

SUBSTANTIAL INJUSTICE: WHY KENYAN  
CHILDREN ARE ENTITLED TO COUNSEL AT  
STATE EXPENSE

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INTRODUCTION

Imagine a courtroom bustling with people. You squeeze your way past the throng in the hallway, holding your breath to

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narrow yourself as you slide through the open door. Inside people wait listlessly on wooden benches for their cases to be called. A young police prosecutor stands near the front with his stack of files, which isn't nearly as large as it should be. He doesn't have them all today, he will tell the magistrate. Some of the cases will have to be rescheduled. Fifteen feet away along the far wall, men sit precariously in a row on a bench, looking like too many books on a library shelf. They're nearly stacked one on top of the other, yet it takes a moment to realize it's not by choice. The entire dirty-looking row is shackled together. These are the men who were brought from remand prison today. Every once in a while someone in a suit approaches one of them, but many know that no one is coming for them. The people in suits, who spend most of their time clustered at a crowded table opposite the prosecutor, are the defense attorneys. As the magistrate calls out names a suit might answer. More often, a silence hangs over the room before one of the shackled men speaks, explaining his defense attorney will not be there today. The magistrate growls that the attorney should schedule his vacation around his cases but adjourns the case to another date anyway.

Another name is called. Again there is no answer from the defense table. A shackled man is commanded to stand, forcing the men on either side of him to raise their hands awkwardly. Frowning her brow, the magistrate glances up at the man and down at the file. As she looks up again, she demands his age. "Sixteen," he answers. She demands to know why he's in her courtroom. He shrugs, not understanding the question in the language of the court—English. After the court clerk paraphrases her question in Swahili, the boy still has no answer. The magistrate, frustrated, remarks that he should not be there and transfers his case to the Children's Court. He sits back down, returning the hands of the men on either side of him to their laps.

The magistrate and prosecutor move on to the next case on their long docket, but you continue contemplating what you've just seen. You don't know how long the boy has been in custody. Given how often the truck is broken down and can't bring prisoners to court, it's possible it's been several weeks. As he sits, shackled between adult men, it's clear what that delay might have meant. Nevertheless, until now, no one had noticed that he was a boy being held with men. Without a lawyer

he has not been informed of his rights and therefore is unable to assert them. Without the appointment of a lawyer the protections of the law will likely continue to fail him.

The Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) recognize that children, like adults, have the right to a fair trial.<sup>1</sup> In addition, the ICCPR recognizes that under certain circumstances the right to a fair trial includes the right to legal assistance without payment by the accused.<sup>2</sup> While the right to counsel at state expense is not considered a fundamental human right under all circumstances, courts have recognized the important role of legal counsel in safeguarding the rights of the accused.<sup>3</sup> Furthermore, states increasingly recognize that “[l]egal aid is an essential element of a fair, humane and efficient criminal justice system” and “a foundation for the enjoyment of other rights.”<sup>4</sup> For children, who usually have less understanding of the legal system than the average

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1. Convention on the Rights of the Child arts. 37, 40, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. ICCPR, *supra* note 1, art. 14(3)(d).

3. See generally David Njoroge Macharia v. Republic, (2011) E.K.L.R. (C.A.K.), [http://kenyalaw.org/Downloads\\_FreeCases/81236.pdf](http://kenyalaw.org/Downloads_FreeCases/81236.pdf) (Kenya) (“The right to legal representation is almost axiomatic in an adversarial system.”).

4. U.N. E.S.C. Comm’n on Crime Prevention and Criminal Justice, U.N. Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Annex, ¶ 1, U.N. Doc. E/CN.15/2012/L.14/Rev.1 (Apr. 25, 2012) [hereinafter Draft Principles and Guidelines]. The international community has recently devoted considerable attention to access to legal aid. For instance, in 2004 the Malawi Paralegal Advisory Service hosted a conference in Lilongwe, Malawi, that included “heads of national legal aid boards, lawyers, academics and civil society representatives” who adopted the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. Kersty McCourt, *How Malawi Put Access to Justice on the UN’s Agenda*, OPEN SOCIETY FOUNDATIONS (May 23, 2012), <http://www.soros.org/voices/how-malawi-put-access-justice-un-s-agenda> (last visited Sept. 24, 2012). The Lilongwe Declaration was “endorsed by the African Commission on Human and Peoples’ Rights” in 2006, *id.*, and recognized by the United Nations Economic and Social Council (ECOSOC) in 2007. E.S.C. Res. 2007/24, U.N. Doc. E/RES/2007/24 (July 26, 2007). ECOSOC then requested that the U.N. Office on Drugs and Crime develop guiding principles for access to legal aid at the global level. *Id.*

adult, the importance of legal assistance cannot be understated.<sup>5</sup>

As a State Party to the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), Kenya must recognize certain minimum rights for children in conflict with the law. One right guaranteed by the CRC is the right of an accused child to “legal or other appropriate assistance.”<sup>6</sup> This obligation, along with many others in the CRC, was domesticated in the Children Act.<sup>7</sup> Since the passage of that Act a new Constitution has come into effect, broadening the rights of the accused to representation.<sup>8</sup> In 2011, the Court of Appeal of

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5. Cf. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 625 (2002) (“Research by child development experts supports the Supreme Court’s solicitude for children and the protections the Court has erected for their lack of decision making ability in non-criminal areas of the law. However, nothing in the social science research suggests that juveniles encountering criminal or delinquency proceedings should receive less protection.”); Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest To Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 175 (2007) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”); Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 529–30 (2012) (“Youth involved in the child welfare and juvenile justice systems are among the most vulnerable children in society . . . . In dependency and delinquency proceedings, youth have basic liberty interests in whether or not they are adjudicated dependent or delinquent, in whether they are removed from their homes, and in the nature, intensity, and duration of the services that courts order for them. Given the liberty interests at stake in these proceedings, youth must have meaningful access to counsel to provide a safeguard from the worst consequences of these systems.”).

6. CRC, *supra* note 1, art. 40(2)(b)(ii).

7. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Second Periodic Reports of States Parties Due in 1997: Kenya, at 13, U.N. Doc. CRC/C/KEN/2 (July 4, 2006).

8. See David Njoroge Macharia v. Republic, (2011) E.K.L.R. at 15 (C.A.K.), [http://kenyalaw.org/Downloads\\_FreeCases/81236.pdf](http://kenyalaw.org/Downloads_FreeCases/81236.pdf) (Kenya) (discussing that while the previous Constitution disclaimed a right to legal aid, the new Constitution specifically grants legal aid under certain circumstances).

Kenya<sup>9</sup> recognized a categorical right to counsel at state expense for all capital defendants,<sup>10</sup> but the jurisprudence regarding who should be afforded counsel at state expense is still unsettled.

In Part I of this Note, I will describe the landmark case of *David Njoroge Macharia v. Republic* and lay out a test for analyzing an individual's right to counsel at state expense under the current Constitution. In Part II, I will describe and analyze the current state of the children's rights regime in Kenya by describing the applicable domestic and international law in turn. I will assert that my analysis shows international instruments set the floor for provision of legal aid to children in Kenya. In Part III, I will apply the substantial injustice test suggested by *David Njoroge Macharia* to criminal cases involving children and argue that by incorporating Kenya's international obligations, the current Constitution of Kenya recognizes a categorical right to counsel at state expense for children. Finally, in Part IV, I will suggest ways in which the right to counsel at state expense for children can be realized, first by describing the interaction of the right to counsel with fundamental aspects of Kenya's juvenile justice system and then by commenting on legal aid programs both implemented and proposed that will enable Kenya to fulfill its duty to provide counsel to criminally accused children. The most important program that will be described is the one envisaged by the Legal Aid Bill, 2012, which if passed would bring a comprehensive legal aid scheme to Kenya for the first time.

## I. DELINEATING THE RIGHT TO COUNSEL AT STATE EXPENSE IN KENYA

The promulgation of a new Kenyan Constitution in 2010 represented a massive shift in the state's obligations towards

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9. The Court of Appeal of Kenya was the highest court in Kenya at the time of the decision in *David Njoroge Macharia v. Republic*. Since then, the judiciary has been reorganized on the basis of the 2010 Constitution, adding a Supreme Court. In any constitutional case, one has an appeal of right to the Supreme Court. The Supreme Court may also certify and hear any other case that involves "a matter of general public importance." CONSTITUTION, art. 163 (2010) (Kenya).

10. *David Njoroge Macharia*, (2011) E.K.L.R. at 18.

criminal defendants. Unlike the repealed Constitution,<sup>11</sup> the current one recognizes a limited right to counsel at state expense. Article 50(2)(h) states, “[e]very accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”<sup>12</sup> Despite this broader understanding of the right to counsel, the Constitution does not define “substantial injustice” or further enumerate circumstances under which a defendant would be entitled to state-funded counsel.

The Kenyan judiciary first gave content to this right in its opinion in *David Njoroge Macharia v. Republic*.<sup>13</sup> In that case, the court recognized a categorical right to counsel at state expense for defendants “accused of capital offences where the penalty is loss of life.”<sup>14</sup> While only a narrow category of individuals is granted a right to counsel at state expense under this decision, the case is instructive in defining what circumstances would constitute “substantial injustice.” It also leaves an open

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11. The repealed Constitution read, “Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice.” CONSTITUTION, art. 77(2)(d) (1963) (Kenya) (amended 2009) (repealed 2010). However, in Article 77(14), the right to counsel was sharply constrained. Article 77(14) stated, “[n]othing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense.” *Id.* art. 77(14).

12. CONSTITUTION, art. 50(2)(h) (2010) (Kenya).

13. *David Njoroge Macharia*, (2011) E.K.L.R. at 5 (“The legal issues raised here are complex, with one of the issues relating to the right to legal counsel at state expense, completely novel, and raised before this Court for the first time . . . .”). In this case, the complainant, David Nguyo, was accosted and robbed by four people on his way home from a bar. After receiving a tip, the appellant, David Njoroge Macharia, was arrested and led officers to a bush from which items stolen from Nguyo were recovered. The appellant was then charged with robbery with violence, a capital offence. He was convicted and sentenced to death after a trial before the Chief Magistrate’s Court at Kibera. He then appealed to the High Court, and after losing in the High Court, he appealed to the Court of Appeal at Nairobi. On appeal, appellant’s counsel argued that he should have been afforded the right to counsel at state expense at trial. The Court found that under the new Constitution, appellant would have such a right; however, his trial took place under the repealed Constitution, which had expressly disclaimed such a right. Therefore, the appellant was not entitled to relief. *Id.* at 1–3.

