

# INTERNATIONAL LAW, AFRICAN CUSTOMARY LAW, AND THE PROTECTION OF THE RIGHTS OF CHILDREN

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During the last several decades, the global community has become concerned about the violation of the rights of children. Of particular interest to the international human rights community is the protection of children from traditional, customary, religious, and other practices (e.g., female genital mutilation, breast ironing, servitude in fetish shrines, forced service by children as “child soldiers,” the use of children to produce pornography or in prostitution and sex tourism, and the sale of children in the illegal organ transplantation market) that harm children. While several international human rights instruments have outlawed many of the practices that are harmful to children, the provisions in these international human rights instruments have not created rights that are justiciable in the domestic courts of the various countries in Africa. Hence, the way forward for the protection of the rights of children in Africa calls for each country to internationalize its national constitution and create rights that are directly justiciable in domestic or municipal courts. Such a process must, at the minimum, bring both national constitutional law and customary law into line with the provisions of international human rights instruments. In addition, each country must provide itself with effective independent judiciaries so that the latter can serve as a legal mechanism to strike down laws and customs that are harmful to children and/or violate constitutional protections.

I. INTRODUCTION .....	538
II. INTERNATIONAL LEGAL INSTRUMENTS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN .....	542
A. UN Declaration of the Rights of the Child .....	542
B. The UN Convention on the Rights of the Child 1989.....	544
C. The Optional Protocols to the UN Convention on the Rights of the Child .....	548
D. The African Charter on the Rights and Welfare of the Child 1990 .....	553
E. The Universal Declaration of Human Rights 1948.....	556
F. The International Covenant on Economic, Social and Cultural Rights.....	556
G. The International Covenant on Civil and Political Rights .....	558
III. AFRICAN CUSTOMARY AND TRADITIONAL PRACTICES AND THE RIGHTS OF CHILDREN.....	561
A. Introduction .....	561
B. Custom, Tradition, Culture, Religion, Superstition and the Rights of Children in Africa .....	564
1. Practices Harmful to African Children: Overview .....	568
2. Harmful Traditional Practices Affecting Children in Africa: Detailed Analysis.....	572
IV. INTERNATIONAL LAW, JUDICIAL INTERPRETATION AND THE PROTECTION OF CHILDREN'S RIGHTS IN AFRICA.....	612
A. Introduction .....	612
B. Internationalization of National Constitutional Law as a Way to Protect the Rights of Children .....	613
C. International Law and Municipal Law: Monist and Dualist Approaches .....	620
D. Judicial Interpretation of Municipal Law as a Mechanism to Protect the Rights of Children .....	626
V. PROTECTING AFRICAN CHILDREN FROM HARMFUL TRADITIONAL PRACTICES: THE MODERATING IMPACT OF INTERNATIONAL LAW .....	631
A. Introduction .....	631
B. Domestic Courts, the Moderating Role of International Law and the Protection of Children's Rights in Africa: Case Studies .....	634
1. The State v. Williams (South Africa) .....	634

2020]	<i>International Law, African Customary Law</i>	537
	2. Christian Education South Africa v. The Minister of Education of the Government of the Republic of South Africa (South Africa) .....	640
	3. Bhe and Others v. The Magistrate, Khayelitsha; Charlotte Shibi v. Mantabeni Sithole and Others; South African Human Rights Commission and Women’s Legal Center Trust v. President of the Republic of South Africa (South Africa).....	647
	4. Attorney General v. Dow (Botswana) .....	658
	5. C.K. (A Child) (Through Ripples International as Her Guardian and Next Friend & 11 Others v. Commissioner of Police/Inspector General the National Police Service & 3 Others (Kenya).....	666
	VI. CONCLUSION AND POLICY RECOMMENDATIONS .....	684

## I. INTRODUCTION

Since the end of World War II, international law has developed to more effectively protect the rights of children and minimize their exposure to various forms of exploitation.<sup>1</sup> Consider, for example, the military exploitation of children. In 1977, the adoption of Additional Protocols I and II to the Geneva Conventions of 1949 allowed for the prohibition of the recruitment and subsequent use of children under the age of fifteen years in military activities.<sup>2</sup> According to Additional Protocol I, “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault.”<sup>3</sup>

In addition, “[t]he Parties to the conflict shall provide [children] with the care and aid they require, whether because of their age or for any

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<sup>1</sup> See, e.g., 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*]. These forms of exploitation include, but are not limited to, use of children in the production of pornography, as well as, for sex; use of children as “child-soldiers” in various conflicts; illegal harvesting and sale of the organs of children; subjecting children to servitude labor in mines, factories, plantations, and other economic pursuits; placing children on the streets to beg for alms that accrue to various adults, including parents, elders in the childrens’ communities, as well as, leaders of various community organizations (e.g., schools); and forcing children, particularly girls, to “serve” indefinitely, in fetish shrines and the homes of rich urban dwellers. In addition, throughout the African continent, children, particularly girls, are subjected to traditional and customary practices that are harmful to children (e.g., female genital mutilation—FGM). *Id.*

2. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77(2), June 8, 1977, <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470> [hereinafter *Additional Protocol I*].

3. *Id.* art. 77(1).

other reason.”<sup>4</sup> Perhaps, more importantly, “[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”<sup>5</sup> If, however, children who are under the age of fifteen years find themselves directly participating in hostilities and through the process, are captured by an adverse Party, “they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”<sup>6</sup>

The Rome Statute of the International Criminal Court (“Rome Statute”), which was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court on July 17, 1998, at Rome and entered into force on July 1, 2002, also provides various protections for children.<sup>7</sup> Specifically, the Rome Statute made it a war crime to conscribe or enlist children “under the age of fifteen years into the national armed forces” or to use “them to participate actively in hostilities.”<sup>8</sup>

The Convention on the Rights of the Child (“CRC”), which was adopted by the UN General Assembly (“UNGA”) through its Resolution 44/25 of November 20, 1989, and entered into force on September 2, 1990,<sup>9</sup> reaffirmed the prohibition against the military recruitment and use of children under the age of fifteen years.<sup>10</sup> The CRC also provided a

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4. *Id.*

5. *Id.* art. 77(2).

6. *Id.* art. 77(3). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(3), June 8, 1977, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>.

7. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 38544 (2002), [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=_en).

8. *Id.* art. 8(2)(b)(xxvi). This provision of the Rome Statute applies to both state-controlled (i.e., government-controlled) armed forces and those of non-state groups. *See id.* art. 8(2)(f).

9. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989), <https://www.refworld.org/docid/3ae6b38f0.html> [hereinafter United Nations Convention on the Rights of the Child].

10. *See id.* art. 38 (noting, inter alia, that “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”).

definition for a child: “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>11</sup> Then, on May 25, 2000, the UNGA adopted the Optional Protocol to the CRC on the involvement of children in armed conflict (“OPAC”), whose main focus was the abolishment of the military exploitation of children.<sup>12</sup>

The OPAC, which entered into force on February 12, 2002, prohibits the recruitment or conscription of children under the age of eighteen years into the armed forces of Member States and their direct participation in hostilities.<sup>13</sup> It also prohibits the compulsory recruitment of children under the age of eighteen years into the armed forces of Member States.<sup>14</sup> The OPAC states further that:

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.<sup>15</sup>

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11. *Id.* art. 1.

12. *See* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [OPAC], 2173 U.N.T.S. 27531 (2002), [https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACC\\_RC.aspx](https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACC_RC.aspx) [hereinafter OPAC].

13. *Id.* arts. 1, 2. According to art. 1, “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.” *Id.* art. 1. Article 2 states that “States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.” *Id.* art. 2.

14. *See* OPAC, *supra* note 12, art. 2.

15. *Id.* art. 3(3)(a)–(d).

With respect to the recruitment of children for military purposes, the OPAC states that “[a]rmed 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 of 18 years.”<sup>16</sup> In addition, OPAC mandates that “States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”<sup>17</sup>

The International Labor Organization (“ILO”), the first specialized agency of the UN, has, since its founding on October 29, 1919, been interested in protecting children, especially from the worst forms of child labor. The ILO was instrumental in the adoption of the Worst Forms of Child Labor Convention (“WFCLC”).<sup>18</sup> In addition to defining “worst forms of child labor” and instructing States Parties to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency,” the WFCLC also prohibits the compulsory enlistment of children below the age of eighteen years.<sup>19</sup>

The term “child” is defined as “all persons under the age of 18”<sup>20</sup> and the “worst forms of child labor”<sup>21</sup> are defined as comprising:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

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16. *Id.* art. 4(1).

17. *Id.* art. 4(2).

18. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, ILO C182, <https://www.refworld.org/docid/3ddb6e0c4.html> [hereinafter WFCLC].

19. *Id.* arts. 1, 3.

20. *Id.* art. 2

21. *Id.* art. 3.

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.<sup>22</sup>

The focus of this article is the moderating role that international law, notably international human rights law, can play in the recognition and protection of the rights of African children. However, before we proceed, it is necessary that we provide an overview of the major international legal instruments designed to protect the rights of children.

## II. INTERNATIONAL LEGAL INSTRUMENTS FOR THE PROTECTION OF THE RIGHTS OF CHILDREN

### A. UN Declaration of the Rights of the Child

The UN Declaration of the Rights of the Child (“DRC 1959”) was adopted unanimously by the UNGA on November 20, 1959.<sup>23</sup> The DRC 1959, which “marked the first major international consensus on the fundamental principles of children’s rights,”<sup>24</sup> built on the rights that had been elaborated in the League of Nations’ Declaration of the Rights of the Child 1924.<sup>25</sup> The DRC 1959 must be distinguished from the CRC.<sup>26</sup>

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22. *Id.*

23. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (Nov. 20, 1959), <http://www.cirp.org/library/ethics/UN-declaration/>. [hereinafter DRC 1959] The declaration was adopted by all 78 Member States of the United Nations General Assembly. *Id.*

24. *Id.*

25. *Id.* The *Declaration of the Rights of the Child 1924*, which is also referred to or known as the *Geneva Declaration of the Rights of the Child*, was drafted by British social reformer, Eglantyne Jebb, and adopted by the League of Nations in 1924. The 1924 Declaration was adopted in extended form by the UN General Assembly in 1959 under the name “Declaration of the Rights of the Child.”

26. *See* United Nations Convention on the Rights of the Child, *supra* note 9, at 46, art. 2(1). This international convention is officially known as the United Nations Convention on the Rights of the Child (“CRC” or “UNCRC”). The CRC was adopted by the UN General Assembly on November 20, 1989 through its resolution 44/25. It entered into force on September 2, 1990 after it had been ratified by the required number of States Parties. *Id.*



The DRC 1959 makes reference to the UN's UDHR,<sup>27</sup> noting that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,"<sup>28</sup> and that "mankind owes to the child the best it has to give."<sup>29</sup> In proclaiming the DRC 1959, the UNGA called "upon parents, men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize [the rights provided in the DRC 1959] and strive for their observance by legislative and other measures progressively taken in accordance with [the principles elaborated in the Declaration]."<sup>30</sup>

The DRC 1959 then proceeds to elaborate on ten principles that embody the rights that children are expected to "enjoy." For example, Principle 2 mentions that "[t]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity."<sup>31</sup> In addition, Principle 2 states what has now evolved into the generally accepted standard for the legal treatment of all issues involving children—"the best interests of the child" standard.<sup>32</sup> Hence, in the enactment of laws for the purpose of protecting children, the "paramount consideration" should be "the best interests of the child."<sup>33</sup>

Other principles elaborated in the DRC 1959 deal with other important aspects of the protection of children. For example, Principle 3 emphasizes the right of a child from birth "to a name and nationality," while Principle 5 deals with special rights for children who are "physically, mentally or socially handicapped"—these children "shall be given the special treatment, education and care required by [their]

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27. *Universal Declaration of Human Rights*, UN General Assembly Res. 217 A (III), Dec. 10, 1948, U.N. Doc. A/810 at 71 (1948), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)), [hereinafter UDHR]. With respect to children, the UDHR states that "[m]otherhood and childhood are entitled to special care and assistance" and that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection." *Id.* art. 25(2).

28. DRC 1959, *supra* note 23, at pmbl.

29. *Id.*

30. *Id.*

31. *Id.* at principle 2.

32. *Id.*

33. *Id.*

particular condition.”<sup>34</sup> Other rights, such as a right “to receive education, which shall be free and compulsory, at least in the elementary stages,”<sup>35</sup> protection from “all forms of neglect, cruelty and exploitation,”<sup>36</sup> and protection “from practices which may foster racial, religious and other form of discrimination,”<sup>37</sup> are also elaborated in the DRC 1959.

#### B. The UN Convention on the Rights of the Child 1989

The UNGA adopted the CRC on November 20, 1989, through its resolution 44/25.<sup>38</sup> The CRC entered into force on September 2, 1990.<sup>39</sup> The CRC, with its fifty-four articles, is considered by most international legal experts as the “most comprehensive document on the rights of children.”<sup>40</sup> In addition to addressing the granting and implementation of children’s substantive rights, the CRC also deals with how children must be treated in situations of armed conflict.<sup>41</sup> The CRC is considered a very important international law instrument for the protection of the rights of children because it enshrines “for the first time in binding international law, the principles upon which adoption is based, viewed from the child’s perspective.”<sup>42</sup>

Professor Geraldine Van Bueren, an expert on international law and the Director of the Program on International Rights of the Child at the University of London, states that the CRC can be broken into four specific aspects of children’s rights. She refers to them as “the four ‘P’s: the *participation* of children in decisions affecting their own destiny; the *protection* of children against discrimination and all forms of neglect and exploitation; the *prevention* of harm to children; and the *provision* of

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34. *Id.* at principle 5.

35. *Id.* at principle 7.

36. *Id.* at principle 9.

37. *Id.* at principle 10.

38. CRC, *supra* note 26.

39. *Id.*

40. See, e.g., Wendy Zeldin, *International Laws: Children’s Rights*, LAW LIBRARY OF CONG., Doc. No. 04112, at 2 (2007), <https://www.loc.gov/law/help/child-rights/pdfs/Children’s%20Rights-International%20Laws.pdf>.

41. Zeldin, *supra* note 40, at 2.

42. Geraldine van Bueren, *The International Law on the Rights of the Child*, 18 FORDHAM INT’L L. J. 832 (1995).

assistance for their basic needs.”<sup>43</sup> As argued further by Van Bueren, “[t]he breakdown of the Convention in this way is useful, as, in addition to making the treaty easy to explain and digest for both children and adults, a duty which is expressly placed upon governments by the Convention, it points to the four complementary principal approaches to children’s rights.”<sup>44</sup>

The CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>45</sup> The CRC has made some very significant achievements in the global effort to protect the rights of children. First, the CRC has created, under international law, new rights for children that did not exist before. For example, Article 7 provides a legal mechanism for the child to preserve his or her identity. As mandated by Article 7, “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*”<sup>46</sup> In addition, Article 8 imposes a duty on States Parties to “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”<sup>47</sup> In other words, States Parties must not only guarantee the protection of the child’s identity<sup>48</sup> but must also make certain that state actors do not illegally interfere with the ability of the child to exercise his or her rights.

Second, the CRC imposes a duty on each State Party to provide “special protection and assistance” to children who, because of their circumstances, are vulnerable to exploitation by both state and non-state actors. According to Article 20, then, “[a] child temporarily or permanently deprived of his or her family environment, or in whose own

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43. Van Bueren, *supra* note 42, at 15 (emphasis added).

44. *Id.*

45. CRC, *supra* note 26, art. 1.

46. *Id.* art. 7(1) (emphasis added).

47. *Id.* art. 8 (1).

48. *Id.* This includes making certain that the country’s laws—that is, the constitution, legislative acts, and customary law—protect and safeguard each child’s rights to an identity.

best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”<sup>49</sup>

Third, the CRC grants every child the right to participate in, as well as practice, his or her own culture. According to Article 30, “[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”<sup>50</sup>

Fourth, the CRC makes rights that are already applicable to the citizens of most countries, either through their national constitutions or treaties and conventions, specifically applicable to children. Article 13 specifically grants the child “the right to freedom of expression.”<sup>51</sup> It states that “[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”<sup>52</sup> The CRC notes, however, that “this right may be subject to certain restrictions.”<sup>53</sup> Those restrictions, however, “shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health and morals.”<sup>54</sup>

Fifth, children are granted the right to a fair trial by the CRC. Article 40 contains various provisions that guarantee and “recognize the right of

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49. CRC, *supra* note 38, art. 20(1). Although not specifically mentioned, such vulnerable children include refugees, orphans, and those who, for a variety of reasons, have been rejected by their parents, as well as those whose parents can no longer take care of them. The CRC mandates, in Article 20, that “States Parties shall in accordance with their national laws ensure alternative care for such a [vulnerable] child.” *Id.* art. 20(2). The CRC also provides examples of such care—it includes, “foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.” *Id.* art. 20(3). This list, however, is not exhaustive. The CRC notes that, in determining the nature and type of assistance to be granted to a vulnerable child, the State Party shall pay “due regard” to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” *Id.* art. 20(3).

50. CRC, *supra* note 26, art. 30.

51. *Id.* art. 13.

52. *Id.* art. 13(1).

53. *Id.* art. 13(2).

54. *Id.*

every child alleged as, accused of, or recognized as having infringed the penal law”<sup>55</sup> to a fair trial. For example, Article 40 instructs States Parties to ensure that:

[e]very child alleged as or accused of having infringed the penal law has at least . . . (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.<sup>56</sup>

Sixth, as argued by Zeldin, “the CRC enshrines in a global treaty rights that hitherto had only been found in case law under regional human rights treaties (e.g., children’s right to be heard in proceedings that affect them).”<sup>57</sup>

Seventh, “[t]he CRC also replaced non-binding recommendations with binding standards (e.g., safeguards in adoption procedures and with regard to the rights of disabled children).”<sup>58</sup> Of particular interest to the protection of children in Africa is the fact that the CRC imposes “[n]ew obligations . . . on States Parties in regard to the protection of children, in such areas as banning traditional practices prejudicial to children’s health and offering rehabilitative measures for victims of neglect, abuse, and exploitation.”<sup>59</sup> For example, Article 39 states that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim

55. *Id.* art. 40(1).

56. *Id.* art. 40(2)(b).

57. Zeldin, *supra* note 40, at 3.

58. *Id.* See also CRC, *supra* note 26, at arts. 21, 23.

59. Zeldin, *supra* note 40, at 3. See also CRC, *supra* note 26, arts. 28(3), 39.

of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.<sup>60</sup>

Finally, the CRC imposes an obligation on States Parties to ensure that children are not discriminated against in their efforts to exercise and enjoy the rights guaranteed them under the Convention.<sup>61</sup> It is argued that the right of the child to take part in proceedings affecting his or her welfare, “together with the principles of non-discrimination in Article 2 and provision for the child’s best interests in Article 3, form the guiding principles of the Convention [i.e., CRC], which reflect the vision of respect and autonomy which the drafters wished to create for children.”<sup>62</sup>

### C. The Optional Protocols to the UN Convention on the Rights of the Child

In 2000, the United Nations adopted two protocols to the Convention on the Rights of the Child, which were expected to deal with specific activities and behaviors that are harmful to children. These include child trafficking; child prostitution; child pornography; and armed conflict. Specifically, the UN adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (“Sex Trafficking Protocol”)<sup>63</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Child Soldier Protocol”).<sup>64</sup> The Sex

60. See CRC, *supra* note 26, art. 39.

61. See Zeldin, *supra* note 40, at 3.

62. Ursula Kilkelly, *The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, 23 HUM. RTS. Q. 308, 311 (2001).

63. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> [hereinafter Sex Trafficking Protocol].

64. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 22173 U.N.T.S. 222 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACRC.aspx> [hereinafter Child Soldiers Protocol].

Trafficking Protocol consists of seventeen articles and deals with one of the most important forms of child abuse and exploitation—the sale of children for use in various types of sexual activities.<sup>65</sup> The Preamble of the Sex Trafficking Protocol considers the “purposes of the Convention on the Rights of the Child” and then sets forth or elaborates measures, which “States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography.”<sup>66</sup>

The Sex Trafficking Protocol specifically imposes certain duties on States Parties in order to protect children from being sold for the purpose of use in prostitution and other abusive and exploitative practices, including, for example, indentured servitude and hazardous work.<sup>67</sup> The Sex Trafficking Protocol is also cognizant of the fact “that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited.”<sup>68</sup> In addition, the Sex Trafficking Protocol is aware of and expresses grave concern over “the growing availability of child pornography on the Internet and other evolving technologies.”<sup>69</sup> In addition to recognizing and taking note of the various threats faced by children, the Sex Trafficking Protocol elaborates measures, which it believes States Parties should take to protect children against abuse and exploitation. For example, Article 1 states that “States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.”<sup>70</sup>

Besides prohibiting certain activities that are harmful to children, which include, for example, the “sale of children,”<sup>71</sup> “child

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65. The other forms of child abuse and exploitation include forced or servitude labor; service as child-soldiers; under-age marriage; and the harvesting and sale of the child’s organs. *See also* Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 HUM. RTS. BRIEF 13 (2001).

66. Sex Trafficking Protocol, *supra* note 63, at pmbl. ¶ 1.

67. That is work that can threaten or even destroy the health of the child and prevent him or her from enjoying a productive life. *See, e.g.*, Revaz, *supra* note 65, at 14.

68. Sex Trafficking Protocol, *supra* note 63, at pmbl. ¶ 5.

69. *Id.* at pmbl. ¶ 6.

70. *Id.* art. 1.

71. *Id.*

prostitution,<sup>72</sup> and “child pornography,”<sup>73</sup> the Sex Trafficking Protocol imposes an obligation on States Parties to criminalize these acts or behaviors. For example, according to Article 3, “[e]ach State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offenses are committed domestically or transnationally or on an individual or organized basis.”<sup>74</sup> The listed offenses include “(i) offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; [and] c. Engagement of the child in forced labor.”<sup>75</sup> For example:

Article 5 strengthens the ability of States Parties to pursue extradition of those who commit offenses under the Sex Trafficking Protocol, and includes such violations as extraditable offenses in any current and future extradition treaty existing between State[s] Parties. It further provides that the Protocol may serve as a legal basis for extradition in cases where no extradition treaty exists.<sup>76</sup>

The Sex Trafficking Protocol reminds States Parties that the “best interest[s] of the child”<sup>77</sup> is “the guiding principle in the treatment of children in and by the judicial system,”<sup>78</sup> and mandates that “States Parties should adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present [Sex Trafficking] Protocol at all stages of the criminal justice process.”<sup>79</sup> So as to strengthen and “enhance the ability of child victims of the various behaviors prohibited under the Sex Trafficking Protocol to seek and secure compensation for the wrongs done to them,”<sup>80</sup> the Sex Trafficking Protocol directs that “States Parties shall ensure that all child victims of the offenses described in the present Protocol have access to

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72. *Id.*

73. *Id.*

74. *Id.* art. 3(1).

75. *Id.*

76. Revaz, *supra* note 65, at 14.

77. Sex Trafficking Protocol, *supra* note 63, art. 8(3).

78. Mbaku, *The Rule of Law*, *supra* note 1, at 337.

79. Sex Trafficking Protocol, *supra* note 63, art. 8(1).

80. Mbaku, *The Rule of Law*, *supra* note 1, at 337.



adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”<sup>81</sup>

Given the fact that sex trafficking can often involve multiple jurisdictions, the “Sex Trafficking Protocol strengthens and enhances the ability of States Parties to cooperate with one another,”<sup>82</sup> and “provides for specific reporting requirements.”<sup>83</sup>

The Child Soldiers Protocol “provides further affirmation of the belief of many in the international community, especially advocates for children,”<sup>84</sup> that “the rights of children require special protection.”<sup>85</sup> While taking note of the “harmful and widespread impact of armed conflict on children,”<sup>86</sup> the Child Soldiers Protocol “condemns activities, especially in conflict situations, that harm children or place them in harm’s way.”<sup>87</sup> The Child Soldiers Protocol also makes note of the Rome Statute of the International Criminal Court (“Rome Statute”) and specifically refers to the “[c]onscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities” as serious and significant violations of international humanitarian law.<sup>88</sup>

In the Preamble to the Child Soldiers Protocol, a note is made on the definition of a “child” that is provided in the CRC.<sup>89</sup> The Child Soldiers Protocol then argues that:

[A]n optional protocol to the Convention that raising the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the

81. Sex Trafficking Protocol, *supra* note 63, art. 9(4).

82. Mbaku, *The Rule of Law*, *supra* note 1, at 337.

83. *Id.*

84. *Id.*

85. Child Soldiers Protocol, *supra* note 64, at pmb1.

86. *Id.*

87. Mbaku, *The Rule of Law*, *supra* note 1, at 337. Activities condemned by the Child Soldiers Protocol include “the targeting of children in situations of armed conflict,” “direct attacks on objects protected by international law, including places that generally have a significant presence of children, such as schools and hospitals.” See Child Soldiers Protocol, *supra* note 64, at pmb1.

88. Rome Statute of the International Criminal Court, art. 8(b)(xxvi), U.N. Doc. A/CONF. 183/9 (July 17, 1998), [http://legal.un.org/icc/statute/99\\_corr/cstatute.htm](http://legal.un.org/icc/statute/99_corr/cstatute.htm).

89. The definition of what constitutes a child is provided in art. 1 of the Convention on the Rights of the Child. See CRC, *supra* note 26, art. 1.

implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.<sup>90</sup>

The Child Soldiers Protocol then raises the age “for direct participation in armed conflict and conscription”<sup>91</sup> to eighteen years<sup>92</sup> and prohibits non-state military groups from recruiting or employing children in military conflicts.<sup>93</sup>

Article 4 of the Child Soldiers Protocol states specifically as follows:

1. 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 of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.<sup>94</sup>

With respect to “voluntary recruitment into [States Parties] national armed forces,”<sup>95</sup> the Child Soldiers Protocol requires States Parties that:

[P]ermit voluntary recruitment into their national armed forces under the age of 18 [years to] maintain safeguards to ensure, as a minimum, that: (a) [s]uch recruitment is genuinely voluntary; (b) [s]uch recruitment is done with the informed consent of the person’s parents or legal guardians; (c) [s]uch persons are fully informed of the duties involved in such military service; (d) [s]uch persons provide reliable proof of age prior to acceptance into national military service.<sup>96</sup>

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90. Child Soldiers Protocol, *supra* note 64, at pmb1.

91. Zeldin, *supra* note 40, at 4.

92. Child Soldiers Protocol, *supra* note 64, arts. 1, 2.

93. *See, e.g.*, Mbaku, *The Rule of Law*, *supra* note 1, at 338.

94. Child Soldiers Protocol, *supra* note 64, art. 4.

95. *Id.* art. 3(3).

96. *Id.* art. 3(3)(a)–(d).

As concerns children who have been “recruited into armed conflict or used in hostilities,”<sup>97</sup> the Child Soldiers Protocol mandates that:

States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.<sup>98</sup>

#### D. The African Charter on the Rights and Welfare of the Child 1990

The African Charter on the Rights and Welfare of the Child (“ACRWC”), which was adopted on July 1, 1990, and entered into force on November 29, 1999, is the first regional treaty that deals specifically with children’s rights.<sup>99</sup> Earlier in 1979, the Organization of African Unity had adopted the Declaration on the Rights and Welfare of the Child (“African Child Rights Declaration”),<sup>100</sup> which became the foundation for the ACRWC. Although the ACRWC builds on the African Child Rights Declaration, “most of [the ACRWC’s] provisions are modeled after those of the CRC.”<sup>101</sup>

Zeldin argues that “[t]he main difference lies in the existence of provisions concerning children’s duties,<sup>102</sup> . . . in line with the African Human Rights Charter.”<sup>103</sup> In its Preamble, the ACRWC recognizes that

97. Zeldin, *supra* note 40, at 4.

98. Child Soldiers Protocol, *supra* note 64, art. 6(1)–(3).

99. Org. of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, AU Doc. CAB/LEG/24.9/49 (1990), <https://au.int/sites/default/files/documents/30913-doc-acrwc-en.pdf> [hereinafter ACRWC].

100. Organization of African Union, *Declaration on the Rights and Welfare of the Child*, OAU Doc. AHG/St. 4(XVI) Rev. 1 (1979) [hereinafter OAU].

101. Zeldin, *supra* note 40, at 5.

102. According to Article 31, “Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty: (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need[.]” ACRWC, *supra* note 99, art. 31(a).

103. Zeldin, *supra* note 40, at 5.

“the child occupies a unique and privileged position in the African society” and “requires legal protection in conditions of freedom, dignity and security,” as well as “particular care with regard to health, physical, mental, moral and social development.”<sup>104</sup> The ACRWC defines a child as “every human being below the age of 18 years.”<sup>105</sup>

The ACRWC also sets forth important principles that are critical to the protection of the rights of children. These include “non-discrimination,”<sup>106</sup> the “best interests of the child,”<sup>107</sup> and “survival and development.”<sup>108</sup> Other principles elaborated in the ACRWC also include the right of a child to: a name and nationality;<sup>109</sup> freedom of expression;<sup>110</sup> freedom of association;<sup>111</sup> freedom of thought; conscience and religion;<sup>112</sup> privacy;<sup>113</sup> education;<sup>114</sup> and leisure, recreation, and cultural activities.<sup>115</sup>

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104. ACRWC, *supra* note 99, at pmb1.

105. *Id.* art. 2.

106. *Id.* art. 3.

107. *Id.* art. 4. This article states that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” *Id.* art. 4(1). Article 4 also deals with the child’s rights during judicial or administrative proceedings affecting the child. *Id.* art. 4. It states that “[i]n all judicial or 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.” *See id.* art. 4(2).

108. ACRWC, *supra* note 99, arts. 3–5. Specifically, this article provides that “[e]very child has an inherent right to life” and that “[t]his right shall be protected by law.” *See id.* art. 5(1). In addition, the “[d]eath sentence shall not be pronounced for crimes committed by children.” *See id.* art. 5(3).

109. ACRWC, *supra* note 99, art. 6. For example, “[e]very child shall have the right from birth to a name.” *See id.* art. 6.

110. ACRWC, *supra* note 99, art. 7. Specifically, “[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by law.” *See id.* art. 7.

111. ACRWC, *supra* note 99, art. 8.

112. *Id.* art. 9. The exercise of this right, however, is subject to guidance by the child’s parents. Nevertheless, the exercise of parental rights is subject to national laws and policies. *See id.* arts. 9(2)–(3).

113. ACRWC, *supra* note 99, art. 10. Specifically, “[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honor or reputation, provided that parents or legal guardians shall

The ACRWC provides special protections for handicapped children. According to Article 13, “[e]very child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.”<sup>116</sup> Children are also to be guaranteed “the right to enjoy the best attainable state of physical, mental and spiritual health.”<sup>117</sup> Article 15 deals with child labor and mandates that “[e]very child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.”<sup>118</sup>

The child must also be protected against abuse and torture,<sup>119</sup> harmful social and cultural practices,<sup>120</sup> and all forms of sexual exploitation.<sup>121</sup> The ACRWC also protects children from the harmful effects of narcotics and illicit drugs,<sup>122</sup> as well as from trafficking and abduction.<sup>123</sup> The ACRWC imposes a duty on States Parties “to take appropriate measures

have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.” *See id.* art. 10.

114. Article 11 provides that “[e]very child shall have the right to an education.” ACRWC, *supra* note 99, art. 11.

115. For example, “States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.” *See id.* art. 12(1).

116. *Id.* art. 13(1).

117. *Id.* art. 14(1).

118. *Id.* art. 15(1).

119. *Id.* art. 16.

120. ACRWC, *supra* note 99, art. 21. These include “customs and practices prejudicial to the health or life of the child,” and “those customs and practices discriminatory to the child on the grounds of sex or other status.” *Id.* art. 21(1). In addition, Article 21 prohibits “[c]hild marriage and the betrothal of girls and boys” and imposes a duty on the State Party to “specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.” *See id.* art. 21(2).

121. States Parties are required to “undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercions or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.” ACRWC, *supra* note 99, art. 27.

122. *Id.* art. 28.

123. *Id.* art. 29.

to prevent: (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; [and] (b) the use of children in all forms of begging.”<sup>124</sup>

#### E. The Universal Declaration of Human Rights 1948

The UNGA proclaimed the Universal Declaration of Human Rights (“UDHR”) in Paris (France) on December 10, 1948, as an international bill of human rights.<sup>125</sup> The UDHR deals with children’s rights in two articles—25 and 26.<sup>126</sup> Article 25(2) states that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>127</sup> In Article 26, the UDHR deals with the child’s right to education and states that “[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”<sup>128</sup> In addition to declaring that “[e]veryone has the right to education,”<sup>129</sup> and that “[e]ducation shall be free, at least in the elementary and fundamental stages,”<sup>130</sup> Article 26 also grants parents “a prior right to choose the kind of education that shall be given to their children.”<sup>131</sup>

#### F. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”), together with the UDHR and the International Covenant on Civil and Political Rights (“ICCPR”), are generally referred to as the International Bill of Human Rights. The ICESCR and the ICCPR, which are binding treaties between the Member States of the United Nations, and the non-binding UDHR, which is a declaration of the UN General

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124. *Id.* art. 29(a), (b).

125. UDHR, *supra* note 27, at 71.

126. *Id.* arts. 25, 26.

127. *Id.* arts. 25(2).

128. *Id.* arts. 26(2).

129. *Id.* arts. 26(1).

130. *Id.*

131. *Id.* arts. 26(3).

Assembly, form the foundation of modern international human rights law.<sup>132</sup> Christopher N. J. Roberts, an expert on human rights and Professor of Law at the University of Minnesota, states that the three documents—the ICESCR, the ICCPR, and the UDHR—“are considered to be the foundational human rights texts within the modern system of international human rights” and that “[t]hey have opened the door for the hundreds of human rights treaties, charters, laws, governmental bodies, public and private organizations, groups, and individuals that now comprise this global regime.”<sup>133</sup>

The ICESCR recognizes that human rights “derive from the inherent dignity of the human person” and hence, are applicable to children as well.<sup>134</sup> In the Preamble, the ICESCR notes that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>135</sup> While many of the Covenant’s provisions can be applied to children, those in Articles 10 and 12 deal specifically with children.<sup>136</sup> According to Article 10:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

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132. All these three documents were drafted under the auspices of the United Nations. *See, e.g.*, CHRISTOPHER N. J. ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* (2015) (examining, inter alia, the evolution of human rights, as embodied in the International Bill of Human Rights).

