

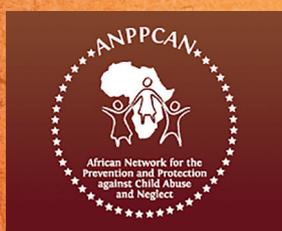
# CMI REPORT

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## Taking the inside or outside track – or both?

NGO advocacy in state reporting under the  
Child Rights Convention: a case study from Kenya

Hugo Stokke



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# 1 Introduction

When states ratify international human rights conventions, they accept an obligation to report on its implementation in law and practice. Under the UN treaty body monitoring system, it has become a regular practice to invite shadow or parallel reports from non-state actors with an interest in the conventions. These alternative reports often take a critical posture to the officially sanctioned state reports and they are typically produced by domestic or transnational civil society organisations (CSOs) for the purpose of bringing to light issues that may have been intentionally or inadvertently omitted from the official versions or biased in various ways in order to put the state in the best possible light. These reports are supplements or counterpoints to the state reports and make up parts of the written evidence to be considered and evaluated by the monitoring committee. On the basis of information available to the committee and supplemented by oral questions and answers (Q&As) involving the state delegation, the committee is in a position to make concluding observations and to recommend specific follow-up actions to be taken by the State party.

This paper asks the perhaps provocative question whether these alternative reports are really necessary. This is not to deny the possibility that these reports may serve a useful purpose as alternative and supplementary sources of information to that provided by the government. The point is simply made that there is nothing wrong – in principle – with the state and non-state actors jointly producing a single, consolidated report, extracting and balancing all relevant information in the public domain. The probability of this happening is contingent upon the terms of cooperation or contestation between the two parties. If the relationship is adversarial, the chances of collaboration are slight.

An alternative explanation of the production of parallel reports may be the self-interest of CSOs and their coalitions to justify their existence and project a high profile. If they are not seen to be at least critical, if not adversarial, they are unlikely to credibly perform their mission as advocates of their constituency. If the state cannot be faulted, then, one might argue, there is hardly a need for watchdogs. But this conclusion may be too hasty. A satisfactory state of affairs at a given point in time is no guarantee that it will remain so. And having a potential alternative voice is an advantage, as a matter of principle, even if actual disagreements may at times be only slight.

The paper is divided into three sections. First, a theoretical section introduces the various means of exerting policy influence. Of particular importance is the distinction between outside and inside tracks. The former opts to work outside the establishment, seeking to influence decision-makers by organising constituencies and channelling voices through their organisations into the established political system. The latter seeks to work inside the establishment, targeting individual key personnel directly and selectively or by offering their expertise to decision-making agencies. This may not involve an either-or choice. The two tracks can run in parallel, depending on calculations of what may be the more effective method.

In the second section a case study is presented of how this process works in the case of Kenya's reporting under the Child Rights Convention (CRC). The main issue is the role of child rights CSOs in organising, preparing and drafting reports to the Convention's monitoring body. We want to examine the ways in which CSOs have contributed to the official report and by what methods, in particular the choice of track to follow. We also want to investigate what reasoning underlies the drafting of an alternative report, not only from the perspective of CSOs, but also from that of state officials and state bodies.

The third section examines the extent to which policy influence is not only directed towards the domestic state, but also towards international constituencies. Do the CSOs, through their domestic reporting, influence the monitoring bodies? Are their inputs considered by the Committee and given credence in its concluding observations and recommendations? Do the parallel reports have any effect? The critiques of domestic NGOs are taken on a detour through an international body and return to the state from afar and from above, figuratively speaking.

The second section is largely based on interviews conducted in Nairobi with representatives from both state and civil society, from CSOs involved in co-ordination and reporting, and from government ministries and departments responsible for the legal and administrative enforcement of child rights. The third section relies on close scrutiny of the reporting and monitoring process, starting from the second state report and ending with the conclusions and recommendations of the Committee. The key question is if and how the alternative reports differ from the official ones and to what extent they are considered and deliberated upon by the Committee.

## 2 Theories of policy influence

There are many theories that seek to explain how policy influence can be exerted, some with explicit reference to rights. One model has been offered by Keck and Sikkink with an emphasis on the workings of transnational networks. Networks can work on issues both simultaneously and sequentially. Four political methods are highlighted:

“(1) *information politics*, or the ability to quickly and credibly generate politically usable information and move it to where it will have the most impact; (2) *symbolic politics*, or the ability to call upon symbols, actions or stories that make sense of a situation for an audience that is frequently far away; (3) *leverage politics*, or the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence; and (4) *accountability politics*, or the effort to hold powerful actors to their previously stated policies and principles.<sup>1</sup>

For our purpose, the first and last political methods are of highest relevance, but also to some degree the third. The degree of norm abidance depends on information politics and on what information is disclosed (and what is not). Alternative reporting is one way of holding states to account over and above its own self-examination which can be biased and incomplete. By ‘siding’ with an international body, more authoritative pressure can be put on the state, but we have to acknowledge the fact that to be subjected to international scrutiny is a fully voluntary act on the part of the state.<sup>2</sup>

What is the purpose of these four methods? What are they directed towards? Keck and Sikkink list four types: (1) issue-creation and *agenda-setting*; (2) influence on *discursive positions* of states and international organisations; (3) influence on *institutional procedures*; (4) influence on *policy change* in

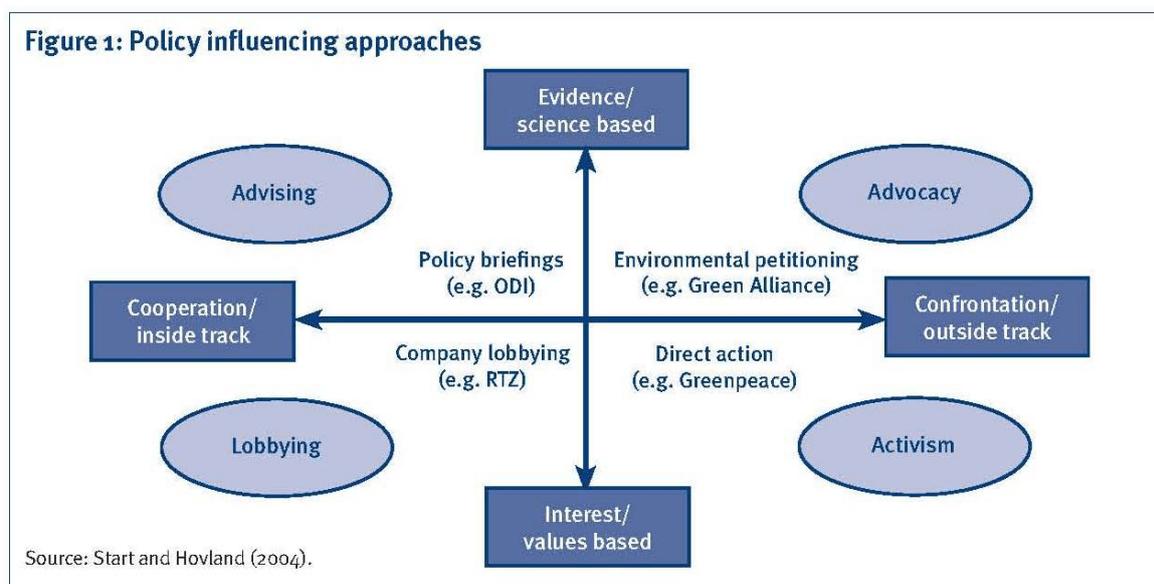
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<sup>1</sup> Margaret E. Keck and Kathryn Sikkink: *Activists Beyond Borders. Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998), 16.

