

Summer 2019

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Recommended Citation

John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT'L & COMP.L. Rev. 287 (2019).
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/2

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The Rule of Law and the Exploitation of Children in Africa

BY JOHN MUKUM MBAKU*

ABSTRACT

The abuse and exploitation of children is a major public policy priority for all African countries. Throughout the continent, children are routinely abused and exploited as sex objects; tools in the production of various goods, including cocoa, gold, and various minerals, as well as, services, such as pornography and prostitution; and, as child soldiers to fight in sectarian conflicts and civil wars. Children in Africa are exploited and abused by both domestic and external or foreign actors and these include, but are not limited to, family members and community leaders, foreign tourists who seek the continent's children for sex, and international criminal gangs who are engaged in the production of child pornography, sex trafficking and the illegal harvesting and sale of organs. With respect to the use of African children in military conflicts, exploiters include state- and non-state actors. In several African countries, religious and customary practices account for a significant amount of the abuse that children, particularly girl children, are subjected to. In addition, many children are also subjected to servitude labor in cocoa plantations, mines, traditional religious shrines, and the homes of rich urban dwellers. International actors involved in the abuse and exploitation of African children also include UN peacekeepers and aid workers belonging to various non-governmental organizations. Effectively combatting the abuse and exploitation of African children must begin with

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institutional reforms within each African country to provide democratic institutions, which can adequately constrain the State and prevent those who serve in it (i.e., civil servants and political elites) from engaging in activities (e.g., corruption and failure to enforce the laws) that contribute to the exploitation of children. With a governing process undergirded by the rule of law, each country can then develop the capacity to bring all perpetrators of child abuse and exploitation to justice. Although making certain that all African countries have legal and judicial systems that are fully capable of effectively prosecuting all individuals and organizations that commit crimes against children must be the first line of the fight against child abuse and exploitation in Africa, it is important to acknowledge the important role that international law can play in the protection of the rights of children in Africa. In addition to the fact that international legal instruments can help African countries in their efforts to make certain that customary and traditional practices involving children do not offend international human rights norms, international law is also critical in efforts to minimize the exploitation and abuse of children across international borders.

I. INTRODUCTION

Throughout Africa, children are extremely vulnerable to abuse and exploitation by both state- and non-state actors.¹ The violation of children's rights in Africa, however, is not limited to domestic groups. Members of international and multilateral organizations (e.g., the United Nations) are sent to the continent to prevent such abuses, especially among refugee children; provide humanitarian services to vulnerable groups (e.g., children and adults displaced by war, sectarian conflict, and other forms of violent disputes); secure the peace; and help feuding groups return to peaceful coexistence. In doing so, they have been implicated in the exploitation and abuse of children.² For example, in 2014, the United Nations (UN) faced one of the worst scandals in its history since it was founded in 1945—UN peacekeepers, who were sent to the Central African Republic to secure the

1. See, e.g., Kevin Lalor, *Child Sexual Abuse in sub-Saharan Africa: A Literature Review*, 28 CHILD ABUSE & NEGLECT 439 (2004); Carol A. Plummer and Wambui Njuguna, *Cultural Protective and Risk Factors: Professional Perspective About Child Sexual Abuse in Kenya*, 33 CHILD ABUSE & NEGLECT 524 (2009); Charles Mtibo, Neil Kennedy and Eric Umar, *Explanations for Child Sexual Abuse Given by Convicted Offenders in Malawi: No Evidence of "HIV Cleansing"*, 35 CHILD ABUSE & NEGLECT 142 (2011).

2. See, e.g., Scott A. Levin, *U.N. Report: Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833 (2003).

peace and stabilize a country that had been embroiled in sectarian conflict for more than a decade, were accused of raping and abusing “hundreds of boys, girls, and women.”³

When António Manuel de Oliveira Guterres became Secretary-General of the UN on January 1, 2017, he acknowledged the exploitation and abuse of children by UN peacekeepers in the Central African Republic and promised to fully address its peacekeepers’ perpetuation of rape and sexual violence. In August 2017, the Secretary-General appointed Jane Connors, an Australian lawyer, legal scholar, and long-time human rights advocate, to be the UN’s first Victims’ Rights Advocate.⁴ In September 2017, Mr. Guterres stated that “[s]exual exploitation and abuse have no place in our world”⁵ and that “[i]t is a global menace, and it must end.”⁶

In addition to creating a new position that oversees the elimination of UN peacekeepers’ sexual exploitation and abuse of children, UN officials also announced that they would significantly increase funding and provide additional staff to the fight against rape and the sexual assault of children. Mr. Atul Khare, UN Under-Secretary-General for Field Support said recently that those additional efforts by the organization have produced a 50% drop in “assaults on children by peacekeepers across the globe during the first 11 months of 2017 compared with the same period in 2016.”⁷ He went on to argue that the organization’s new anti-sexual violence campaign is making significant progress. Nevertheless, he conceded that “even one allegation is one too many.”⁸ The spokeswoman for UN peacekeepers in Bangui, Central African Republic, Ms. Uwolowulakana Ikavi-Gbetanou, confirmed that the new measures, which include additional training of personnel and more aggressive investigations of cases, are paying off as “abuse cases”⁹ have declined.¹⁰

Nevertheless, the UN’s own watchdog, the UN Human Rights Committee, has conceded that despite some progress, much more work is

3. Christian Locka and Jabeen Bhatti, *Africans Slam U.N. for Rapes by Troops*, USA TODAY (Jan. 1, 2018), <https://www.pressreader.com/usa/usa-today-us-edition/20180116/281522226496304>.

4. *Australian Jane Connors Appointed First UN Rights Advocate for Victims of Sexual Exploitation*, UN NEWS CENTER (Aug. 23, 2017) <http://www.un.org/apps/news/story.asp?NewsID=57401#.W19bmGW71Bw>.

5. *Quoted in* Locka and Bhatti, *supra* note 3.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

required.¹¹ Human rights groups, however, have disputed the UN claims of improvement in the fight against sexual violence in the Central African Republic.¹² Researchers have argued that although the UN's new advocate against sexual violence, Paula Donovan, has implemented a policy of "zero tolerance for sexual exploitation and abuse,"¹³ the situation has worsened in the Central African Republic.¹⁴

Granted, post-apartheid South Africa has a very progressive constitution¹⁵ and has managed to establish a democratic governing process undergirded by separation of powers and relatively effective checks and balances,¹⁶ and has an economy that is considered one of the strongest and most robust in the continent.¹⁷ Yet, its children are still among the most vulnerable to abuse and exploitation.¹⁸ South Africa has one of the highest levels of child abuse and exploitation in the world, including child rape and the use of children in the production of pornography and various forms of prostitution.¹⁹

11. *Id.*

12. *Id.* See also Fred Muvunyi, *UN on Spot Over Sexual Assaults in CAR*, DW (March 4, 2016), <http://www.dw.com/en/un-on-spot-over-sexual-assaults-in-car/a-19095276>.

13. *Id.*

14. *Id.*

15. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Oct. 11, 1996, <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>. See also Christopher Oechsli and Darren Walker, *20 Years On, South Africa's Remarkable Constitution Remains Unfulfilled*, PUBLIC RADIO INTERNATIONAL (PRI) (Mar. 21, 2015), <https://www.pri.org/stories/2015-03-21/20-years-south-africa-s-remarkable-constitution-remains-unfulfilled>.

16. Judge Phineas M. Mojapelo, *The Doctrine of Separation of Powers (a South African Perspective)*, 26 *ADVOCATE* 37 (Apr. 2013), <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>. Judge Mojapelo is Deputy Judge President of the Southern Gauteng High Court. See also Pius N. Langa, *The Separation of Powers in the South African Constitution*, 22 *S. AFR. J. ON HUM. RTS.* 2 (2006); Fabrice Tambe Endoh, *Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited*, 7 *AFRI. REV.* 67 (2015).

17. Jannie Rossouw, *South Africa Just Leapt over Nigeria to be Become Africa's Largest Economy Again*, *QUARTZ AFRICA* (Aug. 16, 2016), <https://qz.com/758947/south-africa-just-leapt-over-nigeria-to-become-africas-largest-economy-again/>.

18. See, e.g., *Sexual Exploitation of Children is Rampant in South Africa* ECPAT INTERNATIONAL (Jan. 15, 2018), <http://www.ecpat.org/news/sexual-exploitation-children-rampant-south-africa/>.

19. Sbongile Dimbaza, *Teen Sex Worker Sells her Body for R10 a Time*, *IOL* (Aug. 20, 2006), <https://www.iol.co.za/news/south-africa/teen-sex-worker-sells-her-body-for-r10-a-time-290141>; Zosa Olenka de Sas Kropiwnicki, *The Politics of Child Prostitution in South Africa*, 30 *J. CONTEMP. AFRI. STUD.* 235 (2012); *Child-sex Industry Booms in South Africa*, *MAIL & GUARDIAN* (July 19, 1996) <https://mg.co.za/article/1996-07-19-child-sex-industry-booms-in-south-africa>.

Unlike citizens of many other African countries, South Africans purposefully decided to provide themselves with post-apartheid governing institutions that would protect the rights of all their citizens, especially people who are members of vulnerable groups, which include children, women, and infants. In fact, in the Interim Constitution,²⁰ adopted by South Africans in 1993 and which provided the foundation for the permanent constitution, children's rights were enshrined at Article 30.²¹ Also enshrined in the Interim Constitution²² were the 34 Constitutional Principles, which were expected to guide and bind the drafters of the country's permanent constitution.²³ These Constitutional Principles also dealt with provisions (e.g., equality of all citizens before the law)²⁴ that were critical to the effective protection of children's rights.²⁵ The post-apartheid government of South Africa has made a concerted effort to protect children's rights. Beyond the government's ratification of several international and regional human rights instruments,²⁶ children's rights are entrenched in the country's constitution.²⁷ In addition, South Africa has enacted a series of laws that have been designed to protect children.²⁸ Despite the availability of these legal instruments to fight child abuse and exploitation, the sexual exploitation of

20. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993, <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993>.

21. *Id.* at art. 30.

22. *See* CONSTITUTION OF SOUTH AFRICA, *supra* note 20.

23. According to Article 71 of the Interim Constitution, which is titled "Constitutional Principles and Certification," "(1) A new constitutional text shall—(a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitution Assembly in accordance with this Chapter. (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a)." Note that South Africa's post-apartheid Interim Constitution was officially referred to as Constitution of the Republic of South Africa, Act 200 of 1993.

24. *See* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, *supra* note 20, at Schedule 4.

25. South Africa's permanent constitution is the Constitution of the Republic of South Africa, 1996, which was certified by the Constitutional Court and signed into law by President Nelson Mandela on December 18, 1996 and came into effect on February 4, 1997 and replaced the Interim Constitution of 1993.

26. Some of them include CONVENTION ON THE RIGHTS OF THE CHILD; OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY; AFRICA CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD.

27. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, *supra* note 20, at § 28.

28. These include CHILDREN'S ACT, No. 38 OF 2005; CRIMINAL LAW (SEXUAL OFFENSES AND RELATED MATTERS) AMENDMENT ACT, 2007; PREVENTION AND COMBATTING OF TRAFFICKING IN PERSONS ACT, 2013; CHILD JUSTICE ACT 75 OF 2008.

children remains a major problem in South Africa.²⁹ In fact, in recent years, a new form of sexual exploitation of children, known as “survival sex,”³⁰ has emerged to join traditional forms of exploitation and abuse, such as rape, prostitution, and pornography.

Throughout Africa, various traditions have preached, albeit falsely, that having sex with virgins can relieve one of many ills, ranging from common fevers to HIV/AIDS.³¹ This so-called “virgin cleansing myth” has contributed to a significant rise in the rape of infants and children, especially with the rise of HIV/AIDS as a major source of premature deaths in the continent. Further, some cultures consider sex with a virgin as a way to revitalize an old man’s sex drive and restore his fertility. These traditions remain an important contributor to the rape of children and infants.³²

Of course, sexual exploitation is not the only way in which children are abused. Many children are not only forcibly recruited to participate in various sectarian conflicts as “child soldiers,”³³ but also sold³⁴ by their

29. *Child Protection Information Sheet: Commercial Sexual Exploitation*, UNITED NATIONS CHILDREN’S FUND (UNICEF) (May 2006), https://www.unicef.org/eapro/Fact_sheet_SexualExploitation.pdf.

30. Mike Mariani, *Exchanging Sex for Survival*, THE ATLANTIC (June 26, 2014), <https://www.theatlantic.com/health/archive/2014/06/exchanging-sex-for-survival/371822/>; Jayne Bigelsen, *Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York*, HUMAN TRAFFICKING HOTLINE (May 2013), <https://humantraffickinghotline.org/sites/default/files/Homelessness%2C%20Survival%20Sex%2C%20and%20Human%20Trafficking%20-%20Covenant%20House%20NY.pdf>; Ian Urbina, *For Runaways, Sex Buys Survival*, N.Y. TIMES (Oct. 26, 2009), <http://www.nytimes.com/2009/10/27/us/27runaways.html>.

31. Scott A. Levin, *U.N. Report: Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833, 833 (2003).

32. Susan Brink, *Fake Cures for AIDS Have a Long and Dreadful History*, NPR (Aug. 17, 2014), <https://www.npr.org/sections/goatsandsoda/2014/07/15/331677282/fake-cures-for-aids-have-a-long-and-dreadful-history>; *Focus on the Virgin Myth and HIV/AIDS*, IRIN NEWS (Apr. 25, 2002), <http://www.irinnews.org/feature/2002/04/25/focus-virgin-myth-and-hiv-aids-0>; Will Brown, *The HIV-Driven Myth of “Virgin Cleansing” in Kolkata’s Brothels*, NEWSDEEPLY WOMEN AND GIRLS (Sept. 20, 2017), <https://www.newsdeeply.com/womenandgirls/articles/2017/09/20/the-hiv-driven-myth-of-virgin-cleansing-in-kolkatas-brothels>; Steve Vickers, *Staging Sex Myths to Save Zimbabwe’s Girls*, BBC NEWS (Oct. 24, 2018), <http://news.bbc.co.uk/2/hi/africa/6076758.stm>.

33. See, e.g., Anne-Lynne Dudenhoefer, *Understanding the Recruitment of Child Soldiers in Africa*, CONFLICT TRENDS/AFRICAN CENTER FOR THE CONSTRUCTIVE RESOLUTION OF CONFLICTS, (Jan. 15, 2018), <http://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/>; *More than 120,000 Child Soldiers Fighting in Africa*, HUMAN RIGHTS WATCH (Apr. 18, 1999), <https://www.hrw.org/news/1999/04/18/more-12000-child-soldiers-fighting-africa>.

34. See, e.g., Randi Kaye and Wayne Drash, *CNN, Kids for Sale: “My Mom Was Tricked,”* CNN (Oct. 13, 2017), <http://www.cnn.com/2017/10/12/health/uganda-adoptions->

parents into servitude and slavery in rich households — many of them in Europe, the Middle East, and North America. In addition, in some African countries, children are forced into marriage when they have not yet reached puberty.³⁵ Despite the prohibition of child marriage in many African countries, the practice persists, partly due to subcultures that consider the practice an essential part of their traditions and religions. Child marriage is a major practice among many subcultures in Nigeria.³⁶ Girls continue to suffer many indignities throughout Nigeria in the name of tradition and culture, and lately, terrorism and religious extremism.³⁷ In Nigeria, the extremist group Boko Haram uses children, especially female children, as suicide bombers.³⁸ Some of the girls abducted by Boko Haram are raped and forced into marriage with members of the extremist group.³⁹

investigation-ac360/index.html; Sharon LaFraniere, *Africa's World of Forced Labor, in a 6-Year-Old's Eyes*, N.Y. TIMES (Oct. 29, 2006), <http://www.nytimes.com/2006/10/29/world/africa/29ghana.html>.

35. Sharon LaFraniere, *Forced to Marry Before Puberty, African Girls Pay Lasting Price*, N.Y. TIMES (Nov. 27, 2005), <http://www.nytimes.com/2005/11/27/world/africa/forced-to-marry-before-puberty-african-girls-pay-lasting-price.html>; Barbara Cole, *South African Child Brides "Sold off to Lascivious Men,"* DAILY NEWS (Nov. 3, 2017), <https://www.iol.co.za/dailynews/south-african-child-brides-sold-off-to-lascivious-men-11839988>.

36. See, e.g., Joe Sandler Clarke, *Nigeria: Child Brides Facing Death Sentences a Decade After Child Marriage Prohibited*, THE GUARDIAN (U.S.) (Mar. 11, 2015), <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides>; UNICEF, *Nigeria Has World's Highest Number of Child Brides*, THIS DAY (NIGERIA) (Dec. 1, 2016), <https://www.thisdaylive.com/index.php/2016/12/01/unicef-nigeria-has-worlds-highest-number-of-child-brides/>.

37. Robyn Kriel, *Boko Haram Favors Women, Children as Suicide Bombers, Study Reveals*, CNN WORLD NEWS, (Aug. 11, 2017), <http://www.cnn.com/2017/08/10/africa/boko-haram-women-children-suicide-bombers/index.html>.

38. See, e.g., Stephanie Nebehay and Alexis Akwagyiram, *Boko Haram Nigerian Child Bombings this Year are Quadruple 2016's: UNICEF*, REUTERS, (Aug. 22, 2017), <https://www.reuters.com/article/us-nigeria-security/boko-haram-nigerian-child-bombings-this-year-are-quadruple-2016s-unicef-idUSKCN1B21F2>; UNICEF, *Boko Haram Use of Child Bombers Soars*, ALJAZEERA (Aug. 22, 2017), <http://www.aljazeera.com/news/2017/08/unicef-boko-haram-child-bombers-soars-170822160541719.html>; Sally Hayden, *Boko Haram: Huge Rise in Children Used as "Human Bombs" by Islamists in Nigeria, UN Warns*, INDEPENDENT (UK), (Aug. 22, 2017), <http://www.independent.co.uk/news/world/africa/boko-haram-child-suicide-bombers-west-africa-unicef-nigeria-islamist-terrorists-a7907166.html>.

39. See, e.g., Kevin Sieff, *They Were Freed from Boko Haram's Rape Camps: But Their Nightmare Isn't Over*, WASH. POST (Apr. 3, 2016), https://www.washingtonpost.com/world/africa/they-were-freed-from-boko-harams-rape-camps-but-their-nightmare-isnt-over/2016/04/03/dbf2aab0-e54f-11e5-a9ce-681055c7a05f_story.html?utm_term=.c5f30af50531; Afolabi Sotunde, *Abducted Nigerian Girls Forced to Marry Boko Haram Rebels*, CBC NEWS WORLD (Apr. 30, 2014), <http://www.cbc.ca/news/world/abducted-nigerian-girls-forced-to-marry-boko-haram-rebels-1.2627701>.

Throughout the world, nearly half a million children under the age of 18 are forced to participate in combat situations. Many of these kids “suffer prolonged exposure to psychological and physical abuse”⁴⁰ and, as a result, are doomed to an adulthood that is filled with major social, economic, and health problems. Many of these children evolve into “killing machines” before they even have the opportunity to mature and develop a moral conscience. Today, throughout the continent, there are efforts underway to try and reeducate these children and help them develop the ability and capacity to function as productive and law-abiding members of society.⁴¹

The abuse of children, whether as sex objects, tools in the production of various goods, or soldiers to fight in wars and sectarian conflicts, is not limited to South Africa, Nigeria, Democratic Republic of Congo, Central African Republic, Uganda, and South Sudan. The exposure of children to extreme abuse and degradation is common in many other countries as well.⁴² In Ghana, for example, children are forced to work long hours in cocoa fields, harvesting cocoa pods and slicing them with large machetes to get to the beans. It is often the case that many of these children accidentally slice their fingers or even hands and receive no immediate medical aid — some usually bleed to death or are permanently deformed.⁴³ Of course, while these children work alongside adults to harvest and process cocoa beans, they

40. Jocelyn TD Kelly, Lindsay Branham, and Michelle R. Decker, *Abducted Children and Youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): Mechanisms of Indoctrination and Control*, 10 CONFLICT AND HEALTH 1 (2016), <https://conflictandhealth.biomedcentral.com/track/pdf/10.1186/s13031-016-0078-5?site=conflictandhealth.biomedcentral.com>.

41. See, e.g., ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA (2011) (examining, *inter alia*, the problem of child soldiers in Africa and showing how local communities are working to rehabilitate these children and reintegrated them into society as productive citizens); SONJA C. GROVER, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER: EXONERATING CHILD SOLDIERS CHARGED WITH GRAVE CONFLICT-RELATED INTERNATIONAL CRIMES (2012) (arguing that children forced to participate in the activities of armed groups or forces committing mass atrocities and/or genocide should be held responsible for international crimes); ALPASIAN ÖZERDEM AND SUKANYA PODDER, CHILD SOLDIERS: FROM RECRUITMENT TO REINTEGRATION (2011) (examining, *inter alia*, the relationship between the experiences of child soldiers and their success at reintegration into society as productive and non-violent citizens).

42. See, e.g., LORETTA E. BASS, CHILD LABOR IN SUB-SAHARAN AFRICA (examining, *inter alia*, the conflict between work and school for child workers in sub-Saharan Africa); ANNE KIELLAND AND MAURIZIA C. TOVO, CHILDREN AT WORK: CHILD LABOR PRACTICES IN AFRICA (2006) (providing a rigorous analysis child labor and its impact on young people in Africa).

43. MYRA WEATHERLY, TEENS IN GHANA (2008) (examining, *inter alia*, the dangerous working conditions for children in Ghana's cocoa fields); KOJO AMANOR, LAND, LABOR AND THE FAMILY IN SOUTHERN GHANA: A CRITIQUE OF LAND POLICY UNDER NEO-LIBERALIZATION (2001) (examining agricultural work among the Akyem Abuakwa peoples of the forest region of Ghana).

forfeit the opportunity to attend school and develop the human capital that they would need to lead productive lives as adults. Moreover, children who spend most of each day working in extremely hot and humid cocoa plantations do not have the opportunity to play and allow their growing bodies and minds to benefit from interaction with people their own age.⁴⁴

As anyone knows from visiting Kenya's beautiful beaches, it is not unusual to find young teenage girls roaming the beaches and adjoining establishments searching for business. Recent research has confirmed that Kenya is one of the most popular destinations in Africa for sex tourism. In recent years, child sex tourism has risen significantly, rivaling the country's traditional tourist attractions — its game parks.⁴⁵

In Burkina Faso, children as young as seven years, work under extremely hazardous conditions in gold mines.⁴⁶ They work deep in the earth, usually without the necessary equipment to protect their underdeveloped and fragile lungs from dust or their bodies from falling rocks.⁴⁷ At a gold mine in the village of Kollo, close to the Burkina-Ghana border, over a third of the people who “smash boulders into pebbles and pebbles into grit with primitive hammers and sticks”⁴⁸ are children as young as seven years old. According to the UN's International Labor Organization (ILO), more than a million children as young as five years old work in small-scale gold mines throughout Africa.⁴⁹

44. PETER LIBOYI MOYI, *CHILD LABOR AND SCHOOLING IN GHANA AND KENYA: THE ROLES OF POVERTY AND EDUCATION POLICY* (2006) (examining how government policies affect child labor and school attendance in Ghana and Kenya); SUDHARASHAN CANAGARAJAH AND HAROLD COULOMBE, *CHILD LABOR AND SCHOOL IN GHANA* (1997) (arguing that child labor prevents children from attending school and developing the human capital they would need as adults); CHRISTOPHER JOHN HEADY, *WHAT IS THE EFFECT OF CHILD LABOR ON LEARNING ACHIEVEMENT? EVIDENCE FROM GHANA?* (examining, *inter alia*, the impact of child labor on learning outcomes).

45. WANJONI KIBICHO, *SEX TOURISM IN AFRICA: KENYA'S BOOMING INDUSTRY* (2016) (arguing, *inter alia*, that sex tourism, including especially, child sex tourism, has risen in recent years to dominate the tourism sector in Kenya); *AFRICAN HOSTS & THEIR GUESTS: CULTURAL DYNAMICS OF TOURISM* (W. E. A. van Beek and Annetee M. Schmidt eds., 2012) (arguing, *inter alia*, that Kenya has risen to be one of the most important destinations in Africa for child sex tourism); GEORGE PAUL MEIU, *ETHNO-EROTIC ECONOMIES: SEXUALITY, MONEY, AND BELONGING IN KENYA* (2017) (exploring a unique form of tourism in coastal Kenya that is based exclusively on sex and culture).

46. Ellen Rolfres, *One Million Children Labor in Africa's Goldmines*, PBS NEWS HOUR (July 10, 2013), https://www.pbs.org/newshour/world/world-july-dec13-burkinafaso_07-10.

47. *Id.*

48. *Id.*

49. INTERNATIONAL LABOR ORGANIZATION (ILO) (Jan. 17, 2018), <http://www.ilo.org/ipecc/Regionsandcountries/Africa/lang--en/index.htm>.

In many African countries, such as Burkina Faso, child labor is against the law. Nevertheless, the laws are rarely enforced. In addition to the gold mines, many Burkinabè children can be found laboring from dusk till dawn in the cotton fields. International organizations, including the ILO consider work in the mines as one of the worst forms of child labor.⁵⁰ The practice exposes children to dangerous levels of dust and toxic chemicals that can permanently damage their still-developing organs — in fact, permanent lung damage is a clear and present danger to Africa's children who labor daily in the mines.⁵¹ Other potential injuries to children working in mines include “muscular and skeletal” damage, “hearing loss, accidental blinding, and mercury poisoning with its attendant neurological damage.”⁵² Of course, children who work in mines are usually absent from school and hence, do not have the opportunity to develop the skills that they need to function as productive adults.⁵³

In Africa, children are subjected to “slave-like working conditions on a daily basis.”⁵⁴ For most of these children, forced labor “deals a mental blow to the individual child, taking away his ability to dream about a future outside of his present status.”⁵⁵ In addition to the fact that many children who are forced to work in the mines are deprived of the opportunity to develop necessary job skills, many of them are killed or permanently deformed.⁵⁶ Those who are forced into sex work are likely to contract life-threatening

50. See generally, *Worst Forms of Child Labor*, ILO (Jan. 17, 2018), <http://www.ilo.org/ipecc/facts/WorstFormsofChildLabour/lang--en/index.htm>; *Children in Hazardous Work: What we Know, What we Need to Do* (Jan. 17, 2018), http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_155428.pdf; ILO, *ILO Urges Ban on Child Labor in Small-Scale Mines and Quarries*, ILO (last visited on Jan. 17, 2018), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_005168/lang--en/index.htm.

51. *Id.* See also ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS (Ronald F. Dodson and Samuel P. Hammer eds., 2011) (examining, inter alia, the consequences of child exposure to asbestos in the Transvaal mines in South Africa); MEREDETH TURSHEN, GENDER AND THE POLITICAL ECONOMY OF CONFLICT IN AFRICA: THE PERSISTENCE OF VIOLENCE (2016) (examining, inter alia, the damage done to children's lungs and nervous system as a result of their participation in mining activities).

52. Rolfres, *supra* note 46.

53. Maria Charity Agbo, *The Health and Educational Consequences of Child Labor in Nigeria*, 11 HEALTH SCI. J. 486 (2017).

54. Charles Braddix, *Millions of African Children at Risk of Labor Exploitation*, BAPTIST STANDARD, (Jan. 28, 2014), <https://www.baptiststandard.com/news/world/millions-of-african-children-at-risk-of-labor-exploitation/>.

55. *Id.*

56. Frank Piasecki Poulsen, *Children of the Congo Who Risk Their Lives to Supply our Mobile Phones*, THE GUARDIAN (UK) (Dec. 7, 2012), <https://www.theguardian.com/sustainable-business/blog/congo-child-labour-mobile-minerals>.

diseases such as HIV/AIDS, tuberculosis, various types of STDs,⁵⁷ and other diseases that can either kill them or permanently disable them.

Poverty is often considered the most important contributor to forced child labor, indentured servitude, as well as the exploitation of children in Africa.⁵⁸ In some countries, parents and other family members often exchange children for “money, goods or gifts.”⁵⁹ Child labor forces African children to remain trapped in poverty for life. Without the necessary skills to function as productive adults, abused and exploited children usually grow up into a life filled with low or no wages, extremely poor living conditions, joblessness, and if they are employed, they would be forced into low-wage, hazardous work, with virtually no access to health care.⁶⁰

The various forms of child exploitation and abuse examined include (1) sexual abuse and exploitation;⁶¹ (2) forced labor, which includes servitude labor; and (3) forced recruitment for participation as soldiers in wars and sectarian conflict. Nevertheless, there are other forms of child abuse and exploitation that this article has not specifically alluded to. These include, but are not limited to, abuse by family members or other close acquaintances, as well as abuse of children in religious and traditional practices. For example, “forced begging” is a form of child abuse that is common in many societies in Africa. It is estimated that in Senegal, over 50,000 children are forced to roam the streets begging for money in what are often extremely hazardous conditions.⁶² In Senegal, many parents send their children to

57. “STDs” are sexually transmitted diseases (also called sexually transmitted infections — STI, and venereal diseases — VD). These diseases are generally transmitted or spread by sex, specifically, vaginal intercourse, anal sex, or oral sex. In addition to the fact that these diseases can kill the infected person, they can also cause sterility and prevent the infected person from ever having children. For more information on STDs, *see generally* LISA MARR, *SEXUALLY TRANSMITTED DISEASES: A PHYSICIAN TELLS YOU WHAT YOU NEED TO KNOW* (2010); KING HOLMES, ET AL., *SEXUALLY TRANSMITTED DISEASES, FOURTH EDITION* (2007); *SEXUALLY TRANSMITTED DISEASES: EPIDEMIOLOGY, PATHOLOGY, DIAGNOSIS, AND TREATMENT* (Kenneth A. Borchardt & Michael A. Noble eds., 1997).

58. KAREN BEEKS AND DELILA AMIR, *TRAFFICKING AND THE GLOBAL SEX INDUSTRY* (2006) (arguing that poverty is the primary contributor to the abuse of children in Africa).

59. Braddix, *supra* note 54. *See also* NATIONAL PROGRAM OF ACTION FOR CHILDREN IN SOUTH AFRICA, *END DECADE REPORT ON CHILDREN: SOUTH AFRICA* (2001) (detailing, *inter alia*, how some parents, due to poverty, are forced to exchange their children for food and money).

60. *Id.*

61. This can include anything from prostitution to the trafficking of children for commercial sex activities, which include the use of these children in the production of child pornography.

62. In addition to the risk of being hit by a passing motor vehicle, these children, who roam the streets of major metropolitan areas begging for money, are also exposed to the toxic fumes that come out of the exhausts of street vehicles. *See, e.g.*, *STREET CHILDREN IN*

daaras (Quranic schools) where they are supposed to obtain an education undergirded by the Quran and Quranic principles. Each school is overseen by a spiritual teacher called a *marabout*.⁶³ However, some of these schools exploit, instead of educate the students.⁶⁴

In Senegal, many *daaras* exploit their students (*talibés*) and send them to the streets to beg for money instead of participating in educational activities. Each student is required to return from the streets with a certain amount of money — a student who fails to meet his daily quota is severely disciplined. Penalties for failure to meet the daily quota range from “being chained in total isolation to violent beatings.”⁶⁵ The money raised by the students is not devoted to providing facilities for children to learn or to help improve the welfare of the children. Instead, teachers corruptly appropriate the collected funds for their own benefit. As a group, the Islamic teachers are very powerful politically with a significant influence on the government. Consequently, it has been very difficult for activists advocating for children to get the government to intervene and eliminate the child abuse at these schools. One suggestion has been for the state to take control of the schools (i.e., the *daaras*) and ensure that children are exposed to religious teachings rather than exploitation.⁶⁶

Another form of child abuse and exploitation, which is quite common in West Africa, is associated with “ritual servitude” and is carried out by various religions. In Ghana, it is called Trokosi.⁶⁷ Ritual servitude or Trokosi is commonly practiced in Ghana, Togo, and Benin. In this practice,

SENEGAL, TRANSLATED BY SHANNON DELANEY (John M. Balonze ed., 2005); STATE AND CULTURE IN POSTCOLONIAL AFRICA: ENCHANTINGS (Tejumola Olaniyan ed., 2017).

63. For more on the marabouts of Senegal, *see, e.g.*, LEONARDO A. VILLALÓN, ISLAMIC SOCIETY AND STATE POWER IN SENEGAL: DISCIPLES AND CITIZENS IN FATICK (1995).

64. These students are referred to as *talibés* and they range in age from 4 to 14 years. In The Gambia, they are referred to as *almudos*. *See, e.g.*, LORETTA E. BASS, CHILD LABOR IN SUB-SAHARAN AFRICA (2004).

65. Kristance Harlow, *10 Horrifying Examples of Modern-Day Child Slavery*, LISTVERSE (Jan. 7, 2014), <https://listverse.com/2014/01/07/10-horrifying-examples-of-mod-ern-day-child-slavery/>.

66. THE EXPLOITED CHILD (Bernard Schlemmer ed., 2000). *See, especially*, the chapter titled *Child Labor and Socialization in Senegal*.

67. For more on the Trokosi system in Ghana, *see generally* BRITISH COUNCIL (GHANA), REPORT OF THE SECOND NATIONAL WORKSHOP ON TROKOSI SYSTEM IN GHANA: SECURING THE INALIENABLE RIGHTS OF WOMEN AND CHILDREN IN TROKOSI BONDAGE (1998); LINDA M. GILLARD, TROKOSI (2010); DANIEL MAWULI TSİKATA, CULTURAL PRACTICES AND EXCLUSION OF GIRLS FROM EDUCATION: THE TROKOSI SYSTEM OF THE SOUTH-EASTERN GHANA (2008); BEATRICE KORANKYEWA QUIST, THE TROKOSI SYSTEM AND ITS IMPACT ON WOMEN IN GHANA (2005); AFRICAN WOMEN AND CHILDREN: CRISIS AND RESPONSE (Apollo Rwomire ed., 2001).

traditional religious shrines⁶⁸ take young virgin girls, either in payment for certain services or in atonement for misdeeds that family members are alleged to have committed, to live at the shrines and serve the priests, elders, and owners of the shrine, usually without their consent⁶⁹ or any compensation.⁷⁰ Among subcultures that practice ritual servitude,⁷¹ there is the belief that the girl forced into such servitude is actually serving and married to the god or gods of the subculture.⁷² The priests at the shrine, who are the “eyes” or representatives of the gods, sexually abuse the girls. If a girl “serving” at the shrine runs away or dies, she must be replaced by a suitable member of her family.⁷³

Although ritual servitude was outlawed in the Volta Region of Ghana in 1998,⁷⁴ it remains a popular practice even though convicted perpetrators can face a minimum of three years in prison.⁷⁵ Ghanaian fetish shrines practice various types of ritual servitude that are known as *trokosi*, *fiashidi*,⁷⁶ and *woryokwe*,⁷⁷ with *trokosi* being the most popular term. In Togo and

68. These shrines are also referred to as “fetish shrines.” See, e.g., MENSAH ADINKRAH, *WITCHCRAFT, WITCHES, AND VIOLENCE IN GHANA* (2015); STEVEN J. SALM & TOYIN FALOLA, *CULTURE AND CUSTOMS OF GHANA* (2002).

69. Nevertheless, the consent of the subculture and/or family is usually involved.

70. ANDREA PARROT & NINA COMMINGS, *FORSAKEN FEMALES: THE GLOBAL BRUTALIZATION OF WOMEN* (2006).

71. For example, the Ewe of Ghana’s Volta Region and the Fon in Benin.

72. See, e.g., LORETTA E. BASS, *CHILD LABOR IN SUB-SAHARAN AFRICA* (2004).

73. See generally D. SOYINI MADISON, *ACTS OF ACTIVISM: HUMAN RIGHTS AS RADICAL PERFORMANCE* (2010); *THE GREENWOOD ENCYCLOPEDIA OF CHILDREN’S ISSUES WORLDWIDE: SUB-SAHARAN AFRICA* (Laura Arntson ed., 2008).

74. See, e.g., Amy Small Bilyeu, *The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 *IND. INT’L & COMP. L. REV.* 457 (1999); Sarah C. Aird, *Ghana’s Slaves to the Gods*, 7 *HUM. RTS. BR.* 6 (1999); Sainabou M. Musa, *Modern Day Slavery in Ghana: Why Application of United States Asylum Laws Should be Extended to Women Victimized by the Trokosi Belief System*, 13 *RUTGERS RACE & L. REV.* 169 (2011); Brian S. Woods, *The Slave Girls of Ghana*, 17 *N.Y.L. SCH. J. HUM. RTS.* 875 (2001).

75. AUGUSTINE SHERMAN, *TROKOSI* (2016).

76. See, e.g., *VULNERABLE CHILDREN: GLOBAL CHALLENGES IN EDUCATION, HEALTH, WELL-BEING, AND CHILD RIGHTS* (Deborah J. Johnson, DeBrenna LaFa Agbényinga, and Robert K. Hitchcock eds., 2014); *NIJMEGEN STUDIES IN DEVELOPMENT AND CULTURAL CHANGE* (Frans Wijsen, Ruerd Ruben & André van der Ven eds., 2009); ANNE C. BAILEY, *AFRICAN VOICES OF THE ATLANTIC SLAVE TRADE: BEYOND THE SILENCE AND THE SHAME* (2005).

77. See generally ELLEN BORTEI-DOKU ARYEETAY, *IMPACT ASSESSMENT OF PSYCHOSOCIAL INTERVENTIONS INVOLVING THE EMANCIPATED TROKOSI AND WORYOKWE WOMEN/GIRLS IN SOUTH EASTERN GHANA: ATTITUDINAL SURVEY REPORT, 2000* (2000); *CHILDREN’S RIGHTS IN GHANA: REALITY OR RHETORIC?* (Robert Kwame Ame, DeBrenna LaFa Agbényiga, and Nana Araba Apt eds., 2011); *BRITISH COUNCIL (GHANA), REPORT OF THE SECOND NATIONAL WORKSHOP ON TROKOSI SYSTEM IN GHANA: SECURING THE*

Benin, the practice is referred to generally as *voodooosi*⁷⁸ or *vudusi*.⁷⁹

In all the countries in Africa where ritual servitude is practiced, the people who own the shrines are usually elders of the village who also hold important political positions in the village's governance institutions. These individuals also exercise significant economic power and are in a position to provide material benefits to many families.⁸⁰ In these villages, the crimes committed against "shrine slaves" are well-known to all villagers. Usually, the girls are raped repeatedly, producing a lot of children to the priests; nevertheless, the children are not considered legitimate offspring of the girls because their husbands (i.e., the priests) are considered individuals who live in the spirit world.⁸¹

During the last several years, there has been a significant increase in the demand for organs.⁸² The severe shortage of organs in the global market has created opportunities for criminal gangs, particularly in developing countries, to traffic abducted children and sell their organs. Children and young adults are often abducted from countries in Africa and sold abroad for adoption and illegal organ transplantation.⁸³ For example, in 2017, a former Nigerian minister, Femi Fani-Kayode, claimed that Nigerian migrants who had been captured and sold as slaves in Libya were being killed and their organs harvested and sold.⁸⁴ In 2010, South Africa's biggest private hospital

INALIENABLE RIGHTS OF WOMEN AND CHILDREN IN TROKOSI BONDAGE (1998).