133. *Id.* at 3.

134. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), Dec. 16, 1966, 993 U.N.T.S. 3 (1966), at pmb1., <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. [hereinafter ICESCR].

135. *Id.* at pmb1.

136. For example, when Article 13 states that “[p]rimary education shall be compulsory and available free to *all*,” the word “all” includes children. *Id.* art. 13(2)(a).

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.<sup>137</sup>

Article 12 recognizes all human beings'<sup>138</sup> right to the "enjoyment of the highest attainable standard of physical and mental health."<sup>139</sup> In order for these rights to be realized, States Parties to the Covenant are instructed to put in place measures to reduce "the stillbirth-rate," "infant mortality," and provide for the "healthy development of the child."<sup>140</sup> Finally, the ICESCR provides for the right to an education for all and specifically makes "primary education . . . compulsory and available free to all."<sup>141</sup>

### G. The International Covenant on Civil and Political Rights

Like the ICESCR, the ICCPR contains provisions that are designed to benefit children and protect their rights.<sup>142</sup> For example, Article 2 imposes an obligation on each State Party to the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>143</sup> Article 2 also imposes an obligation on each State Party to pass the necessary legislation to give effect to the rights elaborated in

137. *Id.* art. 10(1)–(3).

138. "Human beings," of course, includes "children."

139. ICESCR, *supra* note 134, art. 12(1).

140. *Id.* art. 12(2)(a).

141. *Id.* art. 13(2)(a).

142. International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

143. *Id.* art. 2(1).



the ICCPR.<sup>144</sup> The ICCPR also requires that each State Party to the Covenant make sure that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>145</sup>

How all people, including children, are treated before the courts and tribunals, is dealt with in Article 14, which states that “[a]ll persons shall be equal before the courts and tribunals.”<sup>146</sup> In addition, Article 14 states that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>147</sup> Although Article 14 encourages transparency and openness in judicial proceedings, it notes that cognizance must be taken of the need to protect children: “any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”<sup>148</sup>

Article 14(4) provides procedures for the treatment of juvenile persons in court proceedings. Specifically, “[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”<sup>149</sup> Moreover, “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”<sup>150</sup> The ICCPR also prohibits the imposition of the death penalty “for crimes committed by persons below eighteen years of age”<sup>151</sup> and in addition, the death penalty shall not be “carried out on pregnant women.”<sup>152</sup>

The ICCPR recognizes the “family” as the “natural and fundamental group unit of society,” which must be protected by “society and the State.”<sup>153</sup> States Parties are obligated by the Covenant to “undertake to

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144. *Id.* art. 2(2).

145. *Id.* art. 2(3)(a).

146. *Id.* art. 14(1).

147. *Id.*

148. *Id.*

149. *Id.* art. 14(4).

150. *Id.* art. 10(2)(b).

151. *Id.* art. 6(5).

152. *Id.*

153. *Id.* art. 23(1).

have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>154</sup> If a marriage is dissolved, “provision shall be made for the necessary protection of any children.”<sup>155</sup>

All of Article 24 is devoted to elaborating on various rights for children. Accordingly, it states that “[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”<sup>156</sup> Also, the ICCPR prescribes that “[e]very child shall be registered immediately after birth and shall have a name” and shall have “the right to acquire a nationality.”<sup>157</sup>

Other international legal instruments dedicated to the protection of the rights of children include the Convention on the Rights of Persons with Disabilities 2006,<sup>158</sup> the African Charter on Human and Peoples’ Rights 1981,<sup>159</sup> CEDAW,<sup>160</sup> and various documentation dealing with or related to adoption and other forms of child placement.<sup>161</sup>

154. *Id.* art. 18(4).

155. *Id.* art. 23(4).

156. *Id.* art. 24(1).

157. *Id.* art. 24(2)–(3).

158. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, G.A. Res. A/RES/61/106, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>.

159. African Charter on Human and Peoples’ Rights, *opened for signature* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 rev. 5, <http://hrlibrary.umn.edu/instree/z1afchar.htm>, (also called the Banjul Charter, after the town in The Gambia where the treaty was adopted) [hereinafter Banjul Charter]. The Banjul Charter was designed to protect the civil, political, economic, social, and cultural rights of the African peoples. *See id.* at pmbl. Although the child is specifically mentioned only once in the treaty, it is important to note that most of the treaty’s provisions can be applied to children. For example, when Article 3 states that “[e]very *individual* shall be equal before the law” and “[e]very *individual* shall be entitled to equal protection of the law,” the use of the expression “every individual” includes children. *Id.* art. 3(1)-(2) (emphasis added).

160. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, art. 5 (entered into force Sept. 3, 1981), [https://www.ohchr.org/en/professional\\_interest/pages/cedaw.aspx](https://www.ohchr.org/en/professional_interest/pages/cedaw.aspx), [hereinafter CEDAW]. The CEDAW is considered an international bill of rights for women and was adopted by the UN General Assembly on

### III. AFRICAN CUSTOMARY AND TRADITIONAL PRACTICES AND THE RIGHTS OF CHILDREN

#### A. Introduction

It has been argued that traditional African institutions, including customs, are very important for effective governance on the continent.<sup>162</sup> For example, the UN Economic Commission for Africa (“UNECA”) states that “[a] number of studies have affirmed the resiliency, legitimacy and relevance of African traditional institutions in the socio-cultural, economic and political lives of Africans, particularly in the rural areas.”<sup>163</sup> Research has also determined that if Africa’s modern State is to perform its functions well and effectively serve its constituents, it must be “grounded on indigenous social values and contexts, while adapting to changing realities.”<sup>164</sup> The construction of such a governing process, one that is grounded in the values of each country’s various subcultures, will

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December 18, 1979. *Id.* The CEDAW positively affirms the principle of equality of men and women and requires States Parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” *Id.* art. 3. With respect to children, CEDAW utilizes the principle of “best interests of the child” when it directs States Parties to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.” *See id.* art. 5(b).

161. These include, but are not limited to, (i) the *Hague Convention on Jurisdiction*; (ii) the *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, 1965; (iii) the *European Convention on the Adoption of Children*, 1967; (iv) the *Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors*, 1984; (v) the *Hague Convention on the Protection of Children in Intercountry Adoption*, 1993; (vi) the *Hague Convention on the Civil Aspects of International Child Abduction*, 1980; and (vii) the *Worst Forms of Child Labor Convention*, 1999. Mbaku provides an overview of these international legal instruments. *See Mbaku, The Rule of Law*, *supra* note 1, at 355–67.

162. *See, e.g.*, U.N. Economic Commission for Africa, African Traditional Institutions of Governance, iii (2007), [http://repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702\\_I.pdf?sequence=1](http://repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702_I.pdf?sequence=1) [hereinafter UNECA].

163. *Id.* at iii.

164. *Id.* at iii. *See also Mbaku The Rule of Law*, *supra* note 1, at 392.

require, at the very minimum, “aligning and harmonizing traditional governance institutions with the modern State.”<sup>165</sup>

Scholars who study traditional African institutions have identified at least four governance functions for these institutions.<sup>166</sup> First, Africa’s traditional institutions can “advise the modern State in its efforts to serve the people, protect their rights, and provide them with public goods and services.”<sup>167</sup> Second, within each African country, “traditional institutions can serve in a developmental role, helping the government carry out its development plans.”<sup>168</sup> Third, traditional institutions can serve as important instruments and mechanisms for the “resolution of conflicts, including those arising from trade and voluntary exchange.”<sup>169</sup> Finally, traditional African institutions can “provide the moral structure for raising children and helping them develop into responsible adults.”<sup>170</sup>

The critical issue for the development of effective governance processes in the African countries, that is, those that are capable of protecting human rights, including especially those of children, is how to integrate *modern* and *traditional* institutions to “produce a governing process that can deliver justice and enhance human development in each country in the continent.”<sup>171</sup> And in doing so, the *blended* governing process must also recognize and protect human rights, including those of vulnerable groups, such as children and women.

Although traditional African institutions can potentially provide a strong foundation for effective governance processes in the continent, “it is important to note that some traditions and customs have actually been and are still major contributors to the abuse and exploitation of children.”<sup>172</sup> Thus, in an effort to combine traditional and modern institutions to produce a governing process capable of enhancing the recognition and protection of human rights, Africa’s constitutional “framers must take cognizance of the fact that any resulting laws and institutions must be those that reflect and align with provisions of

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165. UNECA, *supra* note 162, at iii.

166. *See, e.g.*, GEORGE B. N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* 555 (2d ed. 2006)

167. Mbaku, *The Rule of Law*, *supra* note 1, at 393.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

international human rights instruments.”<sup>173</sup> Thus, “any custom and tradition that violates human rights, as reflected in international human rights laws, must not be allowed to become part of the country’s standing laws—such harmful practices, as embodied in these traditions [and customs], must be prohibited by law.”<sup>174</sup>

Several international human rights instruments have called for the elimination or moderation of customary and traditional practices that violate human rights and hence, are harmful to citizens, including especially children and members of other vulnerable groups, such as women. For example, in its “Introduction,” the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) states that the “general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as *it gives formal recognition to the influence of culture and tradition on restricting women’s enjoyment of their fundamental rights.*”<sup>175</sup> CEDAW imposes an obligation on States Parties to:

take all appropriate measures: (a) *To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;* (b) *To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*<sup>176</sup>

While the ACRWC states that “[t]he education of the child shall be directed to: (c) the preservation and strengthening of positive African morals, traditional values and cultures,”<sup>177</sup> the ACRWC also provides 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

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173. *Id.*

174. *Id.*

175. CEDAW, *supra* note 160, at Introduction.

176. *Id.* art. 5.

177. ACRWC, *supra* note 99, art. 11(2)(c).

discouraged.”<sup>178</sup> The ACRWC then imposes an obligation on States Parties to the Charter regarding the protection of children against harmful social and cultural practices.<sup>179</sup> According to Article 21:

State[s] 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 ground of sex or other status.<sup>180</sup>

In addition, the Charter prohibits another customary practice that is harmful to African children: “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 18 years and make registration of all marriages in an official registry compulsory.”<sup>181</sup>

#### B. Custom, Tradition, Culture, Religion, Superstition and the Rights of Children in Africa

Several scholars and commentators have argued that “traditional values are often deployed as an excuse to undermine human rights.”<sup>182</sup> Nongovernmental organizations that study the recognition and protection of human rights around the world, for example, 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,”<sup>183</sup> including, of course, those of children. The Human Rights Study, conducted by Graeme Reid, also found that throughout the world, many state- and non-state actors invoke cultural, religious and customary norms and use them to justify their

178. *Id.* art. 1(3).

179. *Id.* art. 21.

180. *Id.* art. 21(1)(a)–(b).

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

182. Graeme Reid, *The Trouble with Tradition: When “Values” Trample Over Rights*, HUMAN RIGHTS WATCH (2009), <https://www.hrw.org/world-report/2013/country-chapters/africa#>.

183. *Id.*

violation of the rights of certain groups, including especially historically vulnerable groups, such as women and children.<sup>184</sup>

For example, “[i]n Saudi Arabia, authorities cite cultural norms and religious teachings in denying women and girls the right to participate in sporting activities—’steps of the devil’ on the path to immorality, as one religious leader calls them.”<sup>185</sup> In the United States, “traditional values” or “traditional family values” have been invoked to oppose legal protections for LGBT persons and women.<sup>186</sup> In many African countries, the customary laws of many subcultures discriminate against women and girls when it comes to inheritance and the ownership of real property.<sup>187</sup> For example, research by Human Rights Watch has determined that in Kenya, “women find it almost hopeless to pursue remedies for property rights violations. Traditional leaders and government authorities often ignore women’s property claims and sometimes make the problems worse.”<sup>188</sup> It is important to note here that African customary, traditional, and religious practices that discriminate against women often do so against girls.<sup>189</sup>

During its third, fourth, and fifth meetings, held April 25–26, 2005, to consider the initial report of the Government of Zambia on the implementation of the ICESCR, the UN Economic and Social Council’s Committee on Economic, Social and Cultural Rights (“CESCR”) made the following observations: (i) that “the persistence of customs and

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184. *Id.*

185. *Id.*

186. *Id.* See also Peggy Campolo, *Just Family Values: How Can Christians Advocate Justice for Non-Traditional Families?*, in *THE JUSTICE PROJECT* 129, 130 (Brian McLaren, Elisa Padilla & Ashley Bunting Seeber eds., 2009) (arguing, inter alia, that “traditional family values” have been invoked to “deny homosexual couples and their families many basic civil rights.”).

187. See *ISSUES IN WOMEN’S LAND RIGHTS IN CAMEROON* (Lotsmart N. Fonjong ed., 2012) (presenting a series of essays that examines the impact of tradition and custom on the rights of women, particularly land rights).

188. *Double Standards: Women’s Property Rights Violations in Kenya*, HUMAN RIGHTS WATCH, (March 4, 2003), <https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>.

189. Manisuli Ssenyongo, *Human Rights of Women in Africa: A Prerequisite for Human Security*, in *PROTECTING HUMAN SECURITY IN AFRICA* 176, 182 (Ademola Abass ed., 2010) (noting, inter alia, that groups that are vulnerable to discrimination in many African countries include “the girl child”).

traditions harmful to women, children and older persons”<sup>190</sup> is one of the factors constraining or impeding the full and effective implementation of the ICESCR by Zambia; (ii) “the prevalence of customary law—certain traditions, customs and cultural practices—leads to substantial discrimination against girls and women”;<sup>191</sup> (iii) Article 23(4) of the Constitution of Zambia provides for 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”;<sup>192</sup> (iv) “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”;<sup>193</sup> (v) “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”;<sup>194</sup> and (v) “traditional attitudes continue and that discrimination against girl children is prevalent” in Zambia.<sup>195</sup>

In addition to the fact that the customary laws and practices of many subcultures within the African countries do not allow women or girls to inherit real property, they have forced many women, particularly widows, into extreme poverty, a situation that renders the children of such women highly vulnerable to exploitation and abuse—these children easily fall victims 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.<sup>196</sup>

190. U.N. Comm. on Econ., Soc., & Cultural Rights, 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].

191. CESCR, *supra* note 192, ¶ 14.

192. CESCR, *supra* note 192, ¶ 10. *See also* CONST. OF ZAMBIA (1991) art. 23(4), [https://constituteproject.org/constitution/Zambia\\_2016.pdf?lang=en](https://constituteproject.org/constitution/Zambia_2016.pdf?lang=en).

193. CESCR, *supra* note 192, ¶ 23.

194. CESCR, *supra* note 192, ¶ 24.

195. CESCR, *supra* note 192, ¶ 32.

196. Mbaku, *The Rule of Law*, *supra* note 1, at 394. *See also* PHILIP FRANKEL, LONG WALK TO NOWHERE: HUMAN TRAFFICKING IN POST-MANDELA SOUTH AFRICA 3 (2017) (examining, inter alia, the trafficking of children for sexual exploitation, forced labor services, slavery, indentured servitude, and/or the removal of organs for sale in the international organ transplantation market).



In general, many African cultural, customary, religious, and traditional practices often promote activities that are extremely harmful to children. These include, but are not limited to, female genital mutilation (“FGM”),<sup>197</sup> forced and under-age child marriage,<sup>198</sup> the abduction of children for various purposes, including prostitution and the production of pornography,<sup>199</sup> discrimination against girls in the access to various services, including, for example, education,<sup>200</sup> and the traditional myth that having sex with virgin girls can “cure and cleanse a man of various ills, including HIV.”<sup>201</sup>

Throughout many countries in Africa, children are exposed to customary, traditional, and religious practices that are condoned by their

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197. FGM is also referred to as female circumcision. It is practiced by many subcultures in Africa. It is quite prevalent among various subcultures in Nigeria, Kenya, and the Republic of Sudan, just to name a few. *See generally* FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE (Bettina Shell-Duncan & Ylva Hernlund eds., 2000) (presenting a series of essays that examines FGM as a cultural and religious practice among several subcultures in Africa).

198. *See generally* MARRIAGE BY FORCE? CONTESTATION OVER CONSENT AND COERCION IN AFRICA (Annie Bunting et al. eds., 2016) (presenting a series of essays that examines forced and early marriage of under-aged children in various countries in Africa). *See also* Christopher Okafor Nwonu & Ifidon Oyakhiromen, *Nigeria and Child Marriage: Legal Issues, Complications, Implications, Prospects and Solutions*, 29 J. L. POL’Y & GLOB. 120 (2014) (examining, inter alia, child marriage Nigeria and its legal implications). *See also* Chika Oduah, *Bid to End Child Marriages Arouses Passions in Northern Nigeria*, VOA NEWS (Mar. 22, 2018), <https://www.voanews.com/africa/bid-end-child-marriages-arouses-passions-northern-nigeria> (noting how difficult it is to eradicate child marriage in Nigeria).

199. *See generally* SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA (Linda Richter et al. eds., 2005) (presenting a series of essays that examines the sexual abuse and exploitation of children in Southern Africa). *See also* NEGOTIATING THE LIVELIHOODS OF CHILDREN AND YOUTH IN AFRICA’S URBAN SPACES/NÉGOCIER POUR SAVIE: LES ENFANTS ET LES JEUNES DANS LES ESPACES URBAINS DE L’AFRIQUE (Michael F. C. Bourdillon & Ali Sangare eds., 2012) (presenting a series of essays, in both French and English, that examines the lives of children and youth in various urban centers in Africa).

200. *See generally* KATARINA TOMASEVSKI, *EDUCATION DENIED: COSTS AND REMEDIES* (2003) (examining, inter alia, the denial of educational opportunities to girls, including those in Africa). *See also* Esi Sutherland-Addy, *Gender Equity in Junior and Senior Secondary Education in Sub-Saharan Africa* (World Bank Working Paper No. 140, 2008) (examining, inter alia, the challenges of maintaining gender equity in primary and secondary schools in sub-Saharan Africa).

201. *See* HIV/AIDS IN SOUTH AFRICA 25 YEARS ON: PSYCHOLOGICAL PERSPECTIVES 71 (Poul Rohleder et al., eds., 2009) (presenting a series of essays that examines the impact of the so-called “virgin cure” on child rape in South Africa).

parents and other community leaders, but which cause harm. Any activity or practice that *violates the rights of children*, regardless of whether it is sanctioned by custom and tradition or even national constitutional law, must be considered a *practice that is harmful to children* and which does not belong in a modern State.<sup>202</sup> It is important for each African State that each government understands that violence against children, even if it is considered an essential part of the culture and customary practices of an ethnic and/or religious group within a State, must never be justified. Unfortunately, throughout Africa, both physical and mental violence against children continues to be justified on “spurious grounds of tradition, culture or religion.”<sup>203</sup>

In the section that follows, this Article takes a closer look at some of the most important practices that are harmful to children. Specific emphasis is placed on those harmful practices that are based on tradition, culture, superstition, and/or religion.<sup>204</sup>

### 1. *Practices Harmful to African Children: Overview*

In a resolution dated December 17, 1954, the UNGA made a note of the treatment of women under private law in Member States and Non-Self-Governing and UN Trust Territories around the world.<sup>205</sup> The UNGA then called on all Member States,

Including States which have or assume responsibility for the administration of Non-Self-Governing and Trust Territories, to take all appropriate measures in the countries and Territories under their jurisdiction with a view to *abolishing such customs, ancient laws and practices* by ensuring complete freedom in the choice of spouse; abolishing the practice of bride-price; *guaranteeing the right of widows to the custody of their children* and their freedom as to remarriage; *eliminating completely child marriages and the betrothal of young girls*

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202. See, e.g., *Violating Children’s Rights: Harmful Practices based on Tradition, Culture, Religion or Superstition*, CRIN (Jan. 17, 2013), <https://archive.crin.org/en/library/publications/violating-childrens-rights-harmful-practices-based-tradition-culture-religion.html> [hereinafter *Violating Children’s Rights*].

203. *Id.*

204. *Id.*

205. See G.A. Res. 843 (IX), Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women (Dec. 17, 1954).

*before the age of puberty and establishing appropriate penalties where necessary; establishing a civil or other register in which all marriages and divorces will be recorded; ensuring that all cases involving personal rights be tried before a competent judicial body; ensuring also that family allowances, where these are provided, be administered in such a way as to benefit directly the mother and child.*<sup>206</sup>

With respect to children, the UNGA Resolution called for the abolition of “customs, ancient laws and practices” that are harmful to children.<sup>207</sup> This includes completely eliminating child marriages and the betrothal of young girls before they reach the age of puberty.<sup>208</sup> In addition, the Resolution also called for the Member States to establish appropriate penalties for anyone convicted of engaging in the prohibited practices.<sup>209</sup>

Since the UDHR was adopted by the UNGA in 1948, the UN has devoted a lot of effort to find ways to outlaw practices, regardless of their source, that are harmful to children. Specifically, UN Women, a UN agency dedicated to empowering women, has called on all countries to abolish FGM and child marriage and other practices harmful to children.<sup>210</sup> Although some advocates for children have argued in favor of dropping the word “traditional” from publications advocating for the

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206. *Id.* ¶ 1 (emphasis added).

207. *Id.*

208. *Id.*

209. *Id.*

210. UN Women is the “United Nations Entity for Gender Equality and the Empowerment of Women.” Specifically, it is a UN entity that works to empower women throughout the world. It became operational in January 2011. *See, e.g., UN Women Executive Director calls for action to end female genital mutilation and child marriage in an event in Senegal*, UN WOMEN (June 17, 2019), <http://www.unwomen.org/en/news/stories/2019/6/news-executive-director-calls-for-action-to-end-fgm-and-child-marriage-in-senegal>. *See also Press Release: Young Leaders Propel African Authorities to Deliver Actions to End FGM and Child Marriage*, UN WOMEN (June 26, 2019), <http://www.unwomen.org/en/news/stories/2019/7/press-release-young-leaders-propel-african-authorities-to-end-fgm-and-child-marriage>. The United Nations Entity for Gender Equality and the Empowerment of Women was formed by consolidating “the Office of the Special Adviser on Gender Issues and Advancement of Women, the Division for the Advancement of Women, the United Nations Development Fund for Women and the United Nations International Research and Training Institute for the Advancement of Women, into a composite entity, taking into account the existing mandates.” *See* G.A. Res. 63/311, ¶ 1 (Sept. 14, 2009).

recognition and protection of children's rights because of their belief that its continued use "may offend [those] communities who value their traditions," others have suggested that the concept of "harmful traditional practices" must be extended or enlarged to include "harmful practices based [specifically] on tradition, culture, religion or superstition."<sup>211</sup>

Throughout the continent of Africa, many communities have continued to embrace and engage in practices that are harmful to children. In addition to the fact that these practices have continued to be accepted and viewed favorably by many of the continent's subcultures, they are also considered an integral part of the cultural identity of many of these groups. These practices are viewed favorably by many subcultures in Africa because of at least one of the following: (a) tradition; (b) culture; (c) religion; (d) custom; and (e) superstition.<sup>212</sup> Nevertheless, this list is not exhaustive—that is, harmful practices based on tradition, culture, religion or superstition, "does not necessarily cover all the violations of children's rights."<sup>213</sup> Other practices, which have not been listed above, such as the denial of opportunity for the education of girls, "discrimination against children with disabilities, including their exclusion from participating in the lives of their communities, poor and discriminating treatment of minorities, particularly religious and ethnic minorities, and child imprisonment," are equally harmful to children in Africa.<sup>214</sup>

Several international human rights instruments have made a note of practices that are harmful to children. For example, the CRC imposes an obligation on States Parties to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."<sup>215</sup> Article 16(2) of CEDAW also outlaws practices based on traditions and customs that are prejudicial to the rights of children. Specifically, the article states that "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry

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211. See *Violating Children's Rights*, *supra* note 202.

212. *Id.*

213. See Mbaku, *The Rule of Law*, *supra* note 1, at 396.

214. See Mbaku, *The Rule of Law*, *supra* note 1, at 396.

215. G.A. Res. 44/25, art. 14, Convention on the Rights of the Child (Dec. 5, 1989) [hereinafter Convention on the Rights of the Child].

compulsory.”<sup>216</sup> The ACRWC also recommends that practices based on “custom, tradition, cultural or religious practice that [are] inconsistent with the rights, duties and obligations contained in . . . the Charter” should “be discouraged.”<sup>217</sup>

Very young African children or infants, like their counterparts in other parts of the world, lack either the capacity to consent or the capacity to withhold consent. As a consequence, “harmful practices based on tradition, culture, religion or superstition are often perpetrated” on these children and infants.<sup>218</sup> African customs and traditions, as well as national laws, grant parents’ powers and/or rights over their children. For example, the Constitution of the Republic of Kenya states that “[e]very child has the right (e) to parental care and protection, which includes equal *responsibility of the mother and father* to provide for the child, whether they are married to each other or not.”<sup>219</sup> In addition, Article 31 of the ACRWC states that “[c]hildren have responsibilities towards their families and societies, to respect their parents, superiors and elders, to preserve and strengthen African cultural values in their relation with other members of their communities.”<sup>220</sup> These assumptions of “parental powers or rights over their children”<sup>221</sup> and the fact that children are expected to “respect their parents, superiors and elders,”<sup>222</sup> as well as the belief in and fidelity to, the cultures and traditions of their subcultures by many African parents, renders many children vulnerable to harmful practices.

Parental rights or power over their children must be exercised responsibly and based on the principle of the “best interests of the child” and with the expressed understanding that “[t]here is no parental right to subject a child to harmful practices.”<sup>223</sup> While parents may legitimately help their children in developing their capacity to exercise their freedom of thought, conscience, and religion, they must only do so “in a manner consistent with the evolving capacities of the child.”<sup>224</sup> Accordingly,

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216. CEDAW, *supra* note 160, art. 16, ¶ 2.

217. ACRWC, *supra* note 99, art. 1, ¶ 3.

218. *Violating Children’s Rights*, *supra* note 202.

219. CONSTITUTION art. 53(1)(e) (2010) (Kenya).

220. ACRWC, *supra* note 99, art. 21.

221. *Violating Children’s Rights*, *supra* note 202.

222. ACRWC, *supra* note 99, art. 31.

223. Mbaku, *The Rule of Law*, *supra* note 1, at 397.

224. Convention on the Rights of the Child, *supra* note 215.

African parents must not use “their adult religious beliefs and practices to justify subjecting children to harmful practices, which violate their children’s rights.”<sup>225</sup> States Parties should make certain that perpetrators of “[h]armful practices that involve direct physical violence on children” must be prosecuted according to the law and punished accordingly if found guilty.<sup>226</sup>

## 2. *Harmful Traditional Practices Affecting Children in Africa: Detailed Analysis*

The Gender & Development Network (“GADN”) defines *harmful traditional practices* (“HTPs”) as “a form of discrimination; they violate the human rights of affected individuals, particularly women and girls. They arise from gender inequality and discriminatory values, which lead to unequal power relations in communities and societies and to violence against women and girls.”<sup>227</sup> While there is no universally-agreed upon definition of HTPs, it is generally agreed that they “stem from value-based discrimination against particular groups of people, and they challenge the human rights of the people affected by them.”<sup>228</sup> As argued by the GADN, HTPs’ roots can be found in “particular cultural and social norms<sup>229</sup> and beliefs” of various subcultures or ethnocultural groups, as well as, “particular interpretations of religion.”<sup>230</sup>

225. Mbaku, *The Rule of Law*, *supra* note 1, at 397.

226. *Id.*

227. GENDER & DEV. NETWORK, HARMFUL TRADITIONAL PRACTICES: YOUR QUESTIONS OUR ANSWERS 1, <https://gadnetwork.org/gadn-resources/2015/1/13/harmful-traditional-practices-your-questions-our-answers> (last visited Mar. 28, 2020). The Gender & Development Network is a UK-based NGO that, together with several experts and organizations around the world, works exclusively on issues affecting the lives of women and girls. *Id.* at 32.

228. *Id.* at 2.

229. “Social norms” are defined as “beliefs, held by groups of people, about the way they must act to be an accepted member of society. Social norms are the ‘unwritten rules’ that show the values that a society holds dear and that govern how people should behave in a given context or situation. Not to keep within the social norms would mean being isolated or excluded by society.” *Id.* Social scientists have defined social norms as “a rule or a standard that governs our conduct in the social situations in which we participate. It’s a societal expectation.” ROBERT BIERSTEDT, *THE SOCIAL ORDER* 222 (2d ed. 1963).

230. GENDER & DEV. NETWORK, *supra* note 227, at 2.

Some groups have objected to the inclusion of the word “traditional” when scholars study the impact of harmful practices on women and girls and other vulnerable groups (e.g., young boys). Nevertheless, it has been argued that including the word “traditional” in the study of harmful practices “allows the harmful nature of HTPs to be addressed, while respecting and working within the context of that tradition.”<sup>231</sup>

In each country and within each subculture, any individual whose behavior does not conform with the social norms of the community (i.e., a particular subculture) would be severely punished by members of the community. Such punishment can include, but is not limited to, isolation/ostracism, shunning, banishment/forced exile, flogging/beatings, shaming, and even death.<sup>232</sup>

Not all traditional practices are harmful to women and children. Some of these practices actually contribute significantly to the promotion of “social solidarity and equity” in various subcultures, both in Africa and around the world.<sup>233</sup> For example, the “Islamic requirement of *kafala* or guardianship of unparented [or orphaned] children” significantly improves not just the welfare of the child in question, but also the community as a whole.<sup>234</sup> Throughout Africa, many subcultures have traditions and customary practices and norms that call for the entire community to get together to help those members that are aggrieved

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231. *Id.*

232. *See, e.g.,* Claude-Hélène Mayer & Rian Viviers, *Experiences of Shame by Race and Culture: An Exploratory Study*, 27 J. PSYCHO. AFR. 362, 362 (2017) (examining, inter alia, the use of shaming as a way to enhance fidelity to social norms among various ethnocultural groups in the Republic of South Africa). For example, children accused of witchcraft may be killed, tortured, abandoned by their parents and forced to live on the streets, where they are susceptible to sex and other types of traffickers, and forever miss the opportunity to grow up in a nurturing and safe environment. For example, children accused of witchcraft may be killed, tortured, abandoned by their parents and forced to live on the streets, where they are susceptible to sex and other types of traffickers, and forever miss the opportunity to grow up in a nurturing and safe environment. ALEKSANDRA CIMPRIC, UNICEF, CHILDREN ACCUSED OF WITCHCRAFT: AN ANTHROPOLOGICAL STUDY OF CONTEMPORARY PRACTICES IN AFRICA 42–43 (2010), <https://www.refworld.org/docid/4e97f5902.html>.

233. GENDER & DEV. NETWORK, *supra* note 227, at 4.

234. Karen Smith Rotabi et al., *The Care of Orphaned and Vulnerable Children in Islam: Exploring Kafala with Muslim Social Work Practice with Unaccompanied Minors in the United States*, 2 J. HUM. RTS. & SOC. WORK 16, 16–17 (2017).

(e.g., from losing a loved one).<sup>235</sup> In Rwanda, for example, the principle of *Ubudehe* makes certain that members of each community work together to protect the weakest among them, as well as the environment in which they live.<sup>236</sup> Moreover, various ethnocultural groups in Cameroon and Nigeria maintain social savings systems that are used to help those who are in need.<sup>237</sup>

Research shows that the failure of large groups of individuals to adhere to social norms, as is occurring in the Democratic Republic of Congo (“DRC”), can lead to extreme violence and a breakdown in the social order.<sup>238</sup> This is evident in the rise of violent youth militias in major metropolitan areas of the DRC, particularly Kinshasa, where many young people have totally detached themselves from their communities and no longer consider themselves bound by the various social or communal norms of their parents. Instead, they have formed their own communities where socio-political interaction is regulated by a new code developed and adopted by them. The result has been brutal and extreme violence on the part of these youths who have gone on to form their own communities, armed with alternative social norms.<sup>239</sup>

235. This approach to the care of children, including orphans, is undergirded by the African saying: “[i]t takes a whole village to raise a child,” which means that “it takes a whole community, and not just two parents, to bring up a child.” Adam Rhaiti, *‘It Takes a Whole Village to Raise a Child’ – An African Saying*, RIGHT FOR EDUC. (Jul. 7, 2016), <https://rightforeducation.org/2016/07/it-takes-a-whole-village/>. See also POLYCARP IKUENOBE, PHILOSOPHICAL PERSPECTIVES ON COMMUNALISM AND MORALITY IN AFRICAN TRADITIONS 1–3 (2006) (examining, inter alia, the African system of extended family).

236. MARGEE M. ENSIGN & WILLIAM E. BERTRAND, RWANDA: HISTORY AND HOPE 1 (2010) (examining, inter alia, the *Ubudehe* process in Rwanda).

237. Dan Soen & Patrice de Comarmond, *Savings Associations Among the Bamilèkè: Traditional and Modern Cooperation in Southwest Cameroon*, 74 AMERICAN ANTHROPOLOGIST 1170, 1170–71, 1174 (1972) (examining, inter alia, social savings systems among the Bamilèkè ethnocultural group in Cameroon); KATE MEAGHER, IDENTITY ECONOMICS: SOCIAL NETWORKS & THE INFORMAL ECONOMY IN NIGERIA 109 (2010) (examining, inter alia, social savings networks in Nigeria).

238. See *Kuluna: Congo Plagued by Lawless Youth Gangs*, DOCUMENTARY CHANNEL (Mar. 4, 2019), <https://rt.drt.com/stories/congo-kuluna-youth-gangs/> (arguing, inter alia, that “[a] social epidemic known as Kuluna is gripping the Democratic Republic of Congo with groups of violent young men and teenagers sowing fear on the streets” and that “[t]hey roam the towns stealing, robbing and attacking, almost unchallenged”).