14. *Id.* at 18.

question as to whether there are other groups of defendants for whom counsel at state expense is categorically required.<sup>15</sup>

While the court's opinion in *David Njoroge Macharia* considered the rights-protective and institution-protective roles of defense counsel, its conclusion that capital defendants were entitled to state-funded counsel was based primarily in international law. Most significantly, the Court of Appeal validated the Kenyan High Court's<sup>16</sup> holding in *In re Zipporah Wambui Mathara*, which ruled that international conventional law was directly applicable in Kenyan courts as a result of Article 2(6) of the Constitution.<sup>17</sup> Article 2(6) states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."<sup>18</sup> This provision has been interpreted by the court to transform Kenya, traditionally a dualist state, into a monist one.<sup>19</sup> Furthermore, by virtue of their in-

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15. See generally *id.* ("Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.").

16. The High Court is a court of original jurisdiction in both civil and criminal matters. CONSTITUTION, art. 165(3)(a) (2010) (Kenya); CONSTITUTION, art. 60(1) (1963) (Kenya) (amended 2009) (repealed 2010). It also has appellate jurisdiction over cases from the Resident Magistrate's Court. Magistrates' Courts Act, (2007) § 3(1) (Kenya).

17. CONSTITUTION, art. 2(6) (2010) (Kenya); *In re Zipporah Wambui Mathara*, (2010) E.K.L.R. paras. 3, 9 (C.C.K.), [http://kenyalaw.org/Downloads\\_FreeCases/77605.pdf](http://kenyalaw.org/Downloads_FreeCases/77605.pdf) (Kenya).

18. CONSTITUTION, art. 2(6) (2010) (Kenya).

19. *David Njoroge Macharia*, (2011) E.K.L.R. at 15 ("Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law . . . . However, this position may have changed after the coming into force of our new Constitution."); *In re Zipporah Wambui Mathara*, (2010) E.K.L.R. para. 9 ("[B]y virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of Kenyan Law."). Monism and dualism are ways of describing the relationship between domestic and international law:

Dualist doctrine points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject-matter. International law is a law between sovereign states: municipal law applies within a state and regulates the relations of its citizens with each other and with the executive. On this view neither legal order has the power to create or alter rules of the other. When municipal law provides that international law applies in whole or in part within the jurisdiction, this

corporation into the Constitution, treaties and conventions to which Kenya is a party have been held to supersede conflicting Kenyan statutory law.<sup>20</sup> As a result, in determining whether capital defendants are entitled to counsel at state expense under the Constitution, the court directly applied the provisions of the ICCPR and the African Charter on Human and Peoples' Rights (Banjul Charter).<sup>21</sup> The court also considered decisions of the Human Rights Committee and other international tribunals as well as non-binding international instruments.<sup>22</sup>

Under the monist interpretation of the Constitution, the provisions of the ICCPR regarding legal aid are binding on the government of Kenya and are directly applicable in Kenyan courts.<sup>23</sup> The ICCPR guarantees all persons the right "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."<sup>24</sup> The court noted that the Human Rights Committee,<sup>25</sup> the treaty body responsible for the interpretation of the ICCPR, has stated, "it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel

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is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law. In case of conflict between international law and municipal law the dualist would assume that a municipal court would apply municipal law.

IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–32 (7th ed. 2008). Monism, by contrast, represents a range of views treating international law and municipal law as part of the same system. The version of monism that most closely describes the Kenyan court's espoused view is Hersch Lauterpacht's, which asserts "the supremacy of international law even within the municipal sphere, coupled with well-developed views on the individual as a subject of international law." *Id.* at 32.

20. *In re Zipporah Wambui Mathara*, (2010) E.K.L.R.

21. *David Njoroge Macharia*, (2011) E.K.L.R.

22. *Id.*

23. *Id.* at 16, 18.

24. ICCPR, *supra* note 1, art. 14(3)(d).

25. "The Human Rights Committee is a body of independent experts that monitors implementation of the [ICCPR] by its State parties." *Human Rights Committee: Monitoring Civil and Political Rights*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Oct. 21, 2012). States Parties must "submit regular reports to the Committee," which then issues "concluding observations" that describe the progress of the State Party in implementing the Covenant. *Id.*



is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings . . . .”<sup>26</sup> The court also noted that in determining whether a non-capital case requires free legal counsel in the “interests of justice,” the Committee considers (1) “the severity of the charge” and (2) “the complexity of the case.”<sup>27</sup>

Article 2(6) also makes the Banjul Charter binding on Kenya.<sup>28</sup> Like the ICCPR, the Charter protects civil rights, including the right to a fair trial. The Charter states that

[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial court or tribunal.<sup>29</sup>

In interpreting the right to a fair trial, the African Commission on Human and Peoples’ Rights states,

[t]he accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require [sic], and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.<sup>30</sup>

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26. *David Njoroge Macharia*, (2011) E.K.L.R. at 13 (citations omitted).

27. *Id.* at 13.

28. Kenya ratified the Banjul Charter on January 23, 1992. AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS (last updated Apr. 2, 2010), available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>.

29. African Charter on Human and Peoples’ Rights art. 7(1), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter].

30. African Comm’n on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, art. H(a)–(b) (i).

The Commission further states that “[t]he interests of justice should be determined by considering: in criminal matters the seriousness of the offence [and] the severity of the sentence.”<sup>31</sup>

Though the Court of Appeal did not explicitly state a test for determining when justice requires state-funded counsel, its summary of the relevant factors suggests a three-part test. The court stated that

any accused person, regardless of the gravity of their [sic] crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence.<sup>32</sup>

Two factors that can be distilled from this summary, the complexity of the case and the nature or seriousness of the offense, align with considerations under the ICCPR and Banjul Charter. However, the third factor considered by the court, the ability of the accused to conduct his own defense, is not present in the tests of the Human Rights Committee or the African Commission on Human and Peoples’ Rights. Instead it naturally emerges from the court’s own assessment of the rights-protective and institution-protective roles of defense counsel.

In analyzing the policy reasons for granting counsel at state expense, the court first analyzed the role of defense counsel with respect to the client. The court acknowledged that counsel’s “knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact [sic], sieve relevant, admissible, and sometimes complex evidences [sic] from what is irrelevant and inadmissible” make him vital at trial.<sup>33</sup> Furthermore, the court noted that without defense counsel a criminal defendant could suffer “incalculable prejudice.”<sup>34</sup>

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31. *Id.*

32. *David Njoroge Macharia*, (2011) E.K.L.R. at 18.

33. *Id.* at 9.

34. *Id.* at 10.

Next, the court described the institutional role of the criminal defense attorney. The court stated,

the right to counsel “relieves trial judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings.”<sup>35</sup>

While the capability prong is absent from the treaty bodies’ interpretations of the ICCPR and the Banjul charter, the Kenyan court was not unique in considering the issue. Instead, the ability of the accused to conduct his own defense has been considered a factor affecting the right to state-funded counsel under provisions similar to the ICCPR in both the South African Constitution and the European Convention for the Protection of Human Rights.

South Africa’s scheme for determining when counsel at state expense should be assigned encapsulates the same purposes of ensuring protection for the accused and ensuring an efficient, rights-respecting judiciary. The South African Constitution guarantees the right to a fair trial, including the right “to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”<sup>36</sup> While the decision of whether “substantial injustice” would result is one for the judge, it is based on factors such as the “ramifications [of the case] and their complexity or simplicity, the accused person’s aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated . . . .”<sup>37</sup> This test can be summarized by looking at three factors: (1) “the seriousness of the offense,” (2) “the complexity of the case,” and (3) the “capacity of the accused to fend for himself.”<sup>38</sup> The South African test consid-

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35. *Id.* at 11 (internal citations omitted).

36. S. AFR. CONST., 1996, § 35(3)(g).

37. *State v. Vermaas*; *State v. Du Plessis* CCT/1/1/94, CCT/2/94; 1995 (3) SA 292 (CC) at 304 para. 15 (S. Afr.).

38. *Makhandela v. State* 2005 ZAGPHC 20, at 4–5 (S. Afr.).

ers the severity of the charges and the complexity of the case, both factors in the Human Rights Committee's approach, but contextualizes those factors in light of the individual circumstances of the accused. While a less individualized test would be more easily administrable, the same logic that reduces culpability for persons with diminished capacity counsels in favor of acknowledging individuals' varying capacities for purposes of assigning state-funded counsel.

The European Convention on Human Rights, while not binding on Kenya, is also illuminating due to the similarity of its fair trial provisions to the ICCPR and Banjul Charter. The European Convention guarantees an accused person the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."<sup>39</sup> The European Court of Human Rights (ECHR) analyzes not only the seriousness of the offense and the severity of the sentence<sup>40</sup> but also the complexity of the case with regard to the specific circumstances of the accused.<sup>41</sup> While the ECHR test is formally two-pronged, the subjective complexity prong has the effect of analyzing the capacity of the accused to defend himself. Therefore, the ECHR test is substantially similar to the South African test and my proposed Kenyan test.

Just as the right to counsel without a right to legal aid is ineffective, a test assessing whether substantial injustice is done to an accused without free legal aid is ineffective without taking into account the capacity of the accused to defend himself. Therefore, in deciding whether to grant an accused person counsel at state expense in a non-capital case, the Kenyan judi-

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39. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(c), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

40. *Quaranta v. Switzerland*, App. No. 12744/87 Eur. Ct. H.R. (May 24, 1991), ¶ 33 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57677>.

41. *Id.* ¶¶ 34–36 ("Such questions, which are complicated in themselves, were even more so for Mr. Quaranta on account of his personal situation: a young adult of foreign origin from an underprivileged background, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.").

ciary should consider (1) the severity of the charge, (2) the complexity of the case, and (3) the capacity of the accused to defend himself. These factors should be evaluated in light of the rights-protective and institution-protective roles of defense counsel.

