influence.<sup>153</sup> Even though this is not necessarily the case for the right to education, it must nevertheless be discussed given its paramount importance for the development of the child.

The reasons why children with disabilities are being hidden at home are complex and multi-layered. Social stigma, fear, negative attitudes, misbelief and prejudices against children with disabilities remain strong in many communities.<sup>154</sup> A regular reason to hide a child with disabilities at home is a shame associated with a disability.<sup>155</sup> It is of paramount importance to acknowledge the fact that there are potentially legitimate reasons for parents or caregivers to hide a child with disabilities at home. These reasons might be fear for the safety of the child with disabilities if she leaves home, the lack of adequate education facilities respecting the dignity of the child, etc. Nevertheless, a very careful analysis is required in such a situation because it is generally acknowledged that isolation is the opposite of a child's best interests, and any missed occasion of integration in the community could lead to negative consequences.<sup>156</sup>

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<sup>151</sup> Interviews with community elders and zone leaders.

<sup>152</sup> COURTIS/TOBIN, p. 1058.

<sup>153</sup> See *supra*, III : Factual research.

<sup>154</sup> UN CRC, General comment No. 9, para. 8.

<sup>155</sup> Interviews with community elders and zone leaders.

<sup>156</sup> ARNAIS SANCHEZ, p. 770.

## 1.1 Right to non- discrimination

Refugee children with disabilities are especially vulnerable to discrimination, not only for being disabled, but for their age, or refugee-/alien status as well, leading potentially to multiple discriminations.<sup>157</sup> Every discrimination is an attack on the dignity of the child and has the potential to ruin her abilities to develop, grow, and learn.<sup>158</sup> Given the stigma associated with a disability, it is possible that children with a parent or sibling with disabilities might also be victims of discrimination.<sup>159</sup> Furthermore, special attentions must be paid to the fact that in many contexts, girls with disabilities are more vulnerable than boys (female mutilation, rape, higher chance of being abandoned, forced to excessively participate in household, etc.).<sup>160</sup>

The right to non-discrimination is firmly embedded in international law (art. 2 and art. 7 UDHR, art. 2 UN Pact I, art. 2 UN Pact II, art. 2 CRC, art. 2 CRPD, art. 2, art. 19, art. 27 and art. 28 ACHPR, art. 2 ACWRC). Kenya has several internal laws prohibiting discriminatory treatment (art. 27 cl. 1 KConst, section 5 KCA, section 2 KPDA). The paramount importance of the right to non-discrimination is underlined by the fact that discrimination is prohibited in all international human rights conventions.<sup>161</sup> Even more, the right to non-discrimination is considered as a cornerstone of most human rights conventions.<sup>162</sup> A definition of discrimination will be provided below and applied to persons with disabilities. Also, the right to reasonable accommodation will be discussed as it is a specific aspect of the right to non-discrimination in the context of disabilities.

### 1.1.1. DEFINITION OF DISCRIMINATION

Even though international conventions regularly prohibit discrimination, they rarely define the term.<sup>163</sup> They depend on doctrine that mainly examines if there is a differential treatment based on a prohibited ground.<sup>164</sup> A differential treatment exists when a person or a group of persons is treated differently than another person or group of persons, even though they are in the same or a comparable situation, or if they are treated equally, even though they are not in the same or a comparable situation.<sup>165</sup> Furthermore, a legitimate reason justifying such differential treatment must be absent. Reasons potentially justifying a differential treatment must be objective and proportionate.<sup>166</sup> Criteria for the proportionality assessment are, in particular, a legitimate aim or pressing social need.<sup>167</sup>

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<sup>157</sup> UN CRC, General comment No. 14, para. 76.

<sup>158</sup> UN CRC, General comment No. 1, para. 10.

<sup>159</sup> SCHMAHL, p. 72.

<sup>160</sup> SCHMAHL, p. 72; see also IV, D, 2.7: Violence towards girls with disabilities.

<sup>161</sup> Art. 2 UDHR, art. 2 UNO Pact I, art. 2 UNO Pact II, art. 2 CRPD, art. 2 CRC, art. 2 ACHPR.

<sup>162</sup> Art. 3 lit. b CRPD, or ACHPR Preamble.

<sup>163</sup> Except for the CRPD.

<sup>164</sup> BESSON/KLEBER, p. 60; SAUL/KINLEY/MOWBRA, p. 178.

<sup>165</sup> BESSON/KLEBER, p. 63.

<sup>166</sup> BESSON/KLEBER, p. 63; HENDRICKS, pp. 54-55; SABATELLO, p. 332.

<sup>167</sup> BESSON/KLEBER, p. 63.

This differential treatment has to be based on a prohibited ground.<sup>168</sup> Such grounds might be race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>169</sup> Other treaties have added other criteria to this list, such as age, colour, ethnic origin and disability.<sup>170</sup> It must be noted that the list of prohibited grounds named in human rights treaties is regularly considered non-exhaustive.<sup>171</sup> Finally, it is important to note that a violation of the right to non-discrimination can only be claimed in relation to a violation of another right, because they are dependant or derivative.<sup>172</sup>

It is important that the right to non-discrimination does not require an identical treatment and that justified factual differences are allowed, sometimes even necessary.<sup>173</sup> Consequently, not every differential treatment will automatically constitute discrimination.<sup>174</sup> If there is an objective reason to justify differential treatment and if a reasonable proportionality between the means employed and the aims sought is given, no discrimination took place.<sup>175</sup> No intention from the perpetrator of a differential treatment is necessary, though, and the simple discriminatory effect of an action or omission suffices to amount to discrimination.<sup>176</sup> Discrimination is most visible when it is materialized in humiliating stereotypes or stigmas, such as violence or harassment.<sup>177</sup>

A distinction can be made between direct and indirect discrimination, whereas direct discrimination regularly consists of a less favourable treatment – without an acceptable reason – than that accorded to another person in a similar situation.<sup>178</sup> Indirect discrimination, on the other hand, is the result of the application of a neutral criterion which disadvantages a specific group more than the members of another group, without an acceptable reason.<sup>179</sup> Another distinction can be made between formal and substantive discrimination. While formal discrimination simply prohibits an entity to pass discriminatory regulations, substantive discrimination requires addressing the historic or pre-existing disadvantage suffered by particular groups by adopting “temporary special measures”.<sup>180</sup> Finally, systematic discrimination consists of “*legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups*”.<sup>181</sup> Hiding a child with a disability at home constitutes direct discrimination. The child might also be victim of other forms of discrimination, e.g. substantive discrimination if her disadvantage is not addressed by temporary special measures. Such temporary measures are discussed in the next chapter under “reasonable accommodation”.

As one of the few international instruments, the CRPD defines discrimination, stating that “*Discrimination on the basis of disability*” means any distinction, exclusion or restriction on

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<sup>168</sup> BESSON/KLEBER, pp. 46, 61.

<sup>169</sup> Art. 2, para. 1 ICCPR.

<sup>170</sup> Art. 2, para. 1 CRC.

<sup>171</sup> For the CRC for example BESSON/KLEBER, p. 62.

<sup>172</sup> BESSON/KLEBER, pp. 46, 53; SCHMAHL, p. 74.

<sup>173</sup> SCHMAHL, p. 71.

<sup>174</sup> SAUL/KINLEY/MOWBRA, pp. 178 ss.

<sup>175</sup> UN ECOSOC, General comment No. 20, para. 13.

<sup>176</sup> BESSON/KLEBER, p. 60; SAUL/KINLEY/MOWBRA, p. 181.

<sup>177</sup> UN CRPD, General comment No. 6, para. 2; Executive Committee, conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>178</sup> BESSON/KLEBER, p. 61; CERA, p. 112; UN CRPD, General comment No. 6, para. 18 lit. a.

<sup>179</sup> BESSON/KLEBER, p. 61; CERA, p. 112; UN CRPD, General comment No. 6, para. 18 lit. a.

<sup>180</sup> BESSON/KLEBER, p. 57; HENDRICKS, pp. 46-48; SAUL/KINLEY/MOWBRA, p. 181.

<sup>181</sup> UN ECOSOC, General comment No. 20, para. 12.

*the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (art. 2 CRPD).*

In Kenyan law, discrimination means “*to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability*” (section 2 KPDA). The KPDA’s definition seems to be restricted to situations in which discrimination bears the consequence of demeaning, scandalization or embarrassment.<sup>182</sup> International law, instead, has a broader approach and emphasizes the human right’s violation that constitutes discrimination.

Considering the above definition, the following analysis can be made of keeping children with disabilities hidden at home. They are not generally treated equally with children without disabilities. This results in an exclusion with the effect of, in most cases, nullifying the concerned children’s other rights as embedded in international law, most notably to effective participation and inclusion in society and to education.<sup>183</sup> Even though a disability might constitute an objective reason why a child is treated differently than another child, a reasonable proportionality between the means employed and the aims sought must be realized. Recognising that the aims of hiding a child with disabilities at home are complex (because of the shame of being associated, protection against violence, financial restraints, etc.), focus should be put on the proportionality question. As the exclusion tends to nullify the concerned child’s other rights as embedded in international law, such as the right to education,<sup>184</sup> the proportionality criteria will most likely not be fulfilled, and the right of the child with disabilities to non-discrimination will be violated.

#### 1.1.2. REASONABLE ACCOMODATION

The CRPD not only prohibits discrimination, but it also promotes equality (art. 1 CRPD). Equality aims to overcome the cycle of disadvantage, promoting respect for dignity and worth, accommodating differences through structural change and by promoting social and political inclusion and participation.<sup>185</sup> Anti-discrimination measures should in this sense not only address the exclusion and discrimination of children with disabilities, for example, but also negligence of taking the necessary action to allow real equality.<sup>186</sup> To address this negligence, the concept of reasonable accommodation was developed.<sup>187</sup>

Reasonable accommodation is defined as all “*necessary and appropriate modification and adjustments (...), to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*” (art. 2 CRPD). Reasonable accommodation requires the adaption of the normally operating processes, procedures, or facilities to the needs of a disabled person.<sup>188</sup> Examples of reasonable accommodation might

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<sup>182</sup> See *infra*, annex A, for an approach where the Kenyatta team is also taking into account the court’s decisions.

<sup>183</sup> See *infra* IV, D, 1.2: Right to full and effective participation and inclusion in society; IV, D, 1.3: Right to education.

<sup>184</sup> See *infra* IV, D, 1.3: Right to education.

<sup>185</sup> CORSI, p. 141.

<sup>186</sup> CERA, p. 169.

<sup>187</sup> UN CRPD, General comment No. 6, para. 16.

<sup>188</sup> Cera, p. 114.

be reorganising or rescheduling work-related activities and the work environment to allow a person with disabilities to enjoy the right to work (art. 23 UDHR) or to adjust learning materials or teaching strategies, thereby allowing a person with disabilities to enjoy the right to education (art. 26 UDHR). Reasonable accommodation could also consist of adjusting and modifying equipment or enabling access to support personnel without unnecessary burdens.<sup>189</sup>

The duty of providing reasonable accommodation extends to a broad array of social actors, including, but not restricted to, the state, employers, education providers, health care providers, provider of goods and services, etc.<sup>190</sup> Reasonable accommodation should be provided from the moment a potentially duty bearer of reasonable accommodation realizes that the person with disabilities in question might require it,<sup>191</sup> but only if it does not constitute an undue burden.<sup>192</sup> Considering the broad field of addressees, community elders and zone leaders could also be considered as duty bearers, especially considering that the promotion of respect and dignity, as well as social and political inclusion, are areas where community elders and zone leaders have influence.

The concept of reasonable accommodation should also be applied to the situation of children being hidden at home. Reasonable accommodation aiming to allow children with disabilities hidden at home the full enjoyment of their rights on an equal basis with others should involve raising awareness among the public, professionals, and society in general.<sup>193</sup> Awareness rising is considered as probably one of the most decisive and effective tools to combat the pejorative stereotypes and negative attitudes that lead parents to hide their children.<sup>194</sup>

Other measures and adjustments could be constituted of strategies that provide assistance to children with disabilities and their families<sup>195</sup> or adopting measures to enable children with disabilities to be heard via assemblies and meetings.<sup>196</sup> The concept of reasonable accommodation is especially important concerning the right to education. Art. 24 para. 2 lit. c CRPD explicitly requires the provision of reasonable accommodation for children with disabilities in education. Inclusive education might be such a required measure, as might be the provision of transport to the school if social or economic barriers are an obstacle.<sup>197</sup> This argument could be developed further to include measures addressing the concern of parents for the safety of their children. Reasonable accommodation would require measures, adjustments, or processes to address this fear. Community elders and zone leaders might be uniquely placed to incite the implementation of such measures and adjustments, if they do not constitute an undue burden, allowing children with disabilities hidden at home to enjoy their full human rights and freedoms.

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<sup>189</sup> UN CRPD, General comment No. 6, para 23.

<sup>190</sup> CERA, p. 170.

<sup>191</sup> UN CRPD, General comment No. 6, para. 24, lit. b.

<sup>192</sup> UN CRPD, General comment No. 6, para. 25, lit. b.

<sup>193</sup> UN CRPD, General comment No. 6, para 39.

<sup>194</sup> UN CRPD, General comment No. 6, para 39.

<sup>195</sup> UN CRPD, General comment No. 6, para. 38.

<sup>196</sup> UN CRPD, General comment No. 6, para. 38.

<sup>197</sup> UN CRPD, General comment No. 6, para. 64.

### 1.1.3. CONCLUSION

A child with disabilities hidden at home is, in the absence of objective reasons proportionally applied to the given situation, likely deprived of its right to effective participation and integration into society, as well as the right to education.<sup>198</sup> This is a differential treatment and as this differential treatment is linked to a prohibited ground and no valid reasons for it exist, it likely constitutes discrimination on the basis of disability. International law requires that the child with disabilities be protected from such discrimination. Nevertheless, a very careful analysis of the individual case is always necessary, as there are potential and legitimate reasons for hiding a child with disabilities at home. Furthermore, the concept of reasonable accommodation should be used to achieve equality. Community elders and zone leaders should use their influence to inform communities that discrimination is a violation of the rights of the child with disabilities.

#### The right to non-discrimination:

- right to non-discrimination is a fundamental human right, directly related to the human dignity
- children with disabilities are likely to be subject of multiple discriminations
- most international instruments discuss several elements to define discrimination:
  - o *differential treatment*
  - o *prohibited grounds*
  - o *accessoriness*
- the right to non-discrimination might require measures and adjustments (reasonable accommodation) to allow the child with disabilities hidden at home to enjoy its human rights. Community elders and zone leaders might be uniquely placed to incite the required measures and adjustments

### 1.2. Right to full and effective participation and integration in society

In international law, it is without question that children with disabilities should enjoy a full and decent life, in conditions that ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.<sup>199</sup> It seems therefore clear that all obstacles potentially hindering this full enjoyment and effective integration of children with disabilities in society should be eliminated.<sup>200</sup>

To address this problem, the CRPD has introduced the principle of “*full and effective participation and inclusion in society*” (art. 3 lit. a CRPD).<sup>201</sup> This principle is very broad and includes political, civil, economic, social, and cultural rights.<sup>202</sup> In fact, the principle can be “split up”

<sup>198</sup> See *infra* IV, D, 1.2.3: Conclusion; IV, D, 1.3.4: Conclusion.

<sup>199</sup> Art. 23 para. 1. CRC.

<sup>200</sup> Art. 1 para. 2 CRPD.

<sup>201</sup> In situation of violence towards children with disabilities; right to inclusion in the community see *infra* p. 34, right to leisure and play see *infra* p. 36, right to culture see. *infra* p. 37.

<sup>202</sup> DELLA FINA, p. 126.

into the right to accessibility (art. 9 CRPD); the right to live independently and to be included in the community (art. 19 CRPD), the right to participation in political and public life (art. 29 CRPD); the right to participate in cultural life, recreation, leisure, and sport (art. 30 CRPD); and the right to participate in the monitoring process (art. 33 CRPD). In the following, we discuss the community elders' and zone leaders' influence, extending to areas of social cohabitation, the right to live independently and to be included in the community, as well as the right to participate in cultural life, recreation, leisure, and sport.

### 1.2.1. THE RIGHT TO LIVE INDEPENDENTLY AND TO BE INCLUDED IN THE COMMUNITY

An important aspect of the principle of full and effective participation and inclusion in society is the right to live independently and be included in the community. While the roots of this right can be traced to art. 29 para. 1 of the UDHR, art. 3 lit. a of the CRPD offers details by requiring *“respect for (...), individual autonomy including the freedom to make one’s own choices, and independence of persons”*. Persons with disabilities have the right *“to live in the community, with choices equal to others”* and to fully enjoy their rights, including *“full inclusion and participation in the community”* (art. 19 CRPD). Also, the CRC in art. 23 para. 1 demands that a child with disabilities *“should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”*. Art. 17 para. 2 of the ACHPR also states that *“every individual may freely take part in cultural life of his community”*.

The right to live independently and be included in the community is considered especially important, as it contains the elements of choice, freedom and inclusion, all vital for exercising other rights (e.g. the right to participate in cultural life or the right to education).<sup>203</sup> Furthermore, it is closely linked with the right to non-discrimination (art. 5 CRPD), equal recognition before the law, and the right to legal capacity (art. 12 CRPD).

On one side, the CRPD offers the right to inclusion in the community, and on the other side the right to live independently. Both aspects are inherently linked to the elements of choice and freedom that are generally accepted as requiring legal capacity and the ability to judge adequately.<sup>204</sup> A child, by definition, lacks the full legal autonomy and capacity of adults<sup>205</sup> but must, according to art. 12 CRC, always be heard and be taken seriously in *“any matter affecting the child”* (see also art. 7 para. 3 CRPD). The view of the child shall thereby be given due weight in accordance with the age and maturity of the child (art. 12 para. 1 CRC). The capacity of the child to form her own view must be assessed on a case-by-case basis by considering if the child has understood and assessed the implication of a particular decision.<sup>206</sup> If the child has the capacity to form her own view, this view must be taken seriously.<sup>207</sup> It is presumed that a child, and consequently also a child with disabilities, has this capacity; and it is not upon the child to prove it.<sup>208</sup> Inclusion in society and living independently are without question matters that affect a child with disabilities. Furthermore, a child with disabilities is

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<sup>203</sup> FIALA-BUTORA/RIMMERMAN/GUR, p. 530.

<sup>204</sup> UN CRPD, General comment No. 1, para 4.

<sup>205</sup> UN CRC, General comment No. 12, para. 1.

<sup>206</sup> UN CRC, General comment No. 12, para. 29.

<sup>207</sup> UN CRC, General comment No. 12, para. 28.

<sup>208</sup> UN CRC, General comment No 12, para 20.

presumed to have the capacity to form her own view on the question of living arrangements and inclusion in society. Her view must be taken seriously, even if it differs from the view of her parents or caregivers. Having established that children with disabilities have a right to be heard concerning their right to live independently and to be included in society, both these rights need to be discussed in more detail.

Aspects to review are the right to effective participation and inclusion in society and the right to live independently. These rights give a person with disabilities choice and control over her daily life, wherein personal autonomy and self-determination are fundamental in order to exercise this right.<sup>209</sup> It is to be understood as the right to live outside of an institutions or similar settings.<sup>210</sup> An institution is not defined, but it constitutes certain elements that leads “residents” to lose their personal choice and autonomy through the imposition of certain living arrangements.<sup>211</sup> This makes them potentially suffer from insolation, a lack of care and psychological support, and vulnerable to violence and abuse.<sup>212</sup> It should be noted that the mere existence of such a facility is not necessarily a problem, but to be placed there against someone’s will most likely always constitutes a human rights violation.<sup>213</sup>

To live independently does not mean that a person with disabilities must or shall live “*on their own*”, but rather the notion refers to a sense of personal autonomy with freedom of choice concerning her own life.<sup>214</sup> As established above, the views of a child with disabilities in situations affecting her must be given due weight. A given situation must very carefully be analysed by considering, *inter alia*, the views of the child on the living arrangement, the level of autonomy, potential alternatives arrangements, and the resources available. Especially in a refugee camp, available resources might be limited for parents to improve living conditions. Should a child though be denied any autonomy to influence her living arrangements, the chances are high that such a situation is considered a violation of the right to live independently. In such a situation, parallels to prohibited institutions cannot be easily dismissed. Family settings where children are hidden at home without any autonomy were therefore already considered to be prohibited institution.<sup>215</sup> Given their moral leadership role, community elders and zone leaders seem to be well placed to advocate for the personal autonomy and freedom of choice of children with disabilities concerning their own lives.

Another aspect of the right to effective participation and inclusion in society is the right to be included in the community. Persons with disabilities shall, according to this right, not be segregated and excluded.<sup>216</sup> Of paramount importance in this context is access to community services (art. 19 lit. b CRPD), especially to personal assistance. Regularly, only such assistance allows a person with disabilities to exercise choice and control over her life.<sup>217</sup> Such services may relate to education, recreational activities, participation in political and cultural life, or public meetings; in short, such support services may relate to any activity the person with disability wishes to participate in.<sup>218</sup> Obviously, this is also the case for a child with disabilities.

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<sup>209</sup> UN CRPD, General comment No. 5, para 16, lit. a.

<sup>210</sup> ARDUIN, p. 94.

<sup>211</sup> UN CRPD, General comment No. 5, para 16.

<sup>212</sup> FIALA-BUTORA/RIMMERMAN/GUR, p. 550.

<sup>213</sup> FIALA-BUTORA/RIMMERMAN/GUR, p. 549.

<sup>214</sup> PALMISANO, p. 359.

<sup>215</sup> UN CRPD, Concluding observation Gabon, para 44.

<sup>216</sup> PALMISANO, p. 360.

<sup>217</sup> FIALA-BUTORA/RIMMERMAN/GUR, p. 552.

<sup>218</sup> UN CRPD, General comment No 5, para. 16, lit b.



Such support services may vary in type or kind according to cultural, economic, and geographic specifics.<sup>219</sup> A child with disabilities hidden at home seems to be precisely in need of such assistance to allow her to have choice and control over her life.

Even though the reasons why children are hidden at home might differ and sometimes might even be legitimate,<sup>220</sup> such a complete segregation and exclusion from the community seems likely to constitute a violation of her rights. Should parents hide their child with disabilities at home due to a specific and potentially legitimate reason (for example, out of fear for her safety), such support services might address the parent's fear or objection, thereby allowing the child to participate and integrate society. The result will depend on a careful analysis of the individual case.

Noteworthy in this context is the link between the right to be included in the community and the right to inclusive education (inclusive education in itself a potential support service),<sup>221</sup> as inclusion of children with disabilities in mainstream education system generates inclusion of persons with disabilities in the community.<sup>222</sup> Also, to be included in the community is closely linked to the right to participate in public life.<sup>223</sup> This might be via direct participation in popular assemblies, engaging with other persons via civil society organizations, participation in public debates, dialogs demonstrations, etc.<sup>224</sup> Inciting collaboration between parents of children with disabilities to organize support services and provide the necessary support framework might be an area where community elders and zone leaders could play a vital role.

#### 1.2.2. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE, RECREATION, LEISURE AND SPORT

The right to participate in cultural life, recreation, leisure, and sport is another perspective of the principle of full and effective participation and inclusion in society. While the UDHR in art. 27 introduces the right *"to participate in the cultural life of the community"*, art. 24 of the same convention contains the *"right to rest and leisure"*. Also, UN Pact I in art. 15 para. 1 lit. a offers the right to *"take part in cultural life"*. The CRC specifies said rights in art. 31 lit. a and additionally recognizes the right of the child to rest and leisure and the right to engage in play, by stating the *"right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts"*. The ACHPR states in art. 17 para. 2 that *"every individual may freely take part in the cultural life of his community"*. The KCA states in section 17 that *"a child shall be entitled to leisure, play and participation in cultural and artistic activities"*. Finally, the CRPD in art. 30 introduces the right to *"participation in cultural life, recreation, leisure and sport"*.

The right to participate in cultural life is the first aspect to be discussed. Culture is understood as a process and a *"way of life"*, thereby providing a comprehensive, broad, and inclusive

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<sup>219</sup> UN CRPD, General comment No. 5, para 30.

