

International Law, Corruption and the Rights of Children in Africa

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ABSTRACT

In adopting the African Charter on the Rights and Welfare of the Child (“African Child Charter”) on July 1, 1990, Africans, through the Organization of African Unity, officially recognized the need to guarantee the fundamental rights of all children. They also imposed obligations on all African States to recognize the rights, freedoms and duties enshrined in the African Child Charter and required States to take all necessary measures to give effect to these rights. To aid in the realization of these rights, each African State was expected to domesticate the African Child Charter and create rights that are justiciable in its domestic courts. In addition to the fact that domestication of the African Child Charter and other international human rights instruments in some African States has faced opposition from religious groups and traditionalists, corruption, lack of political will, and the failure of many countries to provide themselves with independent and fully functioning judiciaries, constrain the realization of children’s rights. The right to basic education is one of the most important of the collection of rights and freedoms guaranteed children by the African Child Charter. Without access to education, the African child will fail to develop the skills that he or she needs to evolve into a productive and contributing member of his or her community. Unfortunately, various forms of corruption continue to constrain the ability of many African children to realize the right to education guaranteed them by international and regional human rights instruments and by their national constitutions. The key to ensuring that the African child’s right to education is realized is institutional reforms to produce a governing process undergirded by the rule of law—that is one that can improve government efficiency and hence, minimize corruption, guarantee the independence of the judiciary, and generally enhance the protection of the rights of children, including especially their right to education.

I. INTRODUCTION

The Heads of State and Government of the Organization of African Unity (“OAU”), meeting at their Sixteenth Ordinary Session in Monrovia, Liberia (“Liberia Ordinary Session”), from July 17–20, 1979, “recognized the need to take appropriate measures to promote and protect the rights

and welfare of the African Child.”¹ The delegates at the Liberia Ordinary Session also noted that “the situation of most African children[] remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity he/she needs special safeguards and care.”²

Delegates at the Liberia Ordinary Session also recognized that the child “occupies a unique and privileged position in the African society and that for the full and harmonious development of his [or her] personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding” and that the child, “due to the needs of his [or her] physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.”³

After reaffirming fidelity to “the principles of the rights and welfare of the child contained in the [OAU Declaration on the Rights and Welfare of the African Child], conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child,” the delegates at the Liberia Ordinary Session adopted the African Charter on the Rights and Welfare of the Child (“African Child Charter”).⁴

Although there are several international and regional human rights instruments that have provisions that protect the rights of children in Africa, this Article will examine only four of them, namely, the *African Charter on the Rights and Welfare of the Child* (“African Child Charter”); the *UN Convention on the Rights of the Child* (“CRC”); the *Optional Protocol to the Convention on the Rights of the Child*; and the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (“The Maputo Protocol”). These instruments provide an effective framework for examining and protecting the rights of Africa’s children.

A. The African Charter on the Rights and Welfare of the Child

Chapter 1 of the African Child Charter imposes an obligation on States Parties to “recognize the rights, freedoms and duties enshrined in this Charter” and requires them to “undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter,

1. Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, at pmbl., OAU Doc. CAB/LEG/24.9/49 (1990), <https://www.refworld.org/docid/3ae6b38c18.html> [<https://perma.cc/GMJ3-LJFN>] [hereinafter African Child Charter].

2. *Id.*

3. *Id.*

4. *Id.*

to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.”⁵ In addition, the African Child Charter prohibits traditional and customary practices that are harmful to children. According to Article 1(3): “Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged.”⁶

In addition to providing a definition for who is a child,⁷ the African Child Charter also defines the “best interests of the child” principle, which has gained universal acceptance as the minimum standard for assessing and determining all actions concerning children. This principle states that: “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”⁸ Additionally, with respect to “all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”⁹

Other articles in the African Child Charter guarantee additional rights for children, including the right to (1) survival and development;¹⁰ (2) a name and nationality;¹¹ (3) freedom of expression;¹² (4) freedom of association;¹³ (5) freedom of thought, conscience and religion;¹⁴ (6) privacy;¹⁵ (7) education;¹⁶ (8) rest and leisure, recreation and cultural activities;¹⁷ (9) special protection measures of prevention in keeping with the physical and moral needs of handicapped children and “under conditions which ensure [the handicapped child’s] dignity, promote his [or her] self-reliance and active participation

5. *Id.* art. 1, ¶ 1.

6. *Id.* art. 1, ¶ 3.

7. *Id.* art. 2 (“A child means every human being below the age of 18 years.”).

8. *Id.* art. 4, ¶ 1.

9. *Id.* art. 4, ¶ 2.

10. *Id.* art. 5.

11. *Id.* art. 6.

12. *Id.* art. 7.

13. *Id.* art. 8.

14. *Id.* art. 9.

15. *Id.* art. 10.

16. *Id.* art. 11.

17. *Id.* art. 12.

in the community”;¹⁸ and (10) “enjoy the best attainable state of physical, mental and spiritual health.”¹⁹

In addition to prohibiting customary and traditional practices that harm children, the African Child Charter also prohibits “all forms of economic exploitation” and seeks to protect children from “performing any work that is likely to be hazardous” or that interferes “with the child’s physical, mental, spiritual, moral, or social development.”²⁰ The African Child Charter also provides protections against child abuse and torture,²¹ ensuring that a child who is accused or found guilty of “having infringed the penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which enforces the child’s respect for human rights and fundamental freedoms of others.”²²

The African Child Charter also defines parental responsibilities²³ and imposes an obligation on States Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.”²⁴ The Charter places particular emphasis on “those customs and practices prejudicial to the health or life of the child” and “those customs and practices discriminatory to the child on the ground of sex or other status.”²⁵ Along these lines, “[c]hild marriage and the betrothal of girls and boys,” which are considered extremely harmful practices, “shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”²⁶

States Parties to the African Child Charter are also required to “undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflict which affect the child” and, in addition, States Parties are also required to take “all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”²⁷ The Charter also provides protections for refugee children²⁸ by establishing the “best interests of the child” as the guiding principle for the adoption of children,²⁹ and providing special protections

18. *Id.* art. 13, ¶ 1.

19. *Id.* art. 14, ¶ 1.

20. *Id.* art. 15, ¶ 1.

21. *Id.* art. 16.

22. *Id.* art. 17.

23. *Id.* art. 20.

24. *Id.* art. 21.

25. *Id.* art. 21(1).

26. *Id.* art. 21(2).

27. *Id.* art. 22(1).

28. *Id.* art. 23.

29. *Id.* art. 24.

for children who are permanently or temporarily separated from their parents,³⁰ and those living under South Africa's apartheid system.³¹

The Charter protects children from sexual exploitation;³² drug abuse;³³ and sale, trafficking and abduction.³⁴ States Parties to the African Child Charter are required to "undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law."³⁵ The Charter also establishes a Committee on the Rights and Welfare of the Child ("CRWC") and charges it with promoting and protecting the rights and welfare of the child.³⁶ Article 42 elaborates the functions and competency of the CRWC and these include formulating and laying down principles and rules aimed at protecting the rights and welfare of children in Africa, as well as cooperating with other African, international and regional institutions and organizations concerned with the promotion and protection of the rights and welfare of the child, and monitoring the implementation and ensuring the protection of the rights enshrined in the African Child Charter.³⁷

B. The Convention on the Rights of the Child

On November 20, 1989, the UN General Assembly adopted the Convention on the Rights of the Child ("CRC") through its Resolution 44/25.³⁸ The CRC entered into force on September 2, 1990 and reaffirmed the prohibitions against the recruitment of children into the armed forces of States Parties and their subsequent use of children under the age of fifteen years in armed conflict. Article 38 states as follows:

30. *Id.* art. 25.

31. *Id.* art. 26. South Africa's apartheid system was abolished in 1994 and a non-racial democratic system was established in the country. *See generally* LIZ SONNEBORN, THE END OF APARTHEID IN SOUTH AFRICA (2010) (providing a detailed analysis of the demise of apartheid in South Africa and the emergence of a non-racial democratic system).

32. African Child Charter, *supra* note 1, art. 27.

33. African Child Charter, *supra* note 1, art. 28.

34. African Child Charter, *supra* note 1, art. 29.

35. African Child Charter, *supra* note 1, art. 30.

36. African Child Charter, *supra* note 1, art. 32.

37. African Child Charter, *supra* note 1, art. 42.

38. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter Child Protection Convention].

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts *which are relevant to the child*.
2. States Parties shall take all feasible measures to ensure that *persons who have not attained the age of fifteen years* do not take a direct part in hostilities.
3. States Parties *shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces*. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, *States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict*.³⁹

In order to implement its provisions, the CRC provided a definition for the child: “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁴⁰ The CRC also imposes an obligation on States Parties to “recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”⁴¹ This and other provisions of the CRC are very important because they prohibit practices that are harmful to the welfare of children, as well as those that interfere with opportunities for children to develop the skills that they need to develop into productive and responsible adults.⁴²

C. Optional Protocol to the Convention on the Rights of the Child

On May 25, 2000, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child (“OPAC”) with the aim of

39. *Id.* art. 38 (emphasis added).

40. *Id.* art. 1.

41. *Id.* art. 32(1).

42. For example, interfering with a child’s right to education can prevent him or her from attending school and acquiring the skills that he or she needs to function as a contributing member of his or her community. *See generally* John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 287 (2019) [hereinafter Mbaku, *The Rule of Law*] (examining the impact of international law on the protection of the rights of children in Africa).

abolishing the military exploitation of children.⁴³ The OPAC, which entered into force on February 12, 2002, outlaws the recruitment or conscription of children under the age of eighteen years into the armed forces of States Parties and their direct participation in armed conflict or hostilities. Articles 1 and 2 state as follows:

States Parties shall take all feasible measures to ensure that members of their *armed forces who have not attained the age of 18 years do not take a direct part in hostilities.*

States Parties shall ensure *that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.*⁴⁴

OPAC also deals with States Parties which allow the voluntary recruitment of individuals into their armed forces, with particular attention to people who are under age 18 years. According to Article 3:

States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.⁴⁵

Many countries, including those in Africa, have armed groups that are distinct from the armed forces of their respective States.⁴⁶ The OPAC has provisions that prohibit the recruitment of children and their subsequent use in hostilities involving these armed groups. Article 4 states as follows: "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age

43. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 27531 [hereinafter OPAC]; *Child Recruitment and Use*, UN OFF. OF THE SPECIAL REPRESENTATIVE OF THE SEC'Y-GEN. FOR CHILD. & ARMED CONFLICT, <https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers/> [<https://perma.cc/6C6A-7LRB>].

44. OPAC, *supra* note 43, art. 2 (emphasis added).

45. OPAC, *supra* note 43, art. 3.

46. See *The Use of Children as Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict*, RELIEF WEB, <https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Use%20of%20Children%20as%20Soldiers%20in%20Africa%20report.pdf>.

of 18 years.”⁴⁷ Additionally, OPAC imposes an obligation on States Parties to “take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”⁴⁸

D. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)

Although the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”) deals directly with the rights of women in the continent, it also covers issues associated with the rights of children. Chapter 6 of the Maputo Protocol, which guarantees women equal rights with men in marriage, also mentions children.⁴⁹ For example, States Parties are required to ensure that “a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.”⁵⁰ In addition, the Charter provides that “a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children.”⁵¹

Article 7 of the Maputo Protocol deals with the rights of children when the marriage is annulled. For example, this article states that “in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children.”⁵² Most importantly, however, is the requirement that “the interests of the children shall be given paramount importance” in “the case of separation, divorce or annulment of marriage.”⁵³

The Maputo Protocol instructs States Parties to take necessary measures to protect children, particularly, girl-children, from armed conflict. According to Article 11, “States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.”⁵⁴ As with other international and regional human rights instruments, the Maputo Protocol also protects women and girls from all forms of abuse, especially in venues

47. OPAC, *supra* note 43, art. 4(1).

48. OPAC, *supra* note 43, art. 4(2).

49. ORG. AFRICAN UNITY [OAU], *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, African Union, Second Ordinary Session of the Assembly of the Union OAU Doc. CAB/LEG/66, adopted July 11, 2005, entry into force Nov. 25, 2005, art. 5 [hereinafter Maputo Protocol].

50. *Id.* art. 6.

51. *Id.*

52. *Id.* art. 7(c).

53. *Id.*

54. *Id.* art. 11(4).

designed to educate and train them. According to Article 12, “States Parties shall take all appropriate measures to: c) protect women, especially the girl-child[,] from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.”⁵⁵

The Maputo Protocol protects children against exploitation and prohibits the employment of underage individuals. To realize this right, the Maputo Protocol directs States Parties to “adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities” and in order to carry out this directive, States Parties shall “introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child.”⁵⁶

Article 13 of the Maputo Protocol also recognizes “that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility.”⁵⁷ With respect to the guardianship of children in the case of the death of the husband, the Maputo Protocol instructs States Parties to “take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions: b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, *unless this is contrary to the interests and the welfare of the children.*”⁵⁸

Research has determined that “traditional values are often deployed as an excuse to undermine human rights,” including those of children.⁵⁹ Human Rights Watch’s investigations have “documented how discriminatory elements of traditions and customs have impeded, rather than enhanced, people’s social, political, civil, cultural, and economic rights,” including, of course, those of children.⁶⁰ Article 5 of the Maputo Protocol specifically instructs States Parties to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to

55. *Id.* art. 12(1)(c).

56. *Id.* art. 13(g).

57. *Id.* art. 13(l).

58. *Id.* art. 20(b).

59. Graeme Reid, *The Trouble with Tradition*, HUM. RTS. WATCH (Jan. 11, 2013), <https://www.hrw.org/news/2013/01/11/trouble-tradition> [<https://perma.cc/A5KH-FKR6>].

60. *Id.*

recognized international standards.”⁶¹ Although this provision does not specifically mention children, it is important to note, first, that most harmful practices that affect women also affect children (specifically, girls) and second, girl-children grow up to become women.

The Maputo Protocol then advises States Parties to “take all necessary legislative and other measures to eliminate such practices, including:”

- a) Creation of public awareness in all sectors of society regarding *harmful practices* through information, formal and informal education and outreach programs; “
- b) Prohibition, through legislative measures backed by sanctions, of *all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them*;
- c) Provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) Protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.⁶²

Female genital mutilation (“FGM”) is one of the most destructive traditional practice in Africa, particularly when it comes to children. FGM involves “procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons.”⁶³ According to the World Health Organization (“WHO”), FGM is a serious violation of the human rights of girls and women, “an extreme form of gender discrimination,” with significant economic, social and health costs.⁶⁴ In fact, the WHO has noted that FGM is “recognized internationally as a violation of the human rights of girls and women: including the right to health, security and physical integrity and the right to be free from torture and cruel, inhuman or degrading treatment.”⁶⁵ According to WHO data, more than “200 million girls and women alive

61. Maputo Protocol, *supra* note 49, art. 5.

62. Maputo Protocol, *supra* note 49, art. 5.

63. *The Economic Cost of Female Genital Mutilation*, WHO (Feb. 6, 2020), <https://www.who.int/news/item/06-02-2020-economic-cost-of-female-genital-mutilation> [<https://perma.cc/Q2XT-KEG7>].

64. *Id.*

65. *Id.*

today have been cut [i.e., subjected to FGM] in 30 countries in Africa, the Middle East and Asia where FGM is concentrated.”⁶⁶

While arguing that FGM “exact[s] a crippling economic as well as human cost” on its victims, the WHO also notes that this practice “is not only a catastrophic abuse of human rights that significantly harms the physical and mental health of millions of girls and women; it is also a drain on a country’s vital economic resources.”⁶⁷ It has been determined that “the total costs of treating the health impacts of FGM would amount to USD 1.4 billion globally per year, if all resulting medical needs were addressed.”⁶⁸ With respect to individual countries, the costs of dealing with the health and economic impacts of FGM are estimated to reach as much as ten percent of each country’s “entire expenditure on health on average” and in some countries, the figure is likely “to rise to as much as 30%.”⁶⁹

Throughout Africa, girl-children who are subjected to FGM “face serious risks to their health and well-being” and these risks include, but are not limited to the “immediate consequences after being cut, such as infections, bleeding or psychological trauma, as well as chronic health conditions that can occur throughout life.”⁷⁰ In addition, girl-children who undergo FGM are “more likely to experience life-threatening complications during childbirth” and “may face mental health disorders or suffer chronic infections,” as well as “pain or problems when they menstruate, urinate or have sexual intercourse” in adulthood.⁷¹ Medical experts have determined that “FGM hurts girls, imposes lifelong health risks on the women they become, and strains the healthcare systems that need to treat them.”⁷² Unfortunately, many of Africa’s national health systems do not have the capacity to treat FGM-related problems, such as fistula.⁷³

66. *Id.*

67. *Id.*

68. *Female Genital Mutilation Hurts Women and Economies*, WHO (Feb. 6, 2020), <https://www.who.int/news/item/06-02-2020-female-genital-mutilation-hurts-women-and-economies> [<https://perma.cc/6QSQ-ZYHK>] [hereinafter WHO, *Female Genital Mutilation Hurts Women*].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Morgan Winsor, *A Fate Worse Than Death for Scores of African Women*, CNN (May 23, 2013, 2:58 PM), <https://www.cnn.com/2013/05/23/health/end-obstetric-fistula-day> [<https://perma.cc/45BV-9P4L>].

Research shows that if FGM is abolished in each African country, there would be significant gains in human rights protections for girls and women, improved economic performance for national economies, and significant reductions in health care costs. According to research by WHO in “27 high-prevalence countries,” if FGM were fully eliminated in these countries, “the associated savings in health costs would be more than 60% by 2050.”⁷⁴ These savings, however, do not include the lost productivity associated with girls and women whose health has been compromised by FGM and its associated complications.

Throughout the continent, FGM is considered an “aged-long practice which is perpetuated in many communities . . . simply because it is customary.”⁷⁵ For centuries, FGM has been practiced in many parts of and communities in Africa, “generally as one element of a rite of passage preparing young girls for womanhood and marriage.”⁷⁶ In the African communities that practice FGM, its supporters believe that “by mutilating the female’s genital organs, her sexuality will be controlled; but above all it is to ensure a woman’s virginity before marriage and chastity thereafter.”⁷⁷ However, researchers have determined that “FGM imposes on women and the girl child a catalogue of health complications and untold psychological problems.”⁷⁸

International law and the international community can play a very important role in making certain that the rights of African children are recognized and enforced. However, the international community does not have a “world government” that can ensure the recognition and enforcement of human rights, particularly those guaranteed by international and regional human rights instruments. So, who has the responsibility to enforce human rights around the world? After noting that human rights law is part of international law, legal scholars have argued that “[t]he most effective mechanism for enforcing international law [including international human rights law] is for each ratifying government to incorporate its treaties and customary obligations into national laws.”⁷⁹ In an effort to understand the failure of many African countries to recognize and enforce children’s

74. WHO, *Female Genital Mutilation Hurts Women*, *supra* note 68.

75. Off. of the U.N. High Comm’r for Hum. Rts., *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, 3, U.N. Doc. A/34/180, (Oct. 28, 2009) [hereinafter Off. of the U.N. High Comm’r for Hum. Rts.].

76. Frances A. Althaus, *Female Circumcision: Rite of Passage or Violation of Rights?*, 23 INT’L FAM. PLAN. PERSP. 130, 130 (1997).

77. Off. of the U.N. High Comm’r for Hum. Rts., *supra* note 75.

78. Off. of the U.N. High Comm’r for Hum. Rts., *supra* note 75.

79. DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 4 (U. Pa. Press eds., 2007) [hereinafter WEISSBRODT & DE LA VEGA].

rights, this Article will next examine the concept of internationalization of national constitutional law.

II. INTERNATIONALIZATION OF CONSTITUTIONAL LAW AND CHILDREN'S RIGHTS IN AFRICA

A. Introduction

The recognition and protection of human rights generally and children's rights in particular, is the purview of national governments. However, for these governments to do so, they must make certain that their national constitutions, as well as statutory and customary laws, reflect the provisions of international human rights instruments. Professor Charles Manga Fombad, an expert on constitutionalism and international human rights law, has noted that "[i]n almost all modern African constitutions, many of the provisions, especially those recognizing and protecting human rights, have been substantially influenced by international human rights instruments and standards."⁸⁰ For example, the Preamble to the Constitution of Côte d'Ivoire has the following passage:

We, the People of Côte d'Ivoire . . . [r]eaffirm our determination to build a Rule of Law in which human rights, public freedoms, human dignity, justice and good governance as defined in international legal instruments to which the Côte d'Ivoire is a party, in particular the United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples' Rights of 1981 and its supplementary protocols, the Constitutive Act of the African Union of 2001, are promoted, protected and guaranteed.⁸¹

An important question here is: Does this reaffirmation of the rights contained in such international human rights instruments as UDHR and the African Charter on Human and Peoples' Rights render these rights justiciable in Côte d'Ivoire's domestic courts? As noted by Professor Fombad, such constitutional affirmations do not "render any of those instruments part of

80. Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 445 (2012) [hereinafter Fombad I].

81. CONSTITUTION DE LA REPUBLIQUE DE COTE D'IVOIRE [CONSTITUTION] Nov. 18, 2016 (Ivory Coast). Note that this is a translation from the French. These types of constitutional affirmations can also be found in the constitutions of other African countries, including, for example, the Constitution of the Republic of Cameroon, 1996 (as amended through 2008). CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] 1996 (as amended through 2008).

national law nor can they be invoked on this basis alone in the interpretation of the constitution.”⁸²

The key to understanding why Africa’s national governments are the main legal mechanism through which children’s rights must be recognized, effectively guaranteed, and protected is that, in general, “international human rights instruments do not automatically confer justiciable rights in national courts.”⁸³ That is, international human rights instruments do not confer rights that can be exercised or invoked in domestic courts. An African country can render the rights contained in the provisions of international human rights instruments directly justiciable in its domestic courts by specifically inserting a statement in its constitution to the effect that “all international human rights instruments which have been signed and ratified by the country form part of this constitution” or that they are “an integral part of this constitution and of national law.”⁸⁴

Several African countries do have constitutions that refer directly to international human rights instruments or their provisions. For example, the Constitution of the Republic of Kenya, 2010, states as follows: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁸⁵ In addition, Kenya’s Constitution also states that “[t]he general rules of international law shall form part of the law of Kenya.”⁸⁶ Through these constitutional provisions, rights guaranteed by customary international law and the provisions of international human rights instruments that Kenya has ratified, are directly justiciable in its domestic courts.

The Republic of Benin (*la République du Bénin*) also makes clear, through its constitution, how international law is to be treated in and by its domestic courts. First, the Preamble to Benin’s Constitution makes specific reference to the UN Charter, the Universal Declaration of Human Rights, and the African Charter on Human and Peoples’ Rights. It states as follows:

82. Fombad I, *supra* note 80, at 445.

83. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103, 108 (2002).

84. *See, e.g.*, CONSTITUTION art. 2(6) (2010) (Kenya).

85. CONSTITUTION art. 2(6) (2010) (Kenya). Article 11 of the Constitution of Cape Verde recognizes treaties and accords within the country’s domestic judicial system. (“[i]nternational law shall be an integral part of the Cape Verdian judicial system, as long as it is in force in the international legal system.”). CONSTITUTION OF THE REPUBLIC OF CAPE VERDE 1992, art. 11(2) The Cape Verdean Constitution also addresses rules and principles of international law. (“Rules, principles of International Law, validly approved and ratified internationally and internally, and in force, shall take precedence over all laws and regulations below the constitutional level.”). CONSTITUTION OF THE REPUBLIC OF CAPE VERDE 1992, art. 11(4).

86. CONSTITUTION, art. 2(5) (2010) (Kenya).

WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law.⁸⁷

The Constitution of the Republic of Benin makes the provisions of the African Charter on Human and Peoples' Rights (“Banjul Charter”) “an integral part” of the national constitution, as well as of “Béninese law.” Through this process, Benin has effectively created, out of the provisions of the Banjul Charter, rights that are justiciable in its domestic courts. In addition, Article 7 specifically reaffirms part of the material provided in the Preamble to the Constitution. According to Article 7, “[t]he rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law.”⁸⁸

B. The Domestication of Treaties: Dualism and Monism

How effect is given in domestic law to an international treaty that has been signed and ratified by a country is determined by which approach to international law is adopted by the country. There exist two well-established approaches “to the determination of how effect is given to international law instruments or how domestic courts receive international and foreign law.”⁸⁹ These are the monist and dualist approaches.⁹⁰

In a monist country, that is one in which the relationship between international law and domestic law is regulated by monism, “the latter and

87. CONSTITUTION OF THE REPUBLIC OF BENIN, 1990, at pmb1. (emphasis added).

88. *Id.* art. 7 (emphasis added).

89. John Mukum Mbaku, *The Role of International Human Rights Law in the Adjudication of Economic, Social and Cultural Rights in Africa*, 8 PENN ST. J. L. & INT'L AFF. 579, 584 (2020) [hereinafter Mbaku, *The Role of International Human Rights Law*]. See also Fombad I, *supra* note 80, at 447 (providing an overview of monism and dualism).

90. The monist approach to the determination of how international law is given effect in nations' domestic courts “is prevalent in countries that follow ‘the civil law tradition derived from Roman law and include such nations as: Austria, Belgium, Luxembourg, France, and German,’ as well as Francophone and Lusophone countries in Africa.” Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 584.

the former comprise one single legal order within the nation's legal system."⁹¹ However, in each one of the monist countries, international law is superior to domestic law. That is, "in an African country which adheres to [the monist approach], the provisions of international human rights instruments, for example, override any contrary domestic law."⁹² It is assumed that the country has already signed and ratified the relevant international law instrument.

In a monist country, "once an international treaty has been signed and ratified by the country, it is not necessary for national authorities to domesticate the treaty and create rights that are justiciable in national courts."⁹³ This is due to the fact that "the act of ratification alone automatically incorporates that international instrument into national law and hence, creates rights that are justiciable in municipal courts" and as a consequence, "[d]omestic courts in monist States, then, must 'give effect to principles of international law over [superseding] or conflicting rules of domestic law.'"⁹⁴

In countries where the dualist approach to international law is followed, the domestic or national legal system may consider "international law as binding between governments," however, international law "may not be asserted by individual residents of the country in national courts unless the legislature or other branch of government makes it national law or regulation."⁹⁵ In dualist countries, international law and domestic law are regarded as separate and independent of each other. In these countries, it is argued, international law "prevails in regulating relations between sovereign States in the international system, whereas municipal law takes precedence in governing national legal systems."⁹⁶ In order for international law to create rights that are justiciable in the domestic courts of dualist countries, "the national legislature or some other authority must incorporate, through explicit legislation, the provisions of the international instruments into domestic law."⁹⁷

In discussions of "international law's binding status in domestic legal systems," it is often the case that international legal experts and jurists distinguish between "the types and sources of international law."⁹⁸ International jurists consider international norms "that have attained the status of international customary law . . . to be part of municipal law under

91. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 69 (2018).

92. *Id.*

93. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 585.

94. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 585.

95. WEISSBRODT & DE LA VEGA, *supra* note 79, at 4.

96. Adjami, *supra* note 83, at 109.

97. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 585.

98. Adjami, *supra* note 83, at 109.

both the monist and dualist theories, and therefore prevail over national law even in domestic courts.”⁹⁹

If a dualist State has not yet domesticated an international law instrument and created rights that are justiciable in its domestic courts, any violations of international law, including international and regional human rights law, can only “be asserted at the international level.”¹⁰⁰ For the recognition and protection of human rights generally and the rights of children, in particular, it is important that policymakers “in the African countries, particularly those which follow the dualist approach, enact explicit legislation to domesticate the various international human rights instruments and create rights that are directly justiciable in domestic courts.”¹⁰¹

It must be noted also that the “effect of international law on a national system also hinges on the properties of international instruments themselves.”¹⁰² The Universal Declaration of Human Rights, for example, is generally considered “a hortatory declaration of principles and aspirations” and that “it does not have the legal status of a treaty.”¹⁰³ However, the CRC, the ICCPR and the ICESCR are treaties and hence, are binding on all States Parties to these treaties.¹⁰⁴

C. The Complexities of the Domestication of Children’s Rights Treaties: The Case of Nigeria

Nigeria follows the dualist approach to the determination of how effect is given to international law instruments. The Federal Republic of Nigeria is a State Party to international human rights instruments (e.g., the CRC and the African Charter on the Rights and Welfare of the Child) that guarantee many children’s rights. However, the arena within which these rights are justiciable (and hence, recognized and enforced) is Nigeria’s domestic courts. Given that Nigeria is a dualist country, for the rights guaranteed by international human rights instruments to be justiciable in its domestic courts, these instruments must be domesticated.¹⁰⁵

99. Adjami, *supra* note 83, at 109.

100. WEISSBRODT & DE LA VEGA, *supra* note 79, at 5.

101. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 586–57.

102. Adjami, *supra* note 83, at 110.

103. Adjami, *supra* note 83, at 110.

104. An international treaty’s binding effect can be traced to or is derived from the principle in international law referred to as *pacta sunt servanda*.

105. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999) (explaining the

Domestication is the process through which international law, including international human rights law, becomes part of the municipal law of a sovereign State.¹⁰⁶ Nigeria can incorporate a treaty into its municipal law by a legislative act, which effectively gives effect to a treaty in the national legal system. In Nigeria, however, the enacting of national legislation is not enough to domesticate *some treaties*, specifically those dealing with children’s issues. Specifically, “while the federal legislature possesses wide powers to domesticate treaties with diverse subject matters (including for example environmental, nuclear and trade treaties), state assemblies must be consulted *whenever the subject matter of a treaty concerns children’s rights or childhood issues in general.*”¹⁰⁷

In addition to the fact that Nigeria’s federal government has to obtain the full consent of the country’s sub-national units before passing legislation to domesticate children’s rights treaties, it must address a few other issues. First, Nigeria as a State is heavily “fragmented in terms of culture, religion, ethnicity, [and] language” and, as a result, it has been very difficult to reach consensus at the *sub-national* level, particularly when it comes to issues involving children.¹⁰⁸ Second, given the fact that the country’s population is “roughly split between a majority Muslim north and a largely Christian south,” with differing perceptions of children’s rights, it has been very difficult to achieve consensus on *national* legislation that deals with children’s issues.¹⁰⁹

In 2003, Nigeria’s federal government enacted the Child Rights Act (“CRA”) to domesticate the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.¹¹⁰ However, in order for the statute to be effective and become binding in all jurisdictions within the country, it has to be re-enacted by the assemblies of the country’s sub-units—that is, the 36 States.¹¹¹ As noted by Daniel Ogunniyi, a researcher

concept of treaty domestication). See also Shaheed Fatima, *Using International Law in Domestic Courts—Part I: Domesticated Treaties*, 8 JUD. REV. 81 (2003) (examining domesticated treaties).

106. Kal Raustiala, *The Domestication of International Commitments* 1–2 (Int’l Inst. for Applied Systems, Analysis Working Paper No. 95-115, Nov. 1995).

107. Daniel Ogunniyi, *The Challenge of Domesticating Children’s Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children*, 62 J. AFR. L. 447–48 (2018) (examining the domestication of children’s rights treaties in Nigeria) (emphasis added) [hereinafter Ogunniyi].

108. *Id.*

109. *Id.*

110. Child’s Right Act No. 26 (2003) (Nigeria).

111. Usang Maria Assim, *Why the Child’s Rights Act still doesn’t apply throughout Nigeria*, THE CONVERSATION (Sept. 24, 2020), <https://theconversation.com/why-the-childs-rights-act-still-doesnt-apply-throughout-nigeria-145345> [<https://perma.cc/B793-6X9L>] [hereinafter Assim, *Why the Child’s Rights Act*] (“In terms of the constitution, children’s issues are the preserve of the constituent states” and that in order for the CRC and the African

at the Law and Development Research Group, University of Antwerp, who writes on constitutional issues in Nigeria, as many as 11 of the country's 36 states have not yet re-enacted Nigeria's CRA.¹¹² In fact, because the CRA has been "extensively challenged since its adoption in 2003," it is currently "applicable [only] in 25 of Nigeria's 36 states."¹¹³

The complexity of domesticating children's rights treaties in Nigeria is related to the concept known as "concurrent legislative powers," a constitutional provision that reserves certain functions exclusively to the Federal legislature and others to the country's 36 State legislatures.¹¹⁴ Section 12(2) of the Constitution grants the Federal Parliament the power to legislate to domesticate treaties, even if the subject matter falls outside its "exclusive competence."¹¹⁵ However, Section 12(3) of the Constitution "stipulates further conditions to be satisfied before any such treaties may become binding within the country."¹¹⁶ Specifically, Section 12(3) mandates that "[a] bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation."¹¹⁷ Hence, for a bill of Nigeria's National Assembly to fully domesticate a treaty, it must be ratified by a majority of the assemblies of the country's 36 States.¹¹⁸

But, how do these provisions relate to the domesticating of children's rights treaties? The Second Schedule of Nigeria's Constitution provides a concurrent legislative list and elaborates the extent of federal and state legislative powers.¹¹⁹ That list, however, does not include matters relating specifically to children and their rights. Although Nigeria's Constitution does not specifically mention "residual powers," it is generally and widely "acknowledged that powers outside the exclusive and concurrent lists

Children's Charter to be fully domesticated, "[e]ach state legislature must make the national law applicable within its territory").

112. Ogunniyi, *supra* note 107, at 468.

113. Ogunniyi, *supra* note 107, at 452. *See also* Olayinka Silas Akinwumi, *Legal Impediments on the Practical Implementation of the Child Right[s] Act 2003*, 37 INT'L J. LEGAL INFO. 385, 385–86 (2010) (examining the constraints to the enforcement of the Child Rights Act in Nigeria).

114. CONSTITUTION OF NIGERIA (1999), Part II: Concurrent Legislative List.

115. Ogunniyi, *supra* note 107, at 453. *See also* CONSTITUTION OF NIGERIA (1999), § 12(2).

116. Ogunniyi, *supra* note 107, at 453.

117. CONSTITUTION OF NIGERIA (1999), § 12(3).

118. *Id.*

119. *Id.* at Second Schedule.

reside with states.”¹²⁰ In other words, powers not specifically granted the Federal Government by the constitution are believed to have been retained by or reside with the states and hence, exercisable by the state legislatures. Several of the nation’s states, primarily those that are opposed to the Convention on the Rights of the Child, for either religious and/or cultural reasons, have refused to grant the federal legislature the necessary support to achieve full domestication of the treaty.

D. Kenya’s Approach to the Domestication of Treaties

Kenya, like Nigeria, is a dualist country. As noted by Nicholas Wasonga Orago, an expert on constitutionalism in Kenya, “[w]ith the adoption of the dualist approach [to international law], Kenya espoused the doctrine of transformation, which envisioned that international law could only be applicable in the domestic legal system if it had been domesticated by parliamentary legislation.”¹²¹ According to the transformation doctrine, “ratified international treaties, once domesticated, only had application in the domestic legal system at the same level as other domestic legislation, and they could be amended by a simple legislative majority.”¹²²

Before Kenya enacted its 2010 constitution, the “prevailing judicial position on the applicability of international law in the Kenyan domestic legal system”¹²³ was established by the Court of Appeal (which at the time was the country’s highest court) in the case *Rono v. Rono*.¹²⁴ Writing for the Court of Appeal, Justice P.N. Waki acknowledged what it referred to as the “raging debates in [Kenya’s] jurisprudence about the application of international laws” within the country’s courts.¹²⁵ Justice Waki also noted that “Kenya subscribes to the Common law view that international law is only part of domestic law where it has been specifically incorporated.”¹²⁶ After confirming this dualist position within Kenya’s legal system, the Court of Appeal declared as follows:

120. Ogunniyi, *supra* note 107, at 453, n.29.

121. Nicholas Wasonga Orago, *The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective*, 13 AFR. HUM. RTS. L.J. 415, 416 (2013) [hereinafter Orago].

122. *Id.* at 416–17.

123. *Id.* at 417.

124. *Mary Rono v. Jane Rono & Another* (2005), Court of Appeal at Eldoret, Civil Appeal 66 of 2002 eK.L.R. (Kenya) [hereinafter *Rono v. Rono*].

125. *Id.* ¶ 21.

126. *Id.*

However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.¹²⁷

In handing down its ruling, the Court of Appeal prefigured “the impending change in the situation of international law in the Kenyan domestic legal system through the adoption of a new constitutional dispensation by pointing to the then Draft Constitution of Kenya which clearly provided for international customary and treaty law to form parts of the laws of Kenya.”¹²⁸ The Court then proceeded to cite to international human rights instruments, specifically the International Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), even though Kenya had, at the time, not yet domesticated this international instrument.¹²⁹

The confusion over the treatment of international law, including international human rights law, was finally clarified by provisions in Kenya’s new constitution—the Constitution of the Republic of Kenya—which was enacted into law in 2010.¹³⁰ Article 2(6) of the Constitution directly incorporates international human rights law in treaties ratified by Kenya into the country’s domestic legal system. According to Article 2(6), “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹³¹ It is no longer necessary for the Kenyan legislature to enact legislation to domesticate international human rights instruments that have been ratified by Kenya. Read with Article 2(6), the act of ratification of a human rights instrument alone is enough to create rights that are justiciable in domestic courts and hence, can be invoked directly by citizens. In addition, Kenya’s Constitution also states that “[t]he general rules of international law shall form part of the

127. *Id.* See also *Bangalore Principles on the Domestic Application of International Human Rights Norms*, UK HUM. RTS. BLOG (Jan. 31, 2019), <https://ukhumanrightsblog.com/2019/01/31/bangalore-principles-on-the-international-human-rights-norms-conference-report-by-anthony-wenton/> [<https://perma.cc/D5TG-F9Q6>] (stating, in Principle 7, as follows: “It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.”).

128. Orago, *supra* note 121, at 418.

129. Rono v. Rono, *supra* note 124, ¶ 24.

130. CONSTITUTION (2010) (Kenya).

131. *Id.* art. 2(6).

law of Kenya,” making the rights found in customary international law directly justiciable in domestic courts in Kenya.¹³²

The Constitution also imposes an obligation on the Kenyan State to “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”¹³³ In the case where the Kenyan State enacts legislation “in consequence of a declaration of a state of emergency,” such legislation must be “consistent with the Republic’s obligations under international law applicable to a state of emergency.”¹³⁴

Scholars of constitutional developments in Kenya have argued that the “change in the reception of international law in the Kenyan legal system from transformation to incorporation” is “based on the importance of a commitment to international human rights protective values at the highest level possible with the hope of non-regression to totalitarian rule.”¹³⁵ This change was confirmed in the High Court case in *In Re Zipporah Wambui Mathara* in which Koome J held as follows:

Principally I agree with counsel for the Debtor that by 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 the Kenyan law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law. This covenant makes provisions for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves.¹³⁶

This holding was affirmed by Majanja J in the High Court of Kenya (at Nairobi) case *Wanjiku & Another v. The Attorney General & Another*. The honorable judge held as follows:

Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new color to the relationship between international law and international instruments and national law. Article 2(5) provides, “*The general rules of international law shall form part of the law of Kenya*” and Article 2(6) provides that “*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*”¹³⁷

132. *Id.* art. 2(5).