<sup>2</sup> This is not to deny that there are instrumental calculations behind ratification as well. States are concerned with their international standing and prestige, even if they are aware of problems of legal incompatibility and lack of capacity for implementation. Other states reason diametrically opposite; they do not countenance ratification unless they are certain that there are no legal and other hurdles obstructing compatibility and implementation.

target actors; and (5) influence on *state behaviour*.<sup>3</sup> For our purposes, all five are of relevance. CSOs can set the agenda on issues that hitherto have been neglected or sidelined; they can influence the position of the state in their reporting to the monitoring bodies; they can push for a more participatory role in state reporting; they can seek policy changes through their participatory role; and with the help of the monitoring bodies influence state behaviour within the issue area. Of all five, probably the most important is agenda-setting, to put issues to the fore that have sidelined and neglected hitherto.

Having said something about the purpose and methods of policy influence, a few words have to be added on how this influence can be exerted. Some approaches have been suggested by researchers at the Overseas Development Institute.<sup>4</sup> Figure 1 below illustrates four options:



Source: Harry Jones, *A guide to monitoring and evaluating policy influence. Background note* (London: Overseas Development Institute, 2011), 2.

This is a two-by-two table split along two dimensions. One dimension is the evidence/ value dimension wherein some approaches veer towards the value end of the continuum whereas other approaches veer towards the evidence end. The other dimension is the one given in the title of this paper: the choice of an inside or outside track which for our purpose is the more significant of the two. One weakness with the evidence/value dichotomy is that it seems improbable that values and evidence can be so neatly divided. Value-based approaches need at least some evidential base to appear credible, even though the evidence may be selectively picked in order to bolster campaigns. Advocacy, as understood here, would be somewhat vacuous unless backed by expressed values and interests. Lobbying, though clearly interest-based, often attempts to package parochial interests in arguments of general beneficence to society at large. Advising may be seen as being disinterested and impartial, but often remains anchored in values, though perhaps less in articulated interests. The concept of ‘epistemic communities’, known from political science, denotes communities which share both causal

<sup>3</sup> Keck and Sikkink, *Activists*, 25.

<sup>4</sup> Daniel Start and Ingie Hovland, *Tools for Policy Impact. A handbook for Researchers* (London, Overseas Development Institute, 2004), 5 and Harry Jones, *A guide to monitoring and evaluating policy influence. Background note* (London: Overseas Development Institute, 2011).

beliefs and principled beliefs, the first associated with knowledge of how things work, the latter with value-laden beliefs about how things ought to work.<sup>5</sup>

The other distinction is less problematic, though. Choosing the outside track implies not only influencing policy-makers, but also the public at large. Campaigns seek to change the views of key government personnel, but also the attitudes of civil society to rally more force behind the demands for policy change. Advocacy in general aims to effect change on both fronts and may target a multitude of actors and agencies to bring about change. It is different, though, with the inside track. Lobbyists seek out their targets more carefully and do not rely on public opinion and, in fact, may rather prefer to avoid too much spotlight on their activities. Advice, also clearly on the inside track, is a bit more ambiguous in this respect. Advice may be sought by policy-makers or it may be offered by experts and the parties may have widely differing motives for either seeking or offering it.<sup>6</sup> Though lobbying and advice may be seen as being cooperative (in the absence of confrontational approaches), the context differs. Lobbyists seek the cooperation of policy-makers to advance their interests, while policy-makers seek the cooperation of experts to marshal evidence for the soundness of their policies. Differing instrumental considerations may lie behind what appears to be *prima facie* consensus-seeking.

In brief, the main distinctions between the inside and outside tracks may be described in terms of the following contrasts; many participants/few participants; media exposure/direct contact; public visibility/private process; conflict of views/common ground; and simple messages/detailed messages. There will be shades of grey in between, but the key point to remember is that the outside track will in various ways involve the public at large. The inside track will never involve the general public, perhaps most clearly in the case of expert advice which by its very nature only admits those who have recognised competence and with regard to sensitive issues may even be shrouded in confidentiality.

Policy influence depends on knowledge about how policy changes occur and about the nature of the policy process. With reference to *policy changes*, different theories have been proposed to explain change.<sup>7</sup> *Large Leaps Theory* (or Punctuated Equilibrium Theory) explains large and fundamental changes in policy, as distinct from incremental changes whereby policy is adjusted without fundamental changes. This happens when a policy issue is redefined or reconstructed, resulting in institutional changes and the creation of new departments and agencies.

*Coalition Theory* (or Advocacy Coalition Framework) applies when individuals who share certain core beliefs about policy areas, recognise the seriousness of the issues, assess society's capacity for change and offer solutions. The binding thread is the core beliefs and the advantage of coordination across individuals and groups. These coalitions may have different ideas of how to go about it. Some are targeting the public and mass media, others individual decision-makers, and yet others are influencing perceptions through research and information exchange.

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<sup>5</sup> See Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization* 46, no. 1 (1992), 1-35.

<sup>6</sup> On this point, see Christina Boswell, *The Political Uses of Expert Knowledge* (Cambridge: Cambridge University Press, 2012).

<sup>7</sup> For a summary, see Sarah Stachowiak, *Pathways for Change. 6 Theories about How Policy Change Happens* (Seattle, Wash.: ORS Impact, n.d.), 3.

*Policy Windows Theory* (or Agenda-Setting Theory) shifts the focus from how advocacy coalitions are generated to specifying the conditions for actual policy influence. This theory is based on the existence of separate and parallel streams and the task for advocacy is to find the points of convergence. The three streams represent problems (definition, attributes, solvability), policies (ideas, solutions) and politics (political mood, campaigns, change of officials). According to this theory, at least two of the streams have to converge for a window of opportunity to open, and success is most likely when all three streams converge. Real policy influence depends very much on timing, the ability to find the right moment in which to focus energies.

*Messaging and Frameworks Theory* (Prospect Theory) says that decision-making is very much a function of how issues are framed and information presented which can be done in multiple ways. Decisions can be inconsistent, reflecting that decisions are based on simplified assumptions and on certainty rather than ambiguity. This theory argues that the way an issue is framed is important in (explaining) changing perceptions and behaviour and ultimately policy changes.

*Power Politics Theory* (Power Elites Theory) is a theory of the inside track whereby direct relationships are made with decision-makers or indirectly with influential people close to decision-makers. As with the Policy Windows theory, timing is critical to identifying the most opportune moment for exerting influence.

Finally, *Grassroots Theory* (or Community Organising Theory) is, to follow the terminology used here, taking the outside track, assuming that power is not monopolised by the elites, but is malleable and can be shifted by capacity-building, mobilisation, awareness creation and policy analysis, media action, social protest and campaigns.