<sup>220</sup> See *supra* IV, D, 1.1.1: Definition of discrimination.

<sup>221</sup> See *infra* IV, D, 1.3.2: The right to inclusive education.

<sup>222</sup> UN CRPD, General comment No. 5, para 88.

<sup>223</sup> UN CRPD, General comment No. 5, para 93.

<sup>224</sup> DU PLESSIS/NJAU, p. 861.

definition.<sup>225</sup> Not only participation, but also access and a contribution to cultural life are included.<sup>226</sup> The aim is to provide every individual with the opportunity to obtain the means of developing her personality.<sup>227</sup> Especially for a child, the right to participate in cultural life gives an important sense of belonging and identity.<sup>228</sup> Via culture, children can express and develop their identities and can “*build their world view representing their encounter with external forces affecting their lives*”.<sup>229</sup> One of the biggest challenges of participation in cultural life for a person with disabilities is access to it.<sup>230</sup> Access is problematic because, even though culture can be expressed in many ways, it regularly is expressed on the street, in school, and in public places.<sup>231</sup> Access would be difficult for a child hidden at home. It is hard to imagine how such a child could enter into an encounter with its community’s culture if kept at home. Her participation in cultural life could be a chance to tackle common negative cultural attitudes and stereotypes.<sup>232</sup> The fact that culture is regularly expressed in public places aggravates isolation and a lack of encounter with the local culture makes it increasingly difficult to imagine a situation where the right of the child with disabilities to participate in cultural life is not violated if she is hidden at home.

Also, the right to recreation, leisure, and sport needs further attention. The CRC, in art. 31 lit. a, provides the right to recreation leisure and sport. The norm aims to “*makes it possible for the individual to cultivate his or her mind and interest*”, and in a similar sense, “*children need some space for themselves between work and education*”.<sup>233</sup> Elements of the right to recreation and leisure are a sufficient respite from work and education (or exertion of any kind) and adequate sleep.<sup>234</sup> Activities might include music, community engagement, sport, games, etc. as chosen voluntarily by the child.<sup>235</sup>

The right to sport on the other hand is defined to a lesser extent in international law, but is generally understood as physical activity potentially benefitting the well-being of a person with disabilities.<sup>236</sup> These norms should be understood holistically, mutually linking and reinforcing other rights of the child and when realized, they would serve to enrich the lives of children.<sup>237</sup> It is essential to health and well-being and not only promotes the development of creativity, imagination, self-confidence, and self-efficacy, but also physical, social, cognitive and emotional strength and skills.<sup>238</sup> By hiding children with disabilities at home, this right seems to be violated, especially since the right to leisure and sport requires an exchange with other individuals.

Also, it might be difficult for a child hidden at home who is always in the same surroundings to change her mind and form of respite. It is also hard to imagine how the right to sport (if

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<sup>225</sup> BANTEKAS/STEPHENSONS CHOW/KARAPAPA/POLYMENPOULOU, p 877.

<sup>226</sup> UN CESCR, General comment No. 21, para 15.

<sup>227</sup> BANTEKAS/STEPHENSONS CHOW/KARAPAPA/POLYMENPOULOU, p. 872.

<sup>228</sup> UN CRC, General comment No. 17, para. 11.

<sup>229</sup> UN CRC, General comment No. 17, para. 14, lit. f.

<sup>230</sup> BANTEKAS/STEPHENSONS CHOW/KARAPAPA/POLYMENPOULOU, p. 878.

<sup>231</sup> UN CRC, General comment No. 17, para. 14, lit. f.

<sup>232</sup> UN CRC, General comment No. 17, para. 50.

<sup>233</sup> PAOLO, N 53.

<sup>234</sup> UN CRC, General comment No. 17, para. 14, lit. a and b.

<sup>235</sup> UN CRC, General comment No. 17, para.14, lit d.

<sup>236</sup> BANTEKAS/STEPHENSONS CHOW/KARAPAPA/POLYMENPOULOU, p. 912.

<sup>237</sup> UN CRC, General comment No 17, para. 8.

<sup>238</sup> UN CRC, General comment No. 17, para. 9.

the child with disabilities is, of course, willing and able to participate) can be adequately fulfilled in a house or garden. As this right aims at enriching the lives and well-being of children, allowing them to develop their creativity and self-efficacy, a permanent restriction to a home with few exchanges with the outside world seems difficult to justify.

Finally, the right to play needs illumination. The right to play is a “new right”, only recognized in the CRC and the ACRWC.<sup>239</sup> “Play” involves “any behaviour, activity or process initiated, controlled and structured by children themselves”.<sup>240</sup> It is recognized that play not only is an idyllic period of self-indulged and frivolity, but it also provides instrumental skills to the child in her capacity to negotiate, regain emotional balance, resolve conflicts, and make decisions.<sup>241</sup> While a child can play without a problem alone, many aspect of playing involve other children, especially those that allow the child to develop her negotiating capacities and emotional balance, as well as conflict resolution strategies. While parents at home can create an environment in which play can take place,<sup>242</sup> important social aspects of play are likely not adequately addressed. Yet again, a very careful analysis of the situation is required.

### 1.2.3. CONCLUSION

The principle of full and effective participation and integration in society is broad and can be divided into several, more specified rights. The right to live independently and to be included in the community allows the child with disabilities a certain degree of autonomy concerning her own life and living arrangement. Should her view differ from those of her parents or caregivers (for example, if she would like to leave the house), her view must be taken seriously. Children with disabilities also have the right to culture, recreation, leisure, and sport in order to build their world views, develop creativity, and learn social, cognitive, and emotional skills. Interaction with the community is regularly required to enjoy these rights, but it is hard to be achieved if a child is hidden at home. To ensure that the views of the child with disabilities are taken seriously and that she can benefit from her right to integration in society, support services are required. These support services can take various forms, but personal support might be the most effective. Community elders and zone leaders should use their influence to incite such personal support services, for example by motivating the parents of children with disabilities to collaborate and create them or by reaching out to specialized organizations for assistance.

***The right to full and effective participation and integration in society:***

- the principle of full and effective participation and integration in society is broad and can be divided in several, more specified, rights
- a child with disabilities has, *inter alia*, the right to:
  - o be included in the community
  - o participate in cultural life
  - o recreation, leisure, sport, and play

<sup>239</sup> PAOLO, N 5.

<sup>240</sup> UN CRC, General comment No. 17, para. 14, lit. c.

<sup>241</sup> LANSDOWN/TOBIN, p. 1204.

<sup>242</sup> UN CRC, General comment, No. 17, para. 14, lit. b.

- the above-mentioned rights are likely to be violated if a child with disabilities is hidden at home
- support services could help children with disabilities hidden at home to fully and effectively participate and integrate in society

### 1.3. Right to education

The right to education is a civil, political, economic, social, and cultural right that emphasizes the indivisibility and interdependence of all human rights.<sup>243</sup> This right is considered particularly important, as it has the ability to contribute significantly to the enjoyment of other human rights.<sup>244</sup> It has therefore also been called a multiplier right<sup>245</sup> and, consequently, is well established and widely recognized.<sup>246</sup>

As a rule, most international conventions not only contain the right to education, but they also explain the aim of education. Art. 26 UDHR, art. 13 UN Pact I, art. 28 and 29 CRC, art. 24 CRPD, art 17 ACHR (although without defining the aim) and art.11 ACRWC contain the right to education. Also, on the national level, the KConst<sup>247</sup> contains the right to education. Next, the definition of education and the forms of transfer, as well as the concept of inclusive education, will be discussed.

#### 1.3.1. DEFINITION AND FORM OF EDUCATION

Education should be understood comprehensively to include on one side the acquirement of skills and on the other side the development of personality.<sup>248</sup> It should be child-centred and child-friendly in a protective and empowering manner.<sup>249</sup> As mentioned above, education aims at a precise goal that reflects the fundamental purposes and principles of the United Nations, where dignity and participation are key elements.<sup>250</sup> On a practical basis, education is to be understood to include the provision of basic skills and the development of the intellectual, spiritual, and emotional potential of a young person.<sup>251</sup> Basic skills are not only literacy and numeracy, but include life skills like taking balanced decisions, conflict management, healthy lifestyle, social relationships, social responsibility, critical thinking, and many other abilities that give a child the required tools to pursue her options in life.<sup>252</sup> Education is therefore a process, although the start and end phases are not clearly defined.<sup>253</sup>

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<sup>243</sup> UN CESCR, General comment No. 11, para. 2 and para. 7.

<sup>244</sup> SAUL/KINLEY/MOWBRAY, p. 1086.

<sup>245</sup> COURTIS/TOBIN, p. 1058.

<sup>246</sup> DELLA FINA, p. 444.

<sup>247</sup> Art. 43, 53, 55 and 56.

<sup>248</sup> SCHAHL, p. 329.

<sup>249</sup> VERHEYDE, p. 9.

<sup>250</sup> UN CESCR, General comment No. 13, para. 4.

<sup>251</sup> VERHEYDE, p. 11.

<sup>252</sup> UN CRC, General comment No. 1, para 9.

<sup>253</sup> VERHEYDE, p. 12.

Traditionally, education is transmitted in the formal setting of a school. Formal education is considered to be structured and chronologically graded, taking place in an educational institution.<sup>254</sup> The key elements, therefore, are those educational activities that communicate information in an organized manner.<sup>255</sup> But education must not necessarily only be transmitted in the traditional form or formal institutions, but also in informal settings. Education “*goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within the society*”.<sup>256</sup>

Informal education settings can be community based, open-air, or at home, as long as they are consistent with the aim of education.<sup>257</sup> The distinction between formal and informal education is important, just as the “use” of informal education structures is regularly recommended to ensure access to education to vulnerable groups, like children with disabilities.<sup>258</sup> If parents hide their child with disabilities at home without offering alternatives (e.g. home-schooling, etc.), they obviously are denying her formal education. Informal education could be an option to nevertheless provide a certain degree education to the child. As education is to be perceived not only as encompassing the acquisition of basic skills like math and literacy, but a full range of social skills too (like conflict management, relationships, etc.), it seems difficult to imagine that without an exchange with other pupils in a formal education setting like a school, the child’s right to education is respected. Nevertheless, a careful analysis of the individual case becomes necessary.

### 1.3.2. THE RIGHT TO INCLUSIVE EDUCATION

A key element in international law in relation to the education of children with disabilities is the right to inclusive education.<sup>259</sup> It has been acknowledged that inclusive education is the most appropriate modality to guarantee that the right to education is also effective for persons with disabilities.<sup>260</sup> The CRPD dedicates a whole article to the explanation of inclusive education, giving a child with disabilities the right to “*individualized support measures (...) provided in environments that maximize academic and social development, consistent with the goal of full inclusion*” (art. 24 para. 2 lit. e CRPD). Inclusive education needs to be understood as a process that transforms culture, policy, and practice in all educational environments (formal and informal)<sup>261</sup> and as an obligation to eliminate barriers that restrict or ban participation.<sup>262</sup>

It is much more than only integrating children with disabilities into mainstream schools.<sup>263</sup> It is a whole system that considers the learning environment, respect for value and dignity, the

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<sup>254</sup> UN CESCR, General comment No. 13, para. 9.

<sup>255</sup> COURTIS/TOBIN, p. 1063.

<sup>256</sup> UN CRC, General comment No. 1, para. 2.

<sup>257</sup> COURTIS/TOBIN, p. 1061.

<sup>258</sup> COURTIS/TOBIN, p. 1064.

<sup>259</sup> Report of the Special Rapporteur on the right to education on the equalization of opportunities for persons with disabilities, para. 10.

<sup>260</sup> HRC, Thematic study on the right of persons with disabilities to education, para. 18.

<sup>261</sup> See *supra* p. 19.

<sup>262</sup> UN CRPD, General comment No. 4, para. 9.

<sup>263</sup> UN CRPD, General comment No. 4, para 11.

support of teachers, diversity, transition, partnership, and monitoring.<sup>264</sup> Inclusive education requires that teachers be specially trained to educate children with disabilities in mainstream schools.<sup>265</sup> It might also require changing the location of a class, using different forms of communication in class, using or allowing technology to assist persons with disabilities, etc.<sup>266</sup> To change the root causes of the problem of hiding children with disabilities at home (shame, fear and stereotypes, etc.), a transformation of culture and practice is needed. Inclusive education precisely demands such a transformation; and community elders and zone leaders might have significant influence on the subject by inciting parents and caregivers to allow their children to participate in school, help organize support measures, exchange with teachers, and raise awareness about the idea of inclusive education.

Inclusive education should be available, accessible, acceptable and adaptable (4A's).<sup>267</sup> The availability criterion focuses on the availability of a proper educational infrastructure and requires sufficient human, budgetary, and material resources to be made available to fulfil education needs.<sup>268</sup> The feature of accessibility aims at opening education to all, but especially to the most marginalized and vulnerable groups.<sup>269</sup> The requirement of an acceptable education touches several aspects, like the quality of education, the need to be culturally appropriate and the avoidance of corporal punishment.<sup>270</sup> Finally, through adaptability, a flexible education is required.<sup>271</sup> This means that the curriculum and teaching approach take different factors into account, such as disability, but also the particular social and political circumstance, like living in a refugee camp.<sup>272</sup> Even though the obligation to fulfil the 4A's falls mainly to the states, community elders and zone leaders might nevertheless have an influence in this area. This might especially be true for the accessibility criteria that demands discrimination-free access to education. Also, the criteria of adaptability, or asking to take social and political circumstances into account (e.g. safe transport to school for children with disabilities) might fall within their area of influence.

### 1.3.3. RIGHT IN EDUCATION

A component of the right to education is the right *in* education. In effect, while the right *to* education concerns the practical organization of education and its content (e.g. art. 28 para 1 and art. 29 para. 1 CRC), the right *in* education provides protection for the children being educated (e.g. art 28 para 2 CRC). Finally, the right *through* education refers to the implementation of other human rights standards by means of human rights education (e.g. art 29 para. 1 lit. b CRC).<sup>273</sup> While Violence towards children with disabilities will be discussed in detail below,<sup>274</sup> a short discussion of the right *in* education is necessary to ensure the protec-

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<sup>264</sup> UN CRPD, General comment No. 4, para 12.

<sup>265</sup> UN CESCR, Concluding observations: Mauritius, N 30.

<sup>266</sup> DELLA FINA, p. 462.

<sup>267</sup> SAUL/KINLEY/MOWBRAY, p. 1099.

<sup>268</sup> COURTIS/TOBIN, p. 1067.

<sup>269</sup> COURTIS/TOBIN, p. 1068.

<sup>270</sup> SAUL/KINLEY/MOWBRAY, p. 1097.

<sup>271</sup> SAUL/KINLEY/MOWBRAY, p. 1099.

<sup>272</sup> COURTIS/TOBIN, p. 1070.

<sup>273</sup> VERHEYDE, p. 2.

<sup>274</sup> See *infra* IV, D, 2: Violence towards children with disabilities.

tion of children from violent, cruel, inhuman, and degrading forms of punishment for educational purposes.<sup>275</sup> A discussion of the topic seems particularly important as corporal punishment of children - especially if they have disabilities - during school or other educational activities in Kakuma camp was reported.<sup>276</sup>

Art. 28 para 2 CRC states that “*school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.*” This provision prohibits any form of corporal punishment, with corporal punishment understood broadly as, “*including any punishment in which physical force is used and intended to cause some degree of pain or discomfort*”.<sup>277</sup> Also, any “reasonable” or “moderate” form of corporal punishment, justified as allegedly being in the child’s best interest, cannot be used as a justification.<sup>278</sup> Other non-physical forms of punishment, like an action that belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child are also incompatible with the CRC.<sup>279</sup> Similarly, disproportionate interference with other rights of the CRC, like the right to liberty (art. 37) or the right to play and leisure (art. 31), might be considered as a violation of the child’s right in education.<sup>280</sup>

The CRC seems very clear on this topic. No violence of any kind is permissible for educational purposes. Nevertheless, it seems necessary to acknowledge that this absolute interdiction of corporal punishment might clash with the fact that some form of corporal punishment for educational purposes is traditionally and locally accepted.<sup>281</sup> While recognizing potentially divergent interpretations, the training of community elders and zone leaders should emphasize the views of the CRC, as the training’s main purpose is a general sensibilization on human rights.

#### 1.3.4. CONCLUSION

The right to education is guaranteed by several international treaties and the KConst. As education not only needs to be understood as the provision of basic skills but also as the development of the intellectual, spiritual, and emotional potential of a young person, it should be understood as a process. This perception corresponds with the fact that education shall not only be transmitted in traditional forms (formal education), but also outside the classroom system (informal education) in order to enable the child to make life experiences.

Considering the right to education as a multiplier right, it is especially important for vulnerable groups to have access to it. For children with disabilities, inclusive education is the most appropriate tool to guarantee effective participation. A child with disabilities hidden at home might profit from some form of informal (and formal – e.g. home schooling) education and can therefore acquire basic skills like literacy and numeracy. But as education is to be understood as a comprehensive process, life skills like conflict management, social relationships,

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<sup>275</sup> COURTIS, TOBIN, p. 1105.

<sup>276</sup> Interviews with community elders and zone leaders.

<sup>277</sup> UN CRC, General comment No. 8, para. 11.

<sup>278</sup> UN CRC, General comment No. 8, para. 26.

<sup>279</sup> UN CRC, General comment No. 8, para. 11.

<sup>280</sup> COURTIS, TOBIN, p. 1108.

<sup>281</sup> Interviews with community elders and zone leaders.

and responsibility should also be acquired during the process. Such skills require, to a certain extent, an exchange with other children.

Of course, it is entirely possible that a child with disabilities is only be educated at home (especially if the disability does not allow otherwise) if the home-setting satisfies the child's best interest and addresses all her educational needs. Such situations seem thought, given the high standards, unlikely. Community elders and zone leaders should therefore use their influence to advocate for a better integration of children with disabilities into mainstream schools, especially by promoting inclusive education.

*The right to education:*

- the right to education is firmly embedded in international law and considered a multiplier right
- education contains the provision of basic skills and the tools children need to pursue their options in life and has clearly defined aims
- education content can be transmitted in formal and informal ways, as long as it is consistent with the aim of education
- children with disabilities have the right to "inclusive education"
- education must be available, accessible, acceptable, and adaptable
- children with disabilities are protected from any form of corporal punishment for educational purposes

## 2. Violence towards children with disabilities

Violence against children with disabilities is present in Kakuma camp, be it physical or in other forms, such as abduction, torture, or abandonment.<sup>282</sup> Violence is linked to negative stereotypes, such as shame about children with disabilities.<sup>283</sup> As a consequence, children with disabilities do not participate in activities – school, sports, cultural activities – nor do they go to school anymore.<sup>284</sup> This situation contributes to making them feel helpless, hinders their development,<sup>285</sup> and widens the gap between them and other children. Because they do not take part in these activities anymore, as result they are excluded from the community and exposed to violence.<sup>286</sup> This creates a circle of violence and exclusion, troubling the children's development and increasing the chances of reproducing violence.<sup>287</sup>

Violence is composed of both mental and corporal or physical violence. Mental violence includes harmful interactions, threats, exploitation, corruption, rejection, isolation, ignorance, neglect towards mental or physical health, medical or education needs, insults, nick-naming,

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<sup>282</sup> UN CRC, General Comment No. 9, para. 79; WhatsApp discussion with students; Interviews with community elders and zone leaders.

UNHCR, Safe Haven: Sheltering Displaced Persons from Sexual and Gender-Based Violence, p. 22.

<sup>283</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 25.

<sup>284</sup> Interviews with community elders and zone leaders.

<sup>285</sup> For children in general but can be taken over for children with disabilities, REYNAERT/ROOSE pp. 37-38; UN CRC, General comment No. 1, para. 10.

<sup>286</sup> For children in general but can be taken over for children with disabilities, REYNAERT/ROOSE pp. 37-38.

<sup>287</sup> UN CRC, General comment No. 13, para. 14, 15 lit. c.



humiliation, domestic violation, psychological bullying or harassment.<sup>288</sup> Corporal or physical violence includes when “*physical force is used and intended to cause some degree of pain or discomfort*”.<sup>289</sup> It includes many practices such as violence with hands or with a tool (for instance a whip, stick, belt, shoe or spoon), “*smacking, slapping, spanking*”, kicking, throwing, scratching, pinching, biting, pulling hair, boxing, caning, humiliations by putting the child into an uncomfortable position, burning, scalding, or even forced indigestion.<sup>290</sup>

Additionally, other forms of violence, especially the psychological type that comes from bullying or harassment, may occur; and they are all considered as degrading for the child.<sup>291</sup> Harassment is a behaviour with the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>292</sup> Neglect “*means the failure to meet children’s physical and psychological needs, protect them from danger, or obtain (...) services when those responsible for children’s care have the means, knowledge and access to services to do so*”.<sup>293</sup> Regarding children with disabilities, violence used as a treatment might occur.<sup>294</sup>

Violence infringes upon basic human rights provisions. First, a review of the penal sanctions in Kenyan law will be made (2.1) and how violence infringes upon the right to freedom from all forms of violence of children with disabilities, (2.2) as well as their right to psychological integrity (2.3) and to physical or corporal integrity (2.4). By extension, the positive duties in situations of violence will be enounced (2.6), namely the obligation to prevent violence (2.6.1), to act while violence is perpetrated (2.6.2) and to enhance recovery and reintegration (2.6.3). A conclusion of these obligations (2.6.4) follows, preceding a chapter dedicated to violence towards girls with disabilities (2.7). If a child with disabilities endures molestation or bullying, the law may require taking active measures to end the violence and to give assistance to the concerned child in order for her to reintegrate into the community.

## 2.1. Penal sanctions

In Kenyan law, there is concrete punishment for “*any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person does any act with respect to, or omits to take proper precautions against any probable danger from, any machinery of which he is solely or partly in charge is guilty of a misdemeanour*” (section 243 lit. g Kenyan Penal Code (KPC)). Since the law does not state any limit to imprisonment, the author of such behaviour can be sentenced to a lifetime in prison or even a death sentence. However, Kenya does not execute death sentences.<sup>295</sup> The law goes further by incriminating “*any person who unlawfully does any act, or omits to do any act which it is his duty to do, (...) by which act or omission harm is caused to any person, is guilty of a misdemeanour and is liable to imprisonment for six months*” (section 244 KPC). Regarding physical violence,

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<sup>288</sup> TOBIN/CASHMORE, p. 696; UN CRC, General comment No. 13, para. 21.

<sup>289</sup> UN CRC, General comment No. 13, para. 24.

<sup>290</sup> UN CRC, General comment No. 13, para. 24.

<sup>291</sup> TOBIN/CASHMORE, p. 696; UN CRC, General comment No. 13, para. 22-24.

<sup>292</sup> UN CRPD, General comment No. 6, para. 18 lit. d.

<sup>293</sup> UN CRC, General comment No. 13, para. 20.

<sup>294</sup> UN CRC, General comment No. 13, para. 20 lit. c-e.

<sup>295</sup> Since 2009, death sentenced were conversed to lifetime imprisonment, [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Kenya](https://en.wikipedia.org/wiki/Capital_punishment_in_Kenya), last consulted on 14.11.2019.

any unlawful assault is incriminated, which makes the author guilty of a misdemeanour and therefore liable to imprisonment for one year (section 250 KPC). However, if the assault causes bodily harm, the author is liable to imprisonment for five years (section 251 KPC).

In Kenyan law, if an individual discriminates against a person because of her disability “*on the ground of any ethnic, communal, cultural or religious custom or practice*”, it is considered an offence (section 26 para. 1 letter e KPDA). The author is liable for a fine up to 20,000 shillings or imprisonment up to one year, or even a fine and imprisonment (section 26 para. 2 KPD). Compensation for the person discriminated against can be asked by the court (section 26 para. 3 KPDA).