## II. THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW IN KENYA

### A. *Domestic Sources of the Rights of Children in Conflict with the Law in Kenya*

Kenyan domestic law, like international law,<sup>42</sup> recognizes the vulnerability and special needs of children. Kenya's primary legislation concerning children is the Children Act, which came into effect on March 1, 2002.<sup>43</sup> The purpose of the Act is

to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child . . . .<sup>44</sup>

It also establishes that

[a]ll judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to - (a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child; [and] (c) secure for the child

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42. See CRC, *supra* note 1, pmbl. (“[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . . .”) (quoting the Declaration on the Rights of the Child, G.A. Res 1386 (XIV), U.N. Doc. A/4354, pmbl. (Nov. 20, 1959)).

43. The Children Act, (2007) § 1 (Kenya).

44. *Id.* pmbl.

such guidance and correction as is necessary for the welfare of the child and in the public interest.<sup>45</sup>

Despite this model legislation the juvenile justice system in Kenya is far from ideal.

One way Kenya deviates from best practices in juvenile justice is its minimum age of criminal responsibility. While the Children Act establishes most aspects of the juvenile justice system in Kenya, the age at which one becomes subject to the formal justice system is set by the Penal Code. The Penal Code establishes eight years old as the minimum age of criminal responsibility (MACR) in Kenya.<sup>46</sup> It also states that children under the age of twelve are not criminally responsible for their acts or omissions “unless it is proved at the time of doing the act or making the omission [they] had capacity to know that [they] ought not to do the act or make the omission.”<sup>47</sup> However, the Committee on the Rights of the Child has noted that provisions that allow the court to assess the capacity of the child in order to determine his criminal responsibility generally result “in practice in the use of the lower minimum age in cases of serious crimes.”<sup>48</sup> Therefore, in Kenya, it is possible for children as young as eight years old to appear in court. The Committee on the Rights of the Child considers an MACR be-

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45. *Id.* § 4(3).

46. The Penal Code, (2010) Cap. 63 § 14(1) (Kenya). A minimum age of criminal responsibility, or MACR, is the “age below which children shall be presumed not to have the capacity to infringe the penal law.” CRC, *supra* note 1, art. 40(3)(a). Kenya has asserted to the Human Rights Committee that the Children Act is being reviewed with the aim of raising the MACR. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant (Continued): Third Periodic Report of Kenya, ¶ 34, U.N. Doc. CCPR/C/SR.2906, 105th Sess., (July 23, 2012). However, the Committee has noted that no change has taken place yet. *Id.* ¶ 45.

47. The Penal Code, (2010) Cap. 63 § 14(2) (Kenya).

48. Comm. on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 44th Sess., Jan. 15–Feb. 2, 2007, ¶ 30, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter General Comment No. 10] (“Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.”).

low the age of twelve years “not to be internationally acceptable.”<sup>49</sup> As a result, juvenile justice is one area in which Kenyan children are particularly vulnerable by international standards. Nevertheless, the upper age limit for juvenile justice in Kenya is in line with the provisions of the CRC and the Committee’s comments.<sup>50</sup> This upper age limit is set by the Children Act, which defines a child as “any human being under the age of eighteen years.”<sup>51</sup>

Article 186(b) of the Children Act governs a child’s access to legal representation or assistance in the preparation and presentation of his defense. Article 186(b) states that “[e]very child accused of having infringed any law *shall* if he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence.”<sup>52</sup> The Act does not describe what “assistance” entails. Nevertheless, “assistance” must be distinct from the “legal assistance” that the child has been unable to obtain in the preceding sentence of article 186(b). Thus, this form of “assistance” raises questions, such as whether the assistance is independent of other institutional players within the court and whether it gives the requisite voice to accused children. This “assistance” also lacks assurance of minimum child sensitivity training standards. Without more specific standards for this “assistance” it is not clear that the “assistance” is adequate from the perspective of the CRC.<sup>53</sup>

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49. *Id.* ¶ 32. *See also* African Union, African Comm. of Experts on the Rights and Welfare of the Child, *Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child Concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child*, at 1, SA2590 (“It is . . . imperative and urgent to raise the criminal liability age to 12 years.”).

50. General Comment No. 10, *supra* note 48, ¶ 36 (“The Committee also wishes to draw the attention of States parties to the upper age-limit for the application of the rules of juvenile justice. These special rules—in terms both of special procedural rules and rules for diversion and special measures—should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years.”).

51. The Children Act, (2007) § 2 (Kenya).

52. *Id.* § 186(b).

53. The Committee has explained,

[t]he child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not

Whether or not these provisions may be sufficient in theory, it is clear that they have not sufficiently protected children in practice. The Legal Resources Foundation Trust, a reputable legal aid organization in Kenya, has noted with concern that “children are not guaranteed legal representation in cases affecting them,”<sup>54</sup> and that “[t]here is no government legal aid scheme in place to ensure the adequate representation of children.”<sup>55</sup> In addition, a 2002 study regarding the legal representation of children in Kenya indicated that only 20% of children who appear in criminal court are appointed a lawyer, and only another 10% pay for their own.<sup>56</sup> The lack of guaranteed legal representation for children means that it is highly unlikely that their rights will be respected at trial and substantially diminishes the possibility that they will receive an outcome that is in their best interests.

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necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

General Comment No. 10, *supra* note 48, ¶ 49. *See also infra* text accompanying notes 73–77.

54. LEGAL RES. FOUND. TRUST, HUMAN RIGHTS: THE SITUATION IN NYANZA PROVINCE 26 (2009).

55. LEGAL RES. FOUND. TRUST, CHILDREN AND HUMAN RIGHTS IN KENYA 25 (2d ed. 2007). *See also* JUSTICE FOR CHILDREN (RIFT VALLEY NEWCASTLE JUSTICE PROJECT), TRUSTEES’ REPORT AND UNAUDITED ACCOUNTS FOR THE YEAR ENDED 31 DECEMBER 2010, at 5–7, in which the organization reports that it handled over 3,000 cases in 2010, 81 of which involved children who had been criminally charged, most of which would have received no legal assistance were it not for JFC. The organization also reported that despite being chosen in 2009 by the government of Kenya to receive funding as a pilot children’s legal aid program (illustrating the fact that none then existed), it had not yet received funding by the end of 2010 to hire lawyers, nor had a Memorandum of Understanding between the government and the organization been finalized. *Id.*

56. JUMA ASSIAGO ET AL., UN-HABITAT, YOUTH AND CRIME IN NAIROBI (2002), <http://ww2.unhabitat.org/programmes/safercities/documents/youth.pdf>. The study did not address whether children had been provided non-legal “assistance” in the preparation or presentation of their defense under Article 186(b) of the Children Act.



In addition to defining children's eligibility for legal aid, the Children Act establishes children's courts. These courts have jurisdiction to hear "any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years."<sup>57</sup> The Children Act also limits the sentences available when disposing of a child's case. First, the court is not permitted to order a child to be imprisoned or sentenced to death.<sup>58</sup> Second, if the child is under the age of ten he is not to be sent to a rehabilitation school.<sup>59</sup> Permissible alternatives to imprisonment are described in section 191 of the Children Act.<sup>60</sup>

Despite the protective provisions of the Children Act, some children are still sentenced to terms of imprisonment and held with adult prisoners.<sup>61</sup> This injustice is exacerbated by confusion among magistrates and lack of clarity in the law as to when the limitations on punishment prescribed by the Children Act apply and as to who should be considered a child for purposes of sentencing. For instance, magistrates have ob-

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57. The Children Act, (2007) § 73(b) (Kenya).

58. *Id.* § 190(1)–(2).

59. *Id.* § 190(3).

60. *Id.* § 191(1) ("In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways – (a) by discharging the offender under section 35(1) of the Penal Code; (b) by discharging the offender on his entering into a recognisance, with or without sureties; (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act; (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care; (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments; (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them; (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions [juvenile detention centers]; (h) by placing the offender under the care of a qualified counsellor; (i) by ordering him to be placed in an educational institution or a vocational training programme; (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act; (k) by making a community service order; or (l) in any other lawful manner.").

61. LEGAL RES. FOUND. TRUST, *supra* note 54, at 27; U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: KENYA (2011), available at <http://www.state.gov/documents/organization/160127.pdf>.

jected to imposing the mandatory minimum sentences as prescribed in the Sexual Offences Act on children accused of defilement.<sup>62</sup> The Sexual Offences Act provides that “where the person charged with [defilement] is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act.”<sup>63</sup> Thus, section 8(7) of the Sexual Offences Act is permissive, rather than mandatory, and introduces ambiguity into the sentencing of children. Despite the Children Act’s clear prohibition on the sentencing of children to imprisonment, the later-in-time Sexual Offences Act establishes a conflicting sentencing scheme, obscuring what sentencing options are available to the magistrate. In addition, magistrates have expressed confusion about whether a person who committed an offense as a child but is an adult at the time of sentencing should be sentenced as a child or as an adult.<sup>64</sup> Both of these ambiguities should be resolved so that individuals who were children at the time of their offense are not sentenced to terms of imprisonment.

The extent to which child sentencing procedures are ignored or misapplied is not clear. The frequency with which children are imprisoned in adult facilities is not documented, as the government does not keep such records<sup>65</sup> and human rights groups are not capable of systematically surveying each prison in the country. Likewise, while the government asserts that children spend an average of three months in pre-trial detention,<sup>66</sup> the United Nations Development Programme has observed that “many children stay in remand for more than three months even for petty offences.”<sup>67</sup> In addition, the gov-

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62. LEGAL RES. FOUND. TRUST, SENTENCING IN KENYA: PRACTICE, TRENDS, PERCEPTIONS AND JUDICIAL DISCRETION 22–23 (2011).

63. The Sexual Offences Act, (2007) § 8(7) (Kenya).

64. LEGAL RES. FOUND. TRUST, *supra* note 62, at 24.

65. Comm. on the Rights of the Child, Written Replies by the Government of Kenya Concerning the List of Issues (CRC/C/KEN/Q/2) Received by the Committee on the Rights of the Child Relating to the Consideration of the Second Periodic Report of Kenya (CRC/C/KEN/2), § 10(d), U.N. Doc CRC/C/KEN/Q/2/Add.1 (Nov. 28, 2006) [hereinafter Written Replies].

66. *Id.* § 10(e).