Moving to the *policy process literature*, there are multiple theories seeking to explain how the political process works. Roughly, they may be divided into two categories, *rational* and *political* theories or models.<sup>8</sup> Rational theories assume a logic of stages or sequences which is linear, either uni-directional or reversible. The political models, on the other hand, emphasise knowledge and beliefs. These features may be shared to varying degrees. Issue networks are looser and less consolidated and not necessarily agreed on either problem definition or desirable policy outcomes. Policy communities are more consolidated than issue networks, but differ from epistemic communities in not sharing principled beliefs. Policy networks consist of specialists within defined policy fields and provide space for policy entrepreneurs who are willing to expend time and energy (and money) to promote proposals or ideas. Advocacy coalitions, as mentioned above, are united by their core beliefs, but may differ in material and other interests or in methods to achieve their goals.

For the purpose of this paper, we are not in a position to follow the process all the way through to a decision and subsequent policy change. Furthermore, the process is mediated by the presence of an international monitoring body. The state of affairs on child rights is looped through an international body that feeds back into the policy apparatus of the State party. The international body can then exert an additional ‘soft’ influence on the state in order to ensure compatibility of state law and practice with international standards. In developing countries, the presence of international agencies and donors adds another factor that has to be taken into account. These may be state donors and international

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<sup>8</sup> See Stephanie Neilson, IDRC-Supported Research and its Influence on Public Policy. Knowledge Utilization and Public Policy Processes: A Literature Review (Ottawa: International Development Research Center, 2001) and Rebecca Sutton, The Policy Process: An Overview (London: Overseas Development Institute, 1999).

CSOs which under these circumstances add up to transnational networks buttressing the work of domestic advocacy coalitions.

Recognising that policy changes may lie far into the future, we shall instead look at agenda-setting, i.e. how an issue has been recognized as a problem and what solutions have been recommended. As has been argued, agenda-setting is the bottleneck.<sup>9</sup> The key sources are the reports prepared by the State party and CSO coalitions to the Child Rights Committee. We want to know how they are prepared and how the CSO coalition can bring issues to the table that for various reasons have been bypassed or sidelined by the official reports.

### 3 Preparation of the reports

In this section we shall look at how the State party and the complementary reports are prepared. The main emphasis shall be on the second as we have all the information necessary to form an opinion on whether and to which extent the complementary report had an influence on the concluding observations of the CRC. We also have information on the preparation of the third State party report, which is actually a combination of the third, fourth and fifth reports, but as the process is still at an early stage, we cannot form any opinion on CSO policy influence at this point. It was reportedly submitted in June 2012, but as of writing, the process has only got so far so as to schedule a pre-working group session in June 2015 to draw up a list of issues for further information from the State party. If this is correct, it indicates a lag of three years from submission to the initial processing of the report and what certainly looks like a growing backlog on the part of the CRC in processing reports.

However, the preparation of the first and initial State party reports is also of interest, because the process was quite different from the standard procedure for the second and third. For one thing, the first State party report is completely anonymous in contrast to the second which had an extensive list of government officials from various ministries as well as both Kenyan and international CSOs and international agencies such as UNICEF credited for their contributions. According to Jane Mbugua, the first was very much a trial and error exercise.<sup>10</sup> Both the State and the CSO sector had to rely on information from the Save the Children Kenya which had links to HQ and other offices and could advise on the procedures and process of drafting the report and UNICEF and CLAN also participated in the collection of information. The involvement of the CSOs in the drafting of the State party report was a valuable experience in preparing the alternate one. But even with the participation of the CSOs in the drafting process, certain sensitive pieces of information had been edited out in the final report that was submitted to the CRC. The CSOs felt they had the responsibility to pass on these missing pieces of information to the CRC which they eventually did. These related to large displacement of people who were living in camps due to political instability in conjunction with the national elections at the time. There were also extra-judicial killings affecting many families, events that the State did not want to be known. There were also weaknesses in the juvenile justice system with children

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<sup>9</sup> Robert W. Porter, *Knowledge Utilization and the Process of Policy Formation. Toward a Framework for Africa*, at [http://www.path.org/vaccineresources/files/Knowledge\\_utilization\\_policy\\_formation\\_USAID.pdf](http://www.path.org/vaccineresources/files/Knowledge_utilization_policy_formation_USAID.pdf). Accessed 4 February 2015.

<sup>10</sup> Interview with Jane Mbugua, former chair of the NGO CRC Committee, Nairobi, August 2012. For further details, see Jane Waithira Mbugua, *Reflections on key of children sector in Kenya from 1989 onwards as recorded by some national civil society actors*. Save the Children Finland, August 2012.

detained under deplorable conditions and together with adults and with no regard to due process. The CSOs had the opportunity to present these issues before the CRC which then could include them among the list of issues requiring further information from the State party. The involvement of children in producing the State party report was, however, minimal and there was also some reluctance on the part of the State party to disseminate the concluding observations of the CRC.

For the second State party report, the procedure was very different. In the view of Jane Mbugua, the second report was the best engagement with the government so far in terms of openness and willingness to exchange information. Much of the information supplied by the CSOs were in the official report, so the supplementary report was more a matter of providing updates and the CSO representatives after having made presentations before the CRC in Geneva debriefed the government on their return. The weakness, as she saw it, was in the dissemination of the concluding observations, but overall, the process was fine.

For one, steps were taken to include children in the process, particularly through holding regional consultations throughout all ten regions of Kenya and a national validation workshop after the conclusion of the regional consultations. Four children out of those participating in the workshops were selected to accompany the NGO delegation and to appear before the CRC. A separate session was held with the children alone and the feedback from the CRC was very positive. The Committee was quite impressed with the performance of the children.<sup>11</sup> An added positive factor was quoting children verbatim in the official report and even including drawings to compensate for difficulties of language.

Secondly, both reports follow the thematic structure set by the CRC into eight thematic sectors and government officials and CSO representatives contributed inputs according to their competence within each sector or across.<sup>12</sup> For both the complementary reports, the Kenya Alliance for Advancement of Children (KAACR) was strongly involved as well as a representative of Save the Children Canada. While regionally and locally based CSOs were consulted during the preparation of the official report, they were minimally consulted in the drafting process of the complementary report. This might be because of lack of resources or because the perception among key CSOs was that they had been adequately consulted during the preparation of the official report. In any case, only a few people were involved in the actual drafting and finetuning of the complementary report, hence possibly making it less representative of the CSO community than what it ought to have been.

For the third report, there was, according to Jane Mbugua, some dragging of feet from both the government and CSO side, but regional consultations were facilitated with the help of a former employee of Save the Children Canada and information was compiled by the National Council for Children's Services and CSOs. For the third report, the engagement with children was less than for the previous report and having a joint validation workshop with adults and children was not the right way to go about it. For the supplementary report, there were no regional consultations. In her view, the participation of children in the preparation of the third report was not up to the high standards set by the second. As for the earlier reports, UNICEF provided financial support and the CSOs themselves put up financial contributions for the regional workshops, particularly in those areas they were active.

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<sup>11</sup> The range of age was from 11 years to 17 years. The representatives were selected from the children themselves. Both boys and girls had to be represented. Some did not have a passport or even a birth certificate.