78. SHERMAN, *supra* note 75.

79. *See, e.g.*, MARTIN A. KLEIN, HISTORICAL DICTIONARY OF SLAVERY AND ABOLITION, 2ND EDITION (2014).

80. Harlow, *supra* note 65.

81. ROBERT H. MILLIGAN, THE FETISH FOLK OF WEST AFRICA (1912); CHILDREN'S RIGHTS IN GHANA: REALITY OR RHETORIC? (Robert Kwame Ame, DeBrenna LaFa Agbényiga & Nana Araba Apt eds., 2011).

82. *See generally* T. RANDOLPH BEARD, DAVID L. KASERMAN AND RIGMAR OSTERKAMP, THE GLOBAL ORGAN SHORTAGE: ECONOMIC CAUSES, HUMAN CONSEQUENCES, POLICY RESPONSES (2013) (examining, *inter alia*, the global market for organs and making suggestions on how to deal with the chronic shortage of organs); MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006) (examining, *inter alia*, the participation of rich Americans who need organs in the illegal markets for organs in developing countries, such as India and Brazil).

83. *See, e.g.*, HOW CLAIMS SPREAD: CROSS-NATIONAL DIFFUSION OF SOCIAL PROBLEMS (Joel Best ed., 2001); INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN (Diana Marre & Laura Briggs eds., 2009).

84. Bill Bond and Sara Malm, *African Migrants Being Sold as Slaves by Libyan Human Traffickers "Have Their Organs Harvested, Bodies Mutilated and Roasted Like Kebabs" Claims Nigerian Ex-Minister*, DAILY MAIL (UK) (Nov. 29, 2017), <http://www.dailymail.co.uk/news/article-5127881/Africans-sold-slaves-Libya-organs-harvested.html>; Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, WORLD HEALTH ORGANIZATION UPDATES, (Jan. 21,

group, Netcare KwaZulu, pleaded guilty to organ trafficking. The health care giant, which also operates hospitals in the United Kingdom (UK), admitted that it had paid poor children to have their kidneys harvested and implanted in wealthy foreign clients.⁸⁵

In Ghana and Côte d'Ivoire, where more than 60 percent of the world's cocoa is produced, there has emerged what is generally referred to as "chocolate slavery."⁸⁶ In both Ghana and Côte d'Ivoire, children between the ages of twelve and sixteen⁸⁷ work long hours⁸⁸ in the cocoa plantations. The children perform various tasks in the plantations, ranging from using chainsaws to clear the forest for the planting of new cocoa seedlings to utilizing large, sharp, and dangerous knives to cut the bean pods from the trees.⁸⁹ They must then pack them in bags or sacks that weigh as much as 100 pounds and drag them through the forest.⁹⁰ Often, the heavy bags are placed on the children's heads, and they are forced to carry them to a center where the pods would be opened and the beans harvested.⁹¹ The process through which the cocoa pods are opened and the beans harvested is extremely dangerous. Using heavy and sharp knives, and without any protective gear, children slice the cocoa pods to release the beans but in doing so, many of them often slice their fingers or even their hands — and without medical care, they bleed to death or become permanently deformed.⁹²

2018), <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>.

85. See, e.g., David Smith, *South African Hospital Firm Admits 'Cash for Kidney' Transplants*, THE GUARDIAN U.S. EDITION (Nov. 10, 2010), <https://www.theguardian.com/world/2010/nov/10/south-africa-hospital-organ-trafficking>; David Smith, *Hospitals in South Africa Charged Over Kidney Transplant Trafficking*, THE GUARDIAN (U.S. EDITION) (Sept. 16, 2010), <https://www.theguardian.com/world/2010/sep/16/hospitals-south-africa-kidney-transplant-scam-charged>.

86. Harlow, *supra* note 65. See also *Child Labor and Slavery in the Chocolate Industry, Food Empowerment Project*, FOOD EMPOWERMENT PROJECT (Jan. 21, 2018), <http://www.foodispower.org/slavery-chocolate/>.

87. Reporters have found children as young as 5 years old working in the cocoa fields in Côte d'Ivoire and Ghana. About 40 percent of the children are girls. While some of them work for only a few months and return to their homes, others stay in the cocoa fields for life. See *Child Labor and Slavery in the Chocolate Industry, supra* note 86.

88. The typical work day for these children begins at six in the morning and ends late in the evening. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The Food Empowerment Project describes the process as follows: "Holding a single large pod in one hand, each child has to strike the pod with a machete and pry it open with the tip of the blade to expose the cocoa beans. Every strike of the machete has the potential to slice a child's flesh. The majority of children have scars on their hands, arms, legs or shoulders from the machetes." *Id.* In addition to these hazards, children are exposed to

Recent research has determined that children from all over West Africa are trafficked into the cocoa fields of Ghana and Côte d'Ivoire to work as "chocolate slaves."⁹³ This form of child labor has been characterized as slavery. In addition to the fact that these children are treated very harshly, including beatings, they are forced to work every day. At night, they are locked in secure buildings to prevent escape. Investigators have determined that those attempting to escape have been captured and severely punished.⁹⁴

It is estimated that about 500,000 child slaves work in the cocoa fields — these children are subject to horrific working conditions and deprived of the opportunity to play as children or attend school. In addition, they are exposed to dangerous working conditions that can either kill them or maim them for life.⁹⁵

This article focuses on the sexual exploitation and abuse of African children and how the rule of law can be used to enhance the ability of African societies to eradicate this practice. In Section II, the article will present an overview of the commercial sexual exploitation of children in the continent. Section III examines various regional and international legal instruments for the protection of children and the prevention of the commercial sexual exploitation of children. In Section IV, the article shows that strengthening, deepening and institutionalizing the rule of law in the African countries can significantly improve the ability of these countries to protect the rights of children and minimize their commercial sexual exploitation. Section V analyzes the harmful practices affecting children based on tradition, religion, culture or superstition. The article also discusses why it is imperative that traditional and customary practices that are harmful to children should either be prohibited or modified so that they reflect or are in conformity with international human rights norms. In Section VI, the article revisits the discussion of the role played by international peacekeepers and aid workers in the abuse and exploitation of African children. Lastly, section VII is

dangerous chemicals. In fact, in many of these cocoa farms, the spraying necessary to kill insects that harm the cocoa pods is actually undertaken by the children and they do so without the benefit of any protective gear. *Id.*

93. *Id.*

94. *Id.*

95. See, e.g., David McKenzie and Brent Swalis, *Child Slavery and Chocolate: All Too Easy to Find*, THE CNN FREEDOM PROJECT ENDING MODERN-DAY SLAVERY (Jan. 19, 2012), <http://thecnnfreedomproject.blogs.cnn.com/2012/01/19/child-slavery-and-chocolate-all-too-easy-to-find/>; Humphrey Hawsley, *Ivory Coast Cocoa Farms Child Labor: Little Change*, BBC News (Nov. 10, 2011), <http://www.bbc.com/news/world-africa-15681986>; L. Diane Mull, and Steven R. Kirkhorn, *Child Labor in Ghana Cocoa Production: Focus Upon Agricultural Tasks, Ergonomic Exposures, and Associated Injuries and Illnesses*, 120 PUB. HEALTH 649 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497785/>.

devoted to a summary and policy suggestions.

II. THE COMMERCIAL SEXUAL EXPLOITATION AND ABUSE OF CHILDREN IN AFRICA

A. Introduction

During the last several years, ECPAT International⁹⁶ has produced important studies of the commercial sexual exploitation of children in many parts of the world, including Africa. At the 2013 Regional Consultation in Addis Ababa, Ethiopia, the UN Special Representative on the Sale of Children, Child Prostitution and Child Pornography, Dr. Najat Maalla M'jid, argued that “a complex matrix of multidimensional and interrelated factors” have left African children extremely vulnerable to commercial sexual exploitation.⁹⁷ First, Africa’s demographic is said to be unique because the continent has an estimated population of 477 million, a significant proportion of which is under 15 years old.⁹⁸ While this large population of children presents the continent with significant opportunities for economic growth and development, it also poses many challenges. If this population, as it grows, is provided with adequate opportunities for education, training, and jobs, then it will contribute significantly to economic growth and development. If, however, national policies do not provide this young population with opportunities for self-actualization, it will descend into poverty and become vulnerable to exploitation and abuse.⁹⁹

Although studies show that African economies are growing faster than

96. *Protecting Children from Online Sexual Exploitation: A Guide to Action for Religious Leaders and Communities*, ECPAT INTERNATIONAL AND RELIGIONS FOR PEACE (June 2016), [https://www.unicef.org/protection/files/FBO_Guide_for_Religious_Leaders_and_Communities_ENG\(1\).pdf](https://www.unicef.org/protection/files/FBO_Guide_for_Religious_Leaders_and_Communities_ENG(1).pdf). See also *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, ECPAT INTERNATIONAL (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

97. *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, ECPAT INTERNATIONAL (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

98. See also Lori S. Ashford, *Africa’s Youthful Population: Risk or Opportunity?* POPULATION REFERENCE BUREAU (WASHINGTON, D.C.) (Jan. 22, 2018), <http://www.prb.org/pdf07/africayouth.pdf>.

99. See, e.g., SOCIAL PROTECTION FOR AFRICA’S CHILDREN (Sudhanshu Handa, Stephen Devereux & Douglas Webb eds., 2010) (arguing that there is need for African countries to provide social protections for children in order to minimize their vulnerability to exploitation).

those of other regions of the world and that many of them have improved significantly in the area of human development,¹⁰⁰ poverty, especially among children, remains a major problem throughout the continent. Africa is one of the regions of the world where income and wealth inequality are most prominent, and poverty remains a major challenge to policymakers. In fact, in 2010, nearly half of Africa's population lived on less than USD 1.25 per day and over two-thirds on less than USD 2.00 per day.¹⁰¹

More than two-thirds of people in Africa currently live and are employed in the rural areas and depend primarily on agriculture for their livelihood.¹⁰² However, Africa's urban areas are currently seeing a significant surge in population growth, some of it coming from rural-to-urban migration. Within the urban areas in Africa, poverty is also a problem — in fact, African cities have extremely high levels of poverty,¹⁰³ with large numbers of people forced into slums.¹⁰⁴ Unfortunately, the majority of these slum dwellers are children and youth.¹⁰⁵ It is estimated that there are at least 30 million street children in Africa.¹⁰⁶ Street children, regardless of the

100. *See, e.g.*, UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), HUMAN DEVELOPMENT REPORT, 2013 (2013); ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) ET AL., AFRICAN ECONOMIC OUTLOOK 2013: STRUCTURAL TRANSFORMATION AND NATURAL RESOURCES (2013) (arguing, *inter alia*, that African economies are expected to grow faster than their counterparts in other regions of the world); AFRICA'S LIONS: GROWTH TRAPS AND OPPORTUNITIES FOR SIX AFRICAN ECONOMIES (Haroon Borat & Finn Tarp eds., 2016) (examining, *inter alia*, the economic forces that will shape Africa's future growth and development).

101. *Poverty*, WORLD BANK (Jan. 22, 2018), <http://www.worldbank.org/en/topic/poverty/overview>.

102. *See, e.g.*, L. FULLER, AFRICAN WOMEN'S UNIQUE VULNERABILITIES TO HIV/AIDS: COMMUNICATION PERSPECTIVES AND PROMISES (2008) (arguing, *inter alia*, that most Africans live in the rural areas and depend primarily on agriculture); LYDIA M. PULSIPHER AND ALEX PULSIPHER, WORLD REGIONAL GEOGRAPHY: GLOBAL PATTERNS, LOCAL LIVES (2008) (detailing, *inter alia*, the importance of the rural agricultural sector to the livelihoods of many people, including those in Africa).

103. *See, e.g.*, SUE JONES AND NICI NELSON, URBAN POVERTY IN AFRICA: FROM UNDERSTANDING TO ALLEVIATION (1999) (examining, *inter alia*, urban poverty in Africa and providing suggestions on how to deal with it); DANIELLE RESNICK, URBAN POVERTY AND PARTY POPULISM IN AFRICAN DEMOCRACIES (2014) (using Senegal and Zambia as case studies, the authors examine the participation of urban poor in politics).

104. JERRY W. HOLLINGSWORTH, THE SOCIAL PROBLEMS OF CHILDREN IN SUB-SAHARAN AFRICA (2013) (arguing, *inter alia*, that Africa's slums are growing at twice the speed of the continent's exploding cities); MIKE DAVIS, PLANET OF SLUMS (2007) (looking generally at the exploding global problem of slums); UN HUMAN SETTLEMENTS PROGRAM, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS, 2003 (2003) (presenting the first global assessment of slums and emphasizing their problems and prospects).

105. *See, e.g.*, HOLLINGSWORTH, *supra* note 104.

106. Momodou Jawo, *Africa: "There are 30 Million Street Children on the Continent,"*

activities that they are engaged in, are very vulnerable and susceptible to various forms of maltreatment, especially sexual exploitation.¹⁰⁷

Since HIV/AIDS became a major global health problem, it has killed many people in Africa.¹⁰⁸ In 2010, it was estimated that more than 58 million African children had lost at least one parent and of those, at least 16 million had lost their parent to AIDS.¹⁰⁹ Studies have revealed that children orphaned by HIV/AIDS have a significantly higher chance of being exposed to various forms of exploitation and abuse, including violence, sexual exploitation, child trafficking, especially for sexual purposes, and the different forms of servitude.¹¹⁰

During the last few decades, many countries in Africa have adopted universal education platforms,¹¹¹ which have provided opportunities for children from poor households to attend school. As a consequence, primary school enrollments have seen tremendous gains across the continent.¹¹² Nevertheless, rates of school completion have not significantly improved in the continent.¹¹³ This has been due to, inter alia, teacher absenteeism, poor

THE DAILY OBSERVER (Banjul), June 17, 2011, <http://allafrica.com/stories/201106170539.html>. See, e.g., AYLWARD SHORTER & EDWIN ONYANCHA, STREET CHILDREN IN AFRICA: A NAIROBI CASE STUDY (1999); PHILIP KILBRIDE, COLLETTE SUDA, & ENOS NJERU, STREET CHILDREN IN KENYA: VOICES OF CHILDREN IN SEARCH OF A CHILDHOOD (2000) (providing an overview of the issue of street children).

107. See, e.g., POONAM SONDEHI GARG, STREET CHILDREN: LIVES OF VALOR AND VULNERABILITY (2004) (arguing that street children are extremely vulnerable to abuse and mistreatment); DAVID KAAWA-MAFIGIRI & JOSHUA WALAKIRA, CHILD ABUSE AND NEGLECT IN UGANDA (2017) (addressing a vast range of issues related to child abuse and neglect in Uganda).

108. See, e.g., JOHN BONGAARTS, POPULATION COUNCIL, GLOBAL TRENDS IN AIDS MORTALITY (1995); BRADLY J. CONDON AND TAPEN SINHA, GLOBAL LESSONS FROM THE AIDS PANDEMIC: ECONOMIC, FINANCIAL, LEGAL AND POLITICAL IMPLICATIONS (2008).

109. See generally UNITED NATIONS CHILDREN'S FUND (UNICEF), AFRICA'S ORPHANED AND VULNERABLE GENERATIONS: CHILDREN AFFECTED BY AIDS (2006); CENTER FOR POLICY STUDIES, AIDS ORPHANS IN AFRICA: BUILDING AN URBAN RESPONSE—EDITED PROCEEDINGS OF A FORUM HELD IN JOHANNESBURG IN JULY 2000 (2001).

110. See, e.g., SISTER MARY ELIZABETH LLOYD, AIDS ORPHANS RISING: WHAT YOU SHOULD KNOW AND WHAT YOU CAN DO TO HELP THEM SUCCEED (2008).

111. In 2003, for example, Kenya adopted free primary education. See, e.g., KEIICHI OGAWA AND MIKIKO NISHIMURA, COMPARATIVE ANALYSIS ON UNIVERSAL PRIMARY EDUCATION POLICY AND PRACTICE IN SUB-SAHARAN AFRICA: THE CASE OF GHANA, KENYA, MALAWI AND UGANDA (2015).

112. See, e.g., COMMUNITY SCHOOLS IN AFRICA: REACHING THE UNREACHED (Deborah Glassman, Jordan Naidoo & Fred Wood eds., 2007).

113. See generally KIRSTEN MAJGAARD AND ALAIN MINGAT, EDUCATION IN SUB-SAHARAN AFRICA: A COMPARATIVE ANALYSIS (2012) (providing a comparative analysis of education systems in sub-Saharan Africa). See also ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended*

health, lack of nutritional food for the students, parents' lack of money, the fact that many children live very far away from school and find it difficult to get to school, especially during the rainy season, poor educational infrastructure, and the inability of children's parents to secure the necessary instructional materials (e.g., pencils, books, and uniforms).¹¹⁴

Although many African countries have made significant progress in closing the gender gap in education, girls continue to have higher dropout rates than boys. In many African countries, cultural and traditional practices tend to favor the education of boys over that of girls.¹¹⁵ Thus, when financially constrained, families prefer to educate boys while girls are either forced into early marriage or sent to engage in what are often dangerous jobs to support the family. Many of these neglected girls are susceptible to exploitation and abuse, including especially sexual exploitation.¹¹⁶

In many African countries, there is systematic discrimination against girls and women.¹¹⁷ Most of the discrimination arises from traditional and cultural practices that push girls and women to the economic and political margins and make them vulnerable to sexual violence and exploitation.¹¹⁸ Throughout the continent, traditional practices preclude women from accessing important economic resources, which include land, money, and credit.¹¹⁹ When girls are fortunate to find work, they usually do so in sectors

Strategies (November 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

114. *See, e.g.*, SERGE THEUNYNCK, *SCHOOL CONSTRUCTION STRATEGIES FOR UNIVERSAL PRIMARY EDUCATION IN AFRICA: SHOULD COMMUNITIES BE EMPOWERED TO BUILD BETTER SCHOOLS?* (2009); *VULNERABLE CHILDREN: GLOBAL CHALLENGES IN EDUCATION, HEALTH, WELL-BEING, AND CHILD RIGHTS* (Deborah J. Johnson, DeBrenna LaFa Agbényiga & Robert K. Hitchcock eds., 2013). *See* *THE STATE OF THE NATIONS: CONSTRAINTS ON DEVELOPMENT IN INDEPENDENT AFRICA* (Michael F. Lofchie ed., 1971) (providing a historical overview).

115. *See* KENNETH KAOMA MWENDA AND GERRY NKOMBO MUUKA, *THE CHALLENGE OF CHANGE IN AFRICA'S HIGHER EDUCATION IN THE 21ST CENTURY*(2009) (showing that most Africans foster a culture that considers male children more important to their female children). *See also* JOSEPH ZAJDA & KASSIS FREEMAN, *RACE, ETHNICITY AND GENDER IN EDUCATION: CROSS-CULTURAL UNDERSTANDINGS* (2009) (showing, inter alia, Africa cultures' preference for the education of boys and the neglect of girl's education).

116. *See, e.g.*, *THE CHILDREN OF AFRICA CONFRONT AIDS* (Arvind Singhal & W. Stephen Howard eds., 2003).

117. *See, e.g.*, GAYLE KIMBALL, *BRAVE: YOUNG WOMEN'S GLOBAL REVOLUTION, VOL. 1* (2017) (detailing, inter alia, discriminatory practices against girls and women, including those in Africa).

118. *See generally* LINDA RICHTER, ANDREW DAWES AND CRAIG HIGSON-SMITH, *SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA* (2004); NANCY A. CROWELL, *UNDERSTANDING VIOLENCE AGAINST WOMEN* (1996).

119. In addition to the fact that some cultures do not allow women to purchase land, they also prohibit women to inherit real property. Job opportunities for women are usually very

of the economy (e.g., restaurants, bars, households) where they are most likely vulnerable to exploitation. The unequal social status subjects them to positions where they are more likely to experience abuse and exploitation by men. In fact, in some societies in Africa, these attitudes towards girls and women have effectively normalized violence against women. For example, in Soweto, South Africa, a survey of 1,500 school children determined that as much as 25 percent of boys found “jackrolling” (i.e., gang rape) to be fun.¹²⁰

In Africa, civil wars and other forms of sectarian violence have created environments in which the sexual exploitation of women has become widespread. Many African countries are currently involved in some form of armed conflict,¹²¹ creating a large population of internally displaced people, most of whom are children.¹²² When war or violent conflict breaks out, children are usually displaced internally or forced to flee across borders. In addition, the lawlessness that accompanies both war and sectarian violence also renders many children susceptible to “abduction, torture and forced recruitment into the armed forces, with very large numbers also experiencing rape, sexual violence, and exploitation.”¹²³ In fact, during the more than 24 years that the Lord’s Resistance Army (LRA) has fought the Ugandan government, it has been engaged in kidnapping and exploiting hundreds of

limited in many African countries, either because of the lack of education and skills or because of traditional practices that prevent women from engaging in wage labor. Even if they work, women must either give their earnings to their parents or their husbands (if they are married). Hence, women usually do not have access to critical resources for personal development. *See, e.g.,* BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM* (2014); *ESSAYS IN AFRICAN LAND LAW* (Robert Home ed., 2011); LYNNE MUTHONI WANYEKI, *WOMEN AND LAND IN AFRICA: CULTURE, RELIGION AND REALIZING WOMEN’S RIGHTS* (2003).

120. BBC, *South Africa’s Rape Shock*, BBC NEWS (January 19, 1999) <http://news.bbc.co.uk/2/hi/africa/258446.stm>.; LLOYD VOGELMAN & SHARON LEWIS, *GANG RAPE AND THE CULTURE OF VIOLENCE IN SOUTH AFRICA* (1993) <http://www.csvt.org.za/index.php/about-us/funding-and-affiliation/1631-gang-rape-and-the-culture-of-violence-in-south-africa.html>. *See also* LYNN LATHAM, *RESULTS FROM THE FORBIDDEN HUMAN ACT* (2017).

121. For example, South Sudan, Central African Republic, Cameroon, Somalia, Mali, Sudan, and Nigeria. *See, e.g.,* Chrispin Mwakideu, *Mixed Picture for Africa in 2017: Armed Conflict Survey*, DW NEWS (May 9, 2017) <http://www.dw.com/en/mixed-picture-for-africa-in-2017-armed-conflict-survey/a-38765465>.

122. *See generally* REFUGEE RIGHTS: ETHICS, ADVOCACY, AND AFRICA (David Hollenbach ed., 2008); ALLEHONE M. ABEBE, *THE EMERGING LAW OF FORCED DISPLACEMENT IN AFRICA: DEVELOPMENT AND IMPLEMENTATION OF THE KAMPALA CONVENTION ON INTERNAL DISPLACEMENT* (2016).

123. ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 7 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

children—many of them have been used as child soldiers and others, mostly girls, have been sexually abused.¹²⁴

During the Arab Spring,¹²⁵ many children throughout the region were exposed to significant levels of violence.¹²⁶ In fact, many news outlets reported that during the pro-democracy demonstrations that characterized the Arab Spring, there were many reports of girls and women being openly groped and molested. It appears that violence against women and girls remains an integral part of social interaction in most of the Middle East and North Africa.¹²⁷

A major consequence of the recent civil war in South Sudan is the significant rise in the street children population and the subsequent increase in child prostitution.¹²⁸ In South Sudan's capital city, Juba, it is estimated

124. See, e.g., Jocelyn TD Kelly, Lindsay Branham and Michele R. Decker, *Abducted Children and Youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): Mechanisms of Indoctrination and Control*, 10 CONFL. HEALTH 11 (May 18, 2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4870729/>. As late as February 2018, the United Nations was reporting that as many as 19,000 children had been "recruited" as fighters by both sides in the South Sudan conflict. The latter has already produced at least one brutal civil war, which was fought between forces loyal to the country's Vice President, Riek Machar, and government forces under the control of President Salva Kiir. That civil war began in December 2013 after President Kiir accused his deputy (Machar) of attempting a coup d'état. A cease fire was declared in January 2014. Nevertheless, that agreement was soon breached and fighting continued. Another cease fire, called the Compromise Peace Agreement, was signed in August 2015. Nevertheless, that agreement was soon breached and fighting has continued since then. More than 300,000 are reported to have been killed since fighting began in 2013, many of them children. See, e.g., The Associated Press *More than 300 Child Soldiers Freed in South Sudan*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/world/africa/south-sudan-child-soldiers.html?ref=collection%2Fsectioncollection%2Fafrika>; Jeffrey Gettleman, *War Consumes South Sudan, a Young Nation Cracking Apart*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/world/africa/war-south-sudan.html>.

125. The Arab Spring was a series of democratic uprisings that started in Tunisia in 2011 and spread throughout the Middle East. For more on the Arab Spring, see VIJAY PRASHAD, *ARAB SPRING LIBYAN WINTER* (2012); THE ARAB SPRING, CIVIL SOCIETY, AND INNOVATIVE ACTIVISM (Cenap Çakmak ed., 2017); HAMID DABASHI, *THE ARAB SPRING: THE END OF POSTCOLONIALISM* (2012).

126. See generally ARAB SPRING AND ARAB WOMEN: CHALLENGES AND OPPORTUNITIES (Muhamad S. Olimat ed., 2013); EMPOWERING WOMEN AFTER THE ARAB SPRING (Marwa Shalaby & Valentine M. Moghadam eds., 2016); GENDER, WOMEN AND THE ARAB SPRING (Andrea Khalil ed., 2015).

127. See generally MONA ELTAHAWY, *HEADSCARVES AND HYMENS: WHY THE MIDDLE EAST NEEDS A SEXUAL REVOLUTION* (2015); *DECONSTRUCTING SEXUALITY IN THE MIDDLE EAST: CHALLENGES AND DISCOURSES* (Pinar Ilkharacan ed., 2008); *FREEDOM HOUSE: WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: CITIZENSHIP AND JUSTICE* (Sameena Nazir and Leigh Tomppert eds., 2005).

128. Simona Foltyn, *South Sudan Child Prostitution on the Rise*, ALJAZEERA (June 29,

that the civil war forced more than 3,000 girls into the streets and that about 500 or more of them are currently engaged in prostitution. Many of these girls, some as young as 12 years, are victims of commercial sexual exploitation, a lot of which has been made possible by the presence of many soldiers on the city's streets.¹²⁹

As mentioned, the Boko Haram insurgency in Nigeria has produced a lot of insecurity, especially in northeastern Nigeria. In addition to the random civilian killings, Boko Haram has also been involved in the kidnapping of many girls,¹³⁰ many of whom are subsequently exploited and abused sexually. Despite the efforts of the Nigerian government, which has been cooperating with the governments of neighboring countries such as Cameroon, Nigeria, and Chad, as well as international partners, such as the United States,¹³¹ China,¹³² and the UK,¹³³ the insurgency remains quite robust and the region's children remain vulnerable to abduction and subsequent abuse and exploitation.¹³⁴

2014), <http://www.aljazeera.com/indepth/features/2014/06/south-sudan-child-prostitution-rise-201462881543120146.html>; U.S. State Department, *South Sudan: 2014 Trafficking in Persons Report* (2014), <https://www.state.gov/j/tip/rls/tiprpt/countries/2014/226817.htm>.

129. See, e.g., *Not Just "Lost Boys," But "Lost Girls"—in War-Torn South Sudan*, THE CHRISTIAN SCIENCE MONITOR (Oct. 2, 2014), <https://www.csmonitor.com/World/Africa/Africa-Monitor/2014/1002/Not-just-Lost-Boys-but-Lost-Girls-in-war-torn-South-Sudan>; World Vision, *Fear and Want: Children Living in Crisis in South Sudan* (Dec. 2014), http://www.wvi.org/sites/default/files/South%20Sudan%20Policy%20Report_LowRes-FINAL.pdf; U.S. Department of Labor, *South Sudan* (2012), <https://www.dol.gov/ilab/reports/child-labor/findings/2012TDA/southsudan.pdf>.

130. In one single episode in 2014, Boko Haram kidnapped as many as 300 girls and subsequently announced that the group would sell the girls to raise money for its activities. There was fear among human rights activists that the girls would be shipped to neighboring countries, such as Cameroon and Chad, where they would be sold into forced marriage, domestic servitude, and other forms of exploitation. For more information on child abductions by Boko Haram, see, e.g., HELON HABILA, *THE CHIBOK GIRLS: THE BOKO HARAM KIDNAPPINGS AND ISLAMIST MILITANCY IN NIGERIA* (2016); Ann Hulbert, *The Ordinary Perpetrators and Victims in the Boko Haram Kidnappings*, THE ATLANTIC, (January/February 2017), <https://www.theatlantic.com/magazine/archive/2017/01/cover-to-cover-the-chibok-girls/508784/>; AISHA MUHAMMED-OYEBODE, *THE DAUGHTERS OF CHIBOK: TRAGEDY AND RESILIENCE IN NIGERIA'S NORTHEAST* (2018).

131. Temitope Omolade, *US "Training Forces" to Fight Boko Haram*, DW NEWS (April 22, 2016), <http://www.dw.com/en/us-training-forces-to-fight-boko-haram/a-19206253>.

132. Office of the Chief of Defense Staff (Nigeria), *China to Partner with Nigeria in the Fight Against Boko Haram Terrorism* (Dec. 11, 2015), <http://defenceinfo.mil.ng/china-to-partner-with-nigeria-in-the-fight-against-boko-haram-terrorism/>.

133. Government of the United Kingdom (UK), *UK Reiterates Support to the Fight Against Boko Haram*, available at <https://www.gov.uk/government/news/uk-reiterates-support-to-the-fight-against-boko-haram> (last visited on Jan. 22, 2018).

134. See generally Stephanie Nebehay and Alexis Akwagyiram, *Boko Haram Nigerian*

Since the jihadist fundamentalist group, al-Shabaab, began its operations in Somalia, many of the girls who have been forced to flee for safety in Kenya, have experienced forced labor and sexual exploitation.¹³⁵ Two large refugee camps in Kenya — Dadaab¹³⁶ and Kakuma¹³⁷ — contain large populations of refugee children and many of them are alleged to have been subjected to various forms of exploitation, including sexual exploitation.¹³⁸ Somali children who live in various refugee camps are not the only ones who are subjected to abuse and exploitation. Many truck drivers who carry goods from Kenya to Somalia often bring back Somali girls and women and sell them to brothels in Nairobi, Mombasa and other locations outside Kenya.¹³⁹

Natural disasters can also create conditions that enhance the exploitation of children. Such disasters, like wars and other forms of sectarian violence, can result in a complete breakdown of law and order and force population movements that can create opportunities for traffickers and child exploiters to function freely and act with impunity. Floods, as well as prolonged droughts, can force families to move from their villages in search of safety — as has been the case in many parts of Africa, many of these displaced people often end up in refugee camps, either within their own

Child Bombings This Year Are Quadruple 2016s: UNICEF, REUTERS (Aug. 22, 2017), <https://www.reuters.com/article/us-nigeria-security/boko-haram-nigerian-child-bombings-this-year-are-quadruple-2016s-unicef-idUSKCN1B21F2>.; BBC, *Nigeria's Boko Haram Conflict: Huge Rise in Child "Human Bombs,"* BBC NEWS (Aug. 22, 2017), <http://www.bbc.com/news/world-africa-41010993>.

135. See generally JOËLLE MORET, SIMONE BAGLIONI & DENISE EFIONAYI-MÄDER, *THE PATH OF SOMALI REFUGEES INTO EXILE: A COMPARATIVE ANALYSIS OF SECONDARY MOVEMENTS AND POLICY RESPONSES* (2006); U.S. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT*, 10 EDITION (2010); LAURIE A. GOULD AND MATTHEW PATE, *STATE FRAGILITY AROUND THE WORLD: FRACTURED JUSTICE AND FIERCE REPRISAL* (2015).

136. See, e.g., BEN RAWLENCE, *CITY OF THORNS: NINE LIVES IN THE WORLD'S LARGEST REFUGEE CAMP* (2016); CLAYTON A. HARTJEN AND S. PRIYADARSINI, *THE GLOBAL VICTIMIZATION OF CHILDREN: PROBLEMS AND SOLUTIONS* (2012).

137. APPLYING ANTHROPOLOGY TO GENDER-BASED VIOLENCE (Jennifer R. Wies & Hillary J. Haldane eds., 2015); AFTER THE COMPREHENSIVE PEACE AGREEMENT IN SUDAN (Elke Grawert ed., 2010).

138. See United Nations High Commission for Refugees (UNHCR), *Kenya Comprehensive Refugee Program, 2014*, <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/05/KCRP-20141.pdf> (last visited on Jan. 22, 2018).

139. U.S. Department of State, *Kenya: 2016 Trafficking in Persons Report*, (2016) <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258795.htm>; International Labor Organization (ILO), *Baseline Survey on Children in Commercial Sex in Kenya's Four Towns of Nairobi, Kisumu, Eldoret, and Nyeri* (Jan. 2008); Aggrey Willis Otieno, *Sexual Exploitation of Children in Travel and Tourism in Kenya: A Case Study of Embakasi, Starehe, Kasarani and Kamukunji Sub Counties in Nairobi* (Sep. 2015), ANPPCAN Regional Office, <http://globalstudysect.org/wp-content/uploads/2016/06/Kenya.pdf>.

countries or outside those countries. After floods displaced thousands of families in south-eastern Zimbabwe in 2014, 3,000 of them were housed in a transit camp called Chingwizi.¹⁴⁰ Many flood victims, especially unsuspecting young girls, faced with extremely difficult conditions at these temporary or transit camps, were susceptible to trafficking, as they struggled to survive on a daily basis. Many of them were lured away with deceptive promises of a better life outside the camps — often, they were promised jobs that never materialized once they had left the camps and instead stepped into the hands of traffickers. They were either sold off into sexual slavery or used directly as prostitutes or in the production of pornography. At the Zimbabwean camp, residents (i.e., the flood victims) accused government and humanitarian aid workers and police officers, whose job it was to distribute aid (e.g., food, water, medicines) and provide security for the camp, of extracting sexual favors from them in exchange for the supplies.¹⁴¹

During the last several years in Africa, civil wars in countries such as Liberia, Sierra Leone, Rwanda, Central African Republic, and Libya, have forced the migration of many children in search of safety and sustenance in neighboring countries.¹⁴² Many of these children are involved in what the International Organization for Migration (IOM)¹⁴³ refers to as “irregular migration.”¹⁴⁴ Throughout the continent, they are people who are continually on the move for a variety of reasons. Among these groups of migrants, one

140. See, e.g., Sebastian Mohfu, *Zimbabwe Flood Victims Still in Camps, Two Years On*, Voice of America (VOA) (Feb. 18, 2006), <https://www.voanews.com/a/zimbabwe-flood-victims-still-camps/3197006.html>. See also Kudzayi S. Tarisayi, *A Bourdieu Perspective of the Chingwizi Transit Camp, Zimbabwe*, 1 J. STUD. IN MGT & PLAN. 297 (2015).

141. See, e.g., *Sex-for-food at Chingwizi camp*, NEWSDAY (May 25, 2014), <https://www.newsday.co.zw/2014/05/sex-food-chingwizi-camp/>; Blessing Zulu and Tatenda Gumbo, *Gov't Officials Allegedly Demand Sex for Food at Chingwizi Camp*, VOA NEWS (May 26, 2014), <https://www.voazimbabwe.com/a/zimbabwe-sex-for-food-at-chingwizi-camp-in-masvingo-villagers/1923049.html>.

142. See, e.g., Jeff Drumtra, *West Africa's Refugee Crisis Spills Across Many Borders*, Migration Policy Institute (Aug. 1, 2003), <https://www.migrationpolicy.org/article/west-africas-refugee-crisis-spills-across-many-borders>.

143. The International Organization for Migration is an intergovernmental organization and part of the United Nations that was established in 1951 and provides services and advice concerning migration to governments and migrants. The IOM also advises and provides services to internally displaced persons, refugees, and migrant workers. For more information on the IOM, see generally MARIANNE DUCASSE-ROGIER, *THE INTERNATIONAL ORGANIZATION FOR MIGRATION, 1951–2001* (2002); INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), *MIGRATION FOR DEVELOPMENT: WITHIN AND BEYOND BORDERS* (2006).

144. The IOM defines irregular migration as “movement that takes place outside the regulatory norms of the sending, transit and receiving countries.” See International Organization for Migration, *Key Migration Terms*, <https://www.iom.int/key-migration-terms> (last visited on Jan. 23, 2018).

can find “refugees, asylum seekers, trafficked persons, stateless persons, and unaccompanied or separated children, as well as other irregular migrants moving for various reasons such as economic, environmental, and humanitarian factors.”¹⁴⁵ These types of migration flows are referred to as “mixed migration flows” and increasingly include children, many of whom are unaccompanied and vulnerable to trafficking and other forms of exploitation.¹⁴⁶

One of the most important sources of harm to children throughout Africa comes from traditional practices, beliefs, and evolving social norms or customs. This article mentioned the ritual servitude system called Trokosi,¹⁴⁷ which is pervasive in several countries in West Africa.¹⁴⁸ Besides Trokosi, there are other traditional practices that harm children or make them vulnerable to exploitation. In Ghana, for example, the customary practice called *kayaye*¹⁴⁹ is a major source of the abuse of young girls in the country. This practice is common in Northern Ghana communities — generally, girls from this relatively poor parts of Ghana travel to the urban centers of Accra and Kumasi to work as *kayayes* (i.e., female porters) in order to earn money for their families and to secure “marital accessories for their future married life.”¹⁵⁰ Studies of the *kakaye* system in Ghana has revealed that the children involved in this practice usually do not have any effective shelter and are forced to engage in commercial sexual activities in order to secure the additional income that they need to survive the harsh conditions of their existence in the urban centers.¹⁵¹

145. ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 8 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

146. See, e.g., DEMOGRAPHY OF REFUGEE AND FORCED MIGRATION (Graeme Hugo, Mohammad Jalal Abbasi-Shavazi, & Ellen Percy Kraly eds., 2018); INTERNATIONAL HUMANITARIAN ACTION: NOHA TEXTBOOK (Hans-Joachim Heintze & Pierre Thielbörger eds., 2018).