67. CONNIE NGONDI-HOUGHTON, ACCESS TO JUSTICE AND THE RULE OF LAW IN KENYA: A PAPER DEVELOPED FOR THE COMMISSION FOR THE EMPOWERMENT OF THE POOR 31 (2006) [hereinafter ACCESS TO JUSTICE].

ernment does not provide data on the number of children remanded to adult prisons,<sup>68</sup> while the UNDP has documented cases of children held in Industrial Area Remand in Nairobi for over a year.<sup>69</sup> Finally, the protections of the Children Act are presumably not available to children charged as adults. While the most recent data indicates that the number of children charged as adults is declining, 180 children were charged as adults in 2006 according to the Prisons Department.<sup>70</sup> In charging children as adults despite the clear standards of the Children Act, police and magistrates are subverting the rule of law. Despite this dereliction of its duty, the government of Kenya has not acknowledged any steps being taken to redress the infringement of the rights of children charged as adults, even though it has been able to identify such children.<sup>71</sup>

### B. *International Sources of the Rights of Children in Conflict with the Law in Kenya*

After *David Njoroge Macharia*, the international sources of the rights of children in conflict with the law are even more salient than the domestic sources of those rights. Notably, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child guarantee accused children the right to a fair trial, including minimum assistance preparing a defense. Their incorporation into the Constitution in Article 2(6) sets a clear floor for the rights of criminally accused children in Kenya.

The CRC guarantees rights to criminally accused children in Article 40. Article 40 states that “[e]very child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . to have legal or other assistance in the preparation and presentation of his or her defence.”<sup>72</sup> In its General Comment No. 10, the Committee on the Rights of the Child elaborated that the assistance afforded under Article 40 need not be legal, but it must be appropriate and free of charge.<sup>73</sup> The Committee further recommended that

68. Written Replies, *supra* note 65, § 10(d).

69. ACCESS TO JUSTICE, *supra* note 67, at 31.

70. Written Replies, *supra* note 65, § 10(g).

71. *Id.*

72. CRC, *supra* note 1, art. 40(2)(b)(ii).

73. General Comment No. 10, *supra* note 48, ¶ 49.

the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible, (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.<sup>74</sup>

Therefore, to be in compliance with the CRC, the “assistance” offered to children under Article 186(b) must be the assistance of someone who has adequate knowledge of the law and who is trained to work with children.<sup>75</sup> The Committee also notes that the assistance “should take place under such conditions that the confidentiality [of communications between the person granting assistance to the child and the child] is fully respected.”<sup>76</sup> This guarantee reflects the assumption that the person providing assistance is independent of the judiciary, police, and prosecutor. Essentially, the person providing assistance must serve a role similar to the one a defense lawyer would fill were the accused able to afford one.

Since the CRC forms part of the floor of constitutional obligations for Kenya, it is important to determine what the CRC requires for States Parties to fulfill their duty to children. In Article 3 of the CRC “States Parties undertake to ensure” that children are given necessary care and protection.<sup>77</sup> Under Article 4, states are required to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>78</sup> This language means Kenya is not absolutely obligated under the CRC to provide assistance to criminally accused children. Instead the state is obligated to take “appropriate” measures to fulfill this duty. Therefore it is important to consider what “appropriate” steps might entail.

In General Comment No. 5 on General Measures of Implementation, the Committee states that the appropriateness standard is meant to avoid prescribing the specific measures

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74. *Id.*

75. *Id.*

76. *Id.* ¶ 50.

77. CRC, *supra* note 1, art. 3.

78. *Id.* art. 4.

each state must take to fulfill its obligations under the Convention.<sup>79</sup> In addition, this construction of the states' obligations was meant to avoid allowing states to limit implementation of the Convention to legislation alone.<sup>80</sup> It is also important to note what the appropriateness standard is not meant to do. In accordance with the ICCPR, the civil and political rights included in the CRC are not subject to resource availability.<sup>81</sup> Therefore, "appropriateness" should not be interpreted as limiting the state's obligations to provide assistance in the preparation and presentation of criminal defense (plainly a civil and political right) on the basis of its available resources. Neither should the provision be considered to give states the right not to take steps that would require either constitutional or statutory amendments. Furthermore the Vienna Convention on the Law of Treaties clearly states municipal legal obligations do not create an excuse for failing to fulfill treaty obligations.<sup>82</sup>

Textually the African Charter on the Rights and Welfare of the Child (ACRWC) takes an even stronger approach to legal assistance than the CRC, stating that an accused child "shall be afforded legal *and* other appropriate assistance in the preparation and presentation of his defence."<sup>83</sup> However, it is unclear whether "legal *and* other appropriate assistance" was the intended construction, since other African Committee of

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79. Comm. on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), 34th Sess., Sept. 19, 2003–Oct. 3, 2003, ¶ 26, U.N. Doc. CRC/GC/5 (Nov. 27, 2003).

80. Office of the U.N. High Comm'r for Human Rights, Legislative History of the Convention on the Rights of the Child Vol. 1, at 349–56, U.N. Doc. HR/PUB/07/1 (2007).

81. Mervat Rishmawi, *Article 4: The Nature of States Parties' Obligations*, in 4 A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1, 20–21 (André Alen et al. eds., 2006). This stands in contrast to the economic and social rights contained in the CRC, with regard to which "States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation." CRC, *supra* note 1, art. 4.

82. Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331. *See also* Rishmawi, *supra* note 81, at 4 (stating that unlike the ICCPR, the CRC does not include a qualification that steps should be taken "in accordance with the constitutional process.").

83. African Charter on the Rights and Welfare of the Child art. 17(2)(c)(iii), July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990) (emphasis added).

Experts on the Rights and Welfare of the Child documents, including its 2011 Guidelines on Action for Children in the Justice System merely guarantee “legal *or* other appropriate assistance.”<sup>84</sup> Furthermore, there are no available interpretations of this right by the Committee of Experts.

The States Parties’ obligations under the ACRWC vary somewhat from those under the CRC. While the ACRWC does not limit states’ obligations to “appropriate” measures, it does limit the States Parties’ obligations to those steps “in accordance with their Constitutional processes.”<sup>85</sup> Nevertheless, the states’ obligations include “legislative or other measures as may be necessary.”<sup>86</sup> By providing for “other measures,” the ACRWC makes its obligations almost coextensive with those of the CRC, with the limited caveat that states must only take steps that comply with their municipal constitutional processes.

In light of Article 2(6) of the Kenyan Constitution, the CRC and the ACRWC indisputably set the constitutional minimum standard for the rights of children accused of a criminal offense. Assuming the African Charter “and” to be a drafting error, that standard is that children are entitled to some appropriate assistance in the preparation and presentation of their defense. Assuming instead that the “and” is not an error, children are entitled to legal assistance—a trained lawyer or paralegal. In either case, legislative provision for such assistance alone is not enough to fulfill Kenya’s treaty obligations. Instead the state must also take other necessary and appropriate measures to provide assistance for criminally accused children. While the CRC and ACRWC provide a constitutional basis for children’s right to assistance in criminal matters, my proposed three-part test suggested by *David Njoroge Macharia* may require a higher standard of legal aid to accused children. In the following section, I will argue that the Constitution of Kenya entitles children to legal counsel at state expense.

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84. Kampala Conference, Nov. 7–8, 2011, *Guidelines on Action for Children in the Justice System in Africa*, ¶ 55, available at <http://acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Guidelines-on-action-for-Children-in-the-justice-system.pdf> (emphasis added).

85. African Charter on the Rights and Welfare of the Child, *supra* note 83, art. 1.

86. *Id.*

### III. WHY THE COURT SHOULD RECOGNIZE THAT ACCUSED CHILDREN HAVE A CONSTITUTIONAL RIGHT TO COUNSEL AT STATE EXPENSE

As discussed in Part II above, under the Convention on the Rights of the Child, Kenyan children are entitled “to have legal or other appropriate assistance in the preparation and presentation of [their] defence[s].”<sup>87</sup> In addition, as a result of Article 2(6) of the Constitution as interpreted in *David Njoroge Macharia* and in *In re Zipporah Wambui Mathara*, the rights recognized in the CRC are constitutional rights. Therefore, at a minimum, Kenyan children have a constitutional right to have some form of appropriate assistance in the preparation and presentation of their defenses.<sup>88</sup>

While the Convention permits non-legal assistance so long as it is appropriate assistance, the Committee on the Rights of the Child has expressed a clear preference for legal over non-legal assistance.<sup>89</sup> The reason for this preference was best expressed in the words of Lord Denning, quoted by the Kenyan Court of Appeal in *David Njoroge Macharia*: “If justice is to be done, [the accused] ought to have the help of someone to speak for him; [sic] and who better than a lawyer who has been trained for the task?”<sup>90</sup> Though a social worker or other non-legal assistant is certainly preferable to a child having no assistance in preparing and presenting his defense, ideally every child would have access to a trained lawyer to prepare and present his or her case.

The Constitution is unequivocal in recognizing an accused person’s right to have a lawyer, rather than merely some form of legal or non-legal assistance, assigned to him at state expense “if substantial injustice would otherwise result.”<sup>91</sup> As discussed in Part I, the court considered capital defendants categorically in *David Njoroge Macharia* and concluded that the

87. CRC, *supra* note 1, art. 40(2)(b)(ii).

88. As noted in Part II, if one believes the African Charter to be more protective than the CRC, this constitutional minimum would actually be for legal assistance, rather than appropriate assistance. See *supra* text accompanying notes 77–79.

89. General Comment No. 10, *supra* note 48, ¶ 49.

90. *David Njoroge Macharia v. Republic*, (2011) E.K.L.R. at 10 (C.A.K.), [http://kenyalaw.org/Downloads\\_FreeCases/81236.pdf](http://kenyalaw.org/Downloads_FreeCases/81236.pdf) (Kenya) (citations omitted).

91. CONSTITUTION, art. 50(2)(h) (2010) (Kenya).

new Constitution entitled them to counsel at state expense.<sup>92</sup> To determine whether children categorically should be entitled to counsel at state expense under Article 50(2)(h) of the present Constitution, one must consider (1) the severity of the charges against children, (2) the complexity of cases against children, and (3) the capacity of the accused children to defend themselves in light of the rights-protective and institution-protective roles of defense attorneys. In considering each of these factors it is important to consider the children's rights regime in Kenya as it currently exists, not merely as it is legislated to be. Due to the determinative weight of the third factor, this test counsels in favor of granting a categorical right to a lawyer at state expense for accused children.