<sup>12</sup> Section 4 of this paper follows the thematic structure with eight themes.

As before, there were separate sessions for adults and children, though not for the national validation workshops.

All in all, the process over the years has led to much more cordial relations between the government and the CSOs to the extent that government may subcontract work to CSOs on legal issues and seek advice or exchange information on a more informal basis, and it is not unusual for personnel to move back and forth between the government and the CSO sector.<sup>13</sup> However, cordiality could entail co-optation by the government, so it is imperative for the CSOs to keep a certain distance on major policy issues and to retain their autonomy, even if it means taking stands on issues that go against government positions, but without fear of being sanctioned for so doing. So, to return to our typology for the CSO sector, it is not really a question of choosing the inner or outer track, it is a question of choosing the track that works best. If personal relationships can be used to push an issue, then they should be used, but if an issue is addressed and it is not working, then as Jane Mbugua said, ‘take it to the street with banners!’

To get the views not only from the CSO side, we had the opportunity to speak with the government side as well.<sup>14</sup> Ahmed Hussain is the head of the Department of Children’s Services and was part of the Kenyan delegation meeting the CRC in Geneva on the second State party report cycle and was strongly involved in the preparation of that report and the third submitted in 2012. He emphasized that the CSOs were participating in the preparation of the State party reports from the word go; from the initial stakeholders’ meeting, budgeting, roadmap, sharing of responsibilities for each thematic group, leading onto the regional forums and to the validation workshops following the regional consultations.

Since the preparation of the State party report was so inclusive, what would be the justification for having a complementary one? According to Ahmed Hussain, because not all of the CSOs may have been involved, not all that is happening may have come out critically during the consultative fora, and there might be things happening on the side that were not properly captured in the report. This is helpful because there might be issues raised by the Committee that otherwise might have been more difficult to respond to. The UN agencies are also suppliers of information to the Committee as well as sponsoring the activities of the Government so the Committee has a range of sources of information to use in their deliberations with the Government delegation. Among the issues that came up were the influx of armed Somalis which was a current event at the time and the issues of parental responsibility and children’s help line that might have dated from the complementary report, according to Hussain. Some of the issues were raised directly by the children appearing before the Committee, such as corporal punishment. Other issues, pertaining to the compatibility of domestic law with international treaties, may have come from the UN agencies. Some issues may have originated with the minorities or even from politicians and the Government.

Hussain thought that the conclusions of the CRC were fair, but could be quite demanding and some issues were liable to be taken up again and again in the conclusions of the CRC, corporal punishment being an example. The government had done what could be humanly possible in terms of legislation, policy, advocacy and training, but still is dependent on reporting from children, from homes and from schools. The help line is hugely important in reporting abuse, including sexual abuse, to the government which can then take action. Female genital mutilation (FGM) is similarly a deep-rooted

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<sup>13</sup> Online technology, including email, very much helped in exchanging information in a timely manner.

<sup>14</sup> Interview with Ahmed Hussain, Head of Department of Children’s Services, Nairobi, August 2012.

cultural practice which will take time to eradicate, even though it has been a recurrent item in the CRC concluding observations. The same can be said for child abuse which is still happening and not unique to Kenya. Other potential intractable issues might include IDPs, tribal clashes, trafficking, orphans and child labour, even though total numbers have come down.

On the division of labour between the government and the CSO side, Hussain would very much like to see it continued as it is, even though it can be expensive and labourious. As he said, ‘sometimes you might not see the speck in your own eyes, somebody else may see the speck and have to remove it.’ It also helped to create a friendly environment as when the Government managed to acquire a toll free telephone number from Telecom Kenya and asked the CSO community to run the help line service on a 24/7 basis and provided facilities for doing that.

For the third, or rather, the consolidated third, fourth and fifth reports, the process was coordinated by the National Council for Children’s Services and one of their sub-committees, the Committee on Policy and Legal Issues was charged with organising the work.<sup>15</sup> This committee against established their own national steering and technical committees for the planning and operative work. Cluster groups were set up to work on the eight thematic areas to be covered in the report. The chair was usually the Ministry in charge of the thematic area, as for example health, and the co-chair a representative of the CSO community. These clusters fit into the four pillars of protection of the NCCS, namely survival, development, protection and participation. The first draft was completed in 2011, building on information and statistics, also from the CSOs. The next step was to hold regional consultations with adults and children. Again the purpose was to collect information from different categories of children from 12 years upwards. All together 13 fora were organised with three especially for children with disabilities. A consultant was hired to put together the information provided by the various clusters as well as the reports from the later regional fora.

Speaking of the complementary report to the third State party report, Ms. Murgor did not see a strong need for one as there was no substantial disagreement between the government and the CSO side on the issues as the process has been an inclusive one from beginning to end.<sup>16</sup> But the government would not like to be seen to gag the CSO side if they did want to go ahead with a complementary report.<sup>17</sup> As we have said above, the cycle is still at an early stage (more than two and half years after submission,) but Ms. Murgor could foresee that certain recurrent issues could come up, particularly the issue of child labour which is within the thematic area of special protection (see 4.8.2 below). Corporal punishment and child trafficking are other issues that might come again and for both, clarifications about what government ministries or agencies have the primary responsibility would be helpful.

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<sup>15</sup> Interview with Ms. Murgor, National Council for Children’s Services, Nairobi, August 2012. Further information on the National Council on Children’s Services can be found in National Council for Children’s Services, *The Framework for the National Child Protection System for Kenya*, available from <http://resourcecentre.savethechildren.se/library/framework-national-child-protection-system-kenya>. Accessed 18 February 2015.

<sup>16</sup> This was confirmed in a separate interview with Mr. Tim Ekesa, head of KAARC. As a side note, we dwelled in the interview with Ms. Murgor on the semantic distinction between a supplementary, a complementary and a complimentary report. There was a clear perception that it should not be seen as an alternative report.

<sup>17</sup> Mr. Ekesa stated in the interview that there was a requirement to have an alternate CSO report, but that does not follow from the CRC concluding observations which speak of cooperation with civil society in general terms. See Committee on the Rights of the Child. *Consideration of reports submitted by States under Article 44 of the Convention. Concluding Observations: Kenya*. 44<sup>th</sup> session. (CRC/C/KEN/CO/2), 19 June 2007, para.19.

Contributions from the CSO sector are valuable as these issues not only target government, but require attitudinal changes within civil society at large and thus suitable for broad-based campaigning.

Ms. Murgor said that what she liked about the second state party report was that ‘there was a lot of honesty and facts in terms of policies, legislation and even programming and then we bring out the challenges and even recommendations as to the way forward (...) I would hope that the complimentary report by civil society would carry the same message, because if we have a common goal we are saying how can this complimentary report by civil society add value to the report that the state has provided (...) We are given concluding observations. Does the same happen for the complimentary report? If it doesn’t happen, then on what value is it? Because to me, when they give those concluding observations, then it is like the state is being told, yes, we commend you on these areas, but you need to improve on these areas, then that report is not going to assist in generating feedback.’<sup>18</sup> That raises a very important point, because it goes to the heart of what is the value added of the complementary report. We know for sure that the CRC does not comment on the additional sources of material it has access to, so that there will be no specific response to the complementary report as such and hence no feedback to the government or the CSO sector. The feedback or response of the CRC will be based on all sources available to it, governmental, non-governmental, international or domestic. So what is the value added of the complementary report? In the next section we hope to give an answer by a close reading of both the official and the complementary reports and the CRC concluding observations.