147. Trokosi involves the abuse of children for reasons of tradition and religion. For more on Trokosi, see LINDA M. GILLARD, *TROKOSI: SLAVE OF THE GODS* (2010); DANIEL MAWULI TSİKATA, *CULTURAL PRACTICES AND EXCLUSION OF GIRLS FROM EDUCATION: THE TROKOSI SYSTEM OF THE SOUTH-EASTERN* (2008).

148. Trokosi is a popular practice in the traditional religious shrines of Ghana, Benin, Nigeria, and Togo. See, e.g., PAN-AFRICAN ISSUES IN CRIME AND JUSTICE (Anita Kalunta-Crumpton & Biko Agozino eds., 2017).

149. For more on this practice in Ghana, see, e.g., *THE GENDERED IMPACTS OF LIBERALIZATION: TOWARDS “EMBEDDED LIBERALISM”?* (Shahra Razavi ed., 2009).

150. ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 9 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

151. *Id.* See also ECPAT International, *Children and Youth in Ghana Must be Empowered*

A common traditional practice in Benin called *vidomegon* also contributes significantly to the exploitation of children. Under *vidomegon*, poor families, most of which are found in the rural areas of the country, send their children, primarily girls, to work in the houses of rich urbanites as domestic servants. The hope is that these children would have more opportunities for self-actualization in the urban areas.¹⁵² Usually, the rural families (i.e., the sending families) arrange with the urban families (i.e., the receiving families) for the latter to provide the child with housing and food. Under such an arrangement, the two families share the child's earned income. Although the arrangement is generally voluntary, many of the children often find themselves working long hours. In addition, they may be forced to live in improper housing and given very little food to eat. Perhaps more important is that many of them are vulnerable to sexual abuse and exploitation.¹⁵³ In fact, researchers have uncovered evidence that shows that the system of *vidomegon* is now being used by traffickers to bring children into the commercial sex trade.¹⁵⁴

Parents, particularly in Senegal, send their young sons to the city to learn the Koran from religious teachers called *marabouts*. However, these children are forced to spend most of their time roaming the streets begging for money. This practice often places them in a position to be physically and sexually abused.¹⁵⁵

in Order to Prevent Sexual Exploitation (July 31, 2014), <http://www.ecpat.org/news/children-and-youth-ghana-must-be-empowered-order-prevent-sexual-exploitation/>.

152. ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 9 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

153. U.S. Department of Labor, Bureau of International Labor Affairs, *2010 Findings on the Worst Forms of Child Labor* (Oct. 3, 2011), <https://www.dol.gov/ilab/reports/pdf/2010TDA.pdf>. See also MONITORING CHILDREN'S RIGHTS (Eugeen Verhellen ed., 1996); Irving Epstein & Leslie Image, *THE GREENWOOD ENCYCLOPEDIA OF CHILDREN'S ISSUES WORLDWIDE: SUB-SAHARAN AFRICA* (2008); MATHURIN G. HOUNGNIKPO AND SAMUEL DECALO, *HISTORICAL DICTIONARY OF BENIN*, FOURTH EDITION (2013).

154. See generally ALEXIS A. ARONOWITZ, *HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS* (2009); U.S. Department of State, *2016 Trafficking in Persons Report: Benin*, <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258726.htm> (last visited on Jan. 23, 2018).

155. Human Rights Watch, *"I Still See the Talibés Begging": Government Program to Protect Talibé Children in Senegal Falls Short* (July 11, 2017), <https://www.hrw.org/report/2017/07/11/i-still-see-talibes-begging/government-program-protect-talibe-children-senegal>; Human Rights Watch, *Senegal: New Steps to Protect Talibés, Street Children: Sustain Momentum with Investigations, Prosecutions* (July 28, 2016), <https://www.hrw.org/news/2016/07/28/senegal-new-steps-protect-talibes-street-children>; Kate Lyons, *Senegal Fails to Stop Abuse of Children in Qur'anic Schools*, *THE GUARDIAN* (U.S. Edition) (July 12,

Throughout the continent, many traditional beliefs continue to place children at risk for sexual abuse and exploitation. In Nigeria, for example, researchers have found a link between witchcraft stigmatization and child trafficking.¹⁵⁶ If labeled as a witch or alleged to be suffering from witchcraft, children are shunned by their communities and forced to fend for themselves. Many of these children are quite vulnerable to abuse and exploitation.¹⁵⁷

The struggle to imitate Western consumption habits, particularly the desire for expensive luxury goods, such as designer handbags, iPhones, watches, and the like, contributes immensely to commercial sexual exploitation of children. Reinforced daily by advertising on radio, TV and the Internet, children and young adults struggle to belong and conform to the new value system adopted by their communities, which include an emphasis on expensive brand-name products and luxury goods. Unable to secure the money required to purchase these expensive goods, these children are often forced to exchange sexual services for the money that they need to purchase designer goods. There has arisen, in many African countries, the “sugar daddy” phenomenon,¹⁵⁸ whereby young girls provide sexual services to older men in exchange for money and material gifts, which may include anything from jewelry, handbags, phones, and intimate wears to expensive cars and even apartments and houses. This form of prostitution has become quite popular throughout Africa as young girls struggle to join the new consumer class that is recognized by its ability to own the latest designer goods from Paris, New York, and Milan.¹⁵⁹

2017), <https://www.theguardian.com/global-development/2017/jul/12/senegal-fails-to-stop-abuse-of-children-in-quranic-schools>.

156. See, e.g., Christian Purefoy, *Children Abused, Killed as Witches in Nigeria*, CNN AFRICA (Aug. 2010), <http://www.cnn.com/2010/WORLD/africa/08/25/nigeria.child.witches/index.html>; Stepping Stones Nigeria, *Witchcraft Stigmatization and Children's Rights in Nigeria, Report prepared for the 54 Session of the UN Committee on the Rights of the Child, Geneva, May 2010* (Dec. 2009), <https://static1.squarespace.com/static/53996fa5e4b0719132a72270/t/58173af75016e1b9d2ecba5d/1477917435000/UNCRC+Shadow+Report+SSN+2009.pdf>.

157. ECPAT International, *Global Monitoring: Status of Action Against Commercial Sexual Exploitation of Children: Nigeria* (2014), http://www.ecpat.org/wp-content/uploads/legacy/A4A2011_AF_NIGERIA_FINAL.pdf.

158. See, e.g., *Rising Poverty Breeds Sexual Exploitation of Children by Sugar Daddies*, IRIN NEWS (May 6, 2004), <http://www.irinnews.org/news/2004/05/06/rising-poverty-breeds-sexual-exploitation-children-sugar-daddies>; UNICEF, *Child Sex Tourism and Exploitation Increasing in The Gambia* (May 5, 2004), https://www.unicef.org/media/media_20825.html; THE CHILDREN OF AFRICA CONFRONT AIDS: FROM VULNERABILITY TO POSSIBILITY (Arvind Singhal & W. Stephen Howard eds., 2003); LORETTA E. BASS, *CHILD LABOR IN SUB-SAHARAN AFRICA* (2004).

159. See generally Karyn Maughan, *SA Teenagers are Trading Sex for Luxury Goods*, IOL News (South Africa) (May 30, 2006), <https://www.iol.co.za/news/south-africa/sa->

B. The Sexual Exploitation of African Children: The International Dimension

Many countries in Africa have developed programs to encourage foreigners, especially from developed countries, to visit their beaches, forests, game parks, and other attractions. These African countries hope to secure the financial resources that they can use to provide social overhead capital¹⁶⁰ for economic growth and development.¹⁶¹ A report from the UN World Tourism Organization shows that tourism is booming in Africa, despite rising political instability in some parts of the continent.¹⁶² The renewed interest in Africa as a tourist destination by many people in the developed countries has produced a significant increase in child sex tourism (CST).¹⁶³

According to research carried out by ECPAT International,¹⁶⁴ sex tourism in Africa, which has been concentrated primarily in West and North Africa — mostly in Senegal and Morocco — has, in recent years, spread to other regions of the continent. The increase has come from both people

teenagers-are-trading-sex-for-luxury-goods-279598; Kirsten Stoebenau, et al., *Consuming Sex: The Association Between Modern Goods, Lifestyles and Sexual Behavior Among Youth in Madagascar*, 9 GLOBAL HEALTH 13 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651287/>.

160. “Social overhead capital” refers to the services that are critical for production in a country. These include, but are not limited to, transportation, communication, and power facilities — roads, railroads, ports and harbors, hydroelectric plants, and telephone lines. *See generally* INFRASTRUCTURE IN AFRICA: LESSONS FOR FUTURE DEVELOPMENT (Mthuli Ncube & Charles Leyeka Lufumpa eds., 2017); MARY ALICE HART, A COMPARISON OF DOMESTIC AND FOREIGN INVESTMENT IN SOCIAL OVERHEAD CAPITAL IN UNDERDEVELOPED COUNTRIES (1961); THE OXFORD HANDBOOK OF AFRICA AND ECONOMICS, VOLUME I: CONTEXT AND CONCEPTS (Célestin Monga & Justin Yifu Lin eds., 2015).

161. *See, e.g.*, IAIN CHRISTIE, ENEIDA FERNADES, HANNAH MESSERLI & LOUISE TWINING-WARD, TOURISM IN AFRICA: HARNESSING TOURISM FOR GROWTH AND IMPROVED LIVELIHOODS (2014).

162. *See* UN World Tourism Organization (UNWTO), *Tourism Highlights 2013 Edition*, <https://www.e-unwto.org/doi/pdf/10.18111/9789284415427>. (last visited on Feb. 21, 2019).

163. Martin Cuddihy, *Child Sex Tourism Thriving in Kenya’s Port City of Mombasa*, ABC (AUSTRALIA) NEWS (Mar. 19, 2015), <http://www.abc.net.au/news/2015-03-19/child-sex-tourism-thriving-in-kenyas-port-city-of-mombasa/6333440>; Patrick Vrancken and Kasturi Chetty, *International Child Sex Tourism: A South African Perspective*, 53 J. AFR. L. 111 (2009); ECPAT International, *Confronting the Commercial Sexual Exploitation of Children in Africa* (September 2007), http://www.ecpat.org/wp-content/uploads/legacy/confronting_csec_eng_0.pdf.

164. *See* ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 8 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

outside and within the continent. ECPAT International reports¹⁶⁵ that the influx of tourists seeking sex with children, “has been facilitated by the proliferation of new flights to Africa, weak application of laws and the corruption of some officials, which allows offenders to commit abuses against children with impunity.”¹⁶⁶

The Moroccan cities of Marrakech and Casablanca have long been known as major destinations for sex tourists, primarily from the West.¹⁶⁷ There is evidence, however, that Cairo, Alexandria, and Luxor (in Egypt) have also emerged as major destinations for sexual tourists.¹⁶⁸ Organized networks of both European and Gambian travel agencies are said to be heavily involved in the promotion of CST to The Gambia.¹⁶⁹ Senegal also remains an important destination for sex tourists.¹⁷⁰ Although Burkina Faso, Côte d’Ivoire, Ghana, and Mali are usually not considered major destinations for CST, recent US government information shows that these countries are quickly becoming important and popular avenues for Westerners seeking to have sex with children.¹⁷¹ In several areas in Benin, cases of CST were reported, and in Togo, the government commissioned a study after acknowledging that tourism for the purpose of seeking sex with children was a major problem.¹⁷² Reports from Nigeria indicate that the use of young girls for the sexual entertainment of wealthy men or visiting business and public officials from abroad has been gaining ground during the last several decades.¹⁷³

165. *Id.*

166. *Id.*

167. Youssef el Kaidi, *Sexual Tourism in Morocco*, MOROCCO WORLD NEWS (Jan. 22, 2013), <https://www.morocoworldnews.com/2013/01/74751/sexual-tourism-in-morocco/>; Olga Piscitelli, *Prostitution, Marrakech is Moroccan Capital of Paid Sex*, ANSAMED (Jan. 24, 2018), http://www.ansamed.info/ansamed/en/news/sections/generalnews/2015/05/28/prostitution-marrakech-capital-of-paid-sex_4e8b87f3-4707-4fca-b6b3-00e3a990d63d.html.

168. See U.S. Department of State, *2013 Trafficking in Persons Report: Egypt*, <https://www.state.gov/j/tip/rls/tiprpt/countries/2013/215455.htm> (last visited on Jan. 24, 2018).

169. U.S. Department of State, *2014 Trafficking in Persons Report: The Gambia*, <https://www.state.gov/j/tip/rls/tiprpt/countries/2014/226726.htm> (last visited on Jan. 24, 2018).

170. Anne Look, *Senegal Draws Tourists with Sun, Sea and Sex*, PUBLIC RADIO INTERNATIONAL/GLOBALPOST (Apr. 29, 2010), <https://www.pri.org/stories/2010-04-29/senegal-draws-tourists-sun-sea-and-sex>; Maya Lau, *Senegalese Sex Tourism*, HUFFPOST (Nov. 7, 2011), https://www.huffingtonpost.com/maya-lau/senegalese-sex-tourism_b_952640.html.

171. U.S. Department of State, *Trafficking in Persons Report 2013*, <https://www.state.gov/j/tip/rls/tiprpt/2013/> (last visited on Jan. 24, 2018).

172. *Id.* See, especially 95–97; 363–64.

173. ECPAT International, *Global Network Urges the Government of Nigeria to Address Child Marriage and Child Sex Trafficking, 2nd Edition* (Apr. 31, 2014), <http://www.ecpat.org/news/global-network-urges-government-nigeria-address-child-marriage-and-child>

In East Africa, the Kenyan coastal cities of Malindi, Mombasa, Kilifi, and Diani, have emerged as major centers of CST. According to a study carried out by UNICEF,¹⁷⁴ 2,000 to 3,000 children are sexually exploited each year by sex tourists, many of them from Europe, with Italians, Germans, and Swiss dominating this horrific market.¹⁷⁵ The UNICEF report, called *The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast*,¹⁷⁶ revealed that as many as 10,000 to 15,000 girls may be involved as victims in CST in several coastal towns in Kenya.¹⁷⁷ In addition to the Europeans, the UNICEF researchers also determined that Ugandans and Tanzanians were also frequent tourists who came to Kenya's coastal cities to demand sex with children.¹⁷⁸ The coastal town of Malindi is said to be especially popular with sex tourists because it has developed an excellent and effective industry of facilitators — local boys who serve as middlemen between the tourists and the vulnerable girls that are subjected to abuse and exploitation.¹⁷⁹ Despite efforts in Nairobi, the government of Kenya has not been able to effectively intervene in the abuse of young girls in these coastal cities. Civil society organizations and other stakeholders believe that the government's failure is due to corruption among law enforcement agencies and the lack of adequate data on the scope of the problem.¹⁸⁰

Nongovernmental organizations (NGOs) in the United Republic of Tanzania have reported that the sexual exploitation of children in tourism is rapidly increasing, especially near and around tourist-oriented hotels on the Indian Ocean beaches. In these places, tourists come specifically to seek sex with both male and female children.¹⁸¹ In addition to mainland Tanzania,

-sex-trafficking/.

174. Chris Niles, *Report Reveals Kenyan Child Sex Industry of "Horrific" Magnitude*, UNICEF (Dec. 19, 2006), https://www.unicef.org/doublepublish/kenya_37817.html.

175. *Id.*

176. UNICEF, *The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast* (Dec. 19, 2006), http://lastradainternational.org/lisidocs/418%20extent_n_efect_1007.pdf.

177. *Id.*

178. *Id.*

179. *Id.* See also ECPAT International, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended Strategies*, at 8 (Nov. 2014), http://www.ecpat.org/wp-content/uploads/legacy/Regional%20CSEC%20Overview_Africa.pdf.

180. UNICEF, *supra* note 176.

181. See, e.g., ECPAT International, *Global Monitoring Status of Action Against Commercial Sexual Exploitation of Children: Tanzania, 2nd Edition*, available at http://www.ecpat.org/wp-content/uploads/legacy/a4a_v2_af_tanzania_4.pdf (last visited on Jan. 24, 2018).

Zanzibar has also emerged as a major destination for CST.¹⁸² Although authorities in Zanzibar have denied that children on the island are involved in prostitution and other forms of sexual abuse and exploitation, there is evidence that tourists, including individuals working for international NGOs and the extractive industries (primarily oil and gas), are frequent visitors to the island to engage in sex with children.¹⁸³

Several studies have determined that Uganda is emerging as a major destination for child sex tourists in East Africa.¹⁸⁴ A study of Uganda's Jinja District to determine the extent of child sexual abuse in 2011 revealed that young girls living in the district were quite vulnerable to sexual exploitation by various categories of persons, including truck drivers, operators of beauty salons, tourists and rich businessmen.¹⁸⁵ It was also determined that many tourists who come to Jinja are also involved in the production of child pornography and other related activities that are directed specifically at children.¹⁸⁶

In Southern Africa, CST is concentrated primarily in South Africa, with the cities and municipalities of Cape Town, Johannesburg, Port Elizabeth, and Durban being the most popular destinations for sex tourists.¹⁸⁷ Most of the tourists who come to South Africa to engage in sex with children are primarily from Europe, with Italy, Germany, and Switzerland as the major suppliers of these child sex tourists.¹⁸⁸

Tourists are not the only "internationals" involved in the sexual abuse and exploitation of Africa's children. Peacekeepers and humanitarian aid workers, as well as NGOs sent by various multilateral agencies have also

182. *Id.*

183. Apolinari Tairo, *Zanzibar Grapples to Protect Children from Sex Tourism*, ETURBONNEWS, (Sept. 27, 2017), <https://www.eturbonews.com/165997/zanzibar-grapples-protect-children-sex-tourism>.

184. ECPAT International, *Global Monitoring Status of Action Against Commercial Sexual Exploitation of Children: Uganda*, http://www.ecpat.org/wp-content/uploads/legacy/EXSUM_A4A_AF_UGANDA.pdf (last visited on Jan. 24, 2018).

185. *Id.*

186. *Id.*

187. ECPAT International, *Global Monitoring Status of Action Against Commercial Sexual Exploitation of Children: South Africa*, http://www.ecpat.org/wp-content/uploads/legacy/Ex_Summary_AF_S-AFRICA_FINAL.pdf (last visited on Jan. 24, 2018). See also Patrick Vrancken and Kasturi Chetty, *International Sex Tourism: A South African Perspective*, 53 J. AFRI. L. 111 (2009) and Surika van Schalkwyk, *Sex Tourism Takes Hold in South Africa*, MAIL & GUARDIAN, (Oct. 31, 2007), <https://mg.co.za/article/2007-10-31-sex-tourism-takes-hold-in-south-africa>.

188. ECPAT International, *supra* note 187.

been implicated in the exploitation of children in Africa.¹⁸⁹ In response to accusations that humanitarian aid workers and UN peacekeepers were sexually abusing and exploiting refugee children under their care in Guinea, Liberia, and Sierra Leone, the UN commissioned a study to determine the nature and extent of the problem.¹⁹⁰ Specifically, the study was commissioned by the UN High Commissioner for Refugees (UNHCR) and the UK-based NGO, Save the Children.¹⁹¹ The investigators completed their work and released their report in 2002.¹⁹² Their findings included “allegations of sexual abuse and exploitation against 67 individuals representing agencies charged with the responsibility of caring for the refugees.”¹⁹³

The UNHCR and Save the Children-UK Report¹⁹⁴ revealed that most of the children sexually abused and exploited in Guinea, Liberia, and Sierra Leone were between the ages of 13 and 18 years.¹⁹⁵ The individuals who were interviewed indicated that younger girls were especially preferred as sexual partners because many of the exploiters believed that having sex with a virgin could “cleanse a man from infection.”¹⁹⁶ Some exploiters also falsely believed that the younger the child, the less likely that they would be infected with HIV.¹⁹⁷ In many of the refugee camps in all three countries, the UNHCR and Save the Children-UK Report¹⁹⁸ noted, sexual favors emerged as the only acceptable currency that displaced peoples could use to access aid that

189. Scott A. Levin, *U.N. Report: Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833 (2003).

190. *Id.*

191. *Id.* See also UNHCR and Save the Children-UK, *Note for Implementing and Operational Partners by UNHCR and Save the Children-UK on Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001 (Feb. 2002)* https://www.savethechildren.org.uk/content/dam/global/reports/health-and-nutrition/sexual_violence_and_exploitation_1.pdf.

192. UNHCR and Save the Children-UK, *supra* note 191.

193. Levin, *supra* note 189, at 833.

194. UNHCR and Save the Children-UK, *supra* note 191.

195. *Id.*

196. Levin, *supra* note 189, at 833.

197. See UN Children’s Fund (UNICEF), *Profiting from Abuse: An Investigation into the Sexual Exploitation of Our Children* (2001) https://www.unicef.org/publications/files/pub_profiting_en.pdf. See also Amy McCoy, *Children “Playing Sex for Money”: A Brief History of the World’s Battle Against the Commercial Sexual Exploitation of Children*, 18 N.Y.L. SCH. J. HUM. RTS. 499 (2002); Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415 (2004).

198. UNHCR and Save the Children-UK Report, *supra* note 191.

had been sent by the international community and which was supposed to be distributed to them without any strings attached.¹⁹⁹ The report further alleges that aid workers used the “humanitarian aid and services” as a “tool of exploitation” and abuse instead of protecting refugees and providing them with the necessary resources to meet their basic needs.²⁰⁰

It was also alleged in the UNHCR and Save the Children-UK Report²⁰¹ that humanitarian aid workers routinely traded aid intended for refugees for sex with children. For example, food staples, medicines, opportunities for education and training, which were supposed to be freely offered to refugee families, were instead exchanged for sexual favors from children.²⁰² In fact, the report stated that²⁰³ it was often the case that the aid workers would pay for sex with children with little more than “a few biscuits, a plastic sheet, [or] a bar of soap.”²⁰⁴

The report²⁰⁵ went on to state that of all the agencies implicated in the sexual abuse and exploitation of refugee children in Guinea, Liberia and Sierra Leone, UN peacekeepers “are reportedly among the highest paying customers for sex with children.”²⁰⁶ These peacekeepers paid between USD 5 and USD 300 for sex with children, and in some cases, a group of peacekeepers would pool their money and then sexually abuse a single child.²⁰⁷

The UNHCR and Save the Children-UK investigators also revealed that some peacekeepers would meet with the parents of a targeted girl and express their intention to help the child, but after gaining the trust of the family, would proceed to abuse and exploit the child.²⁰⁸ In Sierra Leone, it was alleged that peacekeepers often rented rooms for the sole purpose of having sex with children and girls would travel to meet these peacekeepers to have sex in exchange for money and a few necessities of life, such as food.²⁰⁹ The following quote from one of the refugee children abused and exploited by peacekeepers and humanitarian workers is very telling: “I leave my child

199. *See, e.g.*, Levin, *supra* note 189, at 833.

200. *Id.* *See also* UNHCR and Save the Children-UK, *supra* note 191.

201. UNHCR and Save the Children-UK, *supra* note 191.

202. *Id.* *See also* Levin, *supra* note 189, at 833.

203. That is, the UNHCR and Save the Children-UK Report.

204. UNHCR and Save the Children-UK, *supra* note 191.

205. That is, the UNHCR and Save the Children-UK Report.

206. UNHCR and Save the Children-UK, *supra* note 191.

207. UNHCR and Save the Children-UK, *supra* note 191.

208. UNHCR and Save the Children-UK, *supra* note 191.

209. Asmita Naik, *Protecting Children from the Protectors: Lessons from West Africa*, 15 FORCED MIGRATION REV. 16 (2002).

with my little sister, who is ten years old, and I dress good, and I go where the NGO workers drink or live, and one of them will ask me for sex. Sometimes they give me things like food, oil, soap, and I will sell them and get money.”²¹⁰

Once the research team of UNHCR and Save the Children-UK completed their work, they presented the UN with the final report. The UNHCR subsequently reviewed the report carefully and decided to incorporate the recommendations of the research team into what came to be referred to as the Framework for Action.²¹¹ Some of the specific recommendations that were adopted by the UNHCR include the following:

“b) Immediate Action

- Convene a meeting with all staff to inform them generally about the allegations and the seriousness with which the Organization is dealing with them. Provide general guidance on the behavior and conduct expected of staff.
- Branch Offices in Liberia, Guinea and Sierra Leone should prepare a plan of action to implement the recommendations contained in this framework and report on all actions taken.
- Determine what disciplinary actions are available.
- All UNHCR staff to be provided gender-awareness training. Implementing Partners should be invited to participate.”²¹²

The UNHCR subsequently admitted that “an internal investigation in West Africa” had found “rampant sexual abuse — including aid workers bribing young girls to have sex in exchange for food rations.”²¹³ The UN agency, however, did not release the names of all the nongovernmental agencies (NGOs) that were implicated in the controversy.²¹⁴ In response to

210. *Id.*

211. See *Note for Implementing and Operational Partners by UNHCR and Save the Children-UK on Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001*, UNHCR AND SAVE THE CHILDREN-UK (Feb. 2002), https://www.savethechildren.org.uk/content/dam/global/reports/health-and-nutrition/sexual_violence_and_exploitation_1.pdf. See, especially Section IV.

212. *Id.* at IV(b).

213. Mindy Belz, *UNCHR: Policing or Protecting? A Report of the United Nations Relief Agency Finds That Aid Workers Are Involved in the Sexual Abuse of Refugee Girls, But the Agency Isn't Willing to Name Any Names*, WORLD MAGAZINE (Mar. 30, 2002), https://world.wng.org/2002/03/unhcr_policing_or_protecting.

214. *Id.*

the UNHCR and Save the Children-UK Report, the UNHCR sent one of its top officials, Kamel Morjane, to visit refugee camps in both Guinea and Sierra Leone and get a first-hand account of the controversy from the refugee's point of view.²¹⁵ Speaking to reporters on March 7, 2002, after his visit to the camps, Morjane stated that "[s]exual exploitation in refugee camps is [a] fact."²¹⁶ He added, however, that "[w]hat we don't have is proof [that] UNHCR personnel or those at other NGOs working with us are implicated."²¹⁷

In May 2002, the UN Security Council (UNSC) adopted a memorandum called a "Presidential Statement," which was read out by the President for the Month, Kishore Mahbubani of Singapore.²¹⁸ In the statement, the UNSC "reiterated its strong condemnation of the targeting and use of children in armed conflicts, including their abduction, compulsory recruitment, mutilation, forced displacement, sexual exploitation, and abuse, and called on all parties to the conflict to immediately desist from such practices."²¹⁹ Present at this UNSC meeting was Carol Bellamy, the Executive Director of the UN Children's Fund (UNICEF). While commending the UNSC for working to strengthen child protection in conflict situations, she stated that the "allegations of widespread sexual abuse and exploitation against refugee, and international displaced children by humanitarian workers in West Africa" were "of great concern."²²⁰

In May 2002, Ruud Lubbers,²²¹ who at the time was the UN High Commissioner for Refugees, stated that he and his office were concerned about "the vulnerability of refugee children to violence, exploitation and abuse."²²² He then stated that he and his agency were committed to "a policy of zero tolerance in cases of sexual exploitation, abuse, and violence."²²³

215. *Id.*

216. *Id.*

217. *Id.*

218. Press release, Security Council, Security Council, in Presidential Statement, Reiterates "Strong Condemnation" of Recruitment, Use of Children in Armed Conflict, U.N. Press Release SC/7393 (May 7, 2002), <https://www.un.org/press/en/2002/sc7393.doc.htm>.

219. *Id.*

220. *Id.*

221. Rudolphus Franciscus Marie "Ruud" Lubbers was prime minister of The Netherlands from Nov. 4, 1982 to Aug. 22, 1994.

222. Ruud Lubbers, High Commissioner for Refugees, United Nations, *Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, to the United Nations Special Session on Children*, New York (May 8, 2002), <http://www.unhcr.org/en-us/admin/hcspeeches/3ce4d8d95/statement-mr-ruud-lubbers-united-nations-high-commissioner-refugees-united.html>.

223. *Id.*

Nevertheless, he continued to say that he had to “defend [his] staff against any unsubstantiated allegations.”²²⁴ In October 2002, the UN’s Office of Internal Oversight Services (OIOS) released a report of its investigation into “alleged sexual exploitation of refugees by humanitarian aid workers and peacekeepers in refugee camps in West Africa,” which it conducted at the request of the UNHCR.²²⁵ The OIOS concluded that “widespread sexual exploitation of refugees was not confirmed by [its] investigation.”²²⁶

The OIOS Report confirmed that the conditions in the camps and in the refugee communities in the three countries²²⁷ rendered the refugees quite vulnerable to sexual and other forms of exploitation and abuse and the vulnerabilities were greater if the victims were young girls.²²⁸ The OIOS Report also stated that the widespread sexual abuse and exploitation of children reported in the UNHCR and Save the Children-UK Report provided “only vague examples of uncorroborated incidents of sexual exploitation, which could not be substantiated after investigation.”²²⁹ Finally, the OIOS investigators concluded that since the UNHCR and Save the Children-UK Report’s allegations of sexual abuse and exploitation of refugee children in camps and refugee communities in the three countries could not be confirmed, “there was not sufficient evidence for either criminal or disciplinary proceedings against any of the alleged offenders.”²³⁰

The UN’s position regarding the UNHCR and Save the Children-UK Report,²³¹ as expressed in its October 22, 2002 Report,²³² was criticized by many people, especially those working to promote the rights of children, including refugee children. One such critic of the UN response was Asmita Naik, one of the researchers and authors of the UNHCR and Save the Children-UK Report,²³³ who argued that the UN’s conclusion regarding the

224. *Id.*

225. Press Release, United Nations, *Allegation of “Widespread Sexual Exploitation” in West Africa Refugee Camps not Confirmed by United Nations Investigation*, U.N. Press Release ORG/1361 (Oct. 22, 2002), <http://www.un.org/press/en/2002/ORG1361.doc.htm>; see also *UN Probe Finds no Widespread Refugee Abuse by Aid Workers, but Urges Preventive Action*, UN NEWS CENTER (Oct. 22, 2002), <http://www.un.org/apps/news/story.asp?NewsID=5117#.Wm4VdmW7lBw>.

226. *Id.*

227. Guinea, Sierra Leone, and Liberia.

228. UN Press Release, *supra* note 225.

229. Scott A. Levin, *U.N. Report: Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833, 838 (2003).

230. *Id.*

231. UNHCR AND SAVE THE CHILDREN-UK, *supra* note 211.

232. UN Press Release, *supra* note 225.

233. *Id.*

allegations against UN peacekeepers and aid workers was “implausible and misleading.”²³⁴ In reaction to the UN’s claim that the UNHCR and Save the Children-UK Report²³⁵ was vague and not sufficiently substantiated, the Save the Children-UK issued a report in which it disagreed with the OIOS’s conclusions.²³⁶

Other NGOs, including Human Rights Watch,²³⁷ conducted their own independent investigations of the alleged sexual abuse and exploitation of refugee children by peacekeepers and aid workers. In its report, Human Rights Watch concluded that “UNAMSIL²³⁸ investigations into allegations of sexual violence by peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence.”²³⁹ Human Rights Watch subsequently made prospective suggestions and strongly advised that “military personnel participating in peacekeeping operations in Sierra Leone (and elsewhere) [should be provided] with training in human rights and international humanitarian law, including a focus on women’s human rights issues, and gender-based crimes.”²⁴⁰ The Human Rights Watch Report went on to advise that all peacekeepers must “understand the U.N. Code of Conduct for peacekeepers, which provides that peacekeepers should not commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children.”²⁴¹ Human Rights Watch’s recommendations were divided into

234. Asmita Naik, *Opinion*, 16 FORCED MIGRATION 1, 46–47 (2003).

235. UN Press Release, *supra* note 225.

236. *Id.*

237. See, e.g., “We’ll Kill You if You Cry”: *Sexual Violence in the Sierra Leone Conflict*, HUMAN RIGHTS WATCH (Jan. 16, 2003), <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict>; *Sierra Leone: Sexual Violence Widespread in War*, HUMAN RIGHTS WATCH (Jan. 16, 2018), <https://www.hrw.org/news/2003/01/16/sierra-leone-sexual-violence-widespread-war>; *Sexual Violence within the Sierra Leone Conflict*, HUMAN RIGHTS WATCH (Feb. 26, 2001), <https://www.hrw.org/news/2001/02/26/sexual-violence-within-sierra-leone-conflict>; *The Armed Conflict in Sierra Leone*, HUMAN RIGHTS WATCH (Apr. 11, 2012), <https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone>.

238. “UNAMSIL” is United Nations Mission in Sierra Leone — a peacekeeping operation that was sent to Sierra Leone by the UN in 1999 in view of the country’s civil war. The UN Security Council created UNAMSIL in 1999 and charged it with helping with the implementation of the Lomé Peace Accord, an agreement that was designed to bring to an end Sierra Leone’s civil war. See generally ‘FUNMI OLONISAKIN, PEACEKEEPING IN SIERRA LEONE: THE STORY OF UNAMSIL (2008); TWENTY-FIRST-CENTURY PEACE OPERATIONS (William J. Durch ed., 2006); MARK MALAN, PHENYO RAKATE AND ANGELA MCINTYRE, PEACEKEEPING IN SIERRA LEONE: UNAMSIL HITS THE HOME STRAIGHT (2002).

239. HUMAN RIGHTS WATCH, *supra* note 237.

240. *Id.* at 6.

241. *Id.*

sections according to each targeted party. For example, the Human Rights Report²⁴² addressed recommendations specifically to the “Government of Sierra Leone,” “Members of the International Community,” “Special Court for Sierra Leone,” “Truth and Reconciliation Commission,” [and the] “United Nations Mission in Sierra Leone (UNAMSIL).”²⁴³

It was not until 2017 that the UN finally admitted that “sexual exploitation is a problem within its own ranks.”²⁴⁴ In early 2017, the UN Secretary-General, António Guterres, admitted to “145 incidents involving 311 victims in 2016 alone, mainly in peace operations.”²⁴⁵ In his report, Andrew MacLeod²⁴⁶ stated that “the 311 victims are only those who were brave enough to come forward to report the rapes and abuse.”²⁴⁷ In a September 2017 address to a High-Level Meeting in New York on the UN response to sexual exploitation and abuse, the UN Secretary-General stated that “bold, urgent and much-needed action to root out sexual exploitation and abuse”²⁴⁸ in the UN must be taken at once. The UN Secretary-General also went on to remark that “sexual exploitation and abuse is not a problem of peacekeeping, it is a problem of the entire United Nations. Contrary to the information spreading that this is a question related to our peacekeeping operations, it is necessary to say that the majority of the cases of sexual exploitation and abuse are done by the civilian organizations of the United Nations, and not in peacekeeping operations.”²⁴⁹

But, why does the problem persist? The answer lies in the argument by some activists that “the United Nations is one place where such complaints²⁵⁰ rarely get a hearing, and where the perpetrators are likely to get away scot-free.”²⁵¹ It is generally believed that the failure of the UN to

242. *Id.* at 49.

243. *Id.* at 6–8.

244. Andrew MacLeod, *The UN has Finally Admitted that Sexual Exploitation is a Problem Within Its Own Ranks. So Where are the Prosecutions?*, INDEPENDENT (UK) (Sept. 20, 2017), <http://www.independent.co.uk/voices/un-child-rape-sex-exploitation-united-nations-antonio-guterres-prosecutions-immunity-trial-a7956816.html>.

245. *Id.*

246. *Id.*

247. *Id.*

248. Antonio Guterres, Secretary General, United Nations, *Secretary-General's Address to High-Level Meeting on the United Nations Response to Sexual Exploitation and Abuse [as delivered]* (Sept. 18, 2017), <https://www.un.org/sg/en/content/sg/statement/2017-09-18/secretary-generals-address-high-level-meeting-united-nations>.

249. *Id.*

250. That is, complaints against UN personnel for sexual abuse and exploitation of refugee children.

251. *See, e.g.*, Rasna Warah, *Why Sexual Harassment and Abuse Cases Continue at U.N.*,

deal effectively and fully with sexual abuse and exploitation of children by the organization's employees is due, inter alia, to two important reasons: first, it is argued that the UN is "imbued with a culture of silence and hypermasculinity"²⁵² and second, UN "staff members enjoy immunity from prosecution."²⁵³

For example, in 2004, a staff member in the office of the UNHCR accused the commissioner, Mr. Ruud Lubbers, of sexually harassing her following a meeting in 2003.²⁵⁴ After what was referred to as a "secret internal investigation"²⁵⁵ by the OIOS, it was determined that Mr. Lubbers had, indeed, sexually harassed the "51-year-old female employee."²⁵⁶ The OIOS investigators also concluded that Mr. Lubbers had tried to use his high position in the UN to "obstruct the investigation into the incident."²⁵⁷ In the summer of 2004, the OIOS report was given to Mr. Kofi Annan, who at the time was the UN Secretary-General. Mr. Annan subsequently consulted outside legal advice and then sought Mr. Lubber's response to the OIOS report. Following these consultations, Mr. Annan decided to drop the case against Mr. Lubbers due to, in his opinion, "a lack of evidence."²⁵⁸

Despite the fact that Mr. Annan had effectively cleared Mr. Lubbers of the sexual harassment alleged by a female employee at the UNHCR, Mr. Lubbers was unable to continue in his position as the controversy continued to fester.²⁵⁹ Subsequently, UN diplomats complained that Mr. Lubbers "had become a political liability for an organization already striving to demonstrate its willingness to hold senior officials accountable after damaging scandals involving corruption in a U.N. humanitarian program in

DAILY NATION (Nairobi, Kenya) (Nov. 19, 2017), <https://www.nation.co.ke/oped/opinion/sexual-harassment-abuse--UN/440808-4194090-wi7fps/index.html>.

252. *Id.*

253. *Id.* Many human rights activists have argued that although the new UN leadership has pledged "zero tolerance" for sexual abuse and exploitation, cases of abuse by UN personnel continue and most of the victims are unlikely to see any justice because of the immunity granted UN employees. *See Warah, supra* note 251.

254. Sarah Left, *UNHCR Chief Accused of Harassment*, THE GUARDIAN, Feb. 18, 2005, <https://www.theguardian.com/world/2005/feb/18/sarahleft> (last visited on Jan. 28, 2018).

255. *Id.*

256. *Id.* The 15-page OIOS investigation concluded that Mr. Lubbers had engaged in a "pattern of sexual harassment" against female employees of the UNHCR.

257. *Id.*

258. *Id.*

259. Colum Lynch, *Official Quits in Harassment Case*, *The Washington Post*, UNITED NATIONS (Feb. 21, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A39901-2005Feb20.html>.