239. PATRICK CHABAL, AFRICA: THE POLITICS OF SUFFERING AND SMILING 155 (2009) (examining, inter alia, the rise of youth gangs in DRC’s major metropolitan center and the relationship of this development to social norms).



In the African subcultures where HTPs exist, many members of these groups and sometimes the majority, believe that these practices are “necessary to improve the well-being of the whole community.”<sup>240</sup> It has been argued that many African parents who force their children to undergo FGM do not do so in order to harm them or put their lives in danger. However, these parents actually believe that subjecting their children to this insidious practice will better their lives since it “is necessary to secure their daughters a good marriage, a good future, and acceptance into their community.”<sup>241</sup> For those interested in fostering a culture of respect for and protection of the rights of children in the African countries, the key is “to find ways to respect different cultures, and protect positive traditions [i.e., traditional practices],” while at the same time, encouraging and enhancing “social change away from harmful practices that deny girls and women their human rights.”<sup>242</sup>

It is important to note that HTPs remain pervasive in many African subcultures, not just because members of these communities mistakenly believe that they are “necessary or helpful to their [communities],” but also because many national governments either do not have the political will to deal with them or are unwilling to do so.<sup>243</sup> In addition, the international community continues to see these HTPs as “culturally sensitive” and hence, quite “difficult” to fully eradicate or modify, especially by external actors.<sup>244</sup> As a result of dysfunctional legal and judicial systems or pervasive bureaucratic corruption, many African countries do not have the legal capacity to deal with HTPs fully.

Even in African countries where the government is committed to eliminating or moderating HTPs, it may still not be able to do so because of several constraints. For example, the government may owe its survival to the groups (e.g., religious or ethnic groups) whose HTPs are to be modified or eliminated by law. For example, in many African countries, issues of “female cleanliness, cultural identity, protection of virginity, prevention of immorality, better marriage prospects, greater pleasure for

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240. GENDER & DEV. NETWORK, *supra* note 227, at 4.

241. *Id.*

242. *Id.*

243. *Id.* at 7.

244. *Id.*

the husband and improvement of fertility<sup>245</sup> are considered a key to the survival of many subcultures. Hence, leaders of these subcultures not only force their members to conform to these practices but also fight any efforts by the government and NGOs to eradicate them.<sup>246</sup>

As argued by the Gender & Development Network, “it is often difficult for people to challenge beliefs and practices, which are deeply embedded within their own cultures.”<sup>247</sup> Of course, some countries simply do not have the necessary resources to undertake the type of educational processes that are needed to fully inform the population of the dangers of HTPs and why it is necessary to eradicate them. This is especially true in African countries where most people do not speak or understand the official or national language.<sup>248</sup> Then, there is the problem of extreme poverty. For example, many poor families are often forced to marry-off their underage daughters to rich old men in order to use the “bride-price” paid on the girl’s head for the upkeep of the family.<sup>249</sup> In addition, securing a husband for the girl-child also reduces the number of people that the family has to support—after the marriage has been effected, the family will no longer have to provide for the upkeep of the child, including providing her with an education.

The Beijing Declaration and Platform for Action (“BDPA”)<sup>250</sup> recognized the fact that States should not use culture, tradition, religion, or superstition to justify harmful practices, which violate the rights of women and girls. At the Beijing Conference, where the BDPA was

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245. Mary McCauley & Nynke van den Broek, *Challenges in the Eradication of Female Genital Mutilation/Cutting*, 11 INT’L HEALTH 1, 1 (2019).

246. *Id.*

247. GENDER & DEV. NETWORK, *supra* note 227, at 7.

248. At independence, most African countries adopted the languages of their former colonizers and made them their official language. For example, English in former British colonies, French in former French and Belgian colonies, etc. Unfortunately, most people in these countries do not speak, write or understand these official languages. As a consequence, it is very difficult to undertake educational programs designed in national/official languages.

249. GENDER & DEV. NETWORK, *supra* note 227, at 7.

250. The Beijing Declaration and Platform for Action was adopted at the 16th plenary meeting of the Fourth World Conference on Women: Action for Equality, Development and Peace, convened by the United Nations and held at Beijing from September 4, 1995 to September 15, 1995 in Beijing, People’s Republic of China. *See* Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 2, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1995).

adopted, States agreed to “[c]ondemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women.”<sup>251</sup>

HTPs can “cause girls and women physical, psychological, emotional and spiritual pain” and can “lead to life-long damage and trauma and may even result in early death.”<sup>252</sup> In addition, HTPs can make it virtually impossible for girls to enjoy their basic human rights and these include (a) the right to life and health; (b) the right not to be discriminated against on the basis of sex; (c) the right for girls not to be subjected to various forms of violence but to enjoy being nurtured by their parents and the community in which they live; and (d) the right to freedom from inhuman or degrading treatment.<sup>253</sup>

Although international human rights instruments offer significant protection against HTPs, national laws, which include constitutions, legislative acts, and customs and traditions, are also critical to the protection of children against harm from practices associated with traditions, customs, religion, and superstition. Many of these international human rights instruments were examined earlier. Just to reiterate, they include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; the Universal Declaration of Human Rights; the African Charter on Human and Peoples’ Rights; and the African Charter on the Rights and Welfare of the Child.

In the sections that follow, this Article will examine some, but not all, of the HTPs. Our interest is primarily in those HTPs that are commonly found among many subcultures in the African countries and which are especially detrimental to the rights and welfare of the continent’s children.

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251. *Id.* ¶ 124(a).

252. GENDER & DEV. NETWORK, *supra* note 227, at 8.

253. *Id.*

a. Acid Violence and Children in Africa

According to the International NGO Council on Violence Against Children, “[a]cid violence involves intentional violence in which perpetrators throw, spray, or pour acid onto the victims’ faces and bodies.”<sup>254</sup> In a study of acid violence in South Asia, Solotaroff and Pande argue that “[a]cid violence is a particularly damaging and shocking form of violence: acid is hurled at the victim, often targeting the head and face, with the intention to maim, disfigure, and blind.”<sup>255</sup> Solotaroff and Pande go on to state that “[t]he great majority of victims are women and girls, many of them below 18 years of age, but men and boys are also targeted.”<sup>256</sup> In South Asian communities, “[a]cid violence reflects deeply ingrained gender inequality and discrimination in a society, whereby women are attacked for transgressing the traditional gender roles that place them in subordinate positions.”<sup>257</sup>

Although acid attacks may sometimes be orchestrated and carried out by mentally unstable individuals, most of the acid assaults on girls and women are undertaken by individuals who believe that the victims have violated or transgressed behavior norms established by tradition and custom.<sup>258</sup> The main objective of the perpetrators of acid violence is not to kill the victim but to permanently maim, disfigure, and inflict physical and mental pain on the individual.<sup>259</sup> Girls who have been physically disfigured and mutilated by acid violence are usually considered outcasts and treated as such by the communities in which they live. As a consequence, fear of being attacked and subsequently ostracized severely “represses [these] girls’ and women’s willingness to challenge

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254. *Violating Children’s Rights*, *supra* note 202, at 19. Sulfuric (H<sub>2</sub>SO<sub>4</sub>) and nitric (HNO<sub>3</sub>) acid are the most common types of acid used in these attacks. Some attackers also use hydrochloric acid, which is much less damaging. Hydrochloric acid is the aqueous solution of hydrogen chloride (HCl), that is, HCl + H<sub>2</sub>O.

255. JENNIFER L. SOLOTAROFF & ROHNINI PRABHA PANDE, *VIOLENCE AGAINST WOMEN AND GIRLS: LESSONS FROM SOUTH ASIA* 56 (2014).

256. *Id.*

257. *Id.*

258. *Violating Children’s Rights*, *supra* note 202, at 19.

259. *Id.* at 20.

established norms,”<sup>260</sup> even if, like FGM, these practices are extremely harmful to them.

Although acid violence has historically been linked primarily to cultures in South Asia, this type of violence can be found in several countries in Africa. The incidence of acid violence against both men/boys and women/girls has been reported in Ethiopia, Liberia, Nigeria, Uganda, South Africa, and Tanzania (Zanzibar). In a study of acid violence in Uganda, Amy Fallon noted that “[w]ith broad availability of dangerous chemicals and light punishments, acid attacks were just waiting to happen.”<sup>261</sup> In fact, acid attacks have become so common in Uganda that a non-governmental organization called the Center for Rehabilitation of Survivors of Acid and Burns Violence (“CERESAV”) was started in 2012 to “offer legal advice and health services to survivors” of acid violence.<sup>262</sup>

In Uganda, most acid violence is usually perpetrated by co-wives in polygamous households. However, there have been cases in which jealous ex-husbands have hired individuals to attack wives who left abusive relationships.<sup>263</sup> In addition, boyfriends have also plotted acid attacks on their girlfriends for refusing to submit to their demands.<sup>264</sup> Although most of the acid violence in Uganda is directed primarily at women, children are also affected by acid violence in this East African country—many mothers, blinded by acid attacks are no longer able to take care of their young children, and, in at least one case, a pregnant mother who was burned by acid almost died while giving birth and afterward found it very difficult to take care of her child.<sup>265</sup> For example, a Ugandan woman named Gloria Kankunda, whose co-wife hired

260. *Id.*

261. Amy Fallon, *Meet the Inspiring Acid Attack Survivors Who Are Pushing to Change Uganda's Laws*, TAKEPART (Mar. 1, 2016), <http://www.takepart.com/article/2016/03/01/uganda-acid>.

262. *Id.*

263. *See id.*

264. *See, e.g., id.* (a Ugandan man perpetrated an attack on his girlfriend who did not want to marry him until after she had completed her education).

265. *See id.* *See also* Sara Malm, *I'll Make These Scars Stars: Brave Women Who Have Survived Acid Attacks in Uganda Reveal Their Injuries in a Bid to Prevent Further Assaults*, DAILY MAIL (Apr. 22, 2016), <https://www.dailymail.co.uk/news/article-3553582/I-ll-make-scars-stars-Brave-women-survived-acid-attacks-Uganda-reveal-injuries-bid-prevent-attacks.html>.

someone to throw acid on her, was not just scarred “physically, psychologically, and socially,” but she spent two years in South Africa where she underwent “20 skin-graft reconstructions” and several operations, during which time she was unable to care for her family.<sup>266</sup>

In 2017, the UK-based *Independent* newspaper reported that the mouth of an Ethiopian woman was “melted shut in horrific acid attack by husband.”<sup>267</sup> Other writers have reported that these attacks are part of the country’s “hidden culture of violence against women.”<sup>268</sup> Acid violence against Ethiopian women is not limited to those living in mainland Ethiopia. For example, an Ethiopian immigrant woman living in Hyattsville, Maryland, was attacked with sulfuric acid by a male roommate who was also an Ethiopian.<sup>269</sup> The victim, Selamawit Tefera Kelbessa, a former Ethiopian Airlines hostess, spent nearly a year in the hospital and eventually took her own life on April 12, 2019.<sup>270</sup>

Additionally, in April 2011, a Liberian man was attacked by acid and eventually flown to the Johns Hopkins Burn Center in Baltimore, Maryland for treatment.<sup>271</sup> The perpetrator of the attack was never found.<sup>272</sup> In 2015, a man in Liberia’s Bong County was arrested and

266. Fallon, *supra* note 261.

267. Jon Sharman, *Ethiopian Woman’s Mouth ‘Melted Shut in Horrific Acid Attack by Husband’*, INDEPENDENT (Sept. 1, 2017), <https://www.independent.co.uk/news/world/africa/ethiopia-woman-acid-attack-mouth-melted-shut-husband-atsede-nigussiem-tigray-area-a7924286.html>.

268. Andrew Heavens, *Ethiopia Acid Victim Shows Many Women are at Risk*, REUTERS (Mar. 27, 2007), <https://www.reuters.com/article/us-ethiopia-acid/ethiopia-acid-victim-shows-many-women-are-at-risk-idUSL2331917720070327?pageNumber=>. See also Daniele Selby, *An Ethiopian Mother Was the Victim of a Shocking Acid Attack*, GLOBAL CITIZEN (Sept. 1, 2017), <https://www.globalcitizen.org/en/content/ethiopia-acid-attack-mother-levelthelaw/>; Amber Henshaw, *Acid Attack on Woman Shocks Ethiopia*, BBC NEWS (Mar. 28, 2007), <http://news.bbc.co.uk/2/hi/africa/6498641.stm>.

269. See Salem Solomon & Mestawet Aragaw, *After Horrific Attack, Ethiopian Immigrant Rebuilds Her Life*, VOA NEWS (Sept. 15, 2018, 8:26 PM), <https://www.voanews.com/usa/after-horrific-attack-ethiopian-immigrant-rebuilds-her-life>.

270. See Spotlight: #MeTooEthiopia “Assault is a Crime, Not a Culture,” TADIAS MAG. (Apr. 16, 2019), <http://www.tadius.com/04/16/2019/spotlight-metooethiopia-assault-is-a-crime-not-a-culture/>.

271. See Linda Ringe, *Liberian Refugee Gets New Face After Devastating Acid Burn*, VOA NEWS (Jan. 31, 2013), <https://www.voanews.com/science-health/liberian-refugee-gets-new-face-after-devastating-acid-burn>.

272. *Id.*

charged with killing his girlfriend by pouring acid on her. The perpetrator, named Tetoe Sumo, later confessed to the crime.<sup>273</sup>

Acid violence, especially against girls, has also been on the rise in Nigeria,<sup>274</sup> South Africa,<sup>275</sup> and Tanzania.<sup>276</sup> While most acid violence is directed at adults, particularly women, children are still affected by them. For one thing, a lot of the women who suffer from acid attacks either die or are permanently disabled and rendered incapable of taking care of their children. In addition to psychological and mental problems, many of these women are physically incapacitated, making it very difficult for them to contribute to family care. In situations in which the women are ostracized by their communities as a result of the disfigurement suffered from acid violence, the shaming also affects the children and could permanently impair their ability to function as productive adults.

#### b. Superstitions Regarding Birth

In Africa, “superstitions among various subcultures about births have a significant impact on children.”<sup>277</sup> Within some subcultures in Africa, certain types of births are considered unlucky or capable of bringing

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273. See Lennart Dodoo, *Liberia: Man Allegedly Kills Girlfriend with Acid*, FPA, <https://frontpageafricaonline.com/front-slider/liberia-man-allegedly-kills-girlfriend-with-acid/> (last updated May 15, 2018).

274. See Kehinde Oluseyi Macaulay, *Assessing Domestic Violence in Nigeria*, 3 *TEXILA INT’L J. ACAD. RES.* at 1–3 (2016) (noting, inter alia, that acid attacks have become an important part of domestic violence in Nigeria). See also Osai J. Ojigbo, *Prohibiting Domestic Violence Through Legislation in Nigeria*, 82 *GENDER & LEGAL SYS.* 86, 89 (2009) (noting, inter alia, that so-called “acid baths” have become an important source of violence against women).

275. See Yolisa Tswanya, *Sulphuric Acid Attack Shocks Paarl Family*, IOL (Mar. 26, 2018), <https://www.iol.co.za/news/south-africa/western-cape/sulphuric-acid-attack-shocks-paarl-family-14072259> (discussing that in 2018, sulfuric acid was dumped on a married man with a wife and three children and who was involved in a minor traffic accident, was attacked with sulfuric acid).

276. See Faith Karimi, *Tanzania Arrests 15 Suspects in Acid Attacks*, CNN, <https://www.cnn.com/2013/09/18/world/tanzania-acid-attack-arrests/index.html> (last updated Sept. 18, 2013, 11:11 AM). See also Raziye Akkoc, *Zanzibar Acid Attack Survivors: We Have Lost Faith in Ever Getting Justice*, TELEGRAPH (Sept. 17, 2015, 7:00 AM),

<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/zanzibartanzania/11870313/Zanzibar-acid-attack-survivors-We-have-lost-faith-in-ever-getting-justice.html>.

277. See Mbaku, *The Rule of Law*, *supra* note 1, at 399.

“evil spirits to the family or community.”<sup>278</sup> Although superstitions differ among the continent’s different ethnocultural groups, the following can be identified as births that are considered by several subcultures to create problems for the family and/or community:<sup>279</sup> (i) multiple births; (ii) birth order and the sex of the child; (iii) premature births; (iv) “fast” or “quick” births; and (v) unusual position of the infant during labor.<sup>280</sup>

For example, research has determined that children have been abandoned or killed by some subcultures in Madagascar because they were supposedly born on an “unlucky” day.<sup>281</sup> At its 34th Session held on September 23, 2003, to consider reports submitted by the Government of Madagascar under Article 44 of the UN Convention on the Rights of the Child, the UN Committee on the Rights of the Child noted that “the murder or rejection of children thought to be ‘born on an unlucky day’ is beginning to disappear, but remains deeply concerned that such murders still occur and at the rejection or abandonment of twins in the Mananjary region.”<sup>282</sup>

There is a long history of twin-killings in Nigeria. In an article published in the *West African Journal of Medicine*, Asindi, Young, and Udo determined that about 10% of the Efik, Ibibio, and Annang ethnocultural groups still “hold a taboo against twins: as babies derived from the devil, non-human and punishment from the gods for sinfulness.”<sup>283</sup> The study also determined that many of the twins were subsequently “rejected and killed.”<sup>284</sup> It has long been a taboo in most parts of Southeastern Nigeria to bear twins and “[m]others who bore twins were thought to have had intercourse with the devil spirit and given birth to something monstrous and unnatural.”<sup>285</sup> In addition to brutally killing the twins, “the mother was shunned by her husband and cast out of the family” and subsequently “relegated to live in ‘twin villages.’”<sup>286</sup>

278. *Violating Children’s Rights*, *supra* note 202, at 20.

279. *Id.*

280. *Id.*

281. *Id.*

282. Comm. on the Rights of the Child, Concluding Observations: Madag., ¶ 30, U.N. Doc. CRC/C/15/Add.218 (Oct. 27, 2003).

283. A.A. Asindi et al., *Brutality to Twins in South-Eastern Nigeria: What Is the Existing Situation?*, 12 W. AFR. J. MED. 148, Abstract (1993).

284. *Id.*

285. *Id.*

286. *Id.*



However, in the mid-1880s, Scottish nurse and Christian missionary, Mary Mitchell Slessor, arrived in Nigeria to convert the “natives” to Christianity and fight to abolish the practice of twin infanticide among various subcultures in Southeastern Nigeria.<sup>287</sup> While Slessor was quite successful in her work, the problem of twin infanticide was not completely eliminated from Nigeria. For example, the Bassa Komo ethnocultural group, which is located on the outskirts of Nigeria’s capital city, Abuja, still brands twin children as evil and hence, subject to being killed. In 2017, Chika Oduah, a reporter for the *Voice of America News* reported that the killing of twin babies, who are branded “evil children,” continues to this day in Kaida Village, which is a community of the Bassa Komo.<sup>288</sup> Nigeria is not the only country where traditional and customary practices support and condone the killing of twin babies. The killing of twins has also been reported in Kenya<sup>289</sup> and Cameroon.<sup>290</sup>

### c. The Flattening of the Breasts of Young Girls

Breast flattening, which is also known generally as “breast ironing,” is a common practice in many African countries. In Cameroon, for example, when “girls start showing signs of puberty, mothers begin ‘ironing’ their breasts, using heated tools like stones, spatulas, and pestles to pound or massage their chests, in an attempt to prevent them

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287. See generally ELIZABETH ROBERTSON & MARY SLESSOR: THE BAREFOOT MISSIONARY (2017) (examining, inter alia, Mary Slessor’s efforts to abolish twin infanticide among various subcultures in Southeastern Nigeria); see also Misty L. Bastian, “The Demon Superstition”: Abominable Twins and Mission Culture in Onitsha History, 40 ETHNOLOGY (SPECIAL ISSUE) 13 (2001).

288. Chika Oduah, *Campaign Tackles Baby-Killing Ritual in Nigeria*, VOA NEWS (Oct. 3, 2017, 7:00 PM), <https://www.voanews.com/africa/campaign-tackles-baby-killing-ritual-nigeria>. See also Orji Sunday, ‘They Ensure each Twin Baby Dies’: The Secret Killings in Central Nigeria, GUARDIAN (Jan. 19, 2018, 5:56 EST), <https://www.theguardian.com/working-in-development/2018/jan/19/twin-baby-dies-secret-killings-nigeria-remote-communities>.

289. See *Twins Both Curse and Blessing in African Societies*, STANDARD DIGITAL (Jul. 5, 2017), <https://www.standardmedia.co.ke/article/2001246099/twins-both-curse-and-blessing-in-african-societies>.

290. See Mildred E. Taylor, *The Koma Tribe of Cameroon and Nigeria that Buried Twins and Their Mothers Alive as Custom*, FACE2FACE AFRICA (Sept. 9, 2018, 12:30 PM), <https://face2faceafrica.com/article/the-koma-tribe-of-cameroon-and-nigeria-that-buried-twins-and-their-mothers-alive-as-custom>.

from developing.”<sup>291</sup> Like perpetrators of FGM, those who impose this insidious practice on their daughters claim that it is being undertaken for the good of these girls.<sup>292</sup>

Although research has determined that breast ironing is present among various subcultures in Chad, Guinea-Bissau, Benin, and Togo, it is a most common practice in Cameroon, where it is estimated that “a quarter of girls and women have had their breasts ‘ironed.’”<sup>293</sup> Cameroonian practitioners of this atrocious abuse of children believe that it protects their children from “unwanted sexual advances.”<sup>294</sup> However, the practice, which is considered a major form of physical and sexual abuse of children, inflicts significant amounts of mental and physical trauma on the affected children and scars them for life.<sup>295</sup>

Short-term effects of breast ironing include “tissue damage, pain, burns, irritation, infection, scarring, depression and shame, among others.”<sup>296</sup> However, while researchers argue that there are many long-term psychological and physical side effects, no detailed studies have yet been undertaken to figure them out. Those parents who undertake the ironing or flattening of the breasts of their daughters, as are those who undertake other harmful practices based on tradition, religion, customs, and superstition, believe and argue that they are doing so in the best interests of their children. Unfortunately, the results are usually physical, psychological, and mental pain for the girls and a life full of pain and suffering.<sup>297</sup>

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291. Daniele Selby & Julie Ngalle, *The Sad Reason Mothers in Cameroon Are ‘Ironing’ Their Daughters’ Breasts*, GLOBAL CITIZEN (Apr. 6, 2018), <https://www.globalcitizen.org/en/content/breast-ironing-cameroon-harmful-practice-girls/>.

292. *Id.*

293. *Id.*

294. *Id.*

295. See Stav Ziv, *Showing Love Through Breast Ironing: Why Some Daughters Endure This Painful Practice to Appease Their Mothers*, NEWSWEEK (Aug. 3, 2017), <https://www.newsweek.com/2017/08/11/breast-ironing-painful-girls-going-through-puberty-cameroon-mothers-often-do-645388.html>.

296. *Violating Children’s Rights*, *supra* note 202, at 21.

297. See Mbaku, *The Rule of Law*, *supra* note 1, at 401.

## d. Blood-Letting

Until the advent of modern medicine, blood-letting was considered by many cultures around the world as a cure for a range of diseases, including elephantiasis, rheumatism, and meningitis, as well as high fevers and headaches.<sup>298</sup> However, in addition to the fact that blood-letting can cause “severe bleeding,” it can also produce “anemia, infection, contraction of STIs, and death.”<sup>299</sup> Although advances in science and medicine have disproven blood-letting’s curative powers and resulted in its being abandoned or outlawed in many Western societies, the practice remains quite popular in several parts of Africa.<sup>300</sup>

For example, studies of blood-letting have determined that two types of practices, “wagemt” and “mogbagegn” are quite popular in the highlands of the Amhara and Tigray regions of Ethiopia.<sup>301</sup> These practices are carried out through “vein resection on the scalp and on the arms” and “the rationale behind [this practice] is that the body is believed to be decaying internally causing tissue swelling and deteriorating health.”<sup>302</sup> In these regions of Ethiopia, blood-letting is prescribed for the treatment of “encephalitis, rheumatism, high fever and headache (usually seen during epidemics of meningitis).”<sup>303</sup>

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298. *Violating Children’s Rights*, *supra* note 202, at 21.

299. *Violating Children’s Rights*, *supra* note 202, at 21. STIs refer to sexually transmitted infections. *See, e.g.*, Anders Jeppsson et al., *Health Care Providers’ Perceptions on Harmful Traditional Health Practices in Ethiopia*, 17 ETHIOPIAN J. HEALTH DEV. 35, 40 (2003).

300. *See* Daniel B. Hrdy, *Cultural Practices Contributing to the Transmission of Human Immunodeficiency Virus in Africa*, 9 REVIEWS INFECTIOUS DISEASES 1109, 1110 (1987) (arguing, *inter alia*, that so-called “medicinal bloodletting” is a major contributor to HIV infections in some African countries).

301. *See* DAWIT ASSEFA, ET AL., ETHIOPIA PUB. HEALTH TRAINING INITIATIVE, HARMFUL TRADITIONAL PRACTICES, at 34 (2005), [https://www.cartercenter.org/resources/pdfs/health/ephti/library/modules/Degree/Mod\\_H\\_TP\\_final.pdf](https://www.cartercenter.org/resources/pdfs/health/ephti/library/modules/Degree/Mod_H_TP_final.pdf).

302. *Id.* at 34–35.

303. *Id.*

## e. Corporal Punishment

Research shows that corporal punishment, which is also referred to as “violent physical discipline,”<sup>304</sup> is by far one of the most important and popular forms of violence imposed on children, including those in Africa.<sup>305</sup> The UN Committee on the Rights of the Child has noted that any efforts, whether at the national or international level, to improve and ensure the recognition and protection of the rights of the child must include a strategy to significantly reduce and perhaps, even eliminate, corporal punishment and other cruel or degrading forms of punishment.<sup>306</sup>

In addition to the general agreement that “corporal punishment is incompatible with the [Convention on the Rights of the Child], many child-advocacy groups, including the Committee on the Rights of the Child, have argued that corporal punishment is “a long standing and pervasive practice, still socially approved and lawful in the home and family in a large majority of states” and that “[i]n some cases it is supported by religious belief, although influential leaders of all the major religions have called for its prohibition and elimination.”<sup>307</sup>

The Committee on the Rights of the Child defines “corporal” or “physical” punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however, light.”<sup>308</sup> Most corporal punishment involves “hitting (‘smacking’, ‘slapping’, ‘spanking’) children, with the hand or with an implement—a whip, stick, belt, shoe, wooden spoon, etc.”<sup>309</sup> Corporal punishment can also involve “kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in

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304. UNICEF, CHILD DISCIPLINARY PRACTICES AT HOME: EVIDENCE FROM A RANGE OF LOW - AND MIDDLE - INCOME COUNTRIES, at 5 (2010), [https://www.unicef.org/protection/Child\\_Disciplinary\\_Practices\\_at\\_Home.pdf](https://www.unicef.org/protection/Child_Disciplinary_Practices_at_Home.pdf) [hereinafter UNICEF, CHILD DISCIPLINARY PRACTICES AT HOME] .

305. See Mbaku, *The Rule of Law*, *supra* note 1, at 401.

306. Comm. on the Rights of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, ¶ 3, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter *The Right of the Child to Protection*].

307. *Violating Children’s Rights*, *supra* note 202, at 23.

308. *The Right of the Child to Protection*, *supra* note 305, ¶ 11.

309. *Id.*

uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).<sup>310</sup>

While parents and the community are expected to guide, correct, and help the child develop into a productive and responsible adult, they must do so only in ways that do not involve the justification of violence against and humiliation of the child.<sup>311</sup> The Committee on the Rights of the Child recognizes "that parenting and caring for children, especially babies and young children, demand frequent physical actions and interventions to protect them."<sup>312</sup> However, such nurturing activities must be separated from "the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation" to the child.<sup>313</sup>

UNICEF has noted that "[v]iolent child discipline may be either physical or psychological in nature" and that "[b]oth forms matter with respect to children's rights and childhood outcomes."<sup>314</sup> Violent psychological discipline, argues UNICEF, "involves the use of guilt, humiliation, the withdrawal of love, or emotional manipulation to control children."<sup>315</sup> Like physical discipline (i.e., corporal punishment), violent psychological discipline has repercussions for children.<sup>316</sup>

The CRC recognizes the "inherent dignity" and "equal and inalienable rights of *all members of the human family*" as the "foundation of freedom, justice and peace in the world."<sup>317</sup> The CRC also notes that "in the Universal Declaration of Human Rights, the [UN] has proclaimed that childhood is entitled to special care and assistance."<sup>318</sup> Article 37 of the CRC imposes an obligation on States Parties to ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading

310. *Id.*

311. *Id.* ¶ 13.

312. *Id.* ¶ 14.

313. Child The Right of the Child to Protection, *supra* note 305, at 5.

314. UNICEF, CHILD DISCIPLINARY PRACTICES AT HOME, *supra* note 303, at 5.

315. *Id.*

316. *Id.* For example, a study of Chinese families shows that "fathers who used physical control had sons who were more physically aggressive with their peers, and mothers who used psychological control had daughters who were both more physically and emotionally aggressive." *Id.*

317. Convention on the Rights of the Child, *supra* note 215, at pmbl (emphasis added). The expression "all members of the human family," of course, includes children. *Id.*

318. *Id.* at pmbl.

treatment or punishment.”<sup>319</sup> The Committee on the Rights of the Child notes that Article 37 of the CRC “is complemented and extended by article 19,”<sup>320</sup> which imposes an obligation on all States Parties to:

Take all appropriate legislative, administrative, social and educational measures to protect the child from *all forms of physical or mental violence*, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>321</sup>

The Committee on the Rights of the Child notes that the CRC’s provision regarding child discipline is not ambiguous because the provision specifically refers to “all forms of physical or mental violence”<sup>322</sup> and such a mandate on States Parties “does not leave room for any level of legalized violence against children.”<sup>323</sup> The CRC also deals with child discipline outside the home. Specifically, Article 28, paragraph 2, imposes an obligation on States Parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”<sup>324</sup>

The CESCR has noted that “corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the [UDHR] and both Covenants: the dignity of the individual,” and that “[o]ther aspects of school discipline may also be inconsistent with human dignity, such as public humiliation.”<sup>325</sup>

The Committee on the Rights of Child also notes that “[c]orporal punishment has also been condemned by regional human rights mechanisms,” including “[t]he European Court of Human Rights,”

319. *Id.* art. 37(a).

320. The Right of the Child to Protection, *supra* note 305, at 6.

321. Convention on the Rights of the Child, *supra* note 215, art. 19(1) (emphasis added)

322. *Id.*

323. The Right of the Child to Protection, *supra* note 305, at 6.

324. Convention on the Rights of the Child, *supra* note 215, art. 28(2).

325. Committee on Economic, Social and Cultural Rights [CESCR], *CESCR General Comment No. 13: The Right to Education*, ¶ 41, E/C.12/1999/10 (Dec. 8, 1999), [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d\)GeneralCommentNo13Therighttoeducation\(article13\)\(1999\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13Therighttoeducation(article13)(1999).aspx).

which, “in a series of judgments, has progressively condemned corporal punishment of children, first in the penal system, then in schools, including private schools, and most recently in the home.”<sup>326</sup> The African Commission on Human and Peoples’ Rights (“African Commission”) is tasked with monitoring the implementation of the African Charter on Human and Peoples’ Rights.<sup>327</sup>

In 2003, the African Commission delivered a decision concerning possible violations of Article 5 of the African Charter on Human and Peoples’ Rights, which prohibits torture and cruel, inhuman, and degrading treatment.<sup>328</sup> According to the Complainant, on June 13, 1999, “the students of the Nubia Association of Ahlia University held a picnic in Buri, Khartoum.”<sup>329</sup> The government’s security agents and policemen subsequently beat some students and arrested others.<sup>330</sup> The students were alleged to have “violated ‘public order’ contrary to Article 152 of the Criminal Law of 1991 because they were not properly dressed or acting in a manner considered being immoral.”<sup>331</sup> Specifically, the “Complainant avers that the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.”<sup>332</sup>

The students arrested by the security forces and the police were subsequently convicted and sentenced by the court to fines and lashes.<sup>333</sup> In the complaint sent to the African Commission on March 17, 2000, the Complainant alleged a violation of Article 5 of the African Charter on Human and Peoples’ Rights.<sup>334</sup> In its decision, the African Commission held that “[t]here is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offenses. Such a right would be tantamount to sanctioning State

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326. The Right of the Child to Protection, *supra* note 305, at 6–7.

327. Banjul Charter, *supra* note 159, art. 45(3).

328. *Id.* art. 5.

329. Doebbler v. Sudan, Communication 236/2000, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 1 (2003), <http://hrlibrary.umn.edu/africa/comcases/236-2000.html>.

330. *Id.* ¶ 2.

331. *Id.*

332. *Id.* ¶ 3.

333. *Id.* ¶ 5.

334. *See id.* ¶ 35.

sponsored torture under the Charter and contrary to the very nature of this human rights treaty.”<sup>335</sup>

In *Christian Education South Africa v. Minister of Education*, the Constitutional Court (“CC”) of South Africa was called upon to determine whether “when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?”<sup>336</sup> The CC upheld the High Court’s ruling that “corporal punishment in schools infringed the children’s right to dignity and security of the person and was accordingly not protected by Section 31 of the Constitution.”<sup>337</sup>

The Committee on the Rights of the Child argued further that any interpretation of the principle “best interests of the child” must be “consistent with the whole Convention [CRC], including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.”<sup>338</sup>

#### f. Cosmetic Mutilation

Throughout the continent, many subcultures undertake what are considered “cosmetic” procedures to significantly improve and enhance their children’s beauty.<sup>339</sup> For example, several types of heavy metal rings may be placed around the necks of young girls and used to stretch their necks and enhance their beauty and appeal to future husbands.<sup>340</sup> Of course, the enhanced beauty will not only make the girl more attractive to prospective suitors but also significantly increase the bribe price that is supposed to be paid to the girl’s family by the husband-to-be.<sup>341</sup>

335. *Id.* ¶ 42 (referencing the Banjul Charter).