Therefore, anyone who harms children with disabilities faces imprisonment for six months. For an assault against children with disabilities, the author risks one year of imprisonment. If it results in bodily harm, imprisonment can extend up to five years. If there is risk to the life of children with disabilities, the authors are liable to a lifetime imprisonment. Any violence motivated because of a child’s disability on the basis of a customary practice exposes the author to a fine up to 20,000 shillings or imprisonment up to one year, or even both a fine and imprisonment. Again, compensation for the person discriminated against may be asked by the court. Thus, the law places sanctions on anyone harming children with disabilities in Kakuma.

Penal sanctions:

- physical assault against children with disabilities can be sentenced by up to one-year imprisonment.
- physical assault against children with disabilities that causes body harm can be sentenced by up to five years imprisonment.
- causing danger to children with disabilities’ life can be sentenced by up to a lifetime imprisonment.
- Authors of discrimination on the basis of disability because of customary practices can be sentenced to:
  - up to 20’000 shillings
  - or/and imprisonment
  - and can be asked for compensation for the victim

## 2.2. Right to freedom of all forms of violence

“*No violence against children is justifiable.*”<sup>296</sup> This principle reflects the general interdiction of any violence against a child with disabilities.<sup>297</sup> In international law, the right to the best attainable state of physical and mental health (art. 16 para. 1 ACHPR), respectively, the highest attainable standard of health (art. 25 CPRD, 24 para. 1 CRC) is guaranteed. It commands giving all children the opportunity to survive, grow, develop and enhance their physi-

<sup>296</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 1.

<sup>297</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 1.

cal, emotional and social well-being and to recognize their potential through a holistic approach.<sup>298</sup> Similarly the ACHPR states that “*human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person*” (art. 4 ACHPR).

As for the protection of children against violence, there is a particular duty to “*protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment*” including situations “*while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*” (art. 19 para. 1 CRC). Intrafamilial harm is addressed with this norm.<sup>299</sup> As caregivers are considered “*those with clear, recognized legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child, primarily: parents, foster parents, adoptive parents, caregivers in kafa-lah of Islamic law, guardians, extended family and community members; education, school and early childhood personnel; child caregivers employed by parents; recreational and sports coaches – including youth group supervisors; workplace employers or supervisors; and institutional personnel (governmental or non-governmental) in the position of caregivers*”.<sup>300</sup>

These provisions protect against all acts of violence, intentional or non-intentional, commission or omission, threatened or actual.<sup>301</sup> Traditions or the use of violence for disciplinary purposes is not tolerated (art. 24 para. 3 CRC).<sup>302</sup> The right to physical and mental integrity prohibits any use of violence (art. 17 CRPD). On the camp level, the Kakuma Refugee Camp Constitution (KRCC) encourages to “*generally, ensure the welfare, well-being and rights of refugees at the camp*” (art. 2 par. 1 KRCC).

Therefore, violence against children with disabilities’ causes harm to them. Their right to the best attainable state of health is violated by violence of any kind. A general interdiction of violence exists, as materialized in their right to be free from all forms of violence, including children with disabilities who are in the charge of their family or their caregivers. Traditions, discipline, or customs that use violence infringe upon this general interdiction and should therefore be prohibited. The intention of the person harming children with disabilities does not matter. It still implies that violence to educate these children infringes upon their right to integrity. Keeping in mind the right to non-discrimination, children with disabilities are a category with a special vulnerability to violence. Their welfare might require more efforts than that needed for other children. Reflexion about the use of violence in education is therefore required since tradition shall not serve as an excuse to infringe upon the provisions of the international legal framework.<sup>303</sup>

This is so, especially when it comes to children with disabilities and their higher exposure to violence<sup>304</sup> and the efforts to preserve their right to integrity and to the best attainable state of health. An adapted education that avoids any use of violence may be the most respectful

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<sup>298</sup> UN CRC, General comment No. 15, para. 1-2.

<sup>299</sup> TOBIN/CASHMORE, p. 689; UN CRC, General comment No. 13, para 3 lit. h.

<sup>300</sup> UN CRC, General comment No. 13, para. 33.

<sup>301</sup> TOBIN/CASHMORE, pp. 689, 723; UN CRC, General comment No. 13, para. 17, 18; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 8.

<sup>302</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 2.

<sup>303</sup> BREEN, p. 9; Bearing in mind especially harmful practices such as corporal punishment, female genital mutilations, amputations, binding, scarring, burning, branding, degrading initiation rites, forced marriage, honour crimes or payback violence, see UN CRC, General comment No. 13, para 29.

<sup>304</sup> As exposed in their risk-assessment, see *supra*, pp. 11 ss.

one, considering the risk of their being victims of external abuse or molestation. According to the international and national laws analysed above, any violence or violation of those provisions may be considered as a violation of the KRCC. Hence, the rights of Kakuma children with disabilities to the best attainable state of health, to be freed from all form of violence, and to integrity may be violated by any harm done to them. A review of the psychological and physical or psychological integrities that are protected is required, which will be analysed next.

*Right to freedom of all forms of violence:*

- violence causes harm to children with disabilities. It infringes their right to be free of all form of violence and its two components:
  - o right to the best attainable state of health
  - o right to integrity
- this general interdiction of violence towards children with disabilities includes:
  - o traditions or customary practices
  - o any intention from their author, including with the desire of protection or discipline
  - o in any setting, including at home or in charge of their caregiver

### 2.3. Right to psychological integrity

Some provisions focus on the right to psychological integrity. The child shall be protected from “*unlawful attacks on his or her honour and reputation*” (art. 16 para. 1 CRC). Any violation of one’s psychological integrity automatically infringes upon one’s right to privacy.<sup>305</sup> This privacy protection contains five dimensions: physical and psychological integrity, decisional autonomy, personal identity, and informational privacy as well as physical privacy.<sup>306</sup> Unlawful is any interference not foreseen by the law.<sup>307</sup> Arbitrary is an interference that is not “*reasonable in the particular circumstances*”, as when there is no legitimate aim and no proportionality, which would require a connection between the aim and the measure, plus being the least intrusive.<sup>308</sup>

The child’s honour and reputation are protected. Honour is linked to the esteem one feels for oneself, whereas reputation has a social dimension that involves public recognition.<sup>309</sup> Bullying falls under the scope of this provision’s protection.<sup>310</sup> The right “*to be addressed and referred to in a manner that is not demeaning*” protects against psychological violence (art. 54 cl. 1 lit. a KConst). For children, psychological abuse is specifically forbidden (section 13 KCA).

Every act of violence affects not only the short term but also the long term or future adult life, because the consequences may be injuries, physical health problems, cognitive impairment,

<sup>305</sup> TOBIN/FIELD, p. 561.

<sup>306</sup> TOBIN/FIELD, pp. 561-560.

<sup>307</sup> TOBIN/FIELD, p. 558.

<sup>308</sup> TOBIN/FIELD, pp. 556-557.

<sup>309</sup> TOBIN/FIELD, pp. 592-593 and its references.

<sup>310</sup> TOBIN/FIELD, p. 593.

trauma, anxiety, rejection, abandonment, depression, other psychological or emotional consequences, as well as mental health problems.<sup>311</sup> Behavioural and developmental consequences may arise; for instance if a child experiences teasing or violence from its own school community, she will likely not go to school anymore.<sup>312</sup> It leads to exclusion from the community,<sup>313</sup> which increases further victimization and the poverty rate, consequently resulting in bad living conditions.<sup>314</sup>

Poverty is shown to be a cause as well as a consequence of disabilities.<sup>315</sup> Furthermore, violence bears its costs too,<sup>316</sup> in increasing poverty. Therefore, all violence, especially psychological, constitute interferences into children's honour and reputation in Kakuma. These are component of their right to psychological integrity. Keeping in mind the right to non-discrimination, children with disabilities are a category with a special vulnerability to violence. Their right to psychological integrity might require special attention. Thus, any psychological violence infringes upon their right to psychological integrity, as protected in international and national Kenyan law. Besides, other provisions protect children with disabilities' right to physical and corporal integrity – to be addressed below.

Right to psychological integrity:

- psychological violence constitutes an interference into children with disabilities' honour and reputation
- it infringes their right to psychological integrity
- behavioural and developmental consequences:
  - social exclusion
  - bad living conditions
  - poverty increase

#### 2.4. Right to physical or corporal integrity

Other provisions protect the physical or corporal integrity in particular. The right to protection against unlawful attacks (art. 16 para. 1 CRC) protects physical integrity. Corporal punishment is always unlawful as well as arbitrary.<sup>317</sup> The right to security is guaranteed (art. 23 para. 1 ACHPR) and "*includes the right not to be subjected to any form of violence*" (art. 29 lit. c KConst). For children in particular, "*abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment*" are prohibited (art. 53 cl. 1 lit. d KConst) and repeated in section 13 of the KCA.<sup>318</sup> For persons with disabilities, the right "*to be treated*

<sup>311</sup> UN CRC, General comment No. 13, para. 15 lit. a; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 36.

<sup>312</sup> Country Report, Kenya – Kakuma Refugee Camp, p. 3; UN CRC, General comment No. 13, para. 15 lit. b.

<sup>313</sup> SABATELLO, pp. 328-330.

<sup>314</sup> SABATELLO, pp. 328-330; TOBIN/MARSHALL, p. 1576; UN CRC, General comment No. 13, para. 15 lit. b.

<sup>315</sup> SABATELLO, p. 330-331.

<sup>316</sup> It can be divided between direct costs, such as medical intervention and social services, and indirect costs of violence, such as durable injury, psychological and emotional costs which impact the child's quality life, the educational impact and the productivity losses, see UN CRC, General comment No. 13, para. 16.

<sup>317</sup> TOBIN/FIELD, p. 562.

<sup>318</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 8.

*with dignity and respect*” protects against physical violence (art. 54 cl. 1 lit. a KConst). Although traditional customs shall be freely practiced, they have to be exercised within the law’s framework.<sup>319</sup> A special protection against “*physical (...) abuse, neglect and any other form of exploitation*” exists for children (section 13 KCA).

Therefore, corporal punishment against children with disabilities constitute unlawful attacks and infringes upon their right to physical or corporal integrity, as well as their right to dignity.<sup>320</sup> Any form of violence against children with disabilities infringes upon their right to security, especially considering their high degree of exposure. Any custom that inflicts corporal punishment upon children with disabilities in Kakuma might be seen to infringe these rights.

*Right to physical or corporal integrity:*

- any physical violence towards children with disabilities constitutes an unlawful attack
- it infringes children with disabilities’ right to physical or corporal integrity and its two components:
  - o right to dignity
  - o right to security
- children with disabilities in Kakuma should not be subject of any customary practices which infringe their rights

## 2.5. Conclusion

The law incriminates authors of violence against children with disabilities in Kakuma. Harming someone makes them liable up to six months imprisonment. Physical assault is liable up to one year of imprisonment, which can go up to five years if the victim’s body is harmed. Endangering a child’s life constitutes a misdemeanour which is liable to lifetime imprisonment, or even sentencing to death. Violence motivated because of a disability on the basis of a customary practice exposes the author to a fine up to 20,000 shillings or/and imprisonment up to one year. Additionally, compensation for the person discriminated against may be asked.

The right to be free from all form of violence is infringed by violence, including the two components, the right to the best attainable state of health and the right to integrity. This general interdiction of violence towards children with disabilities embraces any traditions or customary practices coming from any author, including the intention of protection or discipline and occurring in any setting, including while children with disabilities in Kakuma are at home or in the charge of their caregiver.

As for children with disabilities’ right to integrity, there are two components. On one hand, their right to psychological integrity protects them against any interference in their honour and reputation. On the other hand, their right to physical or corporal integrity protects them against unlawful attacks. The two components, the right to dignity and the right to security are infringed upon by any violence against children with disabilities in Kakuma. They shall not

<sup>319</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 11.

<sup>320</sup> UN CRC, General comment No. 13, para. 13.

be subject to any customary practices that violate these rights, considering their high degree of exposure to violence.

Thus, traditional practices that use violence, whether psychological or physical, against children with disabilities should be condemned. Furthermore, the law gives positive duties in cases of violence towards children with disabilities in the camp, which will be the next topic.

## 2.6. Positive obligations in situations of violence

Individuals shall take on positive obligations to prevent, end, and promote recovery and reintegration after any act of violence.<sup>321</sup> Measures can be classified as primary, which are general preventive measures;<sup>322</sup> as secondary, which are the preventive measures targeted for children at risk;<sup>323</sup> and as tertiary interventions, which aim at the recovery of a child who has been the victim of abuse or violence.<sup>324</sup> These measures are directly related to children with disabilities' right to dignity, as well as physical and psychological integrity, and they are justified in regard to the right of children with disabilities to achieve equality.<sup>325</sup> The obligations hereinafter developed may also oblige individuals to comply with international human rights.<sup>326</sup>

The duty *“to prevent the occurrence of all forms of exploitation, violence and abuse”* against persons with disabilities (art. 16 para. 3 CRPD) encompasses *“social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment”* (art. 19 para. 1 CRC), including intrafamilial harm.<sup>327</sup> Measures need to be taken against any act of violence, including intentional and non-intentional acts of commission or omission.<sup>328</sup> Programmes for children with disabilities, as well as programmes for their family, shall be promoted.<sup>329</sup>

### 2.6.1. PREVENTION

Every violence is preventable.<sup>330</sup> Violence prevention has the purpose of respecting a child with disabilities' right to dignity, physical and psychological integrity, welfare, health, development, non-discrimination, and especially inclusion.<sup>331</sup>

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<sup>321</sup> UN CRC, General comment No. 13, para. 2, 46.

<sup>322</sup> It can be through social services or other approaches which promote violence prevention, see. UN CRC, General comment No. 13, para. 3 lit. g.

<sup>323</sup> UN CRC, General comment No. 13, para 46.

<sup>324</sup> TOBIN/CASHMORE, p. 710.

<sup>325</sup> HENDRICKS, pp. 41-42; UN CRC, General comment No. 13, para. 7 lit. c, 11 lit. d.

<sup>326</sup> For an argumentation of why the controversies are being avoided, see *supra*, p. 18.

<sup>327</sup> TOBIN/CASHMORE, p. 689; UN CRC, General comment No. 13, para 3 lit. h.

<sup>328</sup> TOBIN/CASHMORE, p. 689.

<sup>329</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 110 lit. b.

<sup>330</sup> TOBIN/CASHMORE, pp. 689-690; UN CRC, General comment No. 13, para. 3 lit. a.

<sup>331</sup> UN CRC, General comment No. 13, para. 11, 13.

### 2.6.1.1. RIGHT TO BE INCLUDED IN THE COMMUNITY

Social cohesion increases the degree of protection against violence in a community,<sup>332</sup> so the inclusion of children with disabilities promotes protection through the community.<sup>333</sup> The right to be included in the community is clearly protected (art. 3 lit. c and 19 CRPD).<sup>334</sup> Full inclusion and participation has to be promoted through effective and appropriate measures for person with disabilities, aiming at the identification and prevention of the circumstances in which violence occurs.<sup>335</sup> Participation may be in the family (art. 7 para. 1, art. 10 CRC) or the community (art. 15 and 17 CRC), especially for children with disabilities (art. 23 CRC).<sup>336</sup>

Combined with the best interests of the child, appropriate proactive measures need to be taken to prevent violence.<sup>337</sup> Negative clichés hinder the realisation of children's rights.<sup>338</sup> A child with disabilities' right to dignity (art. 23 para. 1 CRC)<sup>339</sup> aims to promote positive attitudes through awareness-raising campaigns and their inclusion in the community to decrease the stigma they are victim of, thereby decreasing their exposure to abuse.<sup>340</sup> Empowerment through the promotion of their skills allows children with disabilities to protect themselves against violence on the one hand<sup>341</sup> and to combat bullying on the other hand.<sup>342</sup> Supporting children's role in their own protection is a duty.<sup>343</sup> The right to non-discrimination for children with disabilities entails the duty that their rights are not violated by third parties (art. 7 CRPD) and that they are able to claim their rights (art. 5 para. 1 CRPD) as part of inclusive equality.<sup>344</sup> It requires the prevention of violence for exposed children, as well as measures to promote the development and empowerment of those children.<sup>345</sup> Any child has a "right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community" (art. 13 ACRWC), as recognized in art. 23 CRC for children with disabilities. Hatred based on grounds of discrimination, such as health status, is prohibited in Kenyan law (art. 29 cl. 2 lit. d

<sup>332</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 34; Women's Refugee Commission, Disability Inclusion, p. 1.

<sup>333</sup> United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 38.

<sup>334</sup> UN CRPD, Observations of the Committee for Kenya, para. 49-50 in PRICE COHEN, Volume II, pp. 1934-1935; in situation of hidden children, see. *supra* p. 14.

<sup>335</sup> TOBIN/CASHMORE, pp. 712-717; UN CRC, General comment No. 13, para. 42 lit. b, 43 lit. a; UN CRPD, General comment No. 6, para. 57.

<sup>336</sup> United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 23.

<sup>337</sup> UN CRC, General Comment No. 14, para. 40, 48; UN CRC, General comment No. 13, para. 3 lit. d.

<sup>338</sup> UN CRC, General Comment No. 14, para. 15 lit. h.

<sup>339</sup> NOWAK/SUNTINGER p. 120.

<sup>340</sup> BESSON/KLEBER, p. 52 and its references; UN CRC, Observations of the Committee for Kenya, para. 49-50 in PRICE COHEN, Volume II, pp. 1934-1935; UN CRPD General comment No. 6, para. 11; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 25.

<sup>341</sup> TOBIN/CASHMORE, p. 705; UN CRC, General comment No. 13, para. 44.

<sup>342</sup> FREEMAN/KOLAPPA/CALDAS DE ALMEIDA/KLEINMAN/MAKHASHVILI/SO PHAKATHI/SARACENO/THORNICROFT, p. 1; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 45; UN CRC, General comment No. 13, para. 44; UN CRC, General comment No. 17, para. 56 lit. b.

<sup>343</sup> TOBIN/CASHMORE, p. 709; to children with disabilities' recognition to have an active role, see *supra* pp. 7 ss.

<sup>344</sup> UN CRPD, General comment No. 6, para. 11; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 25.

<sup>345</sup> CAMPOY CERVERA, pp. 124-125.



ii *cum* art. 17 cl. 4 KConst). More locally, the KRCC aims to “promote awareness on human rights at the camp” (art. 2 para. 7 KRCC) and “to generally, ensure the welfare, wellbeing and rights of refugees at the camp” (art. 2 para. 1 KRCC).

#### 2.6.1.2. RIGHT TO NON-DISCRIMINATION

An obligation to prevent violence demands the inclusion of children with disabilities in Kakuma in their community. Positive actions are part of the right to non-discrimination, and a different treatment under the form of special assistance<sup>346</sup> needs to be undertaken to achieve equality.<sup>347</sup> It may be permanent in special circumstances such as a particular impairment or structural barrier.<sup>348</sup> With children with disabilities, there is a *de facto* situation of inequality, such that positive measures are required to redress it through community action.<sup>349</sup> Otherwise it might lead to material discrimination that englobes formal discrimination and any hindering of social participation.<sup>350</sup>

It promotes their protection because it prevents the circumstances where violence against them is perpetrated. Participation of children with disabilities, whether in their family or the community, may require special assistance that has to be individually adapted, so they can be included in the community. Their right to dignity creates the duty to change the negative attitudes of which they are victims and decreases the stigma associated with children with disabilities. Any traditional practice<sup>351</sup> which leads to a stigma towards them should cease, and they shall be encouraged to empower themselves as a component of violence prevention.

Discrimination forms a circle of exclusion and hinders a child’s development, so appropriate measures shall be undertaken to ensure ending discrimination and providing special support.<sup>352</sup> Given the situations of children with disabilities, differential treatment with special assistance is required to eliminate discrimination.<sup>353</sup> Special assistance has to be given to ensure that children with disabilities can exercise their rights and fully enjoy them on an equal basis with children without disabilities to ensure their full development.<sup>354</sup>

Child development is a holistic concept that should look for her optimal physical, mental, spiritual, moral, psychological and social state through full social integration.<sup>355</sup> Integration of the

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<sup>346</sup> JONES, p. 68; BESSON/KLEBER, p. 64; UN CRPD, General comment No. 6, para. 17, 22.

<sup>347</sup> HENDRICKS, pp. 41-49; International Court of Justice, *German Settlers in Poland*, Advisory Opinion of 10 September 1923, Ser. B, No. 6; International Court of Justice, *Minority Schools in Albania case*, Advisory Opinion of 6 April 1935, Ser. A/B, No. 64; UN CRPD, General comment No. 6, para. 22.

<sup>348</sup> UN CRPD, General comment No. 6, para. 28.

<sup>349</sup> UN CRC, Observations of the Committee for Kenya, para. 24-26 in PRICE COHEN, Volume I, pp. 226-227; SEATZU, p. 89.

<sup>350</sup> HENDRICKS, p. 48.

<sup>351</sup> For a list of traditional harmful practices, see *supra*, p. 34.

<sup>352</sup> General Assembly, A world fit for children, para. 20-22.

<sup>353</sup> BESSON/KLEBER, p. 65; about the misuse of those criteria, SABATELLO, p. 332; UN CRC, General Comment No. 5, para. 12, 30.

<sup>354</sup> CAMPOY CERVERA, pp. 133-134.

<sup>355</sup> DORSCH, p. 208; UN CRC, General Comment No. 5, para. 12.

child into the community ensures her physical protection<sup>356</sup> and extends psychological protection. Advocating for her rights is a measure as well in order to prevent violence in the future.<sup>357</sup>

### 2.6.1.3. RIGHT TO EXPRESS HER VIEW

Through participation, the child can inform about her needs and express her views (art. 12 CRC).<sup>358</sup> From a developmental point of view, it brings the child new decision-making skills, self-esteem, conflict resolution, and communication skills.<sup>359</sup> A child learns to process information and make decisions wisely, decreasing the risk of anxiousness, depression, and exclusion.<sup>360</sup> This implies proper preparation with appropriate information given to the child about her rights,<sup>361</sup> in particular is the one to express her views and to be free from any manipulation, influence, or pressure.<sup>362</sup> This is a component of the right to self-determination.<sup>363</sup> It requires adults to open a discussion with the child and to hear her, recognising her ability to make her own decisions.<sup>364</sup> The age and maturity of the child<sup>365</sup> have to be considered in order to determine the child's ability to understand issues and express views in a reasonable and independent manner.<sup>366</sup>

In the maturity assessment, physical, emotional, cognitive and social development shall be considered.<sup>367</sup> These views have to be given due weight, implying that they should be considered when a decision that affects them is issued.<sup>368</sup> The right to non-discrimination commands considering a child with disabilities' views as much as any other child's,<sup>369</sup> and even to pay special attention to this particular marginalized category of children to give their views priority through special attention and support.<sup>370</sup>

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<sup>356</sup> Women's Refugee Commission, Disability Inclusion. Translating Policy into Practice in Humanitarian Action, p. 2.

<sup>357</sup> Women's Refugee Commission, Disability Inclusion. Translating Policy into Practice in Humanitarian Action, p. 2

<sup>358</sup> United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 23.

<sup>359</sup> General Assembly, A world fit for children, para. 32 dig. 1; United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 23.

<sup>360</sup> *A contrario*, United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 41-42.

<sup>361</sup> UN CRC, General comment No. 14, para. 100; UN CRC, General comment No. 12, para. 40-46; United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 24.

<sup>362</sup> CAMPOY CERVERA, p. 130; UN CRC, General comment No. 12, para. 22.

<sup>363</sup> CAMPOY CERVERA, p. 133.

<sup>364</sup> UN CRC, General comment No. 12, para. 40-46; United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 24.

<sup>365</sup> CAMPOY CERVERA, pp. 131-132.

<sup>366</sup> UN CRC, General comment No. 12, para. 30, 40-46.

<sup>367</sup> UN CRC, General Comment No. 14, para. 83.

<sup>368</sup> CAMPOY CERVERA, p. 131.

<sup>369</sup> CAMPOY CERVERA, p. 129; UN CRC, General comment No. 12, para. 118; Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, para. 81.

<sup>370</sup> UN CRPD, General comment No. 7, para. 56; General Assembly, A world fit for children, para. 32 dig. 1.