## 4 Agenda-setting: Comparing reports and assessing agenda-setting influence

Before getting to the actual reports, it may be warranted to outline the procedure of reporting and monitoring. The system is based on regular state reports which may be supplemented by reports prepared by domestic and international CSOs. After examining the state reports, the monitoring body, in this case the Child Rights Committee, draws up a list of issues to be examined in closer detail and a set of questions is drafted. The state is then required to provide the information requested by the Committee. After this information has been submitted, the state delegation meets with the Committee in a question and answers session in Geneva. Drawing on written as well as oral information, the Committee drafts its concluding observations, usually containing specific recommendations to be followed up in the next report to the Committee. With those recommendations, the cycle begins anew.

For the purpose of this paper, we shall examine the second round of reporting. The advantage is that we have the concluding observations from the first report and can determine the extent to which these have been followed up in the second report. Further, we have the full set of official reports, the transcripts of the Q&A sessions and the concluding observations of the Committee. In addition, we have the alternative reports prepared by domestic and international CSOs. The key question is the following: To what extent has the parallel CSO report had an agenda-setting function by emphasising issues other than those contained in the official report and to which extent have these issues been taken up and considered by the Committee?

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<sup>18</sup> Another point brought up was whether government officials were able to see and read the complementary report before it was dispatched to the CRC in Geneva. For reasons of reciprocal accountability, that certainly ought to be done, but we can’t verify it.

It is stated clearly that the report supplied by the NGO CRC Committee is a complementary and not an alternative report. It was compiled in response to the official State Party Report and the contents of the official report were obviously known to the drafters of the complementary report. It is noted in the introductory paragraph of the complementary report that the process of preparing the State Party Report was ‘quite inclusive’ with participation from children and civil society organizations and that the State party report ‘forms the springboard for the NGO complimentary report.’ The first thing to note, as we found in the above section, is that both tracks were followed in the drafting process of the official report as the NGO coalition were both on the inside track in assisting in preparing the official report and on the outside track in drafting a complementary report.

Secondly, the NGO CRC Committee is an example of what we above called an advocacy coalition, a coalition of NGOs with common core beliefs and acknowledging the advantage of coordination, but with differences in working methods and in target groups. The Committee may also be an example of the Policy Windows Theory as two separate streams converge in this specific case; first the problem stream (definition, attributes, solvability) and secondly, the policy stream (ideas, solutions) and thirdly, though perhaps more uncertain, the politics stream.

The methodology for compiling the complementary report included examining the concluding observations from the previous State party report to see what follow-up action has been undertaken; incorporating reports from various regional children’s workshops; interviewing key officials in Government ministries; and updating on developments after the submission of the State Party Report. In other words, the complementary report is not really an alternative report, a separate statement written independently and without knowledge of the content of the official report. This fact complicates our own methodology here because it makes it more difficult to discern what is taken from the official report and what are the original contributions of the NGO Committee. As both international and national NGOs assisted in various ways in preparing the official report, the report is officially of course a government document, though with considerable support from the outside.<sup>19</sup> In other words, there is a probability that the report represents the consensual view far beyond government circles which is not really surprising considering that the CRC has been ratified by practically all states in the world and very much represents a global consensus on the issues.<sup>20</sup>

The structure of the various reports is similar. The State party report is divided into eight chapters which are as follows; (1) General measures of implementation, (2) Definition of a child, (3) General principles, (4) Civil rights and freedoms, (5) Family environment and alternative care, (6) Basic health and welfare, (7) Education, leisure and cultural activities, and (8) Special protection measures. The State Report runs to 100 pages so it is well-nigh impossible to go into detail on legislation and policy across all eight chapters. The complementary report is considerably shorter (38 pages) and the concluding observations from the CRC Committee shorter yet (22 pages) as it is written as a summary of the information made available to it. Furthermore, the State report for obvious reasons does not contain recommendations in contrast to the two others, but does list the various constraints that prevent full implementation of the many provisions of the CRC.

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<sup>19</sup> Jane Mbugua who was a key author of the complementary report was also credited with providing technical support in the preparation of the official report.

<sup>20</sup> As per the current chart of CRC ratifications, there are 194 State parties to the Convention. The only states that have not ratified the CRC are Costa Rica, Somalia, South Sudan and the United States of America. See the list at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en).

As the CSO report is a complementary report, our purpose here is to see to what extent it does complement the official State report by adding issues that have not or insufficiently been covered in the official State report and secondly to see whether these issues have been picked up by the Committee in their concluding observations and recommendations. We will leave aside the parts that are merely repetitions or restatements of material in the official report. While acknowledging that all issues are of importance, we regard (1) - (4) and (8) to be of higher importance as they touch upon core features of the CRC, especially (3) which will be reflected in the following analysis.

As of writing, the third cycle has not been completed and according to available online information there will be a pre-sessional working group to draw up a list of issues requiring further information from the State party. This indicates that a third State party has been submitted and possibly a complementary report, too, but as the cycle is still in an early phase, it would be premature to consider it here.

## 4.1 General measures of implementation

The complementary report is more specific on *legislation* contrary to the CRC. The ratification of the Statute of the International Criminal Court entails the prohibition of sexual exploitation as part of war crimes and crimes against humanity and there is no municipal law reflecting the standards of the Rome Statute, though the Sexual Offences Act has a broader definition. Children born out of wedlock have only the support of the mother while children born within wedlock have the support of both parents. This is contrary to the spirit and provisions of the CRC which place responsibility on both parents, according to the report. The report makes a point that criminal responsibility remains at eight years of age and that the Constitution allows for discrimination based on personal law which has the effect of nullifying protection in the Children Act against different harmful cultural practices.<sup>21</sup> The CRC Committee does welcome the enactment of the Children's Act in 2001, but urges the continuation of the legislative review of the situation of orphans and vulnerable children and generally asks the Government to mobilize all resources to ensure the effective implementation of the Act, including the protection of child victims and witnesses of crimes.<sup>22</sup>

With regard to *coordination*, both the state and the complementary report speak of the the National Council for Children Services and the Department of Children's Services, but the complementary report raises a point about clarification of roles between the two. The issue is whether the NCCS should limit itself to making policies and leaving implementation to the DCS or whether it should do both. The complementary report also draws attention to the absence of Area Advisory Councils in most districts, representing the NCCS at the local level, and lack of capacity in those areas where they have been established.<sup>23</sup> The CRC Committee picks up this point and recommends the State party to 'strengthen its efforts to establish mechanisms for coordination at the local level throughout the country and assign adequate resources to support inter-institutional coordination at both national and local levels.'<sup>24</sup>

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<sup>21</sup> See NGO Complementary Report on: Implementation of the United Nations Convention on the Rights of the Child (UNCRC) in Kenya, compiled by Kenya NGO CRC Committee. July 2006, 13.