#### A. *The Severity of Charges Against Children*

This Note discusses the severity of the charge by analyzing three components: the seriousness of the offense, the seriousness of the effects of the criminal process, and the seriousness of the consequences of conviction. These criteria must be considered relative to the person of the accused, in this case, a child. It should be noted that the seriousness of the offense will particularly affect children who are charged with murder, as murder suspects lose the protection of having their cases heard in Children's Court.<sup>93</sup>

While the seriousness of the offense is far from dispositive, the seriousness of the effects of the criminal process should have a stronger bearing on whether to grant children a categorical right to counsel at state expense. Upon arrest, children are kept in police cells that usually do not have separate holding areas for children and adults.<sup>94</sup> In addition, while children are meant to spend no more than twenty-four hours after being arrested in police custody, children sometimes spend up to two months in police cells due to a lack of adequate trans-

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92. *David Njoroge Macharia*, (2011) E.K.L.R. at 18.

93. The Children Act, (2007) § 73(b) (Kenya).

94. INSTITUT UNIVERSITAIRE KURT BOSCH & DEFENCE FOR CHILDREN INT'L, PROTECTING THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW: RESEARCH ON ALTERNATIVES TO DEPRIVATION OF LIBERTY IN EIGHT COUNTRIES 60 (2008) [hereinafter PROTECTING THE RIGHTS OF CHILDREN], available at [http://www.defenceforchildren.org/files/gabriella/ResearchMCR\\_alternativesToDetention.pdf](http://www.defenceforchildren.org/files/gabriella/ResearchMCR_alternativesToDetention.pdf).



portation.<sup>95</sup> When children are remanded after their arraignment, they spend an average of three months in children's remand homes.<sup>96</sup> Even so, some children are remanded in adult remand facilities where they are vulnerable to abuse.<sup>97</sup> Regardless of whether they are remanded in children's remand facilities or in adult ones, the time spent in remand can have a serious effect on children's development. Children in remand spend time away from their studies and families, and they are likely to be exposed to physical and psychological abuse.<sup>98</sup>

The effects of the trial process are wide-ranging and dramatic. Pre-trial detention may remove a child from school. Older children may be prevented from earning money to support themselves or their families. Pre-trial detention may also expose children to torture at the hands of officials or to abuse at the hands of other prisoners. Appearing in court may bring shame, negative publicity, and other psychological hardship as well.

Some of the effects of the trial process, including pre-trial detention, could be mitigated by access to counsel. In an institution-protective capacity, the right to legal aid is recognized as promoting the efficiency of the criminal justice system. The Lilongwe Declaration notes, "legal aid to suspects and prisoners has the potential to reduce the time suspects are held in police stations, congestion in the courts, and prison populations . . . ."<sup>99</sup> Likewise, the Draft Principles and Guidelines on

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95. VÉNUŠ MAROUN & CÉCILE TROCHU GRASSO, WORLD ORG. AGAINST TORTURE, RIGHTS OF THE CHILD IN KENYA: AN ALTERNATIVE REPORT TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD ON THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN KENYA 31 (2007), available at [http://www.omct.org/files/2005/09/3074/kenya\\_omct\\_altern\\_report\\_crc\\_eng.pdf](http://www.omct.org/files/2005/09/3074/kenya_omct_altern_report_crc_eng.pdf).

96. Written Replies, *supra* note 65, § 10(e).

97. LEGAL RES. FOUND. TRUST, *supra* note 54, at 18.

98. MAROUN & GRASSO, *supra* note 95, at 25–26. Regardless of the exact nature of the detention, child abuse is rife in the Kenyan detention system. *Id.* at 23–31; LEGAL RES. FOUND. TRUST, *supra* note 54, at 18. See also OPEN SOC'Y JUSTICE INITIATIVE, JUSTICE INITIATIVES: PRETRIAL DETENTION 11, 17–25 (2008) (documenting the often poor conditions associated with pre-trial detention, and the deleterious social, mental, and health effects that result therefrom).

99. Penal Reform Int'l Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers, and Other Service Providers in Africa, Nov. 22–24, 2004, *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, pmb. (Nov. 24, 2004) [hereinafter *Lilongwe Declara-*

Access to Legal Aid in Criminal Justice Systems state, “[l]egal aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources.”<sup>100</sup>

Legal aid can also play a rights-protective role. Providing a child with defense counsel helps mitigate the negative effects of the criminal process. First, a child’s lawyer will be able to push for a timely arraignment. Second, the lawyer will be able to advocate for the child’s bail, which is available even for serious offenses.<sup>101</sup> Third, in court the lawyer will be able to raise other violations that arise out of the child’s conditions of confinement, such as his being held with adults or being detained in an adult facility. Fourth, by having access to legal counsel at the earliest stages of the proceeding, the child is more likely to be able to prevent undue delay that could result from his own search for legal counsel and the preparation of his defense. Finally, having access to legal counsel is rights-protective in that a child will be less likely to self-incriminate or accept an ill-advised guilty plea in the presence of his attorney than he would if left by himself or under the supervision of a guardian.

The potential consequences of conviction for children in conflict with the law must also counsel in favor of recognizing their right to counsel at state expense. Although imprisonment and the death penalty<sup>102</sup> may not be imposed on a child, these sentences are still meted out by magistrates who are either unaware of the law or who misapply the law in sentencing minors.<sup>103</sup> In addition, while the sentences permitted under

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tion], available at [www.penalreform.org/files/rep-2004-lilongwe-declaration-en.pdf](http://www.penalreform.org/files/rep-2004-lilongwe-declaration-en.pdf).

100. Draft Principles and Guidelines, *supra* note 4, ¶ 4.

101. CONSTITUTION, art. 49(1)(h) (2010) (Kenya).

102. It should be noted that there has been a de facto moratorium on the death penalty since 1987. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations Adopted by the Human Rights Committee at Its 105th Session (Kenya), July 9–27, 2012, ¶ 10 (advanced, unedited version). Nevertheless 1,582 convicts remain on death row, despite the commutation of 4,000 death sentences by the Kenyan president in 2009. *Id.*

103. See, e.g., Julius Muriira & 3 Others v. Republic, (2008) E.K.L.R. (C.A.K.) (Kenya) (holding that the High Court judge erred in sentencing a

the Children Act may not be considered severe when imposed on adults,<sup>104</sup> those sentences have greater long-term effects on children. The consequences of conviction should be viewed as especially severe in light of the fact that most children are convicted of petty offenses, and most will not become career criminals.<sup>105</sup> As a result, many children who would likely grow out of their criminal behavior are sentenced to institutions that will remove them from their normal developmental environment, subject them to an increased likelihood of abuse, and in doing so, affect the course of the rest of their lives.

Assigning an advocate at state expense to a child would prevent many of the abuses of rights associated with the child's exposure to the criminal justice system. First and foremost, a child's advocate can serve both rights-protective and institution-protective purposes by advising the court of the proper sentencing procedures for children and appealing any improper sentences. Second, the child's lawyer can advocate for a non-custodial sentence, particularly in cases of petty offenses. This advocacy would also support institutional goals such as the need to reduce prison overcrowding, which is a major problem in Kenya.<sup>106</sup>

In sum, while the specific circumstances surrounding the severity of the charge will depend on each child's individual case, a child should only be deprived of liberty as a last resort.<sup>107</sup> Therefore, if children are being diverted<sup>108</sup> properly

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sixteen-year-old to death, as the death penalty is unavailable for minors); *Edward Ochieng Ouko v. Republic*, (2006) E.K.L.R. C.A.K. (Kenya) (stating that both the trial magistrate and the High Court judge failed to take notice of the fact that the appellant was a child and could not be sentenced to a term of imprisonment); *Isaac Kigundu v. Republic*, (2009) E.K.L.R. (C.A.K.) (Kenya) (holding that a High Court judge had wrongly sentenced a child, sixteen years old at the time of the offense and seventeen at the time of sentencing, to death in violation of section 25(2) of the Penal Code and Section 190(2) of the Children Act).

104. It should be noted that under the ECHR interpretation, a term of imprisonment of three months was considered severe enough to warrant State-funded counsel for an adult. *Benham v. United Kingdom*, App. No. 19380/92 Eur. Ct. H.R. (June 10, 1996), ¶ 61, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57990>.

105. FLORENCE MARTIN & JOHN PARRY-WILLIAMS, *SAVE THE CHILDREN, THE RIGHT NOT TO LOSE HOPE: CHILDREN IN CONFLICT WITH THE LAW—A POLICY ANALYSIS AND EXAMPLES OF GOOD PRACTICE* 9–11 (2005).

106. LEGAL RES. FOUND. TRUST, *supra* note 62, at vi.

107. CRC, *supra* note 1, art. 37(b).

from the criminal justice system, the cases that remain in the criminal system will be those with the most severe charges and the greatest need for the protection afforded by competent counsel.

### B. *The Complexity of Cases Against Children*

Like the seriousness of offenses, the complexity of cases against children will vary greatly from child to child. However, one type of case raises particular cause for concern. Children who are charged with adult co-defendants cannot be tried before a children's court,<sup>109</sup> yet those children may be vulnerable to manipulation or pressure that will result in an unjust judgment that is not in their best interests. Furthermore, cases with multiple defendants are inherently more complex than those in which the child is the sole accused. In cases with multiple defendants, the child's defense counsel would take on a primarily rights-protective role. The attorney would be able to raise important issues regarding the child's mental state and relative culpability. In addition, the attorney would be better positioned to protect the child from becoming a scapegoat for the adult defendants than the child would be on his own. Under a categorical analysis of children's right to counsel at state expense, the complexity of the case plays little role. Nevertheless, cases excluded from the jurisdiction of children's courts under article 73(b) should be recognized as circumstances in which children would be particularly vulnerable without access to an advocate.

### C. *The Capacity of Accused Children To Adequately Defend Themselves*

The determinative factor in recognizing a categorical right to counsel at state expense for children is the capacity of children to defend themselves. Courts are skeptical of the average adult's ability to conduct an effective defense on his own behalf.<sup>110</sup> A child, almost by definition, would be even less ad-

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108. For a discussion of diversion programs, see *infra* Part IV.A.