133. *Id.* art. 21(4).

134. *Id.* art. 58(6)(a)(ii).

135. Orago, *supra* note 121, at 420.

136. *In Re of Zipporah Wambui Mathara* (2010) eK.L.R. ¶ 9 (C.C.K.) (Kenya) (emphasis added).

137. *Beatrice Wanjiku & Another v. Attorney General & Another* (2012) eK.L.R. ¶ 17 (H.C.K.) (Kenya).

It has been argued that “[t]he direct incorporation of international human rights law into the domestic legal system [of Kenya], as per the 2010 Constitution, is in line with prevailing jurisprudence of international treaties.”¹³⁸ For example, the UN Committee on Economic, Social and Cultural Rights (“ESCR Committee”), writing about the status of the [ICESCR], makes the following comment:

In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State [P]arty, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.¹³⁹

Since Kenya adopted its new constitution in 2010, legal scholars have been concerned about “the hierarchy or place of international human rights law in ratified international treaties in relation to other sources of law in the Kenyan domestic legal system.”¹⁴⁰ It is noted that many countries, such as the United States, which have constitutional provisions that directly incorporate international human rights law into their domestic legal systems, “have adopted varying interpretations of those provisions; with the result that international human rights law is accorded a different hierarchical status vis-à-vis domestic law, depending on the interpretation adopted.”¹⁴¹ Within the U.S. legal system, judges have taken a more nationalistic approach to constitutional interpretation, which has “progressively given more prominence to its domestic law at the expense of international human rights law with the adoption of the self-executing and non-self-executing doctrine to the direct application of treaties, and has further placed treaties at hierarchically the same level as domestic legislation.”¹⁴²

Scholars of constitutionalism and human rights in Kenya have argued that “if the international human rights norms and standards contained in ratified international human rights treaties are to enhance the protection

138. Orago, *supra* note 121, at 421.

139. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Draft General Comment No. 9: The Domestic Application of the Covenant, U.N. Doc. E/C. 12/1998/24 (Dec. 3, 1998), ¶ 4.

140. Orago, *supra* note 121, at 422.

141. Orago, *supra* note 121, at 429.

142. Orago, *supra* note 121, at 429.

of the rights and fundamental freedoms of the Kenyan people, [the] restricted application of international human rights law norms should not be adopted in the Kenyan domestic legal system.”¹⁴³ Kenya, it is argued, should, instead, “accept international human rights law as a prominent source of legal obligations, especially in the adjudication of human rights violations, providing a proper accountability mechanism to ensure that the political institutions of the state fulfil [the country’s] internal and external obligations emanating from binding international human rights law.”¹⁴⁴

Thus, Kenya should adopt “a progressive interpretation of the constitutional provisions directly incorporating international law in [its] domestic legal system in such a manner that international human rights law can enhance government accountability regarding the respect, protection, promotion and fulfilment of human rights and fundamental freedoms at the domestic level.”¹⁴⁵ There are at least three possibilities for the interpretation of Section 2(6) of the Constitution of Kenya 2010: (i) international human rights law is placed at the same level with other relevant constitutional provisions; (ii) provisions of international human rights treaties that have been ratified by Kenya are placed below both constitutional norms and national legislation; and (iii) international law is granted a status that is slightly lower than the constitutional provisions, but which is superior to domestic legislation in the new constitutional dispensation.¹⁴⁶

Orago argues that if one takes a “holistic reading of [section] 2” of the Constitution of Kenya 2010, it can be determined that the drafters “intended that international law, as long as it is consistent with the purport, spirit and the provisions of the Constitution, should have a prominent place in the Kenyan domestic legal system.”¹⁴⁷ Section 2 makes the constitution the supreme law of the land and “binds all persons and all State organs at both levels of government.”¹⁴⁸ This section of the Kenya Constitution also incorporates international law as a part of the law of Kenya¹⁴⁹ and makes its “validity or legality” not “subject to challenge by or before any court or other State organ.”¹⁵⁰

The examination of the domestication of international law in Nigeria and Kenya have revealed a few important lessons for African countries. First, each African country, whether it is monist or dualist, can, through its constitution, put to rest, the issue of how international law is to be

143. Orago, *supra* note 121, at 429.

144. Orago, *supra* note 121, at 430.

145. Orago, *supra* note 121, at 430.

146. Orago, *supra* note 121, at 434–35.

147. Orago, *supra* note 121, at 435.

148. CONSTITUTION (2010), § 2(1) (Kenya).

149. *Id.* § 2(6).

150. *Id.* § 2(3).

treated in the domestic legal system. Creating a constitutional provision, such as section 2(6) in Kenya's Constitution, would clarify any misunderstanding regarding the place of international law in the domestic legal system.¹⁵¹ Bénin's Constitution makes a similar clarification in Article 7:

The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law.¹⁵²

Second, a country can resolve the issue of hierarchy by specifically making a constitutional declaration as that found in the Constitution of Bénin:

WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law.¹⁵³

Although many African countries do not make the provisions of international human rights instruments directly justiciable in their domestic courts, they do, however, acknowledge international law and impose an obligation on their governments to consider international law when national courts interpret the Bill of Rights and other laws, including customary laws. For example, section 39 of the Constitution of the Republic of South Africa states as follows: "When interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law."¹⁵⁴ Similarly, the Constitution of the Republic of Cape Verde makes the following declaration in Article 16(4): "Constitutional and legal norms regarding fundamental rights may be interpreted and integrated in accordance with the Universal Declaration of Human Rights."¹⁵⁵

Finally, each African country must find appropriate ways to deal with the problems that Nigeria now faces with respect to the domestication of the Convention on the Rights of the Child and other children's rights treaties. The function of a central or federal government is to harmonize

151. CONSTITUTION (2010), § 2(6) Kenya ("Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.").

152. CONSTITUTION OF THE REPUBLIC OF BENIN, 1990, art. 7.

153. *Id.* at pmbl.

154. S. AFR. CONST., 2012, § 39(1)(b).

155. CONSTITUTION OF THE REPUBLIC OF CAPE VERDE 1992, art. 16(3).

national laws (constitutional, statutory and customary) and bring them into line with the provisions of international human rights laws. Like Nigeria, many African countries consist of various subcultures, each with different customs, traditions, cultures and religions. For example, Cameroon has more than “250 identifiable ethnic groups”¹⁵⁶ and like Nigeria, it is fragmented in terms of culture, religion, ethnicity and language.¹⁵⁷ Some of these ethnolinguistic groups have customary laws and traditional practices that harm women and girls. For example, in Cameroon, many groups practice female genital mutilation (“FGM”),¹⁵⁸ breast ironing,¹⁵⁹ and child marriage.¹⁶⁰

In addition to the fact that these practices harm girls and women, they also violate their rights. The Maputo Protocol specifically prohibits FGM in its Article 5 as a practice that “negatively affect[s] the human rights of women and which [is] contrary to recognized international standards.”¹⁶¹ Many international NGOs have recognized the practice of FGM as “a human rights violation.”¹⁶² In addition, the UN and its many agencies (e.g., UNICEF, UNHCR, WHO, UNFPA and UNAIDS) have identified FGM is a violation of the human rights of women and girls. In an interagency statement produced by the WHO and other UN agencies, it was stated that “[f]emale genital mutilation of any type has been recognized as a harmful practice and a violation of the human rights of girls and women.”¹⁶³

Similarly, the Office of the UN High Commissioner for Human Rights has noted that “[c]hild, early and forced marriage (CEFM) is a human rights violation and a harmful practice that disproportionately affects women and girls globally, preventing them from living their lives free from all forms

156. JOHN MUKUM MBAKU, *CULTURE AND CUSTOMS OF CAMEROON 1* (Toyin Falola ed., Greenwood Press 2005) (2005).

157. Ogunniyi, *supra* note 107, at 448.

158. See, e.g., Moki Edwin Kindzeka, *Cameroon, WHO Push for End to Female Circumcision*, VOA NEWS (June 17, 2014), <https://www.voanews.com/a/cameroon-who-push-for-end-to-female-circumcision/1938703.html> [<https://perma.cc/8JYP-NNJE>]; see also BAYEN BESSEM PRISCILLIA, LINNÆUS UNIVERSITY SWEDEN, *THE EFFECTS OF FEMALE GENITAL MUTILATION IN CAMEROON: CASE STUDY EJAGHAM COMMUNITY OF EYUMJOCK SUB-DIVISION 4* (May 30, 2016) (examining the impact of FGM in Cameroon).

159. Tamsin Bradley, *Breast Ironing is a Harmful Practice to Young Girls that Isn't Getting Sufficient Attention*, QUARTZ AFRICA (May 8, 2019), <https://qz.com/africa/1614334/breast-ironing-is-ignored-problem-in-cameroon-across-africa/> [<https://perma.cc/8BZM-Q5ZS>].

160. Emeline Fonyuy, *Child Marriage Worries Rise Amid Coronavirus Lockdown in Cameroon*, THE NEW HUMANITARIAN (June 11, 2020), <https://www.thenewhumanitarian.org/news/2020/06/11/Cameroon-coronavirus-child-marriage> [<https://perma.cc/E9UP-6CLJ>].

161. Maputo Protocol, *supra* note 49, art. 5.

162. *Q&A on Female Genital Mutilation*, HUM. RTS. WATCH (June 16, 2010), <https://www.hrw.org/news/2010/06/16/qa-female-genital-mutilation> [<https://perma.cc/K8UD-MJ5H>].

163. *Eliminating Female Genital Mutilation*, AN INTERAGENCY STATEMENT OF THE WORLD HEALTH ORGANIZATION [WHO] 8 (2008), https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf;jsessionid=A6A09551F062D7F6D8BDA5AA50EB6197?sequence=1.

of violence.”¹⁶⁴ Given that customary and traditional practices, such as FGM and child marriage, are considered human rights violations, each African State must make certain that its laws—its constitution, as well as its statutory and customary laws—reflect the provisions of international and regional human rights instruments. Hence, national governments in the African countries should not allow the customary and traditional practices of the various subcultures that exist within their countries to interfere with the internationalization of their constitutional laws. In the domestication of international human rights law, including children’s rights treaties, the process should not be subjected to or held hostage by the traditional, customary and cultural practices of ethnolinguistic groups within various African countries, as is the case in Nigeria with legislation to domesticate the CRC and the African Charter on the Rights and Welfare of the Child.

E. After Domestication, then Enforcement

Once an African country has domesticated international human rights instruments that it has ratified and, as a consequence, has created rights that are justiciable in its domestic courts, the next step is to make certain that it has the capacity and the political will to protect and enforce these rights. In particular, the country must make certain that it has a governing process that guarantees judicial independence, and provides the courts with the capacity that they need to enforce the laws. In addition, the country’s institutional arrangements must be capable of effectively preventing political interference with the ability of the courts to perform their constitutional functions. For example, a survey of Ghanaians about their judiciary revealed that “more than 8 out of every 10 Ghanaians (85%) said judges and magistrates were some of the most corrupt public officials in the country.”¹⁶⁵ The survey also determined that the police officers, who usually work closely corrupt than judges.¹⁶⁶ Finally, Ghanaians also considered their civil servants and political elites—members of the executive and legislative branches—

164. *Child, Early and Forced Marriage, Including in Humanitarian Settings*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., [https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%20and%20forced%20marriage%20\(CFM,from%20al1%20forms%20of%20violence](https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%20and%20forced%20marriage%20(CFM,from%20al1%20forms%20of%20violence) [https://perma.cc/JTB4-LE5H].

165. Franck Kuwonu, *Judiciary: Fighting graft needs muscles*, UNITED NATIONS: AFRICA RENEWAL, <https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles> [https://perma.cc/X8U2-25F5].

166. *Id.*

to be also among the most corrupt people in the country. Such systemic corruption does not augur well for the recognition and protection of the rights of children.

In a 2020 report on human rights in Cameroon, the U.S. Department of State noted that although the country's constitution and law "provide for an independent judiciary, . . ., this is not always the case in practice. In some instances, the outcomes of trials appeared influenced by the government, especially in politically sensitive cases. Authorities did not always respect and enforce court orders."¹⁶⁷ Although the judiciary is constitutionally granted independence from the executive and legislative branches, that independence has rarely been realized because the president is able to appoint "all members of the bench and legal department of the judicial branch, including the president of the Supreme Court, and may dismiss them at will."¹⁶⁸

In addition, the U.S. Department of State noted that "[t]he constitution designates the president as 'first magistrate,' thus 'chief' of the judiciary, making him the legal arbiter of any sanctions against the judiciary."¹⁶⁹ Furthermore, the U.S. Department of State report noted that in some cases that come before the courts, judges "are subordinate to the minister of justice or to the minister in charge of military justice."¹⁷⁰ The report also noted that "[w]ith approval from the minister of justice, the Special Criminal Court may drop charges against a defendant who offers to pay back the money he is accused of having embezzled, which essentially renders the act of corruption free of sanctions."¹⁷¹ Without a truly independent judiciary, it is virtually impossible for a country to uphold the rights of children and enforce laws against those who violate these rights.

In the following section, this Article takes a look at the governing process and its importance to the protection of the rights of children. It is important to note, however, that to enhance the protection of the rights of children, all laws in each African country—whether constitutional, statutory or customary—must conform to the provisions of international human rights instruments.

167. U.S. DEP'T OF STATE, CAMEROON 2020 HUMAN RIGHTS REPORT 12 (2020).

168. *Id.*

169. *Id.* at 11.

170. *Id.*

171. *Id.*

III. THE GOVERNING PROCESS AND CHILDREN'S RIGHTS

A. Introduction

For an African country to develop the capacity to adequately and effectively protect children's rights, it must, if it has not already done so, provide itself with a governing process that is undergirded by the rule of law. It has been argued that one of the most important challenges that Africa faces today is "the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to practice their dictatorship" and that this "democratic majoritarianism [risks] descending into the tyranny of the majority."¹⁷² James Madison, one of America's Founders, recommended the *republican system of government*—specifically separation of powers with checks and balances—as a mechanism to minimize majoritarian tyranny and generally enhance good governance. Some scholars of African constitutional law and constitutionalism—for example, Professor Charles Manga Fombad—have called for African countries to specifically entrench governmental systems based on the rule of law and constitutionalism¹⁷³ in order to improve political governance and peaceful coexistence and enhance economic development.

Constitutionalism encompasses "the idea that a government should not only be sufficiently limited in a way that protects citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations."¹⁷⁴ Fombad argues that the elements of modern constitutionalism, include "(i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; [v] the control

172. Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 *BUFF. L. REV.* 1007, 1035–1036 (2011) [hereinafter Fombad II].

173. *Id.* at 1036. *See also* THE FEDERALIST NO. 10 (James Madison). This was James Madison's first essay. It was part of a series of essays initiated by Alexander Hamilton to argue for the ratification of the Constitution of the United States. It was originally published in the *Daily Advertiser*, New York, Thursday, November 22, 1787.

174. Fombad II, *supra* note 172, at 1013–14.

of the amendment of the constitution; and [vi] institutions that support democracy.”¹⁷⁵

Recognizing and protecting children’s rights must be seen as part of the overall effort to fight government impunity and generally improve the institutional environment for the protection of human rights. In a country pervaded by impunity, it is virtually impossible to enforce laws against gross human rights violations, especially laws designed to protect children. Impunity is “directly related to the nature of each country’s laws and institutions and specifically to whether the country’s governing process is undergirded by the rule of law.”¹⁷⁶ According to the UN’s *Principles and Promotion of Human Rights Through Action to Combat Impunity* report, “[i]mpunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished.”¹⁷⁷

Impunity is pervasive in countries with dysfunctional governing processes—that is, countries in which the laws do not adequately constrain citizens, especially the civil servants and political elites who serve in government. Some of these individuals consider themselves above the law and engage in behaviors (e.g., corruption and self-dealing) that infringe on the rights of their fellow citizens, especially children. For example, a study by Transparency International has determined that “[f]rom improper budget spending and insufficient access to education, to poor teaching practices and nepotism, *corruption in education is rampant across Africa, robbing millions of young people of their right to knowledge and a decent future.*”¹⁷⁸ Corruption in the provision of public services, including in education, directly affects the rights of children, many of whom are denied the opportunity to attend school and develop the skills that they need to evolve into productive adults and contributing members of their communities.

175. Fombad II, *supra* note 172, at 1014. In the original, the number (iv) appears twice and hence, there is no (vi).

176. John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 184 (2019) [hereinafter Mbaku, *International Law and the Struggle Against Government Impunity in Africa*].

177. ESCOR, Comm’n on Human Rights, *Promotion and Protection of Human Rights: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005), at Principle I.

178. *Corruption in Education Threatens Children’s Prospects in Africa and Must be Attacked*, TRANSPARENCY INT’L (Nov. 21, 2013), <https://www.transparency.org/en/press/corruption-in-education-threatens-childrens-prospects-in-africa-and-must-be> [<https://perma.cc/NTC5-25NS>] (emphasis added).

Effectively fighting impunity in Africa must involve the reconstruction of African States to create democratic institutions that are capable of effectively and adequately “constraining the government and preventing civil servants and political elites from acting with impunity” and engaging in behaviors that directly threaten the rights of children and other groups.¹⁷⁹ Hence, each African country must provide itself with a governing process that can significantly enhance the ability of domestic institutions to bring to justice the perpetrators of human rights violations, including those of children. If a country has a governing process that is undergirded by the separation of powers with effective checks and balances, which must include an independent judiciary, a robust and politically active civil society, and an independent press, it is likely the case that impunity will be minimized and the recognition, promotion, and protection of the rights of children will be maximized.

Thus, to protect children’s rights, each African country must direct reforms to the following broad areas. First, each country must make certain that it has a governing process that is undergirded by the rule of law. Such a governing process is characterized by separation of powers, with effective checks and balances. Second, each country must internationalize its national constitution to ensure that all laws, including bills of rights, statutory and customary laws, reflect or comport to the provisions of international human rights instruments. Third, the judiciary in each country must be independent enough and have the necessary capacity to perform its constitutional functions without political interference—these functions include checking the exercise of government power. Fourth, there must be a robust and politically active civil society to guard the government and generally improve governance through, for example, participation in elections. Finally, there must exist various civil society organizations (e.g., free and independent newspapers, political parties) that provide citizens with the mechanisms to participate in governance, inform voters on the issues to be decided during an election, expose government impunity, and force the government to be accountable to the people and the constitution.

In each African country, customs and traditions are usually an integral part of the governing process. However, instead of maintaining law and order and enhancing peaceful coexistence—the traditional functions of a governing process—several elements of the customary and traditional

179. Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 176, at 201.

practices of some subcultures within many African countries often inflict significant harm on Africa's girls and women. It is necessary then, for this Article to provide an overview of how these traditional and customary practices violate the rights of African girls and women, prevent them from living full lives, and interfere with their ability to function as contributing members of their societies.

B. Harmful Customary and Traditional Practices as a Threat to Children's Rights in Africa

It is argued that custom, tradition, culture, and religion, are major constraints to the recognition and protection of the rights of children in Africa. In several countries, "traditional values are often deployed as an excuse to undermine human rights," including those of children.¹⁸⁰ Civil society organizations that study children's rights in Africa, including the international NGO, *Human Rights Watch*, have "documented how discriminatory elements of traditions and customs have impeded, rather than enhanced, people's social, political, civil, cultural, and economic rights," and these include, of course, the rights of children.¹⁸¹ The study by Reid and Human Rights Watch also determined that many state- and non-state actors routinely invoke customary and religious norms to justify their trampling of the rights of women and girls.¹⁸²

In many African countries, the customary and cultural practices of many ethnocultural groups have been used to justify discrimination against women and children and the violation of their rights. For example, after Kenya enacted the Prohibition of Female Genital Mutilation Act 2011 and established The Anti-Female Genital Mutilation Board to enforce the law, Dr. Tatu Kamau, a well-known female doctor, filed a petition before the Nairobi High Court seeking to have the law annulled and the board disbanded.¹⁸³ She argued before the Court that FGM is "an age-old Kenyan tradition and that an outright ban infringes on a woman's right to exercise their cultural beliefs."¹⁸⁴ In addition to arguing that the term "mutilation," which has replaced "circumcision" and gained global acceptance as the most appropriate way to describe this insidious practice, is offensive and

180. Reid, *supra* note 59.

181. Reid, *supra* note 59.

182. Reid, *supra* note 59.

183. Bukola Adebayo, *A Kenyan Doctor is Seeking to Legalize Female Genital Mutilation*, CNN (Oct. 25, 2019, 3:54 PM), <https://www.cnn.com/2019/10/25/africa/kenya-doctor-fgm-petition-intl> [<https://perma.cc/VF7R-6WVC>].

184. *Id.*

“denigrates the cultural significance of the practice,” Dr. Kamau also opposed the view that FGM violates the rights of girls and women.¹⁸⁵

Representing herself before the Nairobi High Court, Dr. Kamau argued that

[w]omen who took their daughters for circumcision were not taking them there to destroy them. Those children were not thrown away afterward, they were celebrated as respected members of the society. To use the word [mutilation] in our context suggests that it is malicious and that we are intentionally damaging our females. To me, it is very wrong.¹⁸⁶

Dr. Morissanda Kouyaté, co-winner of the UN Nelson Mandela Prize for his work to abolish the practice of FGM in Africa, has argued, however, that “[a]ttacking women and girls physically and psychologically is neither culturally right nor justifiable on health grounds. It is a pure violation of their rights, and this is unacceptable.”¹⁸⁷

Research by Human Rights Watch determined that “[a]t least 50,000 children attending hundreds of residential Quranic schools, or daaras, in Senegal are subjected to conditions akin to slavery and forced to endure often extreme forms of abuse, neglect, and exploitation by the teachers, or marabouts, who serve as their de facto guardians.”¹⁸⁸ Noting that not “all Quranic schools run such regimes,” the Human Rights report stated that “many marabouts force the children, known as talibés, to beg on the streets for long hours—a practice that meets the International Labor Organization’s (ILO) definition of a worst form of child labor—and subject them to often brutal physical and psychological abuse.”¹⁸⁹ In addition, “the marabouts are also grossly negligent in fulfilling the children’s basic needs, including food, shelter, and healthcare, despite adequate resources in most urban daaras, brought in primarily by the children themselves.”¹⁹⁰

When the UN Committee on Economic, Social and Cultural Rights (“CESCR”) met at its fourth and fifth meetings (April 25–26, 2005) to

185. *Id.*

186. *Id.*

187. Leah Rodriguez, *This Doctor has Worked to Stop FGM for Decades—And Says We’re Making Progress*, GLOB. CITIZEN (Aug. 31, 2020), <https://www.globalcitizen.org/en/content/fgm-doctor-morissanda-kouyate-interview/> [<https://perma.cc/K2AB-XR9T>].

188. “*Off the Backs of the Children, Forced Begging and Other Abuses Against Talibés in Senegal*,” HUM. RTS. WATCH (Apr. 15, 2010), <https://www.hrw.org/report/2010/04/15/backs-children/forced-begging-and-other-abuses-against-talibes-senegal> [<https://perma.cc/F6EQ-MTHC>].

189. *Id.*

190. *Id.*

consider the Government of Zambia’s initial report on the implementation of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), it made several observations, including: (1) that “the persistence of customs and traditions harmful to women, children and older persons” is an important factor impeding the ability of authorities in Zambia to fully and effectively implement the ICESCR in the country;¹⁹¹ (2) “the prevalence of customary law—certain traditions, customs and cultural practices—leads to substantial discrimination against girls and women”;¹⁹² (3) Article 23(4) of the Constitution of Zambia provides various exclusions and exceptions to the prohibition against discrimination, including with respect to “adoption, marriage, divorce, burial, devolution of property on death, and other matters of personal law, and to the application of customary law”;¹⁹³ (4) “the harsh living conditions of widows and girl orphans due to, among other things, harmful traditional practices such as ‘widow-cleansing’, early marriages and denial of inheritance”;¹⁹⁴ (5) “the large number of street children, especially in the capital, Lusaka, who are particularly exposed to physical and sexual abuse, prostitution, and a high risk of being infected with HIV/AIDS”;¹⁹⁵ and (vi) “traditional attitudes continue and that discrimination against girl children is prevalent” in Zambia.¹⁹⁶

Of importance is that the customary laws and practices of many ethnocultural groups in Africa do not allow women and girls to inherit real property. A significant number of these women are widows who have been forced into extreme poverty, rendering them incapable of taking care of their children and placing the latter in situations in which they can easily be exploited and abused. In fact, these children have easily fallen victim “to sex traffickers, producers and distributors of pornography, purveyors of sex tourism, and traffickers of children for body parts sold in the international organ transplantation market.”¹⁹⁷

Throughout the continent, many subcultures engage in practices that oppress and exploit children, as well as undermine and violate their rights. Many of these harmful practices are justified by either custom and tradition

191. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, 15, U.N. Doc. E/C.12/1/Add.106 (June 23, 2005) [hereinafter CESCR].

192. *Id.* ¶ 14.

193. *Id.* ¶ 10; *see also* CONST. OF ZAMBIA (1991), § 23(4).

194. CESCR, *supra* note 191, ¶ 23.

195. CESCR, *supra* note 191, ¶ 24.

196. CESCR, *supra* note 191, ¶ 32.

197. John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT’L L. REV. 535, 566 (2020).

and/or religion.¹⁹⁸ These practices constitute major threats to the rights of children in Africa, including their right to attend school and significantly improve their ability to grow up to be gainfully employed adults.¹⁹⁹

For children's rights to be recognized and protected in an African country, it must be the case that the country has, first, internationalized its constitutional law and effectively mainstreamed "international human rights law into national law either by legislation or by amending existing domestic laws where there is contradiction."²⁰⁰ Second, the country must establish a governing process that adequately constrains the state and prevents civil servants and political elites from acting with impunity and violating the rights of children. Such a governing process must have a judicial system that is independent enough and has the necessary institutional capacity to not only adequately guard the government, but to bring to justice those who violate children's rights. Unfortunately, in many African countries, even including those that have domesticated the various international human rights instruments, there is still widespread abuse of the rights of children. This is due to the fact that these countries have not yet provided themselves with a governing process capable of adequately preventing those whose job it is to enforce the laws and protect children, from engaging in behaviors (e.g., self-dealing and corruption) that contribute to the non-enforcement of the law.

This section of the Article cannot be concluded without mentioning the case of African girl-children who are forced into early marriage and those who get pregnant before they complete their education. In the sub-section that follows, this Article will examine how these girls are discriminated against by their governments and the communities in which they live, especially as it relates to their ability to continue with their studies.

C. The Special Case of Child Marriage and Pregnant Girl-Children

When Sudan signed the African Charter on the Rights and Welfare of the Child ("African Child Charter"), it made a declaration to the effect

198. See Dawit Assefa et al., *Harmful Traditional Practices*, AWASSA COLL. OF HEALTH SCI., 2005, at 34, 35, https://www.cartercenter.org/resources/pdfs/health/ephti/library/modules/degree/mod_htp_final.pdf.

199. Mbaku, *The Rule of Law*, *supra* note 42, at 398–410 (providing an overview of the various traditional and customary practices that harm Africa's children).

200. John Mukum Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT'L & COMP. L. 293, 359 (2020) [hereinafter Mbaku, *Threats to the Rule of Law*].

that it did not consider itself bound by Article 11(6) (education of children who become pregnant before completing their education) and Article 21(2) (child marriage and the betrothal of girls and boys).²⁰¹ Through this declaration, Sudan effectively denied access to education for two categories of girl-children—those who are forced to marry early and those who are impregnated while in school.²⁰²

A study conducted by Human Rights Watch determined that “[m]illions of pregnant and married adolescent girls across many African countries are being denied their education because of discriminatory policies and practices” and that “[m]ore than 49 million girls are out of primary and secondary school in sub-Saharan Africa with 31 million of them out of secondary education, undermining their rights and limiting their opportunities.”²⁰³ Forcing children to marry before they reach the age of maturity and child pregnancy are major obstacles to the ability of these girls to realize their right to education. Child marriage effectively places the girl-child in a position in which she can no longer attend school—in addition to the fact that the new husband, who is most likely to be an older man, is not likely to grant her permission to continue her education, pregnancy at such an age and the complications associated with it (e.g., obstetric fistula, excessive hemorrhaging, shock, sepsis, and even death)²⁰⁴ can render finishing school virtually impossible.

The Human Rights Watch study also determined that in many parts of sub-Saharan Africa, “40 percent of girls marry before age 18” and, of the 20 countries with the highest rates of child marriage in the world, 15 of them are in Africa.”²⁰⁵ In addition, sub-Saharan Africa also has the world’s “highest prevalence of adolescent pregnancies.”²⁰⁶ In fact, researchers have determined that “[i]n 14 sub-Saharan African countries, between 30 and 51 percent of girls give birth before they are 18” and because cultural

201. *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child*, AFRICAN UNION (2019), <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf> [hereinafter African Child Charter, Status List].

202. *Id.*

203. *Africa: Make Girls’ Access to Education a Reality*, HUM. RTS. WATCH (June 16, 2017, 8:01 PM) [https://www.hrw.org/news/2017/06/16/africa-make-girls-access-education-reality#:~:text=\(Dakar\)%20%E2%80%93%20Millions%20of%20pregnant,Day%20of%20the%20African%20Child\[https://perma.cc/QV49-A9DD\]](https://www.hrw.org/news/2017/06/16/africa-make-girls-access-education-reality#:~:text=(Dakar)%20%E2%80%93%20Millions%20of%20pregnant,Day%20of%20the%20African%20Child[https://perma.cc/QV49-A9DD]) [hereinafter Human Rights Watch].

204. Katy Migiro, *Teenage Brides Suffer Pain and Shame of Fistula*, REUTERS (Aug. 4, 2011, 12:20 AM), <https://www.reuters.com/article/us-childmarriage-fistula/teenage-brides-suffer-pain-and-shame-of-fistula-idUKTRE7731E520110804> [https://perma.cc/EDH3-DP7V] (noting the prevalence of obstetric fistulas among pregnant underaged girls in Africa).

205. Human Rights Watch, *supra* note 203.

206. Human Rights Watch, *supra* note 203.

and/or religious beliefs and values “often stigmatize unmarried, pregnant girls,” many of them are forced into early marriage, regardless of the conditions that led to their pregnancies, which in many circumstances, often include rape by older members of the community.²⁰⁷

Adolescent pregnancy is a major problem in Africa—millions of girls get pregnant even before they complete primary school, creating a major social, economic and health crisis. Unfortunately, national governments do not invest in programs to reduce this threat to girl-children. Instead, they punish these adolescents by denying them the opportunity to complete their education and gain skills that can help them develop into productive adults and contributing members of their communities. By refusing to help these girls, all of whom are victims of cultural and religious beliefs within their communities, African governments are jeopardizing these children’s futures and trampling on their human rights, which include a right to education as guaranteed by various international and regional human rights instruments (e.g., the CRC and the African Child Charter) and many national constitutions.²⁰⁸

Over the years, many countries in Africa have committed themselves to guaranteeing universal education, including especially “compulsory primary and lower-level secondary education to all children.”²⁰⁹ Recent research has determined that although “70 percent of all countries have at least nine years of compulsory education, only 40 percent of countries in sub-Saharan Africa do.”²¹⁰ Most important is that many of these countries “expel pregnant girls and young mothers from school,” effectively forcing them into a life of poverty and hopelessness.²¹¹

Although Tanzania has made primary and lower-secondary school free to all students, “[m]ore than 40 percent of Tanzania’s adolescents are left

207. Human Rights Watch, *supra* note 203.

208. For example, § 29(1) of the Constitution of the Republic of South Africa, 1996, guarantees “everyone” the right “to a basic education, including adult basic education.” S. AFR. CONST., 1996. *See also* Child Protection Convention, *supra* note 38 (guaranteeing the right of the child to education).

209. Human Rights Watch, *supra* note 203.

210. Nellie Peyton, *Hold States Accountable for Africa’s Education Shortfalls*, says UNESCO, REUTERS (Oct. 25, 2017, 9:16 AM), <https://www.reuters.com/article/us-education-africa-governments/hold-states-accountable-for-africas-education-shortfalls-says-unesco-idUSKBN1CU2F0> [<https://perma.cc/H6YP-82CH>].

211. Human Rights Watch, *supra* note 203.

out of quality lower-secondary education.”²¹² Research has determined that the major barriers to the education of children in Tanzania include “a lack of secondary schools in rural areas, an [entrance examination] that limits access to secondary school, and a *discriminatory government policy to expel pregnant or married girls*.”²¹³ While human rights activists have praised Tanzania’s decision to abolish “school fees and contributions” in its secondary schools, the country has been criticized for its discriminatory practices and policies toward pregnant and married girls.²¹⁴

Sierra Leone is another African country that discriminates against pregnant girls when it comes to access to education. As schools in the country were emerging from “an eight-month hiatus due to the Ebola crisis” in 2015, students, administrators, and other stakeholders discovered that many pupils had fallen “victim to the deadly Ebola virus while others [were not able to return to school] because they [were] barred from school” by new government policies—the latter were meant to keep out pregnant girls and deny them the opportunity to return to school and complete their education.²¹⁵ However, in 2020, the government of Sierra Leone was forced to reverse the policy “after the country’s top court declared [that the policy] was discriminatory and violated human rights.”²¹⁶

Some African countries (e.g., Cameroon, South Africa, and Zambia) have adopted what are referred to as “re-entry” policies that pave the way for [pregnant] girls to return to school after they deliver their babies.²¹⁷ However, research has shown that some of the re-entry policies “are difficult for girls to meet” and are often “complicated or unclear, or include harmful directives such as mandatory pregnancy screening.”²¹⁸ For example, in Malawi, “girls are immediately suspended [from attending classes] upon discovery of their pregnancy for one year but may be readmitted at the beginning of the next academic year following the suspension.”²¹⁹ However,

212. *Tanzania: 1.5 Million Adolescents Not in School*, HUM. RTS. WATCH (Feb. 14, 2017), <https://www.hrw.org/news/2017/02/14/tanzania-15-million-adolescents-not-school> [<https://perma.cc/779F-NN2B>].

213. *Id.*

214. *Id.*

215. Laura Angela Bagnetto, *Sierra Leone: Pregnant Girls Barred from School and a Right to Education*, ALLAFRICA (Mar. 29, 2015), <https://allafrica.com/stories/201503300120.html> [<https://perma.cc/M5HC-R5TF>].

216. Jacky Habib, *Sierra Leone Reverses Ban on Pregnant Students*, CARE (Sept. 8, 2020), <https://www.care.org/news-and-stories/news/sierra-leone-reverses-ban-on-pregnant-students> [<https://perma.cc/V6R9-K3YZ>].

217. *Leave No Girl Behind in Africa: Discrimination in Education Against Pregnant Girls and Adolescent Mothers*, HUM. RTS. WATCH (June 14, 2018), <https://www.hrw.org/report/2018/06/14/leave-no-girl-behind-africa/discrimination-education-against-pregnant-girls-and> [<https://perma.cc/PGD3-5AF7>].

218. *Id.*

219. *Id.*

the young mother “who wishes to reapply for admission must send two requests: one to the Ministry of Education and one to the school she wishes to attend.”²²⁰

Most importantly, “poor dissemination at the school level and lack of awareness of these policies by teachers, communities, and girls themselves limit their effectiveness.”²²¹ In addition to the fact that school officials and teachers “do not proactively follow-up on girls who left school due to pregnancy to initiate re-entry,” no effort is usually made to determine the conditions that contributed to these premature pregnancies (e.g., rape) and how to mitigate them.²²² In addition, lack of support from the pregnant girls’ families, the need for those seeking re-entry to pay certain fees, the stigma that follows the pregnant girl even after she has given birth, and the general lack of child care and other critical services to nursing mothers, make re-entry extremely difficult.²²³

Many girl-children become pregnant either because they are forced into early marriage (and hence, become pregnant in their new husband’s house) or because they lack the information that they need to make “informed decisions about their sexuality, family planning, and their reproductive health, while others are coerced into sex and require protection and access to health services and support.”²²⁴ Throughout the continent, “[s]exuality and reproduction are often not included in the national school curricula.”²²⁵ However, although sex education is included in HIV/AIDS awareness or life-skills programs, teachers are often not able to teach the required courses because of their traditional and/or religious beliefs or the fear of being persecuted or shunned by their communities. In South Africa, for example, it has been determined that religious groups from the United States have been working with so-called “pro-family” groups to keep sex education out of the classroom.²²⁶

220. *Id.*

221. *Id.*

222. *Id.*

223. George Otieno Onyango, Felix Ngunzo Kioli & Erick Otieno Nyambedha, *Challenges of School Re-entry Among Teenage Mothers in Primary Schools in Muhoroni District, Western Kenya*, SSRN ELECTRONIC J., 2, Jan. 2015, at 2.

224. Human Rights Watch, *supra* note 203.

225. Human Rights Watch, *supra* note 203.

226. Koketso Moeti, *Sex Education is Under Threat. So are the Rights of the Next Generation*, CITY PRESS (Jan. 9, 2020), <https://www.news24.com/citypress/voices/sex-education-is-under-threat-so-are-the-rights-of-the-next-generation-20200108> [<https://perma.cc/WM8A-TVXR>].

Many international and regional organizations have recognized the importance of guaranteeing gender equality and universal access “to free primary and secondary education for all children by the 2030.”²²⁷ In fact, the African Union (“AU”) has recognized the need for all Member States to end child marriage and eliminate all forms of gender-based violence and discrimination.”²²⁸ Groups advocating for the rights of children, including, for example, Human Rights Watch (“HRW”), have noted that African governments should “guarantee that girls have equal access to free quality primary and secondary education and support to stay in school.”²²⁹

In addition, argued HRW, African governments “should adopt clear guidelines that instruct schools to re-enroll young mothers, provide support services in schools, and ensure that young mothers have access to early childhood services” and that “all children have access to age-appropriate, comprehensive sexuality, and reproductive education.”²³⁰ It is important that each African government eliminate policies that “exclude pregnant or married girls, and put in place special measures to ensure that all adolescent girls can go to school.”²³¹

Before proceeding to take a more comprehensive overview of the obstacles to the realization of the rights guaranteed children by international and regional human rights instruments and national constitutions, this Article will examine corruption and its relationship to political dysfunction in Africa.