<sup>22</sup> Committee on the Rights of the Child. Consideration of reports submitted by States under Article 44 of the Convention. Concluding Observations: Kenya. 44<sup>th</sup> session. (CRC/C/KEN/CO/2), 19 June 2007, para.9.

<sup>23</sup> NGO Complementary Report, 14.

<sup>24</sup> CRC, Concluding Observations, para. 11.

With regard to *independent monitoring*, both reports mention the Kenya National Commission on Human Rights, but the complementary report says that there are no specific measures taken by the Commission to address violations of children's rights and that the Commission does not handle civil litigation even if it involved children. The complementary report recommends establishing a specific department for dealing with children's issues and setting up a quick response mechanism to address violations of children's rights.<sup>25</sup> The CRC Committee picks up this point and recommends the State party to 'ensure that KNCHR pays special attention to the concerns of children, e.g. by establishing a children's right unit in order to be accessible for children and to facilitate dealing with complaints by or on behalf of children in a child-sensitive manner by well-trained staff, and when cases have been referred to authorities ensure that they are followed up on by KNCHR.'<sup>26</sup>

On *data collection*, both the complementary report and the CRC Committee are in full agreement that the State party 'strengthen its system of collecting data as a basis for assessing progress achieved in the realization of children's rights,' but it should be noted that this was in the Committee's list of issues requiring further information from the State party, so this might be a Committee initiative independently of the complementary report.<sup>27</sup>

On *allocation of resources*, the State party report acknowledges that 'children's interests are not clearly identified in the budget and so a clear analysis of the proportion spent on children is not possible' and 'while there has been a general increase in the allocation to social services such as health and culture it is not possible to identify children's interests in the budget so that a clear analysis can be done on the proportion that is spent on children.'<sup>28</sup> The complementary report adds the important point that 'children are not involved in the budgetary process and their interests are not taken on board.' The report also says that the Government has purchased expensive and luxurious vehicles and spent a lot of money servicing foreign debts which could have gone to improve the welfare of children. Of course, issues of wastage go beyond the mandate of the CRC Committee. In their concluding observations, there is no mention of wastage, but the State party is encouraged to negotiate debt relief in favour of resources for child protection. The Committee notes that 'it is not possible to identify the funds spent on children or have a clear understanding of this proportion of the budget.'<sup>29</sup> The Committee urges prioritisation of children's economic, social and cultural rights, especially for marginalised children and adequate budget allocations with a view to alleviating disparities.

## 4.2 The definition of a child

There was no disagreement between the State party report and the complementary report on this issue. The Children's Act defines a child as under the age of 18 years, but there is no definition of a child in the Constitution of Kenya and as the revised Constitution was rejected, there is still no definite constitutional grounding. There is no minimum age for sexual consent for boys, but the age was raised from 14 to 16 years of age for girls. The Hindu Marriage and Divorce Act and the Marriage Act

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<sup>25</sup> NGO Complementary Report, 15.

<sup>26</sup> CRC, Concluding observations, para. 13.

<sup>27</sup> CRC, Concluding observations, para. 17.

<sup>28</sup> See Committee on the Rights of the Child. *Consideration of reports submitted under Article 44 of the Convention. Second periodic reports of States parties due in 1997. Kenya.* CRC/C/KEN/2. 4 July 2006, para. 41.

<sup>29</sup> CRC, Concluding observations, para. 14.

provide that the marriage age is 16 years for girls and 18 years for boys. Customary and Islamic Sharia law allow for persons below 18 years to be married.

The State party report gave a solid overview of legal provisions across a wide range of areas, including marriage, sexual consent, criminal responsibility, employment, inheritance, enlistment in the armed forces and so on. The complementary report covers some of the ground in the official report, particularly marriage, sexual consent and labour. The concluding observations of the CRC state unequivocally that the minimum age for marriage is 18 years of age for both girls and boys.

## 4.3 General principles

### 4.3.1 Non-discrimination

The complementary report drew particular attention to the very low enrolment rate in schools of children from the North Eastern Province. In 2003 it was 9.3 per cent for girls and 15.9 per cent for boys as against 89.8 per cent and 91.3 per cent in Nyanza Province, demonstrating huge regional disparities. Other discriminated groups include children with disabilities, orphans and vulnerable children (OVCs), children from families affected by HIV/AIDS, refugee and asylum seeking children and children born out of wedlock. Most of these problems are acknowledged by the State party, though there is no mention of refugees and asylum seekers on this point. A nice touch in the State report is the inclusion of quotes from children, probably taken from the regional consultation meetings. The concluding observations do not take up any specific points, generally urging the State party to revise legislation to ensure compliance with the CRC; ensure that equal access is provided to education, health care and other public services and carry out public education programmes to prevent and combat discrimination.

### 4.3.2 Best interests of the child

Curiously there is no section on the best interests of the child in the complimentary report which may indicate that the NGO coalition is in full agreement with the statements in the State party report and hence sees no need for further information. The recommendation from the CRC committee espouses a mainstreaming principle, that is that ‘the State party ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children.’<sup>30</sup>

### 4.3.3 Right to life, survival and development

There are no observations and recommendations from the CRC Committee on this point so we will let it pass here. It may be that these issues are covered by other articles of the Convention so that the Committee did not see any point in including it here. It may also be the case that the Committee was satisfied with the information provided and did not see a need to make observations.

### 4.3.4 Respects for the views of the child

There is broad agreement among all three reports that ‘the prevailing socio-cultural and traditional attitudes and practices are serious obstacles to guaranteeing this right and the full consideration of

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<sup>30</sup> CRC, Concluding observations, para. 27.

children’s views in administrative and judicial decision-making processes at local or national levels.’<sup>31</sup> The complementary report recommends the government to ‘finalize gazettelement and embark on country wide dissemination of the national Guidelines for Child Participation, drafted by the National Council for Children Services.’<sup>32</sup> This recommendation is picked up by the CRC in their concluding observations and recommendations.<sup>33</sup>

## 4.4 Civil rights and freedoms

With regard to *birth registration*, the complementary report points to the huge disparity between urban (86 per cent) and rural areas (56 per cent) in birth registration, possibly compounded by a decrease in delivery at health facilities from an estimated 43 per cent in 1998 to 40 per cent in 2003. It points out that there are no mechanisms to ensure that birth registration is done within the first six months after birth, which is also acknowledged by the State party report. The concluding observations pick up the point about urban-rural disparities, but specifically raise the point about discrimination of children born out of wedlock and of non-Kenyan fathers which we mentioned under 4.1 and 4.3.1 above.<sup>34</sup>

Both the State party report and the complementary report provide information on freedom of thought, conscience and religion, protection of privacy and access to appropriate information, but as there are no concluding observations on these issues from the CRC committee, we can safely skip them here.

However, with regard to *torture* or other cruel, inhuman or degrading treatment and punishment, the concluding observations note with concern ‘the excessive use of force and shooting at children in Kisumu in October 2005,’ an incident mentioned neither by the State party report nor by the complementary report. The committee is further concerned at reports indicating that rapes of girls by law-enforcement agents have not been investigated.<sup>35</sup> This is also passed over by both reports, though the State report acknowledges that ‘children in the street continue to face cruel and inhuman treatment especially at the hands of law enforcement agencies usually on allegations of having committed crimes.’<sup>36</sup> However, it is not stated whether the reports of rape are in any way connected to allegations of having committed crimes.