Opening communication with these children as a mode of prevention against future violence is an objective of special assistance in order for them to have someone to talk to in such situations.<sup>371</sup> To be available, in terms of time, is a duty so that children with disabilities in such situations are able to reach out for help, speak up, and avoid violence or abuse.<sup>372</sup> Giving them the necessary support after hearing them is required as well.<sup>373</sup> Their protection is a duty, which complies with the right to non-discrimination.<sup>374</sup> Their right to integrity, which includes their right to freely play<sup>375</sup> and to express their views (art. 12 CRC),<sup>376</sup> aims to reach for the most appropriate action.

Therefore, children with disabilities have to be given the opportunity to express themselves as a component of their right to self-determination. It brings new decision-making skills, self-esteem, conflict resolution, communication skills, process information, and less risk of anxiousness, depression, and exclusion. Their right to express their views commands opening a discussion to recognize their ability to express their views, considering their age, maturity, and other individual characteristics. In short, their right to self-determination commands considering their views. Their right to non-discrimination commands prioritising their views to ensure they can express themselves about the violence they might have suffered.

#### 2.6.1.4. RIGHT TO REST, LEISURE, PLAY PARTICIPATION IN RECREATIONAL ACTIVITIES

A further way to promote inclusion and participation is through these children's right to rest and leisure (art. 31 CRC, 30 CRPD and 12 ACRWC) that guarantees the right to play and participate in recreational activities as well as cultural life or artistic activities.<sup>377</sup> Play is "*any behaviour, activity or process initiated, controlled and structured by children themselves; it takes place whenever and wherever opportunities arise*".<sup>378</sup> It includes the exercise of autonomy, physical, mental or emotional activity such as music, art, crafts, community participation, clubs, sports, games, hobbies pursuit, as long as they are freely chosen by the child, depending on the child's age.<sup>379</sup> Below one year, activities will more target parents by promoting infant stimulation through exercises.<sup>380</sup> From one to four years, play groups based on the mother-toddler model will be adapted, including pre-school activities.<sup>381</sup> From five to ten

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<sup>371</sup> Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>372</sup> Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110; World Vision Kenya/UNHCR Geneva/Women's Refugee Commission/UNHCR Kenya/Film Aid/Danish Refugee Council (DRC)/Norwegian Refugee Council (NRC), National Refugee Youth Consultation. Summary Report, p. 6.

<sup>373</sup> Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>374</sup> Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>375</sup> UN CRC, General comment No. 17, para. 56 lit. a.

<sup>376</sup> About the importance of giving due weight to a child's view, UN CRC, General comment No. 13, para. 43 lit. a; UN CRC, General Comment No. 5, para. 12.

<sup>377</sup> In situation of hidden children, see *supra* p. 16.

<sup>378</sup> UN CRC, General comment No. 17, para. 14 lit. c.

<sup>379</sup> UN CRC, General comment No. 17, para. 14 lit. c-e.

<sup>380</sup> United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 47.

<sup>381</sup> United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 47.

years, games, dance, music, drawing, painting, storytelling, singing are adapted for a child's inclusion.<sup>382</sup> Then, from eleven to seventeen years, social relationship through sports, group discussion or community projects support peer leadership.<sup>383</sup> The right to rest and leisure promotes a child's right to quiet time and to social and cultural activities, which prevent social exclusion and the violence synonymous with exclusion.<sup>384</sup> Children with disabilities have the right to equal access to participation in play, recreation, and sporting and leisure activities, which implies pro-active measures to ensure that these activities are accessible, available, and do not erect barriers that would hinder their participation.<sup>385</sup> It complies with their right to non-discrimination.

Cultural life engagement is also a component of a child's identity, because it improves their feeling of belonging to a community, either by maintaining or restoring social cohesion through recreational activities.<sup>386</sup> It can be through dance, festivals, crafts, ceremonies, rituals, theatre, literature, music, cinema, exhibitions, film or video.<sup>387</sup> The right aims to reach for the best development of the child, who can equally and actively participate in community life.<sup>388</sup> It provides creativity, imagination, motivation, physical activity, skills development, and interactions that improve self-confidence, self-efficacy, strengths and skills<sup>389</sup> and also improve negotiation skills, emotional balance, conflicts resolution and decisions' making.<sup>390</sup>

This right should benefit each child, according to the non-discrimination principle, with particular attention given to children with disabilities.<sup>391</sup> Assistance shall be provided to the child and to those responsible for her care, which has to be "*appropriate to the child's condition*" and to ensure access to "*recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development*" (art. 13 para. 2 ACRWC). An "*active participation in the community*" (art. 13 para. 1 ACRWC) is protected, as seen in art. 18 para. 4 ACHPR to ensure community integration.<sup>392</sup> More locally, the KRCC promotes to "*integrate the persons with disability*" (art. 2 para. 5 KRCC) and to "*create and promote awareness on human rights at the camp*" (art. 2 para. 7 KRCC).

Therefore, children with disabilities' right to rest and leisure commands ensuring they participate in activities such as music, art, crafts, community participation, clubs, sports, games, dance, festivals, ceremonies, rituals, theatre, literature, music, cinema, exhibitions, film, video or others that involve the community. Age adaptation is required, such as for play groups based on the mother-toddler model for babies with disabilities, and for small children's games, dance, music, drawing, painting, storytelling, and singing. As for adolescents with disabilities, social relationship through sports, group discussion or community projects

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<sup>382</sup> United Nations High Commissioner for Refugees (UNHCR), *Refugee Children. Guidelines on Protection and Care*, p. 47-48.

<sup>383</sup> United Nations High Commissioner for Refugees (UNHCR), *Refugee Children. Guidelines on Protection and Care*, p. 48.

<sup>384</sup> ALDERSON, p. 203.

<sup>385</sup> UN CRC, General comment No. 17, para. 50.

<sup>386</sup> UN CRC, General comment No. 17, para. 11; United Nations High Commissioner for Refugees (UNHCR), *Refugee Children. Guidelines on Protection and Care*, p. 35.

<sup>387</sup> UN CRC, General comment No. 17, para. 14 lit. f.

<sup>388</sup> UN CRC, General comment No. 17, para. 24.

<sup>389</sup> UN CRC, General comment No. 17, para. 8-9.

<sup>390</sup> UN CRC, General comment No. 17, para. 9.

<sup>391</sup> LANSDOWN/TOBIN, p. 1198; UN CRC, General comment No. 17, para. 5, 14 lit g, 16.

<sup>392</sup> DEGENER p. 10.

are adapted. It is a means to enable their right to inclusion in the community. Individuals have to ensure that children with disabilities in Kakuma are given the opportunity to participate in activities they would like to; otherwise it could constitute material discrimination.<sup>393</sup> It contributes to violence prevention,<sup>394</sup> hence is a full component of children with disabilities' right to special assistance to prevent violence against them in Kakuma.

#### 2.6.1.5. RIGHT TO THE BEST ATTEINABLE STATE OF HEALTH

The right to the best attainable state of health (16 para. 1 ACHPR, 25 CRPD, 24 para. 1 CRC) aims toward appropriate prevention.<sup>395</sup> The right to non-discrimination commands that special attention be given to vulnerable children.<sup>396</sup> It includes "*individual factors such as age, sex, educational attainment, socioeconomic status and domicile; determinants at work in the immediate environment of families, peers, teachers and service providers, notably the violence that threatens the life and survival of children as part of their immediate environment; and structural determinants, including policies, administrative structures and systems, social and cultural values and norms.*"<sup>397</sup>

The child's views are of particular importance since they give direction on how to reach each child's best attainable state of health individually, what services they may need, how to provide them, what the barriers in accessing the existing services are, the quality of these, and the attitude of the professionals.<sup>398</sup> They have the right to "*special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance*" (art. 13 para. 1 ACRWC), as in art. 18 para. 4 ACHPR.

Therefore, children with disabilities' right to the best attainable state of health requires taking active measures to ensure their protection. They have to be adapted to the characteristics of each child with disabilities in accordance with their opinions, keeping in mind any assessment needed.<sup>399</sup> Individuals have to ensure that children with disabilities are safe and consider the individual risks they may face.

In addition, "*necessary support for the child and for those who have the care of the child*" is required (art. 19 para. 2 CRC). In combination with the non-discrimination principle, it dictates the obligation of protection against violence towards children with disabilities.<sup>400</sup> In a context of refugee or asylum-seeking children, such protection exhorts special assistance on a case-by-case basis, considering the risk of exposure (art. 22 CRC)<sup>401</sup> and according to the child's best interests.<sup>402</sup> Identification of these children is required, whose realisation of their rights

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<sup>393</sup> HENDRICKS, p. 48.

<sup>394</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 34.

<sup>395</sup> UN CRC, General comment No. 15, para. 2.

<sup>396</sup> UN CRC, General comment No. 15, para. 8, 15.

<sup>397</sup> UN CRC, General comment No. 15, para. 17.

<sup>398</sup> UN CRC, General comment No. 15, para. 19.

<sup>399</sup> For the individual assessment required by the child's best interests, see *supra* p. 8.

<sup>400</sup> TOBIN/CASHMORE, p. 705.

<sup>401</sup> POBJOY, pp. 846-847.

<sup>402</sup> UN CRC, General Comment No. 14, para. 32.

might require special measures.<sup>403</sup> By ensuring sufficient support for the child, and their caregivers as well, exclusion can be avoided.<sup>404</sup> Support for children with disabilities includes programmes such as “*childcare, early child development and after-school care programmes; child and youth groups and clubs; counselling support to children experiencing difficulties (including self-harm)*”.<sup>405</sup> Home-visitation programmes ensure full access to their rights.<sup>406</sup> Counsel has to be confidential, with a special focus on the child’s consent.<sup>407</sup>

The right to the best attainable of health commands it be handled by a professional with a defined responsibility, with a professional ethics code and a child-sensitive approach.<sup>408</sup> All programmes that involve children’s participation should be transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, and safe and sensitive to risk.<sup>409</sup> Individual adaptation to the particular factors of the case is required by the child’s best interests principle. And it has to take into account their personal development, social, cultural environment, status, and their views in accordance with their age and maturity. Therefore it must be individual oriented and take into account the specificity of the particular case.<sup>410</sup> In the maturity assessment, physical, emotional, cognitive and social development shall be considered.<sup>411</sup> Effective inclusion of children requires protective measures that ensure they are free from all forms of violence.<sup>412</sup> It has to protect the child, yet not focus on her as a recipient of welfare, but as a subject, whose rights shall be respected<sup>413</sup> in line with children’s evolving capacities and views to prevent violence.<sup>414</sup>

#### 2.6.1.6. CONCLUSION

Children with disabilities must be protected from any kind of violence in Kakuma. Violence and bullying are major factors that hinder their participation in community life, culture, or the arts.<sup>415</sup> Bullying especially hinders a child’s right to play and take part in the cultural and artistic life of the community.<sup>416</sup> Intimidation, harassment, or reprisal against children with disabilities impairs their right to inclusion into society.<sup>417</sup>

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<sup>403</sup> UN CRC, General Comment No. 5, para. 12; UN CRC, General comment No. 13, para. 47 lit. a, b; UN CRC, Observations of the Committee for Kenya, para. 49-50 *in* PRICE COHEN, Volume II, pp. 1934-1935.

<sup>404</sup> TOBIN/MARSHALL, p. 1576.

<sup>405</sup> UN CRC, General comment No. 13, para. 43 lit. b.

<sup>406</sup> UN CRC, General comment No. 13, para. 47 lit. c; UN CRC, General comment No. 15, para. 65; General Assembly, Guidelines for the Alternative Care of Children, para. 35.

<sup>407</sup> UN CRC, General comment No. 15, para. 31.

<sup>408</sup> UN CRC, General comment No. 15, para. 21, 26.

<sup>409</sup> UN CRC, General comment No. 12, para. 134.

<sup>410</sup> VON SCHORLEMER/SCHULTE-HERBRÜGGEN, p. 200; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3, para. 28; TOBIN/MARSHALL, p. 1589; UN CRC, General comment No. 13, para. 3 lit. c; General Assembly, Guidelines for the Alternative Care of Children, para. 6-7.

<sup>411</sup> UN CRC, General Comment No. 14, N 83.

<sup>412</sup> UN CRC, General comment No. 12, para. 120.

<sup>413</sup> TOBIN/CASHMORE, p. 723.

<sup>414</sup> See art. 12 CRC, the child’s right to express her views freely and be given due weight, and the child’s best interests; TOBIN/CASHMORE, p. 709; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 103.

<sup>415</sup> UN CRC, General comment No. 17,

<sup>416</sup> UN CRC, General comment No. 17, para. 30.

<sup>417</sup> UN CRPD, General comment No. 7, para. 95 lit. c.

Hence, social and educational measures must be undertaken to prevent violence against children with disabilities in Kakuma. Their right to inclusion is an obligation for the community. Integration of the child into the community ensures their physical protection. Their right to dignity should change the negative attitudes of which they are victims. Any traditional practice which leads to a stigma should cease. Children with disabilities' right to rest and leisure commands ensuring participation in activities of their choice. Individuals have to ensure that children with disabilities in Kakuma are given the opportunity to participate in any activities they would like to; otherwise it may constitute a discrimination. Children with disabilities' right to the best attainable state of health requires to active measures to ensure their protection, which has to be adapted to the characteristics of each child with disabilities in Kakuma.

They have to be given the opportunity to express themselves by opening a discussion with adults or their peers that recognizes their ability to express themselves considering their age, maturity, and other individual characteristics. Their right to self-determination commands considering their views. Their right to non-discrimination commands prioritizing their views and to ensure they can express themselves about the violence they may have suffered in the camp. Individuals have to ensure they are safe, considering the risks they may face individually. Their right to support commands ensuring they are protected from any kind of violence in Kakuma. Identification is required, and risk of exposure too, which can be achieved through counsel and home-visitation programmes. It always needs to be reminded that every programme has to be individually adapted and may have to be handled by professionals, according to the child's best interests' principle.<sup>418</sup>

***Violence prevention:***

- social or educational measures have to be undertaken to prevent violence against children with disabilities in Kakuma
- they shall be included into their community through:
  - o changing negative attitudes towards them
  - o play groups on mother-toddler model for babies with disabilities
  - o games, dance, music, drawing, painting, storytelling, singing for small children with disabilities
  - o social relationship through sports, group discussion or community projects are adapted for adolescents with disabilities
  - o communication with their peers and adults
- there is a connection between social inclusiveness, support for children with disabilities and violence prevention
- children with disabilities at risk shall be identified
- counsel and home-visitations programmes would be appropriate to ensure certain protection

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<sup>418</sup> For the individual assessment required, see *supra* p. 8.

## 2.6.2. WHILE VIOLENCE IS PERPETRATED

While violence occurs, sanctions may arise for any omission of helping someone who is being harmed. In effect, anyone who “*omits to take proper precautions against any probable danger*” against someone’s life can be charged for a lifetime prison or a death-sentence (section 243 lit. g KPC).<sup>419</sup> The law is going further by incriminating anyone who “*omits to do any act which it is his duty to do*” so that harm is done to a person. Such omission’s author is liable to imprisonment up to six months (section 244 KPC).

For long-time ongoing harm, identification of the evidences revealing maltreatment requires awareness to indicators showing such harm.<sup>420</sup> Evidence of physical violence can be unexplained or repeated injuries, alleged self-inflicted injuries or delay in seeking medical care.<sup>421</sup> A child-sensitive process should lead to developing a safe place with a trusted person.<sup>422</sup> All measures that end ongoing suffering have to be undertaken,<sup>423</sup> therefore taking immediate appropriate action.<sup>424</sup> A proper reporting system to specialized organizations is of capital importance for any person aware of such violence.<sup>425</sup> Even if violence happens at home, children’s rights should prevail over the family’s private sphere; therefore, one has to intervene (art. 19 para. 1 CRC) and intrafamilial harm has to end too.<sup>426</sup> The right to non-discrimination also requires punishing those responsible for harm, as well as measures promoting the development and empowerment of those children.<sup>427</sup>

Therefore, when children with disabilities are suffering from violence in Kakuma, one has to intervene to end the violence. Otherwise, leaders or elders assuming a particular responsibility towards their community may be liable to imprisonment. If such harm causes danger to the lives of children with disabilities, the perpetrator risks lifetime imprisonment. Identification of children with disabilities suffering from violence is an obligation for everyone, which can be achieved through evidence awareness, such as unexplained repeated injuries, alleged self-inflicted injuries, or a delay in seeking medical care. Afterwards, victims of such violence shall be referred to specialized organizations, such as in the Kakuma context the Lutheran World Federation, Jesuit Refugee Services, Humanitarian Inclusion, International Rescue Committee, and Voice for Disabled People Association.

Hence, six-months of imprisonment might be the sanction for community elders and zone leaders who do not act while children with disabilities are being violated in Kakuma. It can go up to lifetime imprisonment if a life is endangered. Understanding the kind of evidence that

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<sup>419</sup> Since 2009, death sentences were conversed to lifetime imprisonment, see: [https://en.wikipedia.org/wiki/Capital\\_punishment\\_in\\_Kenya](https://en.wikipedia.org/wiki/Capital_punishment_in_Kenya), last visited on 14.11.2019.

<sup>420</sup> TOBIN/MARSHALL, p. 1574; UN CRC, General comment No. 13, para. 48.

<sup>421</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 13.

<sup>422</sup> UN CRC, General comment No. 8, para. 29; UN CRC, General comment No. 12, para. 120; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 27.

<sup>423</sup> TOBIN/MARSHALL, p. 1571.

<sup>424</sup> UN CRC, General comment No. 13, para. 48; United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 84.

<sup>425</sup> UN CRC, General comment No. 13, para. 50; United Nations High Commissioner for Refugees (UNHCR), Refugee Children. Guidelines on Protection and Care, p. 83; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 74.

<sup>426</sup> TOBIN/CASHMORE, p. 689; UN CRC, General comment No. 13, para 3 lit. h; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 38.

<sup>427</sup> CAMPOY CERVERA, pp. 124-125.



reveals that children with disabilities are victims of violence is required of everyone. If a child with disabilities is a victim of such acts, she shall be referred to the specialized organisations in the camp, as indicated above.

While violence is perpetrated:

- while violence is perpetrated, leaders and elders have to end it; otherwise they are potentially exposed to:
  - o six-months imprisonment if children with disabilities are harmed
  - o a lifetime imprisonment if children with disabilities' life are endangered
- an evidence-based approach can reveal violence. Intervention, reporting and referral to specialized organisations are required:
  - o Lutheran World Federation
  - o Jesuit Refugee Services
  - o Humanitarian Inclusion
  - o International Rescue Committee
  - o Voice for Disabled People Association

### 2.6.3. RECOVERY AND REINTEGRATION

The recovery and reintegration of persons with disabilities who have been victims of violence has to be realized through “*all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse*” (art. 16 para. 4 CRPD and 39 CRC). Restoring a state of health as before constitutes an immediate remedy for the child who is a victim of violence, and soothes any effect of the harm.<sup>428</sup> Reintegration should focus on the child’s development to avoid any future circumstances that could lead to violence.<sup>429</sup> To this extent, recovery and reintegration should consider all prevention measures against violence.<sup>430</sup>

An individual approach is adapted in order to individualize measures, taking into account every child’s specific needs, gender, ethnicity, age, relatives, and everyone who interacts with her, including their communities, and according to the best interests of the child principle.<sup>431</sup> The right to express views commands taking into account those of children with disabilities, especially when it comes to reporting complaints (art. 12 CRC).<sup>432</sup> A child-sensitive process should lead to develop a safe place with a trusted person.<sup>433</sup> The right to effective access to

<sup>428</sup> TOBIN/MARSHALL, pp. 1571, 1593.

<sup>429</sup> TOBIN/MARSHALL, p. 1572.

<sup>430</sup> About the prevention measures, see *supra* p. 33.

<sup>431</sup> TOBIN/MARSHALL, pp. 1574-1576; UN CRC, General comment No. 13, para. 8; Women’s Refugee Commission, Implications for women, children, and youth disabilities. Vulnerability- and Resilience-based approaches in response to the Syrian crisis, p. 3.

<sup>432</sup> About the general obligation to give due weight to a child’s view, see art. 12 CRC; HAMMARBERG p. 148; TOBIN/MARSHALL, p. 1575; World Health Organization, promoting rights and community living for children with psychosocial disabilities, p. 74; UN CRC, General Comment No. 5, para. 12.

<sup>433</sup> UN CRC, General comment No. 8, para. 29; UN CRC, General comment No. 12, para. 120; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 27.

redress through support for the victims and their caregivers is a component of the guaranteed necessary support (art. 19 para. 2 CRC).<sup>434</sup>

Therefore, children with disabilities in Kakuma shall be reintegrated through individual measures. They shall be given the opportunity to express themselves about these measures and to report any violence or complaints. Safe places and trusted persons shall be available in order to attain redress from violence of which they have been victims.

Programmes should support the participation and inclusion of persons with disabilities in the community (art. 26 para. 1 lit. b and 4 para. 3 CRPD) without discrimination with no exclusion accepted.<sup>435</sup> Inclusion of children with disabilities shall be systematic.<sup>436</sup> Active involvement plays a role in their empowerment and shows they are capable to play an active role in the community, as rights holders.<sup>437</sup> The right to leisure and play has a role here (art. 31 CRC and 12 ACRWC) since it promotes the child's integration into the community (art. 3 lit. c CRPD).<sup>438</sup>

A child can open up about her trauma and communicate through play or artistic expression in order to externalize her experience; it helps resolve psychological issues.<sup>439</sup> The environment for play has to be without stress or any social exclusion, prejudice or discrimination; in other words, a safe space from social harm or violence.<sup>440</sup> Proactive measures should aim to remove any barrier that prevent children with disabilities from participating in activities,<sup>441</sup> to ensure they have equally access.<sup>442</sup> Sports, including competitions, should be accessible and encouraged according to every child's ability.<sup>443</sup> They aim to restore social cohesion through recreational activities such as music, dance, playtime or art, respectively, and include someone who has been victim of discrimination.<sup>444</sup>

Therefore, the right to inclusion of children with disabilities requires actively including them in the community, by providing special assistance when needed as a component of their recovery. It is a means to achieve inclusion and part of their right to rest and leisure. By taking part in activities of the community, children with disabilities as victims of violence in Kakuma can externalize their traumas to their peers or to adults. It is also a component of their recovery and solves the psychological consequences of violence. Adults must ensure that children with disabilities are given opportunities to participate in activities, such as sports competitions, recreational activities, music, dance, playtime, or art and that they are not victims of exclusion or discrimination.

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<sup>434</sup> UN CRC, General comment No. 13, para. 41, lit. f, h.

<sup>435</sup> UN CRPD, General comment No. 7, para. 16.

<sup>436</sup> UN CRPD, General comment No. 7, para. 24-25.

<sup>437</sup> UN CRPD, General comment No. 7, para. 74.

<sup>438</sup> LANSDOWN/TOBIN, p. 1198.

<sup>439</sup> UN CRC, General comment No. 17, para. 31.

<sup>440</sup> UN CRC, General comment No. 17, para. 32.

<sup>441</sup> UN CRC, General comment No. 17, para. 50.

<sup>442</sup> UN CRC, General comment No. 9, para. 71.

<sup>443</sup> UN CRC, General comment No. 9, para. 72.

<sup>444</sup> United Nations High Commissioner for Refugees (UNHCR), *Refugee Children. Guidelines on Protection and Care*, p. 35.

Recovery and reintegration:

- adapted individual measures for children with disabilities victims of violence have to be undertaken
- children with disabilities shall have the opportunity to express themselves, especially to report violence against them
- active inclusion into the community shall be achieved, with special assistance if necessary:
  - o through activities such as sports competitions, recreational activities, music, dance, playtime, or art
  - o special attention shall be provided so that children with disabilities may take part into those activities without discrimination
  - o those activities are means to express their traumas and help to their recovery

#### 2.6.4. CONCLUSION

Violence prevention has to be achieved through social and educational measures for children with disabilities in Kakuma. Their right to inclusion is an obligation for the community, and their participation may require special assistance, according to their individual impairment. Consequently, their special assistance has to be individually adapted to achieve inclusion, and, consequently, to ensure their physical and psychological protection. By condemning the negative perceptions regarding children with disabilities, individuals must comply with their right to dignity. Any harmful traditional practice that leads to a stigma should cease because it violates their right to dignity.