336. *Christian Educ. South Africa v. Minister of Educ.* 2000 (4) SA 757 (CC) at para. 1 (S. Afr.). This case was triggered by the passage of the South African Schools Act (the Schools Act) in 1996. *See* South African Schools Act 17579 of 1996 §§ 10(1)–(2).

337. *Christian Education South Africa*, (4) SA 757, at para. 6.

338. The Right of the Child to Protection, *supra* note 305, at 7.

339. *Violating Children’s Rights*, *supra* note 202, at 24.

340. *Id.*

341. *See id.*



According to the International NGO Council on Violence Against Children, this practice is quite pervasive in Asia and southern Africa.<sup>342</sup>

In various parts of Ethiopia, partly to “highlight a girl’s beauty or to scare enemies, cuts are made in the lips, and sometimes ears, of young girls and a plate of variable size, is inserted.”<sup>343</sup> Practitioners of this tradition quite often go further and, in addition to the cuts, also extract the front teeth in order to enhance the inserting of the plates.<sup>344</sup> With time, larger and larger plates are inserted in order to stretch the girl’s lips to the size that reflects beauty standards generally recognized by the community.<sup>345</sup> This practice is known to seriously affect the health of the victims—in addition to various infections, the victim can find it very difficult to eat and hence, may suffer from malnutrition.<sup>346</sup>

g. Cursing

Cursing rituals practiced by many subcultures in Africa are known to contribute to the sexual exploitation and abuse of children. In many instances, children are forced or coerced to take “oaths of allegiance” to various traditional religious deities and spirits.<sup>347</sup> These rituals form an effective instrument of control over children, and if the child attempts to breach the terms of the ritual, they are punished severely by the deity, as well as the community of which the child is a member. Children who take these oaths live in extreme fear and are highly susceptible to trafficking and sexual exploitation.<sup>348</sup>

ECPAT UK, the NGO which works to protect children globally, has determined that it is often the case that children who are trafficked “take part in ritual oaths before they leave their country of origin which they

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342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. Morissanda Kouyaté (Director of Operations on Inter-African Committee on Traditional Practices Affecting the Health of Women and Children), *Harmful Traditional Practices Against Women and Legislation*, U.N. Doc. EGM/GPLHP/2009/EP.07, ¶ 2.4 (May 11, 2009) (writing for the UN Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women).

347. *Violating Children’s Rights*, *supra* note 202, at 24.

348. *Id.*

are told is to keep them or their traffickers safe.”<sup>349</sup> During the ritual ceremonies, a child is usually required to provide samples of their “hair, blood or personal belongings which will be contained in a ‘packet’ and the child is taken to a shrine or graveyard to swear an oath or promise.”<sup>350</sup> While some subcultures have claimed that the oath is designed to ensure the child’s “ongoing beauty and prosperity,” it can also be used “to prevent [the child] from speaking out about their experiences, from running away, or as a means of ensuring that they work off a ‘debt.’”<sup>351</sup> Many children who are subjected to these oaths are usually afraid to breach them for fear that “either they or a member of their family will suffer severe consequences, including death.”<sup>352</sup>

#### h. Female Genital Mutilation

Globally and in Africa, FGM is by far the most recognized harmful traditional practice. The World Health Organization (“WHO”) has defined FGM as “all procedures that involve the partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.”<sup>353</sup> FGM has been classified into four categories, “depending on the degree and severity” and these are: “(i) clitoridectomy, ii) excision, iii) infibulation, and iv) other.”<sup>354</sup>

The practice of FGM “violates numerous human rights, including the right to health and the right to protection from all forms of violence.”<sup>355</sup> FGM has also been recognized by international, regional and national human rights organizations as “violating a child’s right to protection from torture and cruel, inhuman or degrading treatment.”<sup>356</sup> Research has determined that FGM is widely practiced by many subcultures in Africa,

349. END CHILD PROSTITUTION CHILD PORNOGRAPHY AND TRAFFICKING OF CHILDREN (ECPAT), UNDERSTANDING CHILD TRAFFICKING I (2009).

350. *Id.*

351. *Id.*

352. *Id.*

353. *Female Genital Mutilation: Key Facts*, WORLD HEALTH ORG. (WHO) (Jan. 31, 2018), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

354. *Violating Children’s Rights*, *supra* note 202, at 26. *See also Female Genital Mutilation: Key Facts*, *supra* note 345 (providing a more detailed analysis of the four major types of FGM).

355. *Violating Children’s Rights*, *supra* note 202, at 26.

356. *Id.*

the Middle East, and South Asia.<sup>357</sup> For example, it has been determined that in the Somali Region of Ethiopia and what until 2010, was the North Eastern Province of Kenya, as much as 97.3% and 98.8% of girls respectively have been subjected to the most severe form of FGM.<sup>358</sup>

Globally, it is estimated that over 140 million girls and women are subjected to FGM, many of them before they reach the age of fifteen years.<sup>359</sup> The subcultures that subject their girl children to FGM argue that the procedure will render the girl (i) cleaner and more suitable for marriage; (ii) more fertile and hence, more attractive to prospective husbands; (iii) more beautiful, attractive, and pleasing to suitors; (iv) less likely to be promiscuous—the girl who has undergone FGM, it is argued, will most likely retain her virginity until marriage and remain faithful to her husband in marriage; and (v) more acceptable to the community.<sup>360</sup>

As countries and communities around the world have become aware of the short- and long-term harmful effects of FGM, some individuals and organizations in these countries have begun to argue that, given its persistence, trained and licensed surgeons should be legally allowed to perform the procedure in modern medical facilities since this will significantly reduce the complications that have, heretofore, plagued this procedure, as performed by traditional “experts.” Nevertheless, FGM, even if it is performed by trained and skilled physicians, can still threaten the short- and long-term health of the girl—in addition to the “increased risk of disease transmission,” the girl who has undergone FGM is also exposed to the risk of contracting fistulas, as well as, “increased complications and difficulty during childbirth, including hemorrhaging, shock, sepsis, and death to both the mother and child.”<sup>361</sup> Hence, despite the efforts to “modernize” FGM and how it is undertaken, it remains a serious threat to the lives of girls in Africa and other parts of the world. The violation of the person of the girl-child, at the very least, is a major

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357. *Id.*

358. NAOMI KIPURI & ANDREW RIDGEWELL, MINORITY RIGHTS GROUP (UK) INTERNATIONAL, *A DOUBLE BIND: THE EXCLUSION OF PASTORALIST WOMEN IN THE EAST AND HORN OF AFRICA* (2008).

359. *Violating Children's Rights*, *supra* note 202, at 26.

360. *Id.* at 27. *See also* Mbaku, *The Rule of Law*, *supra* note 1, at 404.

361. *Violating Children's Rights*, *supra* note 202, at 27.

infringement on her human rights and does not serve any medical purpose.<sup>362</sup>

In countries where FGM is practiced, many proponents of the practice have argued that it is a major religious rite. In fact, FGM in Africa is undertaken by members of Christian and Muslim families, as well as those of households that practice traditional African religions. Scholars have argued, however, that “none of the holy texts of Christianity, Judaism, or Islam requires or prescribes the practice [i.e., FGM] and many religious scholars have spoken publicly against this belief.”<sup>363</sup> Scholars have long argued that “FC/FGM [female cutting/female genital mutilation] is a cultural, not a religious, practice” and that “[t]he practice predates the arrival of Christianity and Islam in Africa and is not a requirement of either religion.”<sup>364</sup> FC/FGM, it is argued, is “practiced by Jews, Christians, Muslims and indigenous religious groups in Africa.”<sup>365</sup> In 2006, Dr. Ali Gom’a, then Grand Mufti of Egypt, “confirmed the un-Islamic character of female circumcision and [subsequently] issued a fatwa accordingly.”<sup>366</sup>

During the period July 20–23, 1998, medical scholars and practitioners, as well as religious leaders, met in convention in The Gambian capital, Banjul, under the auspices of the Inter-African Committee on Traditional Practices, to discuss issues associated with

362. GENDER & DEV. NETWORK, *supra* note 227, at 11.

363. *Violating Children’s Rights*, *supra* note 202, at 27.

364. FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 6 (Anika Rahman & Nahid Toubia eds., 2000).

365. *Id.*

366. Gritt Klinkhammer, *Costs of Religious Pluralism in Liberal Societies*, in ON EXIT: INTERDISCIPLINARY PERSPECTIVES ON THE RIGHT OF EXIT IN LIBERAL MULTICULTURAL SOCIETIES 157, 167 n.26 (Dagmar Borchers & Annamari Vitikainen eds., 2012) In Egypt, the Grand Mufti is the government’s main source of religious authority and is considered by both the government and the people as the symbolic religious representative of the government. They can issue *fatwas* on religious matters. Professor Gom’a served as the Grand Mufti of Egypt from September 28, 2003 to February 11, 2013. See Amr Osman, *Ali Gom’a: Kill Them, They Stink*, Memo Middle East Monitor (Jan. 27, 2014, 11:07 AM), <https://www.middleeastmonitor.com/20140127-ali-gomaa-kill-them-they-stink/>. The al-Azhar Mosque and al-Azhar University and the Grand Mufti are considered the most important sources of authority for Sunni Muslims. See MARIZ TADROS, *THE MUSLIM BROTHERHOOD IN CONTEMPORARY EGYPT: DEMOCRACY REDEFINED OR CONFINED* 152 (2012).

FGM.<sup>367</sup> The delegates confirmed that “FGM has neither Islamic nor Christian origin or justifications,” and that they were “[s]eriously concerned by the incorrect interpretations and misuse of Islamic teachings to perpetuate violence against women, particularly FGM.”<sup>368</sup> They also pledged to uphold “the principle of equality and justice for all, without discrimination between men and women.”<sup>369</sup> Finally, the delegates to the Banjul Convention “strongly condemned the continuation of female genital mutilation” and committed themselves to finding ways to “clarify the misinterpretation of religion and to teach the true principles of Islam and Christianity with regard to violence against women, including FGM.”<sup>370</sup>

In a recent article, Reyhana Patel, Director of External Relations for Islamic Relief Canada, stated that “Islam does not advocate FGM and has a key role to play in eradicating this brutal practice.”<sup>371</sup> The article also noted that the “first-ever conviction” of an individual for practicing “female genital mutilation/cutting (FGM/C)” had just occurred in the UK, “more than 30 years after the practice was criminalized in that country.”<sup>372</sup> The hope is that the UK will continue the use of the law to eradicate this practice and that other countries, including especially those in Africa, will learn from the UK’s experience and example and criminalize the practice, as well as make certain that those laws prohibiting FGM/C are fully enforced and done so effectively and judiciously.

If FGM cannot be justified on religious grounds and it is banned in many countries, then why is it that the practice remains quite pervasive in many countries? A possible answer to this question is that in many countries, especially in Africa, laws are usually not enforced effectively or only done so capriciously and arbitrarily, usually in ways that disadvantage girls and women or discriminate against them. However,

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367. See Regina Mustafa Abusharaf, *Gender Justice and Religion in sub-Saharan Africa*, in RELIGION AND THE GLOBAL POLITICS OF HUMAN RIGHTS 129 (Thomas Banchoff & Robert Wuthnow eds., 2011).

368. *Id.* at 143.

369. *Id.* at 144.

370. *Id.*

371. Reyhana Patel, *Islam Must Never be Used to Justify Female Genital Mutilation*, [REUTERS](http://news.trust.org/item/20190205180900-4sb36/), (Feb. 6, 2019, 8:00 AM), <http://news.trust.org/item/20190205180900-4sb36/>.

372. *Id.*

there are many organizations, both at the international and national levels, that are working to fully and effectively challenge the continued practice of FGM. For example, in 2008, eleven UN and UN-related agencies issued a joint statement on eliminating female genital mutilation and in this statement, they argued that “[f]emale genital mutilation is a dangerous practice, and a critical human rights violation.”<sup>373</sup>

It is important to note that these UN agencies have pledged their support to regional and national organizations, including governments, that are fighting to eliminate FGM. Enacting legislation to prohibit the practice of FGM must be part of a holistic approach to the elimination of this insidious practice. Elsewhere, I have argued, however, that “while legal prohibition is an important first step to the eradication of FGM, it is a necessary but not sufficient condition.”<sup>374</sup> Sufficiency “requires that the legal prohibition actually be enforced within the country.”<sup>375</sup> Although many African countries legally prohibit FGM, many subcultures still engage in this practice because of “the failure of local authorities to enforce the laws prohibiting the practice.”<sup>376</sup>

### i. Marriage of Under-Age Girls

In a book published in 2014, former U.S. President Jimmy Carter, stated that “[a]nother serious and pervasive example of gender abuse is the marriage of young girls, often without their consent and contrary to their best interests.”<sup>377</sup> He then goes on to note that “[t]here are an estimated 14 million girls married every year before they reach the age of eighteen, and 1 in 9 of these are younger than fifteen.”<sup>378</sup> Of particular

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373. WORLD HEALTH ORGANIZATION, ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 21 (2008), [https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf?sequence=1) (noting the agencies involved were the Office of the UN High Commissioner for Human Rights, UN AIDS, UN Development Program, UN Economic Commission for Africa, UNESCO, UN Population Fund, UN Commissioner for Refugees, UNICEF, UN Women, and the WHO).

374. Mbaku, *The Rule of Law*, *supra* note 1, at 406.

375. *Id.*

376. *Id.*

377. JIMMY CARTER, A CALL TO ACTION: WOMEN, RELIGION, VIOLENCE, AND POWER 158 (2014).

378. *Id.*

interest to scholars studying child abuse and exploitation in Africa is what President Carter determined during his study of religion and its role in the oppression of women and girls.<sup>379</sup> He found that poverty is a major factor in the decision to marry off an underage daughter.<sup>380</sup> He went on to argue that “marrying off a daughter is a convenient way to eliminate the need to feed her” and, in addition, the family also gets to keep the “bride price” paid on her head by the future husband.<sup>381</sup>

Child marriage is defined as “a marriage of a girl or boy before the age of 18 and refers to both formal marriages and informal unions in which children under the age of 18 live with a partner as if married.”<sup>382</sup> Although child marriage affects both boys and girls, in Africa and parts of Asia, it disproportionately affects girls.<sup>383</sup> In terms of the prevalence of child marriage, of the thirty countries with the highest prevalence rates, twenty-one, or 70%, of them are found sub-Saharan Africa.<sup>384</sup>

Most international human rights instruments provide protections for children, and these include the requirement that there should be a minimum age for marriage and that Member States enact national legislation to affect this marriage requirement. In addition, governments are required to stop harmful social and cultural practices, such as *child marriage*, that affect the welfare and dignity of children.<sup>385</sup>

For example, according to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent

379. *See id.*

380. *See id.* (discussing that marrying off the girl of the family eliminated a mouth to feed).

381. *Id.*

382. *Child Marriage: Challenge, Solution, Resources*, UNICEF, <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage> (last visited Feb. 20, 2020) [hereinafter UNICEF, *Child Marriage*].

383. *See id.* *See also* Saranga Jain & Kathleen Kurz, *New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs*, INT’L CTR. FOR RESEARCH ON WOMEN (ICRW) (Aug. 13, 2019, 8:28 AM), <https://www.girlsnotbrides.org/resource-centre/new-insights-on-preventing-child-marriage-a-global-analysis-of-factors-and-programs/>.

384. Jain & Kurz, *supra* note 382, at 46.

385. ACRWC, *supra* note 99, art. 21.

authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.<sup>386</sup>

In addition, the Committee on the Elimination of Discrimination Against Women in its General Recommendation 21, has recommended that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”<sup>387</sup>

Nevertheless, despite these international efforts to eradicate child marriage and other practices that are harmful to children, many countries in Africa have not yet provided themselves with legal and judicial institutions that are capable of eradicating child marriage and other practices that exploit children, violate their human rights, and deprive them of the right to self-actualization.

Why does child marriage persist in many countries in Africa despite international efforts to eradicate this insidious practice? One factor enhancing and promoting child marriage in Africa is the economic status of the family.<sup>388</sup> Children of poor families, much more so than those in families that are economically more well-off, are more likely to be forced into early marriage.<sup>389</sup> In fact, research shows that poverty increases the risk for child marriage and that the “poorest countries have the highest child marriage rates.”<sup>390</sup> Research by Jain and Kurz has determined that “[a] girl from the poorest household in Senegal, for example, is more than four times as likely to marry before age 18 as a girl in the richest household” and “[i]n Nigeria, 80 percent of the poorest girls marry before the age of 18, compared to 22 percent of the richest girls.”<sup>391</sup> In many African countries, such as Senegal and Nigeria, “[m]any families say they marry their daughters early because girls are an economic

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386. G.A. Res. 1763 A (XVII), at art. 2 (Nov. 7, 1962).

387. U.N. GAOR, 13th Sess., U.N. Doc. A/49/38 (1994), <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>

388. *Economic Impacts of Child Marriage: A Review of the Literature*, 13 REV. FAITH & INT’L AFF. 12, 12 (2015) (noting that “socio-economic status, education levels, and community context . . . influence the likelihood of a girl being married early”).

389. Jain & Kurz, *supra* note 382, at 9.

390. *Id.*

391. *Id.*



burden that can be relieved through marriage.”<sup>392</sup> Of course, such marriages also produce significant economic benefits for the poor family through the receipt of money and other resources from the daughter’s prospective husband/family.<sup>393</sup>

Another risk factor for early or child marriage is illiteracy and low levels of education. Education actually protects the girl from early marriage and allows her to develop into a productive adult before she gets married. Studies show that throughout Africa and other regions of the world, “higher levels of schooling for girls decrease their risk of child marriage.”<sup>394</sup> Specifically, “[g]irls with eight or more years of education are less likely to marry young than girls with zero to three years of school.”<sup>395</sup> Hence, one way to minimize a girl’s chances of marrying young is to provide her with opportunities for education and training.<sup>396</sup> For example, the World Bank has argued that “[b]y keeping girls in school, girls would have a better chance for safety and security, to health and education, and to make their own life choices and decisions.”<sup>397</sup>

Other factors contributing to child marriage include the following: (i) a child becomes an orphan and marriage is seen as a form of safety net or security; (ii) a poor family is displaced by some form of conflict (e.g., sectarian violence, civil war, or natural disaster) and becomes homeless and as a consequence, the child becomes more of an economic burden to the family, necessitating the need to marry her off; and (iii) cultural, religious and customary beliefs that mandate that “a child, especially a girl, is better off or safer in the house of her ‘husband.’”<sup>398</sup>

Unfortunately, girls who are forced into early or underage marriages often “end up being subjected to a lot of physical, emotional, and psychological abuse and exploitation by their husbands.”<sup>399</sup> In addition, research has determined that child marriage usually leads to early childbirth and that “[g]irls who have babies also have a high risk of

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392. *Id.*

393. *Id.*

394. *Id.* at 10.

395. *Id.* at 10.

396. *Educating Girls, Ending Child Marriage*, WORLD BANK (Aug. 24, 2017), <https://www.worldbank.org/en/news/immersive-story/2017/08/22/educating-girls-ending-child-marriage> [hereinafter *Educating Girls*].

397. *Id.*

398. See Mbaku, *The Rule of Law*, *supra* note 1, at 408.

399. *Id.*

suffering from obstetric fistula, a condition in which the vagina, bladder and/or rectum tear during childbirth and, if left untreated, causes lifelong leakage of urine and feces.<sup>400</sup>

In addition, “[c]hild marriage also exposes young married girls to a greater risk of HIV infection.”<sup>401</sup> For example, a study of Kenya and Zambia determined that “15- to 19-year old married girls were 75 percent more likely to have HIV than sexually active, unmarried girls.”<sup>402</sup> The study also determined that “[m]arried girls may be more vulnerable to HIV infection because they have little option to change their sexual behavior even with knowledge about HIV” and that “[c]hild brides also have less access to quality health care services and information compared to girls who marry when they are older.”<sup>403</sup>

Of course, girls who are forced to marry early usually do not have the opportunity to go to school or complete their schooling.<sup>404</sup> As a consequence, they are less likely to acquire the skills that they need to function as productive adults.<sup>405</sup> Early marriage tends to “preclude further education and reinforce poverty.”<sup>406</sup> Most child brides end up in marriage relationships in which the wife is totally dependent on the husband, a situation that can lead to significant levels of “domestic violence, sexual abuse, and isolation from family and the community.”<sup>407</sup>

#### j. Domestic and Sexual Slavery

In many countries throughout Africa, children from poor families are “sold” into servitude in the homes of rich urban families. For example, in a study of Oyo State, Nigeria, Tade and Aderinto determined that the “employment of domestic servants is a common phenomenon . . . where vulnerable children are internally trafficked to work as domestic servants

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400. Jain & Kurz, *supra* note 382, at 7.

401. *Id.*

402. *Id.*

403. *Id.*

404. *See Educating Girls, supra* note 393. (noting that child marriage deprives girl-children of “education and earnings opportunities”).

405. *See id.*

406. Jain & Kurz, *supra* note 382, at 7.

407. *Id.*

in affluent urban households.<sup>408</sup> A study by the Bureau of International Affairs of the U.S. Department of Labor also determined, with respect to Ghana, that “[t]he majority of children subject to human trafficking are transported within Ghana for labor in cocoa, *domestic work*, commercial sexual exploitation, and fishing.”<sup>409</sup> Since children who are trafficked for domestic work in the houses of rich urban dwellers are usually hidden in these homes, “they are not visible to activists who are seeking to eliminate this practice and improve the welfare of these children.”<sup>410</sup>

In a convention adopted in 1930, the ILO defined “forced or compulsory labor” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>411</sup> The Convention to Suppress the Slave Trade and Slavery of September 25, 1926 (“Slavery Convention”) defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>412</sup> Moreover, it defines the slave trade as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”<sup>413</sup>

In 1956, the United Nations adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which imposed obligations on Member

408. Oludayo Tade & Adeyinka A. Aderinto, *Factors Influencing the Demand for Domestic Servants in Oyo State, Nigeria*, 4 INT’L J. CHILD, YOUTH & FAM. STUD. 521, 521 (2012).

409. *Child Labor and Forced Labor Reports: 2018 Findings on the Worst Forms of Child Labor: Ghana*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/ghana> (last visited Apr. 5, 2020) (emphasis added).

410. Mbaku, *The Rule of Law*, *supra* note 1, at 408.

411. Int’l Labor Org. [ILO], *Convention Concerning Forced or Compulsory Labor*, art. 2(1), ILO No. 29 (1930) [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C029](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029).

412. *Convention to Suppress the Slave Trade and Slavery*, League of Nations Doc. 60 L.N.T.S. 253 (Sep. 25, 1926).

413. *Id.* art. 1(2).

States to abolish certain institutions and practices similar to slavery.<sup>414</sup> These included (a) debt bondage; (b) serfdom; as well as:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.<sup>415</sup>

In 1948, the United Nations' UDHR reaffirmed the proclamations of the League of Nations and UN conventions and resolutions by stating in Article 4 that no one shall be subjected to "slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."<sup>416</sup> Then, in 1957, the ILO adopted Convention No. 105: Abolition of Forced Labor Convention, which provides for "the immediate and complete abolition of forced or compulsory labor as specified in Article 1 of this Convention."<sup>417</sup>

414. G.A. Res. 608(XXI) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Apr. 30, 1956).

415. *Id.* art. 1(a)–(d).

416. G.A. Res. 217 (III) A, art. 4 (Dec. 10, 1948).

417. Int'l Labor Org. [ILO], *Abolition of Forced Labor Convention*, at art. 2, ILO No. 105 (1957), [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105). Article 1 imposes an obligation on Member States of the ILO, which have ratified the Abolition of Forced Labor Convention to undertake to "suppress and not to make use of any form of forced or compulsory labor—(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labor for purposes of economic development; (c) as a

Eventually, the international community came to the conclusion that slavery and the slave trade had mutated and had assumed forms not covered by existing legislation. Thus, delegates at the 1998 session of the UN Working Group on Contemporary Forms of Slavery adopted a recommendation that stated that “trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights.”<sup>418</sup> Then, in 1999, the General Assembly of the ILO unanimously adopted Convention 182 on the worst forms of child labor.<sup>419</sup> In Convention 182, the ILO prohibits “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and *serfdom and forced or compulsory labor*, including forced or compulsory recruitment of children for use in armed conflict.”<sup>420</sup>

As part of its effort to fully eradicate and end the trafficking of persons, the UN adopted the Convention against Transnational Organized Crime in 2000.<sup>421</sup> The purpose of *the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* is:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

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means of labor discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.” *Id.* at art. 1(a–e).

418. U.N. GAOR, 23rd Sess. U.N. Doc. E/CN.4/Sub.2/1998/14 (July 6, 1998), <https://digitallibrary.un.org/record/257618>.

419. Int’l Labor Org. [ILO], *Worst Forms of Child Labor Convention*, at pmb1., C182: ILO No. 182 (1999), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182).

420. *Id.* art. 3(a) (emphasis added).

421. G.A. Res. 55/25, *Convention Against Transnational Organized Crime and the Protocols Thereto* (Nov. 15, 2000) [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf).

(c) To promote cooperation among States Parties in order to meet those objectives.<sup>422</sup>

The term “trafficking in persons” is defined as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>423</sup>

When the UDHR was adopted in 1948 by the UN General Assembly, the world organization included in it a clause that effectively prohibited slavery and the slave trade (in all its forms) in all Member States.<sup>424</sup> According to Article 4, “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>425</sup> Nevertheless, slavery and the slave trade remain a pervasive practice in many Member States of the United Nations even to this day. For example, Lisa Kristine, a photographer who depicts modern-day slavery, notes that “[t]here are 27 million slaves in the world today” and that, although “[s]lavery is illegal everywhere,” it nevertheless, “exists all over the world.”<sup>426</sup>

In an article published in 2018, in Oxygen Media, a division of the United States’ NBC Universal,<sup>427</sup> Sharon Lynn Pruitt noted that the “Global Slavery Index [had] counted 45.8 million enslaved people in 167 countries, with one in four victims being children.”<sup>428</sup> She went on to list

422. *Id.* at annex II, art. 2.

423. *Id.* at annex II, art. 3.

424. UDHR, *supra* note 27, art. 4.

425. *Id.*

426. Lisa Kristine, *The Persistence of Slavery: Photographs of Human Trafficking and Enslavement Around the World*, ATLANTIC (Sep. 26, 2012), <https://www.theatlantic.com/international/archive/2012/09/persistence-of-slavery/262847/>.

427. *See Our History*, NBCUniversal, <https://www.nbcuniversal.com/history> (last visited Apr. 5, 2020).

428. Sharon Lynn Pruitt, *6 Countries Where Slavery Still Exists: Thought Slavery had Ended? Not for Everyone*, OXYGEN MEDIA (Apr. 9, 2018, 4:30 PM), <https://www.oxygen.com/very-real/6-countries-where-slavery-still-exists>.

six countries where slavery is still a part of daily life for many people, and these are Mauritania, India, People's Republic of China, Uzbekistan, Libya, and North Korea.<sup>429</sup> However, Mauritania has made some progress in its efforts to deal with slavery—in addition to outlawing the practice, its national courts, in 2018, “handed down the country’s harshest anti-slavery ruling,” sentencing two slave-owners to prison terms of 10 and 20 years.<sup>430</sup>

The Office of the UN High Commissioner for Human Rights issued a press release on November 21, 2014, to laud Niger’s 2003 law criminalizing slavery and slavery-like practices.<sup>431</sup> The 2003 law amended the country’s Penal Code (Code pénal) and criminalized slavery and slavery-like practices in Article 270–2.<sup>432</sup> The relevant article is 270–2, which imposes a penalty of ten to thirty years in prison and a fine of CFA Francs 1,000,000 to 5,000,000 for anyone convicted of enslaving others or forcing them into slavery; inciting others to alienate their freedom or dignity or that of a dependent in order to turn them into slaves.<sup>433</sup>

Although Niger has criminalized slavery and slavery-like practices and, in addition, is a State Party to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,<sup>434</sup> Nigeriens continue to practice a modern form of

429. *Id.*

430. Nellie Peyton, *Mauritania Jails Slave-Owner for 20 Years in Harshest Ruling*, REUTERS (March 31, 2018, 4:04 AM), <https://af.reuters.com/article/topNews/idAFKBN1H707G-OZATP>.

431. *Niger: U.N. High Commissioner for Human Rights, Niger: UN Rights Expert Hails Criminalization of Slavery, but Urges Stronger Law Enforcement*, OHCHR (Nov. 21, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15330&LangID=E>. The law that criminalized slavery and slavery-like practices in Niger is Law 2003–25 of June 13, 2003. See Yahia H. Zoubir, *Security in the Sahara-Shel Region: National and Regional Approaches*, in GLOBAL SECURITY WATCH - THE MAGHREB: ALGERIA, LIBYA, MOROCCO, AND TUNISIA 109 (Praeger 2013). It amended the country’s Penal Code (1961). *Id.* See generally Penal Code No. 2003-025 (2003) (Niger).

432. See Penal Code No. 2003-025 (2003) (Niger).

433. *Id.* Here is the French version of Article 270–2: “Le fait de réduire autrui en esclavage ou d’inciter autrui à aliéner sa liberté ou sa dignité ou celle d’une personne à sa charge, pour être réduit en esclavage, est puni d’une peine d’emprisonnement de 10 à 30 ans et d’une amende de 1.000.000 à 5.000.000 de francs.” *Id.*

434. United Nations Conference of Plenipotentiaries Res. 608 (XXI) (April 30, 1957). Niger ratified the Supplementary Convention on July 22, 1963. See *id.*

slavery referred to as *wahaya*. This is due primarily to the lack of political will, made possible by the fact that most of the country's political elites are opportunists who seek public office simply in order to enrich themselves and their benefactors.<sup>435</sup> A “wahaya” is a girl or woman who is sold as a “fifth wife” to other men.<sup>436</sup> These girls are referred to “as ‘fifth wives’ because they have a different status to the four wives legally permitted in Niger. A man might have three or four legal wives and then any number of ‘fifth wives.’”<sup>437</sup> The organization Anti-Slavery International notes that the acquisition of the wahaya does not involve any marriage ceremony, traditional or otherwise, and the girls sold into this form of slavery “don’t benefit from any of the legal rights or protections that legal wives have. They are essentially treated as domestic and sexual slaves.”<sup>438</sup>

Besides wahaya, there are other forms of customary child slavery. First is *child servitude in wealthy urban households*—both boys and girls as young as five years old are sent to the urban centers by their parents to live in the homes of wealthier families and perform “housework in exchange for room, board, and possibly an education.”<sup>439</sup> Studies have determined that while the experience may be positive for some children, the majority of them become trapped “in domestic slavery in degrading treatment and conditions, including gruelling [sic] 10–14 hour work days and denial of basic rights, an education, and contact with families.”<sup>440</sup>

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435. GALY KADIR ABDELKADER & MOUSSA ZANGAOU, WAHAYA: DOMESTIC AND SEXUAL SLAVERY IN NIGER—10 PERSONAL STORIES 4, [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=3945&context=global\\_docs](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=3945&context=global_docs) (last visited Feb. 07, 2020).

436. Sarah Mathewson, *Child Bride or Slave? The Girls in Niger Who are Both, GIRLS NOT BRIDES* (Dec. 2, 2012), <https://www.girlsnotbrides.org/child-bride-or-slave-the-girls-in-niger-who-are-both/>.

437. *Id.*

438. *Id.* ABDELKADER & ZANGAOU, *supra* note 420, at 10.

439. *Violating Children's Rights*, *supra* note 202, at 36.

440. *Id.* See also JENS CHR. ANDVIG, SUDHARSHAN CANAGARAJAH & ANNE KIELLAND, ISSUES IN CHILD LABOR IN AFRICA, WORLD BANK AFRICA REGION HUMAN DEVELOPMENT 6 (Working Paper Series Sep. 2001), <https://pdfs.semanticscholar.org/51ef/f8f6c2f0ad12358f423d722e9f37e57b3931.pdf> (noting, *inter alia*, that “[c]hildren who work in the urban households are often poor, rural relatives who have been placed there to cover the domestic child labor demand left when the urban family sends their own children to school”).



Second is *Trokosi*, a practice that is common in several countries in West Africa in which “young girls are given to fetish temples to live as domestic or sexual slaves.”<sup>441</sup> In Benin, Ghana, and Togo, these girls are sent to the shrines as payment or punishment for a crime committed by a member of the family.<sup>442</sup> Within subcultures that practice *Trokosi*, it is generally believed that “the girl forced into such servitude is actually serving and married to the god or gods of the subculture.”<sup>443</sup> Each shrine’s priests, who serve as the “eyes” or “representatives of the gods,” usually “sexually abuse the girls” and if any children are born through such a process, they are considered children of the gods.<sup>444</sup> Although ritual servitude has been outlawed in Ghana’s Volta Region, it remains quite pervasive even though perpetrators could potentially face a minimum of three years in prison if convicted.<sup>445</sup>

The third is *forced street begging*. For example, researchers have determined that over 50,000 Senegalese children are forced to walk hazardous streets, begging for alms for their benefactors, which are Quranic schools called *daaras*.<sup>446</sup> Senegalese parents send their children to the *daaras* to obtain an education, which they believe would be “undergirded by the Quran and Quranic principles.”<sup>447</sup> Each of these schools is supervised by a spiritual leader called a *marabout*.<sup>448</sup> Unfortunately, in Senegal, the students who are called *talibés*, are exploited by the *marabout* and forced to spend most of their day and even nights begging on the streets.<sup>449</sup>

Research conducted by Human Rights Watch on Senegal’s *talibés* has uncovered some of the dangers of this harmful practice. For example, “[d]uring the first half of 2016, at least five children living in residential Quranic schools died, allegedly as a result of beatings meted out by their

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441. *Violating Children’s Rights*, *supra* note 202, at 37.

442. *Id.*

443. Mbaku, *The Rule of Law*, *supra* note 1, at 299.

444. *Id.*

445. *Id.*

446. Mbaku, *The Rule of Law*, *supra* note 1, at 299–98.

447. *Id.* at 298.

448. Mbaku, *The Rule of Law*, *supra* note 1, at 298. *See generally* LEORNADO A. VILLALÓN, *ISLAMIC SOCIETY AND STATE POWER IN SENEGAL: DISCIPLES AND CITIZENS IN FATICK* (Cambridge University Press 1995) (examining, *inter alia*, the relationship between the *marabouts* and the *talibés*).