IV. CORRUPTION AND POLITICAL SYSTEMS IN AFRICA

A. Introduction

Before examining how corruption interferes with the ability of national governments to recognize and protect the rights of children in Africa, this Article will provide an overview of the relationship between corruption and democratic systems of government. Several scholars have developed and tested empirical models that correct for the endogeneity of democracy and have determined that democracy is an important mechanism for fighting and significantly reducing corruption.²³² Hence, countries that desire

227. Human Rights Watch, *supra* note 203.

228. Human Rights Watch, *supra* note 203.

229. Human Rights Watch, *supra* note 203.

230. Human Rights Watch, *supra* note 203.

231. Human Rights Watch, *supra* note 203.

232. See generally Ivar Kolstad & Arne Wiig, *Does Democracy Reduce Corruption?* (Chr. Michelsen Inst. Working Paper No. 4, 2011).

to reduce corruption should develop and adopt democratic institutions.²³³ It is cautioned, however, that “the effect of democracy on corruption may differ across different forms of democracy.”²³⁴

In a 2008 study using a cross-state framework and panel data to empirically test the effect of democratization on corruption, Shrabani Saha determined that “‘electoral democracy’ represented by ‘political right[s]’ does not produce sufficient checks against corruption” and that this type of democracy, especially in transition countries, is more likely to exacerbate levels of corruption, when one compares them to autocratic countries.²³⁵ Saha’s results showed, however, that “an advance[d] mature democracy significantly restrains corruption levels.”²³⁶ Although corruption tends to increase in the early stages of the democratization process, once democracy has been deepened and institutionalized and the governing process has acquired effective checks against the exercise of government power, corruption decreases significantly.²³⁷

A study by Shyamal Chowdhury empirically investigates the impact of democracy and freedom of the press on corruption.²³⁸ He argues that “[t]he presence of press freedom brings public corruption cases to the voters while voters in a democracy in turn punish corrupt politicians by ousting them from public offices.”²³⁹ To retain their offices, elected political elites must work hard to reduce corruption²⁴⁰ and improve efficiency in the allocation of public services, which include the maintenance of law and order and the enforcement of laws against the violation of the rights of children. The free and independent press, then, can investigate alleged incidents of corruption and make that information available to electors. The voters or electors can then utilize that information to determine who to vote for during an election. Political elites whose corruption and opportunism

233. John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27 TRANSNAT’L L. & CONTEMP. PROBS. 310, 336 (2018) [hereinafter Mbaku, *Corruption and Democratic Institutions*].

234. *Id.* at 336; see also Kolstad & Wiig, *supra* note 232, at 19.

235. Shrabani Saha, *Democracy and Corruption: An Empirical Analysis in a Cross-country Framework* 18 (July 9-11, 2008) (paper prepared for presentation at the New Zealand Association of Economists Annual Conference, Wellington, New Zealand).

236. *Id.* at 18.

237. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 336.

238. Syamal K. Chowdhury, *The Effect of Democracy and Press Freedom on Corruption: An Empirical Test*, 85 ECON. LETTERS 93 (2004) (empirically testing the impact of democracy and press freedom on corruption).

239. *Id.* at 93–94.

240. *Id.* at 94.

have been exposed by the press can be severely punished at the polls. Thus, elected officials and candidates for public office must make certain that they avoid promoting, engaging in, or contributing to corruption.²⁴¹

However, “a deepening of democracy and increases in freedom of the press may not result in an immediate and significant reduction in corruption.”²⁴² It has been argued that as a State transitions from autocracy to democracy, “the increased democratization of its political system may actually increase the incidence of corruption and other forms of political opportunism.”²⁴³ This is due to the fact that “[i]n the early stages of democratization, . . . political systems may either have no checks and balances or have those that are relatively weak and hence, are incapable of serving effectively as a constraint to impunity or the abuse of government power.”²⁴⁴ At the same time, the significantly increased political openness brought about by the process of liberalization “will invariably increase contact between state custodians (civil servants and politicians) and individuals from the private sector, creating more opportunities for corruption and rent-seeking.”²⁴⁵

In many transition countries, including those in Africa, as democracy is deepened and becomes institutionalized, the system of checks and balances becomes more effective and the perverse incentives, which had enhanced corruption, give way to those that discourage and impede opportunism among elected politicians. For example, as elections become fair, regular (not infrequent), inclusive, credible, transparent, and competitive, they become more effective tools to be used by voters to discipline corrupt, poorly-performing and recalcitrant political elites.²⁴⁶

Lindita Camaj studied the role of the media in fighting corruption with specific emphasis on government accountability.²⁴⁷ Camaj’s study, which is based on cross-sectional data from 133 countries, specifically looks at “elements of vertical accountability (electoral competitiveness, civil society, and voter turnout),” as well as “horizontal accountability (judicial independence and political system).”²⁴⁸ Camaj confirmed previous research, which had

241. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 337; *see also* Chowdhury, *supra* note 238, at 100.

242. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 337 (emphasis omitted).

243. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338.

244. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338–39.

245. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 339.

246. John Mukum Mbaku, *Threats to Democracy in Africa: The Rise of the Constitutional Coup*, THE BROOKINGS INST. (Oct. 30, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/> [<https://perma.cc/5N9B-LN5S>].

247. Lindita Camaj, *The Media’s Role in Fighting Corruption: Media Effects on Government Accountability*, 18 INT’L J. PRESS/POL. 21 (2012).

248. *Id.* at 31.

determined that free media can function as an important check or guard on government corruption and other forms of political opportunism.²⁴⁹ Specifically, Camaj found that “media freedom is an important determinant of corruption even after controlling for variables of horizontal accountability and that there is some significant interaction between media freedom and institutions of horizontal checks and balances.”²⁵⁰

Finally, Camaj determined that when “free media are coupled with independent judiciary and strong parliaments they have a stronger impact on government corruption.”²⁵¹ Put another way, if a country’s institutional arrangements are characterized by separation of powers with effective checks and balances, “the presence of an independent or free press within such a political system produces a very strong mechanism for minimizing corrupt behaviors.”²⁵²

In addition to forcing accountability in government, the free press can also promote transparency and openness in government communication. Through this so-called “watchdog” or “gatekeeper” role, the free press can help civil society have access to the *public information*²⁵³ that it needs to perform its function as a check on the exercise of government power. When the free media undertake activities that “promote government transparency and accountability, it can scrutinize government officials and the decisions that they make, examine and explain policies to citizens, highlight policy failures, and investigate corruption and maladministration by public officials.”²⁵⁴ Investigations by the free press can help democracy-enhancing institutions, such as the police and other accountability institutions (e.g., the Public Protector) secure the information that they need to perform their constitutional function. For example, it was the free press that alerted civil society to corruption and state capture in South Africa during the

249. *Id.*

250. *Id.* at 37.

251. *Id.*

252. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338. These checks and balances include an independent judiciary, three branches of government, which are independent of each other and hence, check and guard each other, as well as a robust civil society. *See also* Mbaku, *Threats to the Rule of Law*, *supra* note 200, at 328.

253. That is, information generated through government activities, which includes, for example, government budgets—sources of revenues and how these revenues are allocated. *See, e.g.*, MBAKU, CORRUPTION IN AFRICA, *infra* note 275, at 197; *see also* Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338 (noting that the press can act as watchdogs and help promote governmental accountability).

254. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338.

regime of President Jacob Zuma and led to an official investigation by the Public Protector,²⁵⁵ Thuli Madonsela. Her report into the “alleged improper and unethical conduct by the President [of the Republic of South Africa] and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers” was released on October 14, 2016.²⁵⁶ The revelations in this state capture report most likely contributed to the downfall of Zuma’s government.²⁵⁷

B. *The Post-1990s African State and Corruption*

By the mid-1990s, “especially after South Africa’s successful transition from the racially-based apartheid system to a multi-racial and democratic political dispensation, many Africans came to see multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.”²⁵⁸ However, as evidenced by the military overthrow of the democratically-elected government of Mohamed Morsi in Egypt on July 3, 2013, the ousting of Robert Gabriel Mugabe’s government in Zimbabwe in 2017, and the April 11, 2019 ouster of the Sudanese President Omar al-Bashir, many countries in the continent are yet to fully entrench and institutionalize democracy. Even in countries that continue to practice some form of *electoral* democracy, existing institutions have failed to fully and adequately guard civil servants and political elites and prevent them from engaging in corruption and self-dealing.²⁵⁹

255. The Public Protector is a Chapter Nine institution within the Constitution of the Republic of South Africa. It is one of seven (7) organizations that were established in terms of Chapter Nine of the Constitution of the Republic of South Africa to guard the country’s democracy and enhance fidelity to the rule of law. *See* S. AFR. CONST., 1996, ch. 9, § 182 (elaborating on the functions of the Public Protector); *see also* Office of the Public Protector, Government of the Republic of South Africa, *State of Capture: A Report of the Public Protector* (Oct. 14, 2016), <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016> [<https://perma.cc/5VED-U9F6>].

256. Office of the Public Protector, Government of the Republic of South Africa, *State of Capture: A Report of the Public Protector* (Oct. 14, 2016), <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016> [<https://perma.cc/4EHU-Z9VV>].

257. *Id.*; *see also* Jason Burke, *Jacob Zuma Resigns as South Africa’s President on Eve of No-confidence Vote*, THE GUARDIAN (UK) (Feb. 14, 2018), <https://www.theguardian.com/world/2018/feb/14/jacob-zuma-resigns-south-africa-president>.

258. John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT’L COMP., POL’Y & ETHICS L. REV. 77, 90 (2018).

259. Corruption Perceptions Index 2020, TRANSPARENCY INT’L (2020), <https://www.transparency.org/en/cpi/2020> [<https://perma.cc/QKC6-UMWQ>] [hereinafter Corruption Perceptions Index].

According to Transparency International's Corruption Perceptions Index ("CPI"), African countries, such as Nigeria, Cameroon, and Uganda, that have been practicing some form of electoral democracy since the 1990s, continue to exhibit relatively high levels of corruption.²⁶⁰ The failure of many democratizing African countries to significantly improve governance has forced some scholars to question the value of democracy as a tool to fight political opportunism in general and corruption in particular.²⁶¹ But, why do these countries continue to be pervaded by high levels of corruption even though they now consider themselves functioning democracies? It has been determined that "although these newly-democratized African political systems do have governing processes based on the separation of powers, they are burdened with relatively weak and, to a certain extent, ineffective checks and balances."²⁶²

For example, in countries, such as Cameroon and Nigeria, civil society remains unable to act as an effective check on the government. In fact, since late-2016, government security forces have committed significant mass atrocities in the Cameroon's Anglophone Regions and yet none of these soldiers has been brought to justice.²⁶³ Despite the significant governance achievements made by Nigeria since it transitioned from military dictatorship to constitutional government in 1999, extra-judicial killings by police and military units remain pervasive.²⁶⁴ In October 2020, for example, there were mass protests throughout many cities in Nigeria after "12 people had been shot dead and many more injured by police."²⁶⁵ The people killed were part of the group of citizens who "were outraged by the impunity with which SARS [Special Anti-Robbery Squad] perpetrates horrific human rights violations" in Nigeria.²⁶⁶

260. See *id.* (ranking Nigeria 149/180, Cameroon 149/180, and Uganda 142/180, with Denmark and New Zealand tied at 1/180 as the least corrupt countries in the world in 2020).

261. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 338.

262. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 340.

263. *Cameroon: Civilians Massacred in Separatist Area*, HUM. RTS. WATCH (Feb. 25, 2020), <https://www.hrw.org/news/2020/02/25/cameroon-civilians-massacred-separatist-area> [<https://perma.cc/CL3U-7JJL>].

264. Ben McNerny, *Nigeria: Extrajudicial Killings by Government Forces Must Stop*, INT'L OBSERVATORY OF HUM. RTS. (Oct. 22, 2020), <https://web.archive.org/web/20201031234002/https://observatoryhr.org/news/nigeria-extrajudicial-killings-by-government-forces-must-stop/> [<https://perma.cc/45XN-TUEU>].

265. *Id.*

266. *Id.*

In mid-July 2021, a security report released by the government of Kaduna State revealed that “at least 545 people had been killed, and 1,723 [people] kidnapped between January and June 2021.”²⁶⁷ Earlier in the year, Kaduna’s Commissioner for Internal Security and Home Affairs, Samuel Aruwan, had reported that 323 people had been killed in the State in the first three months of the year through “banditry, violent attacks, communal clashes, and reprisals.”²⁶⁸ Commissioner Aruwan’s report also noted that in 2020, “a total of 937 people were killed and 1,972 kidnapped in Kaduna [State].”²⁶⁹

Kaduna State, of course, is not the only part of Nigeria affected by violence. In fact, according to a report from the UN, violence by non-state actors in Northeast Nigeria has forced more than 65,000 people to flee their homes, creating a major humanitarian emergency in the region.²⁷⁰ Meanwhile, violent clashes between nomadic herders and farmers in Benue and Nasarawa States have claimed 7,000 lives in five years.²⁷¹ This pervasive violence is hardly conducive to the realization of children’s rights, as contained in the national constitution and international and regional human rights instruments.

The increase in openness and transparency made possible by transition to democracy in many African countries, including Nigeria and Cameroon, has improved access to the government and its agents. This has implied “more access to the dispensation of public funds”²⁷² and significantly increased opportunities for individuals in and outside the government to engage in corruption and rent seeking.²⁷³

In more mature economies (e.g., the United States, Canada, and various countries in Northern Europe), one usually finds governing processes

267. Samson Toromade, *Kaduna Reports 545 People Killed, 1,723 Kidnapped in 6 Months*, PULSE.NG (July 14, 2021), https://www.pulse.ng/news/local/kaduna-reports-545-people-killed-1723-kidnapped-in-6-months/xjzvzwy?utm_source=newsletter&utm_medium=email&utm_campaign=daily-2021-07-14 [<https://perma.cc/9JGP-LJVL>] [hereinafter Toromade, *Kaduna Reports*].

268. Samson Toromade, *Bandits Killed Over 300, Kidnapped Nearly 1,000 People in Kaduna in 3 Months*, PULSE.NG (Apr. 30, 2021), <https://www.pulse.ng/news/local/kaduna-bandits-kill-over-300-kidnap-nearly-1000-in-3-months/vvv7qmq> [<https://perma.cc/P4TP-ZACP>].

269. Toromade, *Kaduna Reports*, *supra* note 267.

270. *Northeast Nigeria Violence Forces 65,000 to Flee, Humanitarians Targeted by Armed Groups*, UN NEWS (Apr. 16, 2021), <https://news.un.org/en/story/2021/04/1089892> [<https://perma.cc/E4VC-97QF>].

271. Kunle Sanni, *Herders, Farmers Clashes Claimed 7,000 Lives in Benue, Nasarawa in Five Years—U.S. Report*, PREMIUM TIMES (Nigeria) (May 23, 2019), <https://www.premiumtimesng.com/news/headlines/331361-herders-farmers-clashes-claimed-7000-lives-in-benue-nasarawa-in-five-years-u-s-report.html> [<https://perma.cc/PDL8-BXL3>].

272. Hamid Mohtadi & Terry L. Roe, *Democracy, Rent Seeking*, J. PUB. ECON. 445, 447 (2003).

273. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 340.

undergirded by adherence to the rule of law. In addition to the fact that governing processes in these countries “include a separation of powers with relatively effective checks and balances,” these countries have also managed to develop a democratic culture.²⁷⁴ They have strong and robust civil societies and non-state organizations (e.g., independent and free press) that help citizens check and guard the exercise of government power. Thus, any effort to deal effectively and fully with corruption must begin with institutional reforms to provide each country with institutional arrangements that adequately guard the state and prevent civil servants and political elites from engaging in corrupt activities.²⁷⁵

*C. The Structure of Government and Corruption
in the African Countries*

The key to the effective control of corruption lies in the country’s governing process. Such a governing process can be obtained through “constitutional design,” which allows citizens to provide themselves with “a government that is strong enough to perform its constitutionally assigned functions,” but also guarded enough so that those who serve in it are not able to engage in self-dealing and other forms of corruption.²⁷⁶ Under this model of governance, the people are granted “full sovereign control over the government in order to make certain that state agents (civil servants and political elites) do not engage in any *ultra vires* acts.”²⁷⁷

The relevant question here is: Will constitutional prohibitions (often referred to as “parchment barriers”) against certain behaviors (e.g., self-dealing) force civil servants and politicians to obey the law and desist or abstain from betraying the trust reposed in them by the people? It has been argued by legal and constitutional experts that parchment barriers alone are a necessary but not a sufficient condition for guarding government agents against engagement in various forms of opportunism, including corruption, rent seeking, and other activities that are detrimental to effective and

274. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 340.

275. JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 110 (2010) [hereinafter MBAKU, CORRUPTION IN AFRICA].

276. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 341.

277. Judith A. Best, *Fundamental Rights and the Structure of Government*, in THE FRAMERS AND FUNDAMENTAL RIGHTS 37, 37 (Robert A. Licht ed., 1992) [hereinafter Best, *Fundamental Rights*].

efficient governance. Sufficiency, it is argued, depends on having a “competent and balanced governing process.”²⁷⁸

Several African countries have codes of conduct or practice for their civil servants, which are administered by a Code of Conduct Bureau. For example, Nigeria has a Code of Conduct for Public Officers Involved with Procurement, which was made possible by the Public Procurement Act, 2007.²⁷⁹ Public officials involved with procurement are required to take an oath before they assume office. That oath is as follows:

OATH OF ALLEGIANCE FOR PUBLIC OFFICERS INVOLVED
WITH PROCUREMENT

I do solemnly swear/affirm that I will in the discharge of my duties be governed at all times by the principles of honesty, accountability, transparency, fairness and equity. I will use the best of my abilities and endeavors to discharge my responsibilities in a way and manner that promotes the objectives of the Public Procurement Act 2007, and policies and regulations made there under the constitution of the Federal Republic of Nigeria 1999 and other laws in that regard, that I shall not take advantage of any information that comes to me for any personal gain or extort money or blackmail a party/bidder of the procurement proceedings.²⁸⁰

So help me God.

Name: _____

Designation: _____ Agency: _____

Signature: _____ Date: _____

The oath taken by public officials before they assume their duties highlights important constraints against corruption and self-dealing. These are “honesty,” “accountability, transparency, fairness and equity,” as well as the “[C]onstitution of the Federal Republic of Nigeria 1999.”²⁸¹ Despite these legislative guarantees, public procurement remains one of the most corrupt sectors of Nigeria’s government.²⁸² Nigeria’s former Minister of Sports and Youth Development, Alhaji Bala Kaoje, has stated that “corruption in the country’s public sector procurement process accounts for over 70% of the government’s total budget” and this has negatively “affected the

278. *Id.*

279. PUBLIC PROCUREMENT ACT (2007) *Code of Conduct for Public Officers Involved with Procurement* (Nigeria), https://www.bpp.gov.ng/wp-content/uploads/2019/01/Code_of_Conduct_For_Public_Officers_Under_The_PPA_2007.pdf.

280. *Id.*

281. *Id.*

282. Sope Williams-Elegbe, *Systemic Corruption and Public Procurement in Developing Countries: Are There any Solutions?*, 18 J. PUB. PROCUREMENT 131, 134 (2018) (examining the pervasiveness of corruption in the public procurement sector in Nigeria).

efficiency of public spending and the opportunities to improve [the] quality of [the] lives of Nigerians.”²⁸³ The Fifth Schedule of Nigeria’s constitution provides a Code of Conduct for Public Officers and a Code of Conduct Tribunal.²⁸⁴

According to Section 6(1) of the Fifth Schedule, “[a] public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties.”²⁸⁵ Although this constitutional provision speaks directly to corruption, this parchment prohibition or barrier has not been successful in curbing the pervasiveness of bureaucratic and other forms of corruption in Nigeria. It has been argued that that quagmire is “due primarily to the fact that the constitutional guarantees are not part of ‘a competent and balanced governing process.’”²⁸⁶ Consequently, many civil servants and political elites in Nigeria regularly engage in self-dealing and other corrupt activities “without fear of retribution or punishment, either by their supervisors (in the case of civil servants) or the voters (in the case of elected officials).”²⁸⁷

In 2000, John Erero and Tony Oladoyin, well-known researchers of corruption and public administration in Nigeria, published an article that analyzed the pervasiveness of corruption in Nigeria’s public sector. They noted that:

At the counter of any police station in Nigeria, there is usually a boldly written notice to the effect that ‘BAIL IS FREE.’ However, no one can be released from police custody without parting with some amount of money. The policemen at the counter will demand money for writing materials with which they claim they will enter the case, whether of a complainant or an accused. At another level, if a policeman effects an arrest, the first thing he or she demands is ‘chop money’ from the suspect. At the level of the inter-relationship between commuter drivers and the police, the situation is a pathetic one. The police of all categories—anti-

283. Peter Smith, *High Corruption in Nigerian Public Sector Procurement Affects Quality of Lives*, PUB. SPEND F. (Aug. 30, 2017), <https://www.publicspendforum.net/blogs/peter-smith/2017/08/30/corruption-nigerian-public-sector-procurement/> [<https://perma.cc/23MQ-J7EH>].

284. CONSTITUTION OF NIGERIA (1999), Fifth Schedule.

285. *Id.* § 6(1).

286. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 342.

287. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 342.

crime, mobile, or traffic wardens—openly demand and take bribes even in the presence of passengers.²⁸⁸

Twenty-one years after this research was published, corruption, especially in Nigeria’s public sector, remains pervasive. In fact, in its 2020 Corruption Perceptions Index (“CPI”), Transparency International, which studies corruption around the world, ranked Nigeria at 149 out of 180 countries with a score of 25 out of 100.²⁸⁹ Nigeria’s score, which represents a deterioration from its score in 2012, puts the country among the most corrupt in the world.²⁹⁰ In a recent article, researcher and communication consultant, Oludayo Tade, lamented the pervasiveness of corruption in virtually all parts of Nigeria’s public sector.²⁹¹ Tade noted that after dominating governance in Nigeria for 16 years and failing to effectively root out corruption, the People’s Democratic Party (PDP) was thrown out of power through a democratic election in 2015.²⁹²

During the 2015 presidential election, Nigerians ousted incumbent Goodluck Jonathan of the PDP and chose Gen. Muhammadu Buhari of the All Progressives Congress (APC) to lead them.²⁹³ Nigerians chose Buhari, a former military ruler, believing that he was better positioned to fight pervasive corruption and defeat various violent insurgencies, including especially those orchestrated by the extremist group, Boko Haram.²⁹⁴ Buhari is now serving his second term as president of Nigeria and it appears he has failed to solve at least two of the issues he campaigned on and which brought him into office—corruption and Boko Haram’s violent mobilization. Corruption remains pervasive and, according to some observers, has become even worse under Buhari’s rule.²⁹⁵

288. John Erero & Tony Oladoyin, *Tackling the Corruption Epidemic in Nigeria*, in *CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES* 280, 280 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000).

289. Corruption Perceptions Index, *supra* note 259.

290. Corruption Perceptions Index, *supra* note 259.

291. Oludayo Tade, *Why Buhari’s Government is Losing the Anti-corruption War*, *THE CONVERSATION* (Mar. 7, 2021), <https://theconversation.com/why-buharis-government-is-losing-the-anti-corruption-war-155488> [<https://perma.cc/9WUX-AEUX>].

292. *Id.*

293. *Nigeria Election: Muhammadu Buhari Wins Presidency*, *BBC NEWS* (Apr. 1, 2015), <https://www.bbc.com/news/world-africa-32139858> [<https://perma.cc/SK69-XVYN>].

294. *Id.*

295. See Ruth Maclean & Eromo Egbejule, *Nigeria Election: ‘Mr. Honesty’ Tainted by Failure to Tackle Corruption*, *THE GUARDIAN* (Feb. 11, 2019), <https://www.theguardian.com/world/2019/feb/11/nigeria-election-mr-honesty-muhammadu-buhari-tainted-by-failure-to-tackle-corruption> [<https://perma.cc/EV2V-VX25>] (arguing that Buhari’s failure to successfully tackle the country’s corruption epidemic has negatively affected his image as an honest political leader); see also Oludayo Tade, *Nigeria: The Buhari Administration’s Failed Anti-corruption Crusade*, *THE AFRICA REPORT*, (Mar. 9, 2021), <https://www.theafricareport.com/70730/nigeria-the-buhari-administrations-failed-anti-corruption-crusade>

In addition to the fact that Buhari has been unable to reduce corruption in the country, he has failed to significantly improve the security situation. Boko Haram remains a major threat to peace and security in Nigeria and the surrounding region as evidenced by the fact that the extremist group continues to commit many atrocities with impunity, including the massacre of farmers and farm laborers, and the kidnapping of young girls in various northeastern states.²⁹⁶ Some observers argue that Boko Haram's activities, as well as those of other bandits who kill, steal, and destroy property with impunity, and also kidnap people and hold them for ransom, have exposed the Nigerian State as gradually "losing her constitutional obligation to protect lives and properties of her citizens."²⁹⁷

To understand why Nigeria and other African countries that have made significant progress toward transition to democratic governance are still pervaded with high levels of corruption, it is necessary to further examine parchment barriers or prohibitions and why such a constitutional guarantee is a necessary but not a sufficient condition for effective corruption control.²⁹⁸

D. Constitutional Prohibitions and the Fight Against Corruption

Governments are formed and empowered by people to provide certain services for them. The relationship between the people and the government of their respective countries is defined and elaborated in the constitution. A bill of rights may be inserted into the constitution to spell out and guarantee certain fundamental rights—the objective of such a constitutional provision is to protect certain important rights against infringement by state- and non-state actors. Thus, a constitution performs two important purposes—(i) it guarantees and protects fundamental rights and freedoms; and (ii) sets out or elaborates the basic structure of government and defines the limits of government power. The constitution is the country's basic law

<https://perma.cc/H5PT-TH5D>] (examining Buhari's failed policies, including his inability to deal with corruption).

296. Oludayo Tade, *Massacres in the Age of Covid-19 Pandemic*, BUS. DAY, Dec. 9, 2020, <https://businessday.ng/opinion/article/massacres-in-the-age-of-covid-19-pandemic> [<https://perma.cc/5CMZ-8UKV>].

297. *Id.*

298. See, e.g., Best, *Fundamental Rights*, *supra* note 277, at 47 (noting that parchment barriers are a necessary but not sufficient condition for the protection of rights).

and all other laws, including custom and tradition, must comply with this basic law.²⁹⁹

The services that most people expect from the government include maintaining law and order, recognizing and protecting citizens' rights, and "creating an institutional environment within which individuals can maximize their values without infringing on the ability of others to do likewise."³⁰⁰ However, it must be understood that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³⁰¹ Professor Judith A. Best notes that "it is ultimately the people who must continuously define and refine their rights in time and place."³⁰² However, for the people to accomplish this objective, they need a governing *process*.

To understand why parchment barriers are not enough to protect fundamental rights, one must ask the following question: What is the source of threats to the people's fundamental rights and freedoms? Best argues that "[d]angers to liberty arise in all times and places, and under unpredictable and changing circumstances. Rights must be protected against all comers—against threats from individuals and organizations of all kinds, both inside and outside of our own society."³⁰³ Perhaps, more importantly, rights "can only be secured by the people employing a properly structured governing process" and "[g]overnment, not parchment prohibitions, is the solution to the problem of securing rights," including, of course, those of children.³⁰⁴

The competent and balanced governing process is one that adequately constrains the state and minimizes opportunism by civil servants and political elites, as well as forces these state custodians to be accountable to both the people and the constitution. Within such a governing process, there is fidelity to the rule of law, fundamental rights and freedoms that are recognized and fully protected, and corruption, self-dealing and other forms of opportunism are minimized. The existence of a competent and effective governing process implies that if government agents (e.g., civil servants and politicians) refuse or are unwilling to enforce the laws, they can be

299. See, e.g., Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*, 57 WM. & MARY L. REV. 1825, 1829 (2016) (noting that the constitution defines "the relationship between the people and their government and set[s] forth a nation's power structure").

300. Mbaku, *Corruption and Democratic Institutions*, *supra* note 233, at 343.

301. U.S. CONST. amend. IX.

302. Best, *Fundamental Rights*, *supra* note 277, at 38.

303. Best, *Fundamental Rights*, *supra* note 277, at 38.

304. Best, *Fundamental Rights*, *supra* note 277, at 38.

compelled to do so through effective threats and sanctions from civil society and its organizations.³⁰⁵

For example, if a government agent engages in self-dealing and infringes the rights of citizens, including those of children (e.g., a politician embezzles money allocated for healthcare for vulnerable groups), sanctions against such a person can come from at least three sources. First, the independent press can investigate and expose the politician's opportunism, seriously damaging the trust that was reposed in him or her by voters when he or she was elected to office. Second, the country's independent judiciary, working with the police, can bring such a self-dealing politician to justice. Finally, the people can exercise their right not to vote for this politician during the next election and effectively remove him or her from office. Depending on the nature of the position (e.g., a state governor), such an individual could also be removed from office through impeachment. This ability of the people to discipline civil servants and politicians can force these public servants to become more efficient and productive in order to avoid being punished at the polls or through the courts.³⁰⁶

As argued by James Madison, one of the founders of the American Republic, in *The Federalist Papers No. 51*, "you must first enable the government to control the governed; and in the next place oblige it to control itself."³⁰⁷ He went on to argue that while "[a] dependence on the people is, no doubt, the primary control on the government," nevertheless, "experience has taught mankind the necessity of auxiliary precautions."³⁰⁸ He and the other founders of the American Republic then borrowed from John Locke's idea that the individuals who make the laws should and must not be the ones to execute them, as well as Charles Louis de Secondat, Baron de Montesquieu's ideas on governance, to create the *republican system of government* in the new United States of America.³⁰⁹

305. JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 133 (2018) [hereinafter MBAKU, PROTECTING MINORITY RIGHTS].

306. Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 176, at 128–30 (noting the importance of a balanced and competent governing process to effective protection of fundamental rights).

307. THE FEDERALIST NO. 51 (James Madison).

308. *Id.*

309. *See generally*, JOHN LOCKE, TWO TREATIES OF GOVERNMENT (Whitmore and Fenn, 1821) (elaborating a governing process characterized by separation of powers); *see also* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., Haffner Press, 1949) (1750) (elaborating his theory of the separation of powers).

Here is what John Locke had to say about the nature of government:

[I]t may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to executive them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have distinct interest from the rest of the Community, contrary to the end of Society and Government.³¹⁰

Despite the fact that he made these observations in 1821, Locke was invariably describing the problems that many of today's African countries face with respect to governance. Locke was specifically worried about the fusion of the function of *making the laws* with that of *enforcing them* and that persons empowered to perform this dual function may engage in self-dealing and manipulate the process to their own advantage. Such a person (or persons) is (are) likely to place himself (themselves) above the law and produce a governing process that is characterized by impunity and high levels of tyranny directed at the majority of citizens. Locke, thus, promoted a governance mechanism that was characterized by a separation of powers.

In addition to the fact that many African constitutions exempt their presidents from prosecution for crimes that they commit while in office, in the process of enforcing laws, many high-ranking officials are considered untouchables who are above the law. For example, Professor Nantang Jua, an expert on corruption and other governance issues, has examined Cameroon's anti-corruption agency—the Financial Disciplinary Committee of the Ministry of Public Service.³¹¹ He determined that:

The Financial Disciplinary Committee of the Ministry of Public Service occasionally prosecutes low-ranking government officials such as postmasters, school bookkeepers and, from time to time, a few men of managerial rank. This can be seen as a device that, in a quest to enhance its legitimacy, that state sees to satisfy society's clarion call that sanctions be meted out on deviating bureaucrats. That *higher-level bureaucrats are largely immune from trial by the Disciplinary Committee* is evidence that Cameroon has an attenuated patrimonial administrative structure in which public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.³¹²

310. LOCKE, *supra* note 309, at 313.

311. Nantang Jua, *Cameroon: Jump-starting an Economic Crisis*, in 21 AFR. INSIGHT 166 (Richard Cornwell ed., 1991).

312. *Id.* (emphasis added). Note that at the request of Paul Biya, Cameroon amended its constitution in 2008 to grant the president immunity from prosecution for any crimes that he committed while in office. CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] 1996 (as amended through 2008), art. 53(3) ("Acts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions.").

Many studies have determined that regular political interference in the functioning of the judiciary ensures that certain high-ranking public officials can be exempt from prosecution for breaking the law.³¹³ The U.S. Department of State has determined that while judges hearing a case in Cameroon “are technically to be governed only by the law and their conscience as provided for by the constitution, in some matters they are subordinate to the minister of justice or to the minister in charge of military justice” and by implication, the President of the Republic.³¹⁴ It is no wonder that many high-ranking political elites and civil servants in Cameroon, especially those who are close or related to the president, often escape prosecution for their crimes.³¹⁵ This is especially true in crimes involving corruption as made clear by Professor Jua.³¹⁶

Professor Jua’s study was published in 1991 during the time when Cameroon and many other countries in Africa were transitioning to a multiparty democracy. So, it is possible that governance has improved significantly, and the situation described by Jua, particularly with respect to the prosecution of high-ranking public officials, has changed for the better. Unfortunately, as noted by the reports of the U.S. Department of State, impunity by high-ranking government officials remains pervasive.³¹⁷ In fact, a recent study of police corruption in Cameroon has determined that many high-level police officers regularly engage in corrupt activities without any fear of prosecution.³¹⁸ Polycarp Ngufor Forkum, who holds

313. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, CAMEROON 2019 HUMAN RIGHTS REPORT (2020), <https://www.state.gov/wp-content/uploads/2020/03/CAMEROON-2019-HUMAN-RIGHTS-REPORT.pdf>.

314. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, CAMEROON 2018 HUMAN RIGHTS REPORT (2019), <https://www.state.gov/wp-content/uploads/2019/03/Cameroon-2018.pdf>.

315. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 176, at 97–99.

316. Jua, *supra* note 311, at 166; see also Charles M. Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in *CORRUPTIONS AND DEVELOPMENT IN AFRICA* 234–35 (Kempe Ronald Hope, Sr. et al. eds., 2000) (noting the extent to which executive control of other branches of government, including the judiciary, has rendered the latter incapable of dealing effectively with the corrupt activities of high-ranking officials, including the president).

317. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, CAMEROON 2020 HUMAN RIGHTS REPORT (2021), <https://www.state.gov/wp-content/uploads/2021/10/CAMEROON-2020-HUMAN-RIGHTS-REPORT.pdf>.

318. *Cameroon Corruption Report*, GAN INTEGRITY RISK & COMPLIANCE PORTAL (May 2020), <https://www.ganintegrity.com/portal/country-profiles/cameroon> [<https://perma.cc/YQ9P-ERX3>].

the rank of Commissioner of Police and heads the Human Rights Unit of the National Advanced Police School in Yaoundé, and the author of a 2016 study on police corruption in Cameroon, determined that “[s]everal high-level police officials have over the years been credibly implicated but never convicted of the theft of police funds destined to cover police operations.”³¹⁹ Part of the problem, noted Forkum, is that judicial commissions of inquiry into corruption, common in countries that are serious about fighting corruption, including that in the police, have never been convened in modern Cameroon.³²⁰

Of course, Cameroon is not an exception. The failure to deal fully with corruption is a problem that is faced by many countries in Africa. In fact, according to Transparency International’s (“TI”) Corruption Perceptions Index (“CPI”), of the 20 countries perceived to be the most corrupt in the world in 2020, 60 percent of them were found in Africa.³²¹ According to the Global Corruption Barometer’s assessment of Africa, “more than half of all citizens [of African countries] think corruption is getting worse in their country and that their government is doing a poor job in tackling corruption.”³²²

In many African countries, corruption was especially prevalent in public services, particularly health care and education,³²³ which are critical to children and their rights. In many countries, TI determined that official financial allocations to critical sectors, such as health care and education, were often embezzled by corrupt civil servants and political elites and “invested” in foreign economies for the benefit of these corrupt officials.³²⁴ Such corruption significantly reduces public investment in life-saving and welfare-enhancing public sectors (e.g., healthcare and education). In addition, TI determined that demanders of public services are usually required to pay bribes before they can access them.³²⁵ This is especially the case with people on the economic margins and living in extreme poverty. As noted by TI, “the poorest people are twice as likely to pay a bribe as the richest people in Africa.”³²⁶ TI noted further that “[p]aying bribes for essential

319. POLYCARP NGUFOR FORKUM, *Cameroon: Police Corruption and the Police Reform Imperative*, in POLICE CORRUPTION AND POLICE REFORMS IN DEVELOPING SOCIETIES 125, 131 (Kempe Ronald Hope Sr. ed., 2016).

320. *Id.*

321. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2020 (2021), https://issuu.com/transparencyinternational/docs/corruption_perceptions_index_2020 [https://perma.cc/3H8S-4T3H].

322. CORALIE PRING & JON VRUSHI, TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER AFRICA 2019 4 (2019), https://images.transparencycdn.org/images/2019_GCB_Africa3.pdf.

323. *Id.*

324. *Id.* at 3.

325. *Id.* at 4.

326. *Id.*

public services means poorer families have less money for basic necessities like food, water and medicine.”³²⁷

Corruption is especially damaging to the education sectors in many African countries. For example, Maty Konte, a research economist at the UN University, determined that “children in large parts of Africa are simply not being well taught or learning what is needed as they progress through the school system” because of pervasive corruption in the education sectors of their countries.³²⁸ She notes that while resources are important for providing the necessary facilities for children to learn and develop necessary skills, the quality of governance, especially at the local level, is just as important.³²⁹ It is the local government that is responsible for providing and maintaining necessary physical infrastructure for learning—textbooks, furniture, buildings, desks, computers, and making repairs to classrooms.³³⁰

Corruption, as will be discussed more fully later, can have at least two negative impacts on the education of young people and their subsequent preparation for participation in both the economy and the political system. First, through corruption, local officials can embezzle funds meant for providing necessary facilities for education and deprive the children of the opportunity to attend school and learn. Second, the demand that citizens seeking access to education services pay bribes to local officials before their children can attend school, participate in school activities and/or take examinations, can seriously undermine public efforts to prepare young people for effective participation in the economy.³³¹

Charles Louis de Secondat, Baron de Montesquieu is generally considered the leader of the modern theory of the separation of powers, which informed the work of the founders of the American Republic.³³² In Montesquieu’s model of government, the functions of government were separated into three well-defined categories, namely, (1) legislative; (2) executive; and (3) judicial. Noting that individuals who hold government power are most likely to try to maximize their self-interest at the expense of that of society as a whole and hence, would want to secure absolute power for themselves,

327. *Id.*

328. Maty Konte, *How Corrupt Local Officials Kill Decent Education in Africa*, THE CONVERSATION, (Feb. 11, 2018), <https://theconversation.com/how-corrupt-local-officials-kill-decent-education-in-africa-91251> [<https://perma.cc/U6Q8-4DQU>].