Concerning *corporal punishment*, the complementary report notes that this practice is ‘still common in many homes,’<sup>37</sup> without mentioning that it appears to be common outside homes as well. In fact, the State party admits that ‘this continues to take place in learning institutions.’<sup>38</sup> The concluding

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<sup>31</sup> CRC, Concluding observations, para. 28.

<sup>32</sup> NGO Complementary Report, 21.

<sup>33</sup> CRC, Concluding observations, para. 29(b).

<sup>34</sup> CRC, Concluding observations, para. 31(d).

<sup>35</sup> CRC, Concluding observations, para. 32.

<sup>36</sup> Second State party report: Kenya, para. 247.5.

<sup>37</sup> NGO Complementary report, p. 23

<sup>38</sup> Second State party report: Kenya, para. 247.6. On this point, see *Briefing from Global Initiative to end all Corporal Punishment of Children*. Briefing for the Committee on the Rights of the Child pre-sessional working group, September 2006 and more generally, World Organisation 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*. 44<sup>th</sup> session - Geneva, January 2007. Geneva, August 2006.

observations state that corporal punishment is also practiced in the penal system, in alternative-care settings as well as in employment settings and in certain schools.<sup>39</sup>

In view of the continued practice of corporal punishment, the Committee urges introducing legislation prohibiting it both in private and public settings, public education campaigns and more effective monitoring to ensure that abuse of power by teachers and other professionals are not taking place in schools and other institutions.

## 4.5 Family environment and alternative care

There are many sub-themes under this thematic area and both the State party report and the complementary report give ample space to document trends within each. The concluding observation have chosen a more narrow compass and only made observations on four sub-themes. With regard to *family support*, the CRC recommends strengthening family support through family counselling, parenting education, local-level social workers and financial allowances. Further, the Committee recommends strengthening support to women before and after childbirth by, *inter alia*, removing the reservation to Art.10, para. 2 of the International Convention on Economic, Social and Cultural Rights (CESCR) and bringing legislation into conformity with the ILO Maternity Protection Convention No. 183, which provides for 14 weeks of paid leave for women working in the formal and informal sectors. These two treaties are not mentioned by neither the official nor the complementary report, possibly because they go beyond the bounds of the CRC.

With reference to *alternative care*, the complementary report mentions specifically the Children (Charitable Institutions) Regulations (2005) which also provide for a independent complaints procedure for children, and Child Placement Plans for periodic Review of Placements.<sup>40</sup> The State party report also mentions that the Government and its partners have developed national standards and guidelines for alternative care, but says that no independent complaints mechanisms for children are yet in place which might indicate that the above regulations came after the submission of the State party report. However, the report points out that registration is not centralised and that information on services and programmes are scattered.<sup>41</sup> The concluding observations have a couple of recommendations not mentioned by neither the State or the complementary report, i.e. strengthen foster care through the governmental cash-transfer programme and to ensure the protection of property of orphans and their inheritance rights.<sup>42</sup>

Regarding *adoption*, both the complementary report and the CRC recommend ratifying the 1993 Hague Convention which the State party has yet to do, though it says that that the provisions have been captured in the Children's Act which would seem to indicate that there are not legal obstacles against ratification.<sup>43</sup> The complimentary report adds that all Adoption Societies are based in Nairobi

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<sup>39</sup> For the results of a recent survey, see Arne Tostensen and Philista Onyango, *Whom the Lord loveth, he chasteneth. Corporal Punishment of Children in Kibera* (Bergen: Chr. Michelsen Institute and Nairobi: African Network for the Prevention and Protection against Child Abuse and Neglect), December 2014.

<sup>40</sup> NGO complementary report, 25.

<sup>41</sup> Second state party report: Kenya, para. 302.

<sup>42</sup> CRC concluding observations, para. 38

<sup>43</sup> Second State party report: Kenya, para. 304.

and none so far in rural areas.<sup>44</sup> The CRC is concerned by reports that irregular inter-country adoptions and trafficking of children for that purpose still exist.<sup>45</sup>

Regarding *abuse and neglect*, the complementary report recommends that the State party should ratify the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography which it has signed.<sup>46</sup> The CRC is concerned with the lack of updated statistics on reported cases of violence, the limited number of investigations and sanctions in relation to such cases and limited recovery and integration measures.<sup>47</sup> The State party report mentions 3,097 reported cases of rape in 2003-2004, but admits that unreported cases could raise the total number.<sup>48</sup>

## 4.6 Basic health and welfare

With regard to *children with disabilities*, the complementary report says that the Persons and Disabilities Act (PWDA), 2003 is yet to come into force despite the formation of the National Persons with Disabilities Council and despite pressures from interest groups. The State party does say the law has been enacted and that the Council is in place, but the CRC picks up on the point and recommends the State party to ensure the effective implementation of the Act. The complementary report further states that programmes for disabled are lacking for autism, speech and language disorders, cerebral palsy and behaviourally challenged which is argued to be contrary to the Act.<sup>49</sup> The CRC generally recommends ‘the inclusion of children with disabilities into the regular educational system and their inclusion into society.’<sup>50</sup>

On *health and health services*, the State party report says that the National Social Health Insurance Fund seeks to ensure that all Kenyans, including (...) can have access to free medical and health services.<sup>51</sup> However, the complementary report says that the ‘Government withdrew the Bill from parliament prior to opening debate on it citing a lack of funding and non-commitment from donors to support the programme,’ indicating the crucial role of donors in support of social sector services.<sup>52</sup> The CRC raises a couple of important points not mentioned by the other reports and recommends the State party to ‘ensure that regional and other free-trade agreements do not have a negative effect on the enjoyment of the right to health of children, in particular with regard to generic medicine,’ and secondly, ‘to step up anti-corruption measures relating to the management of funds for the health sector.’<sup>53</sup>

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<sup>44</sup> NGO complementary report, 25.

<sup>45</sup> CRC concluding observations, para. 40.

<sup>46</sup> As of February 2015 it has still not been ratified. The other Optional Protocol on the Involvement of Children in Armed Conflict was ratified on 28 January 2002.

<sup>47</sup> NGO complementary report, 25.

<sup>48</sup> Second State party report: Kenya, para. 294.

<sup>49</sup> NGO complementary report, 27.

<sup>50</sup> CRC concluding observations, para. 46(a).

<sup>51</sup> There is a word missing in the text which presumably should be ‘children.’

<sup>52</sup> NGO complementary report, 28.

<sup>53</sup> Second State party report: Kenya, para. 48 (f,g).