Iraq and sexual misconduct by U.N. peacekeepers in Congo.”²⁶⁰ On February 20, 2005, Mr. Lubbers officially announced his resignation and in doing so, he continued to proclaim his innocence.²⁶¹ In asking Lubbers to resign, however, Annan’s office noted that the Secretary-General “had accepted legal advice that the original allegations made against Mr. Lubbers could not be substantiated” but that “the continuing controversy has made the High Commissioner’s position impossible.”²⁶² Apparently, Mr. Annan’s office did not have faith in its own OIOS, whose investigation had supported the UNHCR staff member’s allegations that charged Mr. Lubbers with sexual harassment, as well as abuse of authority in an effort to cover up any investigation of the charges.²⁶³

Despite the global uproar over allegations of sexual abuse and exploitation of refugee children in Guinea, Liberia, and Sierra Leone, as well as the decision by the UN to adopt a “zero tolerance” policy for sexual abuse, the problem remains unabated.²⁶⁴ Some observers now see the continued sexual abuse and exploitation of refugee children by peacekeepers as a “persistent stain on the United Nations’ image.”²⁶⁵

The UNHCR and Save the Children-UK Report, which was released in 2002, concluded that the very people²⁶⁶ who were supposed to protect vulnerable children and provide them with resources to meet their basic needs had turned into monsters who were using the humanitarian aid and services at their disposal as tools and mechanisms for the sexual abuse and exploitation of refugee children in West Africa.²⁶⁷ Yet, despite condemnation by many state- and non-state actors, the problem remains and, in fact, has worsened. In late 2017, over 15 years since the UNHCR and Save the Children-UK Report was released, new incidents of the sexual abuse and exploitation of refugee children were alleged against UN peacekeepers in the Central African Republic.²⁶⁸ Acknowledging that there was indeed a

260. *Id.*

261. *Id.*

262. Quoted in Lynch, *id.*

263. *Id.*

264. Tomi Oladipo, *The UN’s Peacekeeping Nightmare in Africa*, BBC NEWS (Jan. 5, 2017), <http://www.bbc.com/news/world-africa-38372614>.

265. Adidi Lalbahadur, *Peacekeepers and Sexual Abuse: A Persistent Stain on the United Nations’ Image*, AFRICA PORTAL (Nov. 20, 2017), <https://www.africaportal.org/features/peacekeeping-and-sexual-assault-persistent-stain-united-nations-image>.

266. These were the peacekeepers and humanitarian aid workers.

267. *Extensive Abuse of West African Refugee Children Reported*, UNHCR (Feb. 26, 2018), <http://www.unhcr.org/en-us/news/press/2002/2/3c7bf8094/extensive-abuse-west-african-refugee-children-reported.html>.

268. See, e.g., *New Allegation of Sexual Abuse Surfaces at UN Mission in Central African*

problem, incoming UN Secretary-General, António Guterres, announced the appointment of a first-ever UN Victims' Right Advocate, Jane Connors and, at the same time, indicated that he would create a "Circle of Leadership" for Heads of State and Government to indicate the UN's resolve to deal with this problem at the highest political level.²⁶⁹

Yet, one wonders whether these actions on the part of the UN Secretary-General will have any significant impact on the culture of sexual abuse and exploitation of children endemic in the UN, especially given that the organization is "imbued with a culture of silence and hypermasculinity"²⁷⁰ and that "staff members enjoy immunity from prosecution."²⁷¹

At this point, the question to ask is: Do any legal instruments exist for the protection of children? If so, why are these instruments incapable of providing the necessary protection for children from abuse by both domestic and international predators? In the next section, this article briefly looks at the various international legal instruments for the protection of the rights of children.

III. THE RIGHTS OF CHILDREN IN AFRICA: THE ROLE OF REGIONAL AND INTERNATIONAL LEGAL INSTRUMENTS

A. Introduction

For many centuries, children were considered the property of their parents,²⁷² and as such, they could be used at the discretion of their parents for a variety of purposes, including being forced to beg on the streets or work

Republic, UN NEWS CENTER (Oct. 11, 2017), http://www.un.org/apps/news/story.asp?NewsID=57865#.Wm8_XWW7lBw.

269. *Id.*

270. Warah, *supra* note 251.

271. *Id.*

272. *See generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (analyzing, *inter alia*, the evolution of children's rights in the United States); EIRLIANI ABDUL RAHMAN AND DANIEL FUNG, SURVIVORS: BREAKING THE SILENCE ON CHILD SEXUAL ABUSE (2017) (arguing, *inter alia*, that a hundred years ago, "children were considered the property of their parents, much like animals were the property of their owners"); DEEPA NARAYAN, VOICES OF THE POOR: CAN ANYONE HEAR US? (2000) (arguing, *inter alia*, that in many African countries, "[c]hildren are . . . frequently considered property, particularly girl children in marriage negotiations"); CHILD RIGHTS: THE MOVEMENT, INTERNATIONAL LAW, AND OPPOSITION (Clark Butler ed., 2012) (arguing, *inter alia*, that "[t]here was a time, exemplified by early Roman law, when children were considered property of the family father, who had a life-and-death power over them").

in dangerous conditions to raise money for the family,²⁷³ sold into servitude for money to meet family expenses, as well as to take care of family debts, to name a few.²⁷⁴ It was in the 19th century that many civil society groups, in an effort to protect children's rights, began to launch legal challenges to customary practices that children are the property of their parents.²⁷⁵ The Progressive movement in the United States played a significant role in efforts to protect children: in addition to challenging the unwillingness of courts to intervene "in family matters,"²⁷⁶ the movement also "promoted broad child welfare reforms, and was successful in having laws passed to regulate child labor and provide for compulsory education."²⁷⁷ The movement also "raised awareness of children's issues and established a juvenile court system."²⁷⁸

In the era of the struggle for civil rights for African Americans and other minority groups in the 1960s, some activists also alluded to children's rights, as children were viewed as "victims of discrimination or an oppressed group."²⁷⁹ Stephen R. Arnott²⁸⁰ argued that "[t]he growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape."²⁸¹ This section provides an overview of the

273. AIDA ALAYARIAN, *CHILDREN OF REFUGEES: TORTURE, HUMAN RIGHTS, AND PSYCHOLOGICAL CONSEQUENCES* (2017) (arguing, *inter alia*, that "[f]orced child begging is another form of child exploitation in which under-age boys and girls are forced to beg through psychological and physical coercion"); ADERANTI ADEPOJU, *AFRICAN FAMILIES IN THE TWENTY-FIRST CENTURY: PROSPECTS AND CHALLENGES* (2005) (arguing that during the last several decades, street children, sent out by their parents to beg for money or forced to beg because they are orphans or "discarded children", have increased in numbers in many of the continent's metropolitan areas, including Addis Ababa, Dakar, Nairobi, and several other cities).

274. FARLEY GRUBB, *GERMAN IMMIGRATION AND SERVITUDE IN AMERICA, 1709–1920* (2011) (arguing, *inter alia*, that during the period 1709–1920, "[m]any parents [who migrated to the United States from Germany] in order to pay their fares . . . and get off the ship [were forced to] barter and sell their children as if they were cattle"); RUSSELL M. LAWSON, *SERVANTS AND SERVITUDE IN COLONIAL AMERICA* (2018) (arguing, *inter alia*, that in colonial America, children "over the age of five could be sold into servitude to pay for their parent's debt").

275. MASON, *supra* note 272.

276. Wendy Zeldin, *International Laws: Children's Rights*, CONG. RESEARCH SERV., 2007–04112, *INTERNATIONAL LAWS: CHILDREN'S RIGHTS*, 9 (2007), <https://www.loc.gov/law/help/child-rights/pdfs/Children's%20Rights-International%20Laws.pdf> (last visited on Jan. 29, 2018).

277. *Id.* at 1.

278. *Id.*

279. *Id.*

280. Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL L. REV. 807 (2007).

281. *Id.* at 815 (The term "post-war" refers to the post-World War II period.).

major international instruments designed to protect the rights of children.

B. International Documentation on the Rights of Children

1. UN Declaration of the Rights of the Child (1959)

This legal instrument was drafted by the UNHCR²⁸² and adopted by the UN General Assembly on November 20, 1959. The Declaration of the Rights of the Child, which builds on rights that had been elaborated in the League of Nations' Declaration of the Rights of the Child 1924,²⁸³ must not be confused with the International Convention on the Rights of the Child.²⁸⁴ The Preamble to the Declaration of the Rights of the Child 1959 ("DRC 1959") makes reference to the Universal Declaration of Human Rights²⁸⁵ and notes that children, "by reason of [their] physical and mental immaturity,"²⁸⁶ need

282. For more on the UN Human Rights Commission, see generally JEROEN GUTTER, THEMATIC PROCEDURES OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS AND THE INTERNATIONAL LAW: IN SEARCH OF A SENSE OF COMMUNITY (2006).

283. The Declaration of the Rights of the Child (also known as the Geneva Declaration of the Rights of the Child) was drafted by Eglantyne Jebb (a British social reformer who was also the founder of the Save the Children-UK organization) and adopted by the League of Nations in 1924. It was adopted in an extended form by the United Nations under the name "Declaration of the Rights of the Child" in 1959. Note that the United Nations was the successor multilateral organization to the League of Nations. The League of Nations was founded on January 10, 1920 and ceased operations in 1946. The United Nations replaced the League of Nations and inherited many of the agencies and organizations founded by the League of Nations. For more on the League of Nations, see generally RUTH HENIG, THE LEAGUE OF NATIONS (2010); on the United Nations, see generally JUSSI M. HANHIMÄKI, THE UNITED NATIONS: A VERY SHORT INTRODUCTION (2015).

284. This legal instrument is officially known as the United Nations Convention on the Rights of the Child (abbreviated as "CRC" or "UNCRC"). It was adopted by the UN General Assembly and opened for signature on November 20, 1989. It came into force on September 2, 1990 after it had been ratified by the required number of nations. It currently has 196 States Parties—the United States is an exception. For more on the CRC, see SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1999) and UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (2007).

285. UN, *Universal Declaration of Human Rights*, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited on Jan. 29, 2018). With respect to children, the Universal Declaration of Human Rights declares, in Art. 25(2) 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." *See id.*

286. UN, *Declaration of the Rights of the Child 1959* [hereinafter DRC 1959], G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354, <http://www.cirp.org/library/ethics/UN-declaration/> (last visited on Jan. 29, 2018).

special safeguards and care, including appropriate legal protection, before as well as after birth.”²⁸⁷ The 1959 declaration emphasized the pledge made by the Geneva Declaration of the Rights of the Child 1924 that “mankind owes to the Child the best that it has to give”²⁸⁸ and called “upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities, and national Governments to recognize these rights and strive for their observance by legislative and other measures. . . .”²⁸⁹ The DRC 1959 then lists 10 principles that embody the rights that children should “enjoy” — for example, Principle 2 states 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.”²⁹⁰ In addition, Principle 2 mentions what has become the overwhelming theme of virtually all legal instruments designed to protect children — “the best interests of the child.”²⁹¹ According to Principle 2, the “paramount consideration”²⁹² in the “enactment of laws” for the purpose of protecting children should be “the best interests of the child.”²⁹³

Other principles emphasize such children’s rights as the right to “a name and nationality,”²⁹⁴ “to receive education, which shall be free and compulsory, at least in the elementary stages,”²⁹⁵ protection from “all forms of neglect, cruelty and exploitation,”²⁹⁶ and protection “from practices which may foster racial, religious and any other form of discrimination.”²⁹⁷

2. The Minimum Age Convention (1973)

The Minimum Age Convention (“MAC”) was adopted on June 26, 1973, by the General Conference of the International Labor Organization at

287. *Id.*

288. League of Nations, *Geneva Declaration of the Rights of the Child 1924*, https://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF (last visited on Jan. 29, 2018).

289. DRC 1959, *supra* note 286.

290. *Id.* at Principle 2.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at Principle 7.

295. *Id.*

296. *Id.* at Principle 9.

297. *Id.* at Principle 10. *See also* GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 110 (1998).

its 58th session.²⁹⁸ As stated in MAC's first article, one overarching objective of this legal instrument was the desire of States Parties to "pursue a national policy designed to ensure the effective abolition of child labor and to progressively raise the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons."²⁹⁹ MAC directed each State Party to "specify, in a declaration appended to its ratification, a minimum age for admission to employment or work within its territory."³⁰⁰ While doing so, States Parties were required to adhere to certain exceptions provided in MAC and these include, as specified in Article 2(3), the requirement that any minimum age for admission to the labor force set by a State Party "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."³⁰¹ Nevertheless, MAC says that the minimum age for admission to the labor force may initially be set at 14 years for a State Party "whose economy and educational facilities are insufficiently developed."³⁰²

If it is determined that the work in question is likely to threaten or "jeopardize the health, safety or morals of young persons,"³⁰³ the minimum age for admission to such work shall be not less than 18 years.³⁰⁴ Nevertheless, MAC instructs States Parties that "[n]ational laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is: (a) Not likely to be harmful to their health or development."³⁰⁵ Exceptions may also apply in cases where children are participating in artistic endeavors or performances.³⁰⁶

3. The UN Convention on the Rights of the Child 1989

The UN Convention on the Rights of the Child ("CRC")³⁰⁷ was adopted

298. Office of the Commissioner, UN Human Rights, *Minimum Age Convention, 1973* (No. 138), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAge.aspx> (last visited on Jan. 29, 2018).

299. *Id.* at art. 1.

300. *Id.*

301. *Id.* at art. 2(3).

302. *Id.* at art. 2(4).

303. *Id.* at art. 3(1).

304. *Id.*

305. *Id.* at art. 7(1)(a).

306. *Id.* at art. 8(1).

307. Office of the High Commissioner, *UN Human Rights, Convention on the Rights of the Child*, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 28 I.L.M. 1448 (1989), <http://www.ohchr.org/EN/ProfessionalInterest/>

and opened for signature, ratification, and accession by the UN General Assembly Resolution No. 44/25 of November 20, 1989. The CRC entered into force on September 2, 1990, in accordance with Article 49, which states that the “Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.”³⁰⁸ Many international experts consider the CRC with its 54 articles as the “most comprehensive document on the rights of children.”³⁰⁹ The CRC specifically addresses (1) the granting and implementation of children’s substantive rights in peacetime, and (2) how children must be treated in situations of armed conflict.³¹⁰ Many international law experts consider this very important because the CRC enshrines, “for the first time in binding international law, the principles upon which adoption is based, viewed from the child’s perspective.”³¹¹

The CRC emphasizes four specific aspects of children’s rights, which Professor Geraldine van Bueren refers to 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 assistance for their basic needs.”³¹² Van Bueren³¹³ states further that “[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.”³¹⁴

But, who is a child for the purpose of the CRC? The latter answers that question in Article 1 and states that “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”³¹⁵ What are the key accomplishments of the Convention on the Rights of the Child? First, the CRC creates new rights for children under international law that did not exist before. For example, the child is granted the right to preserve his or her identity — according to Article 7, “[t]he child shall be registered immediately after birth and shall

Pages/CRC.aspx.

308. *Id.* at art. 49.

309. Zeldin, *supra* note 276, at 2.

310. *Id.*

311. GERALDINE VAN BUEREN, *supra* note 297.

312. *Id.* at 15.

313. *Id.*

314. *Id.*

315. Convention on the Rights of the Child, *supra* note 307, at art. 1.

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*.³¹⁶

Second, vulnerable children (e.g., refugees) are granted special protection. According to Article 20, “[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”³¹⁷

Third, children are granted the right to practice their culture. Article 30 states that “[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 his own religion, or to use his or her own language.”³¹⁸

Fourth, the CRC invokes existing rights and makes them specific to children. In Article 13, the “right to freedom of expression” is specifically granted to the child: “The 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.”³¹⁹

Fifth, another existing right that is enshrined in the CRC is the right to a fair trial.³²⁰ Sixth, “[t]he CRC enshrines in 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).”³²¹ Seventh, the CRC also made “binding” what had previously been “non-binding recommendations,” and these include “safeguards in adoption procedures and with regard to the rights of disabled children.”³²²

Eighth, in regard to the protection of children, the CRC imposes new

316. *Id.* art. 7 (emphasis added). *See also id.* art. 8, which states that “States Parties 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.”

317. *Id.* art. 20(1). *See also id.* art. 22(1), which states that “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

318. *Id.* art. 30.

319. *Id.* art. 13(1). This right, however, is subject to certain restrictions. *See id.* art. 13(2).

320. *Id.* art. 40.

321. Zeldin, *supra* note 276, at 3.

322. *Id.* *See also* Convention on the Rights of the Child, *supra* note 307, art. 21, 23.

obligations on States Parties, and these include “banning traditional practices prejudicial to children’s health and offering rehabilitative measures for victims of neglect, abuse, and exploitation.”³²³ Finally, the CRC imposes an obligation on States Parties to ensure that children are afforded all opportunities to enjoy the rights elaborated in the CRC and that they are not discriminated against in their efforts to do so.³²⁴ Legal scholars have argued that “the right of the child to be heard, both in general and, more specifically, in all proceedings that affect the child,” and “[t]his right to participate, 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, which reflect the vision of respect and autonomy which the drafters wished to create for all children.”³²⁵

4. The UN’s Optional Protocols to the CRC

In 2000, the UN adopted two protocols to the Convention on the Rights of the Child: (1) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (“Sex Trafficking Protocol”),³²⁶ and (2) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Child Soldiers Protocol”).³²⁷ The Sex Trafficking Protocol, which consists of a Preamble and 17 articles, deals with a very important form of child abuse and exploitation — the trafficking of children for sexual purposes.³²⁸ The

323. Zeldin, *supra* note 276, at 3. *See also* Convention on the Rights of the Child, *supra* note 307, art. 28(3), 39.

324. Zeldin, *supra* note 276, at 3. *See also* Convention on the Rights of the Child, *supra* note 308, art. 2; VAN BUEREN, *supra* note 297, at 16; 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 HUMAN RTS. Q. 308, 311 (2001).

325. Kilkelly, *supra* note 324, at 311.

326. United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, U.N. Doc. A/RES/54/263 (May 25, 2000), <https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf> [hereinafter Sex Trafficking Protocol]. This protocol was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of May 25, 2000. It entered into force on January 18, 2002.

327. United Nations Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. A/RES/54/263 (May 25, 2000), <https://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf> [hereinafter Child Soldiers Protocol]. This protocol was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of May 25, 2000. It entered into force on February 12, 2002.

328. As discussed earlier, other forms of child abuse and exploitation include forced or

Preamble of the Sex Trafficking Protocol elaborates the purposes of the CRC and specifically sets forth 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.”³²⁹

The Sex Trafficking Protocol specifically requests that States Parties implement specific provisions of the CRC in order to protect children from being trafficked for the purpose of sexual and economic abuse and exploitation, including the engagement of children in hazardous work — that is, work that can threaten or destroy the health of children and deprive them of prospects for a productive life.³³⁰ The Sex Trafficking Protocol also recognizes 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”³³¹ and expresses grave concern over “the growing availability of child pornography on the Internet and over evolving technologies.”³³² The Protocol then proceeds to measures that States Parties should take to protect children against the various forms of abuse and exploitation.³³³

In addition to prohibiting certain behaviors harmful to children, such as the “sale of children,”³³⁴ “child prostitution,”³³⁵ and “child pornography,”³³⁶ the Sex Trafficking Protocol imposes an obligation on States Parties to criminalize these acts. For example, Article 3(1) states that “[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 such offenses are committed domestically or transnationally or on an individual or organized basis.”³³⁷ The offenses listed 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

servitude labor, participation in armed conflicts, 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 HUMAN RTS. BRIEFS 13 (2001).

329. Sex Trafficking Protocol, *supra* note 326, pmbl.

330. *Id.* *See also* Revaz, *supra* note 328.

331. Sex Trafficking Protocol, *supra* note 326, pmbl.

332. *Id.*

333. 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.” *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

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

the child in forced labor.”³³⁸ The Sex Trafficking Protocol also strengthens the ability of States Parties to extradite individuals accused of committing any or more of the listed offenses back to the proper jurisdiction for prosecution.³³⁹

In reminding States Parties that the “best interests of the child” is the guiding principle in the treatment of children in and by the judicial system, the Sex Trafficking Protocol mandates that States Parties adopt “appropriate measures to protect the rights and interests of child victims of the practices prohibited under the Sex Trafficking Protocol at all stages of the criminal justice process.”³⁴⁰ In order to enhance the ability of child victims of the list of practices prohibited under the Sex Trafficking Protocol to seek and secure compensation for the wrongs done to them, the Sex Trafficking Protocol mandates that “States Parties shall ensure that all child victims of the offenses described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”³⁴¹

Finally, the Sex Trafficking Protocol strengthens and enhances the ability of States Parties to cooperate with one another in the fight against child sex trafficking and provides for specific reporting requirements.³⁴²

The UN Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“The Child Soldiers Protocol”)³⁴³ in its Preamble, provides further affirmation of the belief of many in the international community, especially advocates for children, that “the rights of children require special protection.”³⁴⁴ The Child Soldiers Protocol also takes note of the “harmful and widespread impact of armed conflict on children”³⁴⁵ and condemns activities, especially in conflict situations, that harm children or place them in harm’s way.³⁴⁶ The Child Soldiers Protocol also notes that the Rome Statute of the International

338. *Id.* art. 3(1). *See also* the additional acts that States Parties are expected to criminalize, which are listed in Article 3(1–5).

339. *Id.* art. 5.

340. *Id.* art. 8; *see also* Revaz, *supra* note 328.

341. Sex Trafficking Protocol, *supra* note 326, art. 9(4).

342. *Id.* art. 12.

343. Child Soldiers Protocol, *supra* note 327.

344. *Id.* pmbl.

345. *Id.*

346. Among the activities condemned by the Child Soldiers Protocol are “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.” *Id.*

Criminal Court specifically lists the “[c]onscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities”³⁴⁷ as a serious violation of international humanitarian law.

In the Preamble, the Child Soldiers Protocol also takes note of the definition of a “child”³⁴⁸ provided in the CRC and argues that “an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.”³⁴⁹ The Child Soldiers Protocol then increases the minimum age for “direct participation in armed conflict and conscription”³⁵⁰ to 18 years.³⁵¹ At Article 4,³⁵² the Child Soldiers Protocol forbids non-state military groups from recruiting or using children in military conflicts. Specifically, Article 4 states 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 shall not affect the legal status of any party to an armed conflict.³⁵³

Although the Child Soldiers Protocol does not require 18 years to be the minimum age for voluntary enlistment or recruitment, it nevertheless requires States Parties that “permit voluntary recruitment into their national armed forces under the age of 18 years” to “maintain safeguards to ensure,

347. United Nations Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 8(b)(xxvi) (July 17, 1998), http://legal.un.org/icc/statute/99_corr/cstatute.htm; see also Law Library of Congress, *International Laws: Children's Rights*, Law Library of Congress, 2007–04112, available at <https://www.loc.gov/law/help/child-rights/pdfs/Children's%20Rights-International%20Laws.pdf> (last visited on Mar. 25, 2019).

348. The definition of a child is provided in Article of the CRC. See Convention on the Rights of the Child, *supra* note 307, art. 21 and 23.

349. Child Soldiers Protocol, *supra* note 327, pmbl.

350. Zeldin, *supra* note 276, at 4.

351. See Child Soldiers Protocol, *supra* note 327, art. 1-2.

352. *Id.* art. 4.

353. *Id.*

as a minimum, that: (a) [s]uch recruitment is genuinely voluntary; (b) [s]uch recruitment is carried out 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."³⁵⁴

Regarding children who have been "recruited into armed conflict or used in hostilities,"³⁵⁵ 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."³⁵⁶

C. Regional Documentation on the Rights of Children

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

The African Charter on the Rights and Welfare of the Child 1990 ("ACRWC")³⁵⁷ is the first regional treaty that deals specifically with children's rights.³⁵⁸ The ACRWC builds on the Organization of African Unity's ("OAU") Declaration on the Rights and Welfare of the African Child 1979.³⁵⁹ Nevertheless, most of the provisions of the ACRWC are modeled after those of the CRC.³⁶⁰ There are, however, differences between the CRC and the ACRWC — unlike the CRC, the ACRWC contains provisions dealing with "responsibility of the child."³⁶¹ The ACRWC's provision on the responsibilities of the child in Article 31 is in line with provisions found in the African (Banjul) Charter on Human and People's Rights.³⁶²

354. *Id.* art. 3(3)(a–d).

355. Zeldin, *supra* note 276, at 4.

356. Child Soldiers Protocol, *supra* note 327, art. 6(1–3).

357. African Union [AU], *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf [hereinafter ACRWC].

358. Zeldin, *supra* note 276, at 5.

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

360. *See, e.g.*, Zeldin, *supra* note 276, at 5.

361. ACRWC, *supra* note 357, art. 31.

362. African Union [AU], *African (Banjul) Charter on Human and People's Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. *See especially* art. 27–29.

The Preamble of the ACRWC emphasizes what is gradually gaining universal acceptance among Africans. That is, “the child occupies a unique and privileged position in the African society” and must be provided legal protection and “particular care with regard to health, physical, mental, moral and social development.”³⁶³ In Articles 3–5, the ACRWC deals with “non-discrimination,”³⁶⁴ “best interests of the child,”³⁶⁵ and the child’s “inherent right to life,” which is “protected by law.”³⁶⁶ In the case of the death penalty, the ACRWC declares that it shall not apply to children.³⁶⁷ Provisions in Articles 6–12 deal with various protections for children, which include a child’s right to (i) a name and a nationality,³⁶⁸ (ii) freedom of expression,³⁶⁹ (iii) freedom of association and peaceful assembly,³⁷⁰ (iv) freedom of thought, conscience and religion,³⁷¹ (v) protection of privacy,³⁷² (vi) education,³⁷³ and (vii) leisure, recreation and cultural activities.³⁷⁴

The ACRWC also emphasizes and specifically addresses the rights of “handicapped children.”³⁷⁵ All children, including those who are inflicted with certain handicaps, should have “the right to enjoy the best attainable state of physical, mental and spiritual health.”³⁷⁶ The ACRWC also mandates that children should be protected against abuse, economic exploitation, and torture³⁷⁷ and that they should not be exposed to work that is hazardous to their health and well-being,³⁷⁸ as well as to harmful social and cultural practices.³⁷⁹ The ACRWC further mandates that children must not, under any circumstances, be exposed or subjected to any form of sexual abuse and

363. ACRWC, *supra* note 357, pmb1.

364. *Id.* art. 3.

365. *Id.* art. 4.

366. *Id.* art. 5.

367. *Id.* art. 5. According to Article 5(3), “Death sentence shall not be pronounced for crimes committed by children.”

368. *Id.* art. 6.

369. *Id.* art. 7.

370. *Id.* art. 8.

371. *Id.* art. 9.

372. *Id.* art. 10.

373. *Id.* art. 11.

374. *Id.* art. 12.

375. *Id.* art. 13.

376. *Id.* art. 14.

377. *Id.* art. 15-16.

378. *Id.* art. 15.

379. *Id.* art. 21.

exploitation.³⁸⁰ States Parties are also required by the ACRWC to provide appropriate measures to “protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.”³⁸¹ Finally, States Parties must take necessary measures to prevent “(a) the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; (b) the use of children in all forms of begging.”³⁸²

2. European Convention on the Exercise of Children’s Rights 1996

The European Convention on the Exercise of Children’s Rights (“ECECR”) consists of a Preamble and 26 articles.³⁸³ In its Preamble, the ECECR emphasizes its objective to promote the “rights” and “best interests” of children.³⁸⁴ As part of the effort to promote children’s rights and activities in the best interests of children, the ECECR states that “children should have the opportunity to exercise their rights, in particular in family proceedings affecting them.”³⁸⁵ Also, children should be “provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children.”³⁸⁶ The ECECR believes that both States and parents should take an active part in the protection of children and make certain that children are able to enjoy their rights.³⁸⁷

Coverage of the ECECR is limited to children “who have not reached the age of 18 years.”³⁸⁸ Chapter II of the ECECR is devoted to the “procedural rights of a child.”³⁸⁹ These rights include “the right to be informed and express his or her views in proceedings,”³⁹⁰ “the right to apply

380. *Id.* art. 27.

381. *Id.* art. 28.

382. *Id.* art. 29.

383. Council of Europe, *European Convention on the Exercise of Children’s Rights*, European Treaty Series No. 160 (Jan. 25, 1996), <https://rm.coe.int/168007cdaf> [hereinafter ECECR]. The ECECR was opened for signature on January 25, 1996 and entered into force on July 1, 2000.

384. *Id.* pmb1.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* art. 1(1).

389. *Id.* ch. II.

390. *Id.* art. 3.

for the appointment of a special representative,³⁹¹ and “other possible procedural rights.”³⁹²

D. Other International and Regional Instruments That Contain Specific Provisions Relevant to the Protection of Children

1. Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights (UDHR) was proclaimed by the General Assembly of the United Nations in Paris, France, on December 10, 1948, as an international bill of human rights.³⁹³ The UDHR contains two articles that specifically refer to children: Articles 25 and 26.³⁹⁴ According to Article 25(2), “[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.”³⁹⁵ Article 26 deals specifically with the importance of education to the “full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”³⁹⁶ With regard to children, Article 26(3) states that “[p]arents have a prior right to choose the kind of education that shall be given to their children.”³⁹⁷

2. The International Covenant on Economic, Social and Cultural Rights 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁹⁸ recognizes the indivisibility of human rights and states that

391. *Id.* art. 4.

392. *Id.* art. 5. These other possible procedural rights include “(a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; (b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; (c) the right to appoint their own representative; (d) the right to exercise some or all of the rights of parties to such proceedings.” *See id.*

393. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948), https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [hereinafter UDHR]. The UDHR consists of a Preamble and 30 articles.

394. *Id.* art. 25-26.

395. *Id.* art. 25(2).

396. *Id.*

397. *Id.* art. 26(3).

398. The International Covenant on Economic, Social and Cultural Rights was adopted

these rights are applicable to children, as well. 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”³⁹⁹ and that “these rights derive from the inherent dignity of the human person.”⁴⁰⁰ Articles 10 and 12 contain specific references to children. According to Article 10(1–3):

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.
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.⁴⁰¹

In Article 12, the ICESCR addresses the right of all human beings to the “enjoyment of the highest attainable standard of physical and mental health.”⁴⁰² For these rights to be realized, States are instructed to put in place measures to reduce “the still-birth rate” and “infant mortality” and to provide for the “healthy development of the child.”⁴⁰³ Finally, the ICESCR provides

and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966. It entered into force on January 3, 1976, in accordance with Article 27. See United Nations International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, U.N. Doc. A/6316, 993 U.N.T.S. 3, pmbl., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [hereinafter CESCR].

399. *Id.* pmbl.

400. *Id.*

401. *Id.* art. 10.

402. *Id.* art. 12(1).

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

for the right to an education for everyone and specifically mandates that “[p]rimary education shall be compulsory and available free to all.”⁴⁰⁴

3. The International Covenant on Civil and Political Rights 1966

The International Covenant on Civil and Political Rights (“ICCPR”)⁴⁰⁵ contains provisions that are designed to benefit children. Article 2, for example, imposes an obligation on each State Party to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,⁴⁰⁶ 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.”⁴⁰⁷ Article 2 also imposes on each State Party the duty to enact the necessary legislation to give effect to the laws elaborated in the ICCPR⁴⁰⁸ and to provide effective remedies when these rights are violated, whether by state- or non-state actors.⁴⁰⁹

Article 14 speaks to the need for each State Party to make certain that “all persons” are treated equally before the “courts and the tribunals.”⁴¹⁰ In addition, this article 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.”⁴¹¹ Nevertheless, the openness and transparency required in judicial proceedings must take cognizance of the need to protect children: “any judgement 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.”⁴¹²

Article 14(4) makes special allowance for the treatment of juvenile

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

405. United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, U.S. Doc. A/6316, 999 U.N.T.S. 171, <https://ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> [hereinafter ICCPR]. It was adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of December 16, 1966, and entered into force on March 23, 1976, in accordance with Article 49. The ICCPR contains a Preamble and 53 articles.

406. That is, the ICCPR.

407. ICCPR, *supra* note 405, art. 2.

408. *Id.* art. 2(2).

409. *Id.* art. 3(a).

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

411. *Id.*

412. *Id.*

persons in court and tribunal proceedings.⁴¹³ Accordingly, in criminal proceedings involving juveniles, “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”⁴¹⁴ In addition, “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”⁴¹⁵ The ICCPR also prohibits the imposition of the death penalty for crimes committed by anyone under the age of 18 years.⁴¹⁶

While recognizing the “family” as the “natural and fundamental group unit of society,” the ICCPR states that the “family” is “entitled to protection by society and the State.”⁴¹⁷ Accordingly, States Parties must “undertake to 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.”⁴¹⁸ In the case where a marriage is dissolved, the ICCPR requires that “provision shall be made for the necessary protection of any children.”⁴¹⁹

The ICCPR devotes all of Article 24 to children. 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.”⁴²⁰ Article 24 further prescribes that “[e]very child shall be registered immediately after birth and shall have a name” and that “[e]very child has the right to acquire a nationality.”⁴²¹

4. The Convention on the Rights of Persons with Disabilities 2006

The Convention on the Rights of Persons with Disabilities (“CRPD”)⁴²² contains specific provisions on children. In the Preamble, the CRPD makes reference to several human rights conventions, including the UN Convention

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

414. *Id.*

415. *Id.* art. 10(2)(a).

416. *Id.* art. 6(5); *see also* VAN BUEREN, *supra* note 297.

417. ICCPR, *supra* note 405, art. 23(1).

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

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

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

421. ICCPR, *supra* note 405, at art. 24(2)–(3).

422. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]. The CRPD consists of a Preamble and 50 articles. The CRPD was adopted by the U.N. General Assembly on December 13, 2006, and was opened for signature on March 30, 2007.

on the Rights of the Child⁴²³ and specifically recognizes that “women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”⁴²⁴ In addition, the CRPD states that “children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child.”⁴²⁵

Article 3 of the CRPD is devoted to the Convention’s general principles, which include “[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”⁴²⁶ Article 4 deals with “general obligations” and one that concerns children is that “[i]n the development and implementation of legislation and policies to implement the present Convention,⁴²⁷ and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, through their representative organizations.”⁴²⁸

Article 6 is devoted to women and girls with disabilities and recognizes that “women and girls with disabilities are subjected to multiple discrimination”⁴²⁹ and that States Parties should “take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.”⁴³⁰ The CRPD devotes Article 7 entirely to children with disabilities and prescribes that “[S]tates Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.”⁴³¹ In addition, states Article 7, “[i]n all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”⁴³² Finally, with respect to children with disabilities, the CRPD prescribes that “[S]tates Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and

423. Convention on the Rights of the Child, *supra* note 307.

424. CRPD, *supra* note 422, at Preamble (q).

425. *Id.* pmbl.

426. *Id.* at art. 3(h).

427. That is, the Convention on the Rights of Persons with Disabilities (CRPD).

428. *Id.* at art. 4(3).

429. *Id.* at art. 6(1).

430. *Id.*

431. *Id.* at art. 7(1).

432. *Id.* at art. 7(2).

maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.”⁴³³

The CRPD also deals specifically with the various forms of child abuse and exploitation. “States Parties,” the CRPD states, “shall take all appropriate . . . measures to protect persons with disabilities, . . . from all forms of exploitation, violence, and abuse, including their gender-based aspects.”⁴³⁴ Each State Party is also required to take “all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services.”⁴³⁵ With respect to the right to a name and a nationality for disabled children, the CRPD states that children with disabilities should 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 their parents.”⁴³⁶

The CRPD recognizes that children with disabilities have the same right to reproductive integrity as other children and prescribes that “[p]ersons with disabilities, including children, retain their fertility on an equal basis with others.”⁴³⁷ With respect to issues or matters of “guardianship, wardship, trusteeship, adoption of children or similar institutions,”⁴³⁸ the CRPD states that “the best interests of the child” are to be the primary consideration. In the case of children with disabilities, the CRPD states further that “States Parties shall ensure that children with disabilities have equal rights with respect to family life.”⁴³⁹ The CRPD also states that in order to realize these rights for children, and also “to prevent concealment, abandonment, neglect, and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.”⁴⁴⁰ It is very important, states the CRPD, that children are not separated from their parents “against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”⁴⁴¹ Children with disabilities

433. *Id.* at art. 7(3).

434. *Id.* at art. 7(1). *See also id.* at art. 16(2).

435. *Id.* at art. 16(4).

436. *Id.* at art. 16(2).

437. *Id.* at art. 23(1)(c).

438. *Id.* at art. 23(2).

439. *Id.* at art. 23(3).

440. *Id.*

441. *Id.* at art. 23(4).

must not be separated from their parents simply on the basis of their disabilities.⁴⁴²

Article 24 deals specifically with the right of persons with disabilities to education.⁴⁴³ States Parties are directed to fully enhance the ability of persons with disabilities, including children, to have access to education and training so that they can develop the skills required to live full and productive lives.⁴⁴⁴ In addition to providing health services to disabled persons, each State Party must also intervene to make certain that further disabilities are minimized, including among children.⁴⁴⁵ States Parties are also expected to take appropriate measures to ensure that “women and girls with disabilities and older persons with disabilities” have access to “social protection programs and poverty reduction programs.”⁴⁴⁶ Finally, children with disabilities must also be granted “equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system.”⁴⁴⁷

5. The European Convention on Human Rights 1950

The European Convention on Human Rights (“ECHR”)⁴⁴⁸ is “the first international human rights agreement to establish supervisory and enforcement machinery.”⁴⁴⁹ The ECHR obliges States Parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I”⁴⁵⁰ of the Convention. Although the word “children” is mentioned only twice in the ECHR,⁴⁵¹ the ECHR employs the word “everyone” throughout

442. *Id.*

443. *Id.* at art. 24(1).

444. *Id.* at art. 24(1)–(5).

445. *Id.* at art. 25(b).

446. *Id.* at art. 28(b).

447. *Id.* at art. 30(d).

448. The European Convention on Human Rights, officially known as the European Convention for the Protection of Human Rights and Fundamental Freedoms, was adopted on November 4, 1950, and entered into force on September 3, 1953. It consists of 59 articles and a Preamble. There have been 11 Protocols to the Convention [hereinafter as “ECHR”]. Nevertheless, from November 1, 1998, Protocol 9 was repealed and Protocol 10 lost its purpose as from the date of entry into force of Protocol 11 (ETS No. 155) on Nov. 1, 1998. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Nov. 4, 1950, C.E.T.S 5.