449. Mbaku, *The Rule of Law*, *supra* note 1, at 298.

teachers, known as *marabouts*, or in traffic accidents while being forced to beg.<sup>450</sup> The “forced beggars of Senegal” are considered by some scholars of international human rights as one of the ten worst horrifying examples of modern-day child slavery.<sup>451</sup> Kristance Harlow notes that in Senegal, the *talibés* are assessed a daily quota which they must meet or face extremely harsh and swift penalties, which include being “chained in total isolation to violent beatings.”<sup>452</sup> The money collected by the *talibés* is not used for their own benefit or that of their schools but ends up in the pockets of the *marabouts*.<sup>453</sup>

Harlow argues that given the fact that *marabouts* are politically very active and “hold immense sway,” the government has been quite reluctant to crack down on this horrific practice.<sup>454</sup> Many human rights activists, both at the national and international levels, “want the Senegalese government to fast-track state-sponsored *daars*, where traditional religious teachings can persist but forced child labor cannot.”<sup>455</sup>

Fourth is *Ukuthwala*, which is practiced by some subcultures in the Republic of South Africa. According to the South African Department of Justice and Constitutional Development, “Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations.”<sup>456</sup>

Ukuthwala, as it is practiced in South Africa’s Eastern Cape, “increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years, by grown men old enough to be their

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450. *Senegal: New Steps to Protect Talibés, Street Children*, HUMAN RIGHTS WATCH (July 28, 2016, 7:01 AM), <https://www.hrw.org/news/2016/07/28/senegal-new-steps-protect-talibes-street-children>.

451. Kristance Harlow, *10 Horrifying Examples of Modern-Day Child Slavery*, LISTVERSE, <https://listverse.com/2014/01/07/10-horrifying-examples-of-modern-day-child-slavery/> (last updated Feb. 24, 2019).

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT REPUBLIC OF SOUTH AFRICA, WHAT IS UKUTHWALA?, LEAFLET, GENDER DIRECTORATE (2015), <http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html> (last visited Feb. 07, 2020) [hereinafter S. AFR. DEPT. OF JUSTICE].

grandfathers.”<sup>457</sup> In addition to the fact that Ukuthwala robs girls of their childhood and puts an end to the “carefree existence that all children are entitled to,” it forces them to assume duties and responsibilities (e.g., taking care of a husband, bearing children, providing for in-laws, etc.) that are the purview of adults. In addition, girls that are subjected to Ukuthwala are most likely to suffer from “numerous health complications,” including “HIV and other sexually transmitted infections,” as well as “pregnancy related complications such as infant mortality, maternal mortality and fistula related diseases.”<sup>458</sup>

The practice of Ukuthwala also impacts the female child’s physical and mental development. Early and forced marriage automatically removes the child from school and deprives her of the opportunity to learn and develop the skills that she needs to function as a productive adult.<sup>459</sup> Through this type of marriage, the girl-child is forced to forgo necessary social development forcing the child to enter an adult world for which she is not fully prepared.<sup>460</sup> As has been argued by some experts, child-marriage is “a symptom of and exacerbates gender inequality.”<sup>461</sup> The continued practice of Ukuthwala, hence, contributes significantly to the exploitation, abuse, and denigration of girls and women.

The Government of the Republic of South Africa has noted that “Ukuthwala and the cruelty it inflicts on the girl-child by denying her right to be a child, among other things, are further inconsistent with the African value of Ubuntu” and that in “[i]n this day and age, the kidnapping and abduction of girl-children that have barely reached puberty cannot be reconciled with the ancient practice of Ukuthwala, which was condoned by communities but subjected to delictual sanctions.”<sup>462</sup>

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457. *Id.*

458. *Id.*

459. Marcel van de Watt & Michelle Ovens, *Contextualizing the Practice of Ukuthwala within South Africa*, 13 CHILD ABUSE RES.: S. AFR. J. 11, 20 (2012).

460. *See* S. AFR. DEPT. OF JUSTICE, *supra* note 456.

461. *Id.*

462. *Id.*

## k. Witchcraft

Witchcraft is a common and popular practice among many subcultures in Africa.<sup>463</sup> Throughout Africa, “[a]n increasing number of children are being accused of witchcraft,” according to UNICEF.<sup>464</sup> Among those who are most at risk of being labeled witches are “[o]rphans, street children, albinos and the disabled.”<sup>465</sup> Once accused of being a witch, the child is likely to be “burned, beaten and even killed.”<sup>466</sup>

In general, a child who is accused of witchcraft is usually “subject to both physical and psychological violence by family, community members, and religious leaders.”<sup>467</sup> In addition, these children are “stigmatized and discriminated against, are mistreated, abused, ostracized, and abandoned.”<sup>468</sup> Quite often, these children are taken to churches where they are subjected to so-called deliverance ceremonies in an effort to free them of the evil spirits that inhabit them.<sup>469</sup> Mbaku notes that “[i]t is not unusual for children subjected to deliverance ceremonies to be beaten, burned, poisoned, buried alive, or forced to undergo some form of violent exorcism.”<sup>470</sup>

One reason why it is very difficult to eradicate witchcraft in the African countries is that “well-established religions, such as Christianity and Islam, which have a very strong presence in virtually all African countries, generally believe in possession by spirits and the need to rid the body and mind of such spirits.”<sup>471</sup> This is why many religious organizations in the African countries are quite reluctant to rid their

463. See, e.g., Bob Tortora, *Witchcraft Believers in Sub-Saharan Africa Rate Lives Worse: Belief Widespread in Many Countries*, GALLUP NEWS (Aug. 25, 2010), <https://news.gallup.com/poll/142640/witchcraft-believers-sub-saharan-africa-rate-lives-worse.aspx> (August 14, 2019, 10h36) (arguing, inter alia, that belief in witchcraft is widespread throughout sub-Saharan Africa).

464. *Rise in African Children Accused of Witchcraft*, BBC NEWS (July 17, 2010), <https://www.bbc.com/news/world-africa-10671790>.

465. *Id.*

466. *Id.*

467. *Violating Children’s Rights*, *supra* note 202, at 39.

468. *Id.*

469. *Id.*

470. Mbaku, *The Rule of Law*, *supra* note 1, at 409–10.

471. *Id.* at 410.

belief systems of the branding of children as witches.<sup>472</sup> In fact, the rise of Pentecostal churches in Nigeria is intertwined with the concept of deliverance from evil spirits. As argued by Sandra Fancello, deliverance from sin and infection by evil spirits is “at the heart of the explosion of Pentecostalism in Africa since the beginning of the 1990s.”<sup>473</sup>

What we have learned from an overview of several harmful traditional practices is that they can have a destructive effect on Africa’s children. In addition to the fact that these traditional practices can stunt a child’s normal development, deny the child of the opportunity to obtain an education and the necessary training to evolve into a productive adult, they can also lead to the child’s premature death.<sup>474</sup> As argued by the UN Secretary-General, “[n]o violence against children is justifiable; all violence against children is preventable.”<sup>475</sup> However, studies show that such violence against children remains an integral part of life in many countries in Africa and cuts across “culture, class, education, income and ethnic origin.”<sup>476</sup>

The UN Secretary-General went on to argue that Member States must put “an end to adult justification of violence against children, whether accepted as ‘tradition’ or disguised as ‘discipline.’”<sup>477</sup> The UN official also noted that “[t]here can be no compromise in challenging violence against children” and that “[c]hildren’s uniqueness—their potential and

472. *Id.* See also Maia Green, *Witchcraft Suppression Practices and Movements: Public Politics and the Logic of Purification*, 39 COMP. STUD. IN SOC. & HIST. 319 (1997).

473. SANDRA FANCELLO, *LES AVENTURIERS DU PENTECÔTISME GHANÉEN: NATION, CONVERSION ET DÉLIVRANCE EN AFRIQUE DE L’OUEST* 147 (2006). Fancello states specifically as follows: “Le phénomène global de la délivrance est au Coeur de l’explosion du pentecôtisme en Afrique depuis le début des années 1990” (The global phenomenon of deliverance is at the heart of the explosion of Pentecostalism in Africa since the beginning of the 1990s).

474. *Ending Child Marriage in Africa*, HUMAN RIGHTS WATCH (Dec. 9, 2015), <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa#> (noting that “[c]hild marriage is closely linked to early childbearing with consequences that can be fatal” and that “[c]omplications resulting from pregnancy and childbirth are the second leading cause of death among adolescent girls aged 15–19 years”).

475. U.N. Secretary-General, *Promotion of the Protection of the Rights of Children*, ¶ 1, U.N. Doc A/61/299 (Aug. 29, 2006).

476. *Id.*

477. *Id.* ¶ 2.

vulnerability, their dependence on adults—makes it imperative that they have more, not less, protection from violence.”<sup>478</sup>

#### IV. INTERNATIONAL LAW, JUDICIAL INTERPRETATION AND THE PROTECTION OF CHILDREN’S RIGHTS IN AFRICA

##### A. Introduction

What can be done by the international community and African governments “to *modify* or if necessary, *fully eradicate*, harmful practices based on tradition, culture, religion or superstition” that threaten or endanger the rights of Africa’s children? First, African countries should make certain that national laws, including the constitution, are in compliance with or reflect provisions of international human rights instruments. Second, traditional values and customary practices, regardless of the subculture to whom they belong, must not be utilized as justification for violating the rights of children. Third, customary and traditional practices that harm children, and hence, violate their rights, must either be modified or eradicated. Fourth, customary law, whether codified or not, must be brought into line with the provisions of international human rights instruments. Fifth, local courts should use international and comparative sources of law as an interpretive device in order to make certain that judicial decisions reflect generally-accepted international human rights standards and norms. Sixth, anyone who makes decisions on behalf of a child (e.g., parents, government officials, legal guardians, and other elders) “must act only in the best interests of the child.”<sup>479</sup> I have argued elsewhere that:

[E]ven [i]f national governments take measures to force a modification or transformation of traditions and customs that are harmful to children, as well as pass laws that prohibit certain activities or behaviors that are injurious to children, these are necessary but not sufficient conditions for the effective and full protection of the rights of children.”<sup>480</sup>

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478. *Id.*

479. Mbaku, *The Rule of Law*, *supra* note 1, at 411.

480. *Id.*

I have argued further that “[s]ufficiency . . . requires that the law be enforced.”<sup>481</sup>

The ability of each African country to enforce national laws and fully protect its children will depend, to a large extent, on the quality of the country’s governance institutions. Hence, in addition to internationalizing constitutional law, as well as bringing all traditional and customary practices into line with the national constitution, the country should provide itself with a governing process that is undergirded by the rule of law. The relevant governing process is one that, at the minimum, must be characterized by separation of powers with effective checks and balances, including an independent judiciary, a robust civil service that is capable of checking on the exercise of government power, and a free and independent press. It is important to note that the absence of effective checks and balances on the government has enhanced the ability of many African civil servants and political elites, including especially the national executive (i.e., the president), to act above the law and engage in behaviors that violate the rights of their fellow citizens, including those of children.

#### B. Internationalization of National Constitutional Law as a Way to Protect the Rights of Children

In the late-1940s, the international community, cognizant of the atrocities committed by various governments against their citizens during World War II, “became quite concerned about how national governments treated or were treating their citizens.”<sup>482</sup> As a consequence, “[s]ince 1945, numerous international instruments, both global and regional, have prescribed certain minimum standards of human rights protection with monitoring bodies to scrutinize national performance.”<sup>483</sup> Thus, on December 10, 1948, the international community, through the UN, adopted the UDHR in Paris.<sup>484</sup> Of course, one can argue that the UDHR

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481. *Id.*

482. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT’L L. 43, 64 (2018) [hereinafter Mbaku, *International Law on the Sovereignty*].

483. Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 444 (2012).

484. G.A. Res. 217 A(III) (Dec. 10, 1948).

is only a “Declaration” and hence, is not legally binding on Member States of the UN. However, since 1948, the provisions of the UDHR “have over the years been so extensively incorporated in other international and regional instruments as well as national constitutions that [the UDHR’s] provisions are now considered to express principles of customary international law.”<sup>485</sup>

Given the special status of the UDHR’s provisions, “the UDHR and other instruments which contain rules considered to be customary international law are automatically applicable in most common law countries . . . as part of national law and must therefore be taken into account in any interpretation of the constitution.”<sup>486</sup> Although many of the provisions of modern African constitutions, particularly those that recognize and protect human rights, “have been substantially influenced by international human rights instruments and standards,” this, however, “does not necessarily make these instruments part of the constitution nor does it mean that they will have a direct role to play in interpretation.”<sup>487</sup>

Generally, “international human rights instruments do not automatically confer justiciable rights in national courts.”<sup>488</sup> However, some African constitutions refer to international human rights instruments or their provisions. For example, in the Preamble to the Constitution of the Republic of Cameroon, reference is made to a few international human rights instruments. It is stated as follows: “We, the people of Cameroon, . . . “[a]ffirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples’ Rights, and all duly ratified international conventions.”<sup>489</sup>

Granted, Cameroon’s constitution and that of many other African countries, have affirmed the fundamental rights and freedoms enshrined in various international human rights instruments.<sup>490</sup> But, does this

485. Fombad, *supra* note 480, at 444.

486. *Id.* at 445.

487. *Id.*

488. 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).

489. REPUBLIC OF CAMEROON [CONSTITUTION] Jan. 18, 1996, pmbl.

490. For example, the Constitution of the Republic of Gabon also makes reference to international human rights instruments in its Preamble: “The Gabonese people, . . . “[a]ffirm solemnly its attachment to human rights and to fundamental liberties that result



constitutional affirmation make the rights contained in these international instruments directly justiciable in national courts? As argued by Fombad, an international constitutional scholar, this affirmation “does not render any of these instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution.”<sup>491</sup>

However, a country can make the provisions of international human rights instruments directly justiciable in national courts by not only making reference to the provisions of these human rights instruments in its national constitution but also by stating, for example, that these instruments “from part of this constitution” or that they “make up an integral part of this constitution and of national law.” This is illustrated by the Constitution of the Republic of Benin.

First, the Preamble to the Constitution of the Republic of Benin states as follows:

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 [UN] of 1945 and the [UDHR] 1948, by the African Charter on Human and Peoples’ Rights adopted in 1981 by the [OAU] and ratified by Bénin on 20 January 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.*<sup>492</sup>

Since the Constitution of the Republic of Benin makes the provisions of the UDHR and the African Charter on Human and Peoples’ Rights “an integral part” of the country’s constitution, as well as of “Béninese law,” it creates rights that are directly justiciable in Béninese courts. Article 7 specifically reaffirms part of what is provided in the Preamble. It states as follows: “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*

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from the Declaration of the Rights of Man and the Citizen of 1789 and from the Universal Declaration of Human Rights of 1948, consecrated by the African Charter of the Rights of Man and the Rights of Peoples of 1981, and by the National Charter of Liberties of 1990.” REPUBLIC OF GABON [CONSTITUTION] 1991, pmb1.

491. Fombad, *supra* note 480, at 445.

492. REPUBLIC OF BÉNIN [CONSTITUTION] Dec. 2, 1990, pmb1 (emphasis added).

law.”<sup>493</sup> Once this internationalization of national constitutional law has been accomplished, the next step for the country to take in order to make certain that the rights of children are recognized and enforced, is to make sure that its courts have the capacity to enforce the laws and that there is no political interference in the ability of the courts to do so. For example, a survey undertaken in Ghana in 2014, determined 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,”<sup>494</sup> a situation that does not augur well for the enforcement of the country’s laws.

An investigation by Ghanaian journalist, Anas Aremeyaw Anas, found widespread corruption among judiciary officers—“judges accepting bribes to either throw out cases or pass lower sentences.”<sup>495</sup> In addition to corruption, the lack of judicial independence, particularly from the executive branch of government, is one of the main reasons why many African judiciaries are unable to perform their functions in a fair and non-arbitrary manner.<sup>496</sup> The Honorable Patricia Timmons-Goodson, a retired justice of the Supreme Court of North Carolina, has stated that “in the absence of an independent judiciary . . . rights are mere ‘empty promises.’”<sup>497</sup>

It has been argued, however, that a country “can technically have an independent judiciary, but informal pressures on judges can lead to bias.”<sup>498</sup> This can be the case in countries such as those in Africa “where the institutions are in the formative stage.”<sup>499</sup> Hence, it is important that each African country internationalize its national constitutional law, as

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

494. Franck Kuwonu, *Judiciary: Fighting graft needs muscles*, AFRICA RENEWAL, <https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles> (last visited Feb. 9, 2020) (noting that the survey was conducted by Afrobarometer, which is an independent and nonpartisan network that carries out public opinion surveys throughout the continent.).

495. *Id.*

496. See, e.g., John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 192 (2019).

497. Patricia Timmons-Goodson, *If a Nation Has No Independent Judiciary, Rights are Merely ‘Empty Promises,’* ABA J. (Mar. 1, 2018), [http://www.abajournal.com/news/article/empty\\_promises\\_a\\_nation\\_without\\_an\\_independent\\_judiciary](http://www.abajournal.com/news/article/empty_promises_a_nation_without_an_independent_judiciary).

498. JANET MORRISON, BUSINESS ETHICS: NEW CHALLENGES IN A GLOBALIZED WORLD 123 (2015).

499. *Id.*

well as, provide itself with a governing process undergirded by separation of powers with checks and balances, which include an independent judiciary.

Although the Republic of Angola does not directly incorporate provisions of international human rights instruments into its national constitution, significant effect, however, is given to international law in that constitution. “The Constitution of the Republic of Angola makes express reference to the applicability of international law in applying and interpreting the national constitution.”<sup>500</sup> According to Article 26, which is titled *Scope of fundamental rights*,

1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law. 2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola. 3. *In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.*<sup>501</sup>

Additional elaboration is provided in Article 27, which states that “[t]he principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the Constitution or are enshrined in law or international conventions.”<sup>502</sup> Moreover, Article 13 clarifies the status of treaties, viz-à-viz the Angolan legal system: “Duly approved or ratified international treaties and agreements shall come into force in the Angolan legal system after they have been officially published and have entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state.”<sup>503</sup> Article 13 also makes reference to customary international law: “General or common

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500. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 66.

501. CONSTITUIÇÃO DA RÉPUBLICA DE ANGOLA [Constitution of the Republic of Angola] 2010, art. 26 (emphasis added).

502. *Id.* art. 27.

503. *Id.* art. 13(2).

international law received under the terms of this Constitution shall form an integral part of the Angolan legal system.”<sup>504</sup>

Ghana’s constitution imposes a duty on the state to consider international human rights instruments when enacting national laws. According to Article 37(3), “[i]n the discharge of the obligations stated in clause (2) of this article, the State, shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.”<sup>505</sup> In addition, Article 40(c) imposes an obligation on the Ghanaian Government to “promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.”<sup>506</sup>

The people of Kenya adopted a new constitution in 2010. This constitution introduced the concept of separation of powers with checks and balances, which included an independent judiciary.<sup>507</sup> The new constitution gave effect to international law. Article 2(5) states, for example, that “[t]he general rules of international law shall form part of the law of Kenya.”<sup>508</sup> In addition, it also clarified the role of international treaties in the Kenyan 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.”<sup>509</sup>

South Africa’s post-apartheid constitution, in Article 39, imposes a duty on the country’s courts, tribunals, or forums to consider international law when interpreting the Bill of Rights. According to Article 39(1), “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . (b) *must* consider international law; and (c) *may* consider foreign law.”<sup>510</sup> The Constitution of the Republic of Cabo Verde states, in Article 17(3), that “[c]onstitutional and legal rules with respect to fundamental rights must be interpreted and integrated in conformance

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504. *Id.* art. 13(1).

505. CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 37(3). Clause 2 empowers the State to pass appropriate laws to assure Ghanaian citizens “of rights of effective participation in development processes” and to promote and protect “all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes.” *Id.* art. 37(2).

506. *Id.* art. 40(c).

507. *See generally* CONSTITUTION (2010) (Kenya).

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

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

510. S. AFR. CONST. § 39(1), 1996.

with the Universal Declaration of Human Rights.”<sup>511</sup> Finally, in a provision dealing with “[i]nterpretation,” the Constitution of the Republic of Malawi states that “[i]n interpreting the provisions of this Constitution a court of law shall (c) where applicable, have regard to current norms of public international law and comparable foreign case law.”<sup>512</sup>

What happens, however, when there is no explicit or implicit authorization for courts to invoke or refer to international human rights law? Scholars of constitutional law have argued that the answer to this question differs from country to country.<sup>513</sup> As I have argued elsewhere, “[i]n recent years, many African countries, which have not explicitly or implicitly authorized the invocation of international human rights instruments, have, nevertheless, been making reference in their constitutions to international human rights.”<sup>514</sup> These references, while they may not constitute explicit or implicit authorization for national courts to refer to or apply international law, have actually provided “room for the large volume of international jurisprudence to influence the nature and scope of rights provided in the constitution and the manner in which these rights are recognized and enforced by the courts.”<sup>515</sup>

Despite setbacks in countries, such as South Sudan, Somalia, Central African Republic, and others that are embroiled in either civil war or some form of sectarian conflict, constitutional makers in several African countries “are gradually warming up to the idea of recognizing international human rights instruments in their constitutions and constitutional interpretation and practice.”<sup>516</sup> Throughout the continent, States “are slowly but steadily recognizing the importance of making certain that domestic law reflects international human rights laws and

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511. CONSTITUTION OF THE REPUBLIC OF CABO VERDE 2010, art. 17(3).

512. CONSTITUTION OF THE REPUBLIC OF MALAWI 1994, art. 11(2)(c).

513. See, e.g., Fombad, *supra* note 480, at 447. See also Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 68.

514. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 68. See also CONSTITUIÇÃO DA RÉPÚBLICA DE ANGOLA [Constitution of the Republic of Angola] 2010, art. 26; REPUBLIC OF CAMEROON [CONSTITUTION] Jan. 18, 1996, art. 45.

515. Fombad, *supra* note 480, at 447.

516. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 68.

norms.”<sup>517</sup> It is hoped that more African countries will eventually incorporate the provisions of international human rights instruments into their national constitutions and create rights that are directly justiciable in each State’s national courts. Through the internationalization of its national constitutional law, each African country can provide itself with the necessary legal tools, as well as, place itself in a much more enhanced position, to protect the rights of its children.

### C. International Law and Municipal Law: Monist and Dualist Approaches

Even in States whose constitutions do not “expressly mention the relevance of international law,” it is possible for “a duly ratified international instrument which is of relevance to constitutional matters” to “have effect on the national constitution.”<sup>518</sup> The impact of the “duly ratified international instrument”<sup>519</sup> on domestic legal processes will depend “on how effect is given to international instruments in the particular country.”<sup>520</sup> There are two well-established approaches in the legal literature on how a country can give effect to international human rights instruments. First is the “monist approach,” which has been adopted by most of Africa’s Francophone and Lusophone countries, and second is the “dualist approach,” which is predominant in the Anglophone countries.<sup>521</sup>

In those countries in which the monist approach regulates the relationship between domestic and international law, the two—that is, domestic and international law—make up or comprise one single legal order within the State’s legal system. Nevertheless, international law predominates or “prevails over national or domestic law” and hence, “in an African country which adheres to this approach, the provisions of international human rights instruments, for example, override any

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517. *Id.* at 68–69. It is important to note that “domestic law” includes constitutional law, statutory law, administrative regulations, case law, international treaties that have been duly ratified, and laws derived from the customs and traditions of the various subcultures that inhabit each country.

518. Fombad, *supra* note 480, at 447.

519. *Id.*

520. Fombad, *supra* note 494, at 447.

521. Fombad, *supra* note 494, at 447.

contrary domestic law.”<sup>522</sup> Within such a legal system, a State’s national or domestic courts, then, must “give effect to principles of international law over [superseding] or conflicting rules of domestic law.”<sup>523</sup>

In the African countries, which have adopted the dualist approach, international law, and municipal law form two separate and independent legal systems.”<sup>524</sup> While international law regulates the “relations between sovereign States in the international system,” the governing of the domestic or municipal legal system is the exclusive purview of municipal law.<sup>525</sup> Within the dualist theory, in order for a municipal legal system to give effect to international law, “national legislatures must incorporate international law into domestic law, thereby creating justiciable rights suitable for enforcement by domestic courts.”<sup>526</sup>

When examining the binding status of international law on domestic legal systems, international legal experts “distinguish between the types and sources of international law.”<sup>527</sup> Under both the monist and dualist theories, “[i]nternational norms that have attained the status of international customary law . . . are considered to be part of municipal law”<sup>528</sup> and, as such, “prevail over national law even in domestic courts.”<sup>529</sup> Within such a legal system, “customary international law, now considered part of domestic law, will prevail over the latter and hence, serve as a constraint on the ability of national policymakers to retain their sovereign right to act in matters of law.”<sup>530</sup>

But, how does international law determine “when norms and treaties of international law have attained the status of customary international law and hence, are eligible to be incorporated into municipal law?”<sup>531</sup> The answer can be found in taking a look at Article 38(1)(b) of the Statute of the International Court of Justice, which refers to

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522. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 69. *See also* Adjami, *supra* note 485, at 108–09.

523. Adjami, *supra* note 470, at 109.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 70.

531. *Id.*

“international custom, as evidence of a general practice accepted as law.”<sup>532</sup>

It has been determined that despite “the existence of these two distinct approaches to how effect is given to international instruments in the African countries,” one must “recognize the fact that there currently is no significant difference between African countries in the way in which they treat treaties, which they have signed and ratified.”<sup>533</sup> Many African countries, whether they are Francophone, Anglophone, or Lusophone, sign and ratify treaties, as well as conventions, but rarely ever “domesticate these [legal] instruments even where the constitution states . . . that an international instrument on ratification takes immediate effect and prevails over national law.”<sup>534</sup>

In Africa’s Anglophone countries, customary international law is considered an integral part of municipal law. Thus, if the principles present in an international instrument (e.g., a treaty) have “crystallized” into customary international law,<sup>535</sup> these principles may still constitute part of national constitutional law even if the State has not signed and ratified the treaty in question. Hence, even if an Anglophone country has not yet signed and ratified an international human rights instrument, that does not, however, mean that that particular instrument’s provisions “cannot form part of national constitutional law, as long as these principles ‘crystallized into customary international law.’”<sup>536</sup>

Whether an international instrument affects a municipal legal system depends, to a large extent, on the nature of the instrument, including its properties. For example, international treaties have a binding effect on States Parties.<sup>537</sup> This “binding effect” is linked directly to the

532. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs., art. 38, § 1.

533. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 71.

534. Fombad, *supra* note 494, at 447–48.

535. Fombad, *supra* note 494, at 448.

536. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 71.

537. See *Introduction to the Convention on the Rights of the Child*, UNICEF (Aug. 25, 2019), <https://www.unicef.org/french/crc/files/Definitions.pdf>. According to the *Introduction to the Convention on the Rights of the Child*, “[a] ‘State Party’ to a treaty is a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument.” *Id.*



international law principle referred to as *pacta sunt servanda*,<sup>538</sup> which has been codified in the Vienna Convention on the Law of Treaties (“Vienna Convention”). Some treaties specifically include provisions that impose an obligation on States Parties “to adopt legislation or other measures to give effect to the provisions in these treaties—that is, to create rights that are justiciable by local or domestic courts.”<sup>539</sup> For example, according to Article 1 of the African Charter on the Rights and Welfare of the Child:

Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.<sup>540</sup>

An African State that wants to put to rest any doubts regarding whether international law, including customary international law, is law (or creates justiciable rights) within its national jurisdiction can use its constitution to do so. For example, the Constitution of the Republic of South Africa speaks directly to the conditions under which customary international law is applicable in the country. According to Article 232,

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538. Vienna Convention on the Law of Treaties pmbL., May 23, 1969, 1155 U.N.T.S. 332. This principle is considered the most important principle of customary international law of treaties. *Id.* Article 26 of the Vienna Convention states as follows: “Every treaty in force is binding upon the parties to it and must be performed in good faith.” *Id.* According to Anthony Aust, “*Pacta sunt servanda* embodies a rule that is an elementary and universally agreed principle fundamental to all legal systems, and is of prime importance for the stability of treaty relations. The oft-quoted Latin phrase means no more than that a treaty is legally binding and so must be performed by the parties to it.” MODERN TREATY LAW AND PRACTICE 160 (Anthony Aust ed., 3d. ed. 2013).

539. See Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 72.

540. ACRWC, *supra* note 99, art. 1(1). The *African Charter on Human and Peoples’ Rights* also imposes a similar obligation on Member States. *See id.* art. 1. Some scholars have argued that at the time the OAU drafter the *African Charter on Human and Peoples’ Rights*, Member States were quite cognizant of the “disparity between the effect of international law in monist and dualist States and sought through article 1 to emphasize the charter of the treaty as binding on States.” *See* Adjami, *supra* note 470, at 110. *See also* LONE LINDHOLT, QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS IN BOTSWANA, MALAWI, AND MOZAMBIQUE 73 (1997).

“[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament.”<sup>541</sup>

The applicability of international law generally is addressed by Article 233: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>542</sup>

But, why would citizens of a country like South Africa allow international law to interfere with their ability to determine the content of their constitutional law? One answer is that conformity with international law, particularly international human rights law, is in line with the desires of the citizens to live under a constitutional and legal order that recognizes, respects and protects certain fundamental rights.<sup>543</sup> In drafting and adopting their post-apartheid constitution, the people of South Africa recognized that they were laying the foundation “for a society based on democratic values, social justice and fundamental human rights.”<sup>544</sup> Thus, granting international law the power to interfere with municipal law is in line with the desires of South Africans to live in a society undergirded by respect for and protection of human rights.<sup>545</sup>

Since the Organization of African Unity (“OAU”) came into being in 1963, Member States have been encouraged to allow international law to infringe on the “sovereign right of domestic lawmakers to freely legislate” in order “to eliminate authoritarian systems of governance and transition these countries to democracy, as well as integrate them into the

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541. S. AFR. CONST., 1996, § 232.

542. *Id.* § 233, 1996.

543. For example, in the Preamble to the Constitution of the Republic of South Africa, 1996 (that is, the country’s post-apartheid constitution), the people of South Africa state explicitly that they were adopting “this Constitution as the supreme law of the Republic [of South Africa] so as to [—] Heal the divisions of the past and establish a society based on democratic values, social justice and *fundamental human rights*.” See S. AFR. CONST., pmb. 1996. Mbaku has noted that “[l]awmakers and citizens of countries like South Africa have voluntarily opted to allow international law to infringe on their sovereign right to determine the content of their constitutional law in an effort to enhance and improve the protection of human and peoples’ rights, as well as create, within the country, a culture that respects and protects human rights.” Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 72–73.

544. S. AFR. CONST., 1996, pmb.

545. *See id.*

global society of free nations.”<sup>546</sup> The African Charter on Democracy, Elections and Governance states, for example, that the objectives of the Charter are to:

1. [p]romote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights; [and] 2. [p]romote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in political arrangements of the State[s] Parties.<sup>547</sup>

The African Union’s efforts to promote democracy, constitutional government and the respect and protection of human rights, including those of children, are contained in several major instruments, which include (1) the Constitutive Act of the African Union,<sup>548</sup> (2) the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government,<sup>549</sup> (3) Declaration on the Principles Governing Democratic Elections in Africa,<sup>550</sup> (4) Guidelines for AU Electoral Observation and Monitoring Missions,<sup>551</sup> (5) African Charter on Human and Peoples’ Rights,<sup>552</sup> and the African Charter on the Right and Welfare of the Child.<sup>553</sup>

546. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 73. *See generally* African Union, *African Charter on Democracy, Elections and Governance* (Jan. 30, 2007), <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

547. Africa Charter on Democracy, *supra* note 543, art. 2(1–2).

548. *See generally* African Union, *Constitutive Act of the African Union* (July 1, 2000), <https://au.int/en/constitutive-act>.

549. *Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government*, U.N. Doc. AHG/Decl.5 (XXXVI) (July 2000), [https://www2.ohchr.org/english/law/compilation\\_democracy/lomedec.htm](https://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm).

550. *See generally* African Union, *Declaration on the Principles Governing Democratic Elections in Africa* (2002), <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AHG.aspx>.

551. Guidelines for African Union Electoral Observation and Monitoring Missions, ACE (Feb. 20, 2002), <http://aceproject.org/ero-en/regions/africa/regional-resources-africa/AU%20GUIDELINES%20FOR%20ELECTION%20MONITORING%20MISSIONS.pdf/view>.

552. *See generally* Banjul Charter, *supra* note 159.

553. *See generally* ACRWC, *supra* note 99.

The AU, through these instruments, supports the efforts of Member States to transition to democracy, promote human rights, including the protection of the rights of children. The values and principles evident in these instruments represent significant constraints on and challenges to the sovereignty of African States. Nevertheless, it is argued that:

[T]he embrace of and commitment to democracy and good governance, including the protection of human and peoples' rights by regional organizations, such as the AU, *provides the wherewithal and opportunity for Member States to use peer pressure to force their neighbors to transition to democratic governance and respect the rights of their citizens.*<sup>554</sup>

Each African country must deal specifically with certain issues that are critical to good governance, democracy, the rule of law, and respect for and protection of human rights, including those of children. The constitutional law of each country must “incorporate provisions that enhance the deepening and institutionalization of democracy, advancement of governance, and the protection of human rights.”<sup>555</sup> Although these regional and international constraints are an infringement on the sovereign right of policymakers in the African countries to “freely legislate”<sup>556</sup> and determine the content of their national constitutional law, they necessarily create “an institutional environment that is more suited to the promotion of democracy, good governance, and the promotion of human rights,”<sup>557</sup> including especially, those of children.

#### D. Judicial Interpretation of Municipal Law as a Mechanism to Protect the Rights of Children

International law can influence how municipal or domestic law is interpreted by national courts. Many of the continent's Anglophone countries have usually followed the well-known and well-established common law “presumption in statutory construction that courts will strive to interpret legislation in a manner that will not conflict with

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554. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 75 (emphasis added).