Children with disabilities' right to rest and leisure commands ensuring participation in activities such as music, art, crafts, community participation, clubs, sports, games, dance, festivals, crafts, ceremonies, rituals, theatre, literature, music, cinema, exhibitions, film, video or others which involve community participation. They may be individual and age-adapted. Individuals have to ensure that children with disabilities in Kakuma are given the opportunity to participate in activities they would like to, to avoid material discrimination. Children with disabilities' right to the best attainable state of health requires active measures to ensure their protection and has to be adapted to the characteristics of each child in Kakuma. They have to be given the opportunity to express themselves in a discussion with adults or their peers, which recognizes their ability to express themselves according to their age, maturity, and other individual characteristics.

Their right to self-determination further commands considering their views. Their right to non-discrimination commands prioritizing their views and ensuring they can express themselves about any violence suffered in the camp. Everyone has to assess the risks they may be individually exposed to and ensure their safety, according to their right to support. It also commands they be protected from any kind of violence in Kakuma. Counsel and home-visitation programmes shall be implemented to ensure their protection. Those programmes need to be individually adapted and may have to be handled by professionals, according to the child's best interests' principle.

Besides, leaders and elders may face six-months imprisonment if they do not act while children with disabilities are being object to violence in Kakuma. If their life is endangered, they

are liable to lifetime imprisonment. Everyone shall be aware of evidence which may reveal children with disabilities are victims of violence and shall refer her to specialized organisations in the camp, such as the Lutheran World Federation, Jesuit Refugee Services, Humanitarian Inclusion, International Rescue Committee and Voice for Disabled People Association.<sup>445</sup>

Children with disabilities shall be reintegrated with adapted individual measures. They shall be given the opportunity to express themselves, especially to give feedback about these measures and to report violence or complaints. They shall have safe places with trusted persons to open up about the violence they may have been victims of. Active inclusion into the community shall be undertaken by providing special assistance to achieve their recovery. A means to achieve their inclusion is their right to rest and leisure, because children with disabilities can externalize their traumas to their peers or adults during activities. It helps them to solve the psychological consequences of violence. Adults have to ensure that children with disabilities are given opportunities to participate in activities such as sports competitions, recreational activities, music, dance, playtime, or art and that they are not victims of exclusion or discrimination. Such activities have to be individually and age adapted.

Consequently, by not giving special attention to children with disabilities in the camp, individuals may infringe upon their right to give their views, to the best attainable state of health, to inclusion in the community, to rest and leisure in order to promote their empowerment. It therefore violates the KRCC.

## 2.7. Violence towards girls with disabilities

Abuse and violence against girls with disabilities are more frequent than the kind experienced by boys with disabilities.<sup>446</sup> A lack of role models in the camp can be observed : only 42 of the 439 refugee teachers in primary school were females in February 2015.<sup>447</sup> A girl with disabilities is at risk of multiple discrimination, not only for having a disability, but also for being a girl – therefore being subject to intersectional discriminations.<sup>448</sup> Gender-based violence may be defined as “*any form of violence against a person due to their gender*”.<sup>449</sup> Such violence might include, for instance, a forced marriage,<sup>450</sup> sexual assault from partners, military personnel, strangers and acquaintances, or domestic violence.<sup>451</sup>

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<sup>445</sup> As suggested by the Kakuma students and following discussions with the concerned organizations.

<sup>446</sup> Country Report, Kenya – Kakuma Refugee Camp, p. 2; UN CRC, General comment No. 13, para. 16; Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR No. 110.

<sup>447</sup> Country Report, Kenya – Kakuma Refugee Camp, p. 2; Report of Rapid Assessment of Barriers to Education in Kakuma Refugee Camp, p. 16.

<sup>448</sup> Violence often contains gender discrimination, see. MC CLAIN-NHLAPO, p. 111; UN CRC, General comment No. 13, para. 19; UN CRPD, General comment No. 3, para. 2; UN CRPD, General comment No. 6, para. 36; General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 78.

<sup>449</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 12.

<sup>450</sup> Interview with community elders and zone leaders.

<sup>451</sup> M. SCHMIECHEN, p. 490.

The diverse discriminations that girls face are recognized (art. 3 lit. g CPRD) as “*multiple discrimination*” (art. 6 para. 1 CPRD). According to the right to non-discrimination, gender equality is guaranteed.<sup>452</sup> Any discriminatory act is unlawful.<sup>453</sup> The recognition of girls with disabilities as rights-holders, hearing their voices, and raising self-confidence contribute to their empowerment.<sup>454</sup> Combatting stereotypes, prejudices and harmful practices complies with their right to “*respect for the inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities*”.<sup>455</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) commands ending every “*distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, or enjoyment or exercise by women*” (art. 1 CEDAW). Active measures aiming to achieve *de facto* equality are allowed (art. 1 para. 4 CEDAW and 5 para. 4 CRPD). The right to “*the elimination of every discrimination against women and also ensure the protection of the rights of the woman*” is guaranteed (art. 18 AHCP), as is the right to reintegration and recovery (art. 39 CRC). Rehabilitation services must offer counselling for any gender-based violence, be accessible, and age- and gender-sensitive (art. 26 CRPD).<sup>456</sup> Support for the participation and inclusion of persons with disabilities in the community shall be given (art. 26 para. 1 lit. b CRPD). The right to participate in play, cultural life, and art (art. 31 CRC) should especially benefit girls with disabilities as gender-stereotypes tend to exclude them from such activities.<sup>457</sup>

Internal law states that “*women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres*” (art. 27 KConst). Not reproducing the customary systems and oppressive structure of relationships between genders is key.<sup>458</sup> The right to “*special attention*” regarding women, children, and persons with disabilities is guaranteed (section 36 Kenyan Refugee Bill). In the Kenyan Bill of Rights, applicable to all persons equally, girls are a vulnerable group requiring special protection.<sup>459</sup> From the point of view of criminal law, the Kenyan Sexual Offences Act (KSOA) offers a large catalogue of gender-based violence including rape (section 3 KSOA), sexual assault (section 5 KSOA), indecent acts with children (section 11 KSOA), promotion of sexual offences with a child (section 12 KSOA), child prostitution (section 15 KSOA), prostitution of persons with mental disabilities (section 19 KSOA), or sexual harassment (section 23 KSOA). Any author of such violence is liable to at least three years and up to lifetime imprisonment. Protection against forced marriage in particular can be found (art. 16 para. 2 CRC); in Kenya, the minimum age for marriage is eighteen year.<sup>460</sup>

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<sup>452</sup> UN CRPD, General comment No. 6, para. 36.

<sup>453</sup> UN CRPD, General comment No. 3, para. 7.

<sup>454</sup> UN CRPD, General comment No. 3, para. 7.

<sup>455</sup> UN CRPD, General comment No. 3, para. 11.

<sup>456</sup> UN CRPD, General comment No. 3, para. 57.

<sup>457</sup> UN CRC, General comment No. 17, para. 48.

<sup>458</sup> MUTESHI, p. 131.

<sup>459</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 13.

<sup>460</sup> WANJIKU NGUNYI/FWAMBA BARASA/PH ONYANGO, Research Manual Kakuma Refugee Camp, p. 12, see section 45 para. 2 of the Marriage Act of 2011.

Thus, gender-based discrimination is particularly invasive, and the differing needs of girls and boys should be recognized to ensure that their right to the best attainable state of health is respected.<sup>461</sup> The multiple types of discrimination they face hinders their inclusion and needs to end.<sup>462</sup> In this context, harmful practices or traditions have to be condemned.<sup>463</sup>

The positive duty of preventing such behaviour entails condemning any violent form of discipline through a gender-sensitive education.<sup>464</sup> A best interests assessment needs to consider exposure because of gender. However, such assessment should never lead to hindering their right to corporal integrity.<sup>465</sup> For all the above-mentioned rights, the best interests of girls with disabilities commands that all designed programmes and professionals take a gender-sensitive approach.<sup>466</sup> Professionals should not condone any attitudinal barriers<sup>467</sup> that hinder access of girls with disabilities to the special assistance they are entitled to receive.

Violence against girls with disabilities, including sexual violence or any other kind that is gender-based and that cumulates in discrimination against their age and disability is not acceptable and forbidden by the law. Condoning negative attitudes and practices that tend to accept violence is part of this prevention.<sup>468</sup> Thus, special attention to girls with disabilities is required to fulfil the right to non-discrimination and to avoid violence against them.<sup>469</sup>

*Violence against girls with disabilities:*

- girls with disabilities face multiple and intersectional discriminations
- gender-based violence infringes the right to non-discrimination
- violence against girls with disabilities has always a gender dimension
- special attention is required in such cases
- condoning practices and stereotypes helps to break the circle of violence

## E. Conclusion of the legal research

This legal research is oriented towards solving practical problems on site. Its structure is therefore mainly centred around two main situations identified as needing attention: hiding children with disabilities at home and violence towards them. Disability, as the term is employed throughout this research, is not a definitive medical diagnosis but fluctuant to the environment. Children with disabilities are particularly vulnerable because they might be exposed to discrimination not only on the basis of their disability, but also their age, social status, and other grounds. They consequently need the protection of the law. Children with disabilities need to be considered as right-holders with inherent dignity and autonomy, enjoying these rights on an equal basis with others.

<sup>461</sup> UN CRC, General comment No. 15, para. 9.

<sup>462</sup> UN CRPD, General comment No. 3, para. 55.

<sup>463</sup> UN CRC, General comment No. 15, para. 9.

<sup>464</sup> General Assembly, Rights of the Child: Report of the independent expert for the United Nations study on violence against children, para. 110 lit. c.

<sup>465</sup> UN CRPD, General comment No. 6, para. 38.

<sup>466</sup> UN CRPD, General comment No. 3, para. 21.

<sup>467</sup> UN CRPD, General comment No. 3, para. 43.

<sup>468</sup> General Assembly, Rights of the Child, para. 100.

<sup>469</sup> BESSON/KLEBER, p. 52 and its references.

According to the principle of full and effective participation and integration in society, a child has, *inter alia*, the right to live independently and be included in the community as well as the right to participate in cultural life, recreation, leisure, and sport. These rights require allowing the child a certain degree of autonomy and exchange with the community. Also, a child with disabilities has the right to education. While the forms of how education is to be transmitted might differ according to the circumstances, inclusive education is the most appropriate tool to guarantee this right. Finally, a child with a disability also has the right to non-discrimination, understood as requiring the application of the concept of reasonable accommodation. By hiding children with disabilities at home, the above-mentioned rights most likely are violated. Nevertheless, a careful analysis of the individual case is always necessary.

As for violence against children with disabilities, any abuse, neglect, mockery, molestation, or maltreatment might lead to imprisonment or a fine. It also infringes upon children with disabilities' right to freedom of all form of violence, their right to the highest attainable state of health, mental and physical integrity, and to security.

Regarding the positive duties required in a situation of violence, special assistance for children with disabilities shall be provided to ensure that children with disabilities exercise and fully enjoy their rights. To prevent violence, social or educational measures must be undertaken, such as inclusion into community activities and cultural life. The right to rest and leisure promotes a child's right to social and cultural activities and prevents social exclusion and the violence accompanying such exclusion. Children with disabilities have a right to equal access to participation in play, recreation, sporting, and leisure activities, which implies pro-active measures that ensure access to those activities.

The right to protection shall comply with those activities, so that the right to express their views is respected as well. It is a component of their right to the best attainable state of health and necessary support, to be implemented through empowerment strategies. While violence is perpetrated, identification based on evidence of violence is required, and any case shall be reported and referred to competent organisations.

Children with disabilities as victims of violence require an adapted solution for the child to recover from the violence of which she has been victim. Specialized assistance is to be individually adapted. As for reintegration, effective inclusion into community activities of children with disabilities requires protective measures to ensure freedom from all forms of violence.

Finally, girls with disabilities are especially exposed to violence. Special attention is required towards them.

The central role of support for children with disabilities and their parents' collectives must be underlined, which play an important role in identifying needs and to provide adequate assistance. Community elders and zone leaders should use their influence to provide places where children with disabilities and their parents or caregivers can gather, express their concerns, and exchange experiences. Such gatherings would serve to challenge negative prejudices and harmful practices toward children with disabilities.

## V. Ethical considerations

All interactions between the teams were oriented to avoid unequal relationships, bearing in mind the different backgrounds of the Geneva, Kakuma, and Kenyatta teams. Unequal relationships may arise from interactions between northern legal clinics those in the south ones.<sup>470</sup> As students from a northern university, the Geneva team had to engage itself in learning from the other teams, without privileging its own cultural perception, to work with students from a refugee camp.<sup>471</sup> Social justice is and has to stay the principal objective of Applied Human Rights II, therefore striving to have an impact mainly on the vulnerable population with and on which the project is focused.<sup>472</sup> Solidarity between the teams, especially because of cultural and background differences, was a key concept during the whole process of this project.<sup>473</sup>

The Geneva team wants to especially follow the three principles that Daniel BONILLA mentioned: “*mutual recognition of the parties involved in the project; using consensus to establish, interpret, and apply the rules governing the clinical exchange; and prioritizing the social justice objectives pursued over the educational and professional development purposes that are also part of the programs of cooperation advanced by the clinics*”.<sup>474</sup> This involves self-reflection about the position each team wants to have during the preparation and training itself.

### A. Efforts and aims

An important effort throughout the entire project was to not simply produce knowledge in Geneva and apply it to Kakuma, as many projects in similar configurations do,<sup>475</sup> but to adapt the international, national, and local legal frameworks to the Kakuma camp’s background, as each law is alive and develops while being applied in particular circumstances. A challenge to achieve this aim was to formulate a message throughout the training, emphasizing children with disabilities’ rights in the camp and combined with an approach sensitive to relations of power and domination.<sup>476</sup> Recognising different ways of life between Kakuma and/or Nairobi and Geneva might lead to new and different interpretations of the selected and discussed legal provisions.<sup>477</sup> This implies facing concepts and traditions that are drastically different. For instance, in speaking about disabilities, the Geneva team had to anticipate that the subject would likely result in a discussion of sorcery.<sup>478</sup>

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<sup>470</sup> BONILLA, p. 3.

<sup>471</sup> BONILLA, p. 3.

<sup>472</sup> BONILLA, p. 4.

<sup>473</sup> BONILLA, p. 4.

<sup>474</sup> BONILLA, p. 4.

<sup>475</sup> BONILLA, p. 10.

<sup>476</sup> CARRON, para. 19.

<sup>477</sup> BONILLA, p. 27.

<sup>478</sup> As the training could not take place at the planned date, the anticipated discussion only happened when exchanging views in the different teams; interviews with community elders and zone leaders; to familiarize with this aspect see GÜSTIN Jo, 9 Histoires Lumineuses où le bien est le mal (Présence africaine), pp. 29 ss.



The Geneva team wants to avoid imposing its view in such a situation but aims to open a discussion on how the concerned children's rights can be conciliated with a given local practice. Collective exchanges on different and challenging situations in the camp and how to improve them, without imposing northern and European views are one of the goals of this project.<sup>479</sup>

The topic of this project was the decision of the Kakuma team. The Kakuma team identified a vulnerable group, children with disabilities, and decided to set up training to raise awareness on problematic situations encountered by this group in everyday life and regarding their rights. These impulses and choices are of paramount importance to the project, since it shall primarily serve the Kakuma communities' interests, in accordance with a social justice achievement goal.<sup>480</sup>

Furthermore, as this training focuses on the rights of children with disabilities, a particularly vulnerable group,<sup>481</sup> a certain caution had to be adopted, anticipating the impact of the message that the teams wanted to share with the training's participants. Legal knowledge of the rights of this vulnerable groups had to be applied in a proper manner, and shared even more carefully, since it could have negative consequences for the concerned group.<sup>482</sup> Therefore, a proper understanding of the situation onsite in Kakuma through regular contacts with the Kakuma team and the interviews conducted with community elders and zone leaders had the aim of warding off the inexperience of the Geneva team students.<sup>483</sup>

To properly conduct the training, high quality standards of legal knowledge were required and part of the horizontal approach aimed at.<sup>484</sup> Just as universities have high standards to meet, the teams had to apply the same standards to this project.<sup>485</sup> This project benefitted from having high quality legal research from Kenyatta University and the University of Geneva on the same topic. This allowed the project to avoid the risk of ignoring national knowledge, putting the Geneva team as a northern clinic with its legal redaction on the same level as the Kenyatta team, coming as a southern clinic with its own legal redaction.<sup>486</sup> This setting allowed for discussing diverging views on certain topics,<sup>487</sup> and encouraging an exchange of knowledge and views, which proved extremely constructive.

Both the Kenyatta and Geneva teams' main aim, considering the legal research and their position as legal researchers, was to inform the Kakuma team on international and national legal aspects of the rights of children with disabilities. On the other side, the Kakuma team taught the other two teams about socio-economic challenges faced when living in a refugee camp, existing power imbalances, coping strategies, and traditional structures of socio-ethnic groups in the context of forced displacement.

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<sup>479</sup> As inspiration of this posture, see the film "No apologies", DAMPHA/ANOKWA/RUPP, 2019, Switzerland.

<sup>480</sup> BONILLA, p. 31.

<sup>481</sup> See *infra*, annex A: legal redaction Kenyatta team.

<sup>482</sup> BONILLA, p. 13.

<sup>483</sup> BONILLA, p. 13.

<sup>484</sup> BONILLA, p. 17.

<sup>485</sup> BONILLA, p. 17.

<sup>486</sup> Bonilla, p. 27.

<sup>487</sup> See *infra*, for instance the topic on the disability definition or on the relationship between Kenyan and international law in both legal redactions, annexes A and B.

These insights provoked the Geneva team to embrace a much more critical view toward the current system of refugee protection. Besides, it led the Geneva team to question itself continuously about its position as northern clinic when interacting with the other teams. Every action had been put into perspective to avoid any hierarchical relationship, when trying to implement a critical – if not postcolonial – approach. Furthermore, this collaboration significantly enhanced the organizational, research, and writing skills of the participating team members. Above all, every team had to fully understand, embrace, and apply the legal clinic’s principle, from theory – hopefully in the near future, when the training will take place – to practice.

Even though proper preparation for the training was impossible because of the COVID-19 pandemic, the alternative solution was having a discussion every week on a topic linked to children with disabilities’ fundamental rights to follow the same purpose.<sup>488</sup> It included a perspective of legal empowerment,<sup>489</sup> law principles flowing from national and international legal texts, and the exchange of knowledge between the three teams how to implement these principles in Kakuma as a way to contribute to mutual enrichment and empowerment. Because the new challenges that arose due to COVID-19 had affected the teams unequally, solidarity in this new situation meant not giving up the project and continuing to a certain degree the legal training of each team.

Legal empowerment<sup>490</sup> is intended to benefit the involved students, the training’s participants, and finally the children with disabilities. The latter especially shall benefit from the shared knowledge, even though they did not participate directly. Their absence constitutes an important critique of this project.<sup>491</sup> The aim of the student teams was to advocate for children with disabilities’ rights to allow them eventually – through dispute or litigation that community elders or zone leaders are entitled to decide – to be claimholders, embraced by the normative force given by knowledge of the rights they detain.<sup>492</sup> Especially in the context of a refugee camp where many ethnicities are mixed, advocacy for children with disabilities’ rights allows them to act against situation that may violate their rights.<sup>493</sup>

This advocacy was also meant to be achieved throughout an information sharing tool, whose development had to be suspended.<sup>494</sup> However, spreading knowledge about their rights to the concerned children has a paramount meaning in a refugee camp, where traditional justice under the form of access to the court is practically inexistent.<sup>495</sup> It aims that the vulnerable population is aware of their rights, allowing them to stand up against the possible deprivation of said rights.<sup>496</sup> Only then may they become actors of the realization of their own rights,<sup>497</sup> as it is a constitutive component of legal empowerment within the refugee community.<sup>498</sup>

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<sup>488</sup> See *infra*, VI, B, 2: Training the teachers.

<sup>489</sup> PURKEY, p. 268.

<sup>490</sup> The United Nations Secretary-General defines it as “the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors”, see PURKEY, p. 264.

<sup>491</sup> See *infra*, VIII, B : Critical review of project.

<sup>492</sup> PURKEY, p. 264.

<sup>493</sup> PURKEY, p. 264.

<sup>494</sup> See *infra*, VI.D: Development of an information sharing tool.

<sup>495</sup> PURKEY, p. 264.

<sup>496</sup> PURKEY, p. 264.

<sup>497</sup> PURKEY, pp. 264, 277.

<sup>498</sup> PURKEY, p. 278.

As underlined in the legal research, a charity approach of different vulnerabilities, including disability, was abandoned.<sup>499</sup> The same principle guided the preparation of the training, privileging a legal empowerment approach.<sup>500</sup> However, due of the COVID-19 crisis, the whole project had to make an important shift. Considering the regular legal discussions maintained, the main intermediate goal was to keep informing the Kakuma colleagues involved in this project, hoping their knowledge would reach the concerned population. This idea, at first sight naive, had to be put into the perspective that some students from the Kakuma team regularly worked with children with disabilities.<sup>501</sup> As actors in the field of children with disabilities, they are vectors of knowledge and potentially able to apply their knowledge once a situation arises.

## B. Critical review

Facilities and other resources for this training were provided by the InZone program, present in Geneva and in Kakuma. However, the difference in these available facilities to the students is important. Lectures in the InZone facilities in Kakuma are obviously singularly different than those in Geneva's facilities. Therefore, particular attention had to be paid to interactions relying on these resources such that this difference does not influence relationships between teams.<sup>502</sup> Every dominance or subordination must be strictly proscribed, even though these factors – among others – in some form inevitably influenced certain interactions between teams. Instead of trying to hide them, the Geneva team wanted to underline those differences and explain its choice about how to cope with them.

The Kakuma team was composed of volunteer students, who all had other tasks or jobs in the camp. Moreover, life in a refugee camp implies a lot of burdens, even in finding an internet connection, or the cost from replying to WhatsApp messages.<sup>503</sup> There are no concrete roads in the camp, making mobility much more difficult and conditional upon the weather's willingness.<sup>504</sup> Meetings are therefore a lot harder to set up than in other settings. Being in a refugee camp involves coping with marginalization, poverty, discrimination, lack of access to services, social exclusion, or systemic human rights violations.<sup>505</sup>

In the preparation phase of this project, the Kakuma team had to face general insecurities typical of a refugee camp,<sup>506</sup> but also droughts and floods<sup>507</sup>, as well as episodes of communal violence.<sup>508</sup> The preparation of this project constituted an unequal challenge for the different teams involved. Nevertheless, this training constitutes a necessary step towards the legal empowerment of students, allowing them to later use their knowledge of human rights.<sup>509</sup> In

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<sup>499</sup> See *infra*, annexes A and B.

<sup>500</sup> PURKEY, p. 278.

<sup>501</sup> WhatsApp discussions with students.

<sup>502</sup> BONILLA, p. 9.

<sup>503</sup> Inzone preliminary training; see *infra*, VI, B, 1: Channels of communication.

<sup>504</sup> Inzone preliminary training.

<sup>505</sup> PURKEY, p. 261.

<sup>506</sup> PURKEY, p. 262.

<sup>507</sup> <https://twitter.com/KanereNews/status/1222734752681095168>, and <https://twitter.com/KanereNews/status/1199851128197746688>, last consulted on 22.02.2020.

<sup>508</sup> <https://kanere.org/five-dead-many-injured-in-communal-violence/>, last consulted 16.06.2020.