329. *Id.*

330. *Id.*

331. *Id.*

332. *See generally* BARON DE MONTESQUIEU, *supra* note 309.

he argued that public servants should be legally constrained. He suggested a system of “checks” and “balances” to accomplish this task.³³³

Modern constitutional scholars have argued that one of the most important reasons for separating political powers is to prevent majoritarian tyranny.³³⁴ To accomplish this, the national government can be divided into “three distinct branches having shared powers.”³³⁵ Electing or selecting individuals to serve in each of these branches of government is undertaken in “different ways, by different coalitions of people, for different terms of office” in order to significantly slow or constrain the ability of the majority to transform its will into law.³³⁶

In the American republican system, individuals who serve in the House of Representatives, one of the two chambers of the legislative branch of government, serve two-year terms. Those who serve in the Senate, the other chamber of the legislature (i.e., the Congress), are elected to serve six-year terms and these terms are subjected to staggered elections. The president, who is part of the executive, is elected to serve a four-year term and officers of the federal judiciary are granted life tenure by the constitution and are selected indirectly by the president.³³⁷

Since transition to democratic governance began in Africa in the early-1990s, several countries have either amended their constitutions or written new ones to introduce the principle of the separation of powers with checks and balances. For example, constitutions in South Africa (1996),³³⁸ Cameroon (1996),³³⁹ Nigeria (1999),³⁴⁰ Ghana (1992),³⁴¹ and Kenya (2010)³⁴² contain provisions that divide the power of government into three distinct branches. Research has revealed, however, that in some of these countries, “the separation of powers is simply an abstract constitutional construct that does not have any practical application.”³⁴³

Although the constitutions of many of these countries establish three separate branches of government, the executive often has control over the other branches of government. In fact, in many of the continent’s Francophone countries, the constitution grants the president the power to guarantee the

333. See generally BARON DE MONTESQUIEU, *supra* note 309, at 157–60.

334. Best, *Fundamental Rights*, *supra* note 277, at 46.

335. Best, *Fundamental Rights*, *supra* note 277, at 46.

336. Best, *Fundamental Rights*, *supra* note 277, at 46.

337. U.S. CONST. art. 1, §§ 2–3, art. 2, § 1, art. 3, § 1.

338. S. AFR. CONST., 1996 (WITH AMENDMENTS THROUGH 2012).

339. CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] 1996 (as amended through 2008).

340. CONSTITUTION OF NIGERIA, (1999).

341. CONSTITUTION OF THE REPUBLIC OF GHANA, 1992 (WITH AMENDMENTS THROUGH 1996).

342. CONSTITUTION (2010) (Kenya).

343. MBAKU, PROTECTING MINORITY RIGHTS, *supra* note 305, at 137.

independence of the judiciary and to do so by appointing members of the judiciary. This process effectively negates the independence of the judiciary because the president can use his power to appoint and dismiss judicial officers to interfere with their ability to act independently.³⁴⁴

When the Republic of Cameroon amended its constitution in 1996 and introduced separation of powers, noted constitutional expert Professor Charles Manga Fombad argued that “[t]he new constitution created a far more centralized system [of government] with an ‘imperial presidency’ and a greatly weakened legislature and judiciary.”³⁴⁵ In addition, he noted that “[t]he extensive powers that the president now possesses reinforce his pre-existing powers to legislate and rule by decree as well as appoint and dismiss, without consulting anybody, cabinet ministers, judges, governors, top military officers and other senior officials in government and para-public establishments.”³⁴⁶ Like Cameroon, many African countries which began transitions to democratic governance in the early-to-mid 1990s, have still not been able to provide themselves with legal and judicial systems that are able to fully enforce the law and minimize corruption, self-dealing and other forms of opportunism by civil servants and political elites.³⁴⁷

The corruption of providers of public services is especially detrimental to the welfare and the rights of Africa’s children. For example, in sectors such as education and health, which provide critical services to children, corruption can destroy any prospects for these children to realize their rights to education. Absenteeism among public school teachers, a pervasive form of corruption, especially in rural schools in the continent, contributes significantly to poor educational outcomes among school children. In a recent study analyzing changes in the rate of teacher absenteeism among South African provinces, it was determined that “the absence rate increased statistically significantly from 2011 to 2017.”³⁴⁸

344. CONSTITUTION OF THE REPUBLIC OF CAMEROON [CONSTITUTION] 1996 (as amended through 2008), art. 37(3).

345. Charles Manga Fombad, *The Dynamics of Record-breaking Endemic Corruption and Political Opportunism in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 357, 384 (John Mukum Mbaku & Joseph Takougang eds., 2004).

346. *Id.* at 384.

347. See generally MBAKU, *PROTECTING MINORITY RIGHTS*, *supra* note 305, at 86–87 (discussing limitations of constitutional protections of newly independent African states).

348. See generally Steven Kayambazinthu Msosa, *A Comparative Trend Analysis of Changes in Teacher Rate of Absenteeism in South Africa*, 10 *EDUC. SCI.* 189, 193 (2020) (discussing impact of teacher absenteeism in South Africa).

In the section that follows, this Article will examine the impact of corruption on children's rights in Africa. The decision in this Article to examine the role that corruption plays in the recognition and protection of the rights of children in Africa is based on at least two important reasons. First, the full and effective protection of the rights of children is a national or domestic affair. While international law and the international community are important, the actual protection of children and their rights is the purview of national governments. Hence, the quality of government and the capacity of each government to enforce laws against the violation of the rights of children are very important. Finally, corruption can seriously undermine the ability of the government to function as an effective mechanism for enforcing the law in general and particularly, laws against the violation of the rights of children.

V. CORRUPTION AND THE RIGHTS OF CHILDREN IN AFRICA: AN OVERVIEW

A. Introduction

Corruption, especially that involving civil servants and political elites, is at the core of some of the most important violations of human rights, including those of children in Africa. Political elites or politicians design public policies and civil servants implement them. Corrupt policymakers are likely to design policies that either fail to advance the recognition and protection of human rights or actually trample on the rights of vulnerable groups. For example, since unification between the English-speaking UN Trust Territory of Southern Cameroons with the French-speaking *République du Cameroun* in 1961 to form what is now the Republic of Cameroon, the francophone-dominated central government in Yaoundé has consistently designed and implemented policies that marginalize the country's Anglophone Regions and trample on their rights.³⁴⁹

In 2010, Abdullahi Adamu, a former governor of Nigeria's Nasarawa State and ranking member of the then ruling People's Democratic Party (PDP), was arrested by the country's Economic and Financial Crimes Commission (EFCC) and accused of embezzling \$100 million of public funds that were meant for several public projects including "roads, schools,

349. John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?* 42 SUFFOLK TRANSNAT'L L. REV. 1, 1-4 (2019) [hereinafter Mbaku, *International Law and the Anglophone Problem in Cameroon*] (examining tyranny directed at the Anglophone Regions of Cameroon by the francophone-dominated central government in Yaoundé).

hospitals and markets.”³⁵⁰ In 2012, a former Delta State governor, James Ibori, pleaded guilty in a London court to embezzling as much as \$250 million in public funds.³⁵¹ Ibori had been extradited to the UK to stand trial after he had fled Nigeria to Dubai to escape the jurisdiction of Nigerian courts.³⁵² Before they were embezzled by corrupt political elites, these funds were destined to be invested in various sectors (e.g., education and health) that are important to the rights and welfare of children.³⁵³

In a report released by Transparency International (TI) in 2007 called *Global Corruption Barometer*, the international anti-corruption NGO noted that according to citizen opinion, corruption is pervasive throughout virtually all the public sectors of most developing countries, including those in Africa, and that the police and the judiciary are especially prone to high levels of corruption.³⁵⁴ TI also argued that “[t]he fact that the judiciary emerges as the sector, after the police, most affected by bribery casts serious doubt about citizens being guaranteed their democratic right to equal access to courts.”³⁵⁵

In each African country, the judiciary and the police are the public institutions that “are in charge of sanctioning corruption-related acts.”³⁵⁶ However, if these institutions are pervaded by corruption, “then the very enforcement mechanisms that are crucial for effective anti-corruption efforts are hindered, and public trust is undermined.”³⁵⁷

As I have discussed elsewhere, “[c]ivil servants, in an effort to illegally extract additional income for themselves, usually allocate public goods and services capriciously, favoring those who are willing and able to pay bribes.”³⁵⁸ Such an approach to the allocation of public services not only introduces significant allocative inefficiencies into the economy, but it

350. Jon Gambrell, *Nigerian Politician Accused of Embezzling \$100M*, THE SEATTLE TIMES (Feb. 24, 2010, 12:00 AM), <https://www.seattletimes.com/nation-world/nigerian-politician-accused-of-embezzling-100m/> [https://perma.cc/JJR2-GLMK].

351. *Nigerian Politician Pleads Guilty to Stealing \$250 Million*, VOA NEWS (Feb. 26, 2012, 7:00 PM), <https://www.voanews.com/a/nigerian-politician-pleads-guilty-to-stealing-250-million-140602243/159666.html> [https://perma.cc/8R6S-8TZ8].

352. *Id.* (noting pervasive corruption in Nigeria’s public sector).

353. Gambrell, *supra* note 350.

354. TRANSPARENCY INTERNATIONAL, REPORT ON TRANSPARENCY INTERNATIONAL GLOBAL CORRUPTION BAROMETER 2007 6 (2007), https://images.transparencycdn.org/images/2007_GCB_EN.pdf [https://perma.cc/4MEV-HJ7T].

355. *Id.*

356. *Id.*

357. *Id.*

358. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 110.

also subjects many citizens, especially historically marginalized groups (e.g., women and girls) to “unnecessary suffering—the poor are deprived of welfare-enhancing (and in many cases, life-saving) public services such as clean water, prenatal care for pregnant women, primary education, and shelter.”³⁵⁹

In many countries in Africa, corruption allows state- and non-state agents to engage in behaviors that violate the rights of children. For example, families force their children into underage marriage;³⁶⁰ children are subjected to significant levels of physical and mental abuse, as well as neglect or negligent treatment; young girls are sold into prostitution, as well as for use in pornography and illegal adoptions and organ transplantation.³⁶¹ These crimes, which constitute major human rights violations, are being committed while “highly corrupt national enforcement agencies standby and do nothing.”³⁶² If the police and the judiciary are compromised by corruption, they are “impotent to stop this insidious institution, which continues to destroy the lives of an important portion of the population of these countries.”³⁶³ This “blatant violation of the human rights” of girls and women guarantees them a life of suffering and pain and perhaps, an early grave, just because they live in countries whose institutions are pervaded by corruption.³⁶⁴

Mary Robinson, the former UN Commissioner for Human Rights, argued that “analyzing corruption in the light of its impact on human rights could well strengthen public understanding of the evils of corruption and lead to stronger sense of public rejection.”³⁶⁵ Below, this Article takes a look at the impact of corruption on human rights.

B. Corruption and Human Rights

According to the Office of the UN High Commissioner for Human Rights (“UNHCHR”), “[c]orruption can have a devastating impact on the availability, quality and accessibility of human rights-related goods and

359. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 110.

360. John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 THE INDONESIAN J. INT’L & COMP. L. 103, 104, 112 (2020) [hereinafter Mbaku, *International Law and Child Marriage in Africa*] (examining child marriage in Africa).

361. Mbaku, *The Rule of Law*, *supra* note 42, at 287, 300.

362. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 110.

363. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 110–11.

364. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 111.

365. TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2004 8 (2004), https://images.transparencycdn.org/images/2004_GCR_PoliticalCorruption_EN.pdf.

services.”³⁶⁶ In addition, corruption “undermines the functioning and legitimacy of institutions and processes, the rule of law and ultimately the State itself.”³⁶⁷ During the last several decades, “[i]nternational human rights mechanisms, including the [UN] Human Rights Council], have paid increasing attention to the negative impact of corruption on the enjoyment of human rights” and have “made numerous recommendations to Member States with the aim to prevent and suppress corruption.”³⁶⁸

The UNHCHR study on the impact of corruption on human rights is part of the international agency’s overview of the role of good governance in recognizing and protecting human rights. The UNHCHR defines good governance as “the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law.”³⁶⁹ In addition, noted the UNHCR, “[t]he true test of ‘good’ governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.”³⁷⁰

With respect to corruption, the UN High Commissioner for Human Rights has determined that “[e]very year \$1 trillion is paid in bribes while an estimated \$2.6 trillion are stolen through corruption—a sum equivalent to more than 5 percent of the global GDP.”³⁷¹ The Office of the UN High Commissioner for Human Rights works with Member States of the UN, national human rights organizations, civil society organizations, and other stakeholders to help create and sustain an environment within these countries that recognizes, respects and protects human rights, including those of children. Unfortunately, corruption, which remains pervasive in many developing countries, including those in Africa, continues to constrain the ability of these States to enforce laws against the violation of human rights.

The Constitutive Act of the African Union provides Member States with “a clear mandate on the promotion and protection of human and peoples’

366. *Corruption and Human Rights*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/Corruption.aspx> [<https://perma.cc/FC6L-H4GL>].

367. *Id.*

368. *Id.*

369. *OHCHR and Good Governance*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> [<https://perma.cc/XR3Z-EE5T>].

370. *Id.*

371. *Id.*

rights on the continent.”³⁷² According to Article 3(h), “[t]he objectives of the [African] Union shall be to (h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”³⁷³ This mandate is further reinforced and strengthened by the African Charter on Human and Peoples’ Rights (“Banjul Charter”),³⁷⁴ African Charter on the Rights and Welfare of the Child,³⁷⁵ the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol),³⁷⁶ as well as various international human rights instruments.³⁷⁷

During the last several years, the Organization of African Unity (“OAU”) and its successor organization, the African Union (“AU”), have reviewed several “strong and convincing arguments” that “have been advanced on the nexus between corruption and human rights violation[s].”³⁷⁸ These arguments, noted the AU, informed the OAU’s decision to convene “a high level meeting of experts to consider ways and means of removing obstacles to the enjoyment of economic, social and cultural rights, including the fight against corruption and impunity.”³⁷⁹ One of the recommendations made at the high level meeting was for the adoption of the African Union Convention on Preventing and Combating Corruption (“AU Corruption Convention”), which took place on July 11, 2003 at the 2nd Ordinary Session of the Assembly of the African Union at Maputo, Mozambique.³⁸⁰

Article 22(5)(g) of the AU Corruption Convention provides that the Advisory Board on Corruption within the African Union should “build

372. African Union Comm’n., *Africa Human Rights Day: “Fighting Corruption and Advancing Human Rights: Our Collective Responsibility,”* 2 (Oct. 21, 2018), https://www.achpr.org/public/Document/file/English/african_human_rights_day_concept_note.pdf [hereinafter *Africa Human Rights Day*].

373. Org. of African Unity, *Constitutive Act of the African Union*, art. 3(h), adopted on July 11, 2000, and entered into force on May 26, 2001, <https://au.int/en/treaties/constitutive-act-african-union> [<https://perma.cc/BKS2-3XFS>].

374. African Charter on Human and Peoples’ Rights, preamble, June 27, 1981, 1520 U.N.T.S. 217, [hereinafter *Banjul Charter*].

375. African Child Charter, *supra* note 1.

376. African Union Comm’n., *Protocol to the African Charter on the Human and Peoples’ Rights on the Rights of Women in Africa*, 4, adopted on July 11, 2003, and entered into force on November 25, 2005, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf.

377. *See, e.g.*, International Covenant on Civil and Political Rights, at 1, Mar. 23, 1976, T.I.A.S. No. 92-908.

378. *Africa Human Rights Day*, *supra* note 372.

379. *Africa Human Rights Day*, *supra* note 372.

380. *Africa Human Rights Day*, *supra* note 372; *see also* African Union Comm’n. (AU), *African Union Convention on Preventing and Combating Corruption*, preamble, adopted on July 11, 2003, and entered into force on August 5, 2006, https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf [hereinafter *African Union Corruption Convention*].

partnerships with the African Commission on Human and Peoples' Rights, African civil society, governmental, intergovernmental and non-governmental organizations to facilitate dialogue in the fight against corruption and related offences."³⁸¹ While noting that "illicit capital flight undermines the capacity of State[s] Parties to implement the African Charter on Human and Peoples' Rights" and "that human rights cannot be fully achieved without the availability of resources, the [African Commission on Human and Peoples' Rights] continues to interrogate the impact of illicit capital flight from Africa on human rights and to seek ways and means of contributing to the development of effective human rights-based measures and solutions to this challenge."³⁸²

As part of the effort to fight corruption and its impact on the recognition and protection of human rights, the AU adopted Resolution 236 in 2013 "in which it called on its Working Group on Economic, Social and Cultural Rights in Africa and its Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to 'undertake an in-depth study on the impact of illicit capital flight on human rights in Africa', within the framework of its mandates to: within its mandate to undertake studies and researches on African problems in the field of human and peoples' rights, and give its views or make recommendations to Governments as appropriate."³⁸³

Corruption has been identified as a significant constraint to "socio-economic transformation, peace, security and development."³⁸⁴ While corruption is a global institution and pervades virtually all economies, it is especially problematic and endemic in several economies in Africa.³⁸⁵ In fact, some observers have argued that corruption has become so endemic and pervasive in many African countries that unless the continent can deal with it more effectively, Africans may not be able to realize the aspirations elaborated in Agenda 2063.³⁸⁶ Agenda 2063's Aspiration 3 speaks of "good governance,

381. *African Union Corruption Convention*, *supra* note 380, art. 22(5)(g).

382. *Africa Human Rights Day*, *supra* note 372, at 2.

383. *Africa Human Rights Day*, *supra* note 372, at 2–3; *see also* Banjul Charter, *supra* note 374, art. 45(1)(a).

384. *Africa Human Rights Day*, *supra* note 372, at 3.

385. *See, e.g.*, MBAKU, CORRUPTION IN AFRICA, *supra* note 275 (examining the impact of corruption on African economies) (examining the impact of corruption on African economies).

386. *Africa Human Rights Day*, *supra* note 372, at 3. *See also* AFRICAN UNION COMMS'N, AGENDA 2063, THE AFRICA WE WANT 5 (2015) https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf [hereinafter AGENDA 2063]; John Mukum Mbaku, *Constitutionalism and Africa's Agenda 2063: How to Build "The Africa We Want,"* 45

democracy, respect for human rights, justice and the rule of law.”³⁸⁷ When and if this aspiration is fulfilled, Africa will “[b]e a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched.”³⁸⁸ At this point, all Africans, regardless of characteristics such as ethnicity, religion, and gender, “will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favor.”³⁸⁹ However, corruption remains one of the most important obstacles to the realization of these aspirations.

Currently, corruption is bleeding the continent of scarce resources for development. Some estimates put corruption’s costs on the continent at more than \$150 billion per year.³⁹⁰ This amount, however, does not include the nearly \$100 billion that leaves the continent as illicit financial outflows. These corrupt practices have a significantly negative impact on the ability of Africans to enjoy their rights, including especially socio-economic rights. Embezzlement of public funds and illicit financial outflows constrain the ability of African governments to provide their citizens with human-rights-enhancing services, such as adequate and affordable access to education, health care, clean water, and housing. This failure is especially hard on historically marginalized groups, such as women and girls. For example, the failure of African countries to prevent female genital mutilation and child marriage because of corruption in police and judicial institutions can effectively deprive these citizens from enjoying the human rights guaranteed them by their national constitutions.³⁹¹

Hence, it is important to note that any effort to fully understand how to recognize and protect human rights, including those of children, must take into consideration the role played by corruption. At the very least, corruption can compromise the ability of African governments to fulfil their obligations under international and national laws “to uphold, respect and protect the human rights of individuals within their jurisdictions” and, in addition, corruption can significantly “impede[] the full realization of these rights

BROOK. J. INT’L L. 573 (2020) (examining obstacles to realizing the aspirations contained in Africa’s Agenda 2063).

387. AGENDA 2063, *supra* note 386, at Aspiration 3.

388. AGENDA 2063, *supra* note 386, at Aspiration 3, ¶ 28.

389. AGENDA 2063, *supra* note 386, at Aspiration 3, ¶ 29.

390. *Africa Human Rights Day*, *supra* note 372, at 3.

391. See e.g., Mbaku, *International Law and Child Marriage in Africa*, *supra* note 360, at 105 (examining the impact of child marriage in Africa’s girl-children).

by their beneficiaries.”³⁹² At the worst, it can allow state- and non-state actors to engage in gross human rights violations with impunity.³⁹³

Because human rights “are indivisible and interdependent, the impacts of corruption are numerous and touch on all aspects of human rights [including] the civil, political, economic, social and cultural rights, as well as the right to development.”³⁹⁴ For any African country to fully ensure the enjoyment of human rights by all its citizens, including children and other vulnerable groups, it must eradicate those practices, including especially corruption by public servants, that interfere with the protection of human rights.

In supporting the UN General Assembly’s 2030 Agenda for Sustainable Development,³⁹⁵ the Human Rights Treaty Bodies³⁹⁶ “identified mismanagement of resources and corruption as obstacles to the allocation of resources to promote equal rights to basic services and to assist those at risk of being left behind.”³⁹⁷ Scholars have studied the empirical relationship between corruption and human rights. Their results show that “more corrupt countries have worse records at protecting human rights, even after controlling for other explanatory variables, such as the level of democracy, national income,

392. *Africa Human Rights Day*, *supra* note 372, at 3.

393. See, e.g., Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, *supra* note 176, at 80.

394. *Africa Human Rights Day*, *supra* note 372, at 3.

395. The 2030 Agenda for Sustainable Development is a resolution that was adopted by the UN General Assembly in 2015 and designed to achieve seventeen specific goals in fifteen years. U.N., *Transforming our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1 (Sept. 25, 2015), <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

396. The Human Rights Treaty Bodies are “committees of independent experts that monitor implementation of the core international human rights treaties. Each State [P]arty to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty.” There are currently nine international human rights treaties, and one optional protocol and from these, ten treaty bodies have been established. Membership in the treaty bodies is made up of independent experts “of recognized competence in human rights, who are nominated and elected for fixed renewable terms of four years by State [P]arties.” Human Rights Treaty Bodies, OFF. UN HIGH COMM. FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> [<https://perma.cc/KGG9-4KG4>].

397. Human Rights Treaty Bodies, *Contributions to the 2030 Agenda for Sustainable Development*, UN SUSTAINABLE DEV. (May 26, 2016), <https://sustainabledevelopment.un.org/content/documents/10323Human%20Rights%20Treaty%20Bodies%20contribution%202016-May-26.pdf>.

population size, government consumption, and regional control variables.”³⁹⁸ In their study of the relationship between corruption and human rights, Landman and Schudel determined that “promoting democracy and economic development alongside a reduction in corruption seems a sensible package of activities to improve the overall human rights situation.”³⁹⁹

The Office of the UN High Commissioner for Human Rights has noted that “[c]orruption can affect human rights as an obstacle to their realization in general and as a violation of human rights in specific cases.”⁴⁰⁰ In addition to the fact that corruption “diverts funds from state budgets that should be dedicated to the advancement of human rights” and therefore “undermines a State’s human rights obligation to maximize available resources for the progressive realization of rights recognized in article 2 of the International Covenant on Economic, Social and Cultural Rights,” it can also “undermine[] the fairness of institutions and processes and distort[] policies and priorities.”⁴⁰¹ Corruption, thus, can severely damage “the legitimacy of regimes leading to a loss of public support and trust for state and government institutions.”⁴⁰²

In countries where corruption is pervasive, legal and judicial systems can lose their ability to function effectively to protect human rights, including especially holding state and non-state actors who are complicit in violating the rights of citizens responsible for their actions. Corrupt politicians, for example, can embezzle funds allocated to human-rights-enhancing services, such as education, health care and law and order. These self-dealing politicians can also support customary and statutory laws that violate the rights of vulnerable groups (e.g., girls and women). In Nigeria, for example, politicians in several states have refused to support the domestication of the Convention on the Rights of the Child because of religious and cultural practices/values.⁴⁰³

In many African countries, police often fail to perform their duties and fully investigate crimes, especially involving sexual violence against poor

398. Todd Landman & Carl Jan Willem Schudel, *Corruption and Human Rights: Empirical Relationships and Policy Advice* (Int’l Council on Hum. Rts. Policy, Working Paper).

399. *Id.* at 38.

400. Office of the High Commissioner for Human Rights, *The Negative Impact of Corruption on the Enjoyment of Human Rights* 1, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf> [hereinafter Office of the High Commissioner for Human Rights, *The Negative Impact*].

401. *Id.*

402. *Id.*

403. See, e.g., Assim, *Why the Child’s Rights Act*, *supra* note 111 (exploring the reasons for why Nigeria has not been able to fully domesticate the CRC); see also Ogunniyi, *supra* note 107 (examining the challenges faced by Nigeria in its efforts to domesticate the CRC).

girls and women and those who are not politically well-connected. For example, in the High Court of Kenya at Meru case, *C.K. (A Child) v. Commissioner of Police*, the Court held that the police failed to perform their jobs and that in doing so, they caused additional harm to victims/petitioners.⁴⁰⁴ In this case, eleven children, who were victims of “defilement, child abuse, and other forms of sexual violence,” brought petitions before the High Court alleging “that the police had failed to effectively investigate their complaints and take the necessary action, which would have brought the perpetrators to account for their unlawful acts.”⁴⁰⁵

Judge Makau, writing for the Court, noted that the petitioners “were survivors of sexual violence and child abuse, that they had suffered physical and psychological harm, and that they had reported the crimes to various police stations.”⁴⁰⁶ Makau, J. then held as follows:

I further find that the petitioners in this petition have suffered horrible, unspeakable and immeasurable harm due to acts of defilement committed against them. They each suffered physical harm in the form of internal and external wounds from the perpetrators ['] assaults and some suffered consequences of unwanted pregnancies vested on children not physically mature enough to bear children. The petitioners have suffered psychological harm from assaults made worse by the threat, fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections.⁴⁰⁷

Judge Makau then went on to state that “[w]hereas the perpetrators are directly responsible for the harms, to the petitioners, the respondents’ herein cannot escape blame and responsibility.”⁴⁰⁸ Makau J then held that:

The respondent’s ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a “climate of [i]mpunity” for commission of sexual offences and in particular defilement.

404. *C.K. (A Child) v. The Commissioner of Police* (2012) 8 eK.L.R. 1 (H.C.K.) (Kenya) [hereinafter C.K.].

405. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *LEGAL GROUNDS: REPRODUCTIVE AND SEXUAL RIGHTS IN SUB-SAHARAN AFRICAN COURTS*, VOLUME III 33 (2017); *see also* C.K., *supra* note 404, at 4.

406. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *supra* note 405, at 34; *see also* C.K., *supra* note 404, at 4.

407. *See also* C.K., *supra* note 404, at 7.

408. *See also* C.K., *supra* note 404, at 7. Note that the respondents in this case were the Commissioner of Police/Inspector General of the National Police Service, the Director of Public Prosecutions, and the Minister for Justice, National Cohesion & Constitutional Affairs. *See* C.K., *supra* note 404, at 7.

As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted.⁴⁰⁹

The Court also determined that although the petitioners went to several police stations after each sexual assault to report the alleged crime and actually “gave names of the perpetrators being people they knew,” the police still failed to take the necessary action as required by law to fully investigate these alleged crimes.⁴¹⁰ Instead, the Court noted that the police “showed disbelief, blamed the victims, humiliated them, yelled at and ignored them as they put them under various vigorous cross-examination and failed to take action.”⁴¹¹ Finally, Makau J held that “[t]he respondents are,” in his view, “directly responsible for psychological harm caused by their actions and inactions,” and that, as a consequence, the petitioners have been severely damaged psychologically.⁴¹² Thus, by refusing to perform their functions, the Kenyan police significantly contributed to the violation of the rights of eleven children.

Another example of how the actions of corrupt police officers contribute to the violation of the rights of women and girls comes from the Supreme Court of Appeal of South Africa case, *Ghia Van Eeden v. Minister of Safety and Security*.⁴¹³ On August 5, 1998, a 19-year old woman “was sexually assaulted, raped and robbed by André Gregory Mohamed, a known dangerous criminal and serial rapist who had escaped from police custody in Durban on 22 May 1998.”⁴¹⁴ After the attack, the appellant “instituted an action for delictual damages against the State” and claimed that “members of the South African Police Services owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm and that they negligently failed to comply with such duty.”⁴¹⁵

Writing for the Court, Vivier ADP held that there was a fundamental breach of the petitioner’s rights. Specifically, the Court held that “[t]he fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms”⁴¹⁶ and that “everyone has the right to freedom and security of person, which includes the right to be free from all forms of violence from either public or private sources.”⁴¹⁷ In addition, stated Vivier ADP, “[i]n

409. C.K., *supra* note 404, at 7.

410. C.K., *supra* note 404, at 7.

411. C.K., *supra* note 404, at 7.

412. C.K., *supra* note 404, at 7.

413. *Ghia Van Eeden v. Minister of Safety and Security* 2002 (4) All SA 346 (SCA) (S. Afr.) [hereinafter *Van Eeden*].

414. *Id.* ¶ 1.

415. *Id.* ¶ 3.

416. *Id.* ¶ 13

417. *Id.*

all the circumstances of the present case I have come to the conclusion that the police owed the appellant a legal duty to act positively to prevent Mohamed's escape."⁴¹⁸ Further, Vivier ADP noted, "I have reached this conclusion mainly in view of the State's constitutional imperatives to which I have referred; the fact that the police had control over Mohamed who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape, and the fact that measures to prevent his escape could reasonably and practically have been required taken by the police."⁴¹⁹

In each African country's legal system, corruption can significantly weaken "the very accountability structures which are responsible for protecting human rights" and can actually "contribute to a culture of impunity."⁴²⁰ Where impunity is pervasive, which means that individuals who commit crimes, including the violation of human rights, are not being brought to justice, historically disadvantaged and marginalized groups (e.g., women, children, the elderly, persons with disabilities, indigenous peoples, and religious minorities) are likely to suffer severely. In many African countries women and girls are already subjected to harmful traditional and customary practices, which include, for example, FGM and child marriage. Corruption in the enforcement institutions reinforces existing systems of exploitation and marginalization and significantly reduces women's and girl's access to services (e.g., health care, education, and police protection) that enhance their ability to enjoy the rights guaranteed by international law and their national constitutions.

This Article's primary interest is how corruption affects children's access to education. Hence, the following section is devoted to an examination of the role that various forms of corruption play in the ability of children to realize their right to education.

VI. CORRUPTION AND CHILDREN'S ACCESS TO EDUCATION

A. Introduction

Corruption has a significant impact on how public resources are allocated and/or managed. If the public sector is pervaded by corruption, public services

418. *Id.* ¶ 24.

419. *Id.*

420. Office of the High Commissioner for Human Rights, *The Negative Impact*, *supra* note 400, at 1.

are likely to be allocated through a capricious and arbitrary manner, favoring demanders who are able to bribe bureaucrats and the political elites.⁴²¹ Through this corruption-induced process, the government's ability "to deliver public services is compromised, the realization of *socio-economic rights*—particularly for the poor—is affected and inequality is perpetuated."⁴²² Specifically, where corruption is systemic, it is very difficult for citizens to realize and enjoy the economic, social, and cultural rights guaranteed them by the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and their national constitutions.⁴²³

According to the UN High Commissioner for Human Rights, "[e]conomic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education."⁴²⁴ It is important to understand that economic, social and cultural rights ("ESCR") "are part of the body of human rights law that developed in the aftermath of World War II."⁴²⁵

While justiciability is a problem for many of these ESCR, several countries, including some in Africa, have resolved this problem by enshrining ESCR in their constitutions and "applying domestic and international law to protect ESCR."⁴²⁶ In 1996, the people of South Africa adopted a constitution, which they believed, would provide them with the legal tools to fully and effectively deal with "the injustices of their racialized past and provide a foundation for the construction of a non-racial democratic governance system."⁴²⁷

421. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 90 (noting that in many African countries, "civil servants have become very arrogant and recalcitrant, enforce the laws in a selective and capricious manner, favoring those who bribe them).

422. John C. Mubangizi & Prenisha Sewpersadh, *A Human Rights-based Approach to Combating Public Procurement Corruption in Africa*, 10 AFR. J. L. STUD. 66, 71 (2017) (emphasis added).

423. Office of the UN High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, 1993 U.N.T.S. 3 (1967) [hereinafter ICESCR].

424. OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: FACT SHEET NO. 33, 1 (2008).

425. *What are Economic, Social and Cultural Rights?*, CTR. FOR ECON. & SOC. RTS., <https://www.cesr.org/what-are-economic-social-and-cultural-rights> [<https://perma.cc/R32U-LSKV>] [hereinafter *What are Economic, Social and Cultural Rights?*]. The Center for Economic and Social Rights is an international non-governmental organization "that fights poverty and inequality by advancing human rights as guiding principles of social and economic justice." *About Us*, CTR. FOR ECON. & SOC. RTS., <https://www.cesr.org/about-us> [<https://perma.cc/R5PZ-9MXV>].

426. *What are Economic, Social and Cultural Rights?*, *supra* note 425.

427. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 637.

Taking cognizance of the fact that the injustices of South Africa's past "included the denial of economic, social and cultural rights to the country's majority African groups," the architects of the country's post-apartheid constitution entrenched ESC rights in South Africa's permanent constitution.⁴²⁸ South Africa, however, did not elaborate the ESC rights separately from other fundamental rights. Instead, South Africans considered ESCR and civil and political rights "as human rights in the Bill of Rights" and, as a result, ESCR "are interspersed between the other rights, on an equal level, emphasizing the interdependence and indivisibility of the different generations of rights."⁴²⁹

Chapter 2 of South Africa's Constitution is devoted to the Bill of Rights and "enshrines the rights of all the people in [the] country and affirms the democratic values of human dignity, equality and freedom."⁴³⁰ The South African Constitution then imposed an obligation on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights."⁴³¹ The State is expected to not only make certain that these rights are not violated by non-state actors but that "the State itself and its agents (i.e., state actors) must not violate the rights guaranteed in the Bill of Rights."⁴³²

Throughout the world and especially in Africa, an important obstacle to the enforcement and realization of ESC rights is "a lack of political will and commitment on the part of [States], international institutions and NGOs whose responsibility it is to respect, protect and promote these rights for the benefit of all human beings."⁴³³ However, it is important to note that while international and regional actors (e.g., the UN, the African Union) are critical to the enforcement of human rights, including ESC rights, national governments must take the lead and must be willing and able to shoulder most of the responsibilities for the realization of all human rights.

In imposing obligations on States Parties to realize the rights contained in the ICESCR, the latter takes cognizance of and acknowledges the limits of available resources. For example, according to Article 2(1) of the ICESCR:

428. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 637–38.

429. Christof Heyns & Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, 2 L., DEMOCRACY & DEV. 153, 157 (J. OF THE FAC. OF L., U. WESTERN CAPE, S. AFR.) (1998).

430. S. AFR. CONST., 1996, § 7(1).

431. *Id.* § 7(2).

432. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 638.

433. *What are Economic, Social and Cultural Rights?*, *supra* note 425.

Each State Party to the [ICESCR] undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.⁴³⁴

The Center for Economic and Social Rights notes that despite doubts about justiciability of ESC rights, national courts have already been involved in adjudicating violations of these rights, including forcible evictions; termination of employees without cause; deliberate poisoning of a water supply; discrimination in access to medical care, work, housing, and education; banning of the formation of unions; depriving children of adequate food and water; the failure of governments to provide effective access to primary education and basic health care facilities; and the failure to maintain educational facilities, healthcare facilities, and public housing units.⁴³⁵

Because the emphasis in this Article is on children's ability to realize the right to education, emphasis in this section is on the role played by corruption in the availability of and access to education, particularly by children, in the African countries. A right to education is defined as a positive right because, in each country, education must be provided by the State through a series of positive actions, either directly by the State or through the private sector with the help and acquiescence of the State.⁴³⁶

Note, however, that in some countries, the right to education is not mentioned in their constitutions. Nevertheless, education advocates have brought legal action under other provisions of their constitutions to have education established as a fundamental right. For example, in the United States, where education is not specifically mentioned in the Constitution, court cases have been brought under the Due Process clause of the Fourteenth Amendment in an effort to establish access to a basic education as a constitutionally protected right.⁴³⁷

Although many African children are forced to drop out of school because of financial hardships, it is important to note that part of this problem relates to government corruption, which imposes significant barriers on access to education, even at the primary or basic level. For example, in many countries on the continent, parents must bribe principals and teachers in order to get their children into what is a free public school. It has been determined that “[c]ash, luxury items and even bags of groceries are now

434. ICESCR, *supra* note 423, art. 2(1); *see also* Committee on Economic, Social and Cultural Rights (CESCR), *CESCR General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1, of the Covenant), Doc. E/1991/23 (Dec. 14, 1990).

435. *What are Economic, Social and Cultural Rights?*, *supra* note 425.

436. *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (providing overview of positive and negative rights).

437. *See, e.g.*, Gary B., et al. v. Whitmer, et al., 957 F.3d 616 (6th Cir. 2020).

so commonly passed from parents to teachers in Uganda that some teachers now boldly request those items.”⁴³⁸

In the opening ceremony of the Annual Conference of the Nigerian Bar Association on August 23, 2015, Nigerian President Gen. Muhammadu Buhari declared as follows:

For the masses of our people, the millions still wallowing in want and diseases, *corruption is a major reason why they cannot go to school; why they cannot be gainfully employed; and why there are few doctors, nurses and drugs in their hospitals and health centers.*⁴³⁹

Some legal scholars have argued that “corruption is inversely related to human rights” and that “[t]he higher [the] levels of corruption, the lesser the degree of human rights protection one is likely to find in a given country.”⁴⁴⁰ It is argued that the corruption-human rights relationship can be examined “along two axes: governmental corruption and business corruption—both with human rights consequences.”⁴⁴¹ Corruption can affect the government’s ability to ensure the recognition and protection of human rights in the following ways: First, corruption can significantly reduce “the capacity of the government to respect, protect, and fulfil its human rights obligations.”⁴⁴² If, for example, the judicial system or the national police are corrupt, then the enforcement of laws that protect citizens’ rights will be in jeopardy. In fact, a corrupt police force will not only fail to maintain law and order and protect all citizens but it can also fail to investigate alleged crimes, especially against vulnerable groups such as women and girls.⁴⁴³

438. Apophia Agiresaasi, *Parents Torn Between Bribing Teachers or Reporting Them in Ugandan Schools*, GLO. PRESS J. (Apr. 1, 2019), <https://globalpressjournal.com/africa/uganda/parents-torn-bribing-teachers-reporting-ugandan-schools/> [<https://perma.cc/6HNN-6W5G>].