449. Zeldin, *supra* note 276.

450. ECHR, *supra* note 448, at art. 1.

451. The word “children” is mentioned in Protocol 7 at Article 5 (“Equality between

and, as a consequence, “children have successfully brought suit either on their own behalf or as co-applicants with their parents.”⁴⁵² Specific references, however, are made to “minors” regarding their detention “by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.”⁴⁵³

Article 6 of the ECHR⁴⁵⁴ deals with the “right to a fair trial”⁴⁵⁵ and stipulates that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁴⁵⁶ Although the ECHR stipulates that “[j]udgment shall be pronounced publicly,” it also states that “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”⁴⁵⁷

Protocol No. 7⁴⁵⁸ specifically mentions “children” and directs that while “[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children as to marriage, during marriage and in the event of its dissolution,” this should not “prevent States from taking such measures as are necessary in the interests of the children.”⁴⁵⁹

6. The African Charter on Human and People’s Rights 1981 (Banjul Charter)

The African Charter on Human and People’s Rights (“ACHPR”)⁴⁶⁰ was

spouses”). Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 11, 1984, http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter Protocol No. 7].

452. Zeldin, *supra* note 276, at 9. *See also* VAN BUEREN, *supra* note 297, at 19 (the article mentions several cases). *See, specifically*, fn. 153.

453. ECHR, *supra* note 448, at art. 5(1)(d).

454. *Id.* at art. 6.

455. *Id.*

456. *Id.* at art. 6(1).

457. *Id.* at art. 6(1).

458. Protocol No. 7, *supra* note 451.

459. *Id.* at art. 5.

460. African Union, *African Charter on Human and People’s Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, I.L.M. 58 (1982) [hereinafter ACHPR] (also called the Banjul Charter,

designed to protect the civil, political, economic, social, and cultural rights of Africans.⁴⁶¹ The child is mentioned only once in the ACHPR.⁴⁶² Emphasis, instead, is placed on the family and the duties and responsibilities that the family has toward its individual members. Some people have argued that this approach by the ACHPR was deliberate and that it was designed to reflect African traditions and customs.⁴⁶³ Nevertheless, the ACHPR also imposes obligations on the individual—in Article 29,⁴⁶⁴ for example, the ACHPR stipulates that “[t]he individual shall also have the duty: [] To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”⁴⁶⁵ Although no additional specific rights are stated for children, the ACHPR instead relies on existing international laws that protect the rights of children.⁴⁶⁶

7. The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (“Rights of Women in Africa Protocol”)⁴⁶⁷ specifically addresses the rights of children and women, with specific emphasis on girls.⁴⁶⁸ The Rights of Women in Africa Protocol directs States Parties to “enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the

it contains 68 articles, was adopted on June 27, 1981, and entered into force on October 21, 1986).

461. *Id.* at pmb1.

462. The child is mentioned in Article 18(3). *See id.*

463. Zeldin, *supra* note 276, at 9-10.

464. ACHPR, *supra* note 460, at art. 29.

465. *Id.* at art. 29(1).

466. In Article 18(3), the ACHPR states that “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in *international declarations and conventions.*” *Id.* at art. 18(3) (emphasis added).

467. African Union, The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa [hereinafter as “Rights of Women in Africa Protocol”], July 11, 2003, <http://www.achpr.org/instruments/women-protocol/> (last visited on Feb. 2, 2018). It was adopted by the African Union on July 11, 2003, and entered into force on November 25, 2005.

468. “Women” are defined in the Protocol as “persons of female gender, including girls.” *See id.* at art. 1(k).

health and general well-being of women.”⁴⁶⁹ In addition, States Parties are expected to take necessary action to “prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public”⁴⁷⁰ as well as use legislation to prohibit “all forms of female genital mutilation, scarification, medicalization, and para-medicalization of female genital mutilation and all other practices in order to eradicate them.”⁴⁷¹

The Rights of Women in Africa Protocol also directs States Parties to “ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.”⁴⁷² In case of “armed conflict”⁴⁷³ situations, States Parties are directed to take all “necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.”⁴⁷⁴ Taking into account the “right to education and training,”⁴⁷⁵ the Rights of Women in Africa Protocol directs all States Parties to take all appropriate measures to “eliminate all forms of discrimination against women”⁴⁷⁶ and girls and provide them with equal access to opportunities for “education and training.”⁴⁷⁷

8. The American Convention on Human Rights (Pact of San José, Costa Rica)

The American Convention on Human Rights (“ACHR”)⁴⁷⁸ imposes on its States Parties the duty to “respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political and other opinion,

469. *Id.* at art. 2(b).

470. *Id.* at art. 4(2)(a).

471. *Id.* at art. 5(b).

472. *Id.* at art. 6. “Women,” as used in the Protocol, includes girls.

473. *Id.* at art. 11.

474. *Id.* at art. (11)(4).

475. *Id.* at art. 12.

476. *Id.* at art. 12(1)

477. *Id.* at art. 12(1)(a).

478. Inter-Am. Comm’n H.R., American Convention on Human Rights, Nov. 22, 1969, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (last visited on Feb. 2, 2018) [hereinafter as ASHR]. The ACHR consists of a Preamble and 82 articles. It was adopted on November 22, 1969, in San José, Costa Rica, and entered into force on July 18, 1978. OAS Treaty Series, No. 36; U.N. Registration 08/27/79 No. 17955.

national or social origin, economic status, birth, or any other social condition.”⁴⁷⁹ As used in the ACHR, “person” means “every human being.”⁴⁸⁰

The ACHR grants every person the right “to recognition before the law,”⁴⁸¹ “to life,”⁴⁸² “to humane treatment,”⁴⁸³ “to personal liberty,”⁴⁸⁴ “to fair trial,”⁴⁸⁵ and “to privacy.”⁴⁸⁶ Parents or guardians, however, are granted the right to “provide for the religious and moral education of their children or wards that is in accord with their own convictions.”⁴⁸⁷ In addition, the right of “freedom of thought and expression”⁴⁸⁸ granted to all persons is not absolute. The state may censor certain forms of public entertainment in order to protect children. Specifically, Article 13(4) states that “[n]otwithstanding the provisions of paragraph 2⁴⁸⁹ above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”⁴⁹⁰

The concept referred to as “the best interests of the child,” which forms the foundation of most laws designed to protect the rights of children, is also mentioned in the ACHR.⁴⁹¹ Specifically, the ACHR states that “[t]he States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.”⁴⁹² The ACHR also recognizes the need to protect the rights of children born out of wedlock and states that “[t]he law shall recognize equal rights for children born out of wedlock and

479. *Id.* at art. 1(1).

480. *Id.* at art. 1(2).

481. *Id.* at art. 3.

482. *Id.* at art. 4.

483. *Id.* at art. 5.

484. *Id.* at art. 7.

485. *Id.* at art. 8.

486. *Id.* at art. 11.

487. *Id.* at art. 12(4).

488. *Id.* at art. 13.

489. Paragraph 2 states as follows: “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.” *Id.* at art. 13(2)(a)-(b).

490. *Id.* at art. 13(4).

491. *Id.* at art. 17(4).

492. *Id.*

those born in wedlock.”⁴⁹³

Additionally, in Article 18,⁴⁹⁴ the ACHR provides that all persons should have the right to a name and to the “surnames of his parents or that of one of them.”⁴⁹⁵ The rights of the child are provided in Article 19: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”⁴⁹⁶ In Article 27,⁴⁹⁷ a State Party is granted permission to suspend certain guarantees “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party.”⁴⁹⁸ In doing so, a State Party is allowed to “take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”⁴⁹⁹ Nevertheless, the ACHR mandates that, regardless of the circumstances, certain articles must not be suspended and these include Article 19 (Rights of the Child).⁵⁰⁰

9. The Convention on the Elimination of All Forms of Discrimination Against Women 1979

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁰¹ is considered an international bill of rights for women.⁵⁰² The CEDAW consists of a Preamble and 30 articles. It was adopted by the UN General Assembly on December 18, 1979, and entered into force on September 3, 1981. The Preamble acknowledges that “extensive discrimination against women continues to exist”⁵⁰³ and goes on

493. *Id.* at art. 17(5).

494. *Id.* at art. 18.

495. *Id.*

496. *Id.* at art. 19.

497. *Id.* at art. 27.

498. *Id.* at art. 27(1).

499. *Id.*

500. *Id.* at art. 27(2).

501. UN, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, <http://www.un.org/womenwatch/daw/cedaw/> (last visited on Feb. 3, 2018) [hereinafter CEDAW].

502. Zeldin, *supra* note 276, at 11. *See also id.* pmb1.

503. CEDAW, *supra* note 501, pmb1.

to state that such discrimination “violates the principles of equality of rights and respect for human dignity.”⁵⁰⁴ The CEDAW positively affirms the principle of equality 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.”⁵⁰⁵ The Preamble also states that the “Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.”⁵⁰⁶

Considering the importance of education and human capital formation to self-actualization for women, CEDAW instructs States Parties to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.”⁵⁰⁷ Perhaps more important, States Parties are directed to develop and implement measures to reduce “female student drop-out rates and the organization of programs for *girls* and women who have left school prematurely.”⁵⁰⁸ The education of girls is especially important in developing countries where the absences of marketable skills among women has trapped them in poverty and made their children highly susceptible to sexual abuse and exploitation.⁵⁰⁹ Ensuring that girls have opportunities for education and training can provide them the skills that they need to function as productive adults, minimizing their chances of remaining trapped in the cycle of poverty and rendering their children vulnerable to abuse and exploitation.⁵¹⁰

Cultural and traditional practices have been identified as important contributors to the abuse and exploitation of women and girls in many countries, including those in Africa.⁵¹¹ Hence, it is important that CEDAW has acknowledged the role played by cultural and traditional practices in the abuse of girls and women and has directed States Parties to take appropriate

504. *Id.*

505. *Id.* at art. 3.

506. *Id.* at pmb1.

507. *Id.* at art. 10.

508. *Id.* at art. 10(f) (emphasis added).

509. *See, e.g.*, SEXUAL ABUSE OF YOUNG CHILDREN IN SOUTHERN AFRICA (Linda Richter, Andrew Dawes and Craig Higson-Smith eds., 2004) (examining, inter alia, the relationship between poverty child sexual abuse and exploitation in Southern Africa).

510. *Id.*

511. *Id.* For a counter argument, see generally P. E. ALIGWEKWE, AFRICAN CULTURE IS NOT TO BLAME (2010) (arguing, inter alia, that customs and traditions in the African countries are not to blame for the sexual abuse of children by clergy).

measures “[t]o 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.”⁵¹²

CEDAW also utilizes the concept “best interests of the child” when it commands 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.”⁵¹³ In addition, CEDAW directs States Parties to take appropriate measures “to eliminate discrimination against women in all matters relating to marriage and family relations and in particular . . . ensure, on a basis of equality of men and women: . . . in matters relating to their children; in all cases the interests of the children shall be paramount; [and] with regard to guardianship, wardship, trusteeship, and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.”⁵¹⁴

Finally, CEDAW also proscribes child marriage and directs States Parties to use legislation to specify a minimum age for marriage and require that all marriages should be registered in a national marriage registry. Article 16(2) 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 compulsory.”⁵¹⁵

E. Documentation Dealing with or Related to Adoption and other Forms of Child Placement

1. The Hague Convention on Jurisdiction

Officially known as The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996 (“1996 Convention on Measures for the Protection of Children”), it was adopted on

512. CEDAW, *supra* note 501, at art. 5(a).

513. *Id.* at art. 5(b).

514. *Id.* at art. 16(1)(d, f).

515. *Id.* at art. (16)(2).

October 19, 1996, and entered into force on January 1, 2002.⁵¹⁶ The objectives of the 1996 Convention on Measures for the Protection of Children are presented in Chapter 1,⁵¹⁷ and they relate to the civil measures needed to protect children.⁵¹⁸ In terms of coverage, “[t]he Convention applies to children from the moment of their birth until they reach the age of 18 years.”⁵¹⁹ According to Article 1, the 1996 Convention is designed: “a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person and property of the child; b) to determine which law is to be applied by such authorities in exercising their jurisdiction; c) to determine the law applicable to parental responsibility; d) to provide for the recognition and enforcement of such measures of protection in all Contracting States; e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.”⁵²⁰ The purpose of the 1996 Convention can be summarized as follows: “The purpose of the Convention is to provide for international cooperation between 1996 Convention countries in the interests of protecting children. The 1996 Convention promotes cooperation among countries by eliminating potential conflicts of jurisdiction between authorities in different countries and by providing for international recognition of measures of protection for children.”⁵²¹

With respect to the best interests of the child, the 1996 Convention’s Preamble confirms that “the best interests of the child are to be a primary consideration.”⁵²² The 1996 Convention’s overarching objective was to provide “a structure to resolve disputes over contact and custody issues when parents are separated and living in different countries,”⁵²³ as well as provide “uniform rules to determine which country’s authorities are competent to take the necessary

516. *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*, 35 I.L.M. 1391, 1396 (1996), <https://www.aph.gov.au/binaries/house/committee/jset/12march2002/childnia.pdf> (last visited on Feb. 3, 2018) [hereinafter 1996 Convention on Measures for the Protection of Children].

517. *Id.* at art. 1.

518. An overview of the contents of the Convention is provided at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> (last visited on Feb. 3, 2018).

519. 1996 Convention on Measures for the Protection of Children, *supra* note 516, art. 2.

520. *Id.* at art. 1(a–e).

521. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Done at the Hague on 19 October 1996, *available at* <https://www.aph.gov.au/binaries/house/committee/jset/12march2002/childnia.pdf> (last visited on Feb. 3, 2018), at para. 4.

522. 1996 Convention on Measures for the Protection of Children, *supra* note 516, at Preamble.

523. Zeldin, *supra* note 276, at 12.

protection measures.”⁵²⁴ The 1996 Convention makes clear that “[t]he judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child’s person or property.”⁵²⁵ In other words, “[p]rovisions on recognition and enforcement ensure that primacy be given to decisions taken by the authorities of the country where the child has his or her habitual residence.”⁵²⁶

In the case where a child must be placed on alternative care across borders, the 1996 Convention provides for cooperation between the various parties on ways to more effectively protect minors, particularly unaccompanied minors, who cross borders to access alternative care, such as foster homes and the Islamic law institution of *Kafala*.⁵²⁷

2. The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions 1965

The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (“1965 Convention on Adoptions”) is the first Hague Convention on adoptions.⁵²⁸ Professor Geraldine van Bueren, an expert on international law related to the protection of children, argues that the 1965 Convention on Adoptions is applicable “to all international adoptions, not only where a child originated from another country but also to adoptions where the only international aspect is the foreign nationality of the child.”⁵²⁹

524. *Id.*

525. 1996 Convention on Measures for the Protection of Children, *supra* note 516 art. 5(1).

526. Zeldin, *supra* note 276, at 12. *See also* 1996 Convention on Measures for the Protection of Children, *supra* note 516, at Chapter IV.

527. *See, e.g.*, 1996 Convention on Measures for the Protection of Children, *supra* note 516, art. 33(1), which states as follows: “If an authority having jurisdiction under Article 5 to 10 contemplates the placement of the child in a foster family or institutional care or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed place or provision of care.”

528. Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, 4 I.L.M. 338 (1965) [hereinafter 1965 Convention on Adoptions]. *See also* INTERNATIONAL DOCUMENTS ON CHILDREN, 2ND EDITION (Geraldine van Bueren ed., 1998), at Chapter 39. The 1965 Convention on Adoptions has 23 articles, was adopted on November 15, 1965, and entered into force on October 23, 1978. In accordance with its Article 23, it was expected to cease to have effect on October 23, 2008. The 1965 Convention on Adoptions currently does not have any States Parties.

529. VAN BUEREN, *supra* note 297, at 98.

The 1965 Convention on Adoptions incorporates certain important provisions regarding the protection of children involved in adoptions. First, authorities⁵³⁰ “shall not grant an adoption unless it will be in the best interest of the child.”⁵³¹ Second, before an adoption is granted, the relevant authorities “shall carry out, through the agency of the appropriate local authorities, a thorough inquiry relating to the adopter or adopters, the child and his family.”⁵³² Third, “[a]s far as possible, this inquiry shall be carried out in cooperation with public or private organizations qualified in the field of inter-country adoptions and the help of social workers having special training or having particular experience concerning the problems of adoption.”⁵³³ Fourth, “[t]he authorities who have jurisdiction under the first paragraph of Article 3 shall apply the national law of the child relating to consents and consultations, other than those with respect to an adopter, his family or his or her spouse.”⁵³⁴

Finally, the 1965 Convention on Adoptions makes provision for any State, “at the time of signature, ratification or accession, . . . [to] make a declaration specifying the provisions of its internal law prohibiting adoptions founded upon”⁵³⁵ certain specified reasons, including, for example, “the existence of a previous adoption of the child by other persons; the age of the adopter or adopters and that of the child.”⁵³⁶

3. The European Convention on the Adoption of Children 1967

The European Convention on the Adoption of Children (“ECAC”)⁵³⁷ “applies only to legal adoption of a child who, at the time when the adopter applies to adopt him, has not attained the age of 18, is not and has not been

530. These authorities are listed in Article 3. These are the people or entities that are granted jurisdiction to grant an adoption. These are: “a. the authorities of the State where the adopter habitually resides or, in the case of an adoption by spouses, the authorities of the State in which both habitually reside; b. the authorities of the State of which the adopter is a national or, in the case of an adoption by spouses, the authorities of the State of which both are nationals.” 1965 Convention on Adoptions, *supra* note 528, at art. 3(a–b).

531. 1965 Convention on Adoptions, *supra* note 528, at art. 6.

532. *Id.*

533. *Id.*

534. *Id.* at art. 5. *See also* VAN BUEREN, *supra* note 297, at 98.

535. 1965 Convention on Adoptions, *supra* note 528, at art.13.

536. *Id.* at art. 13(d, f).

537. European Convention on the Adoption of Children, Apr. 24, 1967, 7 I.L.M. 211 [hereinafter ECAC]. The ECAC comprises of a Preamble and 28 articles.

married, and is not deemed in law to have come of age.”⁵³⁸ The provisions contained in the ECAC, however, are only minimum standards — States Parties are granted the right to adopt “provisions more favorable to the adopted child.”⁵³⁹

The essential provisions of the ECAC deal with practices that States Parties should incorporate in their national laws for the purpose of protecting adopted children. One of these essential provisions is that “[a]n adoption shall be valid only if it is granted by a judicial or administrative authority (hereinafter referred to as the ‘competent authority’).”⁵⁴⁰ In addition, such a competent authority must only grant an adoption if that authority is convinced or satisfied that the adoption is in the best interests of the child being adopted.⁵⁴¹ In deciding whether to grant an order of adoption, the competent authority must make adequate inquiries into issues such as “the personality, health and means of the adopter, particulars of his home and household and his ability to bring up the child,”⁵⁴² “the views of the child with respect to the proposed adoption”⁵⁴³ and “the mutual suitability of the child and the adopter, and the length of time that the child has been in his care and possession.”⁵⁴⁴

After the child’s adoption has been concluded, the adopted child must be provided the means to “acquire the surname of the adopter either in substitution for, or in addition to, his own.”⁵⁴⁵ In addition, the adopted child must be treated “as if he [or she] were a child of the adopter born in lawful wedlock” in matters of succession.⁵⁴⁶ Thus, if the law of succession in a State Party grants “a child born in lawful wedlock a right to share in the estate of his father or mother,”⁵⁴⁷ the adopted child should be treated similarly.⁵⁴⁸

The ECAC also mandates that States Parties shall make provision in their national laws to “prohibit any improper financial advantage arising from a child being given up for adoption.”⁵⁴⁹ Finally, States Parties are asked to make “[p]rovision . . . to enable an adoption to be completed without

538. *Id.* at art. 3.

539. *Id.* at art. 16. *See also* VAN BUEREN, *supra* note 297, at 99.

540. ECAC, *supra* note 537, at art. 4.

541. *Id.* at art. 8(1).

542. *Id.* at art. 9(2)(a).

543. *Id.* at art. 9(2)(f).

544. *Id.* at art. 9(2)(d).

545. *Id.* at art. 10(3).

546. *Id.* at art. 10(5).

547. *Id.*

548. *Id.*

549. *Id.* at art. 15.

disclosing to the child's family the identity of the adopter⁵⁵⁰ and "to require or permit adoption proceedings to take place in camera."⁵⁵¹ In addition, each State Party must maintain records on each adoption but "their contents reproduced in such a way as to prevent persons who do not have a legitimate interest from learning the fact that a person has been adopted or, if that is disclosed, the identity of his former parents."⁵⁵²

4. The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors 1984

The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors ("IAC")⁵⁵³ applies specifically to "the adoption of minors in the form of full adoption, adoptive legitimation and other similar institutions that confer on the adoptee a legally established filiation, when the domicile of the adopter (or of the adopters) is in one State Party and the habitual residence of the adoptee is in another State Party."⁵⁵⁴ These adoptions, according to Article 12,⁵⁵⁵ "are irrevocable."⁵⁵⁶

At the time a State Party signs, ratifies, or accedes to the Convention, it may "declare that it"⁵⁵⁷ applies to any other form of international adoption of minors.⁵⁵⁸ Although adoptions referred to in Article 1 are irrevocable, revocations of those referred to in Article 2 "shall be governed by the law of the habitual residence of the adoptee at the time of adoption."⁵⁵⁹ With respect to "capacity, consent, and other requirements for adoption, as well as those procedures and formalities that are necessary for creating the relationship,"⁵⁶⁰ the IAC prescribes that "[t]he law of the habitual residence of the minor shall govern."⁵⁶¹

550. *Id.* at art. 20(1).

551. *Id.* at art. 20(2).

552. *Id.* at art. 20(4).

553. Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24 1984, 24 I.L.M. 460 [hereinafter IAC]. The IAC was adopted by Member States of the Organization of American States on May 24, 1984, and entered into force on May 26, 1988. It has 29 articles.

554. *Id.* at art. 1.

555. *Id.* at art. 12.

556. *Id.*

557. *Id.*

558. *Id.* at art. 2.

559. *Id.* at art. 12.

560. *Id.* at art. 3.

561. *Id.*

With respect to the identity of the birth parents of the adopted child, the IAC protects their identity but makes allowance for medical information. Specifically, “the secrecy of the adoption shall be guaranteed. However, whenever possible, medical background information on the minor and on the birth parents, if it is known, shall be communicated to the legally appropriate person, without mention of their names or of other data whereby they may be identified.”⁵⁶² The IAC’s Article 11 provides that “. . . the adoptee, and the adopter (or adopters) and the family thereof, shall have the same rights of succession as those of legitimate family members.”⁵⁶³

In the case where it is permitted to convert a simple adoption into “full adoption, adoptive legitimation, or similar institutions,” this shall be governed, “at the choice of the petitioner, by the law of the habitual residence of the adoptee at the time of the adoption, or by that of the State in which the adopter (or adopters) has his domicile at the time the conversion is requested.”⁵⁶⁴ In addition, the consent of an adoptee who is more than 14 years of age is required in the case of a conversion.⁵⁶⁵ In the case where an adoption is annulled, the relevant law is that of the jurisdiction under which the adoption was granted.⁵⁶⁶ To be valid, an annulment must be granted only by “judicial authorities, and the interests of the minor shall be protected in accordance with Article 19 of this Convention.”⁵⁶⁷

Although the “terms of this Convention [i.e., the IAC] and the laws applicable under it shall be interpreted consistently and in favor of the validity of the adoption and the best interests of the adoptee,”⁵⁶⁸ the “authorities of a State Party may refuse to apply the law declared applicable under this Convention [i.e., IAC] when the law is manifestly contrary to its public policy.”⁵⁶⁹

5. The Hague Convention on the Protection of Children in Intercountry Adoption 1993

The Hague Convention on the Protection of Children in Intercountry

562. *Id.* at art. 17.

563. *Id.* at art. 11.

564. *Id.* at art. 13, para. 1.

565. *Id.* at art. 13, para. 2.

566. *Id.* at art. 14.

567. *Id.*

568. *Id.* at art. 19.

569. *Id.* at art. 18.

Adoption (“1993 Convention”)⁵⁷⁰ has three broad objectives: First, “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect to his or her fundamental rights as recognized in international law.”⁵⁷¹ Second, “to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”⁵⁷² Further, “to secure the recognition in Contracting States of adoptions made in accordance with the Convention.”⁵⁷³ It has been argued that the underlying principle of the 1993 Convention is that “although it is difficult to define the best interests of the child, the child’s interests should always take priority over those of the prospective adopters.”⁵⁷⁴ The application of this principle, however, has been quite problematic.⁵⁷⁵

Chapter II of the 1993 Convention provides requirements for intercountry adoptions, which include, *inter alia*, that “[a]n adoption within the scope of the Convention [i.e., 1993 Convention] shall take place only if the competent authorities of the State of origin . . . a) have established that the child is adoptable; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests; c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin; and d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and dully informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required.”⁵⁷⁶ There is a requirement that the child’s consent to the adoption, where it is required, be granted or given freely, and done so in the “required legal form, and expressed or evidenced in writing”⁵⁷⁷ and that this consent “has not been induced by payment or

570. Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter 1993 Convention]. The Convention comprises a Preamble and 48 articles. It was adopted on May 29, 1993, and entered into force on May 1, 1995.

571. *Id.* at art. 1(a).

572. *Id.* at art. 1(b).

573. *Id.* at art. 1(c).

574. VAN BUEREN, *supra* note 297, at 100.

575. *Id.*

576. 1993 Convention, *supra* note 570, at art. 4.

577. *Id.* at art. 4(d)(3).

compensation of any kind.”⁵⁷⁸

With respect to the privacy rights of the adopted child, the 1993 Convention also mandates that “[t]he competent authorities of a Contracting State shall ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.”⁵⁷⁹ Nevertheless, an exception is made in the case of the child and his or her representative, hence, the competent authorities “shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.”⁵⁸⁰ Finally, personal data collected and transmitted under the 1993 Convention, “shall be used only for the purposes for which they were gathered or transmitted”⁵⁸¹ without prejudice to the Convention’s Article 30.

6. The Hague Convention on the Civil Aspects of International Child Abduction 1980

The Hague Convention on the Civil Aspects of International Child Abduction (“1980 Convention”)⁵⁸² “governs issues related to parental kidnapping or the removal of children under the age of sixteen across international borders and involving the jurisdiction of different countries’ courts.”⁵⁸³ The 1980 Convention’s stated objectives, as outlined in Article 1, are “a) to secure the prompt return of children wrongfully removed or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.”⁵⁸⁴ The elements that States Parties can use to determine if the removal or retention of a child qualifies as wrong are provided in Article 3, which states that “[t]he removal or retention of a child is to be considered wrongful where — a) it is in breach of rights of custody attributed to a person, an institution or any other body, jointly or alone, under the law of the State in which the child was habitually resident immediately

578. *Id.* at art. 4(d)(4).

579. *Id.* at art. 30(1).

580. *Id.* at art. 30(2).

581. *Id.* at art. 31.

582. The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter as “1980 Convention”], Oct. 25, 1980, T.I.A.S. No. 11,670. This Convention was adopted by The Hague Conference on Private International Law on October 25, 1980, and entered into force on December 1, 1983. It comprises a Preamble and 45 articles.

583. Zeldin, *supra* note 276, at 14.

584. 1980 Convention, *supra* note 582, at art. 1.

before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”⁵⁸⁵

Each Contracting State is required to designate a Central Authority whose duty is to “discharge the duties imposed by the Convention upon such authorities.”⁵⁸⁶ In a Contracting State whose political system consists of federal and sub-national units (e.g., states or provinces) with more than one system of law or “States having autonomous territorial organizations,”⁵⁸⁷ such a Contracting State is “free to appoint more than one Central Authority and to specify the territorial extent of their powers.”⁵⁸⁸ The Central Authorities are directed to “cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.”⁵⁸⁹

7. Worst Forms of Child Labor Convention 1999

The Worst Forms of Child Labor Convention (“WFCLC”)⁵⁹⁰ is generally designated as the “Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.”⁵⁹¹ In the Preamble, the WFCLC makes mention of the need to “adopt new instruments for the prohibition and elimination of the worst forms of child labor”⁵⁹² and that this should be “the main priority for national and international action, including international cooperation and assistance,”⁵⁹³ so as to “complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973, which remain

585. *Id.* at art. 3(a)-(b).

586. *Id.* at art. 6.

587. *Id.*

588. *Id.*

589. *Id.* at art. 7.

590. International Labor Organization (ILO), *Worst Forms of Child Labor Convention*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182 (last visited on Feb. 5, 2018) [hereinafter WFCLC]. The WFCLC was adopted by the General Conference of the International Labor Organization on June 17, 1999, and entered into force on November 19, 2000. It comprises a Preamble and 16 articles.

591. See the ILO’s webpage at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182 (last visited on Feb. 5, 2018).

592. WFCLC, *supra* note 590 pmb1.

593. *Id.*

fundamental instruments on child labor.”⁵⁹⁴

For the purposes of the WFCLC, the term “child” applies to “all persons under the age of 18.”⁵⁹⁵ The “worst forms of child labor” comprise:

- (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;
- (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.⁵⁹⁶

Each Contracting Party is directed to take all necessary measures to:

- (a) prevent the engagement of children in the worst forms of child labor;
- (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and for their rehabilitation and social integration;
- (c) ensure access to free basic education and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labor;
- (d) identify and reach out to children at special risk; and
- (e) take account of the special situation of girls.⁵⁹⁷

8. International Convention for the Protection of All Persons from Forced Disappearance 2006

The International Convention for the Protection of All Persons from Forced Disappearance (“Forced Disappearance Convention”)⁵⁹⁸ stipulates in

594. *Id.*

595. *Id.* at art. 2.

596. *Id.* at art. 3 (a)–(d).

597. *Id.* at art. 7(2)(a)–(e).

598. International Covenant for the Protection of All Persons from Forced Disappearance

its Article 1 that “[n]o one shall be subjected to enforced disappearance.”⁵⁹⁹ In addition, the Convention states that “[n]o exceptional circumstances whatsoever”⁶⁰⁰ may be used as justification for “enforced disappearance.”⁶⁰¹ For purposes of the Convention, “enforced disappearance” is defined as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁶⁰²

The Convention, however, prescribes that States Parties may establish “aggravating circumstances,”⁶⁰³ without “prejudice to other criminal procedures,”⁶⁰⁴ particularly “in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, *minors*, persons with disabilities or other particularly vulnerable persons.”⁶⁰⁵

Article 25 of the Convention is devoted to enforced disappearance of children.⁶⁰⁶ That article provides for each State Party to take necessary measures to prevent, as well as, punish under its criminal law, the following offenses:

- (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
- (b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph

(Jan. 24, 2007), G.A. Res. 61/177 [hereinafter the Forced Disappearance Convention]. The Forced Disappearance Convention comprises a Preamble and 45 articles. It was adopted on December 20, 2006.

599. *Id.* at art. 1(1).

600. *Id.* at art. 1(2).

601. *Id.*

602. *Id.* at art. 2.

603. *Id.* at art. 7(2)(b).

604. *Id.*

605. *Id.* (emphasis added).

606. *Id.* at art. 25.

(a) above.⁶⁰⁷

States Parties have the obligation to take all necessary measures to “search for and identify the children referred to in paragraph 1(a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.”⁶⁰⁸ In addition, States Parties are expected to “assist one another in searching for, identifying and locating children referred to in paragraph 1(a) of this article.”⁶⁰⁹ In order to protect the best interests of the children referred to in paragraph 1(a) of Article 25,⁶¹⁰ as well as their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.⁶¹¹

Article 25 affirms further that in all cases and especially in “all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the view of the child being given due weight in accordance with the age and maturity of the child.”⁶¹²

IV. PROTECTING THE RIGHTS OF CHILDREN IN AFRICA: THE RULE OF LAW AND NATIONAL INSTITUTIONS

A. Introduction

The question of how to protect African children and minimize their exposure to sexual abuse and exploitation must be couched, not just in terms of international legal instruments, but also of the extent to which the governing process in a country is undergirded by the rule of law. In the end, a country’s domestic institutions — whether legal, political, economic, social, or traditional — must be on the frontline of the fight to protect children. While international law is important, especially regarding the need for multilateral cooperation to minimize the abuse and exploitation of children across international borders, the law of the African country where

607. *Id.* at art. 25(1)(a)-(b).

608. *Id.* at art. 25(2).

609. *Id.* at art. 25(3).

610. *Id.* at art. 25(1)(a).

611. *Id.* at art. 25(4).

612. *Id.* at art. 25(5).

the child lives is more important. It is the quality of a country's institutions that can determine the extent to which its children are protected and their rights enforced. While the protection of children should be the concern of all nations, each country has the primary duty to protect children within its borders, regardless of their nationality or citizenship. Its ability and capacity to do so is determined, to a great extent, by the nature of its governing process. Children's rights are more likely to be protected in countries whose governing processes are undergirded by the rule of law — in countries with such legal systems, state custodians (civil servants and political elites) are well-constrained by the law and less likely to act with impunity and engage in activities or behaviors (e.g., corruption) that render children vulnerable or susceptible to abuse and exploitation.

Many African countries have constitutions and other laws that protect children.⁶¹³ However, it is often the case that these laws are either not enforced or manipulated to garner benefits for the ruling elites or politically well-connected individuals. For example, although Ghana has enacted a comprehensive child protection act,⁶¹⁴ the country is still among several West African countries where children are routinely subjected to dangerous and exploitative working conditions, primarily but not exclusively, in cocoa plantations.⁶¹⁵ The existence of constitutional provisions and legislative acts to protect children is a necessary but not a sufficient condition for the full and effective protection of children. Sufficiency requires that each country provide itself with a governing process undergirded by the rule of law. Without such a process, civil servants and political elites are likely to act with impunity and engage in behaviors (e.g., corruption) that make children vulnerable to the various forms of abuse and exploitation. In the following section, this article will take a closer look at the rule of law and why it is critical to an effective system of protection of children against sexual abuse and exploitation.

613. For example, the Constitution of the Republic of Ghana provides protections for the rights of children in Chapter 28. See CONSTITUTION OF THE REPUBLIC OF GHANA, Jan. 7, 1993 (amended 1996).

614. Parliament of the Republic of Ghana, *The Children's Act* (1998), <http://www.unesco.org/education/edurights/media/docs/f7a7a002205e07fbf119bc00c8bd3208a438b37f.pdf> (last visited on Feb. 5, 2018).

615. In addition to servitude labor in the country's cocoa plantations, Ghanaian children are also exposed to ritual servitude (called *Trokosi*) — in this practice, traditional religious shrines routinely abuse young virgin girls sexually and, although the practice is outlawed in the country, it remains a popular cultural practice. See generally MENSAH ADINKRAH, WITCHCRAFT, WITCHES, AND VIOLENCE IN GHANA (2015); STEVEN J. SALM AND TOYIN FALOLA, CULTURE AND CUSTOMS OF GHANA (2002).

B. The Rule of Law

Although many legal scholars and philosophers have been involved in seeking out a definition for the rule of law, one of the most important is British legal philosopher Albert Venn Dicey.⁶¹⁶ Dicey⁶¹⁷ argues that the rule of law must embody three important concepts: the law is supreme; all citizens are equal before the law; and the principle that the rights of individuals established in court decisions must be accepted and respected.⁶¹⁸ Other important contributors to the definition of the rule of law include the late Rt. Hon. Lord Bingham of Cornhill KG,⁶¹⁹ a distinguished British judge and jurist who argued that “the core of the existing principle” of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁶²⁰

In recent years, some legal scholars⁶²¹ have argued that the most effective way to frame definitions of the rule of law is to distinguish between “formal definitions” and “substantive definitions.”⁶²² Formal definitions of the rule of law speak to the rules that are designed to constrain civil government and the courts, which have been granted power (usually by the people and through the constitution) to apply these rules to state custodians (i.e., that is, those who serve in government or the people’s agent: civil servants and political elites).⁶²³ While substantive definitions also speak of

616. ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION: WITH AN INTRODUCTION BY E.C.S. WADE* 183 (Springer 1985) (1885). Note that the rule of law is usually contrasted to the “arbitrary exercise of [public] power” — this is the “evil” that the rule of law is supposed to eliminate or curb. *See, e.g.*, Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 46 (Gianluigi Palombella & Neil Walker eds., 2008).

617. *Id.*

618. *Id.*

619. TOM BINGHAM, *THE RULE OF LAW* (2011) (providing, inter alia, a definition for the rule of law).

620. Rt. Hon. Lord Bingham of Cornhill KG, *The Sixth Sir David Williams Lecture*, Center for Public Law, University of Cambridge, Cambridge, UK, <https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> (last visited on Feb. 5, 2018).

621. *See, e.g.*, Ronald J. Daniels and Michael Trebilock, *The Political Economy of the Rule of Law Reform in Developing Countries*, 26 *MICH. J. INT’L L.* 99 (2004).

622. *Id.* at 104–107.

623. Craig A. Stern, *Human Rights or the Rule of Law—The Choice for East Africa?*, 24 *MICH. ST. INT’L L. REV.* 45 (2015).

the content of the rules, they more importantly concern the extent to which these rules “embody principles of justice such as human rights.”⁶²⁴

As an example of the formal definition of the rule of law, we can turn to Friedrich August Hayek:⁶²⁵

Nothing distinguishes more clearly conditions in a free country from those in a country under the arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough. While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.⁶²⁶

The definition of the rule of law provided by Hayek⁶²⁷ is formal because “it prescribes how law should operate generally rather than prescribing any particular content of the law.”⁶²⁸ The rule of law, according to this formal definition, implies that there is law formally enacted, and both state custodians (that is, government officials) and citizens are bound by and must abide by that law.⁶²⁹ As argued by Professor Robert Stein,⁶³⁰ the most important aspect of the rule of law is that “the law is superior, applies

624. *Id.* at 47.

625. FRIEDRICH AUGUST HAYEK, *THE ROAD TO SERFDOM* (Routledge, 2005) (1944).

626. *Id.* at 75–76.

627. *Id.*

628. Stern, *supra* note 623, at 48.

629. *See, e.g.*, Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT’L L. 293 (2009).

630. *Id.*

equally, is known and predictable, and is administered through a separation of powers.”⁶³¹ In a country with a governing process undergirded by the rule of law, then, no one, including senior civil servants and politicians, is above the law. Instead, all citizens, regardless of their economic and political status, are bound by and subject to the law.⁶³² For African countries, it is important to mention that where the rule of law functions, one’s ethnic or racial (cf. South Africa under apartheid)⁶³³ status should not have any bearing on how the law treats them — all persons are subject to the law and all persons are equal before the law.

In addition to a requirement that the law must be generally known and understood, it must apply equally to all citizens, and must be that which the people can obey. As argued by US suffragist and advocate of women’s rights, Elizabeth Cady Stanton, “[t]o make laws that man cannot and will not obey, serves to bring all law into contempt. It is very important in a republic that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?”⁶³⁴ In addition, in each rule of law system, there must be available mechanisms and institutions that have the capacity to enforce the legal rules when they are breached, regardless of who breaches them.⁶³⁵

631. *Id.* at 301.