109. The Children Act, (2007) § 73(b) (Kenya).

110. *E.g.*, David Njoroge Macharia v. Republic, (2011) E.K.L.R. (C.A.K.), [http://kenyalaw.org/Downloads\\_FreeCases/81236.pdf](http://kenyalaw.org/Downloads_FreeCases/81236.pdf) (Kenya) ("It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may

ept at doing so. A child is extremely unlikely to be able to understand the rules of evidence, methods of cross-examination, and even the elements of his own crime to the extent necessary to be able to raise an adequate defense. Assuming very young children would make the most incompetent pro se defendants, Kenya's very low MACR (eight years old)<sup>111</sup> exposes a range of even more vulnerable child defendants to criminal prosecution than do other state systems with higher MACRs. The essence of the question of whether a child has the capacity to defend himself is this: Will the defense that the child is capable of putting on without the assistance of a lawyer be sufficient to prevent "substantial injustice?" Even with regard to relatively minor offenses being adjudicated in relatively straightforward cases, the answer is more likely than not to be no.

Recognizing that a narrow category of children may be capable of putting on an adequate defense, why not determine the "substantial injustice" question on a case-by-case basis? The most troubling aspect of adjudicating the right to counsel at state expense for children on a case-by-case basis is that the child or the assistant he is supposed to be assigned will have to raise and argue the issue before the court. Such a requirement demands not only the ability to argue such an issue but also the awareness that the right exists. Furthermore, the "incalculable prejudice" to the accused that may result when the accused does not have access to legal representation is intolerable with respect to a child, particularly due to the fact that the justice system is supposed to be working in the child's best interests.<sup>112</sup>

On a more basic level, the international community has recognized that children are less capable and more vulnerable than adults. Human rights instruments recognize that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal pro-

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be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?") (internal citations omitted).

111. The Penal Code, (2010) Cap. 63 § 14(1) (Kenya).

112. The Children Act, (2007) § 4(3) (Kenya).

tection.”<sup>113</sup> Indeed, the United Nations Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>114</sup> state that “[c]hildren should have access to legal aid under the same conditions or more lenient conditions as adults” and provide “special measures” for children.<sup>115</sup> A categorical right to state-funded legal counsel is one “special safeguard” that would be protective of all others. As noted above, children are sentenced to imprisonment and death despite statutory protections against those sentences for juveniles.<sup>116</sup> Likewise, children are held in prison cells and remand facilities with adults despite provisions that mandate separate accommodations for them.<sup>117</sup> Without lawyers to challenge these practices, the Children Act is little more than an aspirational piece of paper.

#### IV. REALIZING THE RIGHT TO COUNSEL AT STATE EXPENSE FOR CHILDREN IN KENYA

The right to counsel at state expense comes with a concomitant duty of states to provide such assistance. The Lilongwe Declaration recognizes that “[a]ll *governments* have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system.”<sup>118</sup> Likewise, the

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113. CRC, *supra* note 1, pmbl. (internal quotations omitted).

114. The U.N. Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are slated to be adopted by the General Assembly of the United Nations in late 2012. Jennifer Smith, *UN Strengthens Right to Legal Aid*, THE WORLD JUSTICE PROJECT (Oct. 27, 2012), <http://worldjusticeproject.org/blog/un-strengthens-right-legal-aid>. The draft is being sponsored by Georgia, the Philippines, and South Africa (acting on behalf of the States Members that are members of the Group of African States). Draft Principles and Guidelines, *supra* note 4, pmbl. The draft was presented to the Commission on Crime Prevention and Criminal Justice in Vienna on April 23–27, 2012. *Id.* The document was drafted in response to Resolution 2007/24 of the Economic and Social Council (ECOSOC Resolution 2007/24). *Id.*

115. Draft Principles and Guidelines, *supra* note 4, ¶¶ 22, 53–54.

116. The Children Act, (2007) § 190 (Kenya); Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Kenya, ¶ 67, U.N. Doc. CRC/C/KEN/Co/2 (June 19, 2007).

117. LEGAL RES. FOUND. TRUST, *supra* note 54, at 27.

118. *Lilongwe Declaration*, *supra* note 99, ¶ 1 (emphasis added). The declaration continues to encourage governments to

Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems state that

[s]tates should consider the provision of legal aid as their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.<sup>119</sup>

Furthermore, under the CRC, it is the duty of the state to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>120</sup> As a result, while civil society and individual lawyers may play an important role in effectuating the right to counsel at state expense, ultimately it is the responsibility of the state to ensure the establishment of a functioning legal aid system. The following subparts will suggest ways in which Kenya can fulfill this duty to its children.

A. *The Right to Counsel as Part of a Comprehensive Juvenile Justice System*

In recognizing the right to counsel at state expense for accused children, the resource question looms large. After all, the Children Act is not fully implemented as it stands, and its provisions regarding access to legal representation are largely dead letters. Nevertheless, the right to counsel for accused children can be realized. In order to be viable, this right must be located within a comprehensive juvenile justice system. The

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adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in doing so empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

*Id.*

119. Draft Principles and Guidelines, *supra* note 4, ¶ 15.

120. CRC, *supra* note 1, art. 4.

basic framework for such a system would include prevention and diversion as central components. The Children Act, however, does not specifically provide for any programs for juvenile delinquency prevention or for diversion of children from the formal justice system.<sup>121</sup>

In Kenya, non-governmental organizations (“NGOs”) and youth groups run most prevention programs. Outreach to the community is a major tool for NGOs and youth groups who often run mentorship and leadership programs as well as rights awareness trainings. For example, The CRADLE<sup>122</sup> runs two programs in schools for girls.<sup>123</sup> One, the Safe Horizon program, works with women leaders in high schools.<sup>124</sup> The other, the Letter Link Project, is based in primary schools and reaches out to girls through clubs.<sup>125</sup>

In order to complement general education and welfare programs and help support the prevention efforts made by NGOs and other community groups, the government of Kenya should keep accurate statistics on child offenders. Without accurate statistics on the number of reported crimes involving children, the number of arrested children, the ages of children arrested or charged, and the number of convicted children, it is impossible to know the extent to which juvenile delinquency is a problem in Kenya. The problem of accurate information is exacerbated by the misuse of juvenile institutions and the juvenile justice system to deal with impoverished children who have committed no crime, which obscures the meaning of those statistics that are available.<sup>126</sup>

Diversion, another key component of a comprehensive juvenile justice system, is gradually being embraced by the Kenyan government.<sup>127</sup> A pilot diversion program began in

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121. The Children Act, (2007) (Kenya).

122. The CRADLE is an NGO devoted to providing legal services to Kenyan children. *Our History*, THE CRADLE, <http://www.thecradle.or.ke/about-us> (last visited Nov. 10, 2012).

123. *Child Rights Awareness*, THE CRADLE, <http://www.thecradle.or.ke/programmes/child-rights-awareness> (last visited Nov. 10, 2012).

124. *Id.*

125. *Id.*

126. MARTIN & PARRY-WILLIAMS, *supra* note 105, at 74.

127. Diversion can happen at any point in the criminal justice process and consists of referring cases away from the formal criminal procedural system. Diversion may be conditional. One scholar describes diversion as follows: “Diversion can be as simple as a formal caution by a police officer or act of



2001 in Nairobi, Nakuru, and Kisumu.<sup>128</sup> The goal of the program is “to divert children, especially those in need of care and protection, away from the justice system at their earliest point of contact—namely with the police—and to ensure that police officers are trained and competent to refer children to other agencies instead of detaining them.”<sup>129</sup> In addition, the program is meant to prevent the “criminal contamination” of children that may occur when children are kept in custody with more serious offenders and to save time and resources by avoiding delays in processing matters in juvenile courts.<sup>130</sup> As of 2005, this program included “13 government departments, 22 NGOs, three legal networks, 19 community-based organizations and four police stations . . . .”<sup>131</sup> From 2001 to 2004, the program diverted 2,800 children from courts and resulted in a 90% drop “in the number of children referred to the children’s courts” in the project areas.<sup>132</sup>

The initial success of the diversion program counsels in favor of its expansion. Currently, the program is heavily focused on diverting children in need of care and protection<sup>133</sup>

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apology for the offence committed, with or without an offer of restitution or compensation.” Adam Stapleton, *Where There Is No Lawyer: A Strategy To Develop Primary Justice Services*, in A HUMAN RIGHT TO LEGAL AID 39, 50 (Hatla Thelle & Paul Dalton eds., Danish Inst. for Human Rights, 2010).

128. MARTIN & PARRY-WILLIAMS, *supra* note 105, at 75.

129. *Id.*

130. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 94.

131. MARTIN & PARRY-WILLIAMS, *supra* note 105, at 75.

132. *Id.* at 76.

133. The Children Act defines when a child is considered “in need of care and protection.” The Children Act, (2007) § 119 (Kenya) (“(1) For purposes of this Act, a child is in need of care and protection – (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or (b) who is found begging or receiving alms; or (c) who has no parent or the parent has been imprisoned; or (d) whose parents or guardian find difficulty in parenting; or (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or (f) who is truant and falling into bad associations; or (g) who is prevented from receiving education; or (h) who, being a female, is subject or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child’s life, education and health; or (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or (j) who is exposed to domestic violence; or (k) who is pregnant; or (l) who is terminally ill, or whose parent is terminally ill; or (m) who is disabled and is being unlawfully confined or ill treated; or (n) who has been sexually abused or is likely to be exposed to sexual abuse and

away from the juvenile justice system, but it does little to divert children accused of petty offenses away from the formal court system. Larger scale diversion is necessary to relieve resource pressures on the juvenile justice system and to ensure that the outcome of cases is in the best interests of the children. In addition to serving practical goals, a more aggressive diversion program would comply with the mandate of the CRC that arrest and detention be measures of last resort in dealing with child offenders.<sup>134</sup> Despite the promise of the diversion program, caution should be exercised in its implementation. Unregulated, discretionary diversion systems can become breeding grounds for due process and human rights violations, especially in the absence of oversight.<sup>135</sup>

With an effective diversion program in place, the right to counsel for children at state expense would be much more realizable. Under those circumstances, the children coming before the court would be only those for whom arrest and detention was a measure of last resort. Not only would there be fewer children in need of state-funded counsel, but those who did require counsel would also be the children who most closely match the criteria for determining whether to assign an advocate at state expense under a case-by-case model. Children whose cases could not be disposed of through the diversion program would be those who presented the most com-

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exploitation including prostitution and pornography; or (o) who is engaged in any work likely to harm his health, education, mental or moral development; or (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health. (2) A child apprehended under this section shall be placed in separate facilities from a child offenders' facilities.”).