439. Gen. Muhammadu Buhari (President of the Federal Republic of Nigeria). “Speech of His Excellency, The President of the Federal Republic of Nigeria, Muhammadu Buhari.” Special Guest of Honor at the Opening Ceremony of the 55th Annual General Conference of the Nigerian Bar Association, ¶ 7, 23 Aug. 2015, Abuja, Nigeria, <https://legalpediaonline.com/nba-agc-2015-opening-ceremony/> [<https://perma.cc/D2HS-B92N>] (emphasis added).

440. Joel M. Ngugi, *Making the Link Between Corruption and Human Rights: Promises and Perils*, 104 PROCEED. ANNUAL MEETINGS (AM. SOC. INT’L L.) 246, 246 (2010).

441. *Id.*

442. *Id.*

443. See C.K., *supra* note 404 (noting the failure of the police to promptly, fully, effectively and professionally investigate complaints of the defilement of women and girls); see also Van Eeden, *supra* note 413 (noting the failure of the South African police to prevent

In many countries in Africa, it has been argued that the key to improving educational outcomes, especially for children, is that “teachers must be trained better” and that more money must be allocated to the education sector.⁴⁴⁴ While the allocation of additional resources to education is a necessary condition for the realization of the right to education guaranteed by national constitutions and international human rights instruments, sufficiency requires good governance at both the central and local levels. Good governance, implies of course, the absence of corruption.

Second, corruption can reduce the amount of revenue available to the government for investment in the provision of essential educational services, education-related services such as basic health care, clean water, nutritious food, and other services that enhance and improve educational outcomes, especially for children. Quite often, high-level political elites and civil servants can embezzle funds destined for or allocated to investment in the provision and maintenance of school and health facilities, the recruitment and payment of teachers and school administrators, and the purchase of textbooks and other instructional materials.

For example, in 2012, James Ibori, former governor of Nigeria’s Delta State (1999–2007), was convicted in London’s Southwark Crown Court of fraud and money-laundering in connection with the embezzlement of \$153 million—money that was meant for development projects in Delta State including the provision of schools for the State’s children.⁴⁴⁵

The ICESCR imposes an obligation on States Parties to take steps “individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.”⁴⁴⁶ In imposing a mandate on States Parties to realize socio-economic rights, the ICESCR took into consideration the fact that as a result of lack of resources, some States Parties would not be able to undertake a full realization of these rights immediately. Hence, the ICESCR qualified the mandate imposed on States Parties with phrases such as “to the maximum of *its available resources*” and “to achieving progressively.”⁴⁴⁷ Although Article 2(1) of the ICESCR requires that each State Party take steps to achieve the full realization of the rights recognized

the escape from their custody of one André Gregory Mohamed who later sexually assaulted, raped and robbed a 19-year-old woman).

444. Konte, *supra* note 328.

445. *UK Seeks to Confiscate Convicted Nigerian’s Loot*, REUTERS (Jan. 16, 2020) <https://www.reuters.com/article/us-britain-nigeria-corruption/uk-seeks-to-confiscate-convicted-nigerian-politicians-loot-idUSKBN1ZF1NB> [<https://perma.cc/N453-2HK4>].

446. ICESCR, *supra* note 423, art. 2(1).

447. ICESCR, *supra* note 423, art. 2(1).

and elaborated in the ICESCR, the State Party is expected to do so “to the maximum of its available resources.”⁴⁴⁸

The constitutions of some African countries distinguish between socioeconomic rights that are “immediately realizable” and those that are “progressively realizable with available resources.”⁴⁴⁹ For example, according to Section 29(1) of the Constitution of the Republic of South Africa, “[e]veryone has the right . . . to basic education, including adult *basic education*.”⁴⁵⁰ In the High Court of South Africa (Gauteng Local Division, Johannesburg) case *Mahapa v. Minister of Higher Education and Another*, Mabesele J, writing for the Court, held that the right to *basic education* guaranteed in Section 29(1) of the Constitution is “immediately realizable.”⁴⁵¹

Judge Mabesele cited to a decision of the Constitutional Court (CC), South Africa’s highest court, in *Governing Body of the Juma Masjid Primary School and Others v. Essay NO and Others*.⁴⁵² Writing for the CC, Nkanbinde J held that:

It is important, for the purpose of this judgment, to understand the nature of the right to—a basic education under section 29(1)(a). Unlike some of the other socioeconomic rights, *this right is immediately realizable*. There is no internal limitation requiring that the right be—progressively realized within—available resources subject to—reasonable legislative measures. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is—reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This right is therefore distinct from the right to—further education provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education—progressively available and accessible.⁴⁵³

While South Africa’s CC held that the right to basic education is immediately realizable, it found the right to “further” or education beyond the basic level not to be immediately realizable.⁴⁵⁴ However, the State is obliged to take reasonable measures to make further education progressively available and accessible.⁴⁵⁵ Despite this, corruption, which can severely

448. ICESCR, *supra* note 423, art. 2(1).

449. Mbaku, *The Role of International Human Rights Law*, *supra* note 89, at 658.

450. S. AFR. CONST., 1996, § 29(1) (with amendments through 2012).

451. *Mahapa v. Minister of Higher Educ. & Another* 2017 (2) SA 254 (ZAGP JHC) at 8 (S. Afr.) (emphasis added).

452. *Id.*

453. *Governing Body of the Juma Masjid Primary Sch. & Others v. Essay N.O. & Other*, 2011 (8) BCLR 761 (CC) at 19 (S. Afr.).

454. *Id.* at 19.

455. S. AFR. CONST., 1996, § 29(1).

slow the creation of wealth as well as create perverse incentives in the allocation of scarce resources, can interfere with the immediate realization of basic education and the progressive realization of further education.

Third, corruption can frustrate the ability of citizens, including the poor, to engage in entrepreneurial activities to create the wealth necessary to meet the educational, health, and nutritional needs of their children. For example, in a recent study of the impact of corruption on entrepreneurship in emerging markets, with specific emphasis on China, Liu, et al. found that “high levels of corruption have a negative effect on entrepreneurship.”⁴⁵⁶ Liu et al. also noted, however, that in China, “[c]orruption promotes entrepreneurship when corruption levels are low, while high levels of corruption inhibit[] entrepreneurship” and that “corruption has a diminishing effect on entrepreneurship.”⁴⁵⁷ In their study, Dutta and Sobel conclude that although the impact of corruption on entrepreneurship is small, it is negative even in a bad business climate.⁴⁵⁸ Unlike some studies that have found that in a dysfunctional institutional environment, entrepreneurs can use corruption to clear bureaucratic bottlenecks or huddles to enhance their ability to engage in productive activities, Dutta and Sobel find that corruption cannot compensate for a “bad business climate.”⁴⁵⁹

Fourth, corruption is now being recognized as “a direct human rights violation” and, in addition, it has been argued that “if a corrupt government official takes a bribe to decide a case against an individual or a corrupt police officer takes a bribe not to investigate a case,” these actions can constitute a direct violation of human rights.⁴⁶⁰ As illustrated by the Kenyan⁴⁶¹ and South African⁴⁶² cases *C.K (A Child)* and *Van Eeden*, respectively, the failure of or refusal by the police to perform their functions or do so effectively and professionally, can constitute a direct violation of the rights of citizens—in both situations, the police engaged in behaviors that directly infringed the rights of women and girls.

With respect to business corruption, Ngugi argues that human rights can be affected in two distinct ways.⁴⁶³ First, corruption can interfere with the ability of the people to check or guard the exercise of government power.⁴⁶⁴

456. Jiaqi Liu et al., *Corruption and Entrepreneurship in Emerging Markets*, 55 EMERGING MKTS. FIN. & TRADE 1051, 1051 (2018).

457. *Id.* at 1065.

458. Nabamita Dutta and Russell Sobel, *Does Corruption Ever Help Entrepreneurship?*, 47 SMALL BUS. ECON. 179, 179 (2016).

459. *Id.* at 179.

460. Ngugi, *supra* note 440, at 246.

461. *See C.K.*, *supra* note 404.

462. *See Van Eeden*, *supra* note 413.

463. Ngugi, *supra* note 440, at 246–47.

464. Ngugi, *supra* note 440, at 246.

The people can discipline poorly-performing and recalcitrant politicians by voting them out of power. However, if the electoral system is corrupt, the people's ability to remove poorly-performing political elites from office is compromised and such individuals can remain in office indefinitely and continue to promote policies that disadvantage the poor's ability to have access to basic education.⁴⁶⁵

Quite often, foreign business interests, working with local political elites, capture the State and proceed to control the formulation and implementation of public policies. For example, in Chile in October 1970, U.S. multinational companies, working with the Central Intelligence Agency ("CIA"), plotted to overthrow the newly-elected government of President Salvador Allende.⁴⁶⁶ It has recently been revealed that the plot against Allende was "the direct result of a plea for action a month earlier by Donald Kendall, chairman of the U.S.-based multinational company, PepsiCo."⁴⁶⁷

A successful coup d'état (*golpe de estado*) against Allende took place on September 11, 1973, ending 46 years of democratic rule in the country. It was led by Chile's General Augusto Pinochet, aided by foreign business interests, and ushered in a period of gross human rights violations that would last for many years to come.⁴⁶⁸

In Cameroon, Paul Biya has been able to use a highly corrupt electoral system, as well as support from many multinational companies, to remain in office indefinitely.⁴⁶⁹ Since 1982, when the country's first president, Ahmadou Ahidjo, resigned the presidency and handed the apparatus of government to Biya, the latter has used corruption and patronage to remain in power to this day (2021).⁴⁷⁰ In 2018, Biya won a seventh term in office in an election that was marred by many irregularities and given that he was re-elected to a seven-year term, he will remain in office until

465. Ngugi, *supra* note 440, at 246.

466. Gregory Palast, *A Marxist Threat to Cola Sales? Pepsi Demands a US Coup. Goodbye Allende. Hello Pinochet*, THE GUARDIAN (Nov. 8, 1998), <https://www.theguardian.com/business/1998/nov/08/observerbusiness.theobserver> [<https://perma.cc/8S99-QNC2>].

467. *Id.*

468. Daniel Sheehy, *An Eyewitness Account of Pinochet's Coup 45 Years Ago*, SMITHSONIAN MAG. (Sept. 10, 2018), <https://www.smithsonianmag.com/smithsonian-institution/eyewitness-account-pinochets-coup-45-years-ago-180970241/> [<https://perma.cc/967Y-2SSG>].

469. See, e.g., Mbaku, *International Law and the Anglophone Problem in Cameroon*, *supra* note 349 (examining Biya's manipulation of the electoral system to remain in power indefinitely in Cameroon).

470. *Id.* See also Moki Edwin Kindzeka, *Paul Biya, Cameroon's 88-Year-Old President, Marks 39 Years in Power*, VOA NEWS (Nov. 6, 2021), <https://www.voanews.com/a/cameroon-paul-biya-marks-39-years-in-power/6302673.html> [<https://perma.cc/46XN-YXMK>].

at least 2025.⁴⁷¹ During his nearly forty years as president of Cameroon, Biya has presided over a regime that is not only notorious for high levels of corruption but one that is pervaded by gross abuse of human rights.

Cameroon's education system is pervaded by corruption. In a study released in 2015, Cameroon high school students were asked to explain what corruption meant to them; they stated: corruption "means to give money, to be sexually harassed, *to be absent from school and then to pay teachers to say you were present.*"⁴⁷² A World Bank study completed in 2008 found teacher absenteeism rates "as high as 30 percent in Kenya" and [t]his was followed by Senegal at 27 percent, Cameroon at 16 percent, and Ghana, at 8 percent.⁴⁷³ Teacher absenteeism is considered one of the most egregious and damaging form of corruption in Africa's education sectors.⁴⁷⁴

Corrupt governments often conclude contracts, especially in the exploitation of natural resources, with multinational corporations that disadvantage the domestic economy and impose significant externalities (e.g., pollution and ecosystem degradation) on the people. In such economies, it is usually very difficult for policymakers to undo corrupt "transactions entered into by previous, odious regimes."⁴⁷⁵

Research has determined that "corruption has an adverse impact on the enjoyment of all human rights—civil and political, social, economic and cultural."⁴⁷⁶ In addition, the adverse impact of corruption on fundamental rights is usually felt more severely by historically marginalized and deprived groups, such as "women, children, persons with disabilities, the elderly, indigenous people, and the LGBT community."⁴⁷⁷ The effect on these groups is usually associated with their inability to access public goods (e.g., education and healthcare) that significantly enhance their welfare. In

471. *Cameroon's President Paul Biya Wins Seventh Term*, BBC NEWS (Oct. 22, 2018), <https://www.bbc.com/news/world-africa-45940414> [<https://perma.cc/NH94-FVRR>].

472. Shilpa Banerji, *How Students in Cameroon are Fighting Corruption in Schools*, WORLD BANK BLOGS (Mar. 12, 2015), <https://blogs.worldbank.org/governance/how-students-cameroon-are-fighting-corruption-schools> [<https://perma.cc/9NTY-ZK8N>] (emphasis added).

473. Association for the Development of Education in Africa, *Reducing Teacher Absenteeism: Solutions for Africa*, ADEA WGEMPS, https://www.adeanet.org/en/system/files/resources/policy_brief_reducing_teacher_absenteeism.pdf. The Association for the Development of Education in Africa is a network and partnership established by a World Bank initiative in 1988.

474. Harry A. Patrinos, *The Hidden Cost of Corruption: Teacher Absenteeism and Loss in Schools*, WORLD BANK BLOGS (Oct. 1, 2013), <https://blogs.worldbank.org/education/hidden-cost-corruption-teacher-absenteeism-and-loss-schools#:~:text=Teacher%20absenteeism%20is%20one%20of,when%20they%20should%20be%20teaching> [<https://perma.cc/AAJ3-AEW8>].

475. Ngugi, *supra* note 440, at 247.

476. Mubangizi & Sewpersadh, *supra* note 422, at 72.

477. Mubangizi & Sewpersadh, *supra* note 422, at 72.

addition, in a country pervaded by corruption, these economically and politically marginalized individuals and groups are not likely to be able to participate in policy design and implementation and hence, their interests will not be reflected in national policy.

In Africa, children are among the group of citizens most disproportionately affected by the negative impact of corruption on human rights. Throughout the continent, children rely on many public services, for example, access to healthcare for a sick child or education to help them develop or acquire the skills that they need to function as productive adults. Unfortunately, children usually are not in a position to challenge their communities' corrupt practices and the self-dealing of their political leaders to minimize the impact of corruption on their rights.⁴⁷⁸

Corruption, in all its manifestations, reduces “the availability of household and public resources to spend on critical services for children.”⁴⁷⁹ Hence, reducing corruption throughout the continent should improve the welfare of Africa's children—in addition to the fact that doing so can improve the flow of funds to both families and governments, the reduction of corruption can also improve bureaucratic efficiency and provide children with increased access to critical services. The additional funds, of course, can be invested in programs that enhance the welfare of children in general and their human rights in particular. Where corruption is pervasive, children are not likely to fully enjoy the rights guaranteed them by international and regional human rights instruments (e.g., the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child).

In the next section, this Article will examine specific ways in which corruption generally and the corrupt practices of African civil servants and political elites in particular directly impact the rights of African children to access education. In doing so, this Article will also seek to provide evidence that can be used to inform policy to address corruption's effect on the rights and welfare of Africa's children, with specific emphasis on children's ability to attend school and develop the skills that they need to function as productive adults.

478. *Stolen Futures: The Impact of Corruption on Children in Africa*, AFRICAN UNION, https://au.int/sites/default/files/documents/36766-doc-the_impact_of_corruption_on_children_-_final_report.pdf [hereinafter *Stolen Futures*].

479. *Id.*

B. Corruption and Children's Access to Education in Africa

One can identify at least three pathways through which corruption affects the rights of children in Africa, including their right to education. First, corruption in the health and education sectors can severely restrict children's access to the services that they need to maintain good health and acquire the skills that will allow them to evolve into productive adults and contributing members of their communities. Where children are unable to have adequate and effective access to education they will fail to enjoy the rights guaranteed them by international and regional human rights instruments. For example, according to Article 11 of the African Charter on the Rights and Welfare of the Child:

1. Every child shall have the right to education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and convention;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievements of African Unity and Solidarity;
 - (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.⁴⁸⁰

Without effective access to education, children will remain trapped in extreme poverty and material deprivation and will fail to develop their potential for leadership in both the economic and the governmental sectors. This is

480. African Child Charter, *supra* note 1, art. 11.

especially true of girl-children, many of whom have, historically been subjected to harmful customary and traditional practices (e.g., FGM and child marriage). Girl-children are especially at risk of being denied access to educational services, given the preference of many families in Africa for boy-children. Among the Igbo of Nigeria, for example, male children are revered “as custodians of both identity and lineage” and this value system has been perpetuated over many generations and remains one of the most important and lasting cultural value among Nigeria’s Igbo, at home and abroad.⁴⁸¹

Given the levels of extreme poverty that pervade many African communities, particularly those in the rural areas, it is important that education, especially at the basic (i.e., elementary/primary and secondary) level, be made free—that is, it should be provided by the government and free of charge to students. Besides making education free, it may be necessary for the government to provide other services (e.g., food, hygiene products for girls, books, writing materials, and other services (e.g., transportation to school)) that significantly enhance the ability of pupils to attend school and participate in educational activities.

Corruption, especially bureaucratic and grand corruption, can directly interfere with the ability of children to have access to critical educational services. Even if a country provides its citizens with a *universal primary education system*, corrupt teachers and administrators can frustrate the ability of students to participate gainfully in schooling activities. Corrupt teachers, for example, may collect fees from students or demand they pay fees as a condition for participating in school activities, a process that makes it impossible for children from poor parents to attend school. In a recent study of schools in Kenya, Taaliu determined that although “[t]he Ministry of Education has set the minimum and maximum fees to be paid by students in both primary and secondary schools,” it is often the case that “[m]any principals of high schools have continued to charge more than the recommended fee.”⁴⁸²

481. Male-child preference is not unique to the Igbo of Nigeria. Such cultural values can be found among other ethnolinguistic groups in Nigeria, as well as in other African countries. See, e.g., Ezebunwa E. Nwokocho, *Male-child Syndrome and the Agony of Motherhood Among the Igbo of Nigeria*, 33 INT’L J. SOCIO. FAM. 219 (2007) (examining male-child preference among Nigeria’s Igbos).

482. Simon Thurania Taaliu, *Corruption in Schools and Universities in Kenya*, 5 OPEN J. SOC. SCI. 227, 229 (2017).

In addition, argues Taaliu, many schools in Kenya have “hidden charges [including] tuition fees which [have] been outlawed by the government” but which schools continue to levy.⁴⁸³ Of course, the money collected through these corrupt and illegal processes is not invested in providing instructional materials (e.g., computers, textbooks, pencils, etc.) for students but to line the pockets of corrupt teachers and administrators. This corruption significantly constrains the ability of many students, especially those from poor families, to attend school and develop the skills that they need to evolve into productive adults.

While he was Finance Minister of Kenya, now president of Kenya, Uhuru Kenyatta, made a presentation to the country’s parliament in which he revealed that as much as 4.2 billion Kenyan shillings (about \$46 million U.S.D.) was missing from the budget of the Ministry of Education.⁴⁸⁴ Kenyatta noted that the money had been stolen from then President Mwai Kibaki’s “landmark initiative to provide free primary education for every Kenyan.”⁴⁸⁵ This type of grand corruption can deprive the country of the type of investment (e.g., in classrooms; bathrooms, especially for girls; instructional materials, such as computers and servers for access to the Internet; recreational equipment; and health clinics to treat children if they get sick while in school) that can support an effective education system.

The second way in which corruption can affect the rights of children is its impact on each country’s system of justice, particularly the police who investigate cases involving the violation of the rights of children and the judicial system, whose job it is to prosecute those alleged to have engaged in criminal activities. For example, if police officers fail to carry out their official duties to professionally investigate alleged criminal activities in their jurisdiction, the judiciary will not be able to effectively bring the perpetrators of crimes against children (e.g., expulsion of children from public school because their parents did not pay bribes requested by their teachers; refusal to allow pupils to take examinations unless teachers are paid bribes; embezzlement by school administrators of funds allocated for feeding students while in school) to justice. Of course, if the judiciary itself is pervaded by corruption, the result will be a similar failure to properly and effectively enforce the laws. Within such an institutional environment, the rights of children will be violated with impunity.⁴⁸⁶

483. *Id.* at 229–30.

484. *See Corruption Puts Kenya’s Educational Funding at Risk*, VOA NEWS (June 19, 2011, 8:00 PM), <https://www.voanews.com/a/article—corruption-puts-kenyas-educational-funding-at-risk-124203949/158335.html> [<https://perma.cc/HLZ8-7WWB>].

485. *Id.*

486. *See, e.g., C.K., supra* note 404, at 12 (examining how the refusal of corrupt police officers to fully investigate crimes against girls and women can have a negative impact on the rights of these girls and women).

In a study of child abuse in Nigeria, Olusegun and Idowu determined that “[c]orruption is a major factor contributing to the low level of recognition and protections that is given to children.”⁴⁸⁷ They note that “even when funds are released to the states or a local government for the purpose of working on a project benefiting the welfare of children, the money is not fully utilized for that particular purpose and is diverted to personal pockets.”⁴⁸⁸ In Nigeria, Olusegun and Idowu argue, “[c]orruption is also a major reason why people perform acts like kidnapping and trafficking children,”⁴⁸⁹ a process which deprives them of the ability to attend school and develop necessary skills.

Finally, corruption can interfere with the ability of the State to protect children from harmful customary and traditional practices, many of which bear directly on their ability to attend school. For example, a girl-child who is subjected to FGM can be forced to abandon school because of the immediate (e.g., pain, excessive bleeding, swelling, problems with the healing of wounds, urine retention) and long-term (complications during childbirth, anemia, the formation of cysts and abscesses, keloid scar formation, urinary incontinence, etc.) factors associated with this insidious procedure.⁴⁹⁰

In addition, children who are forced into early or child marriage usually have to drop out of school, forfeiting the opportunity to acquire the skills that they need to evolve into economically competitive and productive adults.⁴⁹¹ Africa’s girl-children are especially susceptible to child marriage—these children, who are forced into marriage are likely to remain uneducated and without any marketable skills and would be “trapped in a life characterized by significantly high health risks, extreme poverty, [and] domestic violence,”

487. Olaitan O. Olusegun & Amos A. Idowu, *Child Abuse in Nigeria: Dimension, Reasons for Its Persistence and Probable*, 4 CHILD & FAM. L.J. 1, 17 (2016).

488. *Id.*

489. *Id.*

490. See, e.g., Rigmor C. Berg and Vigdis Underland, *Immediate Health Consequences of Female Genital Mutilation/Cutting (FGM/C)*, Report of the Knowledge Center for the Health Services (NOKC) No. 08–2014, March 2014, <https://www.ncbi.nlm.nih.gov/books/NBK464798/> [<https://perma.cc/J96Y-R8CP>] (examining the immediate health consequences of FGM). See also *Female Genital Mutilation (FGM) Frequently Asked Questions*, UNITED NATIONS POPULATION FUND (Feb. 2020), <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#:~:text=Long%2Dterm%20consequences%20include%20complications,and%20increased%20risk%20of%20HIV> [<https://perma.cc/AFA5-5YFL>] (examining the long-term consequences of FGM).

491. See, e.g., Mbaku, *International Law and Child Marriage in Africa*, *supra* note 360, at 123 (2020) (examining child marriage and its consequences on girl-children in Africa).

usually at the hands of their much older husbands and their extended families.⁴⁹²

Article 1 of the African Charter on the Rights and Welfare of the Child (“African Child Charter”), imposes an obligation on States Parties to ensure that “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”⁴⁹³ The African Child Charter also protects children against harmful social and cultural practices—it states that:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) those customs and practices prejudicial to the health or life of the child; and
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.⁴⁹⁴

However, the rights contained in the African Child Charter are not directly justiciable in the domestic courts of the African countries. Each African country must domesticate the Charter (e.g., through legislation) in order to create rights that are justiciable in domestic courts. However, corruption can interfere with the ability of policymakers to design and implement the necessary domesticating legislation. For example, through corruption, business interests can capture an African State and subsequently have control over the design and enactment of legislation. State capture, it is argued, “can fundamentally and radically transform the structure of the state and the institutional foundation on which the state is built.”⁴⁹⁵

In a state whose government has been captured by business interests, the latter may make possible the enactment of legislation that can enhance their ability to engage in the *worst forms of child labor* or prevent the

492. *Id.*

493. African Child Charter, *supra* note 1, art. 1, ¶ 3.

494. African Child Charter, *supra* note 1, art. 21, ¶¶ 1–2.

495. John Mukum Mbaku, *Rule of Law, State Capture, and Human Development in Africa*, 33 AM. U. INT’L L. REV. 77, 779 (2018) [hereinafter Mbaku, *Rule of Law, State Capture, and Human Development*].

enforcement of laws against the trafficking of children for use in servitude labor, prostitution, the production of pornography, and other forms of child labor, all of which will interfere with the ability of children to attend school.⁴⁹⁶ If business interests have captured the State, “legislatures will legislate primarily to meet the interests of these businesses for monopoly profits.”⁴⁹⁷ In fact, these business interests may not be interested in using the power of government to alleviate or eradicate poverty, recognize and protect human rights, and generally promote policies that enhance development, especially among historically marginalized groups, which include women and girls. They may actually be “violently hostile to such policies since they may view them as obstacles to their ability to monopolize economic spaces and continue to generate above normal rates of return from their enterprises.”⁴⁹⁸

The activities of such state-capturing businesses may also negatively affect public revenue sources. For example, in an effort to minimize their tax burden through corrupt processes, businesses that have captured the State can significantly reduce the national tax base, negatively affecting the revenues that the government would otherwise have used to provide services to citizens, including building and operating schools that cater to the educational needs of children.

In the sections that follow, this Article will provide an in depth analysis of how the different types of corruption affect children’s access to education in Africa. In doing so, this Article will also seek to determine why children are extremely vulnerable to the corrupt activities of their countries’ civil servants and politicians.

C. Why African Children are More Vulnerable to Corrupt Activities

Corruption is especially detrimental to children and their rights. This is due, inter alia, to the fact that “children are more reliant on public services than adults,” they “lack the power to challenge instances of corruption,”

496. The worst forms of child labor include slavery, child trafficking, debt bondage, serfdom, forced labor, sexual exploitation, illicit activities (e.g., producing and trafficking drugs), and other forms of labor that harm children. *The Worst Forms of Child Labor*, INT’L LABOUR ORG., <https://www.ilo.org/ipecc/Campaignandadvocacy/Youthinaction/C182-Youth-orientated/worstforms/lang—en/index.htm> [<https://perma.cc/2BFU-HRS9>].

497. Mbaku, *Rule of Law, State Capture, and Human Development*, *supra* note 495, at 782.

498. Mbaku, *Rule of Law, State Capture, and Human Development*, *supra* note 495, at 782.

and they do not have “the independence [and financial resources or the general wherewithal] to search for alternative producers” or providers of services.⁴⁹⁹

With respect to access to education, for example, “[c]hildren can be affected directly by corruption, such as through a requirement to pay bribes to receive services, or indirectly through missed services because resources have been plundered.”⁵⁰⁰ In fact, it has been estimated that at the very least, as many as “25 million children in primary school are affected by corruption” in Africa.⁵⁰¹ To better understand the impact of corruption on children, especially as it relates to their access to education, one must begin by looking at the behaviors of those who provide children with educational services.⁵⁰² First, the behaviors of *civil servants* (e.g., public school teachers and administrators who provide educational services directly to children, as well as bureaucrats in national education ministries who direct and implement policies on education) and *policymakers* (i.e., the political elites who enact legislation to guide and govern national education policy) may cause a serious leakage of public funds through *illicit financial flows* (“IFFS”) and *grand corruption*.⁵⁰³

Second, providers of educational services to children can also engage in other behaviors (e.g., absenteeism by teachers and administrators, theft of school and instructional supplies, solicitation of unofficial or illegal fees, abuse of power, which may include the sexual exploitation of pupils and their use to perform services for teachers and administrators, and outright fraud) that can render the educational environment hostile to the effective delivery of services to children.

Finally, parents who have the necessary resources may distort the market for the supply of educational services by bribing teachers and administrators to place them and their children in a position to gain privileged access to publicly financed scarce educational services, effectively forcing children from poor families into untenable positions. In addition, parents may also

499. *Stolen Futures*, *supra* note 478, at 12.

500. *Stolen Futures*, *supra* note 478, at 12.

501. *Stolen Futures*, *supra* note 478, at 12.

502. *Stolen Futures*, *supra* note 478, at 12.

503. *Stolen Futures*, *supra* note 478, at 15. In the African Union/UN Economic Commission for Africa High Level Panel Report on Illicit Financial Flows from Africa, illicit or illegal financial flows (IFFS) are “earnings that are not strictly illegal but are wrongful as they can involve market/regulatory abuse or tax abuse such as individual and corporate tax abuse or conflicts of interest.” See AU/UNECA, *The HLP Report: A Simplification of the AU/UNECA High Level Panel Report on Illicit Financial Flows from Africa*, March 2020, 23 <https://financialtransparency.org/wp-content/uploads/2020/07/HLP-Report-A6-Final-Spreads-1.pdf>. IFFS can also be defined as “‘money [that is] illegally earned, transferred or used’ or financial transfers linked to illegal or illicit (or wrongful but not necessarily illegal) activity.” *Id.* at 22.

help their children cheat on their examinations, including especially entrance examinations into either institutions of higher learning or elite primary and secondary schools. In Nigeria, for example, cheating on examinations has become a very pervasive practice in the country's education sector.⁵⁰⁴ A recent study has revealed that malpractices, often involving examinations to gain admission to institutions of higher learning, were first recorded in Nigeria in 1914.⁵⁰⁵ Following independence in 1960, the problem only got worse. For example, in 2004, as many as 11 percent of students who sat for the West African Examination Council (WAEC)-organized examination, which is required for admission to institutions of higher learning, committed at least one form of malpractice or another, often with the help and acquiescence of their parents.⁵⁰⁶

Corruption in education is not unique to Nigeria. Widespread examination malpractices have been reported in Uganda,⁵⁰⁷ Kenya,⁵⁰⁸ Cameroon, and Tanzania,⁵⁰⁹ just to name a few. Even in the United States, which has one of the most developed education sectors in the world, many wealthy parents have been implicated in bribing admissions and other university officials in an effort to gain admission to prestigious institutions of higher learning for their children.⁵¹⁰

504. Iyabo Lawal, *Lessons from United States' Education Scandal*, THE GUARDIAN (UK) (Mar. 21, 2019), <https://guardian.ng/features/lessons-from-united-states-education-scandal/> [<https://perma.cc/9RXY-F2PB>].

505. *Id.*

506. *Id.*

507. Apophia Agiresaasi, *Uganda Struggles with Widespread Exam Fraud, as Pupils and Teachers Perpetuate Cheating*, GLOBAL PRESS J. (May 4, 2018), <https://globalpressjournal.com/africa/uganda/uganda-combats-widespread-cheating-school-exams-students-teachers-share-blame/> [<https://perma.cc/W4H7-W3SX>].

508. Callen Nyamwange, *Why Kenyan Students are Cheating in Their Exams and What Can be Done*, THE CONVERSATION (July 16, 2018), <https://theconversation.com/why-kenyan-students-are-cheating-in-their-exams-and-what-can-be-done-99409> [<https://perma.cc/BE9W-7U4M>].

509. Damtew Teferra, *The Need for Action in the Era of Academic Fraud*, UNIV. WORLD NEWS (Sept. 21, 2018), <https://www.universityworldnews.com/post.php?story=20180918104541112> [<https://perma.cc/38E7-5JSX>].

510. *See, e.g.*, Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html> [<https://perma.cc/N4PG-JW45>] (examining the college admissions scandal that became front-page news in the United States and implicated many wealthy families); *see also* Alanna Durkin Richer & Collin Binkley, *TV Stars and Coaches Charged in College Bribery Scheme*, AP NEWS (Mar. 12, 2019), <https://apnews.com/article/north-america-ia-state-wire-ct-state-wire-boston-tx-state-wire-2450688f9e67435c8590e59a1b0e5b47> [<https://perma.cc/2HZW->

In the provision of educational services to children, there is a type of corruption called *quiet corruption*, which usually has devastatingly negative impacts on children's rights. In the next section, this Article examines *quiet corruption* and its negative impact on the ability of African children to fully and effectively realize their right to education.

D. *Quiet Corruption and Children's Rights to Education in Africa*

In a 2010 report on Africa, the World Bank identified corruption, especially *quiet corruption*, as a major constraint to sustainable development in the continent.⁵¹¹ The World Bank defined quiet corruption as “various types of malpractice of frontline providers (teachers, doctors, inspectors, and other government representatives) that do not involve monetary exchange.”⁵¹² These behaviors, according to the World Bank, “include both potentially observable deviations, such as *absenteeism*, but also *hard-to-observe deviations from expected conduct*, such as *a lower level of effort than expected or the deliberate bending of rules for personal advantage*.”⁵¹³

In its 2010 report, the World Bank noted that “primary school teachers in a number of African countries are not in school 15 to 25 percent of the time (*absenteeism*), but, in addition, a considerable fraction of those in school are not found teaching (*low effort*).”⁵¹⁴ These deviations of frontline providers from the behaviors that are expected of them as part of their contracted duties have significantly broadened the negative impact of corruption on children's rights throughout the continent.⁵¹⁵

In addition to the fact that quiet corruption is not as visible as other types of corruption (e.g., bribery), it “occurs across a much wider set of transactions directly affecting a large number of beneficiaries.”⁵¹⁶ Specifically, quiet corruption is often pervasive in “a large share of health-provider-patient or teacher-pupil interactions, for example.”⁵¹⁷ This type of corruption is especially bad for the poor, many of whom place a heavy reliance on

HUPJ] (examining the college admissions bribery scheme emerged in the United States in 2019 and implicated TV stars and coaches).

511. WORLD BANK, AFRICA DEVELOPMENT INDICATORS 2010, SILENT AND LETHAL: HOW QUIET CORRUPTION UNDERMINES AFRICA'S DEVELOPMENT EFFORTS vii (2010) [hereinafter WORLD BANK].

512. *Id.*

513. *Id.* at xi (emphasis added).

514. *Id.* (emphasis added).

515. *Id.* These providers are government or public workers who are expected to perform certain specified duties (e.g., teach, and advise and mentor students) as detailed in their employment contracts.

516. *Id.*

517. *Id.*

“publicly provided services” to improve their quality of life.⁵¹⁸ Absenteeism by educators and healthcare providers can seriously undermine a child’s development “with potential permanent effects on adult educational attainment, cognitive skills, and underlying health.”⁵¹⁹ For example, the failure of public school teachers to perform their expected duties and deliver educational services to their students, can deprive these students of the opportunity to acquire the skills that they need to function as productive adults.⁵²⁰ This can seriously endanger a country’s efforts to develop its human resources and enhance their ability to participate in productive activities to produce the wealth that is needed to fight poverty. In fact, quiet corruption can significantly reduce a country’s productive capacity and hence, its gross domestic product, by preventing the effective development of its human capital.⁵²¹ A lower GDP implies that there would be less revenue available to the government for investment in programs that benefit children.

For teachers to effectively deliver educational services to their students, they must be present in school.⁵²² It has been argued that teachers might stay away from their jobs because (1) they are intentionally doing so in order to pursue other activities that are beneficial to themselves (e.g., engaging in entrepreneurial activities to generate wealth for themselves during the time they are supposed to be teaching and mentoring their students)—this is one form of quiet corruption; or (2) because the grand corruption of their superiors has created an extremely hostile, dangerous and poor working environment for teachers, students and staff.⁵²³ Grand corruption (e.g., embezzlement of public funds allocated to education), for example, can significantly reduce the amount of resources that are available for use in creating a safe and welcoming environment for the education of children. In fact, lack of instructional materials, as well as a poor or even hazardous working environment (e.g., dilapidated buildings,

518. *Id.*

519. *Id.*

520. *See id.* at 6.

521. *See* BENNO J. NDULU, ET AL., CHALLENGES OF AFRICAN GROWTH: OPPORTUNITIES, CONSTRAINTS, AND STRATEGIC DIRECTIONS 100 (2007) (examining constraints to economic growth in Africa, including especially the failure of African countries to properly develop their human resources and make them important contributors to growth and development).

522. *See* Indermit Gill & Kenan Karakulah, *Africa’s 3 deadly deficits: Education, electricity, and taxes*, THE BROOKINGS INST. (June 8, 2018), <https://www.brookings.edu/blog/future-development/2018/06/08/africas-3-deadly-deficits-education-electricity-and-taxes/> [<https://perma.cc/7BP4-WZZV>].

523. WORLD BANK, *supra* note 511, at 3.

lack of basic sanitation facilities, such as bathrooms), can force teachers and administrators to stay away from their jobs.⁵²⁴

Regardless of the reasons, teacher and staff absenteeism negatively affects children's rights to secure necessary education and training to prepare them to function as productive adults.