<sup>509</sup> PURKEY, p. 268.

addition, many students from the Kakuma team have previously or are now following additional studies.<sup>510</sup>

Another big difference between the teams must be addressed: on the one hand, the Geneva team received 18 credits (ECTS) for its involvement in the project, while the other teams did not receive any credits (ECTS) at all. This project consequently was important for the university courses of the Geneva team, while the other teams were volunteering. This inequality implies that the Geneva team accepted to bear more responsibilities in the organization. But at the same time, the Geneva team had the desire to empower the other teams, allowing them to self-organize such trainings in the future. An underlying risk in this situation was that the northern law clinics took the central decisions about the project with only a marginal consideration of the southern legal clinic's opinions.<sup>511</sup> Such vertical relationships should be avoided, even though they are to a certain extent institutionalized in the project by the obvious difference of backgrounds between the students living in Geneva, in Nairobi, or in Kakuma and the different importance this project had in the academic curriculum of the teams.

The Kenyatta team students were volunteers too since they did not receive any credits (ECTS) for their work in this project. Even though their setting cannot be compared to the setting of the Kakuma students, there was still a fundamental difference with the Geneva teams. The Geneva teams received recognition for their participation in the project by being awarded 18 credits (ECTS), the equivalent of participation in a master seminar. The work of the other teams did not benefit from equal recognition.

This unequal recognition of participation and work in this project, combined with the different backgrounds, is perfectly illustrated by the fact that this thesis is considered as the work of the Geneva team, although credit should have been equally given to the other teams. Even though this redaction wanted to address the problematic situation in the camp and the power imbalances between northern and southern clinics,<sup>512</sup> it undoubtedly reproduced a certain inequality concerning possibilities and recognition.

### C. Adopted position

The above discussion must be aligned with the main objectives of this project: first, the achievement of social justice through the law, and secondly, the improvement of the legal knowledge of the participating students.<sup>513</sup> Mutual and equal recognition of the efforts of all the teams is compulsory to achieve the aspired horizontal relationship.<sup>514</sup> This obviously implies completely avoiding any form of paternalism,<sup>515</sup> keeping the differences concerning recognition by the different universities in mind. All the teams learned from this project. The preparation in the field constituted only a short-term effect that now needs to be put in perspective with the long-term effect of the project, meaning the knowledge gained through the

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<sup>510</sup> WhatsApp discussions with students.

<sup>511</sup> BONILLA, p. 6.

<sup>512</sup> BONILLA, p. 6.

<sup>513</sup> BONILLA, p. 31.

<sup>514</sup> BONILLA, p. 37.

<sup>515</sup> BONILLA, p. 38.

process for each team.<sup>516</sup> This capacity-building component of the project is,<sup>517</sup> as enounced in the introduction, the second major goal of this academic project.

As BONILLA states: “*social justice and educational objectives are the main goals to be achieved through this project*”.<sup>518</sup> Professional recognition should only be a consequence, depending on the project’s success.<sup>519</sup> Above all, this project aimed to bring social justice through change coming from the field.<sup>520</sup> It was to be done by taking into account all the interactions with those who hold the power in the camp, and, among others, the aid providers and authorities.<sup>521</sup> Such legal empowerment restores knowledge equality between the parties to avoid abuse and to inequalities.<sup>522</sup> The three student teams and the future participants of the training (when the training will finally take place) were and will be asked to effect change from the “field”.

Realising to be a rights-owner is the first step to eventually obtaining the realization of those rights.<sup>523</sup> In this context, many challenges may still arise in relation to those who profit from the vertical hierarchy of the power in the camp. On the other hand, this awareness will lead to action towards the concretization of those rights and encourage training participants to take an active role in their everyday life, thereby decreasing the dependence of those who bear the power in the camp,<sup>524</sup> while giving usefulness to the law.<sup>525</sup> For this reason, the training is meant to be a sensibilization about the content of rights embedded in international law, avoiding theoretical question in academia.

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<sup>516</sup> PURKEY, p. 263.

<sup>517</sup> PURKEY, p. 277.

<sup>518</sup> BONILLA, p. 31.

<sup>519</sup> BONILLA, p. 32.

<sup>520</sup> PURKEY, p. 270.

<sup>521</sup> PURKEY, p. 269.

<sup>522</sup> PURKEY, p. 269.

<sup>523</sup> PURKEY, pp. 270, 274.

<sup>524</sup> PURKEY, p. 270.

<sup>525</sup> PURKEY, p. 278.

## VI. Training preparation phase

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Since September 2019, the three student teams have been in contact with each other and are preparing the training. Despite the postponement due to COVID-19, a risk the Geneva team did not anticipate in the risk assessment (A), the teams could gain important experience, especially in overcoming the different practical challenges of the training preparation (B), the identification and development of an information sharing tool (D), as well as the development of an evaluation tool (E). Therefore, the corresponding chapters are not conceptual but rely on the experiences of the Geneva team. This is important for future students of the Applied Human Rights project.

The proposed program of the training (C) is only in the conceptual planning stage and could not be tested. It is therefore to be understood as a conceptual element in an otherwise practical thesis.

### A. Risk assessment

Risk assessments are compulsory for such a project. Mainly the risks linked to the particularities of a refugee camp, logistical problems due to the distance, and the lack of coordination between different actors in the field need to be assessed.<sup>526</sup> Such risk assessment was conducted by the first Applied Human Rights students, planning the training in 2018. Given the timely proximity and similarity of the situation, the same risk assessment was therefore considered as up to date and sufficient for this year's training. This risk assessment can be found in the annex.<sup>527</sup>

Every risk assessment is inevitably limited to potential future events that were barely imaginable during the assessment and consequently non-exhaustive. The COVID-19 pandemic in 2020 must be considered as unimaginable at the time of the risk assessment.

During January 2020, the first reports emerged of a new virus spreading in China called the "severe acute respiratory syndrome coronavirus 2 (SARS-COV 2 or COVID-19). After having spread through the Chinese province of Wuhan, the virus spread across the world at a yet unknown speed. On the 11<sup>th</sup> of March 2020, the WHO declared the virus a worldwide pandemic.<sup>528</sup> Towards mid-March, Europe became after China the second epicentre of the virus.<sup>529</sup> Consequences of the spread included the passing of emergency legislation, requiring populations to limit their movements to an absolute minimum, applying strict hygiene measures, and complying with "social distancing" regulations.<sup>530</sup> To halt the spread of the virus, many affected countries started imposing travel restriction.<sup>531</sup>

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<sup>526</sup> PURKEY, p. 263.

<sup>527</sup> See *infra*, annex D: Risk assessment.

<sup>528</sup> WHO, Coronavirus disease 2019 (COVID-19) Situation Report – 51.

<sup>529</sup> Le monde, le monde se barricade, l'Europe épicentre de la maladie coronavirus.

<sup>530</sup> For Swiss measures, see COVID-19 Ordinance 2, RS 818.101.24.

<sup>531</sup> IATA, Coronavirus outbreak – update.

In Switzerland, the government took several measures to combat the virus. On the 16<sup>th</sup> of March, schools and shops were closed, and gathering of more than fifty persons were prohibited and travel restrictions enacted.<sup>532</sup> The University of Geneva consequently informed that any travel related to the University was now strictly forbidden until further notice.<sup>533</sup> InZone's activities in Kakuma had to be suspended.<sup>534</sup> Considering the restrictions, combined with a general insecurity about future developments in the world and Kakuma camp, it became clear that the training could not take place as planned in the first week of May 2020. In mid-March, it was decided to put the project temporarily on hold and assess how the project could be pursued in the future.

On the 15<sup>th</sup> of March, Kenya closed its borders to foreign travellers for the next 30 days.<sup>535</sup> UNHCR in Kakuma camp, without providing verifiable numbers, declared toward the end of March being heavily engaged in WASH<sup>536</sup> activities, mainly promoting the washing of hands and increasing the availability of water, soap, essential household items, and sanitary material packages.<sup>537</sup> On the 20<sup>th</sup> of March 2020, the UNHCR released a notice on its website recommending to *"minimize social gatherings, practice handwashing regularly with soap and running water, cover your mouth and nose with a tissue or handkerchief when coughing and sneezing"*.<sup>538</sup>

As a result of the virus, no movement passes were issued anymore.<sup>539</sup> On the 26<sup>th</sup> of March, a mandatory to carry identity cards in Kakuma was introduced.<sup>540</sup> On the 27<sup>th</sup> of March, Kenya imposed on its territory (also Kakuma) a curfew from 7:00 pm to 5:00 am, with the risk of being arrested.<sup>541</sup> Then, in mid-May, a new ordinance imposed the mandatory use of face masks, under the penalty of a fine up to 20,000 Kenyan shillings or imprisonment up to six months.<sup>542</sup>

The COVID-19 situation revealed some very interesting flaws in the risk assessment of the Geneva team. As discussed, it is impossible to provide an exhaustive catalogue of risks. Nevertheless, it is striking to note that not a single one of the assessed risks was considered to potentially originated in Geneva or Europe. At a maximum, the risks to be blocked in Nairobi, or not being allowed to enter Kenya, were identified. Admitting that the likelihood of a pandemic was incredibly small, the lack of identifying even one risk originating in Europe illustrates the subconscious northern conviction of being untouchable: in this perception risks have to come from the global south. For members of legal clinics keen on questioning northern positions and privileges, it is sobering to admit the (subconscious) influence of a perception that assumes risks do always originate from the global south.

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<sup>532</sup> COVID-19 Ordinance 2, RS 818.101.24.

<sup>533</sup> <https://www.unige.ch/coronavirus/en/events-organisation/>, last consulted on 20.04.2020.

<sup>534</sup> Internal announcements.

<sup>535</sup> BLOOMBERG, Kenya restricts foreign travel, suspends schools on coronavirus.

<sup>536</sup> Water, sanitation, and hygiene.

<sup>537</sup> UNHCR, COVID-19 EXTERNAL UPDATE, 23 - 26 MARCH 2020.

<sup>538</sup> UNHCR, Coronavirus – what you need to know about the current situation in Kenya (Coronavirus – COVID-19).

<sup>539</sup> UNHCR, important notice to all refugees and asylum-seekers in light of coronavirus (coronavirus – Covid-19) of 25<sup>th</sup> March 2020.

<sup>540</sup> UNHCR, Notice to all refugees and asylum-seekers living in Urban area in light of coronavirus (Covid-19) of 26<sup>th</sup> March 2020.

<sup>541</sup> UNHCR, Notice to all refugees and asylum-seekers living in Urban area in light of coronavirus (Covid-19) of 26<sup>th</sup> March 2020.

<sup>542</sup> Mandatory Face Mask ordinance, issued by Kenyan government and UNHCR.

## B. Practical challenges and coping strategies

In the process of setting up a training week, organized partly from abroad and taking place in such a particular setting as Kakuma refugee camp, many practical challenges arose. In the hope of a recurrence of this project and to facilitate the organization for future students, those challenges are listed below, along with the coping strategies to deal with them.

### 1. Channels of communication

As the most appropriate and uncomplicated means of communication, the teams used WhatsApp groups; several were created. One group united all students from Kakuma, Kenyatta and Geneva, as well as those responsible for the Geneva Law Clinic and the InZone project. This group was the main channel of communication for the project. The Geneva team and the Kenyatta team had a separate WhatsApp group, where specific questions about the legal research could be exchanged. Finally, the Geneva team had another WhatsApp group with the responsible persons from the Law Clinic and InZone project. This channel was mainly used to coordinate the project's advancement, follow up on developments in the camp, and coordinate the communication. The communication with external organizations like the UN-HCR, HI, etc. was done via mail.

The use of WhatsApp made it difficult to take a sometimes necessary distance from the project, given the permanent availability offered by this tool. In effect, the combination of different time zones, the accessibility of each involved student, and the flexibility that WhatsApp offers, made an almost non-stop reactivity necessary to develop trust and therefore privileged communication between students. Text messages were sent and received any time of the day or night, including workdays and holidays. To channel the communication, the Geneva team developed internal communication guidelines.<sup>543</sup>

One point of those guidelines not respected was the time frame that provided that communication should only take place between working hours (evenings and weekends should be off). In reality, this timeframe was impossible to respect, and more flexibility was required. This increased flexibility was required because, on the one hand, there was a time shift of two hours (during winter) and one hour (during summer) between Switzerland and Kenya. On the other hand, since most of the involved students volunteered for this project, they did not necessarily have time to reply during normal worktimes.<sup>544</sup> In conclusion, the Geneva team issued guidelines that were useless as communication took place during evenings, nights, or on weekends.

The use of WhatsApp groups as a primary means of communication was linked to certain challenges. One recurring issue concerned the internet connection required to use WhatsApp.

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<sup>543</sup> See *infra*, annex, H.

<sup>544</sup> Concerning this difference between the teams, see. *supra* V, B: Critical review.



Kakuma camp had two cell phone towers.<sup>545</sup> Despite the presence of these towers, camp residents regularly suffered from poor network coverage in some zones.<sup>546</sup> While Kakuma 1 and 2 could access 3G and 4G network, coverage in parts of Kakuma 3 and 4 were more restricted, resulting in intermediate 2G connectivity.<sup>547</sup> According to a survey in the camp, connectivity was not the main problem, but the cost for mobile internet was.<sup>548</sup> The same survey emphasized that almost three quarters of the refugees surveyed reported no personal income or earnings of less than one USD per day, despite spending up to 2.50 USD per week for internet access, representing a huge share of available resources.<sup>549</sup> The Kakuma team expressed the same concern.<sup>550</sup> A weak connection and the high cost also made videocalls practically impossible, a means of communication that would have been highly appreciated by all teams in addition to written exchanges.

The use of phone calls through WhatsApp – or even Facebook – did function. However, a poor network connection made it impossible to have an entire conversation. The Geneva team tried to participate in a Kakuma team gathering via a phone call. This idea had to be abandoned since the poor network made it impossible to follow up on what was being discussed.

Private conversation outside the mentioned WhatsApp groups was a major way for more private contact between students. Having recognized the necessity to develop more private relationships with the Kakuma team, the Geneva team decided to “split up” the private contacts with the Kakuma team students. The objective was to get to know each student more personally; thus, the conversations started with the simple presentation of each student’s personal situation, interests, and education path. Over time, these personal contacts evolved and covered many themes, be it everyday life in the camp, a private topic or one not necessarily linked to the project. It should be emphasised again that most students engaged themselves on a voluntary basis, even though they had other work, studies, or projects in their lives going on at the same time. Given the fact that the teams were not able to meet in person at the moment this paper was being written, these private conversations are of major importance for the teams.

A key challenge was to involve all students equally in the project. Interactions *inter* and *intra* the different teams were quite complex. The *inter* team communication was sometimes delicate due to the relations of power between the teams coming from different backgrounds – Kakuma, Nairobi, Geneva. The communication *intra* team was even more complicated from an outside point of view, since it was difficult to know how a student from a team saw his/her colleagues and not the power positions at play.

Especially regarding the students living in the refugee camp, the positions of each member did influence the group interactions. Being a member from another team or an external observer, such relations were difficult to understand simply based on written messages on WhatsApp. Efforts were required to involve each student in the group. There was a consistent tension, at least from the Geneva team’s point of view, between aiming for a horizontal and

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<sup>545</sup> Innovating mobile solutions for refugees in East Africa, p. 11.

<sup>546</sup> Innovating mobile solutions for refugees in East Africa, p. 11; WhatsApp discussions with students.

<sup>547</sup> Innovating mobile solutions for refugees in East Africa, p. 11.

<sup>548</sup> Innovating mobile solutions for refugees in East Africa, p. 18.

<sup>549</sup> Innovating mobile solutions for refugees in East Africa, p. 19.

<sup>550</sup> WhatsApp discussion with students.

equal interaction with each student individually and with each team as a whole, while respecting that all other teams were volunteering and therefore might not have had the time nor the energy to get involved on an equal basis.

Nevertheless, the communication via WhatsApp functioned overall in an efficient manner.

## 2. Training the teachers

The Geneva team lacked a comprehensive understanding of the situation on site. Also, the Kenyatta team had not been in Kakuma camp. On the other side, the training potentially challenged the participating leaders' and elders' traditional or cultural perceptions of children with disabilities.<sup>551</sup> Consequently intense discussions might evolve during the training on site. It will be vital that the Kakuma, Kenyatta and Geneva students take the role of teachers to handle critical questions and keep leading the group discussions with the aim of sensitising the participants. Also, from the legal empowerment point of view, the training of teachers is key for a successful program. Giving the students the means to learn, apply, and teach legal concepts contributes to the legal clinics' goal of training actors of social justice,<sup>552</sup> while aiming to equalize access to knowledge in the camp.<sup>553</sup>

While the Geneva team could, via their legal research, familiarize themselves extensively with the relevant international law, the Kakuma team would not be able to do so. On the other side, the students in Kakuma have a comprehensive understanding of the traditional perceptions and perspectives of the different communities on persons with disabilities, an insight and understanding that the Geneva team completely lacks. The Kenyatta team, responsible for examining the rights of children with disabilities from the perspective of the Kenyan legal framework, yet has other capacities and knowledge gaps.

Finding an appropriate way for teams to share their findings and knowledge with each other was a major challenge. The training of teachers was originally planned to take place from mid-March until mid-April via individual chats and calls on WhatsApp. Prior to these planned chats, the Geneva team shared their research with the other teams. Keeping in mind that the other teams would not necessarily have the time nor resources to consult and familiarize themselves with the complete redaction, the Geneva team made summaries of the key elements of their legal research in the form of bullet point sheets, both in English and French.<sup>554</sup> These bullet points sheets were shared with the students and have also been summarized in vocal messages and shared on the group app.

It was impossible to verify whether any of the students had effectively consulted any of the prepared documents. The Geneva team asked the group regularly if any question had arisen from the research lecture or the bullet point sheets, without receiving conclusive answers. The Geneva team tried to address the low responsiveness by discussing legal concepts with each student individually. This was mainly tried through WhatsApp vocal messages because

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<sup>551</sup> WhatsApp discussion with students.

<sup>552</sup> PURKEY, p. 270.

<sup>553</sup> PURKEY, p. 268.

<sup>554</sup> See *infra*, annex I.

quality phone calls were hardly possible due to the low network capability. Despite these efforts, the effective transmission of knowledge was difficult.

In any case, the COVID-19 outbreak and the temporary suspension of the project required a reorganization. It was decided that the additional months resulting from the postponement should be dedicated to the training of the students (the teachers) and exchanges between the three student teams on the legal topics. To this end, the Geneva team developed a comprehensive “legal preparation program” from April to June.<sup>555</sup> At the beginning of every week, the Geneva team would send a vocal message, summarising the theme-related legal concepts to the WhatsApp group, aiming to improve the transmission of legal knowledge. In addition, questions and discussion points were sent to the WhatsApp group, and the other student teams were invited to discuss the questions and share their thoughts and reflections. At the same time, the Kakuma team could teach the other teams about the perceptions and opinions of these topics existing in the Kakuma camp and among the various communities.<sup>556</sup>

Planning of the legal preparation program:

Start date	Subject	Debriefing
30.03.2020	Definitions	03.04.2020
06.04.2020	Legal framework	10.04.2020
13.04.2020	Right to non-discrimination	17.04.2020
20.04.2020	Right to full and effective participation	24.04.2020
27.04.2020	Right to education	01.05.2020
04.05.2020	Penal sanction for physically or psychologically harming a child	08.05.2020
11.05.2020	Right to freedom of all forms of violence	15.05.2020
18.05.2020	Right to psychological integrity	22.05.2020
25.05.2020	Right to physical/corporal integrity	29.05.2020
01.06.2020	Positive obligations I	05.06.2020
08.06.2020	Positive obligations II	12.06.2020

The discussions of the week of 4 May 2020 were suspended in order to have a discussion on how the project could continue and be developed further, bearing in mind that it might take some time before all teams would be able to gather in Kakuma camp and conduct the training.<sup>557</sup>

The participation of the students varied broadly, with some sharing their thoughts almost every day and some not participating at all. Of the six students still engaged in the project during the legal preparation, two texted almost daily their thoughts about the week’s topic, while three others did so on average two times a week. The remaining students (the Kenyatta students not included) did not participate regularly.

It should be noted that the situation in the camp became critical due to the global pandemic and its socio-economic consequences, which were also harsh on the students.<sup>558</sup> While the teams wished to continue with the planned discussions to maintain a certain level of normality, it cannot be denied that the whole process was to a certain extent superficial.

<sup>555</sup> See *infra*, annex C.

<sup>556</sup> See *infra*, annex C.

<sup>557</sup> See *infra*, IX: Complement of project due to COVID-19.

<sup>558</sup> WhatsApp discussions with students.

### 3. Language

In Kakuma camp, over 20 different nationalities are present, all with their own languages.<sup>559</sup> Considering the countries of origin of the inhabitants of Kakuma,<sup>560</sup> the most spoken languages seem to be English, French, Swahili, and Arab. This has been confirmed by the Kakuma students.<sup>561</sup> Different languages pose challenges for the organization of the training, as there is no common language that all participants have mastered. All participants either master English or Kiswahili however.<sup>562</sup>

While the communication between the different student groups during the preparation of the training took place in English, and without major problems, the question remained how the language difficulties should be resolved during the training on site. Based on last year's experience and feedback, and for organizational reasons, it was decided to only chose participants who are either English or Kiswahili speakers. The training would take place in these two languages and in three different settings.<sup>563</sup> The first setting would be with all participants united, requiring a permanent translation. For the translation, it was decided to ask the InZone management team to provide interpreters, as InZone has had several years of training humanitarian translators.<sup>564</sup>

It was planned to get in contact with the interpreters prior to the training to familiarize them with the topics to be discussed. This setting was to be used for the opening and closing ceremonies. For the second setting, the participants would split up into two language groups, English and Kiswahili. This setting was chosen as the most adaptable to teaching legal concepts in particular. As several members of the Kakuma and Kenyatta teams are fluent both in English and Kiswahili, no assistance from the management team and interpreters would be necessary. Finally, the third setting would consist of splitting up the English and Kiswahili language groups each into two smaller groups, allowing for the participants to exchange in the language of their choice on the acquired legal concepts and to apply it to known situations.

### 4. Flexibility

Setting up a training week in a refugee camp with three teams from different countries and backgrounds - who are differently involved in the project - requires an extremely high level of flexibility.<sup>565</sup> As this training was to take place for the second time with new students on every team, no clear structures were yet existing, giving the teams a huge margin to conceptualize, organize, and coordinate the project. Flexibility is therefore key in every single aspect of this project, and constant changes and adaptations concerning the program, channels of communication, deadlines, health and security issues, planning, risk assessment, etc. are necessary. An exhaustive discussion of how the different phases of this project would

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<sup>559</sup> UNHCR, Kakuma camp and Kalobeyei Settlement Briefing kit, May 2019.

<sup>560</sup> See *supra*, III : Factual research.

<sup>561</sup> WhatsApp discussion with students; Interviews with community elders and zone leaders.

<sup>562</sup> Interviews with community elders and zone leaders.

<sup>563</sup> See *infra*, annex E.

<sup>564</sup> <https://www.unige.ch/inzone/what-we-do/news/2016/inzone-presents-rapid-response-module-humanitarian-interpreting-orcit-conference/>, last consulted on 08.06.2020.

<sup>565</sup> CARRON, para. 43.

require different degrees of flexibility goes beyond the framework of this research and is likely not useful. Therefore, flexibility shall simply be mentioned here as an all-encompassing key element for the success of the project.

A specific challenge is the adaptation of the program to COVID-19. Apart from literally changing and adapting the whole training preparation phase, the postponement of the training to a yet unknown future date might be hard for some students to reconcile with the continuation of their academic programs and other planned and semi-compulsory activities, such as legal internships, etc.

## 5. Security of students in Kakuma

The security of students participating in the training has absolute and utmost priority. It is widely acknowledged that a refugee camp in general can pose various risk to the personal safety of the refugees living there.<sup>566</sup> Risks might arise from banditry in the camp,<sup>567</sup> government personnel,<sup>568</sup> the country of origin,<sup>569</sup> fellow refugees,<sup>570</sup> or the host community,<sup>571</sup> to only name a few potential sources. The Kakuma team in their capacity as vocal and engaged human rights law students living in a refugee camp engaging in activities to promote human rights, expose themselves and potentially risk their personal security.