Regarding *HIV/AIDS*, the complementary report mentions that the HIV/AIDS Prevention and Control Bill is yet to be enacted. The CRC draws attention to its general comment no. 3 and list a series of measures to be taken including health services for pregnant mothers, comprehensive information and public education about HIV/AIDS, involvement of children in development and implementation of policies, assistance to orphaned children and prevention of discrimination against children infected with or affected by HIV/AIDS.<sup>54</sup>

With reference to *standard of living*, the complementary report mentions housing as one important component of standard of living and the National Housing Policy document in 2004 as an example. The State party report acknowledges that ‘housing is expensive especially for urban dwellers pushing a majority into informal settlements that lack the basic facilities and expose children to abuse.’<sup>55</sup> The CRC observations are comprehensive and general, noting that the Poverty Reduction Strategy does not address children, especially children in need of protection and working children, and recommends the State party to pay particular attention to the rights and needs of children in the implementation of various development plans and strategies.<sup>56</sup>

## 4.7 Education, leisure and cultural activities

The complementary report notes that while there is free primary education, it is not compulsory, a point affirmed by the CRC which recommends the Government to ‘ensure that all children complete eight years of compulsory free primary education.’ The complementary report also requests the Government to take immediate measures to ensure that secondary education is free in Kenya which is again reaffirmed by the CRC in recommending the State party to ‘undertake measures to provide secondary education free of cost.’<sup>57</sup> While there are Constituency Bursary Funds (CBF) to support secondary education of children from poor families, there is a concern in the complementary report that funds may not go to the most deserving cases and may even have been politicized. The State party report acknowledges that the transition rate from primary to secondary education is too low, attributing it to the slow growth of secondary school institutions and high level of poverty among households.<sup>58</sup> Both the complementary report and the CRC draw attention to alternatives for children not finishing school such as village polytechnics and vocational training centres and the CRC also points out the importance of access to informal education for children falling outside the formal school system.

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<sup>54</sup> CRC concluding observations, para. 52.

<sup>55</sup> Second State party report, para. 389.2.

<sup>56</sup> CRC concluding observations, para. 56.

<sup>57</sup> CRC concluding observations, para. 58.

<sup>58</sup> Second State party report, para. 406.

## 4.8 Special protection measures

### 4.8.1 Refugee children

The complimentary report mentions the Refugee and Displaced Persons Bill which by the time of the CRC concluding observations had been enacted into law. It also highlights the negative effects of long-term encampment resulting in limited access to health and education services and restrictions on freedom of movement. Refugee children living outside the camps risk police harassment, prosecution for being illegal aliens and return to their homelands. The CRC picks up both these points in their concluding observations and requests disaggregated information on refugees and asylum seekers, more resources for the refugee department and encourages continued cooperation with the UN High Commissioner for Refugees.<sup>59</sup>

### 4.8.2 Economic exploitation

The main issue here is *child labour* and the complementary report recommends the Government to re-initiate the process of adoption of a National Child Labour Policy which the State party and complementary report acknowledge only to be in draft form.<sup>60</sup> The CRC recommends appropriate legislation and policies to combat the worst forms of child labour, strengthening institutions providing protection against child labour and seek technical assistance from the International Labour Organisation, UNICEF and national and international NGOs in this field.

### 4.8.3 Street children

The CRC expresses ‘deep concern’, which is fairly strong language coming from the Committee, about the large number of street children, estimated to be in the region of 250,000 in 2001, according to the State party report. The Committee is concerned with the denial of their right to education and health and their vulnerability to various forms of violence, the lack of a comprehensive strategy to protect and address their situation and the negative attitudes of society towards street children and recommends preventive as well as curative measures to be taken.<sup>61</sup>

### 4.8.4 Sexual exploitation and trafficking

As has been said above, there is no minimum age for sexual consent for boys and Kenya has not yet ratified the Optional Protocol on the sale of children, child pornography and child prostitution. Further, the Counter-trafficking in Persons Bill has not been enacted.<sup>62</sup> The State party report is quite clear that there is no law that specifically deals with child trafficking and abduction and that covers the range of ways through which trafficking occurs.<sup>63</sup> Both the complementary report and the CRC concluding observations highlight prevention and awareness-raising with particular attention to the tourism sector.

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<sup>59</sup> CRC concluding observations, para. 60.

<sup>60</sup> For an update on progress or rather the lack of it, see Philista Onyango, *The Role of Advocacy against Child Labour*, September 2014. As far as is known, it is still in draft form at the time of writing.

<sup>61</sup> CRC, concluding observations, paras. 63-4.

<sup>62</sup> As per the concluding observations, June 2007.

<sup>63</sup> Second State party report: Kenya, para. 507.

### 4.8.5 Administration of juvenile justice

The CRC is concerned with the minimum age of criminal responsibility which at 8 years of age is too low and recommends raising it to at least the age of 12 years and consider increasing it further and to guarantee that no child is sentenced to the death penalty which reportedly has happened. Detention of persons under 18 years of age should be a measure of last resort only and if detained, should be kept separate from adult detainees. Generally, the Committee recommends alternatives to deprivation of liberty, such as diversion, probation, counselling and community services.<sup>64</sup> The Diversion of Children in Conflict with the Law project and the establishment of Child Protection Units in police stations are examples of best practices as well as the establishment of children's courts, all of which need to be expanded throughout the country.

### 4.8.6 Minority and indigenous children

This pertains basically to pastoralists and hunter-gatherer communities who are poorer, have less access to basic health and education services and lag behind in enrolment and literacy rates compared to the average citizen. The Committee recommends the recognition of the right to their lands and resources, political participation and cultural identity and recommends the State party to consider ratify ILO Convention no. 169 on Indigenous and Tribal Peoples. Mobile schools and clinics should be set up to cater for these communities and appropriate measures taken to prevent traditional harmful practices and support given to victims of these practices.<sup>65</sup>

## 5 Conclusions

We asked at the outset whether CSOs choose the inside or the outside track in exerting policy influence on children's rights. The analysis above showed quite clearly that they have done both. They are fully involved in the preparation of the official reports providing expertise and advice on issues within their respective fields of competence which has clearly been acknowledged by the government side. While the cooperation was not optimal from the start, it has improved over the second and third reporting cycles. Even so, complementary reports have been prepared and submitted as part of the additional material to be considered by the CRC, thus taking the outside track in order to present an alternative view. However, the analysis has also made clear that the CSO report is more to be regarded as complementary than truly alternative, thus making it more of a supplementary account than a diverging one.

So the question was then: is it necessary and does it add value? We would say, having perused the material, a qualified yes. But having said that, the added material gives no indication that the government has deliberately omitted or sidelined issues. On some issues, the concluding observations appear to be based on sources other than the official and alternate reports.

We don't see the complementary report as being required under the CRC as was stated in one of the interviews. It is an opportunity or option than can be exercised if there is a reason and justification for doing so. That seems to be a view shared by both the government and CSO side, conditional upon the

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<sup>64</sup> CRC, concluding observations, para. 68.

<sup>65</sup> CRC, concluding observations, para. 70

CSOs bringing issues on the agenda that have so far in various ways been disregarded and under-reported. As was stated by government officials, children advocates on both sides of the fence are joint in a common cause for children's rights and welfare. Their common cause is to push the rest of government to take children's rights seriously through mainstreaming in government decisions and allocations. In that sense, the advocacy coalition bridges the divide between government and non-government and takes on a different meaning. The challenge becomes intra-governmental and the question is how much leverage this mixed coalition has on government decisions across the board. Perhaps that is the real issue.

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