134. CRC, *supra* note 1, art. 37(b).

135. See Godfrey O. Odongo, *The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context*, in CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 147, 154 (Julia Sloth-Nielsen ed., 2008) (“The potential for unequal access and discrimination in referral of child offenders to diversion calls for the need for diversion to be underpinned by legislation.”).

plex cases and/or the most severe charges. Thus, the non-diverted cases would be those in which a child would have the most difficulty representing himself.

In further developing its juvenile justice system, Kenya should also consider utilizing the South African model. South Africa has developed “one-stop child justice centers” in order to implement its child rights provisions.<sup>136</sup> While these centers may not be practical in less populated areas, they may be a practical possibility in Nairobi and other population centers. These centers combine all major juvenile justice services in one building, including “holding cells, assessment rooms, police services, probation services, a courtroom, and rooms for presenting diversion programs.”<sup>137</sup> In addition to being convenient and allowing different child-serving agencies to work in close proximity to one another, these centers have the added advantage of being less stigmatizing than other places in which one might find similar resources.<sup>138</sup> For example, in Kenya, courtrooms serve both as adult and children’s courts. These courts may be embarrassing or frightening for children. By relocating a children’s court into a child justice center, the child may feel less fearful and more dignified.

### B. *Delivering Legal Aid Despite Resource Constraints*

While this paper does not set out to design a comprehensive legal aid program for Kenya, any discussion of the right to legal counsel at state expense for children must consider the current legal aid environment within Kenya. Legal aid in Kenya is currently provided primarily through a range of legal aid organizations such as Legal Resources Foundation Trust, the CRADLE, Kituo Cha Sheria, Independent Medico-Legal Unit, and International Justice Mission, to name a few. The Kenyan government has also begun to accept responsibility for the provision of legal aid services. Recently there have been encouraging developments in both the provision of legal ser-

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136. U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON IMPROVING ACCESS TO LEGAL AID IN AFRICA 81 (2011) [hereinafter LEGAL AID HANDBOOK], available at [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_improving\\_access\\_to\\_legal\\_aid\\_in\\_Africa.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_on_improving_access_to_legal_aid_in_Africa.pdf).

137. *Id.*

138. *Id.* at 81–82.

vices and the drafting of legislation to institute a comprehensive legal aid program.

In 2007 the government launched the National Legal Aid and Awareness Programme, which was formed to provide legal advice in the short term with the goal of providing legal representation in the long term.<sup>139</sup> The Programme launched a number of pilot programs, including the Nairobi High Court Family Division Pilot Project, the Nairobi Children's Court Pilot Project, the Mombasa Capital Offences Pilot Project, the Kisumu Paralegal Advise [sic] Office Pilot Project, the Nakuru Children's Justice Pilot Project, and the Moi University Law Clinic (Eldoret) Pilot Project.<sup>140</sup> Many of these pilot projects integrate the principles of innovative legal aid schemes in an attempt to provide wider-ranging legal aid through the government. While it is not clear what progress has been made under each of these projects, many of them serve as useful examples of the ways in which counsel at state expense could be delivered to Kenyans.

The Nairobi Children's Court Pilot Project, run by the Law Society of Kenya and the Children's Legal Action Network, provides legal education, aid, advice, and litigation services to children charged with crimes, as well as to children who are victims and witnesses of crime.<sup>141</sup> This pilot project is a version of a *judicare* scheme (a method of providing legal services in which a legal aid body contracts with a network of private attorneys to provide legal services).<sup>142</sup> While these types of programs generally function well when the number of cases is relatively few, the administrative resources required to run such a program with a high volume of cases make it infeasible in most situations.<sup>143</sup> Despite this limitation, this system is well suited to areas where there is no need for a traditional

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139. Human Rights Comm., *supra* note 102, ¶ 19.

140. *National Legal Aid (and Awareness) Programme*, MINISTRY OF JUSTICE, NAT'L COHESION AND CONSTITUTIONAL AFFAIRS, [http://www.justice.go.ke/index.php?option=com\\_content&task=view&id=162&Itemid=99](http://www.justice.go.ke/index.php?option=com_content&task=view&id=162&Itemid=99) (last visited Sept. 26, 2012).

141. *Id.*

142. David McQuoid-Mason, *Delivery of Legal Aid Services in Developing Countries: In the Light of South African Experience*, in JUSTICE FOR THE POOR: PERSPECTIVES ON ACCELERATING ACCESS 449, 459 (Ayesha K. Dias & Gita H. Welch eds., 2009) (describing *judicare*).

143. *Id.* at 460.

public defender due to the low volume of cases.<sup>144</sup> The government should make an effort to transition from *judicare* programs like this one to more cost-effective one-stop justice centers or traditional public defenders. The Legal Aid Bill, discussed below, is a step toward more comprehensive legal aid provision.<sup>145</sup> If the government fails to pass that bill and continues to rely on *judicare*, the government will make its provision of legal aid services more expensive than necessary.

The Moi University Law Clinic follows the pattern of legal services clinics at universities around the world, which have generally proved quite successful.<sup>146</sup> This pilot project focuses on “serving poor, vulnerable and marginalized clients” with a “broad range of services” including “legal aid, legal education, [and] referrals for litigation and mediation.”<sup>147</sup> University legal aid clinics can be a valuable source of human resources for countries that lack a large population of lawyers.<sup>148</sup> Kenya should also consider taking advantage of its pupillage requirement<sup>149</sup> to encourage young lawyers to do public interest work. In South Africa, the government has placed legal interns in rural law offices to do legal aid work under the supervision of private attorneys.<sup>150</sup> Kenya could undertake a similar program by offering stipends or other incentives to pupils to do their pupillage in a rural area where legal services may not otherwise be available to indigent clients.

A more ambitious approach to legal aid provision is envisaged in the Kenya Legal Aid Bill, 2012.<sup>151</sup> The legislation’s

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144. *Id.*

145. See *infra* text accompanying notes 152–62.

146. McQuoid-Mason, *supra* note 142, at 471–75.

147. MINISTRY OF JUSTICE, NAT’L COHESION AND CONSTITUTIONAL AFFAIRS, *supra* note 140.

148. McQuoid-Mason, *supra* note 142, at 475.

149. The Advocates Act, (2012) Cap. 16 § 13(b)(i). After a law student finishes her coursework, she must undertake a six-month supervised pupillage. The pupillage consists of supervised legal work and can be undertaken in an advocate’s chambers, within the government, or with a private or public corporation. Advocates Program Training Overview, Council of Legal Education, Kenya School of Law, *available at* [http://www.ksl.ac.ke/index.php?option=com\\_content&task=view&id=20&Itemid=276](http://www.ksl.ac.ke/index.php?option=com_content&task=view&id=20&Itemid=276).

150. McQuoid-Mason, *supra* note 142, at 463.

151. The Legal Aid Bill is currently in draft form and has not yet been tabled before Parliament. It is also not yet included on the 2012 Bill Tracker, which provides an overview of the status of bills before Parliament during

goal is “to establish an accessible, sustainable, and accountable system of legal aid, to establish the National Legal Aid Service, to promote legal awareness and greater access to justice and for connected matters.”<sup>152</sup> While the program of legal aid<sup>153</sup> set out in the Legal Aid Bill is far from reality in Kenya, the bill exhibits a number of features that make it a promising comprehensive legal aid program for the country. First and most importantly, the bill establishes a Legal Aid Fund with diversified funding sources including monies from Parliament, donations, and fees levied under the Legal Aid Bill.<sup>154</sup> Second, legal aid provision is tiered at the state, county, and ward levels. The National Legal Aid Service established through the bill will have a headquarters in Nairobi and regional offices throughout the country, and it will be accountable to Parliament.<sup>155</sup> The County Legal Aid Service offices, located in each county, will implement the policies of the National Legal Aid Service and oversee local legal aid providers, among other duties.<sup>156</sup>

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the year. *Bill Tracker As at 17th September 2012*, Kenya Nat'l Assembly, 10th Parliament, 4th Sess., available at [http://www.parliament.go.ke/index.php?option=com\\_content&view=article&id=113:bill-tracker&catid=46:house-business](http://www.parliament.go.ke/index.php?option=com_content&view=article&id=113:bill-tracker&catid=46:house-business).

152. Draft Legal Aid Bill, (June 2012) pmbi.(Kenya), available at [http://www.kituoachasheria.or.ke/index.php?option=com\\_docman&task=cat\\_view&gid=12&dir=DESC&order=name&Itemid=92&limit=5&limitstart=5](http://www.kituoachasheria.or.ke/index.php?option=com_docman&task=cat_view&gid=12&dir=DESC&order=name&Itemid=92&limit=5&limitstart=5).

153. According to the Draft Legal Aid Bill, “legal aid” includes

- (a) legal advice and awareness creation; (b) legal representation;
- (c) assistance— (i) with resolving disputes other than by legal proceedings; (ii) with taking steps preliminary or incidental to any proceedings; and (iii) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings; (d) in relation to a justice advisory centre- (i) the provision of legal information and law-related education; and (ii) undertaking law-reform and advocacy work on behalf of the community it serves . . . .

*Id.* § 2.

154. *Id.* §§ 22–26.

155. *Id.* § 4(1)–(4).

156. *Id.* § 20(3) (“Without prejudice to the generality of subsection (1), a County Service office shall perform and be responsible for all or any of the following functions- (a) to give effect to the policy and directives of the Service: [sic] (b) the general implementation of legal aid in the County; (c) to consider applications for legal aid; (d) coordinate and monitor the accredited legal aid providers within the country [sic] (e) to undertake preventive and strategic legal aid programmes; (f) to develop training modules and provide training to paralegals; (g) to organize legal aid camps and clinics, especially in rural and slum areas for the purpose of educating vulnerable

Finally, at the most local level, a minimum of two paralegals will be stationed in each of the justice advisory centers, where they will provide legal advice and refer cases to the County Service offices as needed.<sup>157</sup> A final positive aspect of the bill is its inclusion of a wide range of legal service providers. The bill permits the accreditation of “(a) advocates; (b) pupil advocates; (c) non-advocate lawyers; (d) law teachers; (e) law students; (f) paralegals employed by the service, government and accredited bodies; (g) civil society and non –governmental [sic] organisations and (h) university law clinics . . . .”<sup>158</sup>

It is also encouraging that the bill specifically provides for legal aid services for children. Section 27 states, “[l]egal aid shall be granted at the expense of the state to . . . a child.”<sup>159</sup> Nevertheless it behoves the legislature to make it clear throughout the bill that it is mandatory for a child to be granted legal aid at state expense. In section 38, the bill uses the permissive “may” when describing the grant of legal representation to a child brought before the court.<sup>160</sup> The incongruity between sections 27 and 38 should be resolved, and legal aid should be granted to all accused children brought before the court in criminal proceedings. In addition, the current formulation of the bill does not make clear whether children have to meet any additional eligibility criteria.<sup>161</sup> Subsequent drafts of this legislation should clarify whether legal aid

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sections of the society on their rights as well as encouraging the amicable settlement of disputes; (h) any other functions relating to legal aid as the Service may direct.”)