555. *Id.* at 76 (internal footnotes omitted).

556. *Id.*

557. *Id.* at 76–77.

international law.”<sup>558</sup> Take, for example, the decision of the High Court of Botswana in the case *Attorney General v. Unity Dow*.<sup>559</sup> In the leading judgment delivered by Amissah JP, the Court of Appeal held as follows:

Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its [c]ourts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.<sup>560</sup>

If, however, domestic legislation is clear and unambiguous, this principle of interpretation need not be employed.<sup>561</sup> In the *Unity Dow* case, the court also addressed the situation where the State has signed an international instrument but has not necessarily ratified or domesticated it and shows that even in such a case, the international instrument can still have “important legal consequences domestically as an aid to constitutional interpretation.”<sup>562</sup> In *Unity Dow*, Amissah JP cited with approval a passage from the judge *a quo* in the same case:

I bear in mind that signing the convention does not give it power of law in Botswana but the effect of the adherence by Botswana to the convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a “narrow construction” which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.<sup>563</sup>

Again, such an approach must be adopted only when “the domestic legislation in question is obscure.”<sup>564</sup> In the UK case, *Salomon v. Commissioners of Custom & Excise*, Diplock L.J. held as follows:

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558. Fombad, *supra* note 494, at 455–56.

559. *See* Att’y Gen. v. Unity Dow (2001) BLR 119 (Bots.).

560. *Id.* ¶ 109.

561. *See, e.g.*, *Salomon v. Customs and Excise Comm’rs* [1967] 2 QB 116 (Eng.) (holding that “[i]f the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty’s treaty obligations”).

562. Fombad, *supra* note 494, at 455–56.

563. *Unity Dow*, BLR 119, at ¶ 108.

564. Fombad, *supra* note 494, at 456.

[I]f the terms of the *legislation* are not clear[, however,] but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another and others are not, the meaning which is consonant is to be preferred. Thus, in the case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.<sup>565</sup>

Constitutional law professor Charles Manga Fombad, who is an expert on constitutionalism and constitutional government in Africa, has argued that “[a]nother way in which the internationalization of the constitutional process through judicial interpretation is taking place are instances where there are lacunae, ambiguities or uncertainties in the relevant constitutional provisions.”<sup>566</sup> He argues further that “[t]he general approach of common law jurisdictions is to adopt the interpretive principle that the uncertainties or ambiguities should be resolved in a manner that upholds any international instruments, especially human rights instruments which might have influenced the adoption of such provisions.”<sup>567</sup>

As argued by the Honorable Justice Michael Kirby, an international legal scholar and a former Justice of the High Court of Australia, where the constitutional text makes reference to specific rights (e.g., fundamental human rights), which are recognized in international law, “it is highly desirable, indeed, obligatory, for judges within municipal systems to familiarize themselves with the international jurisprudence collecting around the same words in international and regional bodies devoted to expounding their meaning.”<sup>568</sup> Various scholars of

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565. *Salomon v. Customs and Excise Comm’rs* [1967] 2 QB 116 (Eng.) (emphasis added).

566. Fombad, *supra* note 494, at 456.

567. *Id.* at 456–57.

568. Michael Kirby, *The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms*, HIGH CT. OF AUSTRALIA, [https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_bang11.htm](https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm) (last visited Feb. 11, 2020).

international and constitutional law have argued that the general acceptance of the Bangalore Principles on the Domestic Application of International Human Rights Norms<sup>569</sup> has produced “some sort of a duty on judges to adopt this interpretative principle” or approach.<sup>570</sup> However, in the situation where the domestic constitution is clear and is not inconsistent with international law, the approach implicit in the Bangalore Principles will not apply.<sup>571</sup>

It is important that States, including those in Africa, see “the evolving internationalization of domestic constitutional law as a global effort to improve governance and generally enhance the protection of human and peoples’ rights,”<sup>572</sup> including those of children. It is becoming evident that municipal courts should “not blindly adhere to strict doctrines such as monism and dualism, but should take into consideration rulings of international and regional tribunals, with a view to enhancing the maintenance of good governance and adherence to the rule of law.”<sup>573</sup> The primary objective of law in any African country should be to (1) improve and enhance peaceful coexistence of population groups; (2) ensure the recognition and protection of human and peoples’ rights, including especially those of vulnerable groups, such as children, women, and religious and ethnic minorities; (3) provide an enabling environment for wealth creation, economic growth and human development; (4) protect children from harmful practices based on tradition and customs; and (5) make certain that domestic law, which includes customary law, does not violate provisions of international human rights instruments.

Africa’s judges, including those who preside over traditional and customary tribunals/courts, as well as its policymakers, must not remain enslaved by legal traditions that are harmful to the rights of some groups of citizens (e.g., children). Instead, each country’s constitution, its legislative acts, and the customs and traditions of its various subcultures

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569. See JOAN CHURCH, CHRISTIAN SCHULZE & HENNIE STRYDOM, *HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 160 (2007) (examining, inter alia, the origins of, and the, Bangalore Principles).

570. Fombad, *supra* note 494, at 457.

571. See *id.* See also Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 78.

572. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 78.

573. *Id.*

must comply with the provisions of international human rights instruments and adequately and effectively protect the rights of children. Judges in each African country should be willing “to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies.”<sup>574</sup> In the Australian case, *Al-Kateb v. Godwin*, Justice Kirby observed that “[t]he fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a ‘wider civilization.’”<sup>575</sup> Justice Kirby also argued that this approach to judicial reasoning does not constitute “an amendment of the Constitution [under the guise of interpretation] but an elaboration and enforcement of it, properly understood in the context of the world of today in which any national constitutional text must now operate.”<sup>576</sup>

According to Professor Charles Manga Fombad, the willingness of municipal courts to “look outside their own domestic legal traditions” is “a universal trend that is bound to be copied in Africa as judges realize that they cannot isolate themselves from the rapid changes in legal thinking and analysis and from the fresh approaches and new insights generated by international jurisprudence to deal with common problems.”<sup>577</sup>

African countries, like their counterparts in other regions of the world, must recognize and accept the fact that the most effective way to protect their children from harmful practices, including those emanating from the cultures and traditions of their various ethnocultural groups, is to make certain that domestic law, which includes not just the national constitution, but also customary law, does not offend provisions of international human rights instruments. In addition, national judges should look outside their domestic legal traditions to, for example, “insights generated by international jurisprudence”<sup>578</sup> to help them render decisions that are in line with international human rights law and hence, effectively protect the rights of children. Finally, national judges can utilize international and comparative sources of law as interpretive tools

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574. Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT’L L. REV. 327, 345 (2006).

575. *Al-Kateb v Godwin* [2004] HCA 37, ¶190 (Austl.).

576. Kirby, *supra* note 571, at 346.

577. See Fombad, *supra* note 494, at 457–58.

578. *Id.*



or devices in order to make certain that judicial rulings reflect generally-accepted international human rights standards and norms and hence, minimize harm to children and the violation of their rights. In doing so, domestic judges can bring *customary law* and the various *customs and traditions of each country's diverse ethnocultural groups* into line with the national constitution and provisions of international human rights instruments.

## V. PROTECTING AFRICAN CHILDREN FROM HARMFUL TRADITIONAL PRACTICES: THE MODERATING IMPACT OF INTERNATIONAL LAW

### A. Introduction

Beginning in the early-1990s, many African countries engaged in constitutional exercises to either produce new constitutions or amend existing ones in an effort to bring their national laws, including customary laws, to conform with the provisions of various international human rights instruments.<sup>579</sup> Post-apartheid South Africa was one of the African countries that was engaged in designing and adopting a new constitution.<sup>580</sup> In their new constitution, the people of South Africa included the following provision regarding a declaration of a state of emergency, derogation from the Bill of Rights and international law: “Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—(b) the legislation—(i) is consistent with [South Africa’s] obligations under international law applicable to states of emergency.”<sup>581</sup>

The South African Constitution also has a provision that deals with the role of international law in the interpretation of the Bill of Rights. According to § 39(1)(b), “[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”<sup>582</sup> Thus, an interpretation that, for example, offends provisions of international

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579. See, e.g., Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 78.

580. S. AFR. CONST., 1996, § 37(4)(b)(i).

581. *Id.* § 37(4)(b)(i).

582. *Id.* § 39(4)(1)(b).

human rights instruments, such as those of the CRC, must give way to one that is consistent with the provisions of the CRC.

With respect to the country's national security and security services, the Constitution mandates as follows: "National security must be pursued in compliance with the law, including international law"<sup>583</sup> and "[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on [South Africa]."<sup>584</sup> For example, in any effort to maintain peace and security, security forces must not behave in ways that offend provisions of international human rights instruments—this implies that state actors, in their effort to maintain law and order, must not infringe on or violate the rights of children.<sup>585</sup>

Regarding international agreements, which include conventions and treaties, that South Africa was a party to before the new, post-apartheid Constitution came into effect, the Constitution states that "[South Africa] is bound by international agreements which were binding on [the country] when this Constitution took effect."<sup>586</sup> South Africa signed the CRC on January 29, 1993, and ratified it on June 16, 1995.<sup>587</sup> The Constitution of the Republic of South Africa, 1996—the post-apartheid constitution—was approved by the CC on December 4, 1996, and took effect on February 4, 1997. Hence, the CRC became binding on South Africa long before the post-apartheid constitution came into effect. Nevertheless, as made evident by § 231(5) of the post-apartheid constitution, the CRC's provisions are binding on South Africa, and its courts must consider them when interpreting the Constitution and the country's other laws.

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583. *Id.* § 198(c).

584. *Id.* § 199(5).

585. For example, the International Committee of the Red Cross (ICRC) notes that while "[i]t is the State's responsibility to maintain law and order, peace and security within its territory," in doing so, the State must make certain "that law enforcement is carried out in a way that respects the State's obligations under international human rights law" and this means that the activities of domestic law enforcement agencies "must comply with the applicable provisions of international human rights law." INT'L COMM. OF THE RED CROSS, TO SERVE AND TO PROTECT: HUMAN RIGHTS AND HUMANITARIAN LAW FOR POLICE AND SECURITY FORCES 31 (2014).

586. S. AFR. CONST., 1996, § 231(5).

587. *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

With respect to customary international law, the Constitution states that “[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament.”<sup>588</sup> For example, state practice has established the rule that “[c]hildren affected by armed conflict are entitled to special respect and protection” as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>589</sup> Hence, according to § 232 of the Constitution of the Republic of South Africa, this rule of customary international humanitarian law establishes rights that are justiciable in South African courts. The treatment of children affected by armed conflict in and by South African courts is bound by this norm of customary international humanitarian law since it is an integral part of domestic law in South Africa.

The South African Constitution also deals with the role that international law can play in the interpretation of domestic legislation, when it states that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>590</sup> International law, then, can serve as an important and critical tool for the fight against practices, whether emanating from or supported by constitutional and statutory law or customs and tradition, that harm children and violate or infringe their rights.

Finally, the Constitution deals with the development of the common law or customary law, when it states that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”<sup>591</sup> It is clear from this provision and others in the Constitution that South Africa’s domestic courts have a significant role to play in the development of law in the country. They also have the power to moderate or nullify laws that offend the Bill of Rights.

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588. S. AFR. CONST., 1996, § 232.

589. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 479 (2005).

590. S. AFR. CONST., 1996, § 233.

591. S. AFR. CONST., 1996, § 39(2).

## B. Domestic Courts, the Moderating Role of International Law and the Protection of Children's Rights in Africa: Case Studies

Since the early-1990s, many African countries have recognized that they are part of a global community of nations and as a consequence, the behavior of their governments cannot and must not ignore international law. In addition to adopting constitutions that acknowledge the country's obligations under international law, many of these countries have also domesticated international law, creating rights that are directly justiciable in domestic courts, as well as, empowering their national courts to consider international law when interpreting the national constitution and legislative acts.

In the following sections, we take a look at how international law is serving as an interpretive tool and enhancing the ability of domestic courts in African countries to protect the rights of children. In doing so, we shall examine several court decisions to determine the extent to which international and foreign law has affected the decision making-processes of African judges.

### 1. *The State v. Williams (South Africa)*<sup>592</sup>

As examined earlier, § 39(1)(b) of the Constitution of the Republic of South Africa expressly clarifies the place of international law in South Africa's legal system—"a court, tribunal or forum," when "interpreting the Bill of Rights, . . . must consider international law."<sup>593</sup> Many scholars of South African constitutional law argue, however, that "the constitution envisages a position wherein international law, plays a more persuasive role in South Africa than any foreign case law."<sup>594</sup> To get an

592. S v. Williams & Others, 1995 (7) BCLR 861 (CC) (S. Afr.).

593. S. AFR. CONST., 1996, § 39(1)(b). Note, however, that even though South African courts are required by the Constitution and hence, are bound, to consider international law when they interpret the provisions of the Bill of Rights, "there is no indication in the constitution itself as to the extent, if any, to which international law can be utilized as an interpretation tool" and the Constitution does not explicitly or implicitly indicate "whether or not there is any preferential treatment to be given to certain international instruments when interpreting rights." Celumusa Delisile Zungu, *The Role, Relevance and Application of International Law in South Africa*, 8 OIDA INT'L J. SUST. DEVELOP. 85, 85-86 (2015).

594. Zungu, *supra* note 591, at 86.

understanding of how South African courts have utilized international law as a tool in the interpretation of the Bill of Rights, we shall examine a few judicial decisions, notably those of the country's highest court, the Constitutional Court ("CC").

This case was referred to the CC "by the Full Bench of the Cape of Good Hope Provincial Division of the Supreme Court (Conradie, Scott and Farlam JJ)."<sup>595</sup> The case represented a "consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a 'moderate correction' of a number of strokes with a light cane."<sup>596</sup> The issue that the CC had to decide was "whether the sentence of juvenile whipping, pursuant to the provisions of section 294 of the Criminal Procedure Act, is consistent with the provisions of the Constitution."<sup>597</sup> Justice Langa wrote and delivered the judgment for the Court, and in doing so, he made reference to many international human rights instruments, including the *International Covenant on Civil and Political Rights*;<sup>598</sup> the *European Convention for the Protection of Human Rights and Fundamental Freedoms*;<sup>599</sup> the *African (Banjul) Charter on Human and Peoples' Rights*;<sup>600</sup> various Comments of the UN Human Rights Committee;<sup>601</sup> the European Commission of Human Rights;<sup>602</sup> the European Court of Human

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595. *Williams & Others*, 1995 (7) BCLR 861, at ¶ 1.

596. *Id.*

597. *Id.* Section 294 of the Criminal Procedure Act, 1977 deals with the whipping of juvenile males and states that "[i]f a male person under the age of twenty-one years is convicted of any offense, whether such conviction is a first or a subsequent conviction, the court convicting him may, in lieu of any other punishment, sentence him to receive in private a moderate correction of a whipping not exceeding seven strokes, which shall be administered by such person and in such place and with such instrument as the court may determine." Criminal Procedure Act 51 of 1977 § 294(1) (S. Afr.). The Constitution mentioned here is the South African Interim Constitution of South Africa, 1993. *See generally* S. AFR. (INTERIM) CONST., 1993.

598. *See Williams & Others*, 1995 (7) BCLR 861, at para. 21 (fn 24).

599. *See id.*

600. *See id.*

601. *See id.* ¶ 26.

602. *See id.* ¶ 27.

Rights;<sup>603</sup> the *Universal Declaration of Human Rights*;<sup>604</sup> as well as, the *Canadian Charter of Rights and Freedoms*.<sup>605</sup>

Justice Langa also made references to decisions of the Supreme Courts of Namibia, Zimbabwe, Canada, the United States, and the German Constitutional Court.<sup>606</sup> In his analysis, Justice Langa argued that Courts have an important role to play “in the promotion and development of a new culture ‘founded on the recognition of human rights,’ in particular, with regard to those rights which are enshrined in the Constitution.”<sup>607</sup> He argued further that:

It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored.<sup>608</sup>

Cognizant of the country’s apartheid past and in recognition of the new post-apartheid order under which South Africans are building a new society, Justice Langa warned that “old rules and practices can no longer be taken for granted” and that “they must be subjected to constant re-assessment to bring them into line with the provisions of the [new post-apartheid Constitution].”<sup>609</sup> Justice Langa made reference to § 30 of the Interim Constitution of South Africa,<sup>610</sup> which is devoted to the rights of children and specifically states, that “[e]very child shall have the right not to be subject to neglect or abuse.”<sup>611</sup> He then went on to argue that “as much as the Constitution recognizes the vulnerability of children as a

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603. *See id.*

604. *See id.* ¶ 21 n. 24.

605. *See id.* ¶ 28.

606. *See id.* ¶¶ 37–60.

607. *Id.* ¶ 8.

608. *See id.*

609. *Id.* ¶¶ 8–9.

610. S. AFR. (INTERIM) CONST., 1993 (this constitution was repealed by the Constitution of the Republic of South Africa).

611. *Id.* art. 30(1)(d).

group and sets out to protect them, juvenile whipping infringed their right to security and not to be subjected to abuse.”<sup>612</sup>

Justice Langa also noted that the wording of several sections of South Africa’s Constitution conform with most international human rights instruments, which include the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the African (Banjul) Charter on Human and Peoples’ Rights.<sup>613</sup> While defining and explaining concepts found in the South African Constitution, Justice Langa argued that the definitions “must necessarily reflect [the experiences of the South African people] and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in *public international law* as well as in *foreign case law*.”<sup>614</sup>

The Court noted that the “[E]ighth [A]mendment to the [C]onstitution of the United States of America (Eighth Amendment) as well as Article 12 of the Canadian Charter of Rights and Freedoms (Canadian Charter) prohibit ‘cruel and unusual punishment.’”<sup>615</sup> With respect to cases of the Supreme Court of Namibia, Justice Langa noted that “[i]n *Ex Parte Attorney-General, Namibia*, Mahomed AJA had no difficulty in arriving at the conclusion that the infliction of corporal punishment, whether on adults or juveniles, was inconsistent with Article 8 of the Namibian [C]onstitution and constituted ‘inhuman or degrading’ punishment.”<sup>616</sup>

In his analysis, Justice Langa, also cited to cases of the Supreme Court of Zimbabwe. In the cases of *S v. Ncube*,<sup>617</sup> *S v. Tshuma*<sup>618</sup> and *S v. Ndhlovu*,<sup>619</sup> the Zimbabwe Supreme Court, “dealing with the issue of corporal punishment for adults, held that the practice was inhuman and degrading in violation of section 15(1) of the Declaration of Rights of the Zimbabwe Constitution which prohibits ‘torture or inhuman or degrading

612. *Williams & Others*, 1995 (7) BCLR 861, ¶ 18.

613. *See id.* ¶ 21.

614. *Id.* ¶ 23 (emphasis added).

615. *Id.* ¶ 28.

616. *Id.* ¶ 31. *See also Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State*, [1991] S.C.N. 35 (Namib.).

617. *See generally* *State v. Ncube*, [2018] S.C.Z. 21 (Zim.).

618. *See generally* *State v. Tshuma*, [2017] S.C.Z. 126 (Zim.).

619. *See generally* *State v. Ndhlovu*, [2015] S.C.Z. 108 (Zim.).

punishment.”<sup>620</sup> Justice Langa also cited to another case from Zimbabwe in which “[j]uvenile whipping was held to constitute inhuman and degrading punishment by the Zimbabwe Supreme Court in *S v. Juvenile*.”<sup>621</sup>

As part of his analysis, Justice Langa also cited to what he termed “a growing consensus in the international community,” which is, “that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity.”<sup>622</sup> Such a consensus, argues Justice Langa, “has found expression through the courts and legislatures of various countries and through *international instruments*. It is a clear trend which has been established.”<sup>623</sup> The *Williams* Court also noted that

The determinative test [in the case at hand] will be the values we find inherent in or worthy of pursuing in this society which has only recently embarked on the road to democracy. Already South Africa has lagged behind. The Constitution now offers an opportunity for South Africans to join the *mainstream of a world community* that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights.<sup>624</sup>

The conclusion reached by the CC, in this case, was that “[S]ection 294 of the Act infringes the rights contained in sections 10 and 11(2) of the Constitution” and that that conclusion was “consistent with the view that has been expressed by many South African judges before.”<sup>625</sup> He argued further that “the courts in [South Africa] have acknowledged the *international consensus* against corporal punishment and, in a sense, associated themselves with it in many judgments which have criticised, sometimes in the strongest terms, the infliction of corporal punishment.”<sup>626</sup> In addition, “[i]n keeping with *international trends*, there

620. *S v. Williams & Others*, 1995 (7) BCLR 86, ¶ 32 (CC) (S. Afr.).

621. *Id.* See also *S v. Juvenile* [1989] S.C.Z. 61 (Zim.).

622. *Williams & Others*, 1995 (7) BCLR 861, ¶ 39.

623. *Id.* ¶ 39 (emphasis added).

624. *Id.* ¶ 50 (emphasis added).

625. *Id.* ¶ 53.

626. *Id.* ¶ 53. (emphasis added).



has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.<sup>627</sup> Most importantly, the *Williams* Court argued, “[i]n addressing itself specifically to punishment, the Constitution ensures that the sentencing of offenders must conform to standards of decency recognised throughout the *civilised world*.”<sup>628</sup>

After citing various international human rights instruments, the emerging consensus of values in the civilized international community, as well as other international sources, the Constitutional Court of South Africa declared invalid and unconstitutional certain provisions of the Criminal Procedure Act No. 51 of 1977. Specifically, the Court held as follows:

The following provisions of the Criminal Procedure Act 51 of 1977 (as amended) are inconsistent with the Republic of South Africa Constitution Act 200 of 1993 (as amended) and are, with effect from the date of this order, declared to be invalid and of no force and effect:

- (a) section 294 in its entirety; and
- (b) the words “or whipping” in section 290(2).<sup>629</sup>

In the *Williams* case, the Constitutional Court of South Africa employed international and comparative sources of law as an interpretive device to make certain that the Court’s decision reflected generally-accepted international human rights standards and norms. And, in doing so, the Court invalidated and declared unconstitutional provisions of a statute that were deemed harmful to children.

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627. *Id.* ¶ 66. (emphasis added).

628. *Id.* ¶ 77.

629. *Id.* ¶ 96.

2. *Christian Education South Africa v. The Minister of Education of the Government of the Republic of South Africa (South Africa)*

The issue to be decided in *Christian Education South Africa v. Minister of Education*<sup>630</sup> concerned § 10 of the South African Schools Act, 1996 (Act No. 84 of 1996),<sup>631</sup> which states that “(1) [n]o person may administer corporal punishment at a school to a learner; (2) Any person who contravenes subsection (1) is guilty of an offense and liable on conviction to a sentence which could be imposed for assault.”<sup>632</sup> The appellant, Christian Education South Africa, is a “voluntary association” and “an umbrella body of 196 independent Christian schools in South Africa with a total of approximately [14,500] pupils.”<sup>633</sup> The appellant sought an order of the Constitutional Court determining that § 10 of the South African Schools Act, 1996 be “declared unconstitutional and invalid to the extent that it prohibits corporal punishment in independent schools where parents have consented to its application[,]”<sup>634</sup> as well as, “to the extent that it is applicable to learners at . . . independent schools . . . whose parents or guardian have given consent to such corporal punishment.”<sup>635</sup> In the court a quo, the appellant’s case had been dismissed.<sup>636</sup> The appeal was then brought before the Constitutional Court of South Africa.

Christian Education South Africa and its constituent member schools “aver that corporal correction—the term they use for corporal punishment—is an integral part of [their Christian ethos] and that the blanket prohibition of its use in its schools invades their individual parental and community rights freely to practise their religion.”<sup>637</sup> In an earlier submission to the Constitutional Court, Christian Education South Africa had referred to corporal punishment as “corporal correction” and

630. See *Christian Educ. S. Afr. v. Minister of Educ.*, 2000 (10) BCLR 1051 (CC).

631. South African Schools Act 84 of 1996 § 10.

632. *Id.* § 10(1)–(2).

633. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 2.

634. *Id.* ¶ 3.

635. *Id.* ¶ 21.

636. This case had initially been heard before the High Court, South Eastern Cape Local Division. See *Christian Educ. S. Afr. v. Minister of Educ. of the Gov’t of the Republic of S. Afr.* 1999 (9) BCLR 951 (SE).

637. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 2.

had argued or contended that it was “part of the common culture of such schools and that such culture is protected by sections 15(1), 29(3) and 31(1) of the Constitution [of South Africa].”<sup>638</sup> The appellant also argued that “corporal correction, as it was administered at schools affiliated to the appellant, was not in conflict with the common law as it constituted moderate chastisement not amounting to an assault, and was imposed by a teacher with the consent of the learner’s parent or guardian.”<sup>639</sup> It was also pointed out that “moderate corporal correction has been declared not to be contrary to either the United States Constitution or to the European Convention on Human Rights.”<sup>640</sup>

The respondent in *Christian Education South Africa* was the Minister of Education who contended that “it is the infliction of corporal punishment, not its prohibition, which infringes constitutional rights.”<sup>641</sup> In addition, the respondent argued that “the claim of the appellant to be entitled to a special exemption to administer corporal punishment is inconsistent with [certain] provisions of the Bill of Rights,”<sup>642</sup> including equality, human dignity, freedom and security of the person, and the right of the child “to be protected from maltreatment, neglect, abuse or degradation.”<sup>643</sup> The respondent also placed reliance on § 31(2),<sup>644</sup> which states that section 31(1) rights “may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”<sup>645</sup>

The Director-General (“DG”) of the South African Department of Education submitted an affidavit in support of the respondent’s position in which the DG contended that “corporal punishment in schools is contrary to the Bill of Rights.”<sup>646</sup> He went on to point out that “in 1996, Parliament adopted the National Education Policy Act, which its

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638. *Christian Educ. S. Afr.*, 1999 (9) BCLR 951, ¶ 2.

639. *Id.*

640. *Id.*

641. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 8.

642. *Id.*

643. *Id.*

644. See S. AFR. CONST., 1996, § 31(1). Section 31 of the Constitution of the Republic of South Africa deals with cultural, religious and linguistic communities and details rights that cannot be denied these communities. They include the right “to enjoy their culture, practise their religion and use their language; the right to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”  
*Id.*

645. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 8.

646. *Id.* ¶ 9.

preamble declared, was: “. . . to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights.”<sup>647</sup>

The respondent, the Minister of Education, stated that:

[T]he trend in democratic countries is to ban corporal punishment in schools. South Africa’s international obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the United Nations Convention on the Rights of the Child, require the abolition of corporal punishment in schools, since it involves subjecting children to violence and degrading punishment.<sup>648</sup>

While indicating that “he does not doubt the sincerity of the beliefs of the parents, nor does he dispute their right to practise their religion in association with each other,” he, however, asserts “that such conduct is not appropriate in schools or the education system.”<sup>649</sup>

Justice Sachs, writing for the Court, began his analysis by taking a look at the concepts “freedom of religion, belief and opinion” and in doing so, he cited to Article 18(1) of the ICCPR, which states as follows:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, *either individually or in community with others* and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>650</sup>

Justice Sachs notes that South Africa’s Constitution complies with the principles referenced in the ICCPR. First, “language rights and rights of belief” are spelled out fully in §§ 15 and 30.<sup>651</sup> In § 31, the emphasis is placed on the protection of “members of communities united by a shared language, culture or religion.”<sup>652</sup> The Court also made mention of the fact

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647. *Id.*

648. *Id.* ¶ 13.

649. *Id.* ¶ 14.

650. *Id.* ¶ 18–19 (emphasis added).

651. *Id.* at ¶ 23. *See also* S. AFR. CONST. §§ 15, 30, 1996.

652. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 23.

that § 31 of the Constitution of South Africa “closely parallels article 27 of the ICCPR, which reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>653</sup>

Section 36(1) of the Constitution of the Republic of South Africa states that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.<sup>654</sup>

The Court then asked whether “the negative impact which the Schools Act has on the practice of corporal correction in the schools of the appellant’s religious community, is to be regarded as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.”<sup>655</sup> Justice Sachs notes with respect to the appellant’s submission that once the appellant had “succeeded in establishing that the Schools Act substantially impacted upon its sincerely held religious beliefs, the State was required to show a compelling state interest in order to justify its failure to provide an appropriate exemption.”<sup>656</sup> The “proposed formulation,” argued Justice Sachs, “imports into our law a rigid ‘strict scrutiny’ test taken from American Jurisprudence,” a test which “requires any legislative

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653. ICCPR, *supra* note 142, art. 27.

654. S. AFR. CONST., 1996, § 30(1).

655. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 28.

656. *Id.* ¶ 29.

provision which impacts upon the freedom of religion to be serving a 'compelling state interest.'"<sup>657</sup>

Justice Sachs argues, however, that South Africa's Bill of Rights "through its limitation clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing."<sup>658</sup> Reference is made specifically to § 36(1) of South Africa's Constitution. As the Court held in *S v. Manamela*,<sup>659</sup> § 36 "requires an overall assessment that will differ from case to case."<sup>660</sup> The *Manamela* Court specifically noted that:

In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying the due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.<sup>661</sup>

The *Manamela* Court also noted that "[e]ach particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom."<sup>662</sup> Justice Sachs, in *Christian Education South Africa*, concluded that:

[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on undertaking the limitations analysis in respect of religious practices, the standard to be

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657. *Id.*

658. *Id.* ¶ 30.

659. *See S v. Manamela*, 2000 (5) BCLR 491 (CC) (S. Afr.).

660. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 31.

661. *Manamela*, 2000 (5) BCLR 491, ¶ 32.

662. *Id.* ¶ 33.

applied is the nuanced and contextual one required by section 36 and not the rigid one of strict scrutiny.<sup>663</sup>

In reaching its decision in *Christian Education South Africa*, the Court noted that “by ratifying the United Nations Convention on the Rights of the Child, [the South African State] undertook to take all appropriate measures to protect the child from violence, injury or abuse.”<sup>664</sup> Justice Sachs specifically cited to Article 5(5) of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*,<sup>665</sup> which states that “[p]ractices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development.”<sup>666</sup> The Court went on to argue that “[c]ourts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents’ religious practices.”<sup>667</sup> In addition, Justice Sachs argues, “[i]t is now widely accepted that in every matter concerning the child, the child’s best interests must be of paramount importance.”<sup>668</sup>

Citing to the Canadian case *P v. S*, Justice Sachs noted the words of Justice L’Heureux-Dubé who stated as follows:

[I]n ruling on a child’s best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child’s best interests.

I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s. 2(a) were the [Canadian Charter of Rights and Freedoms] to apply to such orders when they are made in the child’s best interests. As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free

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663. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 31.

664. *Id.* ¶ 40.

665. See G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981) [hereinafter Declaration on Intolerance].

666. *Id.* art. 5(5).

667. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 41.

668. *Id.*

to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion. It is important to note that the trial judge's order refers to the appellant's "religious fanaticism" and not to the normal exercise of his religion in respect of his child. Like the trial judge and the Court of Appeal, I would dismiss this argument.<sup>669</sup>

Justice Sachs noted the dissenting opinion of Mr. Klecker in the European Commission of Human Rights' decision in *Campbell and Cosans v. United Kingdom*:

Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being . . . The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention.<sup>670</sup>

In reaching its ruling in this case, the Constitutional Court ("CC") of South Africa invoked the country's obligations under international human rights law, notably the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Comments of the UN Human Rights Committee.<sup>671</sup> The Court also cited to decisions of the European Commission of Human Rights, European Court of Human Rights, the German Constitutional Court, as well as those of the Supreme Courts of Namibia, Zimbabwe, Canada, the United States, and Germany.<sup>672</sup> The CC also referred to various international human rights instruments, such as the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African (Banjul) Charter on Human and Peoples' Rights, the Canadian Charter of Rights and Freedoms, and the Universal

669. *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, 181–82 (Can. Que. S.C.C.).

670. *Christian Education South Africa*, 2000 (10) BCLR 1051, ¶ 45 (quoting *Campbell and Cosans v. United Kingdom*, 3 Eur. Ct. H.R. 531, 556 (1982) (Klecker, dissenting)).

671. *See id.* ¶ 13.

672. *See id.* ¶¶ 41, 45–46.



Declaration of Human Rights.<sup>673</sup> It then dismissed the appeal, effectively denying the appellant's (Christian Education South Africa) claim for a constitutionally compelled exemption from the blanket prohibition of the use of corporal punishment in schools.<sup>674</sup>

3. *Bhe and Others v. The Magistrate, Khayelitsha; Charlotte Shibi v. Mantabeni Sithole and Others; South African Human Rights Commission and Women's Legal Center Trust v. President of the Republic of South Africa (South Africa)*

The Constitutional Court (CC) of South Africa was called upon to jointly decide three cases, namely, *Bhe and Others v. The Magistrate, Khayelitsha; Charlotte Shibi v. Mantabeni Sithole and Others; South African Human Rights Commission and Women's Legal Center Trust v. President of the Republic of South Africa* (hereinafter referred to jointly as "Bhe").<sup>675</sup> These three cases concerned intestate succession in South African customary law; more specifically, the case concerned the principle of primogeniture in customary law in South Africa.<sup>676</sup> The applicants before the CC were "concerned with the rights of [their] daughters and sisters to succeed a deceased African male who had died without leaving a will."<sup>677</sup>

The CC noted that there were "two main issues in the cases before this Court."<sup>678</sup> The first, the CC argued, concerned the "question of the constitutional validity of section 23 of the [Black Administration Act 38 of 1927]."<sup>679</sup> The second issue to be decided by the CC concerned "the question of the constitutional validity of the principle of primogeniture in the context of the customary law of succession."<sup>680</sup>

673. *See id.* ¶¶ 40–52.

674. *See id.* ¶ 52.

675. *See generally Bhe v. Magistrate* 2005 (1) SA 580 (CC) (S. Afr.).

676. *See id.* ¶¶ 2–3.

677. Simisola Obatusin, *Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts*, 56 COLUM. J. TRANSNAT'L L. 636, 666 (2018).

678. *Bhe*, 2005 (1) SA 580, ¶ 3.

679. *Id.* *See also* Black Administration Act 38 of 1927 (repealed 2005) (the original act used the word "native" instead of "black").