During the training preparation, the Kakuma team was exposed to difficulties originating from life in a refugee camp. Among others, in November 2019, heavy rains caused the death of several people in Kakuma camp.<sup>572</sup> Flooding in the camp often resulted in streets being unpracticable and in the destructions\ of infrastructures.<sup>573</sup> In December 2019, fighting erupted in the camp because of conflict between communities.<sup>574</sup> Streets were extremely unsafe, and it was recommended to stay at home. For the Kakuma team, this meant not being able to conduct planned interviews with the community elders and zone leaders, nor being able to reach the InZone hub, nor being able to go outside at all. These situations delayed the training preparation since the code of conduct for such events was obviously to stay safe and not to take any risk.

Finally, concerning the planned program of the training, the Geneva team was made aware of scepticism about the feasibility of a program extending beyond 17h00 as afterwards, the way back home is considered dangerous. In any case, the presence of various security risks for persons living in Kakuma camp must be acknowledged. These risks have been taken into account to the extent possible through the risk assessment.<sup>575</sup>

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<sup>566</sup> UNHCR, The personnel security of refugees.

<sup>567</sup> UNHCR, The personnel security of refugees, para. 10.

<sup>568</sup> UNHCR, The personnel security of refugees, para. 12.

<sup>569</sup> UNHCR, The personnel security of refugees, para. 13.

<sup>570</sup> UNHCR, The personnel security of refugees, para. 15.

<sup>571</sup> UNHCR, The personnel security of refugees, para. 17.

<sup>572</sup> <https://kanere.org/2020/03/23/7-dead-as-heavy-rain-pounds-kakuma-refugee-camp/>, last consulted on 10.03.2020.

<sup>573</sup> <https://kanere.org/2020/03/23/7-dead-as-heavy-rain-pounds-kakuma-refugee-camp/>, last consulted on 10.03.2020

<sup>574</sup> <https://kanere.org/2020/03/23/five-dead-many-injured-in-communal-violence/#more-2315>, last consulted on 10.03.2020.

<sup>575</sup> See *infra*, annex D.

## 6. Organizational and material aspects

The training preparation required the organization of the venue, and food and drinks during the training, transport compensation for participants and sonorisation (microphone and amplifier). Also, the training on site would require plenty of material, most not easily available in Kakuma camp or only at a considerably higher price than in Geneva or Nairobi. A very careful planning of the material that the Geneva team had to take to Kakuma was therefore necessary. Considering these material aspects and given the lack of affordable printing options in Kakuma, a lot of paper material had to be brought in from the outside.

Most of the material the Geneva team would have to take to the camp was teaching and study material. The Geneva team developed paper slides for all presentations, course material for the participants, etc. Also, there were several specific items needed such as name badges, pens, t-shirts, diplomas, etc. A comprehensive list of items to be transported from Geneva to Kakuma can be found in the annex.<sup>576</sup>

Concerning the organizational aspects of the training, the Geneva team could rely to a large extent on what had been done in 2019 by the previous team. The venue would again be the Don Bosco Hall and the classrooms of the InZone hub, depending upon the language setting. At the time of the writing of these lines, the InZone hub was building a new community hall that would have enough space to host the training. It is unclear, however, if the community hall would be finished by the time the training was to take place. Similarly, food and water would be organized by a group of refugees. The transport compensation would mainly be organized by the InZone management team and their treasurer, as would the sonorisation.

### C. Planned program of the training

The program for the training was in the planning stage as the COVID-19 pandemic stopped the whole project. The following is a summary of the reasoning and processes that lead to the originally planned programme.

#### 1. Didactical considerations

As the overall aim of the project was a training and a sensibilization on the rights of children with disabilities, the question of how the knowledge transfer would take place from the students (the teachers) to the community elders and zone leaders and vice-versa was a major question and one that would determine the success of the project. The training week itself should be designed as interactive as possible, allowing a critical exchange, and therefore a sensibilization on the topic. To this aim, several didactical methods were used: the classic lecture format, a forum theatre, and group discussions in big (up to 20 pax) and small groups (max 5 pax).

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<sup>576</sup> See *infra*, annex F.

The traditional classic lecture format was to be used for the introductory speeches and daily orientations, as well as for the theoretical modules. Also, the intervention of external associations would take place in this format. As it would not necessarily encourage critical thinking and interaction,<sup>577</sup> this method was not often used. Most of the available time was planned for group discussions, allowing a direct confrontation of ideas and opinions.

To enrich the training with experience of professionals working in Kakuma camp with children with disabilities, several organizations were contacted and asked to participate in the training and give a presentation. VDPA and HI were of particular interest in this regard. These organizations gave the Geneva team already during the preparation process useful insights how the system of justice works inside the camp and the major problems children with disabilities face in the camp. It was planned for these organizations to share their experiences and insights by presenting a given topic.<sup>578</sup>

Another didactical method to be used during the training is the forum theatre (or theatre of the oppressed). The concept of a forum theatre was created by Augusto BOAL as an approach allowing for an active dialogue and critical reflection between the audience and the performing actors.<sup>579</sup> During forum theatre, a short scene is performed, introducing a given topic, often as a critic of society.<sup>580</sup> This scene is then replayed again, and the audience is encouraged to share their opinions and different solutions to the situation performed.<sup>581</sup> Such interaction allows addressing various aspects of a challenging and problematic situation.<sup>582</sup>

In the context of the training week on the rights of children with disabilities, the forum theatre was to introduce three challenging situations to community elders and zone leaders. First, the issue of parents hiding their children with disabilities at home; second, the issue of violence towards them; and third the positive obligation they have to prevent, stop, and help in the recovery of victims of violence.

The forum theatre would have been used in two steps during the training week. A first session would have taken place in the morning where the above-mentioned situation would have been introduced to raise awareness of the many challenging aspects involved. During the rest of the morning, a theoretical session (in classic lecture format) on those human rights potentially violated in the sketch would have taken place. This theoretical session would have been followed by group discussions.

During these discussions, the participants would have been encouraged and animated by the Kakuma, Kenyatta and Geneva students to apply their acquired legal knowledge of the theoretical session on the sketch played during the forum theatre and discuss the resulting legal problems and consequences. At the end of the day, the different small groups would have come back together, and the forum theatre would have taken place for a second time. This time, though, all participants would have been invited to share the results of their group discussions to actively transform and animate the sketch.

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<sup>577</sup> WIECHMANN.

<sup>578</sup> See *infra*, annex E.

<sup>579</sup> BRETT-MACLEAN/YIU/FAROOQ, p. 1.

<sup>580</sup> BRETT-MACLEAN/YIU/FAROOQ, p. 1.

<sup>581</sup> BRETT-MACLEAN/YIU/FAROOQ, p. 1.

<sup>582</sup> BRETT-MACLEAN/YIU/FAROOQ, p. 1.

## 1. Program of the training week

The Geneva team, mainly in coordination with the Kakuma team, had developed a detailed training plan for the week. While the first day of the training would have been dedicated to introducing the participants to the training week's aim and to each other, the last day would have been mainly consisted of the closing ceremony. The discussion of children with disabilities' rights would have been conducted between Tuesday and Thursday. In the following, an overview of the different planned training days is presented.<sup>583</sup>

### 1.1 Monday

The first day of the training would have been mainly dedicated to the introduction of participants to the training itself, to the different actors intervening during the training, and also to the other participants. In the afternoon, a first legal topic was planned to be presented.

Time	Topic	Considerations
09h00-10h30	Welcome and breakfast	To address the difficulties of moving in a refugee camp from one place to the other; and considering the often long distances, the day starts with a breakfast. The breakfast provides a certain marge of manoeuvre regarding time management. In addition, present participants are registered and receive their badges.
10h30-11h45	Opening Ceremony	The opening ceremony gives some important humanitarian actors in the camp the stage to show their support for the initiative and also allow the Kakuma team to introduce themselves to these actors. As organizations, the UNHCR, HI and VDPA are invited. The presence of the humanitarian actors also gives the training the required institutional framework.  The responsible persons of the InZone and Law Clinic of the University of Geneva, the Kakuma, Kenyatta and Geneva students, as well as the inZone management team, give short speeches.
11h45-12h00	Administrative Introduction	In an administrative introduction several issues are addressed, such as introducing the participants to the program of the week and the procedure for participants to receive their transport allowance.
12h00-13h00	Lunch	
13h00-13h15	Introduction to afternoon	A short overview of the activities during the afternoon allows a smooth procedure.
13h15-15h15	Introduction participants	As most participants do not know each other prior to the training, an introduction round is necessary.
15h15-15h45	Session 1: Relationship between international and Kenyan law	A theoretical session about the relationship between international law, customary law and Kenyan law takes place. Understanding how international law influences the Kenyan legal framework and subsequently the laws applicable in Kakuma camp is essential for the rest of the training.
15h15-16h15	Discussion of session 1	A discussion of the different elements presented during session one allows a better understanding of the topic and the problems.
16h15-17h00	Closure of day 1	Participants are invited to ask questions and share remarks about the first day. Also, day two is introduced. Finally, the travel allowance is distributed.

<sup>583</sup> See for the detailed training plan *infra*, annex E.



## 1.2 Tuesday

The second day would have been dedicated to the topic of children being hidden at home by their parents or caregivers. A short forum theatre in the morning was designed to help the participants to visualize the problems and challenges. After a short discussion of the forum theatre, the legal aspects of hiding a child with disabilities at home would have been discussed in different teaching formats throughout the day. Towards the end of the day, the forum theatre would have been played again. The participants would again have been invited to share their thoughts about the scene presented, but this time by applying the legal elements that had been discussed during the day.

Time	Topic	Considerations
09h00-10h00	Breakfast	
10h00-10h15	Introduction to morning	A short introduction explains how the morning program is structured and what topics are to be discussed.
10h15-10h30	Forum theatre 1	A group of students does a short sketch to introduce the subject of hiding children with disabilities at home. This sketch helps the participants to become aware of the different aspects of the problem.
10h30-11h00	Discussion of theatre 1	The participants are asked about their opinion concerning the situation depicted in the theatre.
11h00-12h00	Session 2: Definitions and hiding children with disabilities at home	A theoretical session about key definitions is necessary, especially the legal terms around "disability" need to be discussed. Also, the right to non-discrimination, the right, the right to full and effective participation and integration, as well as the right to education are presented.
12h00-13h00	Lunch	
13h00-13h15	Introduction to afternoon	A short overview of the activities during the afternoon allows a smooth procedure.
13h15-14h00	Speech of HI	HI informs about its activities, challenges, strategies and shares their experiences.
14h00-14h30	Questions for HI	A discussion of the speech by HI allows a better understanding of the topic and the problems.
14h30-15h30	Group discussion in small groups	The participants are split up into small group to discuss the different aspects of the problem of hiding children with disabilities by applying the knowledge of session 1 and 2 and the different speeches. They discuss the forum theatre and what could have been done differently.
15h30-16h30	Forum theatre - what should have been done differently	All participants come back together to discuss the forum theatre by applying the legal elements discussed during the training.
16h30-17h00	Closure of day 2	The participants are invited to summarize the main takeaways of the day and to share general remarks. Also, participants are invited to ask and discuss open question. The next day is introduced and the travel allowance distributed.

### 1.3 Wednesday

The third day would have been dedicated to the topic of violence towards children with disabilities. A short forum theatre in the morning was intended to help participants visualize the problems and challenges. After a short discussion of the forum theatre, the legal aspects of violence towards a child with disabilities would have been discussed in different formats throughout the day. Towards the end of the day, the forum theatre would have been played again. The participants would again have been invited to share their thoughts about the scene presented, but this time by applying the legal elements that had been discussed during the day.

Time	Topic	Considerations
09h00-10h00	Breakfast	
10h00-10h15	Introduction to morning	A short introduction explains how the morning program is structured and what topics are to be discussed.
10h15-10h30	Forum theatre 2	A group of students does a short sketch to introduce the subject of hiding children with disabilities at home. This sketch helps the participants to become aware of the different aspects of the problem.
10h30-11h00	Discussion of theatre 2	The participants are asked about their opinion concerning the situation depicted in the theatre.
11h00-12h00	Session 3: Violence towards children with disabilities	A theoretical session about the necessity of the right to freedom of all form of violence, the right to psychological integrity, and the right to physical/corporal integrity.
12h00-13h00	Lunch	
13h00-13h15	Introduction to afternoon	A short overview of the activities during the afternoon allows a smooth procedure.
13h15-14h00	Speech of VDPA	VDPA informs about its activities, challenges, strategies and share their experiences.
14h00-14h30	Questions for VDPA	A discussion of the speech by VDPA allows a better understanding of the topic and the problems.
14h30-15h30	Group discussion in small groups	The participants are split up into small group to discuss the different aspects of the problem of violence towards children with disabilities by applying the knowledge of session 1, 2 and 3 and the different speeches. They also discuss the forum theatre and what could have been done differently.
15h30-16h30	Forum theatre - what should have been done differently	All participants come back together to discuss the forum theatre by applying the legal elements that have been discussed during the training.
16h30-17h00	Closure of day 2	The participants are invited to summarize the main takeaways of the day and to share general remarks. Also, participants are invited to ask and discuss open question. The next day is introduced and the travel allowance distributed.

## 1.4 Thursday

The fourth day would have been dedicated to the topic of positive obligations to prevent and stop violence towards children with disabilities and to assist victims of violence in their recovery and integration. A short forum theatre in the morning was intended to help the participants to visualize the problems and challenges. After a short discussion of the forum theatre, the legal aspects of hiding a child with disabilities at home would have been discussed in different formats throughout the day. Towards the end of the day, the forum theatre would have been played again. The participants would again have been invited to share their thought about the scene presented, by applying the legal elements that had been discussed during the day.

Time	Topic	Considerations
09h00-10h00	Breakfast	
10h00-10h15	Introduction to morning	A short introduction explains how the morning program is structured and what topics are discussed.
10h15-10h30	Forum theatre 3	A group of students plays a short sketch to introduce the subject of hiding children with disabilities at home. This sketch helps participants become aware of the different aspects of the problematic areas.
10h30-11h00	Discussion of theatre 3	The participants are asked about their opinion concerning the situation depicted in the theatre.
11h00-12h00	Session 4: Violence towards children with disabilities	A theoretical session on the topic of violence prevention, the duty to stop violence and the obligation to help victims of violence to recover and integrate to society.
12h00-13h00	Lunch	
13h00-13h15	Introduction to afternoon	A short overview of the activities during the afternoon allows a smooth procedure.
13h15-14h00	Speech of Mobilizers	The mobilizers inform about their activities, challenges, strategies and share their experiences.
14h00-14h30	Questions for Mobilizers	A discussion of the speech by the mobilizers would allow a better understanding of the topic and the problematic areas.
14h30-15h30	Group discussion in small groups	The participants are split-up into small group to discuss the different positive obligations to prevent and stop violence towards children with disabilities and to assist victims of violence to recover and integrate by applying the knowledge of session 1, 2, 3 and 4 and the different speeches. They also discuss the forum theatre and what could have been done differently.
15h30-16h30	Forum theatre: what should have been done differently	All participants come back together to discuss the forum theatre by applying the legal elements that have been discussed during the training.
16h30-17h00	Closure of day 2	The participants are invited to summarize the main take-aways of the day and to share general remarks. Also, participants are invited to ask and discuss open question. The next day is introduced and the travel allowance distributed.

## 1.5 Friday

The fifth day would have been dedicated to the closing ceremony. The participants would have received their diplomas and been invited to evaluate the training. An aperitif would have closed the training program. Geneva team would have planned to leave at the end of the morning.

Time	Topic	Considerations
09h00-10h00	Breakfast	
10h00-11h00	Closing ceremony	During the closing ceremony, the participants receive their diplomas. The responsible person of the InZone project, the Kakuma, Kenyatta, and Geneva students give a speech.
11h00-11h15	Closure of day 5	The participants are invited to summarize the main take-aways of the training and are invited to hand in feed-back questionnaires. Also, participants are invited to ask and discuss open question.
11h15-open	Aperitif for participants and feedback	

## 2. Roles of the Kakuma, Kenyatta and Geneva students during the training

During the training, different functions would have been assigned to participating students according to preferences, language, availability, and aptitude. Also, considering the possibility of unpredictable events, it would have been vital to have a reserve of students that might take over a particular function. Based on the experiences of the last training, the function of “note keeping, “discussion animation”, “presentation of a topic” and “reserve” would have been planned.

Note keeping would have allowed for a comprehensive overview of the different arguments brought forth in the different groups. It would first and foremost have provided every group at the end of the day (when all teams would again come together to summarize the findings) with a comprehensive overview of the argument discussed and considered. The notes would also have allowed a comparison and analysis of the elements and arguments the different groups considered to be essential in the discussion. The notes would finally have provided a general overview of the discussion and would have served as an important source of information for the information sharing tool.

Especially when the participants were split into small groups, an animation of the discussion would have been important. The animators would have been required to guide and frame the discussions, bring in different perspectives, and make whenever necessary the link to the legal topics discussed prior. Animators would have been equipped with prepared talking points. The importance of this task cannot be underestimated. Especially during the group discussions, the clash of perceptions might be the most vivid. A successful navigation through the tensions between the different legal norms in international, Kenyan, and customary law, different cultural interpretations and customs, as well as different backgrounds likely would have been key for the success of the training.

Regularly, a legal topic would have been introduced to participant via a presentation. This function would not only have entailed the presentation of the topic, but also the animation of discussions potentially arising from related questions. Therefore, it would be vital that the student(s) presenting the topic be completely versed in it to lead the discussion. Certain tools could be used to assist the presentation, mainly sheets summarising the key information. Finally, a comprehensive dossier with all necessary information would have been given to the participants of the training.<sup>584</sup>

Finally, the reserve would have replaced students assigned with one of the other tasks in case of need. Furthermore, the reserve would have assisted the other functions continuously. This would have been of paramount significance during the small group discussions, especially if they headed toward a difficult and contentious topic (e.g. the influence of magic on a disability, different interpretations of a child's best interest, or cultural differences). In addition, the reserve team would have assisted the animators.

### 3. Development of an information sharing tool

The development of a tool to share the discussion information during the training week was an issue of major concern. It would have to be in line with the legal empowerment goal of the Law Clinic to allow the participants, the Kakuma, Kenyatta and Geneva students (but also the broader public) to access the key legal information provided and a summary of the main arguments and discussions of the training. Several tools were discussed: a brochure (like last year),<sup>585</sup> video, podcast, radio emission, etc.

A brochure could summarize within several pages the main legal points of the training and also include the result of the discussions of each topic. The advantage of a brochure is that there already exists a draft from the 2018-2019 project for potentially reuse. The idea emerged that such a brochure could become a series that the following Applied Human Rights teams would develop. This would allow a certain accumulation of knowledge, and a series would have the advantage of gaining a certain reputation. On the other side, a brochure could only be created after the training - with a certain delay - and is not necessarily adaptable to refugee camp conditions.

In effect, the first brochure could only be finalized several months after the training. The design would ideally be created and developed in Kakuma camp, with the same for the printing, to support local businesses and enhance knowledge production in the field. Considering that costs in Kakuma camp are higher than in Geneva, for example, questions about the already stretched budget might arise. On the other hand, a paper brochure is not meant to last in a camp where weather conditions are plentiful.

Another idea to consider is to make short videos with the key legal messages. To make a video was mainly the wish and idea of the Kakuma students. Videos were thought to introduce for the duration of up to two minutes a certain legal topic. The idea was to share such short videos on social media (mainly WhatsApp) and ask the recipients to share the video again, thereby potentially reaching a huge number of people.

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<sup>584</sup> See *infra*, annex I.

<sup>585</sup> For last brochure, <https://www.unige.ch/droit/lawclinic/fr/publications/brochures/kakuma/>.

Videos should be simple with only someone or several person speaking directly into the camera (filmed with a cell phone) and maybe some key messages added in writing during the editing process. The advantage would be the direct transfer of information: receiving a video from a known person might increase acceptance. Furthermore, compared to a brochure, such videos would not only be limited in providing information to the training participants, but also to the broader public. Therefore, it would serve to significantly widen the circle of potentially sensitized persons on the rights of children with disabilities. However, such videos might endanger the safety of the students who would take part in them. As every action in the camp might have an impact on the personal situation of a Kakuma team member, reflexion on who would appear in a video require further discussions. Besides, the content of a video of a maximum of two minutes is extremely limited. Questions about what particular legal information is possible to share in such a format are legitimate.

Yet another idea of note was to prepare a radio emission or a podcast. Several legal subjects would be prepared in a popular, scientific way, allowing for easy appropriation of the topic for the listeners. Selected participants of the training and some representative of international humanitarian organizations would be invited to participate in an interview and share their perception of the issue, as well as their experience in handling the problem. A radio emission would have the widest reach of the discussed tools, considering that the brochure would only be for the participants and videos require a smart phone and require an expensive internet connection. To create a radio emission or podcast, specific skills and materials are required, which at the time of the discussion were not available and would have required additional organization. Also, radio-stations in Kakuma and the surrounding area would need to cooperate and provide airtime. No doubt, airtime can be bought, but it likely would strain the tight budget.

At the time, the training was postponed to an unknown date, and no final decision was taken.

#### 4. Development of evaluation tools

To assess whether the goals of the project have been achieved, an evaluation was vital. The two project goals were: the sensibilisation of community elders and zone leaders on the right of children with disabilities and to add a practical aspect to the academic legal formation of the three participating student teams. Both questions are subjective and therefore best answered by a questionnaire.

A complete and in-depth evaluation of the whole project was initially planned once the training had taken place. So far, only an evaluation questionnaire about the preparation phase has been prepared. This questionnaire can be found in the annex.<sup>586</sup>

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<sup>586</sup> See *infra*, annex K.

## VII. Training implementation phase

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As mentioned above, the training could not take place as planned so this section remains theoretical. The student teams and their supervisors are examining options for how to re-schedule the training.

## VIII. Evaluation phase

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In order to identify areas of improvement for a future similar project, a complete and final evaluation of the preparation, implementation, and information sharing processes will take place after the on-site training. For the time being, only certain parts of the project can be evaluated. A critical review is nevertheless possible.

### A. Feedback fellow students

The prepared questionnaire was distributed to the Kakuma team at the beginning of June, ten months after the project had started; it asked for feedback on the project to date. The questionnaire was only sent to the Kakuma students as they were the most involved in the preparation and because they were the only team on the ground.

The questionnaire asked the students to evaluate different aspects of the project on a scale from 1(not at all) to 10 (completely). It included questions on the overall scope of the project, legal understanding, preparation, and personal participation. Finally, four open question were asked.

The evaluation was overwhelmingly positive, ranging from 7-10. Low scores were received from one participant concerning the accessibility of the legal information and its presentation. Similarly, the understanding of certain areas of law was twice rated low (4-6). Also, the question asking students if they felt that their contributions had been taken seriously received the same value as the contributions of other student teams with a 6. Finally, the question concerning the appreciation of participation in one case received a 6.

Replies to the open question can be summarized as follows. Suggestions for improvement seemed to focus on communication. Better animation of the discussions in the WhatsApp group was suggested to involve the students better who did not participate on a regular basis. It was also noted that if a student lacked a smart phone, communication became difficult. It was therefore suggested that InZone should provide the hardware. Changing the venue from Kakuma to Nairobi or Geneva was also suggested. The students identified that a big challenge for them was the language barrier between the different student teams and an insufficient budget for communication (internet). In addition, time was mentioned as a challenge, as all students were heavily engaged in other activities beside the Applied Human Rights project. As one of the best aspects of the project, the Kakuma students mentioned collaboration between the three student teams and the possibility of learning how to implement human rights in practice.

From the above evaluation, two issues need further attention. First, it seems as if some students were hesitant to criticise the project and therefore did not answer certain questions. While it is too early for an in-depth analysis, the question of power imbalances should be kept in mind.<sup>587</sup> Second, the two low evaluations concerning the understanding of certain areas of law should be addressed.