632. See also John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 *BROOK. J. INT’L L.* 959 (2013).

633. Note that under the apartheid system in South Africa, nationals of the country were subject to differential citizenship categories, with whites enjoying full citizenship rights while Africans were subjected to a type of attenuated citizenship that rendered them unequal to their fellow white citizens at law. See, e.g., GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY OF AMERICAN AND SOUTH AFRICAN HISTORY* (1982) (providing, inter alia, a comprehensive examination of the policy racial segregation and discrimination in South Africa); *NEW HISTORIES OF SOUTH AFRICA’S APARTHEID-ERA BANTUSTANS* (Shireen Ally & Arianna Lissoni eds., 2017) (presenting a series of essays that examine, inter alia, the process through which the apartheid government derogated the citizenship rights of Africans through its Bantustan policy).

634. A.B.A. Division of Public Education, *Part I: What is the Rule of Law*, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (last visited on Feb. 5, 2018) (quoting Elizabeth Cady Stanton, Tenth National Women’s Rights Convention (May 10-11, 1860)).

635. See, e.g., Stern, *supra* note 623 and Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 *SING. J. LEGAL STUD.* 232, 233 (2012). Tamanaha adds the element of enforcement in Hayek’s definition of the rule of law and goes on to argue that the existence of the rule of law in a country implies there be institutions (e.g., courts) that make the law function as an instrument to constrain the behavior of civil servants and politicians and effectively prevent them from acting with impunity, as well as provide the wherewithal for citizens to organize their private lives. Without an effective enforcement system, the law will lose its value.

A substantive definition of the rule of law, unlike its formal counterpart, places certain constraints on the content of law. Thomas Carothers⁶³⁶ provides a sample of this approach to understanding the rule of law when he argues that

[t]he rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. *They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century.* In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.⁶³⁷

Carothers expands the formal approach to the definition of the rule of law and links it to the general protection of human rights. It is very important, especially to the protection of children in Africa, that national rules accord with universally accepted human rights laws.⁶³⁸ As argued by several legal scholars,⁶³⁹ “[t]he rules must also accord with principles of justice or there is no rule of law.”⁶⁴⁰ Scholars have argued that the need to link domestic law to universally accepted human rights principles is made necessary by the fact that throughout history, even civil servants and politicians in dictatorial governmental regimes have justified their impunity by claiming that their behaviors actually adhered to the rule of law. For example, as argued by former US President, Richard Nixon, “[w]ell, when the president does it, that means that it is not illegal.”⁶⁴¹

636. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. March-April, 1998, at 95, 96.

637. *Id.* (emphasis added).

638. For example, *the International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

639. Stern, *supra* note 623, at 51.

640. *Id.*

641. Sir David Frost, *I have Impeached Myself: Edited Transcript of David Frost's Interview with Richard Nixon, Broadcast in May 1977*, THE GUARDIAN (UK), Sept. 7, 2007, <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> (last visited Feb. 5, 2018).

Nevertheless, scholars also argue that “if a legal system fails to meet the standards of the formal version of the rule of law, it fails to meet the standards of the substantive version also.”⁶⁴² Of course, even if national laws incorporate provisions that address human rights issues and hence, make national laws reflect universally accepted human rights principles, there is no guarantee that such rights would be protected, especially if those who serve in government (civil servants and politicians) do not respect and obey the law. For example, even if national constitutions incorporate provisions respecting human rights, civil servants and political elites are still likely to act with impunity and violate those rights if the country lacks the institutions or institutional capacity to enforce the law (e.g., an independent judiciary and well-constrained police forces).⁶⁴³

The existence of rule-of-law systems in Africa that reflect provisions of international human rights laws are a necessary but not sufficient condition for the enforcement of protections against the abuse and exploitation of children. Sufficiency requires that each African country provide itself with the appropriate structure of government. According to Best,⁶⁴⁴ “fundamental rights are expressed in and secured by a competent and balanced governing process, not by mere ‘parchment barriers.’”⁶⁴⁵ Thus, even though many countries in Africa have transitioned to democratic governance systems and now have constitutions that include a bill of rights and make allowance for the separation of powers, the absence of a competent and balanced governing process — undergirded by effective checks and balances (e.g., a truly independent judiciary,⁶⁴⁶ a robust civil society, and an independent and free

642. Stern, *supra* note 623, at 52.

643. Mbaku, *supra* note 632, at 1001–1005.

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

645. Best, *supra* note 644, at 37.

646. That is, a judiciary system that is granted “security of tenure,” “financial security” free from “arbitrary interference by the Executive in a manner that could affect judicial independence,” and “institutional independence with respect to the judicial function . . . [and] judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.” See *Valente v. The Queen* [1985] 2 S.C.R. 673. This is the Supreme Court of Canada case that established the minimum requirements for judicial independence in the country. These requirements are in line with the requirements for judicial independence provided by the Founders of the American Republic and enshrined in the U.S. Constitution. See U.S. Const. art. III, §1 (which states, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

press) — has failed to minimize government impunity. As a consequence, corruption pervades these countries, the law is not enforced, and children are routinely abused and exploited.⁶⁴⁷

Throughout the continent, many citizens do not view their national laws and institutions as effective instruments for the protection of their rights, including those of children. Perhaps, many citizens do not see these laws as effective mechanisms for them to hold their governors accountable.⁶⁴⁸ Rather, national legal institutions are considered alien impositions designed exclusively to benefit national elites and other politically connected individuals and groups.⁶⁴⁹ Thus, in African countries, there is a challenge to the rule of law that usually does not appear in many other countries — alienation of the majority of people from the law and civil government, which as has been illustrated by sectarian violence in countries such as Nigeria, Central African Republic, South Sudan, Côte d'Ivoire, and Kenya, and which has become a significant challenge to the functioning of the rule of law:

Citizens must see the law as an instrument that they can use to deal effectively with everyday problems, including organizing their lives and peacefully resolving conflicts, including those that arise from trade and other forms of free exchange. If, however, citizens view the laws and institutions as “alien” impositions, used by their political elites to oppress and exploit them, they are more likely to refuse to recognize these laws, let alone obey them. Within such a context, compliance becomes very difficult — the police and other enforcement agencies may be totally overwhelmed and simply unable to perform their

647. In fact, in countries such as Ghana, which during the last several years have significantly improved their governance architecture and provided themselves with institutional arrangements undergirded by separation of powers, corruption and the maltreatment of children continues unabated. This is so because existing laws against the abuse and exploitation of children are not being enforced. *See, e.g.*, RAYMOND C. CHRISTIAN, *THE COCOA PLANTATIONS: AMERICA'S CHOCOLATE SECRET—FORCED CHILD LABOR, RAPE, SODOMY, ABUSE OF CHILDREN, CHILD SEX TRAFFICKING, CHILD ORGAN TRAFFICKING, CHILD SEX SLAVES* (2015) (examining, inter alia, why laws against the abuse and exploitation of children are not being enforced in Ghana's cocoa fields). Also, in a 2012 publication, a Moi University (Kenya) professor, Wanjohi Kibicho, argued that child sex tourism is a booming industry in Kenya despite the fact that it is prohibited by several domestic laws. Kenya is a signatory to many international conventions that offer protections, directly or indirectly to children. The problem, of course, lies in the fact that the law is not being fully enforced. *See* WANJOHI KIBICHO, *SEX TOURISM IN AFRICA: KENYA'S BOOMING INDUSTRY* (2012).

648. Mbaku, *supra* note 632, at 1019.

649. *Id.* at 1036.

constitutionally assigned functions, effectively allowing society to degenerate into chaos and violence.⁶⁵⁰

In such a political situation as described in the quote above, civil government is effectively detached from the process of governance and, as a result, the rule of law deteriorates into a construct that has no real life or effect.⁶⁵¹ In order for an effective rule of law regime to exist in a country, the law itself must function effectively to regulate the relationship between civil government and the country's populace. As argued by Stern,⁶⁵² "[a] state of civil lawlessness is not the rule of law, however much what passes for the institutions of civil government may by themselves accord with the law."⁶⁵³ If state custodians (i.e., civil servants and political elites) do not accept, respect and obey the law, citizens are not likely to act differently. This "compound and mutually reinforcing breach in the rule of law must frustrate"⁶⁵⁴ the protection of the rights of children and put them into situations in which they are highly susceptible to abuse and exploitation.

What exactly is civil government supposed to do? While this answer lies in the nature of a country's constitution—for, it is the constitution that defines the scope and extent of government power and places limits on how that power can be exercised—it is generally believed that civil government exists to secure "civil justice" for the people.⁶⁵⁵ Consider the Declaration of Independence by the Representatives of the United States of America in 1776.⁶⁵⁶

We hold these truths to self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*,⁶⁵⁷ that among these are Life, Liberty and the pursuit of happiness.

650. *Id.* at 1004–1005.

651. Stern, *supra* note 623, at 54.

652. Stern, *supra* note 623.

653. *Id.* at 54.

654. *Id.*

655. *Id.* at 55.

656. U.S. Congress, *A Declaration by the Representatives of the United States of America, July 4, 1776*.

657. People's rights are not defined by the government. Instead, these rights are defined by the people. They then form governments "to secure" these "unalienable rights" as described in the U.S. Declaration of Independence.

That to secure *these rights*,⁶⁵⁸ Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness.⁶⁵⁹

As articulated by the founders of the American Republic,⁶⁶⁰ people form governments to protect their rights — these are rights that have been defined by the people or their duly elected representatives and subsequently elaborated in their country's constitution. In addition to protecting the people's rights or what the founders of the American Republic referred to as "unalienable rights," the government can also provide the people with the economic institutions (e.g., a framework of regulations that enhances the proper functioning of markets) that enhance the citizens' ability to create the wealth that they need to meet their basic needs.

Governments are formed by citizens and empowered through the constitution to perform certain functions for them. But the founders of the American Republic were also quite aware of the dangers posed by unconstrained government and hence, insisted on a governing process that was undergirded by federalism and separation of powers with effective checks and balances, including judicial review.⁶⁶¹ The founders of the American Republic wanted to prevent tyranny directed at the people by the government.

Put differently, America's founders were aware that civil government servants (bureaucrats and politicians, also called "custodians of the state") as *agents* of the people (i.e., the principal) were likely to act opportunistically and engage in self-dealing to maximize their interests at the expense of the people. In doing so, these custodians of the state would engage in improper and ultra vires acts and threaten individual liberty. It was necessary then, for the people (the principal) to adequately constrain state custodians. Professor Stern⁶⁶² puts it this way: "Armed with legal rights, the subjects of civil government could enlist

658. That is, the "unalienable rights."

659. U.S. Congress, *supra* note 656 (emphasis added).

660. *Id.*

661. KATHIANN M. KOWALSKI, CHECKS AND BALANCES: A LOOK AT THE POWERS OF GOVERNMENT (2012) (providing an overview of the system of government in the American Republic); 2 DANIEL E. BRANNEN AND LAWRENCE W. BAKER, CHECKS AND BALANCES: THE THREE BRANCHES OF THE AMERICAN GOVERNMENT (2005) (examining, inter alia, the system of checks and balances in the American system of government).

662. Stern, *supra* note 623, at 56.

the institutions of the law — courts above all — to protect themselves against the all-too-likely trespasses of civil government.”⁶⁶³

Rights against impunity of the opportunistic acts of civil government are referred to as “negative rights.”⁶⁶⁴ While a negative right can be satisfied by government inaction, the satisfaction of positive rights requires the government to act and do so purposefully. Negative rights, on the other hand, specify and define activities that must not be undertaken by civil government — for example, “the deprivation of life, liberty, or property.”⁶⁶⁵ Negative rights, then, implicate the right of citizens to be free from state action, while positive rights enable the citizen to “command government action.”⁶⁶⁶ With respect to children, negative rights call upon state custodians (civil servants and political elites) not to engage in any behaviors (e.g., corruption)⁶⁶⁷ that contribute directly or indirectly to the abuse and exploitation of children. Positive rights, on the other hand, specifically call upon civil government to take action, for example, to defend weak and vulnerable groups (e.g., women, children) from harm by non-state actors.

The global community has provided a relatively strong foundation to positive human rights against civil governments. That foundation can be found in the UN General Assembly’s Universal Declaration of Human Rights,⁶⁶⁸ which although not legally binding, embraces both negative and positive rights.⁶⁶⁹ The other foundational instrument, also adopted by the UN, is the International Covenant on Economic, Social and Cultural Rights,

663. *Id.*

664. See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 868 (2001).

665. Stern, *supra* note 623, at 56.

666. Cross, *supra* note 664, at 864.

667. It is often the case in many African countries that sex traffickers pay bribes to police and court officers so that they (i.e., the traffickers) can operate freely and without fear of arrest and prosecution within the jurisdiction covered by the corrupted officials. See, e.g., JIM RODGERS, *AFRICA: THE QUEST FOR JUSTICE AMID CONFLICT AND CORRUPTION* (2016) (examining, inter alia, how difficult it is to eradicate prostitution, sex trafficking and other forms of the exploitation of women and girls in countries that are burdened by corruption and sectarian conflict); RICHARD OBINNA IROANYA, *HUMAN TRAFFICKING AND SECURITY IN SOUTHERN AFRICA: THE SOUTH AFRICAN AND MOZAMBIKAN EXPERIENCE* (2018) (showing, inter alia, the connection between human trafficking and corruption); *GLOBALIZATION AND HUMAN RIGHTS IN THE DEVELOPING WORLD* (Derrick M. Nault and Shawn L. England eds., 2011) (arguing, inter alia that in countries with significant levels of corruption, national governments are unlikely to fully protect the rights of citizens, including fighting human trafficking).

668. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See also Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1765 (2008).

669. See, e.g., Stern, *supra* note 623, at 57.

which was adopted by the UN in 1966 and embraces essentially positive rights.⁶⁷⁰

1. Elements of the rule of law and child protection in Africa:
Supremacy of law

In order to determine the extent to which the absence of the rule of law in an African country may affect or explain the abuse and exploitation of children, it is necessary to take a closer look at the elements of the rule of law. An important obstacle to the protection of children in Africa is corruption and other forms of opportunism by civil servants and politicians. Where corruption is rampant, the laws against child abuse and exploitation, whether in the workplace,⁶⁷¹ in traditional religious shrines,⁶⁷² or in the sex tourism industry, are not enforced, thereby placing vulnerable children at the mercy of their exploiters. During the last several decades, corruption has emerged as one of the most important contributors to improper actions by state custodians (i.e., civil servants and politicians) against citizens, especially children.⁶⁷³

670. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, U.N.T.S. 3.

671. For example, in the cocoa fields of Ghana and Côte d'Ivoire, in the mines of Burkina Faso, and on the streets of Dakar, Senegal. *See, e.g.*, Ellen Rolfres, *One Million Children Labor in Africa's Goldmines*, PBS NEWS HOUR, July 10, 2013, available at https://www.pbs.org/newshour/world/world-july-dec13-burkinafaso_07-10 (last visited on Feb. 6, 2018); MYRA WEATHERLY, *TEENS IN GHANA* (2008) (examining, inter alia, the dangerous working conditions for children in Ghana's cocoa fields); KOJO AMANOR, *LAND, LABOR AND THE FAMILY IN SOUTHERN GHANA: A CRITIQUE OF LAND POLICY UNDER NEOLIBERALIZATION* (2001) (examining agricultural work among the Akyem Abuakwa peoples of the forest region of Ghana); WANJONI KIBICHO, *SEX TOURISM IN AFRICA: KENYA'S BOOMING INDUSTRY* (2016) (arguing, inter alia, that sex tourism, including especially, child sex tourism, has risen in recent years to dominate the tourism sector in Kenya).

672. These shrines are also referred to as "fetish shrines." *See, e.g.*, MENSAH ADINKRAH, *WITCHCRAFT, WITCHES, AND VIOLENCE IN GHANA* (2015); STEVEN J. SALM AND TOYIN FALOLA, *CULTURE AND CUSTOMS OF GHANA* (2002).

673. John Mukum Mbaku argues, for example, that "throughout many developing countries, including several in Africa, selling of young girls into prostitution continues as highly corrupt national enforcement agencies standby and do nothing. The police and the judiciary, compromised by corruption, are impotent to stop this insidious institution, which continues to destroy the lives of an important portion of the population of these countries." JOHN MUKUM MBAKU, *CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS* 110–11 (2010). *See also* POLICE CORRUPTION AND POLICE REFORMS IN DEVELOPING SOCIETIES (Kempe Ronald Hope, Sr. ed., 2015) (presenting a series of essays that examine, inter alia, the impact of police corruption on the ability of civil government to protect the rights of citizens).

One reason for the pervasiveness of corruption in many African countries today is that the supremacy of law is not guaranteed by national constitutions or that in countries in which such constitutional guarantees are present, the people do not have effective legal mechanisms (e.g., the separation of powers with effective checks and balances)⁶⁷⁴ to realize these guarantees. As argued by British legal philosopher Albert Dicey,⁶⁷⁵ the rule of law comprises “firstly, the supremacy of law as opposed to arbitrariness or even wide discretion by government; and second, the equality of all persons before the law.”⁶⁷⁶ Many legal scholars believe that in order for a country’s governing process to be undergirded by the rule of law, all citizens, including those who serve in the government, must be subject to the law — that is, the law is supreme.⁶⁷⁷

However, throughout Africa, wealthy and politically-connected individuals often consider themselves above the law and act accordingly. For example, under the legal system existing in Mobutu’s Zaire, certain groups of individuals, who considered themselves “untouchables,” and hence, not subject to the country’s known and standing laws, engaged in activities (such as corruption) that harmed the welfare of citizens, including violating their rights.⁶⁷⁸ This attitude toward the law in Zaire (now Democratic Republic of Congo — DRC), which has lasted to this day,⁶⁷⁹ is responsible for the failure

674. In addition to judicial independence, there must exist social checks and balances, which include, but are not limited to, robust civil society, the right to form political parties and compete for positions of power in the government, and independent civil society organizations (e.g., a free press). A free press is a very important tool to check the exercise of government, as evidenced by that institution’s enormous contributions to the exposure of political corruption in, for example, the United States (e.g., the Watergate Affair) and recently, in South Africa (the Gupta Affair). For Watergate, see generally ERIKA WITTEKIND, *THE UNITED STATES V. NIXON: THE WATERGATE SCANDAL AND THE LIMITS TO U.S. PRESIDENTIAL POWER* (2012); for the Gupta Affair, see generally BBC News, *The Guptas and Their Link to South Africa’s Jacob Zuma*, BBC NEWS, Nov. 2, 2016, <http://www.bbc.com/news/world-africa-22513410>; David Pilling and Joseph Cotterill, *Jacob Zuma, the Guptas and the Selling of South Africa*, FINANCIAL TIMES, Nov. 29, 2017, <https://www.ft.com/content/707c5560-d49a-11e7-8c9a-d9c0a5c8d5c9>.

675. ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (Macmillan 1959 (1885)).

676. *Id.* at 181.

677. *Id.* See also Mbaku, *supra* note at 673.

678. See, e.g., David J. Gould and Tshiabukole B. Mukendi, *Bureaucratic Corruption in Africa: Causes, Consequences and Remedies*, 13 INT’L J. PUB. ADMIN. 427, 429 (1989).

679. For example, DRC’s present president, Joseph Kabila, has ignored the country’s constitution and is currently serving an unconstitutional term in office. Mr. Kabila was expected to step down as president in December 2016 as required by the country’s constitution, but he has refused to obey the law and has continued to remain in office. See generally John Mukum Mbaku, *The Postponed DRC Elections: The Major Players for 2018*,

of the country to maintain the rule of law. It is no wonder that throughout DRC, the abuse and exploitation of children is pervasive as government officials (civil servants and politicians) (1) directly abuse and exploit children for their own benefit; and (2) fail to enforce laws designed to protect children.⁶⁸⁰

Of course, the DRC is not the only African country where some citizens consider themselves above the law and consequently ignore the law and engage in behaviors that directly abuse and exploit children or refuse to enforce laws designed to protect the rights of children. In fact, even in a country such as Kenya that is considered the bastion of democracy in East Africa, President Uhuru Kenyatta's government, in early February 2018, defied a court order to lift a ban on three private television stations.⁶⁸¹ In

The Brookings Institution, Dec. 2, 2016, <https://www.brookings.edu/blog/africa-in-focus/2016/12/02/the-postponed-drc-elections-the-major-players-for-2018/>; Jason Burke, 'Go Kabila Go': New Effort to Oust DR Congo President Despite Fear of Violence, THE GUARDIAN, Oct. 2, 2017, <https://www.theguardian.com/world/2017/oct/02/go-kabila-go-new-effort-to-oust-drc-president-despite-fear-of-violence>.

680. Since independence from Belgium in 1960, the Democratic Republic of Congo's civil servants and political elites have often failed to enforce the law. Part of their inaction has been made possible by their corruption — many of them have received bribes from non-state actors who exploit the country's enormous natural resources, as well as its human resources, to allow them to operate freely and without state regulations or any encroachment from the government. Thus, the pervasiveness of child abuse and exploitation in DRC is closely linked to the government's failure or unwillingness to enforce the laws and the desire of civil servants and political elites to remain above the law. See, e.g., WALTER C. SODERLUND, E. DONALD BRIGGS, TOM PIERRE NAJEM AND BLAKE C. ROBERTS, AFRICA'S DEADLIEST CONFLICT: MEDIA COVERAGE OF THE HUMANITARIAN DISASTER IN THE CONGO AND THE UNITED NATIONS RESPONSE 1997–2008 (2013) (arguing, inter alia, lawlessness has contributed significantly to the rape and other forms of sexual abuse of civilians, including especially children and women in the Democratic Republic of Congo); CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE (Julia Sloth-Nielsen ed., 2016) (providing a collection of essays that links increased child abuse and exploitation in DRC to lawlessness).

681. See Maggie Fick and Humphrey Malalo, *Kenya Defies Court Order to Reopen TV Stations, Detains Opposition Figure*, REUTERS, Feb. 2, 2018, <https://www.reuters.com/article/us-kenya-politics/kenya-defies-court-order-to-reopen-tv-stations-detains-opposition-figure-idUSKBN1FM0Q5>. Even Kenyatta's lawyer, Ahmednasir Abdullahi, has criticized the government for not obeying the court order, arguing that no matter how disagreeable the order may appear to the government, the latter must obey it because in a constitutional democracy, the court is the final authority in deciding constitutional issues. See "I am Embarrassed with Uhuru as His Lawyer for Disobeying Court Orders"—Lawyer, KENYA TODAY, Feb. 3, 2018, <https://www.kenya-today.com/politics/lawyer-ahmednasir-blasts-uhuru-disobeying-court-orders>. The problem can be traced to the August 8, 2017, presidential election. The two main contenders in that election were Uhuru Kenyatta of the Jubilee Alliance and Raila Odinga of the National Super Alliance (NASA). After the election was concluded, Kenyatta was declared the winner by the electoral commission (Independent Electoral and Boundaries Commission—IEBC). However, Odinga appealed to the Kenya Supreme Court, arguing that the election had been marred with irregularities. The Supreme Court subsequently annulled

2008, the president of the Republic of Cameroon, Paul Biya, had the constitution changed to place himself above the law — Article 53(3) states that “[a]cts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions.”⁶⁸²

In a study of corruption in Cameroon, Professor Nantang Jua⁶⁸³ determined that “higher-level bureaucrats are largely immune from trial by the Disciplinary Committee.”⁶⁸⁴ He then went on to argue that this is “evidence that Cameroon has an attenuated patrimonial administrative structure in which public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.”⁶⁸⁵ Professor Jua’s study was completed and published in 1991. Almost three decades later, the situation in Cameroon has not radically changed — the President of the Republic and members of his government continue to consider themselves above the law and as a consequence, corruption and other forms of impunity remain pervasive. Within such an institutional environment, corruption is pervasive and the laws

the elections and demanded a new presidential election. That rerun election took place on October 26, 2017, and the results were announced on October 30, 2017. Odinga and his opposition alliance (NASA) boycotted the re-run election. Kenyatta was declared the winner by the IEBC. Odinga, however, refused to recognize Kenyatta as the duly elected president of the Republic of Kenya and vowed to inaugurate himself as what he and NASA called the “People’s President” and then set up an alternative government. *See, e.g.,* John Mukum Mbaku, *Foresight Africa Viewpoint—Elections in Africa in 2018: Lessons from Kenya’s 2017 Electoral Experiences*, The Brookings Institution, Feb. 1, 2018, <https://www.brookings.edu/blog/africa-in-focus/2018/02/01/foresight-africa-viewpoint-elections-in-africa-in-2018-lessons-from-kenyas-2017-electoral-experiences/>. On Tuesday, January 30, 2018, Odinga “inaugurated” himself as president. *See* BBC News, *Kenya’s Raila Odinga ‘Inaugurates’ Himself as President*, BBC NEWS, Jan. 30, 2018, <http://www.bbc.com/news/world-africa-42870292>. The Government of Kenya, however, shut down TV stations to prevent them from covering Odinga’s “inauguration.” *See* Alex Iszatt, *Kenyan Government Shuts Down Free-To-Air TV Stations*, THE TELEGRAPH (UK), Jan. 30, 2018, <http://www.telegraph.co.uk/news/2018/01/30/kenyan-government-shuts-free-to-air-tv-stations/>. Subsequently, a court ordered the government to suspend the shutdown of the TV stations, but the government refused to obey the order. *See* Maggie Fick and George Obultsa, *Kenya Government Ignores Court Order Suspending Shutdown of Three TV Stations*, REUTERS, Feb. 1, 2018, *available at* <https://www.reuters.com/article/us-kenya-politics/kenya-government-ignores-court-order-suspending-shutdown-of-three-tv-stations-idUSKBN1FL4V1>.

682. *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON, Jan. 18, 1996 (amended June 2, 1972). Note that the constitution’s official name is “Law No 2008/01 of 14 April 2008 to amend and supplement some provisions of law No 96/6 of 18 January 1996 to amend the Constitution of 2 June 1972.”

683. Nantang Jua, *Cameroon: Jump-starting an Economic Crisis*, 21 AFR. INSIGHT 162 (1991).

684. *Id.* at 166.

685. *Id.*

are not enforced or enforcement is arbitrary and capricious. Such a dysfunctional governing process does not augur well for the protection of children — effective protection of children requires that the country's governing process be undergirded by the supremacy of law.

2. Elements of the rule of law and child protection in Africa: Voluntary acceptance of the law

Many legal scholars have argued that “[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law.”⁶⁸⁶ According to Levi, Tyler and Sacks, “[g]overnments are most dependent upon the cooperation of their citizens under those circumstances in which they are least able to obtain it via the mechanisms [of surveillance and sanctioning] or reward and punishment.”⁶⁸⁷ Although it is possible for a governmental regime to “govern primarily or exclusively through coercive force,”⁶⁸⁸ exercising government power through “legitimate power makes governing easier and more effective.”⁶⁸⁹

If the majority of the persons in a country consider their government legitimate and trust it, they are most likely to voluntarily accept and respect the laws enacted by that government. Such a view of the country's known and standing laws will significantly reduce the costs of policing and hence, compliance to the laws. However, if citizens view the governmental regime as illegitimate, state custodians (i.e., civil servants and politicians) will be forced to “expend more resources in monitoring and enforcement to induce sacrifice and compliance.”⁶⁹⁰ Thus, where the majority of citizens view their governing process as legitimate, the costs of governing will be significantly minimized through the reduction of reliance on “coercion and monitoring.”⁶⁹¹

As argued by the American Bar Association (“A.B.A.”),⁶⁹² “[t]he rule of law functions because [the majority of citizens] agree that it is important

686. A.B.A. Division of Public Education, *supra* note 634.

687. M. Levi, T. Tyler and A. Sacks, *The Reasons for Compliance with Law, Paper for the Workshop on the Rule of Law*, Yale University (March 28-29, 2008), <https://pdfs.semanticscholar.org/e3bc/09b7f814c41787503259e5d06d6f1f24222f.pdf>.

688. JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 102 (2018).

689. Levi, Tyler and Sacks, *supra* note 687.

690. *Id.*

691. *Id.* at 3.

692. A.B.A. Division of Public Education, *supra* note 634.

to observe the law, even if a police officer is not present to enforce it.”⁶⁹³ Governmental legitimacy has been a major problem in many African countries given the fact that since the colonial period, “government has always been seen as a foreign or alien imposition designed to maximize the interests of a small elite group (the Europeans during colonialism; urban-based ethnocultural elites and their benefactors . . . in the post-independence period . . .) at the expense of the mass of the people.”⁶⁹⁴ Thus, throughout most of the post-independence period, most Africans have usually considered their governments and associated institutions as “illegitimate and as a consequence, compliance with the laws has been extremely challenging.”⁶⁹⁵ It is only when the majority of citizens trust their government and consider it legitimate that they will “defer to political authorities and uphold laws.”⁶⁹⁶ In fact, if the government is considered legitimate by a majority of citizens, the latter is most likely to cooperate with the former in matters of voting, military service, tax payments, and voluntarily accept, respect and obey the laws, minimizing the need for the government to devote a significant part of public revenues to policing and compliance.⁶⁹⁷

Where government is considered legitimate by the majority of citizens, there is likely to be created within the country an institutional environment that is conducive to the maintenance of a rule of law regime and within such a regime, laws against corruption and the abuse and exploitation of children are likely to be fully enforced. Thus, the effective protection of Africa’s children requires a governing process, within each country, that is undergirded by voluntary acceptance and respect for the law by a majority of citizens.

3. Elements of the rule of law and child protection in Africa: Judicial independence

No country can maintain an effective rule of law regime without an independent judiciary. Although judicial independence is a complex and multifaceted concept, it requires, at the very least, “security of tenure,” “financial security,” and “institutional independence.”⁶⁹⁸ Judicial

693. *Id.*

694. MBAKU, *supra* note 688, at 104.

695. *Id.*

696. Levi, Tyler and Sacks, *supra* note 687, at 2.

697. *Id.*; *see also* Mbaku, *supra* note 688.

698. Valente v. The Queen [1985] 2 S.C.R. 673, paras. 27, 40, 47. This is the Supreme

independence, argues the A.B.A., is built on “a foundation in which judges are fair and impartial, there is a separation of powers (the judiciary is a separate and co-equal branch of government), the selection of judges is based on merit and these judges represent the diversity of their communities, the judiciary and the judges who serve in them are granted enough resources and security, and judges are accountable to the . . . Constitution.”⁶⁹⁹

According to Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia, “[i]f the judges are given a role of reviewing the actions of the political branches as against a written constitution and its protective features, judicial independence must be built into the constitution itself.”⁷⁰⁰ In conclusion, Judge Mikva states that a truly independent judiciary “must be protected from any institution or group capable of creating pressure. This means not only the ancient power of sovereigns to dismiss judges at their pleasure, but also the more subtle ability of officials to interfere with the administration of justice.”⁷⁰¹

The constitutions of many countries in Africa have provisions guaranteeing the independence of their judiciaries.⁷⁰² For example, the Constitution of the Republic of South Africa, 1996,⁷⁰³ states at Article 165, that:

- (1)The judicial authority of the Republic is vested in the courts.
- (2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.
- (3)No person or organ of state may interfere with the functioning of the courts.
- (4)Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity,

Court of Canada case that set the standard for judicial independence in Canada.

699. Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 1007 (2013). See also Judge Louraine C. Arkfield, *The Rule of Law and Independent Judiciary*, 46 JUDGES J. 12 (2007).

700. Judge Abner J. Mikva, *The Need for an Independent Judiciary: Implications for South African Reform*, 8 AM. U. J. INT'L L. & POL'Y 621 (1993).

701. *Id.* at 622–23.

702. African constitutions that expressly provide for judicial independence include Ghana (Articles 125 & 127); Namibia (Article 78); Uganda (Articles 126 & 128); Zambia (Article 91); and Egypt (Articles 165 & 166). See, e.g., H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239 (2006).

703. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, May 8, 1996 (amended Oct. 11, 1996).

accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

South Africa's Constitutional Court has recognized the independence of the judiciary in its rulings.⁷⁰⁴ In the case, *De Lange v. Smuts*,⁷⁰⁵ the Constitutional Court of South Africa adopted the standard for judiciary independence provided by the Canadian Supreme Court's ruling in *Valente v. The Queen*.⁷⁰⁶ In addition, the Constitutional Court has also held that

[t]he Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for the courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court.⁷⁰⁷

In general, South Africa's Constitutional Court has, in its various rulings, made clear that judicial independence has two important dimensions, which are (1) individual independence, which provides that when judges adjudicate cases, they must be independent and act independently and impartially; and (2) institutional independence, which implies that specific structures and guarantees must be provided "so that judicial officers and the courts are adequately protected against interference from external actors."⁷⁰⁸

While many other African countries have constitutions that guarantee judicial independence, these guarantees have not been realized. This is so

704. *See, e.g.*, *De Lange v. Smuts* (1998)[3]SA 785[CC], para. 59.

705. *Id.*

706. *Valente*, *supra* note 698.

707. *Van Rooyen v. The State* (2002)[5]SA 24[CC], para. 18.

708. *Mbaku*, *supra* note 699, at 1008–1009. Some of these external actors include other branches of governments, individuals who have legal actions pending before the courts, and special interests (e.g., private entrepreneurs and businesses) that are likely to benefit from interfering with the administration of justice. For example, a private company that is facing a significant fine because its operations have severely damaged the environment could benefit from bribing the judges who are expected to enforce a judgment against the company.

because, unlike South Africa, these countries do not provide their judiciaries with “security of tenure,” or “financial security,” free from “arbitrary interference by the Executive in a manner that could affect judicial independence.”⁷⁰⁹

Consider the case of Cameroon. In 1996, Cameroon produced a new constitution, which introduced separation of powers with checks and balances.⁷¹⁰ This constitution guarantees judicial independence: “[j]udicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals,”⁷¹¹ and “[t]he Judicial Power shall be independent of executive and legislative powers.”⁷¹² Nevertheless, the same constitution also states that “[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department.”⁷¹³ When the framers of Cameroon’s constitution granted one branch of government the power to guarantee the independence of another, they could not have been thinking of true and effective judicial independence and separation of powers. As Professor Charles Manga Fombad,⁷¹⁴ an authority on Cameroon constitutional law, argues, “[a] careful analysis of the constitutional provisions”⁷¹⁵ in [Cameroon’s 1996 constitution] “show[s] that the 1996 amendment did not add anything substantive to the preexisting practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.”⁷¹⁶

Fombad argues further that all of Cameroon’s post-independence presidents — Cameroon has had only two heads-of-state since reunification in 1961 — have enjoyed virtually unconstrained and absolute power over the judicial branch of government through the appointment and promotion of officers to the judiciary, as well as budgetary allocations to the latter.⁷¹⁷ As an example of how the President of the Republic of Cameroon, Paul Biya, manipulates the judiciary for his own benefit, Fombad shows that shortly

709. Valente, *supra* note 698, at para. 40.

710. CONSTITUTION OF THE REPUBLIC OF CAMEROON, *supra* note 682.

711. CONSTITUTION OF THE REPUBLIC OF CAMEROON, *supra* note 682, at art. 37(2).

712. *Id.*

713. *Id.* at art. 37(3).

714. See, e.g., CHARLES MANGA FOMBAD, CONSTITUTIONAL LAW IN CAMEROON (2012).

715. Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 247 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000).

716. *Id.* at 247. See also Charles Manga Fombad, *Judicial Power in Cameroon’s Amended Constitution of 18 January 1996*, 9 LESOTHO L.J. 1, 10 (1996).

717. Fombad, *supra* note 715, at 247–48.

before the elections of 1996 and 1997, Biya issued a decree doubling the salaries of judiciary officers, with justices of the supreme court receiving as much as 200% increase in their compensation packages. The justices of the supreme court have the power to certify the results of each election, including the election for president.⁷¹⁸ Although Cameroon has a governing process undergirded by separation of powers, with what is supposed to be an independent judiciary, “the universally accepted elements of the rule of law do not actually exist under the terms of Cameroon’s 1996 Constitution — the guarantee of security of tenure, financial security, and institutional independence of the judiciary have all been left to the vagaries of the political process, and specifically to the discretion of the President of the Republic, another branch of government.”⁷¹⁹

Judicial independence is very important to the maintenance of an effective rule of law system. In fact, without judicial independence, it is virtually impossible to eradicate corruption and other forms of impunity. It is no wonder that in African countries, which do not have judiciaries that are independent of the executive branch of government, government impunity, including corruption, are pervasive. Such an institutional environment is not conducive to the effective protection of children — those who abuse and exploit children can escape justice by paying bribes to those whose job it is to enforce the laws.

4. Elements of the rule of law and child protection in Africa: Openness and transparency

In order to improve the institutional environment for the protection of the rights of children, three aspects of openness and transparency are important. First, it is critical that the process through which the constitution is designed and adopted is transparent and open so that the participation of all of each country’s subcultures can be maximized. Second, law-making in the post-constitutional period must be open and transparent, so that those who choose not to participate in the process are aware of how laws are made and why some laws are chosen instead of others. Finally, it is important to note that the design and implementation of public policies are important elements in the fight against behaviors such as corruption that are major contributors to child sexual abuse and exploitation.⁷²⁰

718. *Id.*

719. Mbaku, *supra* note 632, at 1010.

720. In addition to the fact that corruption, especially of the grand type, deprives the government of revenues that can be devoted to programs that lift children (e.g., education) and families (e.g., job training) out of poverty and minimize their vulnerability to abuse and

Making certain that government business is conducted in an open and transparent manner⁷²¹ can significantly reduce corruption and other forms of political opportunism⁷²² that are detrimental to the protection of children. As Gerring and Thacker argue, “[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption. Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).”⁷²³

African countries interested in effectively eradicating child abuse and

exploitation, it can also negatively affect the ability of state custodians (i.e., civil servants and political elites) to enforce the laws, as well as deprive them of resources for enforcing the laws. As occurred recently in South Africa, private business interests can capture the state through corruptly enriching civil servants and politicians. Once the state is captured these private interests would have significant impact on how laws are made and which laws are chosen. Child traffickers, thus, can actually capture the state and place themselves in a position to exploit and abuse children without fear of prosecution. *See generally* 1 CHILD ABUSE AND NEGLECT WORLDWIDE UNDERSTANDING, DEFINING, AND MEASURING CHILD MALTREATMENT (Jon R. Conte ed., 2014) (arguing, inter alia, that corruption deprives many countries of resources that could be used to fight child abuse and exploitation); Robyn Dixon, *In South Africa, Even the Schoolchildren Pay Bribes*, L.A. TIMES, Sept. 15, 2015, <http://www.latimes.com/world/africa/la-fg-south-africa-corruption-20150930-story.html>; Africa Independent Television, *Corruption in Education: Abuse of Students by Teachers/Lecturers Must Stop—Transparency International*, http://www.aitonline.tv/post-corruption_in_education_abuse_of_students_by_teachers_lecturers_must_stop_transparency_international (last visited on Feb. 7, 2018); Sahara Reporters, *Africa: Child Abuse and Persecution of Children*, Nov. 18, 2008, <http://saharareporters.com/2008/11/18/africa-child-abuse-and-persecution-children>.