1. Teacher Absenteeism

In a recent study of teacher absenteeism in sub-Saharan Africa, the UN Children's Fund ("UNICEF") noted that "[l]earning is an outcome of a complex interplay of educational inputs such as teacher characteristics, learning materials, and school infrastructure, and the educational processes taking place in the classroom, characterized by learning time, and child-centered learning philosophy and practice."⁵²⁵ The UNICEF study also noted that "teacher attendance" or the presence of teachers in the classroom, is a key to "school quality and student achievements."⁵²⁶

The study revealed that "on an average school day, between one-quarter to half of all teachers in primary schools are absent from *classrooms* where they are contracted to teach."⁵²⁷ Given that these teachers, who are on the public payroll and hence, are contractually required to deliver various educational services (e.g., teaching and advising students and helping them develop the skills that they need to function as productive adults) to the students under their care, the failure to perform their contracted duties is a form of corruption because they continue to receive their regular salaries and benefits (which may include retirement and preferential access to publicly provided health care).⁵²⁸ In a piece written for the World Bank, Harry A. Patrinos notes that while "[e]ducation is critical if [countries] are to meet the goal of ending poverty and boosting shared prosperity by 2030, . . . [c]orruption undermines the equally critical goal of ensuring that all children and youth go to school and learn."⁵²⁹ Evidence, argues Patrinos, "confirms that teacher absenteeism is a significant problem in many countries, wasting financial resources and shortchanging young students."⁵³⁰ More

524. WORLD BANK, *supra* note 511, at 3.

525. *Time to Teach: A Study on the Determinants of Teacher Absenteeism in sub-Saharan Africa*, UNICEF, at 1, [https://www.unicef-irc.org/files/upload/documents/TTT%20-%20Research%20proposal%20\(2\).pdf](https://www.unicef-irc.org/files/upload/documents/TTT%20-%20Research%20proposal%20(2).pdf) [hereinafter UNICEF].

526. *Id.*

527. *Id.*

528. *Id.* at 17.

529. Patrinos, *supra* note 474.

530. Patrinos, *supra* note 474.

importantly, as argued by Patrinos, “[t]eacher absenteeism is one of the most serious forms of corruption in education.”⁵³¹

In a study conducted for the Washington, D.C.-based international NGO, The Brookings Institution, Kevin Watkins argues that “[t]he ultimate aim of any education system is to equip children with the numeracy, literacy and wider skills that they need to realize their potential—and that their countries need to generate jobs, innovation and economic growth.”⁵³² The study determined that across Africa, an estimated “61 million children of primary school age—one-in-every-two across the region—will reach their adolescent years unable to read, write or perform basic numeracy tasks.”⁵³³ It was also determined that while a child entering the educational systems of an OECD country today “has an 80 percent chance of receiving some form of tertiary education,” the “comparable figure for sub-Saharan Africa is 6 percent.”⁵³⁴

While hunger and malnutrition, parental illiteracy (which constrains the ability of parents to help their children with their homework assignments, as well as appreciate the importance of education to their children’s futures), and social and economic environments (e.g., poverty and harmful customary and traditional practices, including child marriage and FGM) are usually considered major obstacles to children’s school attainment, one should not discount the role played by the “weaknesses of the school system.”⁵³⁵ After all, “[t]eaching is at the heart of the learning crisis” for Africa’s children.⁵³⁶ Unfortunately, poor teacher preparation and “epidemic levels of teacher absenteeism” continue to contribute to the continent’s education deficit.⁵³⁷

Of course, there can be legitimate reasons for teachers to be away from their classrooms. Some of these reasons include illness; emergencies (a

531. Patrinos, *supra* note 474.

532. Kevin Watkins, *Too Little Access, Not Enough Learning: Africa’s Twin Deficit in Education*, THE BROOKINGS INST. (Jan. 13, 2013), <https://www.brookings.edu/opinions/too-little-access-not-enough-learning-africas-twin-deficit-in-education/#:~:text=Too%20Little%20Access%2C%20Not%20Enough%20Learning%3A%20Africa’s%20Twin%20Deficit%20in%20Education,-Kevin%20Watkins%20Wednesday&text=Failure%20to%20tackle%20the%20learning,dynamic%20growth%20with%20shared%20prosperity> [https://perma.cc/4DAD-8D2X].

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

teacher called to take care of a sick child at home); participation in continuing education activities (including attendance at professional conferences); and absences excused by the teacher's supervisors. However, such absenteeism is supposed to be of extremely short duration and usually accompanied by a replacement for the absent teacher.⁵³⁸ Official absences can also be secured through corruption, where, for example, the absent teacher is engaged in activities (e.g., managing a private business) that generate benefits for the teacher and the supervisor who is granting permission for the excused absence. All absences, regardless of whether they are corruptly secured or not, have a negative impact on student learning and achievement.⁵³⁹

The failure of teachers to report to work and actually teach their students "is a significant source of inefficiency in the education system."⁵⁴⁰ In addition to the fact that "the loss of teaching hours due to absenteeism can be presented as a waste of 46 cents in every dollar invested in education—equivalent to an annual wastage of between 1 and 3% of GDP," absenteeism can also have an important impact on equity in the provision of educational services.⁵⁴¹ A UNICEF article which was based on data from 36 countries collected by Afrobarometer⁵⁴² from surveys of 36 African countries, shows "a strong association between levels of teacher absenteeism and marginalized and/or vulnerable sub-populations."⁵⁴³

Based on the World Bank's Service Delivery Indicator ("SDI") surveys of several African countries,⁵⁴⁴ teacher absenteeism was determined to be "very pervasive," with absenteeism rates of more than "30 percent for most countries," with the exception of Senegal.⁵⁴⁵ The surveys found that "approximately 24 percent of teachers were not in school during unannounced visits, while 18 percent were at school but not teaching a scheduled class."⁵⁴⁶ In other words, approximately 42 percent of the teachers who were supposed to be teaching children were not doing so because they were absent from their duties—either because they were actually absent or were present in

538. Patrinos, *supra* note 474.

539. Patrinos, *supra* note 474.

540. UNICEF, *supra* note 525, at 1.

541. UNICEF, *supra* note 525, at 2.

542. Afrobarometer is an independent, non-partisan research network that measures public attitudes on economic, political, and social matters in Africa. AFROBAROMETER, <https://afrobarometer.org/> [<https://perma.cc/EB7T-LWEP>].

543. UNICEF, *supra* note 525, at 2.

544. The surveys were conducted on several African countries, including Kenya (2012), Madagascar (2016), Nigeria (2013), Niger (2016), Mozambique (2014), Tanzania (2014), Togo (2013), and Uganda (2013), for education and health. *See Country Reports*, SERV. DELIVERY INDICATORS, sdindicators.org/countries [<https://perma.cc/GSA6-3LTX>].

545. *Stolen Futures*, *supra* note 478, at 18.

546. *Stolen Futures*, *supra* note 478, at 18.

school but were not engaged in teaching and mentoring students as required by the conditions of their employment.

The surveys revealed wide variations by country as to the form of absence. Mozambique and Madagascar had the highest *school absence* rates of 45 and 31 percent respectively, while Kenya and Tanzania had the highest rates of *classroom absence* at 32 and 30 percent respectively.⁵⁴⁷ As the primary purpose of schools or educational institutions is to educate the pupils entrusted to them, both forms of teacher absenteeism are problematic. Hence, while it is true that if a teacher is *absent from school* he or she would not be available to provide necessary educational services to the registered students, it is also important to note that even teachers who are present in *school* may not appear in the *classroom* to deliver the required lessons. Thus, in determining the impact of teacher absenteeism on the rights of children, a key variable to examine is “classroom absence.”⁵⁴⁸

When teachers are not present in their classrooms to deliver lectures, advise, and mentor students, they negatively and “severely impact children, especially through an unfair reduction in the amount of learning received per day and consequently the effective learning days in a school year.”⁵⁴⁹ When one takes into consideration the combination of “the absence from both the school and classroom with the time engaged in non-teaching activities,” it is determined that “116 days out of 190 days in the country’s school year are lost in Mozambique” and “two out of every five teachers are not attending to pupils in class in Madagascar.”⁵⁵⁰ This level of quiet corruption represents a major infringement on the rights of the children of Mozambique and Madagascar to education, as embodied in the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁵⁵¹

Hence, it is not only important that a teacher be present in school as required by his or her teaching schedule, but that teacher must actually be

547. *Stolen Futures*, *supra* note 478, at 18.

548. *Stolen Futures*, *supra* note 478, at 18–19.

549. *Stolen Futures*, *supra* note 478, at 19.

550. *Stolen Futures*, *supra* note 478, at 19.

551. Child Protection Convention, *supra* note 38, art. 28(1) (“States Parties recognize the right of the child to education, and with a view to achieving these rights progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and *available free to all*.”). While the Child Protection Convention imposes an obligation on States Parties to make primary education compulsory and free to all citizens, teacher absenteeism can render this process incapable of actually educating the children; *see also* African Child Charter, *supra* note 1.

in the classroom and ready and prepared to deliver services to students. Unfortunately, available evidence shows that “classroom absence is particularly high in some [African] countries, especially Tanzania and Kenya.”⁵⁵² According to the World Bank’s Service Delivery Indicator (SDI) surveys, as a result of “absence from school or absence from the classroom when at school, or presence in classroom but not teaching, pupils in Tanzania lost cumulatively 2 hours and 46 minutes of teaching per day instead of receiving the 5-hour and 56-minute school day.”⁵⁵³

In Uganda, a country in which “absence rates cost nearly half of the schooling day . . . a primary school pupil . . . spends approximately 3 hours, 17 minutes with her teacher instead of the official time of 7 hours and 20 minutes.”⁵⁵⁴ The World Bank concluded that “nearly one out of every three classrooms in sub-Saharan Africa[] is orphaned, i.e., with student presence but no teachers,” due to the “severe teacher absence rates” in these countries.⁵⁵⁵ Throughout the continent, then, “a substantial proportion of African children are in school but not learning” and this “loss of potential learning time can impact overall education attainment during adulthood and affect overall cognitive development.”⁵⁵⁶

In addition to the fact that teacher absenteeism can deny many African children the right to an education, it can also create the need for school systems to provide remedial instruction to children whose education has been short-changed by their absent teachers. In many countries, these remedial lessons are usually provided outside the public education system through private tutoring sessions that are paid for by each student’s parents. Evidence from East Africa shows that “such remedial lessons can compromise teacher effort by creating an incentive to teach certain topics only during private lessons” and “[t]his disadvantages those pupils who cannot pay” and these usually are the children of poor parents.⁵⁵⁷

2. *Paying Bribes in Order to Access Education Services*

According to data from Afrobarometer surveys, “at least 29 percent of Africans reported paying a bribe to access various services.”⁵⁵⁸ But, how does this impact services, such as education and healthcare, which are critical to the welfare and livelihood of children and which are supposed to be free to them? Afrobarometer determined that on the average in the

552. *Stolen Futures*, *supra* note 478, at 19.

553. *Stolen Futures*, *supra* note 478, at 19.

554. *Stolen Futures*, *supra* note 478, at 19.

555. *Stolen Futures*, *supra* note 478, at 19.

556. *Stolen Futures*, *supra* note 478, at 19.

557. *Stolen Futures*, *supra* note 478, at 19.

558. *Stolen Futures*, *supra* note 478, at 24.

African countries surveyed, “14.7 percent of individuals who make contact with schools have paid a bribe.”⁵⁵⁹ In addition, it was determined that “[t]he highest proportion of people paying bribes are in Malawi (57 percent), Liberia (45 percent) and Cameroon (32 percent)” and the countries in which people pay bribes less frequently are “Cape Verde, Botswana and Mauritius.”⁵⁶⁰ While this process directly violates the rights of children in general, it is especially detrimental to the health and education of children from poor families. Given that the poverty of these families will render them incapable of paying the requested bribes, their children will not be able to access the services they need to maintain their health, as well as acquire the skills (through education and training) that they need to grow up into productive adults.

Of all the countries surveyed by the Afrobarometer, it was determined that at least “133 million children are enrolled in primary school.”⁵⁶¹ In these countries, of all the children enrolled in primary school, approximately 25 million were exposed to corruption, a process that significantly affects their ability to access publicly-funded education services. Even children whose parents can pay the requested bribes are invariably subjected to inferior or poor-quality services because many corrupt teachers are not interested in performing their jobs efficiently and effectively but in using their positions to generate extra-legal income for themselves. In addition, it is often the case that some parents bribe teachers to improve their children’s grades, effectively forfeiting their children’s rights to develop the skills that they would need as adults.

*E. The Obstructing Role of Grand Corruption in Children’s
Access to Education in Africa*

In any country, including those in Africa, government or public budgets represent the most important source of the resources that can be used to create the capacity for economic growth and development generally and for the education of children in particular. For example, the government can invest in education, healthcare, water treatment plants, roads, and other infrastructures that can provide an environment for entrepreneurship and the creation of wealth. Of particular interest to this Article is that the public resources stolen by unscrupulous and corrupt civil servants and

559. *Stolen Futures*, *supra* note 478, at 24.

560. *Stolen Futures*, *supra* note 478, at 24.

561. *Stolen Futures*, *supra* note 478, at 26.

political elites can be invested in universal primary education systems, which can provide each country's children the tools they need to fight poverty, prevent disease, and generally improve their living conditions and those of their fellow citizens.

Economists have long argued that “the well-being of a society is a function not only of the traditional stocks of financial capital, labor and natural resources but also of the knowledge and skills of individuals.”⁵⁶² In addition, “increased knowledge and skill will yield improved economic outcomes for both individuals and societies, especially in modern societies, where it is widely held that knowledge and skill convey a greater economic and social premium than in the past.”⁵⁶³ Hence, education is key to a country's efforts to fight poverty and promote human development because it is “the primary means of developing knowledge and skill.”⁵⁶⁴

For African countries pervaded with high levels of poverty, investment in education is key to economic and human development—such investments can help each country develop its human resources, beginning with the education of its children. Unfortunately for many countries in Africa, grand corruption (e.g., embezzlement of public funds) diverts funds away from the public budget and into the hands of corrupt civil servants and political elites. Through this process, the government is deprived of funds that could have been invested in children's health and education. As many researchers have argued, “[e]mbezzlement or diversion of school funds deprives schools of needed resources” and deprives children of access to a “quality and inclusive education.”⁵⁶⁵ Specifically, “[d]iversion and mismanagement of school supplies results in wastage and loss, depriving school children of the materials they need to learn.”⁵⁶⁶

According to Transparency International, grand corruption consists of “acts committed at high levels of government that benefit the few at the expense of the many and causes serious and widespread harm to individuals and society and . . . often goes unpunished.”⁵⁶⁷ The World Bank has estimated

562. ROBERT CROCKER, HUMAN CAPITAL DEVELOPMENT AND EDUCATION, SKILLS AND KNOWLEDGE FOR CANADA'S FUTURE: SEVEN PERSPECTIVES TOWARDS AN INTEGRATED APPROACH TO HUMAN CAPITAL DEVELOPMENT, STATISTICS CANADA/STATISTIQUE CANADA, at i (2006), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.501.1445&rep=rep1&type=pdf>.

563. *Id.*

564. *Id.*

565. MONICA KIRYA, EDUCATION SECTOR CORRUPTION: HOW TO ASSESS IT AND WAYS TO ADDRESS IT, at 1–2 (2019), <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it.pdf>.

566. *Id.* at 8.

567. *Stolen Futures*, *supra* note 478, at 29.

that “between US\$20 billion to US\$40 billion is lost annually due to grand corruption in developing countries.”⁵⁶⁸

In many African countries, grand corruption arises from extremely weak and dysfunctional institutional arrangements, which are incapable of adequately constraining and guarding the exercise of government power. This failure allows state custodians (i.e., civil servants and political elites) to engage in behaviors (e.g., grand corruption) that divert resources from the public sector into the pockets of these corrupt individuals.⁵⁶⁹ In these countries, governments often fail to prosecute high-ranking officials who are accused of engaging in corrupt activities.⁵⁷⁰ For example, in a study of Nigeria’s anti-corruption agency, the Economic and Financial Crimes Commission (EFCC), Human Rights Watch concluded that the EFCC had failed to bring to justice many of the country’s corrupt political elites.⁵⁷¹

The Goldenberg corruption scandal, which involved the “payment of massive cash subsidies for fictitious exports of gold and diamonds by a firm called Goldenberg International” and which rocked Kenyan political economy in the 1990s, cost the country’s taxpayers over £400m.⁵⁷² The funds lost in these fictitious transactions amounted to 10 percent of the country’s gross domestic product and had these funds been used “to provide insecticide treated nets, Kenya would have been malaria free and 34,000 malaria deaths would have been prevented each year. *At least 63 percent of malaria deaths [in Kenya] occur in children under five.*”⁵⁷³ Of course, these resources could have, alternatively, been invested in education and health, helping provide a more enabling environment for children to acquire the human capital that is critical for the country’s development.

In 2011, Shell and the Italian oil company, ENI, paid “US \$1.1 billion as kickbacks and bribes in Nigeria to access the exploration rights for an off-shore oil block OPL 245 with an estimated 9.23 billion barrels of crude

568. *Stolen Futures*, *supra* note 478, at 29.

569. MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 24.

570. In a study of corruption in Cameroon, Professor Nantang Jua determined that “higher-level bureaucrats are largely immune from trial by the Disciplinary Committee” of the Ministry of Public Service, the agency charged with prosecuting government workers involved in corrupt activities. See MBAKU, CORRUPTION IN AFRICA, *supra* note 275, at 97–98.

571. *Nigeria’s EFCC ‘Failing to Tackle Corrupt Politicians*, BBC NEWS (Aug. 25, 2011), <https://www.bbc.com/news/world-africa-14671687> [<https://perma.cc/8J79-KQJB>].

572. Jeevan Vasagar, *Charges in Kenya Corruption Scandal*, THE GUARDIAN (Mar. 16, 2006), <https://www.theguardian.com/world/2006/mar/16/kenya.jeevanvasagar> [<https://perma.cc/AL2F-MF4X>].

573. *Stolen Futures*, *supra* note 478, at 29.

oil.”⁵⁷⁴ These kickbacks were paid directly to a company owned and controlled by Nigeria’s then Oil Minister, Dan Etete, and only a “small fraction [of the money was] paid to the federal government.”⁵⁷⁵ The diversion of these monies from the public treasury into the hands of a corrupt public official effectively deprived the national treasury and the people of Nigeria of critical resources for fighting poverty and promoting economic growth and development. The African Union has noted that these diverted funds represented more than Nigeria’s healthcare budget in 2016 and, according to Global Witness, “it is because of such acts of corruption that 5 million Nigerians face starvation in the North, 450,000 children face acute malnutrition, and 10 percent of children die within 5 years of birth.”⁵⁷⁶

After serving as the democratically elected president of Zambia during the period 1991–2002, Frederick T. Chiluba was charged in court for embezzling \$72 million U.S.D. of public funds. In 2007, Chiluba was convicted of “fraud by a London court and ordered to repay \$58m (£36m) in embezzled funds.”⁵⁷⁷ However, the ruling “was never enforced in Zambia.”⁵⁷⁸ The African Union has noted that the \$72 million lost to Chiluba’s corruption was enough to meet “the annual public education expenditures for 48 percent of the children enrolled in primary school in 2008” in Zambia.⁵⁷⁹

Throughout the continent, the embezzlement of public funds by unscrupulous and corrupt civil servants and political elites continues to deprive African countries of scarce resources that could have been invested in keeping children healthy, enhancing their ability to attend school, and helping them obtain the skills they need to develop into productive adults. In its report on the impact of corruption on children in Africa, the African Union noted that “the diversion and consequent unavailability of schooling resources prevent children from enrolling in school and lead to poor quality education for those who enroll.”⁵⁸⁰

The AU report also determined that among children who are enrolled in public schools in Africa, “a substantial proportion do not have access to desks, chairs, textbooks and pens due to the very low capitation grants received by schools.”⁵⁸¹ The AU also noted that “limited available public funds can lead to poor infrastructure which forces pupils to study under

574. *Stolen Futures*, *supra* note 478, at 30.

575. *Stolen Futures*, *supra* note 478, at 30.

576. *Stolen Futures*, *supra* note 478, at 30.

577. *Zambia’s former President Frederick Chiluba buried*, BBC NEWS (June 27, 2011), <https://www.bbc.com/news/world-africa-13929859> [<https://perma.cc/4MMB-EGNN>].

578. *Id.*

579. *Stolen Futures*, *supra* note 478, at 30.

580. *Stolen Futures*, *supra* note 478, at 32.

581. *Stolen Futures*, *supra* note 478, at 32.

trees or makeshift structures and as such end up fully exposed to weather changes.”⁵⁸² Further, the lack of adequate toilets and other sanitation facilities has become a major obstacle to the ability of girls to attend school and obtain an education.⁵⁸³

In some African countries, such as Niger, Tanzania, Kenya, and Uganda, a significant teacher shortage has significantly increased the pupil-to-teacher ratio, negatively affecting the ability of these teachers to effectively and efficiently serve their students.⁵⁸⁴ In addition, “in Uganda, Madagascar, and Niger, less than 10 percent of the students have textbooks.”⁵⁸⁵ According to Transparency International’s CPI, these countries are ranked poorly with respect to corruption—with scores of 24 (Madagascar), 28 (Uganda), and Niger (32) out of 100 on the control of corruption.⁵⁸⁶

Some African countries, such as Niger, Togo, and Nigeria, lack both “teaching equipment and infrastructure.”⁵⁸⁷ Importantly, the diversion of resources through grand corruption can deprive the government of “important public services to regulate and monitor the quality of services” provided to pupils in school.⁵⁸⁸ These include, for example, inspectors that regularly inspect schools and monitor the extent to which teachers are effectively teaching their pupils and forensic accountants to audit school records and ensure that resources allocated to schools are expended efficiently and lawfully.

A study conducted in Madagascar, Tanzania, Togo, and Uganda, determined that “70 percent of the schools had not received a school inspector during the past year” and that “[w]ithout regular and frequent school inspections, it cannot be easily established whether children are receiving a good quality education”⁵⁸⁹ or not. Without regular and timely visits by inspectors, it is difficult to hold schoolteachers and administrators accountable for their actions.

The African Union report also noted that without grand corruption, many African countries would have been able to provide their school children with food. Due to high levels of corruption, however, a significant number

582. *Stolen Futures*, *supra* note 478, at 32.

583. *Stolen Futures*, *supra* note 478, at 32.

584. *Stolen Futures*, *supra* note 478, at 32.

585. *Stolen Futures*, *supra* note 478, at 32.

586. *Corruption Perceptions Index*, TRANSPARENCY INT’L, <https://www.transparency.org/en/cpi/2019/> [https://perma.cc/Z6BP-N9UE].

587. *Stolen Futures*, *supra* note 478, at 33.

588. *Stolen Futures*, *supra* note 478, at 33.

589. *Stolen Futures*, *supra* note 478, at 33.

of African children go to school hungry, a process that can “compromise[] their cognitive development and learning outcomes.”⁵⁹⁰ Currently in Africa, only countries that score 65/100 or higher on Transparency International’s CPI, such as Botswana and Namibia, are able to provide universal feeding programs for their school children.⁵⁹¹

If the funds stolen through grand corruption are derived from foreign development assistance, the government may be required to return those funds to the donors, a process that could further reduce the amount of money available to the government for investment in public services. For example, after “funds earmarked for universal primary education” in Kenya were embezzled, donors, including the UK Department for International Development, forced the Government of Kenya to refund a total of \$78.5 million.⁵⁹² In an effort to balance the budget, the government was forced to cut the national budget, effectively compounding the government’s inability to increase its allocations to the education sector.⁵⁹³

During the 2012-2013 school year, the Ugandan government promised school teachers a 15 percent increase in their salaries.⁵⁹⁴ However, before the salary increases could be granted to the teachers, the country was embroiled in a grand corruption scandal, which involved the embezzlement of “donor relief funds,” being managed by the Office of the Prime Minister.⁵⁹⁵ Because the government of Uganda was required to reimburse the stolen funds, it was unable to implement the promised salary increases for teachers throughout the country.⁵⁹⁶ The result was teacher strikes that paralyzed public schools and deprived children of the opportunity to attend school.⁵⁹⁷

Another way that grand corruption manifests itself in Africa is through payments to “ghost pensioners.” In Uganda, for example, the government lost as much as \$66 million in 2012, a loss that “was the result of a syndicate by officials from both the Ministry of Public Service and [the] Ministry of Finance.”⁵⁹⁸ The study, by the Office of Uganda’s Auditor General, also determined that the fraudulent payments were made to non-existent

590. *Stolen Futures*, *supra* note 478, at 34.

591. *Stolen Futures*, *supra* note 478, at 34.

592. *Stolen Futures*, *supra* note 478, at 34.

593. *Stolen Futures*, *supra* note 478, at 34.

594. *Stolen Futures*, *supra* note 478, at 34.

595. *Stolen Futures*, *supra* note 478, at 34.

596. *Stolen Futures*, *supra* note 478, at 34.

597. Elias Biryabarema, *Ugandan Teachers Go on Strike to Demand 20 Percent Pay Rise*, REUTERS (Sept. 16, 2013), <https://www.reuters.com/article/uganda-strike/ugandan-teachers-go-on-strike-to-demand-20-percent-pay-rise-idUSL5N0HC17L20130916> [<https://perma.cc/4872-QL4M>].

598. *Stolen Futures*, *supra* note 478, at 35.

pensioners, that some of the non-existent pensioners received multiple payments, and that fraudulent payments were also made to foreign pensioners.⁵⁹⁹

In addition to the fact that the reduction of public budgets through grand corruption has made it very difficult for African governments to meet promised salary increases for teachers and staff in public schools, it has also significantly impaired the ability of governments to hire and retain quality teachers. As a consequence, teachers are usually the “least paid public servants in most African countries” which is evidenced by data which show that “the amount of funds lost in grand corruption cases in Uganda in 2012 was enough to offer teachers a 50 percent salary increment during the financial year 2012/13.”⁶⁰⁰

Of course, the pervasiveness of grand corruption in any African country can severely alter the way public revenues are allocated. Often, this reallocation favors projects that are beneficial to high level bureaucrats and political elites. In corrupt regimes, civil servants and political elites may favor allocations to infrastructure construction projects that offer multiple opportunities for corrupt enrichment and neglect spending on primary education and health care, which may not offer extra-legal enrichment opportunities. Within the health or education sectors, however, government agents may prefer investments in the *construction* of health and education facilities—which are more susceptible to corruption—than in providing services such as family planning, prenatal care, and sanitation supplies (e.g., feminine hygiene products) for girls.⁶⁰¹

Grand corruption manifests itself in the siphoning of funds from the public sector through such schemes as direct embezzlement, payment of pensions to ghost pensioners, and kickbacks from the award of procurement and other government contracts, becoming a major obstacle to government investment in the delivery of services to citizens. More importantly, grand corruption continues to hinder the effective teaching and education of Africa’s children. Hence, grand corruption, like the other types of corruption, directly violates the rights of African children to quality healthcare and education.

599. *Stolen Futures*, *supra* note 478, at 35.

600. *Stolen Futures*, *supra* note 478, at 35.

601. *Stolen Futures*, *supra* note 478, at 35.; *see also* Phineas Rueckert, *Period Poverty, Stigma are Keeping Girls Out of School*, GLOBAL CITIZEN (May 30, 2018), <https://www.globalcitizen.org/en/content/menstrual-hygiene-day-education/> [<https://perma.cc/PCW3-ZKW4>] (emphasis added) (noting the impact of the failure for governments to provide school girls with period materials on their willingness to attend school).

F. Illicit Financial Flows and the Rights of Children in Africa

Another important contributor to the leakage of funds from Africa's public sectors is *illicit financial flows* ("IFFs"). As noted by the African Union's Report of the High Level Panel on Illicit Financial Flows from Africa, IFFs are "earnings that are not strictly illegal but are wrongful as they can involve market/regulatory abuse or tax abuse such as individual and corporate tax abuse or conflicts of interest."⁶⁰² IFFs can also be defined as "money that is illegally earned, transferred or utilized originating from activities including bribery and theft by corrupt government officials."⁶⁰³

In Africa, IFFs can result from (1) grand corruption (e.g., civil servants embezzle public funds and "invest" the ill-gotten gains in foreign bank accounts or real property abroad); (2) efforts to evade taxes owed the government, especially by multinational companies; (3) trade misinvoicing;⁶⁰⁴ and (4) money laundering.⁶⁰⁵ Money laundering usually takes place through three stages: (i) funds generated through engagement in illegal or criminal activities are transferred out of the country—this is called "placement"; (ii) the party or parties involved in this transaction undertake efforts to conceal the transfer process in order to prevent or foil the ability of domestic, as well as, international authorities, to discover the funds—that is called "layering"; and (iii) the now "cleaned" or "laundered" money is made available to the criminal from what now seems to be a legitimate source (e.g., a legitimate business, which includes a commercial bank).⁶⁰⁶

In a recent study of misinvoicing and its impact on tax revenue in sub-Saharan Africa, Asmah, et al., determined that "between 2002 and 2011, sub-Saharan Africa lost 5.7% of its GDP, through IFFs, of which 62%

602. Stolen Futures, *supra* note 478, at 15; *The HLP Report: A Simplification of the AU/UNECA High Level Panel Report on Illicit Financial Flows from Africa*, FINANCIAL TRANSPARENCY COALITION, at 23 (Mar. 2020), <https://financialtransparency.org/wp-content/uploads/2020/07/HLP-Report-A6-Final-Spreads-1.pdf>.

603. *Stolen Futures*, *supra* note 478, at 36.

604. Trade misinvoicing is defined as "the willful falsification of the value, volume and/or classification of an international transaction of goods and services by at least one party to the transaction" and is usually undertaken to facilitate the illegal or illicit transfer of income from a country. Emmanuel Ekow Asmah, Francis Kwaw Andoh & Edem Titriku, *Trade Misinvoicing Effects on Tax Revenue in Sub-Saharan Africa: The Role of Tax Holidays and Regulatory Quality*, 91 ANNALS PUB. COOP. ECON. 649, 650 (2020).

605. Money laundering has been defined as "the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions." *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, U.N., Dec. 20, 1988, 1582 U.N.T.S. 95 art. 3(1)(b)(i).

606. See generally *Money Laundering*, U.N., <https://www.unodc.org/unodc/en/money-laundering/overview.html> [<https://perma.cc/ZWK5-TKEL>].

was due to misinvoicing.”⁶⁰⁷ The Asmah, et al. study also determined that “aside from being ranked above the global average of 18.24%, sub-Saharan African countries were the highest hit in trade misinvoicing during the 10-year period 2008–17.”⁶⁰⁸ South Africa, one of the continent’s biggest economies, on average, suffered annual losses of \$19.9 billion U.S.D., which represented “about 19.41% of its value of total trade globally,” through misinvoicing.⁶⁰⁹

Trade misinvoicing does not affect only South Africa. In their study, Asmah, et al. also determined that “Nigeria, Ghana and Kenya lost U.S. \$8.7 bn, U.S. \$3.7 bn and U.S. \$2.8 bn respectively, through import misinvoicing over the [2008–2017] period.”⁶¹⁰

In its 2020 report on economic development in Africa, the United Nations Conference on Trade and Development (“UNCTAD”) determined that each year, Africa loses \$88.6 billion through capital flight and that between \$30 and \$52 billion comes through trade misinvoicing.⁶¹¹ The annual outflow of \$88.6 billion from the African continent represents 3.7% of the latter’s GDP and an amount that is “as much as the combined total annual inflows of official development assistance, valued at \$48 billion, and yearly foreign direct investment, pegged at \$54 billion, received by African countries—the average for 2013 to 2015.”⁶¹²

The UNCTAD has also determined that during the period from 2000–2015, the total illicit flight of capital from Africa amounted to \$836 billion and that “[c]ompared to Africa’s total external debt stock of \$770 billion in 2018, this makes Africa a ‘net creditor to the world.’”⁶¹³ These illicit financial flows (IFFs) are a major drain on “capital and revenues” in the continent and seriously undermine the ability of national governments to invest in productive capacity.⁶¹⁴ Specifically, the UNCTAD determined that in African countries that are pervaded by high IFFs, governments

607. Asmah et al., *supra* note 604, at 650.

608. Asmah et al., *supra* note 604, at 650.

609. Asmah et al., *supra* note 604, at 650.

610. Asmah et al., *supra* note 604, at 650.

611. *Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa*, U.N. CONF. ON TRADE AND DEV., at 15 (2020), https://unctad.org/system/files/official-document/aldcafrica2020_en.pdf.

612. *Africa Could Gain \$89 Billion Annually by Curbing Illicit Financial Flows*, U.N. CONF. ON TRADE AND DEV. (Sept. 28, 2020), <https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows> [<https://perma.cc/3KDD-G46T>].

613. *Id.*

614. *Id.*

“spend 25% less than countries with low IFFs on health and 58% less on education.”⁶¹⁵ In addition, given that “women and girls often have less access to health and education, they suffer most from the negative fiscal effects of IFFs.”⁶¹⁶

As determined by the UNCTAD, the continent is not likely to make up the large financial gap to achieve sustainable human development if it is unable or unwilling to fully and effectively tackle the illicit flow of capital out of the continent. For one thing, fully and effectively tackling IFFs represents a major way to secure the capital needed to invest in infrastructure, education, health, and productive capacity. UNCTAD concludes that “curbing illicit capital flight could generate enough capital by 2030 to finance almost 50% of the \$2.4 trillion needed by sub-Saharan African countries for climate change adaptation and mitigation.”⁶¹⁷ Of course, some of those savings can be devoted to spending on education, especially at the primary level.

In addition to their impact on public finances, IFFs, particularly those involving the outflow of funds, also affect household incomes. The exit of financial resources from a country can have an impact on “household income and thus the ability of the family to provide for their children.”⁶¹⁸ As already discussed, the amount of financial resources entering or fleeing a country will have a significant impact on the ability of the government “to provide social goods such as healthcare, education, water and sanitation.”⁶¹⁹ Effective control of corruption can, of course, have a significant positive impact on inflow of direct foreign investment, a process that can, in turn, affect household income. While government effectiveness is critical for the provision of water and healthcare, household income is “more important for shelter, sanitation and education.”⁶²⁰

G. Other Forms of Corruption that Affect Children’s Rights to Education in Africa

Grand corruption and IFFs aside, there are other ways in which the behaviors of civil servants (who include public school teachers and administrators) and politicians harm or constrain the ability of children to realize their rights to education. Examples include the pilfering of drugs in health facilities (e.g., public hospitals, clinics and dispensaries) by opportunistic

615. *Id.*

616. *Id.*

617. *Id.*

618. Bernadette O’Hare et al., *The Effect of Illicit Financial Flows on Time to Reach the Fourth Millennium Development Goal in sub-Saharan Africa: A Quantitative Analysis*, 107 J. ROY SOC. MED. 148, 148 (2014).

619. *Id.*

620. *Id.* at 148–49.

staff members, leading to chronic shortages. This theft of hospital supplies produces shortages that are often quite detrimental to the health of children. For example, in July 2021, Uganda's Statehouse Anti-Corruption Unit reported that it had arrested "ruthless nurses and cleaners at Kawempe Referral Hospital for [stealing and] selling government drugs" and that "[t]heir greed denies our daughters and sisters safe delivery of babies as mothers."⁶²¹ Corrupt civil servants and politicians can engage, with the help and cooperation of domestic and international businesses, in the importation of fake, expired and counterfeit drugs into the country. A recent study by the London School of Hygiene and Tropical Medicine estimated that "substandard and fake anti-malarial drugs could be causing 116,000 extra deaths from the disease every year in sub-Saharan Africa."⁶²²

The WHO has noted that of all the fake medicines seized by governmental agencies during the 2013–2017 period, as much as 42% were confiscated in sub-Saharan Africa.⁶²³ According to the WHO, "[s]ubstandard and counterfeit medicines may be responsible for up to 116,000 malaria deaths annually in sub-Saharan Africa alone,"⁶²⁴ and as much as 70% of these deaths are of children under the age of 5 years.⁶²⁵

The pervasiveness of corruption in the bureaucracies of many African countries implies that the problem could be worse than indicated by the WHO data. For one reason, because many civil servants are involved in the importation of fake and counterfeit drugs, it is not likely that these same individuals will seize their own illegal goods, nor voluntarily admit publicly that they are engaged in such illegal and dangerous activities.

621. *Three nurses arrested for alleged theft of drugs*, THE INDEPENDENT (July 9, 2021), <https://www.independent.co.ug/three-nurses-arrested-for-alleged-theft-of-drugs/> [<https://perma.cc/5FRQ-3FBE>]. See also *Stolen Futures*, *supra* note 478, at 37.

622. See, e.g., Peter Mwai, *Fake Drugs: How Bad is Africa's Counterfeit Medicine Problem?*, BBC NEWS (Jan. 17, 2020), <https://www.bbc.com/news/world-africa-51122898> [<https://perma.cc/SVK5-JAWN>]; Jocelyne Sambira, *Counterfeit Drugs Raise Africa's Temperature*, AFRICAN RENEWAL (May 2013), <https://www.un.org/africarenewal/magazine/may-2013/counterfeit-drugs-raise-africa%E2%80%99s-temperature> [<https://perma.cc/6WZJ-RNZ9>] (quoting the WHO as the defined counterfeit medicine as "one which is deliberately and fraudulently mislabeled with respect to identity and/or source.").

623. Mwai, *supra* note 622.

624. Jackson Thomas et al., *Fake Drugs are a Key Reason Malaria Still Kills so Many People*, QUARTZ AFRICA (Apr. 26, 2018), <https://qz.com/africa/1263133/malaria-kills-many-because-of-fake-drugs/> [<https://perma.cc/Z5PF-PQ99>] (quoting recent WHO estimates).

625. *Id.*

Hence, it is likely the case that the incidence of fake and counterfeit drugs in Africa is much higher than that revealed by the WHO data.

In a study on counterfeit drugs in Nigeria, Professor Olusegun Akinyandenu, who studies Nigeria's healthcare system, concluded that "[m]ajor factors contributing to the prevalence of counterfeit drugs in Nigeria include ineffective enforcement of existing laws, non-professionals in [the] drug business, loose control systems, high cost of genuine drugs, greed, ignorance, [and] corruption."⁶²⁶ Akinyandenu also determined that fake and counterfeit drugs pose a significant and existential threat to Nigeria's efforts to achieve its development goals, which include providing an enabling and effective environment for the education and training of its children so that they can eventually take leadership positions in government and the economy.⁶²⁷

In 2020, the UN Office of Drugs and Crime (UNODC) reported that drug counterfeiting is complicating Nigeria's efforts to confront the COVID-19 pandemic.⁶²⁸ In an investigation conducted in March 2020, INTERPOL, the International Criminal Police Organization, noted that in "April and May [2020] alone, [Nigeria's] National Agency for Food and Drug Administration and Control (NAFDAC) seized 36 falsified medicines and medical products, including tramadol, codeine as well as substantial medicines related to COVID-19 such as chloroquine and hand sanitizers."⁶²⁹

Transparency International (TI), the Berlin-based international anti-corruption NGO, has identified corruption as "one of the major reasons for the preponderance of counterfeit drugs in Nigeria, in addition to inadequate legislation, ineffective enforcement of existing laws" and that "[e]xamples of corrupt practices that facilitated counterfeiting of drugs included extortion of bribes from applicants for drug registration, deliberate over-supply of drug samples for resale, and acceptance of perquisites and material gifts from companies being inspected."⁶³⁰

Doctors have warned that "[a] surge in counterfeit and poor quality medicines means that 250,000 children a year are thought to die after receiving shoddy or outright fake drugs intended to treat malaria and pneumonia

626. Olusegun Akinyandenu, *Counterfeit Drugs in Nigeria: A Threat to Public Health*, 7 AFR. J. PHARMACY & PHARMACOLOGY 2571, 2571 (2013).