157. *Id.* § 21 (“The functions of a justice advisory centre shall be to- (a) coordinate legal advice and awareness within the Ward; (b) refer cases in need of legal aid services to the local County Service office; (c) facilitate and conduct legal aid clinics within the location; (d) encourage the settlement of disputes by way of negotiation, mediation, and conciliation; (e) perform such other functions as may be assigned by the local County Service office.”).

158. *Id.* § 51(4).

159. *Id.* § 27(1)(b).

160. *Id.* § 38(2) (“Where a child is brought before a court in proceedings under the Children act or any other written law, the court may where the child is unrepresented, order that the child be granted, order that the child be granted legal representation [sic].”)

161. Section 27 of the Legal Aid Bill also provides for legal aid at state expense for “a person or group of persons who need legal services but who cannot afford to pay for the services.” *Id.* § 27(1)(a). These people nonetheless have to meet eligibility criteria spelled out in sections 28 and 30. Section 28 states,

is unconditionally available to children. While the passage and implementation of this legislation are yet to come, the Draft Legal Aid Bill would vastly improve the coordination and reach of legal aid services in Kenya.

Community paralegals have also played an important role in providing legal services in Kenya. Legal Resources Foundation Trust trains community paralegals “to work directly with the poor, marginalised, vulnerable and excluded people to address social justice and human rights.”<sup>162</sup> Paralegals have been an especially successful source of legal aid in Malawi, where they serve four purposes. First, they provide “legal advice and assistance to those in conflict with the law in prison, in police custody and at court.”<sup>163</sup> Second, they facilitate “legal empowerment of prisoners so they can represent themselves through conducting paralegal aid clinics inside prisons on a daily basis.”<sup>164</sup> Third, they “[link] up the criminal justice system by fa-

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[a] person is eligible for the grant of legal aid if that person has insufficient means to enable him or her to obtain private legal services and — (a) he or she is a citizen of Kenya or is a resident in Kenya; or (b) he or she is an asylum seeker or refugee under the Refugees Act; (c) He or she is a victim of human trafficking [sic] (d) he [sic] or she is an internally displaced person or a stateless person; or (e) the [sic] matter in respect of which legal aid is sought is in an area of law and is a type of case and type of proceedings for which the service provides legal aid services; (f) the matter is of public interest; (g) he [sic] or she applies in accordance with the guide; (h) he [sic] or she meets the prescribed eligibility requirements; (i) the application for legal aid services is approved, in accordance with the procedures set out in the guide.

*Id.* § 28. Section 30 reads,

(1) The Service may grant legal aid to an applicant in respect of proceedings in criminal matters if— (a) the [sic] applicant is a natural person charged with or convicted of an offence; and (b) it [sic] appears to the Service that the applicant does not have sufficient means to enable him or her to obtain legal assistance; and (c) either— [sic] (i) the offence to which the application relates is punishable by a term of imprisonment; or (ii) it appears to the Service that a substantial injustice would otherwise result if the applicant is not granted legal aid.”

*Id.* § 30.

162. *Our Approach*, LEGAL RES. FOUND. TRUST, [http://www.lrf-kenya.org/index.php?option=com\\_content&view=category&layout=blog&id=2&Itemid=4](http://www.lrf-kenya.org/index.php?option=com_content&view=category&layout=blog&id=2&Itemid=4) (last visited Nov. 29, 2012).

163. LEGAL AID HANDBOOK, *supra* note 136, at 31.

164. *Id.*



ilitating communication and better coordination among police, prisons, courts and the community.”<sup>165</sup> Fourth, they help “[inform] policy on legal aid.”<sup>166</sup>

Malawian paralegals have been successful in effecting a successful juvenile diversion policy. Malawian paralegals first gained access to prisons in 2003 with the intent to track the parents and guardians of juveniles who were in custody. When they began visiting the prisons regularly, they offered to screen juveniles to see if they were eligible for diversion from the formal criminal justice system. After twelve months of screening children in four police stations, the program was expanded to all police stations. Between 2004 and 2007 the paralegals diverted 77% of children’s cases away from the formal criminal justice system.<sup>167</sup> While paralegal programs have also been successful in Kenya,<sup>168</sup> sustained, focused effort is needed to make those services an effective juvenile justice tool.

Using paralegals to provide basic legal advice and training is especially important in places like Kenya, where there are far fewer lawyers than in the developed world. Kenya has 8,001 lawyers for a population of approximately 43 million people.<sup>169</sup> While paralegals already play an important role in providing legal services in Kenya and have a recognized role under the Draft Legal Aid Bill,<sup>170</sup> the Kenyan legislature should consider expanding their role further.<sup>171</sup> The legisla-

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165. *Id.*

166. *Id.*

167. Stapleton, *supra* note 127, at 53.

168. In 2004, the Kenya Prison Paralegals Project was able to reduce “the remand population at Thyika [sic] women’s prison from 80 to 20 prisoners.” PENAL REFORM INT’L, INDEX OF GOOD PRACTICES IN REDUCING PRE-TRIAL DETENTION 9 (2005).

169. *The World Factbook: Kenya*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last visited Nov. 10, 2012); *Membership*, THE LAW SOC’Y OF KENYA, [www.lsk.or.ke/index.php/membership](http://www.lsk.or.ke/index.php/membership) (last visited Nov. 10, 2012).

170. Draft Legal Aid Bill, (June 2012) § 65 (Kenya), available at [http://www.kituochasheria.or.ke/index.php?option=com\\_docman&task=cat\\_view&gid=12&dir=DESC&order=name&Itemid=92&limit=5&limitstart=5](http://www.kituochasheria.or.ke/index.php?option=com_docman&task=cat_view&gid=12&dir=DESC&order=name&Itemid=92&limit=5&limitstart=5).

171. An increasing role for paralegals in the formal justice system has been sought elsewhere in sub-Saharan Africa. For example, the Malawi Law Society has proposed modifying The Legal Education and Practitioners Act to include “paralegals as service providers.” Bruno Kalemba, *Access to Justice: The State of Legal Aid Services in Malawi*, in A HUMAN RIGHT TO LEGAL AID, *supra* note 127, at 99, 103–04. The Sierra Leone Legal Aid Bill of 2012,

ture should permit trained paralegals with a certain level of certification to stand up in magistrates' courts on behalf of unrepresented indigent defendants. Currently, police officers of the rank of Assistant Inspector or higher may serve as public prosecutors.<sup>172</sup> As long as certified paralegals were trained similarly to police prosecutors, this scheme would provide greater equality of arms between the prosecution and defense than currently exists.<sup>173</sup> In addition, the cost of paying a paralegal would be less than that of paying an attorney, and a team of paralegals could work under an attorney to whom they could refer a case if it were too complex.

Though there are many innovative options for providing legal aid, not all of which have been discussed here, there is one scheme that should not be pursued. Kenya requires lawyers to complete a pro bono requirement in order to renew their practice certificates.<sup>174</sup> While pro bono requirements for private attorneys may appear an attractive option because they impose costs on private attorneys rather than on the government, they should not be the government's primary method of ensuring the right to counsel for indigent defendants. Too often, pro bono work results in representation of lower quality than that afforded paying clients.<sup>175</sup> The work is also sporadic and uncoordinated. The Law Society of Kenya estimates that 300 lawyers have offered pro bono services through its Legal Awareness Week over the past three years.<sup>176</sup> This amount of work is not sufficient to meet the needs of indigent clients.

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passed by the legislature and currently awaiting the assent of the President, also includes an extensive role for paralegals. Legal Aid Bill, (2012) § 65 (Sierra Leone); Sonkita Conteh & Lotta Teale, *New Legal Aid Law in Sierra Leone Embraces the Role of Paralegals*, OPEN SOC'Y JUSTICE INITIATIVE (May 11, 2012), <http://www.soros.org/voices/new-legal-aid-law-sierra-leone-embraces-role-paralegals>.

172. The Criminal Procedure Code, (2010) Cap. 75, Subsidiary Legislation L.N. 234/1972 (Kenya).

173. If the prosecutor on a case is a trained lawyer as opposed to a police prosecutor, a paralegal should not be used to provide legal representation.

174. McQuoid-Mason, *supra* note 142, at 457–58.

175. LEGAL AID HANDBOOK, *supra* note 136, at 28; McQuoid-Mason, *supra* note 142, at 458.

176. THOMAS O. HANSEN ET AL., DANISH INST. FOR HUMAN RIGHTS, ACCESS TO JUSTICE AND LEGAL AID IN EAST AFRICA: A COMPARISON OF THE LEGAL AID SCHEMES USED IN THE REGION AND THE LEVEL OF COOPERATION AND COORDINATION BETWEEN THE VARIOUS ACTORS 69 (2011).

Therefore, the current pro bono requirement should be used to continue to provide supplementary legal aid services, but the government should not abdicate its responsibility to provide representation to indigent persons by relying solely on such a program.

#### CONCLUSION

The recognition of a categorical right to counsel at state expense for Kenyan children is an important rights-protective procedural safeguard. The Children Act establishes a strong rights-respecting background for the adjudication of juvenile cases in Kenya. However, the judiciary's ongoing failure to implement the Children Act properly means that the need for counsel is even greater for children than it would otherwise be. Without an effective program of diversion, this right is likely to be too resource-intensive for Kenya to bear. Therefore, in looking ahead to fulfilling its constitutional obligations, Kenya must make good use of non-custodial sentencing procedures as well as diversion at the first point of contact with the justice system. Further, Kenya should pass the pending Legal Aid Bill to provide comprehensive, coordinated legal aid services. The country should also continue to take lessons from other developing nations to determine how to structure a cost-effective, innovative legal aid system that meets the needs of children. With careful planning and execution, Kenya can become a model nation for the fulfillment of its duties to juvenile defendants.