721. This includes, but is not limited to, making certain that government-generated information, particularly that concerning how the government functions, is made available to the people and done so in a relatively accessible manner. Although placing government information on Internet websites may appear to be an effective way for the government to maintain openness and transparency, this method may not be effective in a country where most citizens do not have access to the Internet. Hence, the adoption of a given technology to improve openness and transparency in government communications must be context-specific. That is, the ability of the population to fully and effectively use the technology should be considered before adoption. Each African country must also consider the problem of language diversity. In what language will the information be presented to the public? Throughout the continent, most countries have adopted the language of their former colonizers as official languages — French, English, Portuguese, Spanish. Unfortunately, most citizens are not literate in these languages. As a consequence, for the purpose of openness and transparency, the government should provide information in languages that are accessible to the majority of the people.

722. For example, capriciousness and arbitrariness in the enforcement of the laws.

723. John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295, 316 (2004).

exploitation must begin by minimizing corruption from their political economies. An important way to do this is to ensure that there is openness and transparency in government communication. A governing process that is pervaded by corruption is not conducive to the effective protection of the rights of children. It is also important to note that openness and transparency are important and critical elements of a trustworthy governmental regime. Where the government operates in an open and transparent manner, citizens are more likely to trust and support such a government, significantly enhancing the ability of the government to develop and implement policies protecting the rights of children. As many scholars argue,⁷²⁴ the benefits of openness and transparency by, for example, a government agency, include “increased public support, increased understanding by the public of agency actions, increased trust, increased compliance with agency rules and regulations, an increased ability for the agency to accomplish its [sic] purpose and a stronger democracy.”⁷²⁵

In Africa’s fight against child abuse and exploitation, then, openness and transparency in government communication are very important. In addition to the fact that openness and transparency significantly increase and improve the accountability of the government to the constitution and to the people, and hence, minimize the various forms of impunity, including corruption, openness and transparency also improve the participation of citizens in governance, a process that enhances the government’s ability to fight corruption and by implication, child abuse and exploitation.

5. Elements of the rule of law and child protection in Africa: The protection of human rights

Many of the Africans who gave their “last full measure of devotion”⁷²⁶ to the struggle for independence did so believing that the post-independence political and economic dispensation would be constructed on a foundation of respect for African peoples’ fundamental and human rights. Specifically, Africa’s freedom fighters believed that immediate post-independence governments would engage all of each new country’s relevant stakeholder groups⁷²⁷ in democratic (i.e., bottom-up, participatory, inclusive, and people-

724. See, e.g., Fairbanks, Plowman and Rawlins, *infra* note 725.

725. Jenille Fairbanks, Kenneth D. Plowman & Brad L. Rawlins, *Transparency in Government Communications*, 7 J. PUB. AFF. 23, 33 (2007).

726. This is a quote from Abraham Lincoln (President of the United States of America), *The Gettysburg Address*, Gettysburg, Pennsylvania (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (last visited on Feb. 10, 2018).

727. These groups would include all of each country’s subcultures.

driven) constitution-making to produce institutional arrangements capable of effectively constraining the state,⁷²⁸ protecting the fundamental and human rights of citizens, promoting and enhancing peaceful coexistence, and promoting entrepreneurship and wealth creation, especially among historically marginalized and deprived groups (e.g., women, religious and ethnic minorities, the urban poor, and rural inhabitants).⁷²⁹

Most students of human rights believe that the modern movement to protect human rights, especially in the West, began with the signing of the Magna Carta in 1215 by King John of England to recognize the rights of some of his subjects. As expressed in Chapter 39 of the Magna Carta, “No free man shall be seized or imprisoned, or stripped of his rights and possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to so, except by the lawful judgment of his equals or by the law of the land.”⁷³⁰

According to the A.B.A., the Magna Carta “planted the seed for the concept of *due process* as it developed first in England, and then in the United States.”⁷³¹ The A.B.A. states further that “[d]ue process means that everyone is entitled to a fair and impartial hearing to determine their legal rights.”⁷³² Countries, such as the United States, whose legal systems are based on the Anglo-American legal and cultural tradition, consider the Magna Carta as a very important source of many elements of their legal systems, particularly those that deal with individual rights. Nevertheless, many of the countries that came into being after World War II, consider the Universal Declaration of Human Rights,⁷³³ which was adopted by the United Nations General Assembly on December 10, 1948,⁷³⁴ as the foundation for

728. These constraints were expected to prevent state custodians (i.e., civil servants and political elites) from acting with impunity and tyrannizing citizens, as well as engaging in corruption and other forms of opportunism to enrich themselves at the expense of the people. The new post-independence institutional arrangements were also expected to force civil servants and politicians to be accountable to the constitution and the people. *See generally* John Mukum Mbaku, *What Should Africans Expect from the Their Constitutions?*, 41 *DENV. J. INT'L L. & POL'Y* 149 (2013).

729. *See, e.g.*, Mbaku, *supra* note 632, at 959.

730. THE MAGNA CARTA, History.com editors, *The Magna Carta*, HISTORY.COM, <http://www.history.com/topics/british-history/magna-carta> (last visited on Feb. 11, 2018).

731. A.B.A. Division for Public Education, *supra* note 634 (emphasis in original).

732. *Id.*

733. UDHR, *supra* note 668.

734. The bilingual document (French and English) was adopted by the UN General Assembly through UN Resolution A/RES/217(III)[A] and official translations were provided in Chinese, Russian, and Spanish. The UDHR was not a treaty. However, it was adopted to provide working definitions for “fundamental freedoms” and “human rights,” which appear in the United Nations Charter. The latter is legally binding on all UN members. As a

the modern global movement to protect human rights.⁷³⁵

Most countries in Africa have signed and ratified conventions and covenants dealing with international human rights.⁷³⁶ In addition to being States Parties to many international human rights covenants and conventions, many African countries have also inserted within their national constitutions clauses that are supposed to guarantee and protect human rights.⁷³⁷ Despite the acknowledgment by many African countries of the importance of protecting fundamental human rights and freedoms, these rights are routinely violated by both state and non-state actors throughout the continent. Such violations of human rights do not augur well for the protection of the rights of children.⁷³⁸

But, why have African countries been unable or unwilling to protect the fundamental human rights and freedoms of their citizens? Part of the reason for this failure to protect the rights of citizens is that most of these countries

consequence, the UDHR is a fundamental constitutive document of the United Nations. Today, many legal scholars, including especially international lawyers, consider the UDHR part of customary international law. According to the United Nations, the UDHR is “generally agreed to be the foundation of international human rights.” In addition, continues the UN, the UDHR “has inspired a rich body of legally binding international human rights treaties” and “represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights.” See UN, *The Foundation of International Human Rights Law*, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited on Feb. 12, 2018).

735. M. GLEN JOHNSON AND JANUSZ SYMONIDES, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION, 1948–98* (1998) (providing a historical overview of the creation and implementation of the Universal Declaration of Human Rights).

736. Some of these include the International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Prevention and Punishment of the Crime of Genocide (1948); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949); International Covenant on the Elimination of Racial Discrimination (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979). See P. R. GHANDHI, *BLACKSTONE’S INTERNATIONAL HUMAN RIGHTS DOCUMENTS* (Allison Bisset et al., 10th ed. 2016).

737. The Constitution of Kenya, 2010 specifically recognizes human rights and the need to protect them and establishes the Kenya National Human Rights and Equality Commission. See CONSTITUTION art. 26 (2010) (Kenya). The Ghanaian constitution also recognizes “fundamental human rights and freedoms” — Chapter 5 is titled “Fundamental Human Rights and Freedoms.” Chapter 18 establishes a Commission on Human Rights and Administrative Justice. See CONSTITUTION OF THE REPUBLIC OF GHANA, *supra* note 613.

738. See, e.g., *The Current Human Rights Situation In Africa: Hearing Before the Subcomm. on Africa of the Comm. on Int’l Relations, Before the H. of Representatives*, 104th Cong. 2d Session (1996), http://repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702_1.pdf?sequence=1 (last visited Feb. 12, 2018).

do not have governing processes undergirded by the rule of law. For example, where the law is not considered supreme by citizens, those in positions of power are likely to consider themselves above the law and engage in behaviors that are detrimental to the protection of human rights. In addition to the fact that state custodians (i.e., civil servants and politicians) may engage in behaviors (e.g., corruption) that directly infringe on the human rights of citizens, they may also refuse to enforce laws that are designed to protect these rights. Children are especially vulnerable in a country with such a weak and dysfunctional governing process — that is, one that is not undergirded by the rule of law. Hence, as part of the effort to improve the protection of children, the first line of business is for each African country to provide itself with a governing process undergirded by the rule of law.⁷³⁹

V. PROTECTING THE RIGHTS OF CHILDREN IN AFRICA: TRADITIONAL INSTITUTIONS

A. Introduction

Many studies have concluded that African traditional institutions are very important to the socio-cultural, economic and political lives of Africans.⁷⁴⁰ At the same time, scholars have also argued that the modern State in Africa, if it is to serve the people well, must be “grounded on indigenous social values and contexts, while adapting to changing realities.”⁷⁴¹ The construction of such a governing process, one that is grounded in the values of each country’s various subcultures, will require, at the minimum, “aligning and harmonizing traditional governance institutions with the modern State.”⁷⁴²

Students of traditional African institutions⁷⁴³ have argued that they have

739. As discussed earlier in this paper, such a governing process will, at the minimum, be characterized by (1) separation of powers with effective checks and balances — some of the latter would include *an independent judiciary*; *a robust civil society*, capable of checking on the exercise of government power; supremacy of law; openness and transparency in government communication; and voluntary acceptance of and respect for the law.

740. United Nations Economic Commission for Africa (“UNECA”), *Relevance of African Traditional Institutions of Governance*, http://repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702_I.pdf?sequence=1 (last visited on Feb. 12, 2018).

741. *Id.* para. iii.

742. *Id.*

743. See generally GEORGE B. N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* (2d ed. 2006) (arguing, inter alia, that traditional institutions are important to political and economic

at the very least three broad governance functions. First, they can advise the modern State in its efforts to serve the people, protect their rights, and provide them with public goods and services. Second, traditional institutions can serve in a developmental role, helping the government carry out its development plans. Third, traditional institutions can play a very important role in the resolution of conflicts, including those arising from trade and voluntary exchange.⁷⁴⁴ Scholars of African governance have argued that the critical issue for effective governance and the protection of the rights of the people in Africa is how to integrate the two systems — the modern and traditional — and produce a governing process that can deliver justice and enhance human development in each country in the continent.⁷⁴⁵ Finally, traditional institutions can provide the moral structure for raising children and helping them develop into responsible adults.

Despite the fact that traditional institutions have the potential to contribute significantly to governance in Africa, 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. Thus, for any integration of traditional and modern systems to provide each African country with an effective governing process, framers must take cognizance of the fact that any resulting laws and institutions must be those that reflect and align with provisions of international human rights instruments. Implied in this argument is that 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, must be prohibited by law.⁷⁴⁶ In fact, the Convention on the Elimination of All Forms of Discrimination Against Women⁷⁴⁷ as well as the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa,⁷⁴⁸ have called for

governance in Africa).

744. UNECA, *supra* note 740, para. iii. *See also* TRADITIONAL INSTITUTIONS IN CONTEMPORARY AFRICAN GOVERNANCE (Kidane Mengisteab & Gerard Hagg eds., 2017); INDIGENOUS CONFLICT MANAGEMENT STRATEGIES IN WEST AFRICA: BEYOND RIGHT AND WRONG (Akanmu G. Adebayo et al. eds., 2015).

745. UNECA, *supra* note 740, para. iii.

746. For example, the Universal Declaration of Human Rights.

747. According to Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women, States Parties are directed to “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” G.A. Res. 34/180, at art. 2(f), Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

748. Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, Afr. Comm'n on Human and People's Rights (African

“customary and traditional practices that violate human rights to be transformed to remove discriminatory elements.”

B. Customs and Traditions and the Exploitation and Abuse of Children in Africa

Many scholars have argued that in many countries, it is often the case that “traditional values are often deployed as an excuse to undermine human rights.”⁷⁴⁹ Human Rights Watch, the nongovernmental organization that promotes the protection of human rights throughout the world, has determined that “discriminatory elements of traditions and customs have impeded, rather than enhanced, people’s social, political, civil, cultural, and economic rights.”⁷⁵⁰ Throughout many countries in Africa, the customary law and traditions of many subcultures, for example, do not allow women to own or inherit real property — in addition to the fact that these customs and traditions discriminate against girls, they have forced many widows into poverty, a situation that places their children, especially girls, at the mercy of traffickers and other exploiters.⁷⁵¹

Female genital mutilation (FGM), forced child marriage, child abduction for various purposes, including service as prostitutes, discrimination against girls in the provision of food and education, and the traditional myth that having sex with virgin children⁷⁵² can cure and cleanse

Union) [hereinafter as “Maputo Protocol”].

749. 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>.

750. *Id.* See Maputo Protocol, *supra* note 748, at art. 2 ¶ 2.

751. See generally MANISULI SSENIONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (2d ed. 2016) (discussing, inter alia, the prevalence in African countries of certain harmful traditions, customs and cultural practices); LINDA OSARENREN, VIOLENCE AGAINST GIRLS WITHIN THE HOME IN AFRICA: THE SECOND INTERNATIONAL POLICY CONFERENCE ON THE AFRICAN CHILD: VIOLENCE AGAINST GIRLS IN AFRICA (2006) (examining, inter alia, various traditional acts, including female genital mutilation, forced child marriage, child abduction, and discriminatory practices in the provision of food and education, that discriminate against and exploit and abuse children).

752. This is called the “virgin myth” — despite the wide availability of information that there is no scientific justification for this belief, the myth remains. The so-called virgin cure has contributed significantly to the rape of thousands of infants and children in Africa. See, e.g., HIV/AIDS IN SOUTH AFRICA 25 YEARS ON: PSYCHOSOCIAL PERSPECTIVES (Poul Rohleder et al. eds., 2009) (exploring, inter alia, the impact of the virgin cure on child rape in South Africa); GROWING A SOUL FOR SOCIAL CHANGE: BUILDING THE KNOWLEDGE BASE FOR SOCIAL JUSTICE (Tonya Huber-Warring ed., 2008) (discussing, inter alia, belief by many cultures in Africa in the virgin-AIDS cure and how it has contributed to the abuse of children in the continent).

a man of various ills, including HIV, are only a few of the traditional practices and customs that contribute significantly to the abuse and exploitation of children.⁷⁵³

Throughout Africa, many children and infants are scarred for life by harmful practices that are condoned by the children's parents, relatives, religious and community leaders, and other important people in the children's lives.⁷⁵⁴ Any practice that violates the rights of children, regardless of its source, must be considered a harmful practice. Allowing these harmful practices to remain legal within a country contributes significantly to the abuse and exploitation of children. Violence against children, no matter the type and no matter its source, must never be justified. Yet, throughout Africa, extreme violence, both physical and mental, against children continues to be justified on "spurious grounds of tradition, culture or religion."⁷⁵⁵ Below, this article takes a closer look at the concept of "harmful practices" that violate the rights of children based on tradition, culture, superstition or religion. Then, this article examines a few of them.

1. Harmful practices that affect children in Africa

In 1954, the UN General Assembly brought the world's attention to what it referred to as "customs, ancient laws and practices relating to marriage and family which, it argued, were inconsistent with the guiding principles provided in the UDHR."⁷⁵⁶ This resolution called for the abolition of many practices that are harmful to children, such as the practice of bride price, child marriage, and the betrothal of young girls before they attain the age of puberty.⁷⁵⁷ Since 1948, when the UN General Assembly adopted the UDHR, the multilateral organization's focus has been on finding ways to outlaw "harmful traditional practices affecting women and girls."⁷⁵⁸ While some child activists have argued in favor of dropping the word "traditional" because of the belief that its continued use may offend those communities that place value on their traditions, others have suggested that the concept of

753. See OSARENREN, *supra* note 751; FEMALE GENITAL MUTILATION (Comfort Momoh ed., 2005) (examining, inter alia, a traditional African institution that is considered to inflict lifelong harm and even death on thousands of African girls each year).

754. See Int'l NGO Council on Violence Against Children, *Violating Children's Rights: Harmful Practices based on Tradition, Culture, Religion or Superstition*, Oct. 2012.

755. *Id.*

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

757. *Id.*

758. Int'l NGO Council, *supra* note 754.

“harmful traditional practices” should be extended to include “harmful practices based on tradition, culture, religion or superstition.”⁷⁵⁹ This article stays with the latter expression.

What characterizes and defines the harmful practices examined below is that these practices continue to be acceptable and viewed favorably in many African communities due to one or more of the following: (1) tradition; (2) culture; (3) religion; and (4) superstition.⁷⁶⁰ It is important to note, however, that “harmful practices based on tradition, culture, religion or superstition,” as used in this article, do not necessarily cover all the violations of children’s rights. Some of these excluded practices, which are equally harmful to the lives of children, include the denial of education to girls, discrimination against children with disabilities, including their exclusion from participating in the lives of their communities, poor and discriminatory treatment of minorities, particularly religious and ethnic minorities, and child imprisonment.⁷⁶¹

Many international human rights instruments have made explicit references to practices that are harmful to children. For example, Article 24(3) of the Convention on the Rights of the Child (“CRC”)⁷⁶² states as follows: “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”⁷⁶³ According to Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),⁷⁶⁴ “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”⁷⁶⁵ In addition, Article 16(2) of CEDAW states that “The 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

759. *Id.*

760. *Id.*

761. *Id.*

762. G.A. Res. 44/25, Convention on the Rights of the Child, 44 U.N. GAOR Supp. (No. 49) at 167 (1989) [hereinafter UNCRC].

763. *Id.* at art. 24(3).

764. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, 34 U.N. GAOR Supp. (No. 46) at 193 [hereinafter CEDAW].

765. *Id.* at art. 2(f).

registry compulsory.”⁷⁶⁶

The African Charter on the Rights and Welfare of the Child,⁷⁶⁷ as well as The Protocol to the African Charter on Human and Peoples’ Rights, on the Rights of Women in Africa,⁷⁶⁸ also contain provisions that address harmful practices based on tradition, culture, religion or superstition.

Before we take a look at some of the harmful practices against African children, it is necessary to note that “[h]armful practices based on tradition, culture, religion or superstition are often perpetrated on very young children or infants who lack the capacity to consent or to refuse consent for them.”⁷⁶⁹ Within the family, parents should have the right to grant consent to interventions on behalf of their children in such areas or issues as healthcare. Nevertheless, parental rights over children must go hand-in-hand with “parental responsibilities” with the “best interests of the child” as a constraint and the foundation of the exercise of those parental rights.⁷⁷⁰ There is no parental right to subject a child to harmful practices. The most important human rights instruments guarantee and uphold every person’s right to freedom of thought, conscience, and religion.⁷⁷¹

Although parents may assist their children as they exercise their right to freedom of thought, conscience and religion, they must only do so “in a manner consistent with the evolving capacities of the child.”⁷⁷² Parents should not use their adult religious beliefs and practices to justify subjecting children to harmful practices, which violate their children’s rights. Harmful practices that involve direct physical violence on children may demand that the perpetrators, even if they are the child’s parents, be punished. Children’s rights activists argue that some harmful practices should be criminalized or prohibited. One such practice is child branding, which may or may not be

766. *Id.* at art. 16(2).

767. *African Charter on the Rights and Welfare of the Child*, Aug. 1, 2016, (African Union) [hereinafter ACRWC].

768. Maputo Protocol, *supra* note 748.

769. Int’l NGO Council, *supra* note 754.

770. *Id.*

771. For example, Article 18(1) of the International Covenant on Civil and Political Rights, 1966 states as follows: “Everyone shall have the right to freedom of thought, conscience and religion.” *See International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171. It was adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of December 16, 1966, and entered into force on March 23, 1976, in accordance with Article 49. In addition, the Convention on the Rights of the Child (“UNCRC”) states, at Article 14(1) that “States Parties shall respect the right of the child to freedom of thought, conscience and religion.” *See UNCRC*, *supra* note 762.

772. *Id.* at art. 14(2).

followed by additional violence.⁷⁷³ For example, the branding of children, either as witches or as persons who are possessed with evil spirits, should be specifically identified and criminalized or banned because the practice is extremely harmful to children. Branded children may not only be killed either in the process of branding or by members of the community who want to get rid of her supposed witchcraft, but also ostracized and denied the opportunity to participate in the lives of their communities.⁷⁷⁴

The best interests of the child presuppose that no form of violence against a child (e.g., corporal punishment, FGM, forced marriage) can be justified as being in the best interest of the child. Quite often, harmful practices, such as FGM, early marriage, and servitude service — usually by girls — in some traditional religious shrines, are justified and defended on the ground that they are necessary for the protection of the victim or her family and community. In the case where parents are perpetrators of the violence against children, “[f]ormal interventions, including prosecution of parents or removal of child victims or perpetrators should only be pursued when assessed as necessary to protect a child from significant harm and to be in the best interests of the child.”⁷⁷⁵ The CRC provides detailed instructions or guidance to States Parties on how to implement, “in the best interests of the child,” the law prohibiting violent forms of punishment. This advice, of course, is also applicable equally to the enforcement of the prohibition of other harmful practices against children.⁷⁷⁶ In each African country, the law must be seen and recognized as a powerful tool to change social beliefs, especially those that are detrimental to the well-being of children. The law should also serve as a tool to prevent crime, including especially those perpetrated against children.⁷⁷⁷

2. Harmful practices affecting children based on tradition, culture, religion or superstition in Africa

Acid attacks: Although acid violence has traditionally been associated primarily with South Asian cultures, it has, in recent years, become an important weapon among many cultures in Africa. Acid attacks against women and girls have been reported in Uganda, Ethiopia, Liberia, Zanzibar,

773. Int'l NGO Council, *supra* note 754.

774. *Id.*

775. *Id.*

776. *Id.* See also UNCRC, *supra* note 762, at *General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, CRC/C/GC/8, (Mar. 2, 2007).

777. Int'l NGO Council, *supra* note 754.

and South Africa.⁷⁷⁸ Perpetrators of acid violence usually do not intend to kill the victim — their main objective is to punish the victim by disfiguring them and inflicting mental and physical pain on them. The disfigured victim, if she survives the attack, is likely to be ostracized by her community and forced to live in isolation. Although the practice is supposed to force girls and women to desist from challenging traditional norms, its use is no longer limited to the enforcement of traditional norms. In Uganda and South Africa, for example, acid attacks have been carried out by jealous co-wives to make their competitors less attractive and hence, less desirable by their husband.⁷⁷⁹

Birth superstitions: Throughout the continent, superstitions among various subcultures about births have a significant impact on children. In addition to the fact that, depending on the circumstances of their birth, some children may be abandoned or killed at birth, they may also be accused of witchcraft and subsequently ostracized by their parents and community.⁷⁸⁰ The following have been identified as births that invoke superstition in one or more subcultures in Africa: (1) multiple births; (2) birth order and sex of the child; (3) premature births; (4) ‘fast ‘ or ‘quick’ births; and (5) unusual birth position of the infant during labor. For example, some groups in Madagascar, have believed in lucky and unlucky days of birth, and in previous times if a child was born on what they considered to be an unlucky day, that child would be killed.⁷⁸¹

Many Nigerian cultures have a long history of killing twin-babies. In the mid-1800s, Scottish nurse and Christian missionary, Mary Mitchell Slessor came to Nigeria to spread Christianity and fight the practice of

778. See, e.g., 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>. Evelyn Lirri, *Uganda Acid Attack Victim Fights Back*, IOL (Jan. 15, 2016), <https://www.iol.co.za/news/africa/uganda-acid-attack-victim-fights-back-1975352>; Amber Henshaw, *Acid Attack on Woman Shocks Ethiopia*, BBC NEWS, (Mar. 28, 2007), <http://news.bbc.co.uk/2/hi/africa/6498641.stm>; Bonnie Allen, *Acid Attacks on the Rise in Uganda*, PRI'S THE WORLD (July 20, 2011), <https://www.pri.org/stories/2011-07-20/acid-attacks-rise-uganda>; Jon Sharman, *Ethiopian Woman's Mouth "Melted Shut in Horrific Acid Attack by Husband"*, THE INDEPENDENT (UK) (Sept. 1, 2017), <http://www.independent.co.uk/news/world/africa/ethiopia-woman-acid-attack-mouth-melted-shut-husband-atsedenigussiem-tigray-area-a7924286.html>.

779. See Fallon, *supra* note 778.

780. Int'l NGO Council, *supra* note 754.

781. See, e.g., PETER TYSON, *MADAGASCAR—THE EIGHT CONTINENT: LIFE, DEATH & DISCOVERY IN A LOST WORLD* 8 (2000) (examining, inter alia, Madagascar's superstitions about children born on unlucky days); see also Kiki King, *Bad Luck Babies: The Twins Abandoned in Madagascar Because of Black Magic Superstitions*, DAILY MIRROR (UK) (May 3, 2014), <https://www.mirror.co.uk/news/real-life-stories/bad-luck-babies-twins-abandoned-3493225>.

infanticide of twins among the Ibibio people of southeastern Nigeria.⁷⁸² Although Slessor, was quite successful, twin infanticide still remains a problem among some subcultures in Nigeria. For example, people of the Bassa Komo ethnocultural group outside the country's capital, Abuja, still kill babies considered to be evil. The group believes that twin babies are possessed of evil spirits and that they would bring misfortune to the community and hence, must be killed.⁷⁸³ The killing of twin babies is not limited to Nigeria. The killing of twin babies has also been reported in other countries around the continent, including Kenya.⁷⁸⁴

Blood-letting: Blood-letting, which many years ago, was supposed to cure many diseases, including such things as elephantiasis, rheumatism, and meningitis, as well as high fevers and headaches, has been disproven by advances in science and medicine and hence, is no longer practiced in many Western societies. Nevertheless, it is still quite popular in many cultures in some parts of Africa.⁷⁸⁵ For example, blood-letting practices, called "wagemt" and "mognbagegn," are quite common in the highlands of the Amhara and Tigray regions of Ethiopia. According to Dawit Assefa, et al.,⁷⁸⁶ blood-letting in these regions of Ethiopia is prescribed for "the treatment of encephalitis, rheumatism, high fever and headache (usually seen during epidemics of meningitis)."⁷⁸⁷ Blood-letting can cause severe bleeding, which

782. For more on Mary Slessor and her work in Nigeria, *see generally* ELIZABETH ROBERTSON, *MARY SLESSOR: THE BAREFOOT MISSIONARY* (2017); W. P. LIVINGSTONE, *THE WHITE QUEEN OF OKOYONG: A TRUE STORY OF ADVENTURE, HEROISM AND FAITH* (2009); JANET BENGE AND GEOFF BENGE, *MARY SLESSOR: FORWARD INTO CALABAR* (1999); JEANETTE HARDAGE, *MARY SLESSOR: EVERYBODY'S MOTHER: THE ERA AND IMPACT OF A VICTORIAN MISSIONARY* (2010).

783. *See, e.g.*, Chika Oduah, *Campaign Tackles Baby-Killing Ritual in Nigeria*, VOICE OF AMERICA NEWS (Oct. 4, 2017), <https://www.voanews.com/a/campaign-tackles-baby-killing-practice-nigeria/4055031.html>; A. A. Asindi, et al., *Brutality to Twins in South-eastern Nigeria: What is the Existing Situation?*, 13 WEST AFRI. J. MED. 148 (1993); Andrés Marroquín and Colleen Haight, *Twin-killing in Some Traditional Societies: An Economic Perspective*, 19 J. BIOECON. 261 (2017).

784. *Twins Both Curse and Blessing in African Societies*, THE STANDARD NEWSPAPERS (NAIROBI) (July 5, 2017), <https://www.standardmedia.co.ke/article/2001246099/twins-both-curse-and-blessing-in-african-societies>.

785. *See, e.g.*, D. B. Hrdy, *Cultural Practices Contributing to the Transmission of Human Immunodeficiency Virus in Africa*, 9 REV. INFECT. DIS. 1109 (1987) (arguing, inter alia, that "medicinal bloodletting" is a major contributor to HIV infections in Africa).

786. Assefa, et al., *infra* note 787.

787. Dawit Assefa, et al., *Harmful Traditional Practices*, Ethiopia Public Health Training Initiative, Awassa College of Health Sciences, https://www.cartercenter.org/resources/pdfs/health/ephti/library/modules/degree/degree/mod_htp_final.pdf (last visited on Feb. 15, 2018). *See especially* 34–35. *See also* R. Hodes, *Cross-cultural Medicine and Diverse Health Beliefs: Ethiopians Abroad*, 166 WEST. J. MED. 29 (1997). *See also* H. Tandeter, M.

can lead to a child's death. It can also result in anemia, various types of infections, including HIV and various sexually-transmitted infections.⁷⁸⁸

Breast flattening: Breast flattening, which is also known in various communities in Africa as breast ironing, is a common practice in West and Central Africa. The practice is designed to prevent girls from developing the physical characteristics — primarily breasts, that are visible even through clothing to men — that might, according to the cultures that engage in this practice, make the girls attractive to sexual predators. Through this process, the communities that practice breast ironing hope to “save” girls from early sexual activity and possible pregnancy. Usually, the breasts of the young girl are “pounded, pressed, or massaged with an object that has often been heated.”⁷⁸⁹

Purveyors of this practice, as is the case with other harmful practices to children based on tradition, religion, customs, and superstition, believe that they are undertaking these activities in the best interests of the child. Unfortunately, the results, which include, but are not limited to, extreme pain, skin and tissue damage, burns, irritation and infection, scarring, and depression, can have severe long-term effects on the child. This practice is very common in many parts of Africa, including Cameroon.⁷⁹⁰

Corporal punishment: Studies show that corporal punishment is one of the most popular forms of violence perpetuated against children throughout Africa.⁷⁹¹ It has been identified by the Committee on the Rights of Children as a major harmful practice that violates the rights of children.⁷⁹² A recent study conducted by UNICEF in 30 countries determined that as much as 75 percent of children had experienced or had been subjected to some form of “physical punishment and/or psychological aggression in their homes.”⁷⁹³

Grynbaum and J. Borkan, *A Qualitative Study on Cultural Bloodletting Among Ethiopians Immigrants*, 3 ISR. MED. ASSOC. J. 937 (2001).

788. Int'l NGO Council, *supra* note 754. *See also* Assefa, et al., *supra* note 787.

789. Int'l NGO Council, *supra* note 754.

790. *See, e.g.*, Gildas Paré and Matthieu Bidan, *The Victims of Cameroon's Horrific Breast Ironing Tradition*, VICE (Aug. 19, 2015), https://www.vice.com/en_us/article/4wbqdj/cameroon-tradition-flattening-chests-876; Stav Ziv, *Showing Love Through Breast Ironing: Why Some Daughters Endure this Painful Practice to Appease their Mothers*, NEWSWEEK (U.S. EDITION) (Aug. 3, 2017), <http://www.newsweek.com/2017/08/11/breast-ironing-painful-girls-going-through-puberty-cameroon-mothers-often-do-645388.html>.

791. Lebogang Seale, *Severe Corporal Punishment Still Carried Out at Many SA Schools*, IOL NEWS, Oct. 7, 2017, <https://www.iol.co.za/news/opinion/severe-corporal-punishment-still-carried-out-at-many-sa-schools-11514666>.

792. UNICEF (United Nations Children's Fund), *Child Disciplinary Practices at Home: Evidence from a Range of Low- and Middle-Income Countries*, 2010, https://www.unicef.org/protection/Child_Disciplinary_Practices_at_Home.pdf.

793. Int'l NGO Council, *supra* note 754. *See also* UNICEF, *supra* note 792.

The Committee on the Rights of the Child defines corporal punishment as “any punishment in which physical force is used and intended to cause some degree of pain and discomfort, however light.”⁷⁹⁴ In carrying out this type of punishment, children, regardless of their age, may be subjected to spanking (usually with various objects, including belts, wooden spoons, tree branches, shoes, kicking, shaking, scratching, burning, biting, scalding with hot liquids, and forcing children to drink hot liquids).⁷⁹⁵ The Committee on the Rights of the Child considers corporal punishment to be demeaning and degrading and generally injurious to the health of the child.⁷⁹⁶ Every year, corporal punishment results in the deaths of thousands of children in Africa. Others who are not killed are permanently disabled.⁷⁹⁷

Cosmetic mutilation: Among many ethnocultural groups in Africa, children are routinely mutilated through processes that are said to enhance their beauty. For example, various types of heavy metal rings may be used to try to stretch and elongate a girl’s neck to make her more beautiful and attractive to potential husbands. This practice is relatively common in southern Africa.⁷⁹⁸ In many parts of Ethiopia, various plates are used to stretch girls’ lips in order to highlight or enhance their beauty. Such practices can significantly and negatively impact the health of the child — infections and malnutrition are common problems that are suffered by girls who are forced to wear lip plates.⁷⁹⁹

Cursing: Cursing rituals in many countries in Africa have contributed significantly to the trafficking and sexual exploitation of children. Child victims are usually required to “take oaths of allegiance” to traditional religious deities and spirits.⁸⁰⁰ Within such belief systems, any child who

794. 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*, CRC/C/GC/8, (Mar. 2, 2007) <http://www.refworld.org/docid/460bc7772.html>.

795. Int’l NGO Council, *supra* note 754.

796. Comm. on the Rights of the Child, *supra* note 794.

797. See, e.g., Philipp Sandner, *Corporal Punishment: How Parents Harm Children with Violence*, DW NEWS, (Nov. 20, 2017), <https://www.dw.com/en/corporal-punishment-how-parents-harm-children-with-violence/a-41457033>; *South Africa Pupil Dies After ‘Teacher Beating,’* BBC NEWS (Apr. 2, 2014), <http://www.bbc.com/news/world-africa-26823432>; World Health Organization (WHO) & Global Initiative to End All Corporal Punishment of Children, *Prohibiting and Eliminating Corporal Punishment: A Key Health Issue in Addressing Violence Against Children*, May 2015, <http://www.who.int/topics/violence/global-initiative-end-all-corporal-punishment-children.pdf>; THEA BROWN, DANIELLE TYSON AND PAULA FERNANDEZ ARIAS, *WHEN PARENTS KILL CHILDREN: UNDERSTANDING FILICIDE* (2017) (presenting a series of essays that examines filicide globally and nationally).

798. Int’l NGO Council, *supra* note 754.

799. *Id.*

800. *Id.*

attempts to or actually breaches the terms of the oath, is subjected to horrific punishment by the deity. Such punishment can include death or various forms of deformities. Through this process, communities and parents can force their children into prostitution, servitude labor, and other harmful practices because the children are afraid of retribution from the deity should they disobey or breach the oath that they had taken.

Dowry and bribe price: A dowry is paid by the bride's family in order to secure her a husband. On the other hand, the groom's family pays the bride price in order to secure him a wife. The bride price is the system that is practiced most often in the African countries. In many African countries (e.g., Nigeria and Cameroon), after the bride price is paid, the husband often treats his bride (wife) as property. A woman in this situation is often beaten, mistreated, especially if she cannot produce children or has produced only female children. In many communities in Africa, the bride price is often used by many poor families as a source of income — impoverished families quite often sell their young daughters to rich old men in order to generate money to meet their basic needs. In subcultures where virginity, as well as FGM, are highly valued in a girl, parents may subject their children to virginity testing⁸⁰¹ and FGM in order for the girl to command a high bride price.⁸⁰²

Female genital mutilation (FGM): International human rights activists consider FGM as the most “widely recognized and addressed of [the] harmful practices”⁸⁰³ against children. According to the World Health Organization (WHO), FGM comprises “all procedures undertaken that involve the partial or full removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.”⁸⁰⁴

FGM is generally classified into four categories, namely, (1) clitoridectomy; (2) excision; (3) infibulation; and (4) other.⁸⁰⁵ Throughout

801. Such testing is usually carried out by so-called traditional nurses and midwives with bare hands and without the benefit of sterilized equipment. As a consequence, many of the girl children tested are susceptible to various types of infections, some of which can be life-threatening. See, e.g., Antony Kaminju, *South Africa's Virginity Testing*, BBC NEWS (May 22, 2017), <http://news.bbc.co.uk/2/hi/africa/6677745.stm>; Bathabile Dlamini, *Forced Virginity-Testing is Unlawful and Offensive, and Will Not Prevent HIV-AIDS*, DAILY MAVERICK (Feb. 2, 2016), <https://www.dailymaverick.co.za/opinionista/2016-02-02-forced-virginity-testing-is-unlawful-and-offensive-and-will-not-prevent-hiv-aids/#.WoX5gWW7lBw>; Human Rights Watch, *UN: WHO Condemns 'Virginity Tests': Degrading, Discriminatory, Unscientific Procedure Should be Banned* (Dec. 1, 2014, 9:25 PM EST), <https://www.hrw.org/news/2014/12/01/un-who-condemns-virginity-tests>.

802. Int'l NGO Council, *supra* note 754.

803. *Id.*

804. World Health Organization (WHO), *Fact Sheet: Female Genital Mutilation*, (Jan. 2018), <http://www.who.int/mediacentre/factsheets/fs241/en/>.

805. Int'l NGO Council, *supra* note 754.

the world, advocates for women, as well as human rights activists, have proclaimed that FGM is a form of torture that violates a child's right to protection from torture and cruel, inhuman or degrading treatment.⁸⁰⁶ FGM is widely practiced by subcultures in Africa, Middle East, and South Asia. It has been determined that in some communities in Ethiopia, as much as 97.3% of young women have been subjected to the most severe form of FGM.⁸⁰⁷

Subcultures' reasons for engaging in this insidious practice called FGM or cutting differ from subculture to subculture. Nevertheless, throughout many subcultures in Africa, practitioners claim that the procedure would make a girl (1) cleaner and more suitable for marriage; (2) more fertile and therefore more likely to produce children; (3) more beautiful and desirable to men who come to marry her; (4) less likely to be promiscuous; (5) more likely to remain a virgin until marriage; and (6) more likely to remain faithful to her husband in marriage.⁸⁰⁸

Cognizant of the health problems associated with FGM, some countries have encouraged their health care providers to provide FGM services to women seeking such services for their daughters. The belief is that allowing trained medical doctors to perform these services would significantly reduce the risk of complications and perhaps, death. According to the study conducted by the WHO, more than 18 percent of all the girls and women subjected to FGM in countries from which data were available had the procedure performed on them by a regular health care provider and not by family members or traditional midwives.⁸⁰⁹

Despite these FGM "innovations," the practice is still considered a major threat to the lives of many girls in Africa. Specifically, FGM, even if it is performed by a trained medical practitioner, exposes the child to both short-term and long-term health problems. These include, but are not limited

806. Manfred Nowak (*Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*), UN Human Rights Council A.HRC/7/3 (Jan. 15, 2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>.