680. *Bhe*, 2005 (1) SA 580, ¶ 3.

Justice Langa, writing for the entire Court, noted that there were three cases, which were “heard together, by direction of the Chief Justice, since they are all concerned with intestate succession in the context of customary law.”<sup>681</sup> “The first case, *Bhe and Others v The Magistrate, Khayelitsha and Others*, (the Bhe case) followed a decision by the Magistrate of Khayelitsha and, on appeal, that of the Cape High Court.”<sup>682</sup> Next, “*Charlotte Shibi v Mantanbeni Freddy Sithole and Others* (the Shibi case), concerned a decision of the Magistrate of Wonderboom which was successfully challenged in the Pretoria High Court.”<sup>683</sup> The third case, *South African Human Rights Commission and the Women’s Legal Center Trust v. President of the Republic of South Africa*, was “an application for direct access to [the CC] brought jointly by the South African Human Rights Commission and the Women’s Legal Center Trust, respectively the first and second applicants.”<sup>684</sup>

Justice Langa then proceeded to “set out the background in respect to each of the matters [before the Court].”<sup>685</sup> The Court noted that the *Bhe* case came before it “as an application for confirmation of an order of the Cape High Court.”<sup>686</sup> Ms. Bhe, the third applicant, sought:

[N]o relief for herself but brings the application in the following capacities: (a) on behalf of her two minor daughters, namely Nonkululeko Bhe, born in 1994 and Anelisa Bhe, born in 2001; (b) in the public interest, and (c) in the interest of the female descendants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate.<sup>687</sup>

Nonkululeko and Anelisa were “the first and second applicants respectively and were the children of Ms Bhe and Mr Vuyo Elius Mgolombane (the deceased) who died intestate in October 2002.”<sup>688</sup> The Court noted that the “Women’s Legal Centre Trust acted in this

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681. *Id.* ¶ 5.

682. *Id.* ¶ 6.

683. *Id.*

684. *Id.* ¶ 7.

685. *Id.* ¶ 8.

686. *Id.* ¶ 9.

687. *Id.* ¶ 10.

688. *Id.*

application ‘in the public interest.’<sup>689</sup> The respondents were the Magistrate of Khayelitsha, the President of the Republic of South Africa, and the Minister of Justice and Constitutional Development. The Commission for Gender Equality, a Section 187 of the Constitution public institution, ‘was admitted as *amicus curiae* and presented helpful written and oral submissions to the Court.’<sup>690</sup>

The two minor children of Ms. Bhe’s were born out of wedlock and had failed to qualify as heirs in their father’s intestate estate. After the death of their father, the deceased’s father was appointed the sole heir and representative of the estate ‘by the Magistrate in accordance with section 23 of the [Black Administration Act 38 of 1927] and the regulations.’<sup>691</sup>

Justice Langa noted that ‘[u]nder the system of intestate succession flowing from [S]ection 23 and the regulations, in particular regulation 2(e), the two minor children did not qualify to be the heirs in the intestate estate of their deceased father.’<sup>692</sup> ‘According to these provisions, the estate of the deceased [had] to be distributed according to “Black law and custom.”<sup>693</sup> Justice Langa then noted the decision of the Court *a quo* (i.e., the High Court), which was that ‘the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the Constitution and were therefore invalid.’<sup>694</sup>

In the *Shibi* case, the matter before the Court concerned an application by Charlotte Shibi, whose brother had died intestate in Pretoria in 1995.<sup>695</sup> Since Shibi’s deceased brother was an African, ‘his intestate estate fell to be administered under the provisions of section 23(10) of the [Black Administration Act 38 of 1927].’<sup>696</sup> In this case and, for similar reasons, Ms. Shibi was not allowed, by the Magistrate of Wonderboom, to inherit the estate of her deceased brother. Ms. Shibi challenged the Magistrate’s decision, as well as, the manner in which the estate had been administered, in the High Court.<sup>697</sup> Subsequently, the

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689. *Id.*

690. *Id.* ¶ 11.

691. *Id.* ¶ 15.

692. *Id.* ¶ 16.

693. *Id.*

694. *Id.* ¶ 19.

695. *See id.* ¶ 21.

696. *Id.* ¶ 22.

697. *See id.* ¶ 22–26.

High Court “set aside the decision of the Magistrate and declared Ms Shibi to be the sole heir” and “awarded damages against the deceased’s two cousins, that is, first and second respondents in this case.”<sup>698</sup>

The Constitutional Court then noted that the South African Human Rights Commission “is a state institution supporting democracy under Chapter 9 of the Constitution.”<sup>699</sup> In its mandate, the Commission is, *inter alia*, to “promote respect for human rights and a culture of human rights . . . [and] to take steps to secure appropriate redress where human rights have been violated.”<sup>700</sup> The Women’s Legal Centre Trust, on the other hand, “is a non-governmental organization whose [main stated] objective ‘is to advance and protect the human rights of all women in South Africa, particularly black women who suffer many intersecting forms of disadvantage.’”<sup>701</sup> In accordance with section 38(a) of the Constitution of South Africa, the Women’s Legal Centre Trust was acting in its own interest,<sup>702</sup> as well as in the interest of the public.<sup>703</sup> The Court noted that the Women’s Legal Centre Trust was also acting in “the interest of a group or a class of people” as made possible by section 38(c) of the Constitution.<sup>704</sup>

The relief that the applicants in *South African Human Rights Commission and Another v. President of the Republic of South Africa and Another* sought was “wider than that in the *Bhe* and *Shibi* cases.”<sup>705</sup> In addition to the provisions of the Black Administration Act that was declared invalid by the Cape and Pretoria High Courts, the applicants in the matter before the Constitutional Court claimed that:

[T]he whole of [S]ection 23 [of the Black Administration Act], alternatively subsections (1), (2) and (6) of section 23, should be declared unconstitutional and invalid because of their inconsistency with the Constitution’s equality provisions (section 9), the right to

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698. *Id.* ¶ 27.

699. *Id.* ¶ 29.

700. S. AFR. CONST., 1996, §§ 184(1)(a), 2(b).

701. *Bhe*, 2005 (1) SA 580, ¶ 29.

702. S. AFR. CONST., 1996, § 38(a).

703. *See id.* § 38(d).

704. *See id.* § 38(c).

705. *Bhe*, 2005 (1) SA 580, ¶ 31.

human dignity (section 10) and the rights of children under section 28 of the Constitution.<sup>706</sup>

The Court then reviewed the legislative framework that purports to give effect to customary law in South Africa.<sup>707</sup> In addition, the Court also examined provisions of the Constitution that create a place, within the South African legal system, for customary law. The Court states that “[c]ertain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.”<sup>708</sup> For example, the Court notes that §§ “30 and 31 of the Constitution entrench respect for cultural diversity.”<sup>709</sup> Additionally, § 39(2) requires a court that is “interpreting customary law to promote the spirit, purport and objects of the Bill of Rights.”<sup>710</sup> Finally, the Court makes reference to §§ 39(3) and 211 of the Constitution, which state, respectively, “that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights” and that the law “protects those institutions that are unique to customary law.”<sup>711</sup> The Court then concluded that since customary law is law in South Africa, it must be interpreted by South Africa’s courts, “as first and foremost answering to the contents of the Constitution,” and be “protected by and subject to the Constitution in its own rights.”<sup>712</sup>

The Court then noted that “an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect.”<sup>713</sup> Thus, argued the Court, “[a]t the level of constitutional validity, the question in [the case before the CC] is not

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706. *Id.* See also S. AFR. CONST., 1996, §§ 9, 10, and 28.

707. *Bhe*, 2005 (1) SA 580, ¶ 35–39.

708. *Id.* ¶ 41.

709. *Id.* See also S. AFR. CONST., 1996, §§ 30, 31. Section 30 deals with “[l]anguage and culture,” while section 31 deals with “[c]ultural, religious and linguistic communities.” S. AFR. CONST., 1996, §§ 30–31.

710. *Bhe*, 2005 (1) SA 580, ¶ 41. See also S. AFR. CONST., 1996, § 39(2).

711. *Bhe*, 2005 (1) SA 580, ¶ 41. See also S. AFR. CONST., 1996, m§§ 39(3), 211.

712. *Bhe*, 2005 (1) SA 580, ¶ 41.

713. *Id.* ¶ 42.

whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.<sup>714</sup>

Justice Langa argued that “the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.”<sup>715</sup> He then proceeded to examine different sections of the Constitution, which he argued were said to have been violated by the “impugned provisions” of the Black Administration Act. These include §§ 10 (rights to human dignity), 9 (equality), and 28 (the rights of children).<sup>716</sup> The learned Justice then proceeded to note that “[t]wo prohibited grounds of discrimination are relevant in this case” and the “first relates to sex,” which Justice Langa chose not to examine in detail, “except to remark that the importance of protecting children from discrimination on the grounds of sex is acknowledged in the African Charter on the Rights of the Child.”<sup>717</sup>

The second ground argued Justice Langa, “relates to the prohibition of unfair discrimination on the ground of ‘birth’ in section 9(3).”<sup>718</sup> The learned Justice then made specific reference to international law and its role in constitutional interpretation in the Republic of South Africa. He argued that “[i]n interpreting both section 28 and other rights in the Constitution, the provisions of international law must be considered.”<sup>719</sup> The Republic of South Africa “is a party to a number of international multilateral agreements designed to strengthen the protection of children.”<sup>720</sup> He then moved on to examine the types of protections that

714. *Id.*

715. *Id.* ¶ 46.

716. *See id.* ¶ 48, 49–51, 52.

717. *Id.* ¶ 53. *See also* ACRWC, *supra* note 99, art. 3 (stating in Article 3 that “[e]very child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”).

718. *Bhe*, 2005 (1) SA 580, ¶ 54. Section 9(3) of the Constitution of South Africa states that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” *Id.* § 9(3).

719. *Bhe*, 2005 (1) SA 580, ¶ 55.

720. *Id.* Among these agreements are the *UN Convention on the Rights of the Child* (1990), the *International Covenant on Civil and Political Rights* (1999), the *African (Banjul) Charter on Human and Peoples’ Rights* (1996), and the *African Charter*

these international human rights instruments provide for children. For example, the CRC, he notes, makes clear and asserts that children, by reason of their “physical and mental immaturity,” require “special safeguards and care.”<sup>721</sup>

Justice Langa makes specific reference to Article 2 of the CRC, which imposes an obligation on States Parties to ensure that the rights set forth in the Convention shall be enjoyed by every child within the jurisdiction of each State Party regardless of or “irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”<sup>722</sup>

The learned Justice then moved on to examine provisions in the ICCPR which provide protections for children. Specifically, Article 24(1) expressly states that:

Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.<sup>723</sup>

With respect to the African Charter on the Rights and Welfare of the Child, Justice Langa notes that Article 3 of this international human rights instrument provides that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.<sup>724</sup>

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*on the Rights and Welfare of the Child* (2000). *Id.* at n.65 (the dates in parentheses are the dates on which South Africa ascended to the individual agreements).

721. *Bhe*, 2005 (1) SA 580, ¶ 55. *See also* Preamble to United Nations Convention on the Rights of the Child, *supra* note 8. (citing the Declaration of the Rights of the Child, adopted by the UN General Assembly in 1959).

722. United Nations Convention on the Rights of the Child, *supra* note 8, at 46, art.2(1).

723. G.A. Res. 2200A (XXI), International Convention on Civil and Political Rights, art. 24(1) (Dec. 16, 1966).

724. ACRWC, *supra* note 99, art. 3.

The next international human rights instrument that the learned Justice refers to is the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>725</sup> particularly, the Convention's Article 14,<sup>726</sup> which prohibits discrimination. Justice Langa notes that "the European Court on Human Rights has held that treating extra-marital children differently to those born within a marriage constitutes a suspect ground of differentiation in terms of article 14 of the Charter."<sup>727</sup> The learned Justice then goes on to note that the U.S. Supreme Court has, in *Weber v. Aetna Casualty and Surety Co.*, held that discriminating on the grounds of "illegitimacy" is "illogical and unjust."<sup>728</sup>

Justice Langa then argues that:

The prohibition of unfair discrimination on the ground of birth in section 9(3) of [the Constitution of South Africa] should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born.<sup>729</sup>

He stated further that "extra-marital children did, and still do, suffer from social stigma and impairment of dignity."<sup>730</sup> Thus, "[t]he prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from [South African] society."<sup>731</sup> Accordingly, "when section 9(3) prohibits unfair discrimination on the

725. See *Bhe*, 2005 (1) SA 580, ¶ 56. See generally Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 005 [hereinafter Protection of Humans].

726. See Protection of Humans, *supra* note 723, art. 14. Article 14 states as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." See European Convention, *supra* note 704, art. 14.

727. *Bhe*, 2005 (1) SA 580, ¶ 56. See also *Marckx v. Belgium*, App. No. 6833/74, 2 Eur. H.R. Rep. 330, ¶¶ 38–39 (1979); *Inze v. Austria*, App. No. 8695/79, 10 Eur. H.R. Rep. 394, ¶ 41 (1987).

728. *Bhe*, 2005 (1) SA 580, ¶ 56 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (holding that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.")).

729. *Id.* ¶ 59.

730. *Id.*

731. *Id.*



ground of ‘birth’, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s parents were married at the time of conception or birth.”<sup>732</sup> If, however, differentiation is made “on such grounds,” argues Justice Langa, “it will be assumed to be unfair unless it is established that it is not.”<sup>733</sup>

In the Court a quo, argues Justice Langa, Section 23 of the Black Administration Act “was correctly described as a racist provision which is fundamentally incompatible with the Constitution.”<sup>734</sup> He argued further that the “Constitutional Court has often expressed its abhorrence of discriminatory legislation and practices which were a feature of [South Africa’s] hurtful and racist past and which are fundamentally inconsistent with the constitutional guarantee of equality.”<sup>735</sup> Thus, “Section 23 cannot escape the context in which it was conceived” and the fact that “[i]t is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of ‘European’ descent.”<sup>736</sup> In addition, Section 23 was “part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, ‘to the Native mind,’ would be ‘both startling and unjust.’”<sup>737</sup>

Justice Langa then reviews several South African judicial rulings that expose legislative acts designed for the “native administration,” which include the Black Administration Act, as legal instruments designed to advance racial discrimination and exploit the African peoples. He then concludes “that construed in the light of its history and context, [S]ection 23 of the [Black Administration Act] and its regulations are manifestly discriminatory and in breach of section 9(3) of our Constitution.”<sup>738</sup> He went on to state, that “[t]he discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of our racist and painful past. Th[e] Court has, on a number of occasions, expressed the need to purge the statute book of such harmful and hurtful provisions.”<sup>739</sup>

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732. *Id.*

733. *Id.*

734. *Id.* ¶ 60.

735. *Id.*

736. *Id.* ¶ 61.

737. *Id.*

738. *Id.* ¶ 68.

739. *Id.*

For the Court, the only question left to be resolved was “whether the discrimination occasioned by [S]ection 23 and its regulations is capable of justification in terms of [S]ection 36 of our Constitution.”<sup>740</sup> According to Section 36 of the Constitution, “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”<sup>741</sup> He then cited to *S v. Manamela and Another (Director-General of Justice Intervening)*:

[T]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.<sup>742</sup>

Justice Langa states that “[t]he rights violated are important rights, particularly in the South African context” and that “[t]he rights to equality and dignity are of the most valuable of rights in any open and democratic state.”<sup>743</sup> The rights in question, according to Justice Langa, “assume special importance in South Africa because of [the country’s] past history of inequality and hurtful discrimination on grounds that include race and gender.”<sup>744</sup> Finally, Justice Langa states: “[i]t is clear from what is stated above that the serious violation by the provisions of section 23 of the rights to equality and human dignity cannot be justified in [the country’s] new constitutional order.”<sup>745</sup> Thus, “[i]n terms of

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740. *Id.*

741. S. AFR. CONST., 1996, § 36(1).

742. *S v. Manamela*, 2000 (3) SA 1 (CC), ¶ 32 (S. Afr.).

743. *Bhe*, 2005 (1) SA 580, ¶ 71.

744. *Id.*

745. *Id.* ¶ 73.

[S]ection 172(1(a) of the Constitution,<sup>746</sup> [S]ection 23 must accordingly be struck down.<sup>747</sup>

Justice Langa then next examines the “context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them,”<sup>748</sup> the “position of the extra-marital child,”<sup>749</sup> and the “effect of changing circumstances.”<sup>750</sup> The Court concludes that customary law, including especially the rules of succession, “have not been given the space to adapt and to keep pace with changing social conditions and values.”<sup>751</sup> The most worrying part of customary law in South Africa, Justice Langa explains, is that it has been “distorted in a manner that emphasizes its patriarchal features and minimizes its communitarian ones.”<sup>752</sup> He then concluded that “[t]he primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.”<sup>753</sup>

Ultimately, after discussing what it argued were the positive aspects of customary law— “consensus-seeking,” ability to provide for “family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements,”<sup>754</sup> and making references to provisions of various international human rights instruments that South Africa has ratified—the Court rendered its ruling.

First, the Court set aside the orders of the Cape High Court in the matter of *Bhe and Others v. The Magistrate, Khayelitsha and Others*, and

746. Section 172 of the Constitution of South Africa deals with the powers of courts in constitutional matters. See S. AFR. CONST., 1996, § 172. It states as follows:

(1) When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

*Id.* § 172(1)(a).

747. *Bhe*, 2005 (1) SA 580, ¶ 73.

748. *Id.* ¶ 75.

749. *Id.* ¶ 79.

750. *Id.* ¶ 80.

751. *Id.* ¶ 82.

752. *Id.* ¶ 89.

753. *Id.* ¶ 95.

754. *Id.* ¶ 45.

the Pretoria High Court in the matter of *Charlotte Shibi v. Mantabeni Freddy Sithole and Others*.<sup>755</sup> Second, the Court declared Section 23 of the Black Administration Act 38 of 1927 “inconsistent with the Constitution and invalid.”<sup>756</sup> Third, the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) and which were published in Government Gazette No. 10601 of February 6, 1987, as amended, were declared to be invalid.<sup>757</sup> Fourth, “[t]he rule of male primogeniture as it applies in customary law to the inheritance of property [was] declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.”<sup>758</sup> Fifth, the Court declared § 1(4)(b) of the Intestate Succession Act 81 of 1987 to be “inconsistent with the Constitution and invalid.”<sup>759</sup>

Specifically, with respect to the three cases, the Court held, in the matter of *Bhe and Others v. The Magistrate, Khayelitsha and Others*, that Nonkululeko Bhe and Anelisa Bhe are the sole heirs of the deceased estate of Vuyo Elius Mgolombane.<sup>760</sup> In the matter of *Charlotte Shibi v. Mantabeni Freddy Sithole and Others*, the Court declared Charlotte Shibi as the sole heir of the deceased estate of Daniel Solomon Sithole.<sup>761</sup>

#### 4. *Attorney General v. Dow (Botswana)*

In this case, *Attorney General v. Unity Dow* (“Unity Dow”),<sup>762</sup> the applicant was Unity Dow, a citizen of Botswana, who was born in Botswana of parents who were members of one of the country’s ethnocultural groups.<sup>763</sup> She was married to Peter Nathan Dow, a citizen of the United States who had been resident in Botswana for nearly fourteen years.<sup>764</sup> A child, named Cheshe Maitumelo Dow, was born to the couple on October 29, 1979, before they were married on March 7,

755. *Id.* ¶ 136(1).

756. *Id.* ¶ 136(2).

757. *See id.* ¶ 136(3).

758. *Id.* ¶ 136(4).

759. *Id.* ¶ 136(5).

760. *See id.* ¶ 136(11)(a).

761. *See id.* ¶ 136(11)(b).

762. *See Attorney-General v. Dow*, 1992 BLR 119 (CA) (Bots.).

763. *See id.* at 125.

764. *See id.*

1984. After their 1984 marriage, they had two more children.<sup>765</sup> The applicant also indicated that she and her family had established their home in Raserura Ward in Mochudi and that “all the children [regarded] that place and no other as their home.”<sup>766</sup>

Under the laws in existence in Botswana prior to the enactment of the Citizenship Act of 1984, Cheshe Dow, the child born to the couple before their 1984 marriage, was a citizen of Botswana, and hence, a Motswana. Nevertheless, in terms of the Citizenship Act of 1984, the two children born during their marriage were not citizens of Botswana and as such, aliens in the land of their birth.<sup>767</sup> The applicant (Unity Dow) argued before the High Court of Botswana that Sections 4 and 5 of the Botswana Citizenship Act of 1984 offended the country’s Constitution because they are discriminatory and a limitation on her basic rights and freedoms.<sup>768</sup> The relevant sections are:

4 (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth – (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

5 (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth – (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.<sup>769</sup>

The High Court noted that “[i]n order to fully understand [the applicant’s] contentions it is advantageous to record that at Independence

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765. See *id.* The two children were named Tumisang Tad Dow (born on March 26, 1985) and Natasha Selemo Dow (born on November 26, 1987). *Id.*

766. *Id.*

767. See *id.*

768. See *Attorney General v. Unity Dow*, MISCA. 124/90, at 30 (High Ct. Botswana June 11, 1991) (unreported), <https://uniteforreproprights.org/wp-content/uploads/2017/10/botswana.pdf>.

769. *Dow*, 1992 BLR at 125.

and up to 1984, the qualifications for citizenship were set out in the Constitution at Sections 20–29. Section 21 reads as follows<sup>770</sup>:

Every person born in Botswana on or after 30th September, 1966 shall become a citizen of Botswana at the date of his birth:

Provided that a person shall not become a citizen of Botswana by virtue of this section if at the time of his birth

(i) neither of his parents is a citizen of Botswana and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Botswana; or

(ii) his father is a citizen of a country with which Botswana is at war and the birth occurs in a place then under occupation by that country.<sup>771</sup>

The High Court went on to note that these provisions were repealed by the Citizenship Act of 1984 and that, as a result, “a child born out of wedlock of a citizen mother and a non-citizen father is a citizen but if born of a marriage between its mother and a non-citizen father that child is an alien.”<sup>772</sup> Counsel for the applicant, the High Court noted, relied on Section 3 of the Constitution, which states as follows:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection

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770. *Unity Dow*, MISCA. 124/90, at 31.

771. *Id.* (quoting S. AFR. CONST., 1996, § 21).

772. *Id.*

as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.<sup>773</sup>

The High Court went on to note that Section 5 of the Constitution guarantees the right to liberty and the right to the protection of the law.<sup>774</sup> Section 7 provides that “[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment” and Section 14 states that “[n]o person shall be deprived of his freedom of movement.”<sup>775</sup> The question that the Court was tasked with answering was “does the provision that the children born in Botswana of a female citizen married to a non-citizen are not citizens of Botswana, offend against the Constitution?”<sup>776</sup>

In his analysis of the case, Justice Horwitz sought help from other jurisdictions, including the Privy Council<sup>777</sup> and the Supreme Court of Zimbabwe,<sup>778</sup> especially as it relates to constitutional interpretation. He also made mention of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, which deals with family life,<sup>779</sup> as well as, “decisions on which have recognized the family unit and the right to protection of illegitimate children.”<sup>780</sup> In addition, Justice Horwitz also mentions the UN Declaration of the Rights of the Child, which contains the following principle: “[the child] shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”<sup>781</sup>

773. *Id.*

774. *Id.*

775. *Id.*

776. *See id.* at 32.

777. *See id.* at 33.

778. *See id.* at 35.

779. *See* Protection of Human Rights, *supra* note 723.

780. *Attorney General v. Unity Dow*, MISCA. 124/90, at 33 (High Ct. Botswana June 11, 1991) (unreported), <https://uniteforreporights.org/wp-content/uploads/2017/10/botswana.pdf>.

781. Declaration of the Rights of the Child, *supra* note 23, principle 6.

Moreover, Justice Horwitz referenced Article 24 of the International Convention on Civil and Political Rights, which states, at Article 24(1), that “[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”<sup>782</sup> The Court then proceeded to outline what it argued were “certain consequences of the [Botswana] Citizenship Act [1984] affecting the Applicant.”<sup>783</sup>

First, Justice Horwitz stipulated that “[n]ot only the husband but the children are liable to be expelled from Botswana.”<sup>784</sup> Second, “if the husband were to decide to leave both Botswana and his wife, (the applicant), the children, assuming they are left behind can only continue to live in Botswana if they are granted residence permits.”<sup>785</sup> Third, assuming that the applicant (Unity Dow), “did not want to follow her husband, or he did not want her to do so, she does not really have a free decision. She can only do so at the price of her children. (It must be remembered that this would not be the position with a male citizen married to an alien female).”<sup>786</sup>

The Court then went on to examine the effect of Section 4 of the Botswana Citizenship Act (1984) on the fundamental liberties of the applicant. Mr. Browde, one of the applicant’s counsels, argued that the applicant, by reason of Section 4 of the Citizenship Act, was:

[D]enied the following human rights and freedoms guaranteed by the Constitution—the right to liberty, protection of the law, immunity from expulsion from Botswana, protection from being subjected to degrading treatment, and not to be discriminated against on the basis of her sex. The Applicant suffers from adverse consequences of the relevant clauses of the Section only because she is a woman.<sup>787</sup>

Justice Horwitz stated that this was “a fair and correct conclusion to be drawn from the wording of the Section especially in comparison with

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782. G.A. Res. 2200A (XXI), International Convention on Civil and Political Rights, (Dec. 16, 1966).

783. *Unity Dow*, MISCA. 124/90, at 35.

784. *Id.* at 37.

785. *Id.*

786. *Id.*

787. *Id.* at 38.



the original citizenship rights which stemmed from the now repealed Sections of the Constitution.<sup>788</sup>

Justice Horwitz then went on to discuss “discrimination generally” and address the following question: “[I]s Section 4 of the Citizenship Act discriminatory?”<sup>789</sup> In doing so, Justice Horwitz argued that he was “strengthened in [his] view by the fact that Botswana is a Signatory to the O.A.U. Convention on Non-Discrimination.”<sup>790</sup> However, he argued that the signing of the Convention by Botswana “does not give it the power of law in Botswana.”<sup>791</sup> Nevertheless, the Court states that:

[T]he effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a ‘narrow construction’ which results in a finding that [S]ection 15 of the constitution permits unrestricted discrimination on the basis of sex.<sup>792</sup>

Justice Horwitz then agreed with Mr. Browde that “the general effect of the provisions of the Citizenship Act which have been attacked before [Justice Horwitz] is to interfere with the dignity of the person. The effect is to lower a person in her position and reputation, and that can be regarded as degrading treatment.”<sup>793</sup> He continued by stating that “Section 4 is discriminatory in its effect on women in that, as a matter of policy,<sup>794</sup>

(i) It may compel them to live and bear children outside wedlock.

(ii) Since her children are only entitled to remain in Botswana if they are in possession of a residence permit and since they are not granted permits in their own right, their right to remain in Botswana is dependent upon their forming part of their father’s residence permit.

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788. *Id.*

789. *Id.*

790. *Id.* at 39.

791. *Id.*

792. *Id.*

793. *Id.* at 41.

794. *Id.*

(iii) The residence permits are granted for no more than two years at a time, and if the applicant's husband's permit were not to be renewed both he and applicant's minor children would be obliged to leave Botswana.

(iv) In addition Applicant is jointly responsible with her husband for the education of their children. Citizens of Botswana qualify for financial assistance in the form of bursaries to meet the costs of university education. This is a benefit which is not available to a non-citizen. In the result the applicant is financially prejudiced by the fact that her children are not Botswana citizens.

(v) Since the children would be obliged to travel on their father's passport the applicant will not be entitled to return to Botswana with her children in the absence of their father.<sup>795</sup>

Justice Horwitz then went on to hold that "Sections 4 and 5 of the Citizenship Act Cap 01:01 are declared *ultra vires* the Constitution of Botswana."<sup>796</sup> Although this case was essentially about the rights of Unity Dow, a Motswana, and the wife of an American citizen living in Botswana, it is evident that the decision of the High Court also dealt specifically with the rights of their two children and the children of Botswana generally.

After the High Court's ruling in favor of Unity Dow, the Attorney-General of Botswana brought an appeal against the judgment before the Court of Appeal ("CA").<sup>797</sup> Judge Amisshah, writing for the CA, began his analysis of the case by noting that "[t]he facts of the case which gave cause for the respondent's<sup>798</sup> complaint were well summarized by the learned judge a quo."<sup>799</sup> Nevertheless, he went on to provide a summary of the facts of the case for the benefit of the various parties to the case before the CA.

The Appellant's appeal was based on several grounds, which included, inter alia, whether the applicant, Unity Dow, had the relevant

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795. *Id.*

796. *Id.* at 42.

797. *See Attorney-General v. Dow*, 1992 BLR 119 (CA) (Bots.).

798. In the Court of Appeal case, the appellant was the Attorney-General of the Republic of Botswana and the respondent was Unity Dow. *Id.* at 124.

799. *Id.*

“locus standi to apply to the High Court for redress pursuant to section 18 of the Constitution.”<sup>800</sup> In his analysis, Judge Amisshah noted “that Botswana is one of the credible prime movers behind the promotion and supervision of the [African Charter on Human and Peoples’ Rights],”<sup>801</sup> which provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>802</sup>

In addition, he made reference to paragraphs 1 and 2 of article 12 of the Banjul Charter:

1. Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.<sup>803</sup>

Justice Amisshah then took note of the pronouncements of Judge Agudah in *Petrus and Another v. The State*.<sup>804</sup> In that case, Judge Agudah noted that at paragraph thirty-seven, “[t]he peoples of [Botswana] form an integral part of the modern civilised world community now used to the enjoyment of the usual democratic freedoms under humane Governments” and that “Botswana is a proud member of the Organization of African Unity (OAU) and of the United Nations (UN); and must be presumed to be willing to abide by all the protocols of those

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800. *Id.* at 127.

801. *Id.* at 153.

802. *Id.* at 156. *See also* Banjul Charter, *supra* note 159, art. 2.

803. *Id.* art. 12(1–2).

804. *See Attorney-General v. Dow*, 1992 BLR 119,154 (CA) (Bots.). *See generally Petrus v. State*, 1984 BLR 14, ¶ 37 (CA) (Bots.) (discussing a case of the Court of Appeal of Botswana, the country’s highest and final court).

bodies which it has agreed to.”<sup>805</sup> Judge Amissah noted that he was in agreement:

[T]hat Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.<sup>806</sup>

He argued further that “[t]his principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.”<sup>807</sup>

After analyzing the decision of the Court a quo, Judge Amissah concluded that that decision “was right in holding that section 4 of the Citizenship Act infringes the fundamental rights and freedoms of the respondent conferred by sections 3 (on fundamental rights and freedoms of the individual), 14 (on protection of freedom of movement) and 15 (on protection from discrimination) of the Constitution.”<sup>808</sup> Finally, Judge Amissah held that “[t]he declaration of the Court a quo that sections 4 and 5 of the Citizenship Act (Cap 01:01) are ultra vires the Constitution, is, accordingly, varied by deleting the reference to section 5. Otherwise, the appeal is dismissed.”<sup>809</sup>

5. *C.K. (A Child) (Through Ripples International as Her Guardian and Next Friend & 11 Others v. Commissioner of Police/Inspector General the National Police Service & 3 Others (Kenya)*

*C.K. (A Child) (Through Ripples International as Her Guardian and Next Friend & 11 Others v. Commissioner of Police/Inspector General*

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805. *Petrus*, 1984 BLR 14 (CA), ¶ 37.

806. *Dow*, 1992 BLR 119 at 154.

807. *Id.*

808. *Id.* at 160.

809. *Id.*

*the National Police Service & 3 Others*<sup>810</sup> concerned petitions brought by eleven children who were victims of “defilement, child abuse, and other forms of sexual violence” before the Kenya High Court at Meru.<sup>811</sup> The petitioners “alleged 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.”<sup>812</sup>

Justice Makau, writing for the Court, noted that the twelve petitioners based their petition, dated October 11, 2012, on various articles of “the Constitution of Kenya, 2010, [several provisions] of the Universal Declaration of Human Rights, [several articles] of the African Charter on the Rights and Welfare of the Child, [several articles] of the African Charter of Human and Peoples’ Rights, Section[s] 3, 5, 15 and 22 of the Children Act 2001 (Chapter 141) of the Laws of Kenya, the Sexual Offenses Act, 2006 (Act No. 3 of 2006) and the Police Act (Chapter 84) of the Laws of Kenya.”<sup>813</sup>

The issues put before the Kenya High Court (“Court”) for adjudication were the following:

1. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ complaints of defilement violates the first eleven petitioners’ fundamental rights and freedoms—(a) to special protection as members of a vulnerable group; (b) to equal protection and benefit of the law; (c) not to be discriminated against; (d) to inherent dignity and the right to have the dignity protected; (e) to security of the person; (f) not to be subjected to any form of violence from public or private sources or torture or cruel or degrading treatment; and (g) to access justice as respectively set out in Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(c) of the Constitution [of the Republic of Kenya].

2. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ respective

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810. *See* C.K. (A Child) v. The Commissioner of Police (2012) 8 K.L.R. 1, 11 (H.C.K.) (Kenya).

811. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *LEGAL GROUNDS: REPRODUCTIVE AND SEXUAL RIGHTS IN SUB-SAHARAN AFRICAN COURTS*, VOLUME III 33 (2017).

812. *Id.* at 33.

813. C.K., 8 K.L.R., at 2.

complaints violates the first eleven petitioners' fundamental rights and freedoms under—(a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights[;] (b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child; (c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child; and (d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and peoples' rights.

3. An order of mandamus directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence.

4. [A]n order of mandamus directing the 3rd respondent together with his agents, delegates and/or subordinates to—(a) formulate the National Policy Framework envisioned by Section 46 of the Sexual Offences Act, 2006 through a consultative and participatory process, ensuring its compliance with the Constitution and to disseminate, implement and widely and regularly publicize the National Policy Framework, and (b) [m]ake and/or cause the National Policy Framework in (a) above to be made a mandatory component of the training curricular at all police training colleges and institutions.