## B. Critical reflections about the project

The following critique of the project will hopefully contribute to facilitating the organization of a similar project by the group of next students engaging in the Applied Human Rights project. A major challenge was understanding and grasping the scope of the project. The realities of Kakuma camp seem very far from Geneva and central information is not easily available or likely to be fully understood by simply reading the corresponding literature; for example, the functional role and actual influence of the community elders and zone leaders.<sup>588</sup> The social structures of a refugee camp are complex in terms of the internal conflict resolution mechanisms that centre around community elders and zone leaders. Then there the influence of these community elders and zone leaders on daily life. Only after extensive reading and a regular exchange with the students on site could all this become clear to the Geneva team.

Arguably, many valuable insights concerning this influence were only gained after the legal research was already finished and might not always be appropriately incorporated into said research. Also, at the very beginning of the training, the Kakuma students were contacting community elders and zone leaders with a questionnaire to determine their interest in the rights of children with disabilities among other issues. The Geneva team was invited to add its own questions to the survey, but the team did not understand at that stage, only a few days into the project, in what areas more information would be highly beneficial (e.g. actual influence of community elders and zone leaders).

Challenges with familiarising the teams with a new and enormously complex project in a complete unknown and different background such as Kakuma camp are inevitable. A quick familiarization with the project right from the start would surely benefit future students. It might be achieved by discussing every phase of the project in detail at the very beginning with the new students, while making available all the documents prepared and used by previous teams (especially questioners). They could be made accessible to the current students (e.g. via a data sharing tool for the Law Clinic – InZone project) or through a comprehensive information sheet about the role of the community elders and zone leaders, their socio-political function, and their perceived influence.

A critical view must also be taken on several of the main sources of information relied upon by this research. Key information sources were the Kakuma team on site, discussions with some organisations on site, and interviews conducted with community elders and zone leaders. This information was mainly gathered via personal discussions on social media and therefore did not necessarily fulfil the traditional academical standard required for a master thesis.

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<sup>587</sup> See *supra*, V: Ethical considerations.

<sup>588</sup> See *supra*, III: Factual research.



While the research sticks to traditional rules conceived for a legal thesis, facts regarding the application of law have not been gathered in an academic way, thereby potentially questioning the legitimacy of the proposed conclusions. Without questioning the honesty or accuracy of the information received, the question remains whether future similar work could devise a better and more comprehensive system to gather factual information. This might be achieved via the integration of a mandatory factual background research in the syllabus before starting the legal research. This means applying the scientific and methodological approach of the social sciences (ethnology, sociology, etc.). Such a compulsory factual background research might also facilitate familiarization with the project and the situation on site (see first critique).

Another critique concerns the complete absence during the training of the persons who are concerned most by it - the children with disabilities. Their lack of participation contradicts several of the principles aimed for by this project as a law clinic, such as participation and empowerment. However, the legal research did emphasise the importance of participation and inclusion of children with disabilities, in terms of their right to full and effective participation and inclusion in society,<sup>589</sup> and the right to education.<sup>590</sup> It discussed repeatedly how children with disabilities might be included in the training and how they could have a voice in the discussions.

Several arguments in the end were brought forth against this idea however. Not only was it unclear if the children would even have an interest in the training, or if they would profit from a program that was, after all, developed addressed to adults. Furthermore, it remained unclear what entity the teams needed to contact to offer these children the possibility to join the training. If children with disabilities were to be included, this must be planned very carefully to assure that they could bring themselves into the discussion. Under no circumstances should the children only be brought in for the sake of it.

As many questions remained unclear, ultimately the idea was abandoned. Acknowledging that the next project would likely not be about the rights of children with disabilities, the question of how to include the concerned vulnerable populations in the training will likely remain. Potential ideas in relation to children with disabilities are, for example, inclusion of schools staff and the people working with these children, but only to the extent possible. Interested parties would not necessarily need to be invited to participate in the training week but could receive a brochure or summary of the finding. The representatives of children with disabilities could also be asked to gather testimonials, requests, demands, etc. of the concerned children before the training. The training could provide them a stage in front of the community elders and zone leaders to share these testimonials and request.

Another point of concern is that the Geneva team integrated national Kenyan law to a certain extent into their legal research. While this surely completes the research and allows for very interesting comparative analyses, the Geneva team lacked the ability to adequately use and interpret Kenyan law. Not only is Kenya's system based on common law, but sources for interpreting the different norms are not easily available. It might be beneficial to the overall quality of future legal research under the Applied Human Rights project to focus only on international law and keep Kenyan law to the extent possible in the hands of the Kenyatta team.

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<sup>589</sup> See *supra*, IV, E, 1.2: Right to full and effective participation and inclusion in society.

<sup>590</sup> See *supra*, IV, E, 1.3: Right to education.

While acknowledging that the Kenyatta students will not receive any credits for their participation in the project but are nevertheless asked to conduct legal research. It is understandable that their motivation and willingness to invest time in the project might therefore be limited, and it might be justified to ask the students from Geneva to at least integrate some very fundamental norms into their own legal research.

## IX. Complement of the project due to COVID-19

As mentioned, the COVID-19 virus forced the teams to rethink and reorganize the training, but it also encouraged the further development of the project. The provisional cancellation of the training, emerging reports from inside Kakuma camp about potential human rights violations in connection with measures against COVID-19, and the increasingly difficult living situation for the inhabitants made the narrow focus of the law clinic project on children with disabilities' rights increasingly unsatisfactory. Therefore, the different student teams at the beginning of April 2020 started brainstorming how their privileged access to information inside the camp could be put to good use in line with the overall aim to implement social justice and promote human rights. Two main ideas were brought forth, first to write an academic paper about the human rights violations identified in the camp, and second to develop a crowdfunding campaign.

### A. Human rights considerations

The privileged access of the Geneva team to information sources inside the camp, as well as the overall human rights framework of the law clinic invites the analysis of the measures taken in Kakuma refugee camp from an international human rights law perspective. At this stage, a comprehensive analysis is not possible. Therefore, only the key questions arising from certain measures are to be raised, taking mainly the ICCPR and the ICESCR as their legal basis. This short analysis of certain key issues could serve to identify topics for the student teams' academic articles.

Art. 12 ICESCR sets forth the right to the highest attainable standard of health. Health is understood as extending to the underlying determinants of health, such as access to safe and potable water, an adequate supply of safe food, and access to health-related education and information.<sup>591</sup> Art. 2 ICESCR allows a progressive realization of the right and acknowledges the limits of available resources. At the same time, art 2 ICESCR also imposes a core obligation to, at the very least, ensure satisfaction of the minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care.<sup>592</sup>

Access to a minimum of nutritious food and potable water is one minimum criterion.<sup>593</sup> Information from inside the camp suggests very restricted access to these goods: water is scarce in general and no additional access has been established to satisfy increased demand due to

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<sup>591</sup> ECOSOC, General Comment No. 14, para. 11.

<sup>592</sup> OHCHR, General Comment No. 3, para. 1.

<sup>593</sup> SAUL /KINLEY /MOWBRA, p. 1008.

hygiene recommendations.<sup>594</sup> Even though some mobile handwashing units have been built,<sup>595</sup> they hardly satisfy the demand, and only one bar of soap is distributed per household per month.<sup>596</sup> Similar information has emerged about the increasing scarcity of food.<sup>597</sup> While acknowledging the difficulties in providing adequate food, water, and hygiene items for a huge population in a refugee camp during a worldwide pandemic, testimony from inside the camp suggests that not even the bare minimum of art. 12 ICESCR is currently being met. As art. 2 ICESCR imposes as a core obligation the assurance of a minimal level of art. 12 ICESCR, the lack of adequate food, water, and hygiene items is likely to constitute a human rights violation.

Worrying reports show concern about the lack of adequate and timely information about the COVID-19 situation in the camp.<sup>598</sup> The right to the highest standard of health includes the right to seek, receive, and impart information on health issues.<sup>599</sup> Furthermore, art. 12, para 2, lit. c ICESCR requires the *prevention, treatment and control of epidemic, endemic, occupational and other diseases*. This provision mainly applies to “*behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS*”.<sup>600</sup>

The WHO recommends behaviour-related measures to reduce the spread of the virus and protect against it.<sup>601</sup> The obligations in art. 12, para. 2, lit. c ICESCR therefore could also apply to the pandemic situation. Obligations arising from this norm include the establishment of prevention and education programs, the provision of a system of urgent medical care during epidemics and similar health hazards, the provision of disaster relief and humanitarian assistance and the implementation of strategies of disease control.<sup>602</sup> Continuous reports from inside the camp suggest a lack of all of the above required measures.<sup>603</sup> Due to the apparent lack of a comprehensive information strategy, most information sharing about the virus and how to protect against it are coming from the refugees themselves.<sup>604</sup> A violation of art. 12 ICESCR therefore seems likely.

The imposed curfew due to COVID-19 is a potential infringement on the right to freedom of movement according to art. 12 ICCRP. In fact, several measures in Kakuma camp limit the right to freedom of movement. The inhabitants are in general subject to Kenyan encampment policy, only allowing refugees to leave the camps for specific circumstances.<sup>605</sup> Furthermore, a curfew has been in place over several years in Kakuma camp due to security considerations.<sup>606</sup> On top of these limitations, a nationwide curfew due to the COVID-19 pandemic has

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<sup>594</sup> CARRON/O'KEEFFE, WhatsApp discussions with students.

<sup>595</sup> [https://twitter.com/UNHCR\\_Kenya/status/1242386161923952640](https://twitter.com/UNHCR_Kenya/status/1242386161923952640), last consulted on 17.03.2020.

<sup>596</sup> WhatsApp discussion with students.

<sup>597</sup> CARRON/O'KEEFFE, WhatsApp discussions with students.

<sup>598</sup> WhatsApp discussions with students.

<sup>599</sup> ECOSOC, General Comment No. 14, para. 12.

<sup>600</sup> ECOSOC; General Comment No. 14, para. 16.

<sup>601</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>, last consulted on 17.03.2020.

<sup>602</sup> ECOSOC, General Comment No. 14, para. 16.

<sup>603</sup> WhatsApp discussions with students.

<sup>604</sup> CARRON/O'KEEFFE; WhatsApp discussions with students.

<sup>605</sup> UNHCR, Important notice to all refugees and asylum-seekers in light of coronavirus (coronavirus - covid-19)

<sup>606</sup> CARRON/O'KEEFFE.

been added.<sup>607</sup> The health, social, and economic consequences of these limitations seem severe.<sup>608</sup> Any limitation of human rights must always be proportionate.<sup>609</sup> The question whether the above mentioned combined limitation to the right to freedom of movement fulfils the proportionality standard remains questionable.

Numerous reports have emerged suggesting that the Kenyan police is using extensive violence to enforce the curfew(s).<sup>610</sup> A peaceful sit-in of about 60 persons in front of UNHCR ended up with 11 persons hospitalized when the police cracked down on them.<sup>611</sup> Such methods raise serious concerns about potential violations of art. 7 ICCRP and the prohibition of torture, cruel, inhuman or degrading treatment or punishment.

Reports have emerged of discriminatory treatment between the inhabitants of Kakuma camp and the Kenyan citizens also present.<sup>612</sup> These reports indicate that Kenyan citizens are not required to wear masks (or do not have to face severe consequences if they do not) or to carry ID cards. Questions concerning the right to non-discrimination according to art 2. ICCRP and ICESCR might arise.

## B. Academic article

One idea to complement the project was to write an academic article. With this article, the teams could raise awareness on the human rights situation in Kakuma camp. The aim would be to unite the skills of the three teams involved in the Applied Human Rights project in order to collectively reflect on an unprecedented emergency situation that seems to be worrying in terms of the respect for human rights. All the students involved in the project expressed a desire to participate in a collective article, according to the availability and needs of each team, and in terms of security. The article would be based on Kenyan and international law. The Kenyatta team would be in charge for the Kenyan law portion and the Geneva team for the international law part, while the Kakuma team would be in charge of the information gathering.

## C. Crowdfunding

As a complement to the academic article, the teams hope to collect financial resources for a local aid organisation in Kakuma camp. The organization should be a local association, ideally involving one or more students from the Kakuma team, and active in the fight against COVID-19 and its socio-economic consequences.

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<sup>607</sup> UNHCR, Important notice to all refugees and asylum-seekers living in urban areas in light of coronavirus (covid-19).

<sup>608</sup> WhatsApp discussions with students.

<sup>609</sup> JOSEPH/CASTAN, p. 31.

<sup>610</sup> CARRON/O'KEEFFE; WhatsApp discussions with students.

<sup>611</sup> [https://www.unhcr.org/ke/18013-kakuma-refugee-camp-update-on-the-sit-in-protest-in-front-of-unhcr-of-  
fice.html](https://www.unhcr.org/ke/18013-kakuma-refugee-camp-update-on-the-sit-in-protest-in-front-of-unhcr-office.html), last consulted 24.05.2020.

<sup>612</sup> WhatsApp discussions with students.

The campaign would be launched via an internet-crowdfunding site. Once the organizations are chosen, a comprehensive communication strategy would be developed, enabling the teams to spread the campaign as wide as possible via several social media channels (Facebook, Instagram, WhatsApp, etc.).

## X. Summary and final remarks

This master thesis has conceptualized and developed a week-long training program for community elders and zone leaders in Kakuma refugee camp on the rights of children with disabilities. The implementation of the training, however, could not take place because of the COVID-19 pandemic and had to be postponed to an as yet unknown future date. The master thesis is part of the Law Clinic and InZone project, 'Applied Human Rights'. The project initially had two main goals under the overall social justice aspirations inherent to a law clinic: first to sensitise community elders and zone leaders in Kakuma refugee camp on the rights of children with disabilities, and second to add a practical legal experience to the academic formation of the participating students. Three different student teams from Kakuma refugee camp, Nairobi and Geneva were involved in the project, each participating to a different extent and assuming different roles. The Kakuma team assured a connection of the project with the realities on the ground and shared experiences and information about local customary law. It was also this team that identified the topic of children with disabilities as needing legal attention. The Kenyatta and Geneva teams then analysed the topic: the Kenyatta team from a Kenyan national law perspective and the Geneva team from an international law perspective.

The legal research of the Geneva team first clarified the key terms. As international law does not contain a definition of children with disabilities, the research had to review the definition of the terms, 'disability', 'child', 'best interest of the child' and - considering the specific circumstances of Kakuma camp - the term, 'refugee'. The discussions showed that 'disability' should be understood as a concept evolving in function of barriers and not as a mere medical condition. A 'child' in international law is to be understood as a human being below the age of eighteen and the 'best interest of the child' as the primary consideration in any action involving the child. Embracing a human rights approach, the research relied on the refugee definition in the AOU RC convention as the most inclusive.

Second, the legal framework was set. As this research – in contrast to that of the Kenyatta team – focused on the international law perspective, the key legal sources were international human rights treaties, first and foremost the CRC and the CRDP. Emphasising the African context of the project, the ACHPR and the ACWRC were also regularly consulted.

The two specific situations in need of legal attention identified by the Kakuma team are first children with disabilities being hidden at home and second, violence towards them. While in these situations several rights of children with disabilities are potentially violated, only those rights influenced by community elders and zone leaders were discussed.

If a child is hidden at home because of her disability, her right to non-discrimination, to full and effective participation and integration in society, and to education might be violated.

The right to non-discrimination is violated if apparent differential treatment is based on a prohibited ground, and disability is regularly considered a prohibited ground. Even though differential treatment can be justified if an objective reason exists, a reasonable proportionality must be kept between the means employed and the aims sought. Recognising the reasons why a child with disabilities might be hidden at home are complex (the shame of being associated with a disability, protection of the child against violence, etc.), it nevertheless seems that by hiding the child at home, her rights embedded in international law tend to be nullified.

Interesting in this context is the ACHPR, imposing as one of the only human rights instruments also duties for individuals. The duty to respect and consider fellow beings without discrimination seems particularly important in regard to children with disabilities. As a complement to the prohibition of discrimination, the CRPD developed the notion of “reasonable accommodation” to promote equality. This concept requires that all necessary and appropriate modifications and adjustments be taken to ensure that persons with disabilities can enjoy and exercise on an equal basis with others all human rights and fundamental freedoms. As this duty expands to a broad range of actors, community elders and zone leaders seem to be addressed here. They should use their influence to encourage a discussion of implementing the idea of a reasonable accommodation more broadly in the communities.

The right to full and effective participation and inclusion in society is broad. Focusing the legal research on those rights over which the leaders have an influence, only some aspects were discussed, namely the right to live independently and be included in the community and the right to participate in cultural life, recreation, leisure, and sport. While the first right requires permitting the child with a disability a certain degree of autonomy concerning her own life and living arrangements, the latter focuses on the necessity that a child be able to build her world views through interaction with others, developing her creativity and learning social, cognitive, and emotional skills. As the enjoyment of these rights regularly depends on interaction with the community, a breach of this right seems likely if the child is hidden at home. As always, a careful analysis of individual cases would be necessary. Community elders and zone leaders might be well placed to encourage respect in the communities for the child with disabilities’ right to full and effective participation and inclusion in society and they might be able to encourage the implementation of support services to this end.

Children with disabilities have a right to education. Education should be understood as a process allowing for the provision of basic skills, as well as the development of the intellectual, spiritual, and emotional potential of a young person. Education might be transmitted in traditional settings, like a school, or in informal settings outside the classroom, enabling the child to enhance her life experiences. The right to education is a multiplier right, significantly improving the enjoyment of other human rights. For children with disabilities, an inclusive education guarantees that their specific situations be taken into account. While it is possible that a child with disabilities hidden at home receives some basic skills in an informal setting, it should be acknowledged that education is to be understood more comprehensively by including life skills such as conflict management and building social relationships. It seems unlikely that a child hidden at home will have enough exchange with other children to acquire said skills. Community elders and zone leaders might advocate in their communities for a better integration of children with disabilities in mainstream schools by promoting inclusive education.

A child with disabilities has the right to freedom from all forms of violence and the right to psychological and physical integrity. Her right to freedom from all forms of violence results in a general interdiction of violence towards the child. Tradition, alleged need for disciplinary measures, customs, etc. do not serve as excuses to use violence. Under the right to freedom from all forms of violence, the child has the right to physical and psychological integrity. This is closely linked to the right to the best attainable standard of health, requiring that each child has the opportunity to survive, grow, develop, and enhance her physical, emotional, and social well-being.

The right to psychological integrity protects the honour and reputation of the child, which also covers privacy and self-esteem. The right to physical integrity, on the other side, protects the child from abuse, neglect, harmful cultural practices, and all other forms of violence, inhuman treatment, and punishment. The Kenyan penal code prohibits violence towards children with disabilities. Sanctions range from fines to imprisonment, or both. The victim is also entitled to compensation if she has been discriminated on the basis of her disability.

It is widely recognized that positive obligations need to be mandated to prevent and end violence towards children with disabilities and to help recover and reintegrate victims back into society. These obligations find legitimation ultimately in the inherent dignity of the child. It is acknowledged that all violence is preventable. This can primarily be achieved through social and educational measures for children with disabilities. Such measures are closely linked to the child's right to inclusion and participation in the community but might require special assistance. Via the fulfilment of the child's right to rest and leisure, the child can participate in activities involving other members of the community, thereby enhancing her inclusion. Omitting to stop violence against children might result in penal sanctions. The child's right to freedom from all forms of violence also protects the child at home in her family life. To assure comprehensive protection, a child-sensitive reporting system is required. Finally, a child victim of violence should benefit from recovery and reintegration measures. Such measures are also intended to prevent further violence. They need to be individually adapted, free of discrimination and centred around the best interests of the child. Community elders and zone leaders might use their influence to enhance awareness in the communities about these positive obligations and encourage inhabitants in the camp to prevent and stop violence themselves and help victims to recover and reintegrate into society.

Girls with disabilities are more regularly victims of violence and abuse than boys with disabilities. They face multiple layers of discrimination, not only due to their disability, but also due to their gender. This increased vulnerability must be recognized and addressed.

This research is based on a critical approach to power and domination with elements of the feminist theory. A key objective throughout this project was to avoid unequal relationships between the teams, as such relationships might arise in interactions between northern southern legal clinics, in view of their different backgrounds.

After conceptualising and developing the theoretical basis for the training, the practical implementation of the training was planned. Innovative solutions were needed for a range of challenges, such as the lack of a common language among participants and concerning several other organizational and material aspects. Above all, flexibility was necessary. Most of the planning was arranged via WhatsApp chats between the different teams. Through the use of WhatsApp groups, the results of the legal research were exchanged and discussed on a regular basis.

The program of the training would have been tight and demanding. The first day would have been planned to be mainly dedicated to the introduction of the participants and to the explanation of the legal framework. The second day would have focused on the problem of hiding children with disabilities at home. Consequently, the third day would have been dedicated to the topic of violence towards children with disabilities with the fourth focused on the positive obligations to stop, prevent, and help victims of violence. Finally, the last day would have been dedicated to the closing ceremony.

All students would have assumed different roles during the training, ranging from note-keeping and presenting a legal topic to animating discussions in small groups. The program would have relied on forum theatres as a didactical means, thus falling in line with the participatory and empowering philosophy of a law clinic. As the COVID-19 pandemic forced the teams to postpone the training, it remains unclear if a program relying on forum theatre would have been a success or not.

In line with the legal empowerment *raison d'être* of a law clinic, the result of the discussions during the training week should be summarized and distributed as widely as possible. Several information-sharing tools have been evaluated to this end. Again, as the COVID-19 pandemic temporarily suspended the training, this part of the project was not developed and remains in the planning phase.

Despite the fact that the implementation of the key element of this project (training on site) could not take place, an evaluation of its conceptualization and preparation remains possible and necessary. One criticism concerned the fact that the authors had struggled to understand the scope and dimension of the project at the beginning. Therefore, one key component upon which the project relies - the influence of community elders and zone leaders - was not discussed in the detail required and desired. Another critique addresses the fact that some of the information this project is based on has not been gathered in a traditional scientific way, but via WhatsApp discussions. Furthermore, it is not ideal that no children with disabilities could have been integrated into the program nor given a voice otherwise. Finally, the fact that the Geneva team integrated Kenyan law into their research might be questioned, as the team lacked the ability to adequately use and interpret Kenyan law. Nevertheless, these criticisms must be interpreted within the unique framework of a master thesis that reunited three student teams in three locations with very different backgrounds but a common goal.

Having summarized the core element of this project, some final personal remarks from the authors about the project are relevant.

Throughout the project, we have been confronted with several situations that were personally challenging. To work for the first time together on a project as enormous as this, in a language that is not our mother tongue, proved difficult in the beginning. Yet over time, it became apparent that this complimented the project and brought a necessary and enriching different perspective required for such a project.

There were several personal challenges related to the power imbalance unavoidably institutionalized in such a project, starting with the fact that only the Geneva team received professional recognition via ETCS for their participation in the project. The regular exchanges with the Kakuma team also confronted the authors with the harsh and unfair conditions in the camp faced by the Kakuma team every day, ranging from police violence and a lack of basic necessities to natural disasters and ethnical violence. Once the training takes place in the future, we will be able to simply go to Kakuma camp, do the training, and leave again to continue



our careers, while our colleagues in Kakuma might be subject to an inhuman encampment policy and possibly find themselves forced to wait many more years in Kakuma before receiving the results of their refugee status determination procedure or their resettlement applications.

On the other side, this project offered a unique framework for us to get in touch with people, environments, and challenges that we would not have encounter elsewhere. It was incredibly enriching to be part of a network of like-minded students - from Geneva to Kakuma to Nairobi – all working for social justice in an extremely challenging environment. It is satisfying for us to know that we can, at least for some time, continue to work with our colleagues in Kakuma and Nairobi. Together, we are planning a crowdfunding campaign to support the efforts of local organizations working to mitigate the worst effects of the COVID-19 pandemic on refugee communities in Kakuma. Additionally, by writing an academic article centred on human rights violations in relation to measures implemented during the COVID-19 pandemic, we hope to continue to raise awareness on the situation in the camp.

This project is a good example of what a law clinic can be. Apart from being a framework for a master thesis, it brings students passionate about human rights together and creates an international network of people, providing unique experiences and expertise. It offers a possibility to the students to continue their work for social justice and human rights beyond what is required by the university.

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