627. *Id.*

628. UNODC, *Falsified Medicines in the Wake of COVID-19: An Emerging Threat for Security and Public Health in Nigeria*, UN OFF. ON DRUGS & CRIME (July 24, 2020), <https://www.unodc.org/nigeria/en/falsified-medicines-in-the-wake-of-covid-19-an-emerging-threat-for-security-and-public-health-in-nigeria.html> [<https://perma.cc/HF6A-H9KP>].

629. *Id.*

630. Habibat A. Garuba et al., *Transparency in Nigeria's Public Pharmaceutical Sector: Perceptions from Policy Makers*, 5 GLOB. HEALTH (2009).

alone.”⁶³¹ A country cannot expect to maintain an educated and skilled workforce if its children are being killed or maimed by shoddy or fake drugs. For example, in November 2008, “34 Nigerian children, aged 4 months to 3 years, died and more than 50 others were hospitalized with severe kidney damage after taking the drug ‘My Pikin’ (‘my child’ in local pidgin), a teething mixture containing paracetamol.”⁶³² It was determined that the “outbreak was due to the use of diethylene glycol, which is much less toxic than DEG and is widely used in the pharmaceutical industry” and which is “a well-known human toxicant that causes generalized multi-organ failure characterized by acute renal failure.”⁶³³

Fake and counterfeit medicines threaten the health and lives of African children. Some researchers now refer to the counterfeiting of anti-malarials as “a form of attack on global public health in which fake and substandard anti-malarials serve as de facto weapons of mass destruction.”⁶³⁴ For example, in 2018 and 2019, 411,000 and 419,000 Africans, most of them children and babies, died from malaria, respectively.⁶³⁵ The WHO has noted that disruptions in access to antimalarial treatment, which could be caused not just by supply chain issues, but also by the influx of fake and counterfeit drugs, can cause additional deaths of between 19,000–100,000.⁶³⁶

VII. THE COURTS AND THE CHILD’S RIGHT TO EDUCATION IN AFRICA

A. Introduction

Many African countries have constitutions that are consistent with international and regional treaties and conventions guaranteeing the rights of children. This has been achieved through either the enactment of domesticating legislation or by specifically inserting into the national constitution a

631. Ian Sample, *Fake Drugs Kill More than 250,000 Children a Year, Doctors Warn*, THE GUARDIAN (Mar. 11, 2019), <https://www.theguardian.com/science/2019/mar/11/fake-drugs-kill-more-than-250000-children-a-year-doctors-warn> (last visited on Feb. 15, 2022).

632. Maurizio Bonati, *Once Again, Children are the Main Victims of Fake Drugs*, 94 ARCHIVES ON DISEASE CHILDHOOD 468, 468 (2009).

633. *Id.*

634. Kaliyaperumal Karunamoorthi, *The Counterfeit Anti-malarial is a Crime Against Humanity: A Systematic Review of the Scientific Evidence*, 13 MALARIA J. (2014).

635. Owen Dyer, *African Malaria Deaths Set to Dwarf COVID-19 Fatalities as Pandemic Hits Control Efforts*, WHO Warns, THE BMJ (Dec. 2, 2020), <https://www.bmj.com/content/bmj/371/bmj.m4711.full.pdf>.

636. *Id.*

provision that defines how international law, including international human rights and humanitarian law, should be treated by domestic courts. For example, the Constitution of the Republic of Kenya, 2010 states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁶³⁷ Additionally, Kenya’s Constitution also states that “[t]he general rules of international law shall form part of the law of Kenya.”⁶³⁸

Kenya signed the UN Convention on the Rights of the Child (“CRC”) on January 26, 1990 and ratified it on July 30, 1990, without any declarations or reservations.⁶³⁹ When Article 2(6) of the Constitution of Kenya, which states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution,”⁶⁴⁰ is read in the context of Kenya’s ratification of the CRC, the ultimate conclusion is that the CRC forms part of the law of Kenya and hence, the rights guaranteed children by the CRC are justiciable in Kenya’s domestic courts. This is also true of the African Charter on the Rights and Welfare of the Child (“African Child Charter”), which was ratified by Kenya on July 25, 2000.⁶⁴¹

Both the CRC and the African Child Charter recognize the child’s right to education and, “with a view to achieving this right progressively and on the basis of equal opportunity,” impose an obligation on States Parties to “[m]ake primary education compulsory and available free to all.”⁶⁴² The African Child Charter, whose drafters were informed by the CRC, devotes Article 11 to education and states: “Every child shall have the right to education.”⁶⁴³ Like the CRC, the African Child Charter imposes obligations on States Parties to ensure that this right is realized. Specifically, the African Child Charter states: “State[s] Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right.”⁶⁴⁴

With respect to the rights of the child in general and the child’s rights to education in particular, the CRC and the African Child Charter recognize four legal principles that are fundamental for the interpretation and application of the rights of children. These principles are (1) non-discrimination/

637. CONSTITUTION art. 2(6) (2010) (Kenya).

638. *Id.* art. 2(5).

639. Child Protection Convention, *supra* note 38.

640. CONSTITUTION art. 2(6) (2010) (Kenya).

641. African Child Charter, Status List, *supra* note 201.

642. Child Protection Convention, *supra* note 38, art. 28(1).

643. African Child Charter, *supra* note 1.

644. African Child Charter, *supra* note 1, art. 11(3).

equality; (2) the best interests of the child; (3) the child's right to life, survival and development; and (4) the child's right to be heard.⁶⁴⁵

The equality principle ensures and guarantees that all children are entitled to "all the rights and freedoms recognized and guaranteed [by the CRC and the African Child Charter] without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."⁶⁴⁶ Similar language can be found in the CRC.⁶⁴⁷

The principle of the "best interests of the child" is designed to serve as a guide in resolving all issues concerning children.⁶⁴⁸ For example, in designing and implementing policies that affect children, the best interests of the child must be the guiding principle. This principle must also apply in the adjudication of cases involving children and/or their rights. Thus, if a court or tribunal is called upon to adjudicate a case involving, for example, divorce or the need to place a child in foster care, the adjudicators must be guided by this important principle. Article 3 of the CRC states that "[i]n *all actions* concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration."⁶⁴⁹

Both treaties also guarantee the child the right to life. This right, however, goes beyond preventing the child from being killed.⁶⁵⁰ States Parties are also required to ensure, not just the survival of the child, but also their development. Thus, the child's right to life also includes the right to education, health, safety, and other services that will enhance the child's ability to develop into a productive adult.⁶⁵¹

These treaties recognize the child's right to participate in making decisions that affect him or her. For example, the CRC imposes an obligation on

645. See generally Child Protection Convention, *supra* note 38; see also African Child Charter, *supra* note 1.

646. African Child Charter, *supra* note 1, at pmbl.

647. Child Protection Convention, *supra* note 38, at pmbl.

648. Usang Maria Assim, *How a South African Court Case Reminded Adults of the Rights of the Child*, THE CONVERSATION (July 27, 2020), <https://theconversation.com/how-a-south-african-court-case-reminded-adults-of-the-rights-of-children-142834> [<https://perma.cc/2X74-XSFN>].

649. Child Protection Convention, *supra* note 38, art. 3(1), 4 (emphasis added); see also African Child Charter, *supra* note 1, art. 4.

650. African Child Charter, *supra* note 1, art. 5.

651. African Child Charter, *supra* note 1, art. 5. See also Child Protection Convention, *supra* note 38, art. 6.

States Parties to “respect the right of the child to participate fully in cultural and artistic life” and to provide “appropriate and equal opportunities” for children to engage in “cultural, artistic, recreational and leisure activity.”⁶⁵² The child is not only guaranteed the right to be heard on matters affecting him or her, but those views must be respected and given due consideration. This dovetails effectively with the best interests of the child principle. In fact, the latter principle would fail if, in making decisions regarding or affecting the welfare of the child, he or she is not granted the right to be heard. However, it is important to note that in considering the child’s view, weight is given to his or her age, maturity and capacity.⁶⁵³

Although there is some controversy surrounding the best interests of the child principle because of its “indeterminacy, vagueness or subjectivity” and that it is sometimes quite difficult to determine with some accuracy what the best interests of the child are, it is also important to note that this vagueness makes this principle a “useful tool to adapt to each specific case.”⁶⁵⁴

In the following section, this Article will examine a case from South Africa’s highest court—the Constitutional Court (“CC”)—to see how domestic courts in the African countries are helping ensure that children realize their rights, specifically, the right to education, guaranteed by their national constitutions and international human rights instruments.

B. AB and Another v. Pridwin Preparatory Schools and Others (South Africa)

This case was an appeal from South Africa’s Supreme Court of Appeal, which was hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg. The Constitutional Court’s (CC) majority decision was written by Justice Theron, with Justices Jafta, Khampepe, Ledwaba, Madlanga, and Mhlantla concurring.⁶⁵⁵

Justice Theron began the analysis of the case by noting that the application to the CC concerned “the constitutional rights of the applicants’ children, two boys, DB and EB, to have their best interests considered paramount in all matters concerning them and to a basic education.”⁶⁵⁶ Justice Theron stated that “[t]he central question to be considered is whether it is constitutionally permissible for an independent school to expel children due to their

652. Child Protection Convention, *supra* note 38, art. 31(1).

653. Assim, *Why the Child’s Rights Act*, *supra* note 111.

654. See Assim, *Why the Child’s Rights Act*, *supra* note 111.

655. *AB and Another v. Pridwin Preparatory School and Others* 2020 (12) ZACC 1 (CC) at 2 (S. Afr.) [hereinafter *AB and Another*].

656. *Id.* ¶ 97.

parents' alleged misconduct, without following a fair procedure and without appropriate justification for its decision."⁶⁵⁷

The two boys in this case were pupils at Pridwin, an independent school in Johannesburg.⁶⁵⁸ In 2016, "DB and EB were in grade 4 and grade R respectively" and on June 30, 2016, Pridwin unilaterally terminated "the Parent Contract that allowed the children to attend the School."⁶⁵⁹ The CC was called upon to determine the constitutional validity of Pridwin's unilateral decision.⁶⁶⁰

In making its decision, Pridwin relied on Clause 9.3 of the Parent Contract, which provides as follows:

The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees prepaid for a period after the end of the term less anything owing to the School by you.⁶⁶¹

The relief that the applicants sought was for the CC to declare "Pridwin's decision unconstitutional and invalid on both procedural and substantive grounds, on the basis that the decision was in breach of section 28(2) (the best interests of the child standard) and section 29(1)(a) (the right to basic education) of the Constitution [of the Republic of South Africa]."⁶⁶² Alternatively, the applicants prayed that "[i]n the event that [the CC] finds that clause 9.3 is not capable of a constitutionally compliant interpretation, they seek an order declaring clause 9.3 of the Parent Contract unconstitutional, contrary to public policy and invalid to the extent that it permits cancellation of the Parent Contract without a fair hearing and on unreasonable grounds that breach children's rights."⁶⁶³

Prior to the unilateral cancellation of the Parent Contract, relations between the boys' parents—AB and CB—and Pridwin, had deteriorated significantly, due to the parents' conduct, particularly during sporting events.⁶⁶⁴ In her dissenting opinion, Acting Judge Nicholls noted that "[t]he under 9 tennis

657. *Id.*

658. *Id.*

659. *Id.*

660. *Id.*

661. *Id.* ¶ 98.

662. *Id.*

663. *Id.* ¶ 99.

664. *Id.* ¶¶ 12–15.

coach was reduced to tears as a result of exchanges with, and accusations by, AB.”⁶⁶⁵ This deterioration in the relationship between the boys’ parents and administrators at Pridwin “culminated in the headmaster addressing a letter to the applicants during June 2016, invoking clause 9.3 of the Parent Contract, effectively terminating the contract and entailing that the two boys’ continued education at Pridwin came to an end.”⁶⁶⁶

Justice Theron noted that in the matter before the CC, “the claim based on public policy is directed, not at upholding the constitutional rights of the boys, but at the School’s enforcement of the Parent Contract and the potential invalidity of clause 9.3 of the Parent Contract.”⁶⁶⁷ She went on to argue that the “claim is contractual in nature, even though public policy is based on the values underpinning the Constitution.”⁶⁶⁸ However, “[t]he claim relating to the constitutional validity of the decision to terminate the Parent Contract is directed at upholding the boys’ constitutional rights.”⁶⁶⁹

Justice Theron stated that the claim which relates to the constitutionality of the decision to terminate the Parent Contract is grounded “in Pridwin’s obligation not to breach the boys’ rights in sections 28(2) and 29(1) of the Constitution [of the Republic of South Africa], which flow directly from the Constitution and operate independently from the contract.”⁶⁷⁰ Justice Theron went on to state that “[t]hese rights are not dependent on whether the contract was terminated lawfully or not.”⁶⁷¹

With respect to section 28(2) of the Constitution, Justice Theron stated that “[t]he right of children to have their best interests be of paramount importance in matters affecting them is a constitutional right enjoyed by every child in South Africa.”⁶⁷² According to section 28(2) of the Constitution, “[a] child’s best interests are of paramount importance in every matter concerning the child.”⁶⁷³

Section 28(2) of the Constitution, argues Justice Theron, “requires that appropriate weight be given to a child’s best interests as the consideration to which the law attaches the ‘highest value’ and that the interests of children be given due consideration when different interests are being considered in order to reach a decision.”⁶⁷⁴ When this consideration is being made, argued Justice Theron, “appropriate weight must be given to the best interests

665. *Id.* ¶ 13.

666. *Id.* ¶ 15.

667. *Id.* ¶ 103.

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.*

672. *Id.* ¶ 137.

673. S. AFR. CONST., 1996, art. 28(2).

674. *AB and Another*, *supra* note 655, ¶ 138 (footnotes omitted).

of the child” and, in addition, section 28(2) “must be interpreted in a manner that promotes the foundational values of human dignity, equality and freedom.”⁶⁷⁵

Justice Theron then noted that the “best interests of the child” is “one of four pillars of the CRC and that the UN Committee on the Rights of the Child (“UN Children Committee”) “recognizes the child’s best interests as a threefold concept in terms of which it is considered to be a right, a principle and a rule of procedure.”⁶⁷⁶ In its General Comment No. 14, the UN Children Committee describes the procedural element of the best interests standard as follows: “[a]ssessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.”⁶⁷⁷

In an earlier case, the CC “held that section 28(2) incorporates a procedural component, affording the right to be heard where the interests of children are at stake.”⁶⁷⁸ In *C v. Department of Health and Social Development, Gauteng*,⁶⁷⁹ the CC dealt with “statutory provisions which permitted a child to be removed from his or her parents’ care, but did not afford any automatic opportunity to make representations.”⁶⁸⁰ Justice Theron then noted that in *C*, the “concurring judgment of [Justice] Skweyiya [] held that this was impermissible, because section 28(2) required that the family and the child concerned be afforded an opportunity to make representations.”⁶⁸¹

Justice Skweyiya’s holding in *C* is as follows:

Section 28(2) of the Constitution requires an appropriate degree of consideration of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child’s best interests.⁶⁸²

Justice Theron then stated that the “overarching principle” in all matters “involving children’s rights and interests is that their best interests must

675. *AB and Another, supra* note 655, ¶ 138.

676. *AB and Another, supra* note 655, ¶ 139.

677. Convention on the Rts. of the Child, Comm. on the Rts. of Child., *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, at 4, para. 6(c), U.N. Doc. CRC/C/GC/14 (2014).

678. *AB and Another, supra* note 655, ¶ 141.

679. *C, et. al. v. Department of Health and Social Development, Gauteng, et. al.*, 2012, ZACC 1 (CC) at 2 para. 1 (S. Afr.) [hereinafter *C, et. al.*].

680. *AB and Another, supra* note 655, ¶ 141.

681. *AB and Another, supra* note 655, ¶ 141.

682. *C, et. al., supra* note 679, ¶ 27.

be considered” and that “[t]his ‘overarching principle’ has been codified in the provisions of [South Africa’s] Children’s Act.”⁶⁸³ The Children’s Act provides certain protections to children and these include: (1) “a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development,”⁶⁸⁴ and (2) section 6(3) grants “family members” the right “to express their views concerning the interests of children.”⁶⁸⁵ Justice Theron concludes that “[t]he provisions of section 6 [of the Children’s Act] serve as a guide for ‘the implementation of all legislation applicable to children’ including the Children’s Act.”⁶⁸⁶

Justice Theron noted that the provisions of the Children’s Act effectively domesticated the CRC and the African Child Charter, all of which “recognize the rights of children to be heard, either in person or through representations, in decisions affecting their interests.”⁶⁸⁷ By doing so, the Children’s Act created rights that are justiciable in South Africa’s domestic courts. Justice Theron declared that the decision made by Pridwin Preparatory School to cancel the Parent Contract was “invalid and set aside.”⁶⁸⁸ The Court reasoned that Pridwin’s decision “to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of sections 28(2) and 29(1)(a) of the Constitution” [of South Africa].⁶⁸⁹

In *AB and Another*, the CC held that children have rights, not just when they grow up into adulthood, but when they are still young.⁶⁹⁰ It is then incumbent on the societies in which these children live to ensure that they realize these rights, as guaranteed in national constitutions and international human rights instruments.⁶⁹¹ It is important to note that the process of protecting children also involves making certain that provisions of national constitutions conform to those of international human rights instruments and that these international human rights treaties are fully domesticated and made part of each country’s laws, effectively creating rights that are justiciable in domestic courts.

Once domestication of the relevant international children’s rights (e.g., those contained in the CRC and the African Child Charter) is completed,

683. *AB and Another*, *supra* note 655, ¶ 143.

684. *AB and Another*, *supra* note 655, ¶ 143 (referencing Children’s Act 38 of 2005 § 10 (S. Afr.)).

685. *AB and Another*, *supra* note 655, ¶ 143 (referencing Children’s Act 38 of 2005 § 6(3) (S. Afr.)).

686. *AB and Another*, *supra* note 655, ¶ 143.

687. *AB and Another*, *supra* note 655, ¶ 144.

688. *AB and Another*, *supra* note 655, ¶ 212.

689. *AB and Another*, *supra* note 655, ¶ 209.

690. *AB and Another*, *supra* note 655, ¶ 160.

691. *See generally AB and Another*, *supra* note 655.

and rights that are justiciable in domestic courts are created, it is incumbent upon the government to ensure these rights are enforced. As has been made clear by *AB and Another*, a judiciary that is fully independent of the other branches of government and has the financial and institutional independence to function, is a critical part of the national effort to enforce children's rights, including those to education.⁶⁹²

Each African country must take deliberate and purposeful action to, first, make certain that its national laws, including its constitution, conform to the provisions of international human rights instruments; second, domesticate the relevant international and regional human rights instruments to create rights that are justiciable in domestic courts; and third, provide itself with a judiciary that is truly independent of the other branches of government and has the capacity to adjudicate cases involving the rights of children.

C. Centre for Child Law and Others v. Minister of Basic Education and Others (South Africa)

The right to basic education is enshrined in the Constitution of the Republic of South Africa. Article 29(1) of South Africa's Constitution states: "Everyone has the right—a. to a basic education, including adult basic education; and b. to further education, which the state, through reasonable measures, must make progressively available and accessible."⁶⁹³ In the case *Centre for Child Law and Others v. Minister of Basic Education and Others*, Judge President of the High Court of South Africa (Eastern Cape Division, Grahamstown), S. M. Mbenenge, writing for the Court, noted that the right to basic education is enshrined in the Constitution without any qualification.⁶⁹⁴

The application before the High Court concerned "children who [had] been precluded from unconditionally continuing to attend public schools unless they or their parents/guardians identify themselves by means of, *inter alia*, passports, identity documents, birth certificates or permits."⁶⁹⁵ Judge President Mbenenge noted that "[i]n ordinary parlance [in South Africa], learners lacking the requisite documents have become known and are

692. *AB and Another*, *supra* note 655.

693. S. AFR. CONST., 1996, art. 29(1)(a–b).

694. *Centre for Child Law and Others v. Minister of Basic Education and Others* 2019 (126) SA 1 (ECG) ¶ 1 [hereinafter *Centre for Child Law*].

695. *Id.*

referred to in this judgment as ‘undocumented children.’”⁶⁹⁶ However, before examining the substantive issues of the case, the learned Judge President provided an overview of the importance of education to the individual and its role as a tool of transformation in South Africa.⁶⁹⁷

The case was filed by the Centre for Child Law, a non-governmental organization located at the University of Pretoria and which is dedicated to promoting the rights and best interests of children; the Legal Resources Centre, a non-profit public interest law center; and 37 affected children who were collectively referred to in the case as “the applicants.”⁶⁹⁸ The South African Human Rights Commission (“SAHRC”) and Section 27 (a public interest law NGO) were admitted as *amicus curiae* to make legal submissions to the Court.⁶⁹⁹ These entities brought the application before the Court on behalf of all the affected children in South Africa.⁷⁰⁰

Mbenenge JP started the overview of the importance of education to the human person by quoting from a treatise on education:

Every person must face the practical realities of life—its opportunities, its responsibilities, its defeats and its successes. How he is to meet these experiences, whether he is to become master or victim of circumstances depends largely upon his preparation to cope with them—his education.⁷⁰¹

Although education is a tool that can transform one’s life, argued Judge President Mbenenge, its “efficacy” in transforming lives and effectively playing this transforming role depends on how well individuals, especially children, can access it.⁷⁰² Hence, argues the learned judge, the key to transforming the lives of children is the “right to education” as enshrined in the Constitution.⁷⁰³ Judge President Mbenenge then cited to *Juma Masjid*,⁷⁰⁴ a case in which the Constitutional Court (“CC”) of South Africa recognized the importance of a basic right to education. In *Juma Masjid*, Justice Nkabinde held:

696. *Id.*

697. *Id.* ¶ 2.

698. *Id.* ¶ 1.

699. *Id.*

700. Jacque Cassette & Tricia Erasmus, *South African court hands down ground-breaking judgment on undocumented children’s right to a basic education*, INT’L BAR ASSOC., <https://www.ibanet.org/article/56C2867A-0B2D-4081-8763-66A06316E3FA> [<https://perma.cc/ZU3H-X532>] [hereinafter Cassette & Erasmus].

701. *Centre for Child Law*, *supra* note 694, ¶ 2.

702. *Centre for Child Law*, *supra* note 694, ¶ 3.

703. *Centre for Child Law*, *supra* note 694, ¶ 2.

704. *Governing Body of the Juma Masjid Primary School & Others v. Essay N.O. and Others* 2011, (1) SA 1 (CC) at 24. ¶ 43 (S. Afr.).

Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school—an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution—is a necessary condition for the achievement of this right.⁷⁰⁵

In the post-apartheid constitutional dispensation, argued Judge President Mbenenge, basic education was made “a pivot of transformation, serving as it does to ‘*redress the entrenched inequalities caused by apartheid.*’”⁷⁰⁶ Judge President Mbenenge then cited to a case of the U.S. Supreme Court on the “transformative and empowerment role of education:”

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, *it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.* Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁷⁰⁷

Judge President Mbenenge then reviewed education in the Eastern Cape and noted that prior to 2016, the Department of Education “provided teaching staff and funding to all learners at schools in the [province] regardless of whether the learners possessed identification documents” and that “[f]unding was provided to schools based on the actual number of learners in the school, and not on the number of learners whose identification document particulars were entered into the South African Schools Administration and Management System.”⁷⁰⁸ During this period the provincial government provided access to basic education and the necessary “nutrition” to all learners so that those “without identification documents were not excluded from attending school.”⁷⁰⁹

705. *Id.*

706. *Centre for Child Law, supra* note 694, ¶ 4.

707. *Centre for Child Law, supra* note 694 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

708. *Centre for Child Law, supra* note 694, ¶ 5.

709. *Centre for Child Law, supra* note 694, ¶ 5.

However, in 2016, the Acting Superintendent-General of the Provincial Department of Education of the Eastern Cape issued circulars which effectively changed the way learners were treated for purposes of access to basic education.⁷¹⁰ For example, in a circular dated June 6, 2016, the Acting Superintendent-General advised school administrators that henceforth, “funding for learners with no identity numbers or with invalid numbers would be withheld until corrected, failing which, by 17 June 2016, the affected learners would be regarded as no longer in existence and thereupon removed from enrolment at the affected schools.”⁷¹¹

The learned judge noted that the first and second applicants had made efforts to convince the Provincial Department of Education not to give effect to “Circular 06 of 2016” but they were unsuccessful.⁷¹² Judge President Mbenenge noted that, “[i]n practical terms, the consequences of the decision to stop funding undocumented children resulted in their exclusion from school and the exclusion of learners from being funded if they remained at school.”⁷¹³ With respect to Phakamisa High School, which is a “no-fee school located at Zwide Township, Port Elizabeth, on whose behalf the second applicant launched the application, there were, at the time of the launch of the application, 37 learners without valid identity numbers.”⁷¹⁴

The first and second applicants’ prayer sought an order from the Court:

*declaring Circular 06 of 2016 “communicated on 17 March 2017 that any Norms and Standards, Post Provisioning allocation and National School Nutrition [P]rogram . . . transfers to schools in the Eastern Cape Province will be based only on the learner numbers where valid identity, permit or passport numbers have been captured in the SASAMS . . . is inconsistent with the Constitution and/ or the South African Schools Act and unlawful.”*⁷¹⁵

The Centre for Child Law and the School Governing Body of Phakamisa High school, the first and second applicants, respectively, also prayed for “consequential relief which, in effect, [required] the first to third respondents to take steps to address the post establishment, paper budget, NSNP funding and furthermore [required] these respondents to report to the court and the first and second applicants’ attorneys regarding the steps taken to comply

710. *Centre for Child Law, supra* note 694, ¶ 6.

711. *Centre for Child Law, supra* note 694, ¶ 7.

712. The first applicant was the Centre for Child Law and the second applicant was The School Governing Body of Phakamisa High School. *See Centre for Child Law, supra* note 694, ¶ 8.

713. *Centre for Child Law, supra* note 694, ¶ 8.

714. *Centre for Child Law, supra* note 694, ¶ 8.

715. *Centre for Child Law, supra* note 694, ¶ 9. This application was launched against the first, second and third respondents. These were the South African Minister of Basic Education (1st), MEC for Education, Eastern Cape (2nd), and the Superintendent-General of the Eastern Cape Department of Education (3rd).

with the order.”⁷¹⁶ There was additional relief sought by the applicants and it was related to the Admission Policy for Ordinary Public Schools—the applicants sought for, inter alia, an order:

“[d]irecting that the three month period for the finalisation of the admission of a learner without an identity document or passport or permit in section 15 of the National Education Policy Act 27 of 1998—Admission Policy for Ordinary Public Schools is not mandatory and that where a learner cannot comply with this requirement he or she must remain conditionally registered at the school and the principal is directed to accept alternative proof in place of birth certificates, passports or permits” and that “no learner may be excluded from a public school on the basis that he/she does not have an identity number, permit or passport.”⁷¹⁷

Judge President Mbenenge then proceeded to provide more information about the case’s chronological litigation history. After that, the learned judge then reviewed the bases of the respective parties’ cases.⁷¹⁸ The first and second applicants based their case on:

the contentions that (a) the right enshrined in section 29(1)(a) read with section 28(2)(a) of the Constitution [of South Africa] accords ‘*everyone*’ a basic right to education, and not a right subjected to a condition that they provide identification documents; (b) the impugned decision infringes section 28(2) of the Constitution which provides that ‘[a] *child’s best interests are of paramount importance in every matter concerning the child*’; (c) the decision is also discriminatory within the meaning and contemplation of the equality clause and section 5 of the South African Schools Act 84 of 1996 which states that ‘*a public school must admit learners and serve their educational requirements without unfairly discriminating in any way*’; and (d) the right to dignity under section 10 of the Constitution.⁷¹⁹

Judge President Mbenenge summarized the issues before the High Court as follows:

- (a) whether there was an unreasonable delay in launching the application and, if so, whether such should be condoned in terms of section 9 of PAJA;
- (b) whether the issue on the constitutionality of the Admission Policy embodied in Circular 06 of 2016 has become moot;
- (c) the constitutionality of clauses 15 and 21 of the Admission Policy;
- (d) whether sections 39(1) and 42 of the Immigration Act should be interpreted as prohibiting the provision of basic education to children whose presence in the country is illegal; and
- (e) what order the court should grant.⁷²⁰

716. *Centre for Child Law, supra* note 694, ¶ 10.

717. *Centre for Child Law, supra* note 694, ¶ 10.

718. *Centre for Child Law, supra* note 694, ¶ 21.

719. *Centre for Child Law, supra* note 694, ¶ 21 (alteration in original) (citation omitted).

720. *Centre for Child Law, supra* note 694, ¶ 35.

In the final analysis of the case, the learned judge discussed Bill of Rights interpretation and noted that “Sections 39 and 42 of the Immigration Act⁷²¹ ought to be interpreted so as not to be in conflict with section 29(1)(a) of the Constitution.”⁷²² Section 39(2) of the Constitution, noted Judge President Mbenenge, “enjoins courts, ‘[w]hen interpreting any legislation’ . . . ‘[to] promote the spirit, purport and objects of the Bill of Rights.’”⁷²³ The learned judge then cited to a case of the Constitutional Court of South Africa, *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd. and Others*, in which Langa DP held that “all statutes must be interpreted through the prism of the Bill of Rights” and that “[a]ll law making authority must be exercised in accordance with the Constitution.”⁷²⁴ Specifically, Langa DP held as follows:

The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

. . . Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.⁷²⁵

Judge President Mbenenge then concluded that “[t]he rights under the Bill of Rights that are of relevance when interpreting sections 39 and 42 of the Immigration Act are *the right to basic education, the right that seeks to uphold the best interests of the child, the right to equality, and the right to dignity.*”⁷²⁶ The learned judge then cited to a U.S. Supreme Court case, which dealt with “whether it was lawful for the State of Texas to deny enrolment and withhold State funds from local schools for the education

721. Section 39 of the Immigration Act deals with educational or learning institutions. Article 39(1) states as follows: “No learning institution shall knowingly provide training or instruction to—(a) an *illegal foreigner*; (b) a *foreigner* whose status does not authorize him or her to receive such training or instruction by such person.” Immigration Act No. 13 (2002) (S. Africa), §§ 39(1)(a)–(b). Section 42 deals with aiding and abetting illegal foreigners. *Centre for Child Law*, *supra* note 694, § 42(1).

722. *Centre for Child Law*, *supra* note 694, ¶ 112.

723. *Centre for Child Law*, *supra* note 694, ¶ 113 (emphasis omitted).

724. *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd. and Others In re: Hyundai Motor Distributors (Pty) Ltd. and Others v. Smit NO and Others*, 2001, (1) SA 1 (CC) at 18, ¶ 22 (S. Afr.).

725. *Id.* ¶¶ 21–23.

726. *Centre for Child Law*, *supra* note 694, ¶ 114 (emphasis added).

of children who were not ‘legally admitted’ into the United States.”⁷²⁷
In *Plyler v. Doe*,⁷²⁸ Justice Brennan, writing for the majority, stated as follows:

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.” *Trimble v. Gordon*, 430 U.S. 762, 430 U.S. 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.⁷²⁹

Justice Brennan concluded that “[i]t is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”⁷³⁰ Judge President Mbenenge then cited to a case from the Dominican Republic which involved two girls who had been denied birth certificates by the government, action which made it in their not being admitted to school. The girls were born in the Dominican Republic of a Dominican mother and a Haïtian father.⁷³¹ The Inter-American Court of Human Rights held that:

the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person’s migratory status in a State. In other words, *States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause.*⁷³²

Judge President Mbenenge then proceeded to examine interpretation in conformity with international law. The learned judge started by noting

727. *Centre for Child Law*, *supra* note 694, ¶ 116.

728. *Plyler v. Doe*, 457 U.S. 202 (1982).

729. *Id.* at 219–20.

730. *Id.*

731. *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 109(6)–109(7) (Sept. 8, 2005).

732. *Id.* ¶ 155 (emphasis added).

that Section 233 of the Constitution of South Africa “enjoins courts when interpreting legislation to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is not.”⁷³³ The learned judge noted that the “South African government [had] agreed through its signature and ratification of several instruments, including the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child to give primary consideration *inter alia* to children’s rights at all times.”⁷³⁴ These Conventions, noted Judge President Mbenenge, “recognise the importance of holding paramount the best interests of the child in all matters concerning them.”⁷³⁵

Finally, argued the learned judge, these international human rights instruments have, “on previous occasions, been the source from which the Constitutional Court drew whilst interpreting provisions of the Bill of Rights.”⁷³⁶ Judge President Mbenenge then made the following order on behalf of the Court:

1. The unreasonable delay in the launch of this application is condoned in terms of section 9(1) of the Promotion of Administrative Justice Act 3 of 2000.
2. Clauses 15 and 21 of the Admission Policy for Ordinary Public Schools published in Government Gazette 19377 (19 October 1998) under Government Notice 2432 are declared to be inconsistent with the Constitution and, therefore, invalid.
3. Circular 06 of 2016, dated 17 March 2016, the contents of which were communicated to School Governing Bodies and Principals of public schools that any Norms and Standards, Post Provisioning allocation and National School Nutrition Program transfers to schools in the Eastern Cape Province will be based only on the learner numbers where valid identity, permit or passport numbers have been captured in the South African Schools Administration and Management System is declared inconsistent with the South African Schools Act 84 of 1996 and the Constitution and, therefore, invalid, and is set aside.
4. The first to third respondents are directed to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province (the schools), and where a learner cannot provide a birth certificate, the Principal of the relevant school is directed to accept alternative proof of

733. *Centre for Child Law, supra* note 694, ¶ 121.

734. *Centre for Child Law, supra* note 694, ¶ 78.

735. *Centre for Child Law, supra* note 694, ¶ 78.

736. *Centre for Child Law, supra* note 694, ¶ 123.

- identity, such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified.
5. Sections 39 and 42 of the Immigration Act 13 of 2002 do not prohibit the admission of illegal foreign children into schools and do not prohibit the provision of basic education to illegal foreign children.
 6. The first, second and third respondents are interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including illegal foreign children, already admitted purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents.
 7. The first to fifth respondents shall pay the costs of the application, including the costs consequent upon the employment of two counsel where utilized, jointly and severally, the one paying the other to be absolved.⁷³⁷

The judgment in *Centre for Child Law* was delivered by the High Court of South Africa (Eastern Division sitting in Grahamstown) on December 12, 2019.⁷³⁸ It was considered “a ground-breaking judgment upholding the right to education of undocumented children.”⁷³⁹ Throughout most African countries, including South Africa, many children do not have birth certificates or other forms of identity documents. According to the South African Human Rights Commission (“SAHRC”), only 38 percent of South African births are registered.⁷⁴⁰

The decision of the full bench of the High Court “confirmed that everyone has the right to basic education regardless of their status or their ability to provide proof of identity through the production of a birth certificate or other official documentation.”⁷⁴¹ The Court scrutinized clauses 15 and 21 of the Admission Policy for Ordinary Public Schools and “found that these clauses unjustifiably limit numerous constitutional rights, including the rights to equality, dignity, the right of children to have their best interests considered paramount (section 28(2)) and the right to basic education by

737. *Centre for Child Law*, *supra* note 694, ¶ 135.

738. *Centre for Child Law*, *supra* note 694, ¶ 1.

739. Cassette & Erasmus, *supra* note 700.

740. Cassette & Erasmus, *supra* note 700.

741. Cassette & Erasmus, *supra* note 700.

excluding undocumented learners from state schools.”⁷⁴² Ultimately, these clauses were declared unconstitutional.