5. An order of mandamus directing the 3rd respondent together with his agents, delegates and/or subordinates to implement the guidelines provided in the Reference Manual on the Sexual Offences Act, 2006 for prosecutors, Sections 27–36, excepting section 34.

6. An order of mandamus directing the 1st respondent together with his agents, delegates and/or subordinates to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this Petition.

7. An Order directing the Respondents to regularly and/or account to the Honorable Court, for such period as the Honourable Court may direct, on compliance and/or implementation of the orders set out in paragraphs (3) to (6) (inclusive) above.

8. The costs of and incidental to this petition.

9. Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honorable court shall deem just and expedient.<sup>814</sup>

In its analysis, the Court determined 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.”<sup>815</sup> Justice Makau stated 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.<sup>816</sup>

The police, the Court noted, had failed to perform their jobs, and in doing so, they had caused further harm to the petitioners. Justice Makau noted that “[w]hereas the perpetrators are directly responsible for the harms, to the petitioners, the respondents’ herein cannot escape blame and responsibility.”<sup>817</sup> The learned judge went on to hold 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. As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted.<sup>818</sup>

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814. *Id.* at 2.

815. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *supra* note 809, at 34. *See also* C.K., 8 K.L.R., at 4.

816. C.K., 8 K.L.R., at 7.

817. *Id.* at 7. The respondents 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 id.*

818. *Id.* at 7.

The Court determined that, although the petitioners visited various police stations after each sexual attack and “gave names of the perpetrators being people they knew,” the police failed to take appropriate action.<sup>819</sup> Instead, the police “showed disbelief, blamed the victims, humiliated them, yelled at and ignored them as they put them under vigorous cross-examination and failed to take action.”<sup>820</sup> The learned judge went on to hold that “[t]he respondents are,” in his view, “directly responsible for psychological harm caused by their actions and inactions,” and that the petitioners have been severely damaged psychologically.<sup>821</sup>

The *C. K. (A Child)* Court took note of the South African Supreme Court of Appeal case, *Van Eeden v. Minister of Safety and Security*,<sup>822</sup> a case in which the “police allowed a dangerous criminal and serial rapist [Mohamed] to escape from custody.”<sup>823</sup> Mohamed, the serial rapist, whom the police had allowed to escape from custody, later brutally attacked and “sexually assaulted, raped and robbed” the appellant, a “19-year old woman.”<sup>824</sup> The Supreme Court of Appeal of South Africa subsequently held, in *Van Eeden*, that a fundamental breach of the petitioners’ freedom had occurred when the police “failed to pursue the perpetrators of child abuse and sexual violence.”<sup>825</sup> Specifically, the Court held as follows:

The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms . . . everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources . . . In all the circumstances of the present case I have come to the conclusion that the [p]olice owed the appellant a legal duty to act positively to prevent

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819. *Id.* at 7.

820. *Id.* at 7.

821. *Id.* at 7. Specifically, Makau J held that the petitioners have “become self-doubtful, self-loathing, self-blam[ing], and have low self-esteem.” *Id.* at 7.

822. *See id.* at 7. *See generally* *Van Eeden v. Minister of Safety and Security*, 2002 (1) SA 389 (SCA) (S. Afr.).

823. *C.K.*, 8 K.L.R., at 7.

824. *Van Eeden*, (1) SA 389, ¶ 1. The perpetrator was named André Gregory Mohamed. *See id.* at para. 1.

825. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *supra* note 809, at 34.



Mohamed's escape . . . I have reached this conclusion mainly in view of the State's Constitutional imperatives to which I have referred.<sup>826</sup>

The *C.K. (A Child)* Court then cited to *Jessica Lenahan (Gonzales) et al. v. U.S.*,<sup>827</sup> a case of the Inter-American Commission on Human Rights, "in support of the proposition that the state had a positive obligation to protect the vulnerable, such as children, and its failure to do so did not need to be intentional in order to constitute a breach of this obligation."<sup>828</sup> In *Jessica Lennan*, the Inter-American Commission on Human Rights ("the IACHR") noted that:

The claimants assert[ed] in their petition that the United States [had] violated Articles I, II, V, VI, VII, IX, XVIII and XXIV of the American Declaration by failing to exercise due diligence to protect Jessica Lenahan and her daughters from acts of domestic violence perpetrated by the ex-husband of the former and the father of the latter, even though Ms. Lenahan held a restraining order against him.<sup>829</sup>

The claimants also alleged that "the police failed to adequately respond to Jessica Lenahan's repeated and urgent calls over several hours reporting that her husband had taken their three minor daughters (ages [seven], [eight], and [ten]) in violation of the restraining order, and asking for help."<sup>830</sup> In addition, contended the claimants, "the State never duly investigated and clarified the circumstances of the death of Jessica Lanahan's daughters, and never provided her with an adequate remedy for the failures of the police."<sup>831</sup> The *C.K. (A Child)* Court agreed with the IACHR which found that "a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances."<sup>832</sup> Justice Makau, then noted that "[t]he courts have

826. *C.K.*, 8 K.L.R., at 7–8.

827. See generally *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

828. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *supra* note 809, at 34.

829. *Jessica Lenahan*, Case 12.626, ¶ 2.

830. *Id.*

831. *Id.*

832. *Id.* ¶ 126.

found that [the] State has a clear duty to investigate crime and found [that] the failure to do so constitute[s] a Constitutional violation of claimant's rights."<sup>833</sup>

The Court in *C. K. (A Child)* also agreed with the principle stated in the Kenyan case, *R V Commissioner of Police & 3 Others ex-parte Phylis Temwai Kipteyo HC. Misc. Appl. 27 of 2008, (2011) Eklr (Gungoma)*,<sup>834</sup> that "once a report is made to the police, the police have a duty to take the appropriate steps and actions to investigate and apprehend the perpetrators, and the failure to do so violated constitutional rights of the victims as guaranteed under Article 244 of the Constitution of Kenya 2010."<sup>835</sup> The *C. K. (A Child)* Court specifically cited to the part of the ruling in the *R V Commissioner of Police* case, which states that:

All the same, the life of the victim and the interests of the family are protected by the constitution and the statutes. The State through the Respondents herein are responsible for security of citizens in this country. It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the State to investigate the disappearance of the victim herein who was its subject and its employee.<sup>836</sup>

Justice Makau went on to note that he agreed with the decision in *R V Commissioner of Police* that "once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offense and the investigation must be [sic] conducted effectively, properly and professionally short thereof amounts to violation of fundamental rights of the complainant."<sup>837</sup> In addition, stated the learned Judge, "[i]n the instant case the police owed a [c]onstitutional duty to

833. *C.K. (A Child) v. The Commissioner of Police* (2012) 8 K.L.R. 1, 8 (H.C.K.) (Kenya).

834. *See generally* Republic v. Commissioner of Police, Mohammed & 3 Others Ex-Parte Phylis Temwai Kipteyo, (2008) H.C.K. 1, 4 (Kenya).

835. CENTER FOR REPRODUCTIVE RIGHTS ET AL., *supra* note 809, at 34.

836. *See Republic*, (2008) H.C.K, at 4. This holding was also quoted by Makau J in *C.K. (A Child) v. The Commissioner of Police* (2012) 8 K.L.R. 1, 8 (H.C.K.) (Kenya). *See also* JUDICIAL BENCH BOOK ON VIOLENCE AGAINST WOMEN IN COMMONWEALTH EAST AFRICA 278 (Commonwealth Secretariat ed. 2017).

837. *C.K.*, 8 K.L.R., at 8.

protect the petitioners' right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the Constitution.<sup>838</sup>

The *C. K. (A Child)* Court also made reference to the Constitution of Kenya, 2010; specifically Article 244, which deals with the National Police Service. Article 244 (a)–(e) states as follows:

The National Police Service shall—

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) foster and promote relationships with the broader society.<sup>839</sup>

In addition, the Court also cited to Article 27 of the Constitution of Kenya, which deals with “[e]quality and freedom from discrimination.”<sup>840</sup> Specifically, Justice Makau cited to Articles 27(1) and 27(4), which state as follows:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit before the law . . . (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or

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838. *Id.* at 8.

839. CONSTITUTION art. 244 (a)–(e) (2010) (Kenya).

840. *Id.* art. 27.

social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.<sup>841</sup>

Justice Makau noted that the petitioners had “contend[ed] that “gender-based sexual violence constitutes discrimination and referred [him] to Article 1 of the *Convention [on] the Elimination of All Forms of Discrimination Against Women*, which defines discrimination against women.”<sup>842</sup> Justice Makau then held that:

Having considered the petitioners['] petition and affidavit in support and the fact the police did not take appropriate action to ensure justice to the petitioners I find the police failure to conduct prompt, effective, proper, corruption free, and a professional investigation into petitioners['] complaints of defilement and other form[s] of sexual violence amounts to discrimination contrary to the expressly and implied provisions of Article 27 of the Constitution of Kenya, 2010 and contrary to Article 244 of the Constitution of Kenya, 2010.<sup>843</sup>

In addition, Justice Makau stated, “the [p]olice failure to effectively enforce Section 8 of the Sexual Offenses Act, 2006 infringes upon the petitioners['] right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.”<sup>844</sup> The learned Judge concluded that the respondents (i.e., the police) were “responsible for [the] violation of the petitioners’ rights under Article 27 of the Constitution of Kenya, 2010” and that they (the police) were “obligated by law to protect girl

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841. *Id.* arts. 27(1), 27(4).

842. *C.K.*, 8 K.L.R., at 8. The Convention on the Elimination of All Forms of Discrimination Against Women defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” CEDAW, *supra* note 160, at art. 1.

843. *C.K.*, 8 K.L.R., at 8–9.

844. *Id.* at 9.

children from defilement and ensure effective investigation of defilement claims.”<sup>845</sup>

Next, Justice Makau cited to a case by the European Court of Human Rights, *Case of M.C. v. Bulgaria*,<sup>846</sup> and took note of part of the holding in that case, which states as follows:

[T]he investigation of the applicant’s case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States’ positive obligations—viewed in the light of the relevant modern standards in comparative and international law—to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.<sup>847</sup>

The Court thus finds that in the present case there has been a violation of the respondent State’s positive obligations under both Articles 3 [on torture and inhuman/degrading treatment] and 8 [on protection of the law] of the Convention.<sup>848</sup>

Another international case that Justice Makau cited was the *Case of C.A.S. and C.S. v. Romania* of the European Court of Human Rights (ECtHR) where the ECtHR in that case held that “an ineffective investigation of sexual assault charges violates the [European Convention on Human Rights].”<sup>849</sup> The learned Judge cited specifically to the section of the ECtHR’s ruling, which states that:

[I]t [i.e., the investigation] should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness

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845. *Id.* at 9.

846. *See generally* *Case of M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. 33, ¶ 185.

847. *Id.*

848. *Id.* ¶ 187.

849. *C.K.*, 8 K.L.R., at 9 (quoting *Case of C.A.S. and C. S. v. Romania*, Eur. Ct. H.R. (2012)).

and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation.<sup>850</sup>

Additionally, Justice Makau also sought supporting case law from the Constitutional Court of South Africa, the country's highest court. Specifically, the learned judge cited to *Carmichele v. Minister of Safety and Security*,<sup>851</sup> a case that involved the brutal and vicious attack of Alix Jean Carmichele. The attacker, Francois Coetzee, was subsequently "convicted of attempted murder and housebreaking in the Knysna regional court and was sentenced to an effective term of imprisonment of twelve-and-a-half years."<sup>852</sup>

The victim (the "applicant") then instituted proceedings in the Cape of Good Hope High Court ("the High Court") against the Minister for Safety and Security and the Minister of Justice and Constitutional Development for damages related to the attack.<sup>853</sup> In her petition, the applicant claimed that "members of the South African Police Service and the public prosecutors at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm."<sup>854</sup> At the completion of the applicant's case, "[Justice Chetty] found that there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongly."<sup>855</sup>

Justice Chetty subsequently "granted an order of absolution from the instance in favour of the respondents with costs."<sup>856</sup> Thereafter, and with leave of the High Court, the applicant took her case to the Supreme Court of Appeal ("SCA"), but the SCA dismissed the appeal with costs.<sup>857</sup> The

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850. *Case of C.A.S. and C. S.*, Eur. Ct. H.R., ¶ 70.

851. *See generally Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938, ¶ 1 (CC) (S. Afr.).

852. *Id.*

853. *See id.* ¶ 2.

854. *Id.*

855. *Id.* ¶ 3.

856. *Id.*

857. *See id.*

applicant then sought relief at the CC. It was to the ruling of the CC in *Carmichele* that Justice Makau, writing for the Court in *C.K. (A Child)*, sought supporting case law. Justice Makau cited specifically to this section of the judgment in *Carmichele*:

The courts are under a duty to send a clear message to the accused, to other potential rapists and the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.<sup>858</sup>

Justice Makau next sought supporting case law from the Inter-American Court of Human Rights (the “Inter-American Court”). Specifically, the learned judge cited to the *Case of González et al. (“Cotton Field”) v. Mexico*,<sup>859</sup> which involved “the assassination of three women, in three separate incidents, who were all found dead in the same cotton field in Ciudad Juárez.”<sup>860</sup> In addition to “finding violations of several articles of the American Convention [on Human Rights], mainly due to the severe investigative deficiencies that marred prosecution of the women’s assassins, the Court also found violations of the Convention on the Prevention, Punishment and Eradication of Violence Against Women

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858. *Id.* ¶ 62. In addition to granting the applicant’s application for special leave to appeal, Ackermann and Goldstone JJ, writing for the Court, also granted her costs. *Id.* ¶ 84. That is, the appeal was upheld with costs, the order of the Supreme Court of Appeal was set aside and a new order was “substituted for that of the High Court: ‘The application for absolution from the instance is dismissed with costs’” and the High Court ordered to proceed with the trial. *Id.*

859. See generally *González v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

860. Monica Rodriguez, Case Summary, *González et al. (“Cotton Field”) v. Mexico*, 36 LOY. L.A. INT’L & COMP. L. REV. 1971, 1971 (2014).

(Convention of Belém do Pará).<sup>861</sup> The Inter-American Court found that the State of Mexico had infringed on the rights of the three assassinated women to equality and non-discrimination in relation to their torture, rape, and murder.<sup>862</sup>

The *C. K. (A Child)* Court cited specifically to the following part of the ruling in the *Cotton Field* case:

Evidence provided to the Court indicates, *inter alia*, that officials of the state of Chihuahua and the municipality of Juárez made light of the problem and even blamed the victims for their fate based on the way they dressed, the place they worked, their behavior, the fact that they were out alone, or a lack of parental care.<sup>863</sup>

The Court therefore finds that, in the instant case, the violence against women constituted a form of discrimination, and declares that the State violated the obligation not to discriminate contained in Article 1(1) of the [American] Convention [on Human Rights], in relation to the obligation to guarantee the rights embodied in Articles 4(1), 5(1), 5(2) and 7(1) of the American Convention [on Human Rights].<sup>864</sup>

Justice Makau noted that on issues of sexual violence, freedom, and security of the person, Kenyan courts have held that the State of Kenya “has an obligation to protect all citizens from violence and ensure their security of person.” This, states the learned judge “is enshrined in Article 29 of [the] Constitution [of Kenya].”<sup>865</sup>

Justice Makau then turned to Articles 48 and 50 of the Constitution of the Republic of Kenya, 2010. Article 48 deals with “access to justice” and imposes an obligation on the State to “ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”<sup>866</sup> Article 50 deals with a “fair hearing” and states that:

861. *Id.*

862. González, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 146–47.

863. *Id.* ¶ 154

864. *Id.* ¶ 402.

865. *C.K. (A Child) v. The Commissioner of Police* (2012) 8 K.L.R. 1, 9 (H.C.K.) (Kenya).

866. CONSTITUTION art. 48 (2012) (Kenya).



(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every accused person has the right to a fair trial.<sup>867</sup>

Thus, these two articles of the Kenyan Constitution impose an obligation on the State to make certain that access to the country's courts is not "unreasonably or unjustifiably impeded."<sup>868</sup> In the situation where there is a legitimate issue (e.g., complaint, dispute, or wrong) that can be resolved by the courts, or where and if appropriate, by an independent and impartial tribunal or body, the State must ensure that citizens are able to have access to these conflict resolution mechanisms.

In the country's criminal justice system, the police play a very important role, particularly with respect to the prevention of criminal activities and the investigation of crimes in order to provide the courts with the necessary information to fully adjudicate criminal matters brought before them. If the police abdicate this important function or role, there is most likely to be a miscarriage of justice, and many citizens may be denied justice. Justice Makau noted that the centrality of the police in criminal justice in Kenya is evidenced by the functions set out for the police in § 24 of the National Police Service Act, 2014.<sup>869</sup>

According to § 24, the functions of the Kenya police service are:

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;

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867. *Id.* art. 50.

868. *C.K.*, 8 K.L.R., at 10.

869. National Police Service Act (2014) Cap. 84 § 24 (Kenya).

- (h) apprehension of offenders;
- (i) enforcement of all laws and regulations with which it is charged;  
and
- (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.<sup>870</sup>

Justice Makau then noted that the police in the case before the Court (i.e., *C. K. (A Child)*) had failed to “conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners[’] [complaints].”<sup>871</sup> They had, instead, demanded bribes as a precondition for performing their jobs, which included investigating the petitioners’ complaints and determining the nature, extent, and type of harm inflicted on the petitioners. By doing so, the police had violated the petitioners’ right to access justice and to have their disputes resolved by the country’s courts in a fair manner in accordance with Article 50(1) of the Constitution of the Republic of Kenya.<sup>872</sup>

The learned Judge also noted that the Constitution of the Republic of Kenya also provides various protections for children. Specifically, Article 53 provides as follows:

- (1) Every child has the right—
  - (a) to a name and nationality from birth;
  - (b) to free and compulsory basic education;
  - (c) to basic nutrition, shelter and health care;
  - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor;

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870. *Id.* § 24(a)–(j).

871. *C.K.*, 8 K.L.R., at 10.

872. *See* KENYAN CONSTITUTION art. 50(1) (2012) (Kenya).

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child.<sup>873</sup>

Article 53(1) imposes an obligation on the State to make certain that all citizens, including the petitioners, are “protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor.”<sup>874</sup> The *C. K. (A Child)* Court then noted that the failure of the police to take action on the petitioners' complaints about their defilement at the hands of people who included relatives, violated the petitioners' rights under Article 53 of the Constitution of the Republic of Kenya, 2010. In addition, the operation of a “child's best interest[s]” prescribed by the Constitution at Article 53(2) mandates not just that the Government of Kenya enact laws to protect the rights of children but that the government make certain that those laws are effectively and duly enforced by all relevant state agencies (e.g., the police and the courts).<sup>875</sup> Failure to fully enforce these laws, Justice Makau stated, would amount to a violation of the country's constitution.

Justice Makau then makes reference to the UN Convention on the Rights and Child, which imposes an obligation on States Parties to:

[T]ake all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment

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873. *Id.* art. 53(1).

874. *C.K.*, 8 K.L.R., at 10.

875. *Id.*

or exploitation, *including sexual abuse*, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>876</sup>

The learned judge made the following ruling:

Having considered the evidence in the petitioners' affidavit and the petition herein, the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaty or convention ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners['] complaints of defilement and other forms of sexual violence infringes on the petitioners['] fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(d) of the Constitution of Kenya, 2010.<sup>877</sup>

In *C. K. (A Child)*, the petitioners relied on various international and regional human rights bodies (e.g., the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European Court on Human Rights) to support their arguments. The petitioners also made use of other authorities, including the Constitutional Court of South Africa. The petitioner's decision to anchor their claim on not only the Constitution of the Republic of Kenya, but also on international and regional authorities, directly implicated certain provisions of the Constitution of the Republic of Kenya, notably Article 2(5–6), which states that “[t]he general rules of international law shall form part of the law of Kenya” and that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”<sup>878</sup>

In the Court's decision, Justice Makau accepted the petitioners' reliance on regional and international authorities. For example, Justice Makau accepted the petitioners' argument that sexual violence constitutes discrimination against women under the Convention on the

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876. United Nations Convention on the Rights of the Child, *supra* note 9, art. 19(1).

877. *C.K.*, 8 K.L.R., at 10.

878. CONSTITUTION art. 2(5)–(6) (2012) (Kenya).

Elimination of All Forms of Discrimination Against Women.<sup>879</sup> Specifically, the *C.K. (A Child)* Court held that:

[T]he neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms [under]—

(a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights,

(b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;

(c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child, and (d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and people's rights.<sup>880</sup>

The *C.K. (A Child)* Court relied on authorities from regional and international bodies to make its decisions. In addition, the Court also cited authorities from the highest courts in countries, such as South Africa and the United States. By utilizing international law, notably international human rights law, as an interpretation tool, Kenyan courts are gradually bringing domestic law into compliance with the provisions of international and regional human rights instruments, even if these international provisions have not been fully domesticated to create rights that are justiciable in national courts. The decision in *C.K. (A Child)* joins others around the world that are using international law as tools of interpretation to define and make explicit the important role that the government must play in protecting its citizens, particularly the girl-child and women, from harm, either by state or non-state actors.

In addition, this decision also joins others by international and regional bodies, such as the Inter-American Human Rights Commission, the European Court of Human Rights, and various domestic courts, such as the Constitutional Court of South Africa, which recognize the obligations imposed on States by national constitutions, as well as, international human rights instruments, to be diligent in investigating,

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879. See CEDAW, *supra* note 160, art. 1.

880. *C.K.*, 8 K.L.R., at 11.

prosecuting, and bringing to justice anyone engaged in gender-based violence. States which fail to fulfill this obligation are in breach of various domestic and international instruments, which provide protection for the rights of girls and women.

## VI. CONCLUSION AND POLICY RECOMMENDATIONS

Since the end of the Second World War and the subsequent founding of the United Nations, international law, and particularly international human rights law, has advanced significantly, especially in its ability and capacity to protect the rights of children. In the area of the exploitation of children for military purposes, for example, the international community has adopted additional legal protections for children. In 1977, a majority of the Member States of the United Nations adopted Additional Protocols I and II to the Geneva Conventions of 1949 effectively prohibiting the recruitment and subsequent use of children under the age of fifteen years in military activities.<sup>881</sup>

Since then, other international legal instruments, designed to provide various protections to children, have been adopted at both the international and regional levels. These include, but are not limited to, the *UN Declaration on the Rights of the Child*;<sup>882</sup> the *UN Convention on the Rights of the Child 1989*;<sup>883</sup> the *Optional Protocols to the UN Convention on the Rights of the Child*;<sup>884</sup> the *African Charter on the Rights and Welfare of the Child, 1990*;<sup>885</sup> the *Universal Declaration of Human Rights, 1948*;<sup>886</sup> the *International Covenant on Economic, Social and Cultural Rights*;<sup>887</sup> and the *International Covenant on Civil and Political Rights*.<sup>888</sup>

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881. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, art. 77(2), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>.

882. See generally Declaration of the Rights of the Child, *supra* note 23.

883. See generally United Nations Convention on the Rights of the Child, *supra* note 9.

884. Sex Trafficking Protocol, *supra* note 63.

885. See generally ACRWC, *supra* note 99.

886. See generally UDHR, *supra* note 27, at 71.

887. See generally ICESCR, *supra* note 134.

888. See generally ICCPR, *supra* note 142.

The effectiveness of these international protections for children, however, depends, to a large extent, on the ability of States to domesticate the provisions of these various international and regional human rights instruments and create rights that are justiciable in domestic or municipal courts. Without the internationalization of national constitutional law, citizens of many African countries continue to be subjected to laws, customs, and traditions that fail to protect their fundamental and human rights. This is especially true of vulnerable groups, such as children, particularly the girl-child; women; and ethnic and religious minorities.

In many African countries, the customary, traditional, and religious practices of various ethnocultural groups discriminate against and violate the rights of children, as well as subject them to various atrocities (e.g., female genital mutilation, breast ironing, and servitude service in fetish shrines). For example, in 2005, the CESCR, which had met to consider a report from the Government of Zambia on the implementation of the ICESCR, observed that “the persistence of customs and traditions harmful to women, children, and older persons” was one of the factors impeding the full and effective implementation of the ICESCR.<sup>889</sup> In addition, the CESCR stated that “the prevalence of customary law—certain traditions, customs and cultural practices—leads to substantial discrimination against girls and women” and that “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,” as well as, “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,” are all factors contributing to the failure of Zambia to fully implement the ICESCR.<sup>890</sup>

Throughout the continent, the failure of African countries, such as Zambia, to internationalize their constitutional law, has allowed the continued existence of laws (constitutional and customary) and customs and traditions that harm children. In 1954, the UNGA adopted a resolution, which, *inter alia*, called for the abolition of “customs, ancient

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889. CESCR, *supra* note 190, ¶15. *See also* CONST. OF ZAMBIA (2016) § 23(4).

890. CESCR, *supra* note 190, ¶¶ 14, 23, 24.

laws and practices” that are harmful to children.<sup>891</sup> Emphasis was placed on completely eliminating child or early marriages and the betrothal of young girls before they reach the age of puberty.<sup>892</sup>

The adoption of the UDHR by the UNGA in 1948 set the foundation for the multilateral effort to recognize and protect human rights generally and the rights of historically vulnerable groups, such as children, in particular. As subsequent UN human rights instruments (e.g., the UN Convention on the Rights of Children) have shown, the emphasis has been placed on outlawing and eliminating all practices, regardless of their source, that are harmful to children. In recent years, for example, UN Women, an international organization dedicated to empowering women, has called on all countries to abolish female genital mutilation (“FGM”), child marriage, and other practices harmful to children.<sup>893</sup>

Threats to the rights and liberties of children in the African countries come from (i) constitutional law that is not fully internationalized and hence, does not conform with the provisions of international human rights instruments; (ii) customary law and traditional practices that harm children; (iii) judiciaries that do not have the necessary independence and capacity to fully perform their functions; and (iv) bureaucracies, including national police units, that are pervaded by corruption and hence, are not capable of performing their functions fully and effectively. As the discussion in this Article has shown, the solution to this quagmire lies, first, in domesticating international law and producing national constitutions that reflect the provisions of international human rights

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891. See Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women, *supra* note 205.

892. *Id.*

893. See UN Women Executive Director Calls for Action to End Female Genital Mutilation and Child Marriage in an Event in Senegal, UN WOMEN (June 17, 2019), <http://www.unwomen.org/en/news/stories/2019/6/news-executive-director-calls-for-action-to-end-fgm-and-child-marriage-in-senegal>. UN Women is the “United Nations Entity for Gender Equality and the Empowerment of Women.” See *About UN Women*, UN WOMEN, <https://www.unwomen.org/en/about-us/about-un-women> (last visited Feb. 29, 2019). Specifically, it is a UN entity that works to empower women throughout the world. See *id.* It became operational in January 2011. See *Video: UN Women Executive Board, First Regular Session 2011*, UN WOMEN (Jan. 24, 2011), <https://www.unwomen.org/en/news/stories/2011/1/video-un-women-executive-board-first-regular-session-2011>.



instruments, and second, reforming customary law to make certain that it conforms to the new and improved national constitutions.

Although the internationalization of national constitutions and reform of customary law may take some time and hence is a long-term project, it is important to note that this must be done in order to deal fully and effectively with the continued abuse and exploitation of children in the African countries. In the short term, however, domestic courts can, through constitutional interpretation, eliminate those laws, whether customary or otherwise, that harm children. In fact, these processes are already taking place in some African countries. For example, in the case of *State v. Williams & Others*, the South African Constitutional Court invalidated and declared unconstitutional provisions of a statute that were deemed harmful to children.<sup>894</sup> Although it did not deal directly or specifically with children, the Tanzanian High Court case of *Ephrahim v. Pastory*<sup>895</sup> provided an opportunity for Tanzanian courts to use international human rights law to challenge and subsequently invalidate “customs and traditions that discriminate against women and violate their rights.”<sup>896</sup>

Justice Mwalusanya, who wrote the decision for the High Court, listed several international human rights instruments that have been ratified by the United Republic of Tanzania, and then declared as follows:

The principles enunciated in the above named [international human rights instruments] are a standard below which any civilised nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.<sup>897</sup>

After determining that the Haya Customary Act was unconstitutionally discriminatory, Justice Mwalusanya then turned to the *Ephrahim* case to determine how the High Court should rule.<sup>898</sup> He then ruled as follows:

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894. *S v. Williams & Others*, 1995 (7) BCLR 86, ¶ 96 (CC) (S. Afr.).

895. *See Ephrahim v. Pastory*, (2001) AHRLR 236 (Tanz.).

896. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 103.

897. *Ephrahim*, (2001) AHRLR 236, ¶ 10.

898. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 105.

I have found as a fact that section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13(4) of the Bill of Rights of [the Tanzanian] Constitution which bars discrimination on account of sex. Therefore under the Section 5(1) of Act 16 of 1984 I take section 20 of the Rules of Inheritance to be *now modified and qualified* such that males and females now have equal rights to inherit and sell clan land.<sup>899</sup>

In conclusion, Justice Mwalusanya made a powerful statement about the rights of women in Tanzania:

From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field and not the elite women in town who chant jejune slogans for years on end on women's liberation, but without delivering the goods.<sup>900</sup>

The *Ephrahim* Court was faced with a serious conflict, which involved the country's recent internationalization of constitutional law and the rights of its citizens under customary laws that conflicted with the country's modernized and internationalized constitution. In the early-1990s, when the *Ephrahim* case was decided, the people of Tanzania had revised their constitution and incorporated a Bill of Rights and other provisions reflecting those found in various international human rights instruments.<sup>901</sup> The new constitutional changes guaranteed nondiscrimination and equal treatment of all citizens before the law. The *Ephrahim* Court recognized its duty to modify customary law and bring it into compliance with the provisions of the national constitution, which,

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899. *Ephrahim*, (2001) AHRLR 236, ¶42.

900. *Id.* ¶44.

901. See Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 106. See also Chris Maina Peter, *Five Years of the Bill of Rights in Tanzania: Drawing a Balance-Sheet*, 4 AFR. J. INT'L & COMP. L. 131, 131 (1992).

through recent amendments, had “been brought into line with provisions of international human rights instruments.”<sup>902</sup>

The *Ephrahim* Court modified customary law to allow and enhance the ability of “women to realize the rights guaranteed them under the Constitution of Tanzania.”<sup>903</sup> By doing so, the *Ephrahim* Court made clear that in the case of a conflict between international human rights norms and customary law, the latter must give way to the former. The function performed by the High Court in Tanzania and the Constitutional Court in South Africa, to modify, through invalidation, customary laws that violate the rights of citizens, including children, or are in violation of constitutional provisions, is a noble one and one that must be emulated by other countries in Africa.

With respect to the domestication of international law, some countries have already started the process, although they still have a long way to go. For example, the Constitution of the Republic of Benin makes the provisions of the UDHR and those of the African Charter on Human and Peoples’ Rights “an integral part” of the country’s constitution, as well as of “Béninise law.”<sup>904</sup> This process of domestication of international and regional law creates rights that are directly justiciable in Béninese courts.

With respect to the way forward for the protection of the rights of children in Africa, including especially the minimization of traditional and customary practices that harm children, each African country must undertake certain forms of institutional reforms. First, each country should internationalize their national constitutions in order to domesticate international human rights instruments and make the instrument’s provisions an integral part of the national constitution. In other words, each country should make the rights contained in international human rights instruments directly justiciable in domestic courts.

Second, each country should make certain that customary law is modified enough to comply with both the national constitution and the provisions of international human rights instruments. In doing so, each country can rid itself of customary, traditional, and religious practices that harm children. Third, each country should provide itself with a judiciary that is independent enough and has the capacity to fully and

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902. Mbaku, *International Law on the Sovereignty*, *supra* note 479, at 106–07.

903. *Id.* at 107.

904. CONSTITUTION DE LA RÉPUBLIQUE DU BÉNIN, Dec. 11, 1990, pmb1 (Benin).

effectively enforce the laws and serve as a check on the exercise of government power. Such a judiciary can, as has been illustrated by the Constitution Court of South Africa in *The State v. Williams & Others*,<sup>905</sup> the High Court of Tanzania in *Ephrahim v. Pastory*,<sup>906</sup> the Constitutional Court of Zimbabwe in *S v. Chokuramba*,<sup>907</sup> declare invalid, unconstitutional or in contravention of the constitution, certain provisions of legislative acts or customary laws that violate the rights of citizens or are contrary to an internationalized national constitution.

It is important to note that how well a State enforces its laws and effectively protects its children is dependent, to a large extent, on the quality of the State's governance institutions. Thus, in addition to internationalizing constitutional law, as well as, bringing traditional and customary practices into line with international human rights law, the State must provide itself with a governing process undergirded by the rule of law. Such a governing process, at the minimum, must be characterized by the separation of powers with effective checks and balances, including an independent judiciary, a robust civil society that is capable of checking on the exercise of government power (and hence, able to contribute to the minimization of bureaucratic corruption), and a free and independent press. Fidelity to the rule of law implies that no one, regardless of their economic and political position or standing in society, is above the law. Such a governing process should minimize engagement by both state- and non-state actors in behaviors and practices that harm children and violate their fundamental rights.

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905. See *S v. Williams & Others*, 1995 (7) BCLR 86 (CC) (S. Afr.) (declaring that “[t]he provisions of section 294 of the [Criminal Procedure] Act [No. 51 of 1977] violate the provisions of sections 10 and 11(2) of the Constitution . . . [and] are therefore unconstitutional”). See *id.* at para. 92.

906. See *Ephrahim v. Pastory*, (2001) AHRLR 236 (Tanz.) (finding that “section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963 is discriminatory of females . . . [and] is inconsistent with Article 13(4) of the Bill of Rights of our Constitution” and therefore is “now modified and qualified such that males and females have now equal rights to inherit and sell clan land”). See *id.* at 13.

907. *S v. Chokuramba*, CCZ 10–2019] CCZ 1, 70 (Zim.) (declaring that “[t]he order of the court *a quo* declaring s 353 of the Criminal Procedure and Evidence Act [Chapter 9:07] to be invalid for the reason that it is in contravention of s 53 of the Constitution is confirmed”). See *id.* at 70.