The Court also declared that “all children have their own dignity and are individuals with distinctive personalities not reliant on or measured in the light of the actions of their parents/guardians.”⁷⁴³ Many of these learners, noted the High Court, were either involuntarily brought to South Africa or were South African children abandoned and subsequently placed in the care of others, and must not be allowed to “bear the negative consequences of their parents’ actions of either entering [South Africa] illegally, failing to obtain their own documentation, or perhaps failing to apply to have their children documented.”⁷⁴⁴

Children’s advocates have noted that this landmark ruling “provides much needed protection to millions of undocumented and vulnerable children in South Africa” and should serve as a standard that should be emulated by other African countries.⁷⁴⁵ Lack of capacity and other impediments (e.g., illiteracy, poverty, distance from urban centers) make it very difficult for many parents/guardians to obtain documentation, including birth certificates, for their children. This, it is argued, creates “a vicious circle of statelessness, abuse, crime and poverty” and makes it very difficult for these undocumented children to have access to the education and training that they need to evolve into productive adults.⁷⁴⁶

Throughout the continent, sectarian violence and other conflicts have forced many parents and their children to flee their “native lands” in search of shelter in other countries. The ruling in *Centre for Child Law* offers hope that these children will be able to have access to education, regardless of where they are. However, in order for this to happen, other African countries must take this ruling to heart and make certain that the right to education is constitutionally guaranteed to all children, regardless of whether they are documented or not. Within many African countries, securing birth certificates and other documents for children is quite challenging because of language problems (many heads-of-family are illiterate), distance from major metropolitan areas where they can register their children, and poverty. Thus, even without the inflow of refugees, many countries are still faced with the problem of undocumented children. Hence, national laws must be transformed to

742. Cassette & Erasmus, *supra* note 700.

743. Cassette & Erasmus, *supra* note 700.

744. Cassette & Erasmus, *supra* note 700.

745. Cassette & Erasmus, *supra* note 700.

746. Cassette & Erasmus, *supra* note 700.

reflect the need to guarantee all children the right to education, as reflected in international human rights instruments.⁷⁴⁷

D. SERAP v. Nigeria (Nigeria)

In 2009, the Registered Trustees of the Socio-economic Rights and Accountability Project (“SERAP”) brought action before the Community Court of Justice of ECOWAS (meeting in Abuja, Nigeria) against the Federal Republic of Nigeria and the Universal Basic Education Commission (“UBEC”) (Nigeria) alleging, *inter alia*, a violation of the right to education, which is guaranteed by Section 18 of the Constitution of the Federal Republic of Nigeria and also by Article 17 of the Banjul Charter. Before examining this case (i.e., *SERAP v. Nigeria*), this Article will first take a look at provisions of the Nigerian Constitution, which guarantee the right to education, as well as how Nigerian courts have adjudicated cases dealing with access to education. According to Section 18 of the Nigerian Constitution:

- (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.
- (2) Government shall promote science and technology.
- (3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide
 - (a) free, compulsory and universal primary education;
 - (b) free secondary education; and
 - (c) free adult literacy program.⁷⁴⁸

But, how have Nigerian courts adjudicated cases dealing with the right to education in the country? In the landmark case of *Badejo v. Federal Minister of Education*, the plaintiff, Miss Adeyinka Abosede Badejo (suing through her next friend, Dr. Babafemi Badejo), brought legal action before the Lagos High Court claiming the government’s discriminatory conduct led to her denial of consideration for admission into a government-financed university preparatory school for top universities within the country and

747. These instruments include the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on Civil and Political Rights.

748. CONSTITUTION OF NIGERIA (1999), § 18 (as amended through 2011). *See also* Child’s Right Act No. 26, § 15 (2003) (Nigeria) (guaranteeing every child in Nigeria the right to “free, compulsory and universal basic education.”).

abroad.⁷⁴⁹ Miss Badejo’s application, as well as, her appeal, were dismissed by the High Court and the Court of Appeal, effectively upholding the government’s discriminatory approach to access to education.⁷⁵⁰

Nigeria is a party to the UN Convention on the Rights of the Child (“CRC”) and the African Charter on the Rights and Welfare of the Child (“African Child Charter”), all of which guarantee the child’s right to basic education.⁷⁵¹ Nigeria has domesticated the provisions of the CRC and the African Child Charter through the Child’s Rights Act 2003 (“CRA”).⁷⁵² Section 15 of the CRA guarantees the child’s right to basic education and states as follows: “Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education.”⁷⁵³

Section 261 of the CRA deals specifically with the incorporation of the rights guaranteed in the CRC into the CRA—the latter creates “committees” and empowers them to ensure that the rights guaranteed children in international human rights treaties to which Nigeria is a party, are realized in Nigeria. For example: “The functions of the *National Committee* are to—(a) initiate actions that shall ensure the observance and popularization of the rights and welfare of a child as provided for in—(ii) the United Nations Convention on the Rights of the Child.”⁷⁵⁴ Similar obligations are imposed on “State Committees” and “Local Government Committees.”⁷⁵⁵

To strengthen the government’s ability to meet its obligations under the CRA, Nigeria’s Parliament enacted the *Compulsory, Free Universal Basic*

749. *Badejo v. Fed. Ministry of Educ.* [1996] 8 NWLR 15 (Nigeria) [hereinafter *Badejo*]. The discriminatory behavior that Miss Badejo speaks of concerns Nigeria’s “affirmative action” program, which is designed to help the Muslim-dominated parts of the country catch up with the rest of Nigeria in education and development. *See, e.g.*, Garba Muhammad, *Northern Nigeria Lagging Behind in Education—Senator*, PREMIUM TIMES (June 30, 2015), <https://www.premiumtimesng.com/news/more-news/185846-northern-nigeria-lagging-behind-in-education-senator.html> [<https://perma.cc/AG5M-E9LJ>] (noting that after many decades of independence, the Northern region of Nigeria is lagging behind educationally).

750. *Badejo*, *supra* note 749. The case was based on the 1979 Constitution of the Federal Republic of Nigeria, which has similar provisions on access to education as those contained in 1999 Constitution of Nigeria. *See* Aisosa Jennifer Isokpan & Ebenezer Durojaye, *The Child’s Right to Basic Education in Nigeria: A Commentary on the Decision in Serap v. Nigeria*, 26 AFR. J. INT’L & COMP. L. 639, 639 (2018) [hereinafter *Isokpan & Durojaye*].

751. *See* Child Protection Convention, *supra* note 38, art. 28 (“States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all.”); *see also* African Child Charter, *supra* note 1, art. 11(1) (“Every child shall have the right to an education.”).

752. Child’s Right Act No. 26 (2003) (Nigeria).

753. *Id.* § 15(1).

754. *Id.* § 261(1).

755. *Id.* §§ 265 & 269 (emphasis added).

Education Act 2004 (“UBE Act”).⁷⁵⁶ Legal scholars and other observers in Nigeria have noted that despite “these legislative provisions intended to create an enforceable right, the state of basic education after more than a decade of the enactment of the CRA 2003 and the UBE Act makes it quite uncertain if the child’s right to basic education indeed exists in Nigeria.”⁷⁵⁷

In 2009, SERAP, a non-governmental organization, brought action before the Community Court of Justice of ECOWAS (meeting in Abuja, Nigeria) (“the Court”)⁷⁵⁸ against the Federal Republic of Nigeria and the Universal Basic Education Commission (Nigeria) alleging, inter alia, a violation of the right to education as guaranteed by the African Charter on Human and Peoples’ Rights (“Banjul Charter”).⁷⁵⁹ Article 17 of the Banjul Charter states as follows:

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.⁷⁶⁰

However, before the Court could consider the merits of the application, the second defendant, Universal Basic Education Commission (UBEC) (Nigeria), “filed a motion alleging that this Court lacks jurisdiction to entertain the action filed by the plaintiff.”⁷⁶¹ UBEC objected to the jurisdiction of the Court on the grounds that “under Article 9 of the Supplementary Protocol[,] the Court does not have the competence to adjudicate on subject matters

756. Compulsory, Free Universal Basic Education Act (2004) (Nigeria).

757. Isokpan & Durojaye, *supra* note 750, at 640.

758. The Community Court of Justice, ECOWAS (Cour de Justice de la Communauté, CEDEAO) was created “pursuant to the provisions of Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS)” and empowered “to ensure the observance of law and of the principles of equity and in the interpretation and application of the provisions of the Revised Treaty and all other subsidiary legal instruments adopted by the Community.” *Community Court of Justice*, ECON. CMTY. WEST AFRICAN STATES, <https://www.ecowas.int/institutions/community-court-of-justice> [<https://perma.cc/6QLW-8LAP>].

759. Socio-Economic Rights and Accountability Project (SERAP) v. Fed. Republic of Nigeria and Universal Basic Educ. Comm’n, Decision ECW/CCJ/JUD/07/10, Community Court of Justice of the Economic Community of West African States [ECOWAS] (Nov. 30, 2010), <https://ihirda.uwazi.io/en/document/qrb6wqua4frswtjqwixgvi> [<https://perma.cc/WLF2-CB7Y>] [hereinafter SERAP v. Nigeria].

760. Banjul Charter, *supra* note 374, art. 17.

761. SERAP v. Nigeria, *supra* note 759, ¶ 3.

outside a treaty, convention or protocol of [ECOWAS]” and that “the issues complained of by the plaintiff are grounded in the municipal law of the Federal Republic [of Nigeria], a matter which the Court has no jurisdiction over.”⁷⁶²

The plaintiff—SERAP—argued, in response to the UBEC (the second defendant) that “the suit [was] not based solely on the domestic legislation of the Federal Republic of Nigeria, to wit the Compulsory and Basic Education Act and the Child’s Right Act but also on legally enforceable international and regional human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights” and that “Nigeria has a duty to fully implement its international human rights obligations, and to make necessary legislations to implement them” and that the “Court is statutorily empowered to hear cases of violations of human rights.”⁷⁶³

In analyzing the issue of jurisdiction, the Court noted that “[t]he subject matter of the application filed by the plaintiff respondent in the instant proceedings is the violation of the right to education and human dignity.”⁷⁶⁴ The Court then argued that although UBEC, the second defendant, relied on Article 9 of the Supplementary Protocol which governs the jurisdiction of the Court, it only made references to subsections 9(1)(a), (b), and (c) to arrive at the conclusion that the Court lacked jurisdiction because those subsections only govern “issues relating to the application and interpretation of ECOWAS texts.”⁷⁶⁵ In fact, Article 9(4) of the Supplementary Protocol specifically grants jurisdiction to the Court “to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS.”⁷⁶⁶ Article 9(4) states: “The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.”⁷⁶⁷

The Court then went on to note that “[t]he thrust of [the] plaintiff’s suit is the denial of the right to education for the people of the Federal Republic of Nigeria, denial of the right of people to their wealth and natural resources and the right of people to economic and social developments guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples’ Rights of which Nigeria is a signatory.”⁷⁶⁸ In addition, the Court argued that it had “jurisdiction over human rights enshrined in the African Charter

762. SERAP v. Nigeria, *supra* note 759, ¶ 5.

763. SERAP v. Nigeria, *supra* note 759, ¶ 8.

764. SERAP v. Nigeria, *supra* note 759, ¶ 11.

765. SERAP v. Nigeria, *supra* note 759, ¶ 12.

766. SERAP v. Nigeria, *supra* note 759, ¶ 13.

767. SERAP v. Nigeria, *supra* note 759, ¶ 13.

768. SERAP v. Nigeria, *supra* note 759, ¶ 14.

and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria, cannot oust the jurisdiction of the Court.”⁷⁶⁹

Further, the Court argued that UBEC’s “reliance on Article 9(1)(a) (b) (c) of the Supplementary Protocol of the Court to argue that the Court does not have subject-matter jurisdiction over human rights issues is misconceived as they failed to take cognizance of the entire provisions of Article 9.”⁷⁷⁰ Instead, the Court declared that it “clearly has subject matter jurisdiction over human right[s] violations in so far as there are recognized by the African Charter on Human and Peoples’ Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS.⁷⁷¹ As the plaintiff’s claim is premised on Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples’ Rights, the Court does have subject matter jurisdiction of the suit filed by the plaintiff.”⁷⁷²

The Court moved on to examine the second issue—whether the right to education was justiciable and can be litigated before the Community Court of Justice of ECOWAS.⁷⁷³ UBEC argued that the “educational objective of the first defendant, the Federal Republic of Nigeria,” which is contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, “lies at the heart of the plaintiff’s suit” and that “the provisions of Chapter II . . . are the directive principles of state policy and are therefore not justiciable.”⁷⁷⁴

UBEC postulated further that “the principles of state policy represent the ideals which the Federal Government ought to strive to achieve and do not confer any positive rights on any citizen.”⁷⁷⁵ In addition, argued UBEC, “the Federal Government of Nigeria has absolute powers over educational matters and that by Section 6(6)(c) of the Constitution, jurisdiction over such issues is reserved exclusively for the Federal High Court” and that, regardless of whether the Constitution had “imposed a duty on all the three organs of government to strive to eradicate illiteracy and to provide free compulsory basic education, these are just educational policies which are

769. SERAP v. Nigeria, *supra* note 759, ¶ 14.

770. SERAP v. Nigeria, *supra* note 759, ¶ 14.

771. SERAP v. Nigeria, *supra* note 759, ¶ 14.

772. SERAP v. Nigeria, *supra* note 759, ¶ 14.

773. SERAP v. Nigeria, *supra* note 759, ¶ 15.

774. SERAP v. Nigeria, *supra* note 759, ¶ 15.

775. SERAP v. Nigeria, *supra* note 759, ¶ 15.

non-justiciable,” making them indeterminable and unenforceable by the Court.⁷⁷⁶

The plaintiff, on the other hand, argued that the right to education is justiciable and enforceable because the right was recognized by the Banjul Charter and the International Covenant on Economic, Social and Cultural Rights, international instruments which have been ratified by Nigeria.⁷⁷⁷ Additionally, argued the plaintiff, “the fundamental objectives and directive principles of state policy in the Nigerian Constitution contain norms which are internationally recognized as enforceable social and economic rights.”⁷⁷⁸

Ultimately, the Court held that while the “directive principles of state policy of the Federal Republic of Nigeria are not justiciable before this Court as argued by [the] second defendant and that fact was not contested by the plaintiff,” the application brought by the plaintiff to the Court “alleges a breach of the right to education contrary to the provisions of [the Banjul Charter].”⁷⁷⁹ The right to education, noted the Court, is therefore “recognized under Article 17 of the [Banjul Charter]” and is “independent of the right of education captured under the directive principles of state policy of the 1999 Federal Constitution of Nigeria.”⁷⁸⁰

In addition, noted the Court, “most human rights provisions are contained in domestic legislation as well as international human rights instruments,” however, “the existence of a right in one jurisdiction does not automatically oust its enforcement in the other. The two rights are independent of each other.”⁷⁸¹ Member States of ECOWAS have declared their “adherence to the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”⁷⁸² Even Nigeria, the first defendant, is a signatory to the Banjul Charter and has already domesticated the treaty, creating rights that are justiciable in its domestic courts. Nigeria is also a signatory to the Revised Treaty of ECOWAS and hence, is bound by its provisions.⁷⁸³

According to the Court, because it is empowered “to apply the provisions” of the Banjul Charter, specifically Chapter 17 which guarantees the right to education, and since it has been established that the rights guaranteed by the Banjul Charter “are justiciable before this Court,” and that “since the plaintiff’s application was in pursuance of a right guaranteed by the

776. SERAP v. Nigeria, *supra* note 759, ¶ 15.

777. SERAP v. Nigeria, *supra* note 759, ¶ 16.

778. SERAP v. Nigeria, *supra* note 759, ¶ 16.

779. SERAP v. Nigeria, *supra* note 759, ¶ 18.

780. SERAP v. Nigeria, *supra* note 759, ¶ 18.

781. SERAP v. Nigeria, *supra* note 759, ¶ 19.

782. SERAP v. Nigeria, *supra* note 759, ¶ 19. *See also* Revised Treaty of the Economic Community of West African States, art. 4(g), July 24, 1993, 2373 U.N.T.S. 233.

783. SERAP v. Nigeria, *supra* note 759, ¶ 19.

provisions of the [Banjul] Charter, the contention of [the] second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.”⁷⁸⁴

Having decided on the issue of justiciability, the Court then moved on to determine whether the plaintiff lacks *locus standi* to initiate or maintain this action. UBEC argued before the Court that the plaintiff lacked the “requisite *locus standi* to initiate the present proceedings because the plaintiff has failed to show that he has suffered any damage, loss or personal injury in respect of the act alleged in the suit.”⁷⁸⁵ In reply to the second defendant’s arguments regarding *locus standi*, the plaintiff argued that “the second defendant’s argument with respect to *locus standi* is based on the restrictive and outdated interpretation of standing, especially in human rights matters.”⁷⁸⁶ In addition, argued the plaintiff, “the modern trend in most national and international jurisprudence is to embrace a more flexible and progressive interpretation of the doctrine of standing, especially in human rights causes” and such that “any citizen is allowed to challenge a breach of a public right in court.”⁷⁸⁷

As such, the plaintiff concluded that “since the right they are seeking to enforce is a public right, they have the requisite standing to maintain the action.”⁷⁸⁸ Still, UBEC relied on and cited to several decisions of the Supreme Court of the Federal Republic of Nigeria “to support their argument that a plaintiff cannot sustain an action unless he has personally suffered some injury or has shown that he has a special interest which must be protected; [meaning] in the absence of that a plaintiff has no justifiable ground to invoke the jurisdiction of a court.”⁷⁸⁹

In response, the plaintiff “produced a list of judicial decisions, both under domestic and international jurisdictions to augment their claim that there is a shift from a restrictive to a flexible approach to standing in cases of human rights violations and therefore a plaintiff need not establish that he has suffered injury or has a special right in order to have standing. Instead[, the] plaintiff has to show that the right alleged to have been breached is public in nature and that the matter is justiciable.”⁷⁹⁰ In supporting their

784. SERAP v. Nigeria, *supra* note 759, ¶ 20.

785. SERAP v. Nigeria, *supra* note 759, ¶ 21.

786. SERAP v. Nigeria, *supra* note 759, ¶ 22.

787. SERAP v. Nigeria, *supra* note 759, ¶ 22.

788. SERAP v. Nigeria, *supra* note 759, ¶ 22.

789. SERAP v. Nigeria, *supra* note 759, ¶¶ 23–26.

790. SERAP v. Nigeria, *supra* note 759, ¶ 27.

argument, the plaintiff relied on and cited to cases from the Supreme Courts of India, Nigeria, Pakistan, and the United States.⁷⁹¹

While both viewpoints had merit, the Court ultimately found that “the arguments presented by the plaintiff [were] more persuasive” for several reasons.⁷⁹² First, is *actio popularis*, a doctrine developed under Roman law “to allow any citizen to challenge a breach of a public right in Court.”⁷⁹³ Second, the plaintiff relied on comparative jurisprudence from several jurisdictions around the world “which all concur in the view that the plaintiff in a human rights violation cause need not be personally affected or have any special interest worthy of protection.”⁷⁹⁴

The ruling of the Community Court of Justice of ECOWAS was historic—it held that all Nigerians have a right to education and that Nigeria had breached Article 17 of the Banjul Charter, which states that “[e]very individual shall have the right to education.”⁷⁹⁵

However, not all agree with the Court’s ruling. Isokpan and Durojaye, experts on the enforcement of economic, social, and cultural rights in Africa, have argued that the Court’s decision in *SERAP* “does not promote the justiciability of the child’s right to basic education under the CRA 2003 and the UBE Act despite the fact that a declaration to that effect was claimed by the plaintiff.”⁷⁹⁶ They argued that “[e]ven though the right to education is generally non-justiciable in the Nigerian Constitution, the CRA 2003 as well as the UBE Act to a degree shows an intention on the part of the government to prioritize basic education” and that because “the major issue that prompted the plaintiff to institute this action centered around corruption hindering the realization of the child’s right to basic education, the case of *SERAP v. Nigeria* was an opportunity for the child’s right to basic education to be elevated beyond just a legislative enactment through judicial activism.”⁷⁹⁷ Isokpan and Durojaye instead suggest that “[t]he [Court’s] decision could have set the pace for the Nigerian judiciary to take a more progressive view of the status of the child’s right to basic education in Nigeria based on the CRA 2003 and the UBE Act.”⁷⁹⁸

791. *SERAP v. Nigeria*, *supra* note 759, ¶ 27–30.

792. *SERAP v. Nigeria*, *supra* note 759, ¶ 31.

793. *SERAP v. Nigeria*, *supra* note 759, ¶ 32.

794. *SERAP v. Nigeria*, *supra* note 759, ¶ 33. The jurisdictions the plaintiff cited to include Bangladesh, India, Ireland, Pakistan, the UK, and the United States. *SERAP v. Nigeria*, *supra* note 759, ¶ 33.

795. Banjul Charter, *supra* note 374, art. 17(1); *see also* David Gartner, *The Right to Education in Africa*, THE BROOKINGS INST. (Dec. 7, 2009), <https://www.brookings.edu/blog/up-front/2009/12/07/the-right-to-education-in-africa/> [<https://perma.cc/2TWC-5TYG>].

796. Isokpan & Durojaye, *supra* note 750, at 643.

797. Isokpan & Durojaye, *supra* note 750, at 643.

798. Isokpan & Durojaye, *supra* note 750, at 643.

In the discussion of whether the right to a basic education as guaranteed by the Constitution of the Federal Republic of Nigeria and several international and regional human rights treaties that Nigeria has ratified and domesticated, it is important to note that even if that right is, indeed, justiciable in the country's domestic courts, the constraining role of corruption remains an obstacle to the realization of this right. First, corruption, which can involve the embezzlement and gross mismanagement of funds allocated for basic education, can make it virtually impossible for Nigeria's children to realize the right to basic education guaranteed them by their national laws and international human rights instruments. Second, if the judiciary is corrupt, or is not independent enough of the other branches of government, it may not be able to function effectively to adjudicate cases involving the child's right to basic education. This is especially true of Nigeria where the judiciary may face difficulties enforcing the right to basic education in those States which have not reenacted the CRA as required by law.⁷⁹⁹

The ECOWAS Court had the opportunity to confront the issue of corruption and its impact on the realization of the right to education in *SERAP*. However, the Court held that although the embezzlement or the "stealing or even mismanagement of funds meant for the education sector" can "have a negative impact on education," it, however, "does not amount to a denial of the right to education."⁸⁰⁰ The Court further argued that Nigeria's Federal Government has "established institutions, including the 2nd defendant to take care of the basic needs of the people of Nigeria" and "has allocated funds to these institutions to carry out their mandate."⁸⁰¹ These efforts, by the Federal Government of Nigeria, argued the Court, are directed at "fulfilling the right to education."⁸⁰² However, noted the Court, some government officials, who are "charged with the duty of implementing the right to education," have violated their oath of office by misusing,

799. See Ogunniyi, *supra* note 107, at 452–54; see also Akinwumi, *supra* note 113, at 386 (examining the constraints to the enforcement of the Child Rights Act in Nigeria). Nigeria adopted the Child Rights Act in 2003 in order to domesticate the Convention on the Rights of the Child and the Banjul Charter. However, the CRA does not automatically "become applicable in all of its 36 States" and this is due to the fact that in the case of children's issues, "[e]ach state legislature must make the national law applicable within its territory." As of 2021, eleven Nigerian States have not yet passed the necessary legislation to make the CRA justiciable in their jurisdictions. Assim, *Why the Child's Rights Act*, *supra* note 111.

800. *SERAP v. Nigeria*, *supra* note 759, ¶ 19.

801. *SERAP v. Nigeria*, *supra* note 759, ¶ 19.

802. *SERAP v. Nigeria*, *supra* note 759, ¶ 19.

misapplying, embezzling, and even stealing some of these funds.⁸⁰³ Because the Federal Government of Nigeria and the 2nd defendant (UBEC) are said to have failed to “act against such persons,” they are accused of having “denied the right of the peoples of Nigeria to education.”⁸⁰⁴ However, noted the Court, “[t]here must be a clear linkage between the acts of corruption and a denial of the right to education.”⁸⁰⁵ But, argued the Court, in an extremely large and resource-rich country such as Nigeria, “one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education.”⁸⁰⁶

Resource scarcity is a major constraint to the fulfilment of the right to education and other socio-economic rights, but corruption can exacerbate the problem. Scarcity, which describes the conflict between limited resources and unlimited wants, is a universal problem, affecting developing countries (e.g., Nigeria) and developed countries (e.g., the United States) alike.⁸⁰⁷ Corruption in the allocation of public resources negatively affects access to essential services, including education, in many countries. This is why many countries have public institutions that are specifically dedicated to the fighting of corruption. For example, in the United States, there are several federal institutions dedicated to fighting corruption. These include the Public Integrity Section of the Department of Justice; the FBI’s Criminal Investigative Division; the Criminal Investigation Division of the IRS, and Office of the Inspector General.⁸⁰⁸

The United States also fights against corruption and seeks to advance the rule of law around the world through, for example, the State Department’s Bureau of International Narcotics and Law Enforcement Affairs and the Foreign Corrupt Practices Act.⁸⁰⁹ The Independent Corrupt Practices and

803. SERAP v. Nigeria, *supra* note 759, ¶ 19.

804. SERAP v. Nigeria, *supra* note 759, ¶ 19.

805. SERAP v. Nigeria, *supra* note 759, ¶ 19.

806. SERAP v. Nigeria, *supra* note 759, ¶ 19.

807. See R. A. Parker, *Social Administration and Scarcity: The Problem of Rationing*, 24 SOC. WORK (1939-1970) 9, 9 (1967) (noting that “[n]eeds are potentially infinite; resources always limited and therefore scarce”).

808. *Public Integrity Section*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-pin> [<https://perma.cc/2XMF-S8HN>]; *Criminal Investigation Division*, FED. BUREAU OF INVESTIGATION, <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/criminal-investigative-division-1> [<https://perma.cc/EU5Y-NHH7>]; *Program and Emphasis Areas for IRS Criminal Investigation*, INTERNAL REVENUE SERV. (Jan. 20, 2022), <https://www.irs.gov/compliance/criminal-investigation/program-and-emphasis-areas-for-irs-criminal-investigation> [<https://perma.cc/B79H-LJM4>].

809. *Combating Corruption and Promoting Good Governance*, U.S. DEP’T OF STATE, <https://www.state.gov/combating-corruption-and-promoting-good-governance/> [<https://perma.cc/SS8B-MAEL>]; see also Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2018).

Other Related Offences Commission (“ICPC”) is Nigeria’s dedicated anti-corruption agency. The ICPC targets public sector corruption, especially that which involves bribery and the misuse of public funds. Another agency, the Economic and Financial Crimes Commission (“EFCC”), which was established in 2003, is empowered to investigate and prosecute money laundering and other financial crimes.⁸¹⁰

In Nigeria, unfortunately, the ICPC, the EFCC and other anti-corruption institutions have not been very successful in fighting corruption. This is evident by the fact that according to Transparency International’s Corruption Perceptions Index (“CPI”), Nigeria is perceived as a very corrupt country, ranking 149 out of 179 countries evaluated, with a CPI of 25/100.⁸¹¹ A study conducted by Ogbewere Bankole Ijewereme determined that “[c]orruption [in Nigeria] denies access to basic education and health services, fuels political violence, generates popular anger that threatens to further destabilize societies, and exacerbates violent conflict.”⁸¹²

Another related threat to the realization of the right to basic education in Nigeria is mass kidnappings of children by extremist groups (e.g., Boko Haram) and opportunistic criminal gangs. For example, between December 2020 and March 2021, “more than 600 children [were kidnapped] while in school, in three separate incidents.”⁸¹³ Unfortunately, this rise in violence dominates the northern part of the country, which historically, has lagged behind other regions of the country in educational achievements, particularly the education of girl-children.⁸¹⁴ In a recent study of insecurity and access to education in Nigeria for The Brookings Institution, Adenira and Castradori

810. See *Economic and Financial Crimes Commission*, EFCC, <https://www.efcc.gov.ng/about-efcc-3> [<https://perma.cc/LC7J-6KWC>] (describing the functions of the EFCC). See also Joseph Onyekwere, *ICPC Corruption Verdict Unsettles Judiciary*, THE GUARDIAN (Nigeria) (Jan. 26, 2021), <https://guardian.ng/features/law/icpc-corruption-verdict-unsettles-judiciary/> [<https://perma.cc/W4JD-23EQ>] (noting a report by the ICPC that the judiciary is one of the most corruption institutions in the country). See generally Emmanuel Obuah, *Combatting Corruption in Nigeria: The Nigerian Economic and Financial Crimes [Commission] (EFCC)*, 12 AFR. STUD. Q. 17 (2010) (examining the role of the EFCC in fighting corruption in Nigeria).

811. Corruption Perceptions Index, *supra* note 259.

812. Ogbewere Bankole Ijewereme, *Anatomy of Corruption in the Nigerian Public Sector: Theoretical Perspectives and Some Empirical Explanations*, SAGE OPEN, 1, 3 (June 4, 2015).

813. Adedeji Adeniran & Marco Castradori, *Student Kidnappings Threaten Collapse of Nigerian Education System*, THE BROOKINGS INST. (Apr. 19, 2021), <https://www.brookings.edu/blog/education-plus-development/2021/04/19/student-kidnappings-threaten-collapse-of-nigerian-education-system/> [<https://perma.cc/6JXP-7MS7>].

814. *Id.*

determined that with “the spate of recent school kidnappings, community and parental trust in the education system could shrink significantly, and the problem of access to quality and equitable education could become severely amplified.”⁸¹⁵

As evidenced by what is happening in Nigeria, constitutionally guaranteeing the right of children to basic education is a necessary but not sufficient condition that children will, indeed, actually receive the educational services required for their full development. Sufficiency requires that, at least, three additional requirements be made: (1) the country’s governing process is undergirded by the rule of law and hence, minimizes corruption and threats to security, such as mass kidnappings; (2) national laws, including the constitution, are internationalized so that they conform to the provisions of international human rights instruments—this implies that the children’s right to education, as well as other rights, are incorporated into the national constitution and customary and traditional laws and practices (e.g., FGM, child marriage) that harm children and interfere with the children’s ability to realize their right to education are abolished or modified and brought in line with constitutional protections; and (3) there exists a judiciary that is independent of the other branches of government and has the capacity to enforce laws that protect children’s rights generally and their rights to education, specifically.

VIII. SUMMARY AND CONCLUSION

In 1979, Africans, through the Organization of African Unity (“OAU”) reaffirmed their fidelity to “the principles of the rights and welfare of the child contained in the [OAU Declaration on the Rights and Welfare of the African Child], conventions and other instruments of the [OAU] and in the United Nations in particular the United Nations Convention on the Rights of the Child.”⁸¹⁶ The OAU went on to develop and adopt the *African Charter on the Rights and Welfare of the Child* (“African Child Charter”) in 1990, which guaranteed many rights to the African child and imposed an obligation on States Parties to “recognize the rights, freedoms and duties enshrined in [the African Child Charter]” and required these States Parties to take all necessary steps to adopt legislative and other measures to give effect to the rights elaborated in the Charter.⁸¹⁷

As of this writing, the African Child Charter has been signed and ratified by 49 African States.⁸¹⁸ Some of these States have also domesticated this

815. *Id.*

816. African Child Charter, *supra* note 1, art. 11(1).

817. African Child Charter, *supra* note 1, art. 1(1).

818. African Child Charter, Status List, *supra* note 201.

important regional human rights instrument and created rights that are justiciable in domestic courts.⁸¹⁹ For example, according to the Constitution of Kenya, 2010, “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁸²⁰ Kenya ratified the African Charter on the Rights and Welfare of the Child on July 25, 2000 and, according to Article 6(2) of the country’s Constitution, the African Child Charter is now part of the law of Kenya. Nigeria, a dualist country, enacted new legislation to domesticate the provisions of the African Child Charter in 2003.⁸²¹

Nigeria’s efforts to domesticate the African Child Charter, however, have revealed some of the complexities associated with efforts in the continent to make sure that national laws, particularly those dealing with children’s rights, reflect provisions of international human rights instruments. Political economy in Nigeria, like that in other African countries, is pervaded by ethnolinguistic and religious diversity, which has a significant impact on approaches to children’s rights. As a result of this differing approaches to children’s rights, eleven northern Nigerian States have not yet passed legislation, as required by law, to enable the CRA in their jurisdictions.⁸²²

Problems related to the enforcement of children’s rights are not unique to Nigeria. Throughout the continent, many African countries, which actually have laws that protect children against various harmful traditional and customary practices (e.g., child marriage, FGM, child slavery and sexual exploitation), as well as guarantee them access to various services, including education and health, are not able to fully enforce these rights within their domestic jurisdictions because of opposition from various groups based on religion and tradition. For example, although many African countries have laws that prohibit child marriage, this practice remains pervasive

819. For example, Kenya, through its Constitution, has made the provisions of the African Child Charter part of the law of Kenya. See CONSTITUTION art. 2(6) (2010) (Kenya).

820. *Id.*

821. The legislation enacted is the Child’s Right Act No. 26 (2003) (Nigeria).

822. Janet Ogundepo, *More states urged to domesticate Child Rights Act, empower girl child*, PUNCH (Oct. 10, 2021), <https://punchng.com/more-states-urged-to-domesticate-child-rights-act-empower-girl-child/#:~:text=According%20to%20data%20from%20the,%2C%20Borno%2C%20Gombe%2C%20Yobe> [<https://perma.cc/9E25-Z9EM>] (noting that eleven Nigerian states are yet to domesticate the CRC). See also Nike Adebawale, *11 states in northern Nigeria yet to pass child rights law—UNICEF Official*, PREMIUM TIMES (NIGERIA) (May 11, 2019), <https://www.premiumtimesng.com/news/more-news/329511-12-states-in-northern-nigeria-yet-to-pass-child-rights-law-unicef-official.html> [<https://perma.cc/RT35-VMB7>] (noting that eleven states in Nigeria have not yet passed legislation to domesticate the CRC).

throughout the continent.⁸²³ Also, even though ritual servitude or Trokosi is banned in Ghana, it remains pervasive throughout the country. In this form of child slavery, “traditional religious shrines take young virgin girls, either in payment for certain services or in atonement for misdeeds that family members are alleged to have committed, to live at the shrines and serve the priests, elders, and owners of the shrine, usually without their consent or any compensation.”⁸²⁴

While religious and traditional institutions in Africa play an important role in the raising of children and imbuing in them values that can help them evolve into productive and contributing members of their communities, these institutions are also responsible for practices that are extremely harmful to children, including especially girl-children. For example, many African subcultures continue to engage in practices (e.g., FGM, child marriage) that harm children and deprive them of the opportunity to enjoy childhood and develop into healthy adults. In addition, countries, such as Nigeria, have struggled to domesticate major international treaties and conventions dealing with children’s rights because of opposition from “religious groups and traditionalists.”⁸²⁵

Granted, countries such as Egypt, Mauritania and Sudan have ratified the African Child Charter. However, they have also made declarations and reservations that represent major obstacles to the full realization of these rights in these countries. For example, upon ratification, acceptance, or accession, the Government of Sudan declared that it did not consider itself bound by the following articles: Article 10 (protection of privacy); Article 11(6) (education of children who become pregnant before completing their education); and Article 21(2) (child marriage and betrothal of girls and boys).⁸²⁶

Sudan’s declarations take away some of the most important rights guaranteed children by the African Child Charter. In fact, denying a girl-child the right to an education just because she was impregnated in school is, at the very least, discriminatory because there is no indication that the male person who got the child pregnant (who could even be a teacher or school administrator) would be held responsible. In addition, denying such a vulnerable child the opportunity to complete her education and training

823. Mbaku, *International Law and Child Marriage in Africa*, *supra* note 360, at 104–105 (noting the pervasiveness of child marriage in many African countries). *See also* *Ending Child Marriage in Africa*, HUMAN RIGHTS WATCH (Dec. 15, 2015), <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa#> [<https://perma.cc/EA2M-YC29>] (“African countries account for 15 of the 20 countries with the highest rates of child marriage.”).

824. Mbaku, *The Rule of Law*, *supra* note 42, at 288–99.

825. Akinwumi, *supra* note 113, at 385.

826. African Child Charter, *supra* note 1, art. 48.

and acquire important skills will force her into a life of poverty and material deprivation. Such action on the part of the Government of Sudan is not in the best interests of the child. Finally, Sudan's decision to exempt itself from the prohibition against child marriage effectively subjects millions of girl-children in the country to this insidious practice and deprives them of the opportunity to attend school and develop life-transforming skills.

Egypt decided to exempt itself from, *inter alia*, Article 30 (children of imprisoned mothers). By the simple fact that their mothers are imprisoned, these children are extremely vulnerable and deserve special care, either through the provision by the government of special services to the imprisoned mothers so that they can take care of their children or by placing these children in alternative care facilities underwritten by the government.⁸²⁷

Although the African Child Charter guarantees several rights to children, the interest of this Article is in the *child's right to basic education*, which is guaranteed in Article 11(1).⁸²⁸ While it is true that many African countries have, through their constitutions and other laws, guaranteed the child's right to education, children are yet to realize that right. Part of the reason for this failure is governmental dysfunction, which is reflected in extremely high levels of corruption. Hence, this Article has sought to emphasize the importance of the governing process to the protection of the child's right to education in the African countries.

While international and regional human rights instruments, such as the CRC and the African Child Charter, guarantee the child's right to education, protection and realization of these rights are the purview of national governments. However, unless the country has an effective governing process, as well as, political will, this right will not be realized. First, each country must arm itself with a governing process that is undergirded by the rule of law—such a governing process is characterized by separation of powers, with effective checks and balances. The checks and balances must include, at the very least, an independent judiciary; a robust and politically active civil society; and effective civil society organizations (e.g., a free and independent press, competitive political parties).

Second, each African country must internationalize its national constitution in order to make certain that all laws, including bills of rights, statutory and customary laws, reflect or conform with the provisions of international

827. African Child Charter, *supra* note 1, art. 48.

828. African Child Charter, *supra* note 1, art. 11(1).

and regional human rights instruments. Third, in addition to making certain that the judiciary is independent, it must be provided enough capacity so that it can perform its constitutionally mandated functions, which include checking on the exercise of government power and making sure that all laws, including especially those dealing with the rights of children, conform to the provisions of international and regional human rights instruments.

There must exist within each African country a civil society that is capable of guarding the government and preventing its agents (civil servants and politicians) from engaging in corruption and other forms of impunity. It is important that there be a virtuous civil society and virtuous political leaders in order to make certain that all State actions are constitutional and conform to international human rights law. Civil society is especially important in Africa because of the role played by the customs and traditions of each country's ethnolinguistic and religious groups in the denial of, or failure to realize, the child's right to education.

Presently in Africa, there are many threats to the realization of the rights of children generally and the children's right to education in particular. Among these are general government dysfunction and harmful customary and traditional practices, such as child marriage and FGM, which create an environment within which children are unable to realize the right to education. In addition, impunity by state- and non-state actors (e.g., Boko Haram in West Africa, al-Shabaab in East Africa, and the Lord's Resistance Army in Central and East Africa) kill children, force others into untenable living conditions, and render them incapable of attending school. These factors are, of course, interrelated and function collectively to deny children their right to education.

For example, while it has been determined that child marriage represents an important constraint to the ability of the girl-child in Africa to attend school and develop the skills that she needs to function as a productive adult, it is important to recognize that child or forced marriage remains pervasive in countries with dysfunctional and corrupt governments. In countries, such as Cameroon, Mali and Nigeria, the failure of national governments to deal fully and effectively with the conditions that breed extremism has encouraged and enabled young people to succumb to recruitment into extremist groups, whose violent mobilization has become a major threat, not just to the ability of children to access educational services but also to their very existence. Hence, government corruption and dysfunction continue to reinforce or make possible pervasive violence and the customary and traditional practices that harm children.

Various forms of corruption, which include, for example, embezzlement of funds meant for education; teacher absenteeism, including teachers who are present in school but do not appear in the classroom to actually teach and mentor students; and poorly-trained teachers and administrators, represent

important threats to the right of children to education. Corruption, of course, can also lead to the deterioration of school facilities, including buildings, instructional materials, such as blackboards, chairs and desks, bathrooms, and other infrastructures needed for the effective delivery of educational services to pupils. Hence, the key to ensuring that the child's right to education is realized is institutional reform to produce a governing process undergirded by the rule of law.

At the very minimum, such a governing process must be able to minimize corruption and violence by state- and non-state actors, generally enhance efficiency in the government, guarantee true independence of the judiciary, and ensure the signing, ratification and subsequent domestication of the various international and regional human rights instruments that protect the rights of children. Each African country must find ways to deal fully with the many factors (e.g., extreme poverty, inequality in the distribution of income and wealth) that make extremist and other violent groups an attractive choice for young people. Finally, it must be made clear that in order for each African country's institutions to function effectively to ensure the realization of children's rights, there must exist in each of these countries a virtuous and politically active civil society and leaders who are well-constrained by the law.