807. Too Many, *Country Profile: FGM in Ethiopia* (Oct. 2013), [https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Ethiopia/ethiopia_country_profile_v1_\(october_2013\).pdf](https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Ethiopia/ethiopia_country_profile_v1_(october_2013).pdf); M. Andualem, *Determinants of Female Genital Mutilation Practices in East Gojjam Zone, Western Amhara, Ethiopia*, 54 ETHIOP. MED. J. 109 (2016); Kidanu Gebremariam, Demeke Assefa, and Fitsum Weldegebreal, *Prevalence and Associated Factors of Female Genital Cutting Among Young Adult Females in Jigjiga District, Eastern Ethiopia: A Cross-Sectional Mixed Study*, 8 INT'L WOMENS HEALTH 357 (2016).

808. Int'l NGO Council, *supra* note 754.

809. *Id.*

to (1) increased risk of disease transmission; (2) a higher probability of the girl suffering from fistula; and (3) significantly higher probability that the girl, once pregnant, will encounter complications and difficulty during child birth, which may include hemorrhaging, shock, sepsis, and death to both the mother and child. Of course, many girls die during or shortly after the procedure has been undertaken.⁸¹⁰

Despite the fact that many subcultures in Africa, which practice FGM, argue that it is undertaken based on religious grounds, scholars have argued that none of the “holy texts of Christianity, Judaism, or Islam requires or prescribes the practice [i.e., FGM] and many scholars have spoken publicly against this belief”⁸¹¹ and have asked that the practice be criminalized and laws passed to prosecute those who engage in it. In fact, from November 22 to 23, 2006, an International Conference of Islamic Scholars on Female Genital Mutilation was held at Al-Azhar University⁸¹² in Cairo, Egypt, under the patronage of Professor Dr. Ali Gom’*a*, Egyptian Grand Mufti, and attended by the world’s most prominent representatives of Islam. The attendees condemned FGM as a practice not acceptable to or sanctioned by their religion, Islam.⁸¹³

From July 20 to 23, 1998, religious leaders and medical scholars convened a symposium on FGM as a form of violence under the auspices of the Inter-African Committee on Traditional Practices in Banjul, The Gambia.⁸¹⁴ The participants in the symposium declared that FGM’s origins can neither be found in Islam nor in Christianity. In addition, they also declared that both Christian and Islamic doctrines cannot be used to justify the practice of FGM.⁸¹⁵

810. *Id.*

811. *Id.* at 27.

812. Al-Azhar is a grand mosque and a university and is considered the spiritual home of Sunni Islam.

813. The conference was sponsored by the German human rights organization called TARGET. During the conference, the attendees, who were eminent and highly esteemed Muslim theologians “proscribed female genital mutilation as a ‘criminal offense’ that is not in keeping with their religion.” The proclamation “was set in stone in the ‘Cairo fatwa’” — a fatwa is a binding religious ruling. Rulings from Al-Azhar are considered very important and influential throughout the Muslim world. See TARGET, *The Golden Book: The Centralpiece of of TARGET’s Action*, http://w3i.target-nehberg.de/HP-10_dasGoldeneBuch/u1-10_dasBuch/index.php?lang=en& (last visited on Feb. 16, 2018). See also GIZ (German Federal Ministry of Economic Cooperation and Development), *Female Genital Mutilation and Islam*, <https://www.giz.de/fachexpertise/downloads/giz2011-en-fgm-islam.pdf> (last visited on Feb. 16, 2018).

814. *For more information on the Banjul Declaration, see* RELIGION AND THE GLOBAL POLITICS OF HUMAN RIGHTS 143–44 (Thomas Banchoff & Robert Wuthnow eds., 2011).

815. *Id.*

FGM cannot be justified on religious grounds. FGM is an extremely painful and violent practice that produces absolutely no benefits to the girls and women who are subjected to it; poses significant risks to the physical, psychological and mental health of those who are subjected to it; and is banned in many countries, including those in which it is practiced. Why then, is it so difficult to eradicate the practice? One answer is that the law, in many of the countries where FGM is still being practiced, is usually not enforced or only done so in a capricious and arbitrary manner. Nevertheless, there are many multinational organizations that are currently involved in challenging the practice of FGM. In fact, in 2008, eleven UN and UN-related agencies issued a statement on “Eliminating female genital mutilation,” in which they argued that “female genital mutilation is a dangerous practice, and a critical human rights issue.”⁸¹⁶

The UN agencies have indicated their intention to support national governments and civil society organizations in their efforts to eliminate FGM within a generation. Passing laws to prohibit the practice must be a critical part of the effort to eradicate FGM. Nevertheless, while legal prohibition is an important first step to the eradication of FGM, it is a necessary but not sufficient condition. Sufficiency requires that the legal prohibition actually be enforced within each country. While FGM is legally prohibited in many African countries, it is still being practiced by many subcultures because of the failure of local authorities to enforce the laws prohibiting the practice.⁸¹⁷

Food Taboos: Throughout Africa, many ethnocultural groups observe certain food taboos that restrict the ability of girls and women to have access to certain foods that are critical to their health and well-being. These taboos affect, not only the girls and women who are deprived of access to essential and vital nutrients, but also the children born to these girls and women. Subcultures that practice these taboos often justify them by arguing that such prohibitions are done to safeguard the health of girls and women—it is generally argued that certain foods, if eaten by girls and women could make them infertile. On the other hand, boys may be forced to eat certain foods against their will because these societies believe that these foods would make

816. The agencies were Office of the United Nations High Commissioner for Human Rights (OHCHR), UN AIDS, United Nations Development Program (UNDP), United Nations Economic Commission for Africa (UNECA), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Population Fund (UNPF), United Nations High Commissioner for Refugees (UNHCR), United Nations Children’s Fund (UNICEF), UN Women, and the World Health Organization (WHO). See World Health Organization (WHO), *Eliminating Female Genital Mutilation: An Interagency Statement (2008)*, http://apps.who.int/iris/bitstream/10665/43839/1/9789241596442_eng.pdf (last visited on Feb. 16, 2018).

817. Int’l NGO Council, *supra* note 754. See also Banchoff and Wuthnow, *supra* note 814.

the boys stronger and more virile. Nutritional taboos arguably cause malnutrition, low birth rate, disease, and sometimes death.⁸¹⁸

Initiation rites: Throughout Africa, many children engage in harmless initiation rites that mark their transition from one social status to another.⁸¹⁹ However, in some of the continent's subcultures, children are forced to undergo "harmful, degrading, and humiliating practices, especially for girls" that have a significantly negative impact on their physical, mental, and emotional health. Some of these rites include forced confinement, beatings, gang rape, forced public nudity, and coerced participation in sexual activities.⁸²⁰ Sometimes, initiation rites ceremonies conflict with school and the children are usually forced to miss school in order to participate in these ceremonies.⁸²¹

Child marriage: Child marriage is defined as "the marriage of a girl or boy younger than 18 to a spouse of any age, regardless of consent given."⁸²² Although child marriage is practiced in many parts of the world, it is especially rampant among various subcultures in Africa.⁸²³ Many international treaties and conventions provide protections for children, which include the requirement that there be a minimum age for marriage. For example, according to Article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, "States Parties . . . 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

818. Int'l NGO Council, *supra* note 754. See also Morissanda Kouyaté, *Harmful Traditional Practices Against Women and Legislation*, Expert Paper prepared for the United Nations (May 11, 2009), http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Morissanda%20Kouyate_.pdf.

819. Such harmful rites include, but are not limited to, christening ceremonies for children, transition-to-adulthood for boys, etc. See, e.g., AFRICA: AN ENCYCLOPEDIA OF CULTURE AND SOCIETY (Toyin Falola & Daniel Jean-Jacques eds., 2015).

820. See, e.g., Lizzie Dearden, *Women and Children Being Raped and Slaughtered as South Sudan Conflict Worsens Famine Threatening Millions*, THE INDEPENDENT (UK) (Mar. 15, 2017), <http://www.independent.co.uk/news/world/africa/south-sudan-famine-dec-emergency-appeal-women-children-rape-murder-war-crimes-refugees-uganda-a7630201.html>; Michelle Nichols, *Africa Child Rape Crisis: Babies as Young as 6 Months Victims of Sexual Violence in Conflict Zones*, REUTERS (June 18, 2013), https://www.huffingtonpost.com/2013/04/18/africa-child-rape-crisis_n_3103558.html (last visited on Feb. 16, 2018).

821. See, e.g., Plan International, *Plan International's Submission to the Joint CRC and CEDAW: General Comment/General Recommendation on Harmful Practices* (2011), <http://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/PlanInternational.pdf>.

822. Int'l NGO Council, *supra* note 754.

823. See, e.g., OKEY FRED ENI, CHILD MARRIAGE IN AFRICA (2017) (examining, inter alia, the pervasiveness of underaged female marriage in Africa); UNICEF, THE STATE OF THE WORLD'S CHILDREN 2009: MATERNAL AND NEWBORN HEALTH (2008) (examining, inter alia, maternal mortality, including that involving underaged brides).

where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.”⁸²⁴ In addition, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women have made specific and clear recommendations that marriage should not be allowed or permitted for children (both boys and girls) under the age of 18 years.⁸²⁵ Despite these efforts at the international level, many countries have yet to act similarly and outlaw this insidious practice, which represents a major violation of the rights of children.⁸²⁶

Why do many cultures around the world practice child marriage? Several factors have been determined to contribute to child marriage including (1) poverty and the need to secure funds to meet a family’s basic needs; (2) the child becomes an orphan or falls into some other state of vulnerability and marriage is seen as a form of security; (3) the child is displaced by some type of conflict that renders her homeless; and (4) cultural and religious beliefs that a child, especially a girl, is better off or safer in the house of her “husband.” Unfortunately, girls who are forced into marriage at an early age end up being subjected to a lot of physical, emotional, and psychological abuse and exploitation by their husbands.⁸²⁷

Customary child slavery: Throughout Africa, many children from poor families are forced into servitude labor in the households of rich urban dwellers. They often work in slave-like conditions and are subjected to a lot of abuse and exploitation. Given the fact that these children are hidden in various households, they are not visible to activists who are seeking to eliminate this practice and improve the welfare of these children. In countries, such as Nigeria and Niger, many young girls are treated as property and sold into slavery in the homes of rich urban dwellers, where they spend many years working under slave-like conditions. These girls

824. Office of the UN High Commissioner for Human Rights, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, Res. 1763A(XVII) (Nov. 7, 1962).

825. UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 21: Equality in Marriage and Family Relations (1994); UNICEF, Early Marriage: Child Spouses, INNOCENTI DIGEST NO. 7 (Mar. 2001), <https://www.unicef-irc.org/publications/pdf/digest7e.pdf>.

826. According to the Pew Research Center, child marriage is legal in 117 countries. *See, e.g.,* Aleksandra Sandstrom and Angelina E. Theodorou, *Many Countries Allow Child Marriage*, PEW RESEARCH CENTER/FACTTANK (Sept. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/09/12/many-countries-allow-child-marriage/>.

827. *See, e.g.,* Neha Thirani Bagri, *Child not Bride: Child Marriage is Allowed in More Than 100 Countries—Including the United States*, QUARTZ NEWS (Sept. 18, 2016), <https://qz.com/783681/child-marriage-is-allowed-in-more-than-100-countries-including-the-united-states/>.

work without compensation and are often sexually abused by the male members of the household.⁸²⁸

Ritual sexual slavery: Throughout the world, young boys and girls are forced, usually by their families, to serve in religious shrines where they are routinely abused and exploited sexually by resident priests. This form of sexual slavery is quite common in several countries in West Africa. For example, in Ghana, it is called Trokosi.⁸²⁹ As practiced in Ghana,⁸³⁰ parents send their young girls to traditional religious shrines,⁸³¹ usually in payment for certain services or in atonement for the moral failings of the child's family, where they spend most of their lives serving the resident priests in different capacities. Invariably, these girls are forced to serve as sex slaves to the priests, elders, and owners of the shrines.⁸³²

Witchcraft: Many subcultures throughout Africa believe in and practice witchcraft. In many of these countries, children, even at birth, are often accused of being witches. In some cases, parents or grandparents may accuse children within the family of being witches and then based on traditional or religious beliefs, such children are cast aside, abandoned, ostracized, abused, and even killed.⁸³³

A child who is accused by his or her parents or the community or religious leaders of being a witch is subjected to extreme physical and psychological violence. In addition to the fact that such children are stigmatized, abused and abandoned, they may be forcefully taken to religious shrines or churches where they are subjected to so-called "deliverance" ceremonies, which often involve a significant amount of violence. It is not unusual for children subjected to deliverance ceremonies to be beaten, burned, poisoned, buried alive, or forced to undergo some

828. See, e.g., Galy Kadir Abdelkader and Moussa Zangou, *Wahaya: Domestic and Sexual Slavery in Niger*, Association Timidria, http://www.antislavery.org/wp-content/uploads/2017/01/wahaya_report_eng.pdf (last visited on Feb. 16, 2018).

829. For more on the Trokosi system in Ghana, see BRITISH COUNCIL (GHANA), REPORT OF THE SECOND NATIONAL WORKSHOP ON TROKOSI SYSTEM IN GHANA: SECURING THE INALIENABLE RIGHTS OF WOMEN AND CHILDREN IN TROKOSI BONDAGE (1998).

830. This type of ritual servitude is also quite common in Togo and Benin.

831. These shrines are also referred to as "fetish shrines." See BRITISH COUNCIL, *supra* note 829.

832. See Amy Small Bilyeu, *The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 IND. INT'L & COMP. L. REV. 457 (1999).

833. UNICEF, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (Apr. 2010), https://www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf; Utibe Effiong, *What's Behind Children Being Cast as Witches in Nigeria*, THE CONVERSATION (Apr. 14, 2016), <https://theconversation.com/whats-behind-children-being-cast-as-witches-in-nigeria-57021>.

form of violent exorcism.⁸³⁴

Many of the children that are accused of witchcraft or of being witches are usually children who are already suffering from some form of disadvantage — for example, children with disabilities.⁸³⁵ One reason why it is so difficult for activists advocating in favor of protections for children to eradicate witchcraft and witchcraft-related violence against children 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. Hence, the reluctance to ban, from their belief systems, the branding of children as witches. Nevertheless, some countries (e.g., Nigeria and South Africa) have taken efforts to ban the abuse of children due to these children being branded as witches.

3. Some preliminary recommendations

What can the international community and national governments do to modify or if necessary, fully eradicate, harmful practices based on tradition, culture, religion or superstition that affect children? According to the UN Secretary-General's Study on Violence Against Children, "[n]o violence against children is justifiable; all violence against children is preventable."⁸³⁶ The UN Secretary-General's report then goes on to state that "such violence exists in every country of the world, cutting across culture, class, education,

834. In the Democratic Republic of Congo ("DRC"), children have been accused of killing and eating their relatives and subsequently subjected to various forms of exorcism. *See, e.g.*, Nick Fagge, 'They Accused Me of Killing and Eating my Grandmother': Agony of Congo's 50,000 'Child Witches' Who are Brutally Exorcised to 'Beat the Devil out of Them,' DAILY MAIL.COM (UK) (Oct. 15, 2015), <http://www.dailymail.co.uk/news/article-3276057/My-grandmother-died-said-witch-drink-salt-water-stuck-fingers-throat-pieces-said-d-eaten-Con-go-s-child-witches-exorcised-devil-beaten-them.html> (last visited on Feb. 16, 2018).

835. These may include children who have been orphaned through HIV/AIDS, children whose families have lost a member, especially following the birth of the child in question, children who exhibit some form of gift (e.g., children who show a significant level of intelligence, including highly artistic ability, etc.), and children with albinism (in Tanzania, for example, albino children are especially persecuted because several communities believe that their body parts contain marginal properties — these children have been killed for their body parts). *See, e.g.*, Ellen Wulforst, *Tanzanian Albino Children, Attacked for Body Parts Used in Witchcraft, Seek Care in U.S.*, GLOBAL NEWS (Canada) (Mar. 27, 2017), <https://glob alnews.ca/news/3337232/tanzanian-albino-children-attacked-for-body-parts-used-in-witch-craft-seek-care-in-us/>.

836. U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Note by the Secretary-General*, U.N. Doc A/61/299 (Aug. 29, 2006).

income and ethnic origin.”⁸³⁷

What, then, is the way forward? The following are preliminary suggestions on how to deal with harmful practices based on tradition, culture, religion or superstition that are often perpetrated against infants and children. First, national governments should take all necessary measures to ensure that (1) traditional values are not deployed as an excuse to undermine the rights of children; (2) customary and traditional practices that violate the rights of children are modified to remove those elements that discriminate against children or harm them; (3) customary and traditional practices must not be out of step with international human rights norms and standards; (4) national institutions, including the courts, are utilized fully to force a modification in customary and traditional practices that harm children or violate their human rights or to get rid of those practices; and (5) parents and other elders, who quite often are called upon to make decisions in place of children who are not capable of doing so, must act only in the best interests of the child.

Nevertheless, even if 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. Sufficiency, as discussed earlier, requires that the law be enforced.

VI. PROTECTING THE RIGHTS OF CHILDREN IN AFRICA: PEACEKEEPERS AND HUMANITARIAN AID WORKERS

A. Introduction

For many years, human rights groups have complained that international aid workers who are sent to various regions of the world, including Africa, to provide humanitarian aid to vulnerable groups, including especially refugees and those displaced by war and other types of violence, often become abusers and exploiters themselves.⁸³⁸ In addition, UN peacekeepers have also been accused by human rights groups of abusing the

837. *Id.*

838. See, e.g., Sebastian Murphy-Bates, *Save the Children Warned a DECADE Ago that Aid Workers were Coercing Children into Sex—as Haitian President Accuses Organizations of Cover-up*, DAILY MAIL.COM (UK) (Feb. 17, 2018), <http://www.dailymail.co.uk/news/article-5402625/Abuse-aid-workers-peacekeepers-Haiti-known-10-years-ago.html>.

same people that they are sent to guard and protect.⁸³⁹ This section examines the role that peacekeepers and humanitarian aid workers have played in the exploitation and abuse of children in Africa.

B. The abuse and exploitation of African children: humanitarian aid workers and peacekeepers

In the early 2000s, the UN was informed that aid workers and peacekeepers working with refugee children in Guinea, Liberia and Sierra Leone were sexually abusing and exploiting them.⁸⁴⁰ The UN subsequently commissioned a study to determine the nature and extent of the problem. The study was undertaken by the UNHCR and the UK-based NGO, Save the Children-UK.⁸⁴¹ The investigators determined that “more than 40 agencies in west Africa have been involved in extensive sexual exploitation of refugee children, offering food rations in return for favors.”⁸⁴² The many refugee children that were interviewed by the UNHCR and Save the Children-UK investigators stated that they were sexually abused, not just by aid workers, but also by UN peacekeepers, whose job it was to protect these extremely vulnerable children from further harm.⁸⁴³ The report concluded that aid workers and peacekeepers used “the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation.”⁸⁴⁴

Most of the girls interviewed stated that it had been made clear to them that in order for them to get any rations from the aid workers, they had to provide sexual favors for them. Many of these children were not aware that they were supposed to receive these rations without performing any favors for them. Additionally, many children also told the investigators that in order for them to have access to healthcare, shelter, medicines, and education, they were forced to perform sexual services for the aid workers and peacekeepers.⁸⁴⁵

The investigators also determined that most of the alleged abusers and

839. See, e.g., Azad Essa, *Why Do Some UN Peacekeepers Rape?*, ALJAZEERA (Aug. 22, 2017), <http://www.aljazeera.com/indepth/features/2017/07/peacekeepers-rape-170730075455216.html>.

840. See, e.g., Audrey Gillan and Peter Moszynski, *Aid Workers in Food for Child Sex Scandal*, THE GUARDIAN (UK) (Feb. 27, 2002), <https://www.theguardian.com/society/2002/feb/27/voluntarysector>.

841. See, e.g., UNHCR and Save the Children-UK, *supra* note 191.

842. Gillan and Moszynski, *supra* note 840.

843. *Id.*

844. *Id.*

845. *Id.*

exploiters were “male national staff who traded humanitarian commodities and services for sex with girls under 18.”⁸⁴⁶ Although education in the refugee camps is free, the parents of the refugee children must provide instructional items, such as books, pencils, uniforms and shoes. This forces the children to either stay away from attending school or bribe the teachers (usually with sexual favors) in order to have access to these instructional materials.⁸⁴⁷ Unfortunately, refugees have virtually no information on their basic rights and entitlements to the humanitarian aid that is supposed to be granted to them while they are in the camps.⁸⁴⁸

The UN’s less-than-enthusiastic response to the UNHCR and Save the Children-UK report was criticized by many human rights groups.⁸⁴⁹ UN peacekeepers are usually sent to various parts of the world, most of which are war-torn areas or those devastated by sectarian conflict, to transition these communities to peaceful coexistence. So, their mission is one of securing the peace, maintaining law and order, at least in the short run, protecting the lives of vulnerable groups (especially children and women), and helping these communities secure sustainable peace and development.⁸⁵⁰ Nevertheless, peacekeepers sent to maintain the peace and safeguard the rights of displaced people in Haiti, Liberia, Guinea, Sierra Leone, Central African Republic, Somalia, Côte d’Ivoire, South Sudan, and the Democratic Republic of Congo, now stand accused of having used their positions to abuse and exploit the very refugee children that they were supposed to protect.⁸⁵¹

After a thorough investigation, the Associated Press (“AP”) determined that between 2014 and 2016, the UN had received as many as 2,000 allegations of sexual abuse and exploitation against the organization’s peacekeepers.⁸⁵² Although the UN continues to claim that it has a zero tolerance on the sexual abuse and exploitation of children, human rights activists, as well as survivors of these insidious crimes, have argued that peacekeepers and aid workers continue to act with impunity and abuse and

846. *Id.*

847. *See* UNHCR and Save the Children-UK, *supra* note 191, at 8–9.

848. *Id.*

849. *See, e.g.,* Asmita Naik, *Opinion*, 16 FORCED MIGRATION 1, 46–47 (2003).

850. Somini Sengupta, *Beleaguered Blue Helmets: What is the Role of U.N. Peacekeepers?*, N.Y. TIMES (July 12, 2014), <https://www.nytimes.com/2014/07/13/sunday-review/what-is-the-role-of-un-peacekeepers.html>.

851. *See* Azad Essa, *Why do Some UN Peacekeepers Rape?*, ALJAZEERA (Aug. 5, 2017), <http://www.aljazeera.com/indepth/features/2017/07/peacekeepers-rape-170730075455216.html>.

852. *Id.*

exploit vulnerable children in the camps under the various agencies' control.⁸⁵³

In February 2018, the Government of the UK announced that it was “reviewing its current work with . . . Oxfam, amid allegations some of its senior employees paid for sex in Haiti in the wake of the devastating 2010 earthquake.”⁸⁵⁴ An investigation by the *Times of London*⁸⁵⁵ “alleges that Oxfam covered up misconduct by senior aid workers, including the then-country director Roland van Hauwermeiren.⁸⁵⁶ The *Times*' investigation revealed that a “confidential report by [Oxfam] found that van Hauwermeiren, who resigned in 2011, paid women for sex in the villa that [Oxfam] had rented for him during the relief efforts.”⁸⁵⁷ It was also alleged that children were sexually abused and exploited by Oxfam personnel.⁸⁵⁸ Shortly after these revelations, the UK's culture secretary, Matt Hancock, who is in charge of regulating UK-based charities, such as Oxfam, stated that “These allegations are deeply shocking and Oxfam must now provide the Charity Commission with all the evidence they hold of events that happened in Haiti as a matter of urgency.”⁸⁵⁹

The UNHCR and Save the Children-UK Report investigating accusations that UN peacekeepers had engaged in the systematic sexual abuse and exploitation of children in Guinea, Liberia, and Sierra Leone was released in 2002. And yet, in 2014, peacekeepers were embroiled in another abuse and exploitation scandal, this time in the Central African Republic — French peacekeepers were accused by human rights groups of raping refugee children and forcing others to have sex with dogs while the peacekeepers photographed the acts.⁸⁶⁰ Although the new UN Secretary-General, António Guterres, has admitted to the impunity by peacekeepers and pledged to increase efforts to eradicate such abuses, and has supposedly implemented a “zero tolerance” policy for sexual abuse, the sexual abuse and exploitation

853. *Id.*

854. Milena Veselinovic and Simon Cullen, *Oxfam Hit With Pay-for-Sex Allegations in Haiti*, CNN WORLD NEWS (Feb. 11, 2018), <https://www.cnn.com/2018/02/10/americas/oxfam-workers-haiti-investigation/index.html>.

855. Sean O'Neill, *Minister Orders Oxfam to Hand Over Files on Haiti Prostitute Scandal*, THE TIMES OF LONDON (Feb. 9, 2018), <https://www.thetimes.co.uk/article/top-oxfam-staff-paid-haiti-quake-survivors-for-sex-mhm6mpmgw>.

856. Veselinovic and Cullen, *supra* note 854.

857. *Id.*

858. *Id.*

859. O'Neill, *supra* note 855.

860. Nicolas Haque, *UN Chief in CAR: Peacekeepers Accused of Sexual Abuse*, ALJAZEERA (Oct. 25, 2017), <http://www.aljazeera.com/news/2017/10/rights-groups-failing-prosecute-peacekeepers-accused-rape-car-171024174502894.html>.

of children under the care of peacekeepers and aid workers remains a major problem in refugee camps and settlements throughout the continent.⁸⁶¹

As late as February 2018, UN peacekeepers in Africa were still being accused of sexually abusing and exploiting children.⁸⁶² On Wednesday, February 14, 2018, the UN said that it had registered “18 alleged cases of sexual abuse and exploitation by its peacekeepers and civilian personnel in the Democratic Republic of the Congo.”⁸⁶³ It appears, then, that despite proclamations from the UN, as well as from aid agencies, such as Oxfam,⁸⁶⁴ the sexual abuse and exploitation of children, especially in conflict situations, remains a major problem. In the following section, we examine some of the reasons why impunity by humanitarian aid workers and peacekeepers remains a major problem for vulnerable children in Africa.

C. The origins of the UN peacekeepers’ privileges and immunities

The UN’s peacekeeping program was initiated at the end of World War II after the global organization’s foundation.⁸⁶⁵ The UN specifically granted immunity from prosecution by the host country for all and any alleged crimes committed by peacekeepers during their service. The UN believed that such immunity was necessary to minimize intervention by local communities in

861. See, e.g., Christian Locka and Jabeen Bhatti, *UN Fails to Stem Rapes by Peacekeepers in Africa: Victims Cry*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/news/world/2018/01/16/u-n-fails-stem-rapes-peacekeepers-africa-victims-cry/1016223001/>; Karen McVeigh, *Unicef Admits Failings with Child Victims of Alleged Sex Abuse by Peacekeepers*, THE GUARDIAN (U.S. EDITION) (Feb. 13, 2018), <https://www.theguardian.com/global-development/2018/feb/13/unicef-admits-failings-with-child-victims-of-alleged-sex-abuse-by-peacekeepers>.

862. See *18 New Sexual Abuse Claims Against UN Peacekeepers in DRC*, NEWS24 (in partnership with City Press) (Cape Town, South Africa) (Feb. 15, 2018), <https://www.news24.com/Africa/News/18-new-sexual-abuse-claims-against-un-peacekeepers-in-drc-20180214>.

863. *Id.* See also *31 Cases of Sexual Abuse by UN Workers Reported in the Past 3 Months*, DAILY SABAH WORLD (NEW YORK) (Nov. 3, 2017), <https://www.dailysabah.com/world/2017/11/03/31-cases-of-sexual-abuse-by-un-workers-reported-in-past-3-months>; Rebecca Ratcliffe, *Sexual Harassment and Assault Rife at United Nations, Staff Claim*, THE GUARDIAN (UK) (Jan. 18, 2018), <https://www.theguardian.com/global-development/2018/jan/18/sexual-assault-and-harassment-rife-at-united-nations-staff-claim>.

864. BBC News, *Oxfam Sex Scandal: Director Promises Justice for Victims*, BBC NEWS (Feb. 16, 2018), <http://www.bbc.com/news/uk-43080330>.

865. The United Nations is a multilateral organization that was founded in 1945 in the aftermath of World War II. It currently has a membership of 193 nations. For more on the United Nations, see generally JUSSI M. HANHIMÄKI, *THE UNITED NATIONS: A VERY SHORT INTRODUCTION* (2015).

the peacekeepers' work with post-conflict situations. At the time, the UN did not believe that impunity on behalf of peacekeepers would be a major problem. It was left to each peacekeeper's own government to hold him or her accountable for any crimes committed while on duty.

During its establishment, it was argued that for the UN to perform its functions effectively, it had to be able to enter into contracts in order to, for example, purchase necessary supplies, acquire real property (e.g., to house its operations), as well as "pursue its private law rights before national courts."⁸⁶⁶ Article 104 of the Charter of the UN was supposed to respond to these concerns. But, it only did so by granting the UN what can be considered a "functional personality" when it stated that "[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."⁸⁶⁷

With respect to the issue of privileges and immunities, the world body was granted a similar functional concept — specifically "functional immunity" — through Article 105(1) of the UN's Charter: "The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."⁸⁶⁸ However, in practice, these rules were simply too abstract and required additional, albeit more detailed, elaboration before both the UN and the legal systems of Member States could utilize them, for example, in determining whether the UN was immune from a particular lawsuit directed at it or whether the UN could enter into a specific legal transaction.⁸⁶⁹

Article 105(2) of the Charter of the UN deals with privileges and immunities for officials of the UN and representatives of Member States: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."⁸⁷⁰

866. August Reinisch, *Convention on the Privileges and Immunities of the United Nations & Convention on the Privileges and Immunities of the Specialized Agencies*, *United Nations Audiovisual Library of International Law*, available at http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf (last visited on Feb. 25, 2018). *See also* THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY (August Reinisch ed., 2016).

867. U.N. Charter, at art. 104.

868. *Id.*

869. *See e.g.*, THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY (August Reinisch ed., 2015).

870. UN Charter, *supra* note 867, at art. 105(2).

At this time in the development of international law, the question of privileges and immunities for international organizations had not yet been subjected to any significant analysis nor had it become part of any international agreements, except for the UN Charter.⁸⁷¹ In order to clarify the provisions in Articles 104 and 105 of the UN Charter,⁸⁷² the UN General Assembly, on February 13, 1946, approved the Convention on the Privileges and Immunities of the United Nations (“UN Privileges and Immunities Convention”)⁸⁷³ and recommended it for accession by each of the Member States of the United Nations. The UN Privileges and Immunities Convention entered into force on September 17, 1946.

The UN Privileges and Immunities Convention deals specifically with the concept of functionality and provides a definition for the UN’s “juridical personality.”⁸⁷⁴ The UN’s “functional personality” is defined in terms of its juridical personality and the Convention grants the UN specific capacity “(a) to contract; (b) to acquire and dispose of immovable and movable property; to institute legal proceedings.”⁸⁷⁵ With respect to immunity from legal processes for the UN, its property and assets, Article II(2) states as follows: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”⁸⁷⁶

Since 1946, when the UN Privileges and Immunities Convention entered into force, the “absolute” immunity granted the United Nations, its property and assets, has, for all intents and purposes, been respected by most countries. But, does not the existence of this *de facto* absolute immunity of the UN fail to acknowledge “the right of access to court as contained in all major human rights instruments”?⁸⁷⁷ The UN Privileges and Immunities Convention, however, anticipates this problem and provides mitigation in Article VIII(29), where it commands the UN to “make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a

871. UN Charter, *supra* note 867.

872. *Id.* at art. 104–105.

873. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946 1 U.N.T.S. 15.

874. *Id.*

875. *Id.* at art. I(1)(a)–(b).

876. *Id.* at art. II(2).

877. THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY (August Reinisch ed., 2015).

party.”⁸⁷⁸ One can interpret the UN Privileges and Immunities Convention’s decision to make allowance for an alternative dispute resolution mechanism as an “acknowledgment of the right of access to court as contained in all major human rights instruments.”⁸⁷⁹

Where the UN enters into a private law contract, such a contract usually contains arbitration clauses. In the case of a tort claim against the UN, for example, involving injury suffered during peacekeeping operations, similar modes of dispute resolution are provided.⁸⁸⁰ Internal disputes — that is, those taking place within the organization itself, are resolved through an internal mechanism.⁸⁸¹

The UN General Assembly also provides privileges and immunities for three categories of persons who are considered critical for the work of the United Nations: (1) official representatives of Member States; (2) UN officials; and (3) experts who are performing missions for the United Nations. Representatives of Member States, however, enjoy only “modified diplomatic privileges and immunities.”⁸⁸² UN officials, however, are granted “functional” immunity as defined in Article V(18), which states that “[o]fficials of the United Nations shall (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.”⁸⁸³ The UN Privileges and Immunities Convention specifically stresses that privileges and immunities are meant for the benefit of the UN and not that of the individuals who work for the UN. In Article V(20), it is stated that “[p]rivileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.”⁸⁸⁴ The UN Secretary-General is granted the “right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived

878. UN Privileges and Immunities Convention, *supra* note 873, at art. VIII(29)(a).

879. Reinisch, *supra* note 877.

880. *Id.*

881. This internal mechanism, referred to as the UN Administrative Tribunal — which was established in 1949 by UN General Assembly Resolution 351 A (IV) of December 9, 1949 — has undergone transformation and now consists of a two-tier judicial system consisting of a UN Dispute Tribunal and a UN Appeals Tribunal. For more on both the UN Dispute Tribunal and the UN Appeals Tribunal, see generally SIMON CHESTERMAN, IAN JOHNSTONE AND DAVID M. MALONE, LAW PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY, (2nd ed. 2016).

882. Reinisch, *supra* note 877. See also UN Privileges and Immunities Convention, *supra* note 873, at art. IV(11).

883. UN Privileges and Immunities Convention, *supra* note 873, at art. V(18)(a).

884. *Id.* at art. V(20).

without prejudice to the interests of the United Nations.”⁸⁸⁵

UN officials also enjoy other privileges besides jurisdictional immunity. UN officials are also “exempt from taxation on the salaries and emoluments paid to them by the UN”⁸⁸⁶ and in addition, they are granted other “fiscal, travel and residence privileges.”⁸⁸⁷ Under the UN Privileges and Immunities Convention, only the UN’s Secretary-General, Under-Secretaries-General, and Assistant-Secretaries-General are granted full diplomatic privileges and immunities.⁸⁸⁸

This convention provided the foundation on which other subsequent treaties dealing with privileges and immunities of international organizations were built. In fact, the UN Convention on the Privileges and Immunities of the Specialized Agencies,⁸⁸⁹ which was adopted by the UN General Assembly on November 21, 1947, and became effective on February 7, 1949, was influenced significantly by the 1946 Convention.⁸⁹⁰

D. UN Peacekeepers, immunity and sexual abuse and exploitation of children in Africa

Today, many observers, especially those who advocate on behalf of African children, argue that the privileges and immunities granted the UN and its officials, particularly those who are serving in a peacekeeping role, have become a major source of gross injustice to many refugee children in Africa.⁸⁹¹ The UN Charter⁸⁹² does not provide any specific legal foundation for peacekeeping operations. Nevertheless, the UN’s foray into peacekeeping started in 1948 when it became apparent that the system of

885. *Id.* (in the case where the UN official is the UN Secretary-General, “the Security Council shall have the right to waive immunity”).

886. UN Privileges and Immunities Convention, *supra* note 873, at art. V(18)(b).

887. Reinisch, *supra* note 877. *See also Id.* at art. V(18)(b-g).

888. UN Privileges and Immunities Convention, *supra* note 873, at art. V(19).

889. Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

890. Examples of other privileges and immunities treaties in the international arena include the General Agreement on Privileges and Immunities of the Council of Europe, 1949 and the Agreement on Privileges and Immunities of the Organization of American States, 1949.

891. Anshul Agnihotri, *Principle of Immunity and Jurisdiction vis-à-vis Sexual Abuse by UN Peacekeeping Force*, CENTER FOR INT’L HUMANITARIAN LAW & HUMAN RIGHTS LAW, NIRMA UNIVERSITY (Aug. 10, 2016), <http://ilnu-jihlhr.org/principle-of-immunity-and-jurisdiction-vis-a-vis-sexual-abuse-by-un-peacekeeping-force/>.

892. U.N., Charter of the United Nations, October 24, 1945, 1 U.N.T.S. 16, <http://www.un.org/en/charter-united-nations/>.

collective security as envisaged by those who had founded the UN system had failed.⁸⁹³ The first peacekeeping mission was authorized by the UN Security Council and involved the deployment of military observers to the Middle East to monitor Armistice Agreement between the State of Israel and its Arab neighbors.⁸⁹⁴

In recent years, peacekeepers have been accused, notably in Africa, of abusing their positions to engage in sexual abuse and exploitation of children.⁸⁹⁵ In 2001, the UNHCR and Save the Children-UK released a report of an investigation that they had conducted into allegations of sexual abuse and exploitation of refugee children in Guinea, Liberia and Sierra Leone.⁸⁹⁶ The investigators found widespread sexual abuse and exploitation of children by peacekeepers and humanitarian aid workers in refugee camps in all three countries.⁸⁹⁷

1. The Prince Zeid Report regarding sexual abuse and exploitation of children in the DRC

On March 24, 2005, then UN Secretary-General Kofi Annan sent a letter to the President of the UN General Assembly in which he provided a “comprehensive review of the whole question of peacekeeping operations in all their aspects.”⁸⁹⁸ He indicated that after allegations surfaced of sexual abuse and exploitation by peacekeepers in the Democratic Republic of Congo, he had concluded that the measures currently in place at the UN were inadequate to fully address the problem. He decided that a fundamental change in approach was needed and subsequently sought the advice of Prince Zeid Ra’ad Zeid Al-Husseini, then Permanent Representative of the Hashemite Kingdom

893. Agnihotri, *supra* note 891.

894. The operation’s name was the United Nations Truce Supervision Organization (“UNTSO”). The UNTSO currently has operations in Haiti, Western Sahara, Central African Republic, Mali, Democratic Republic of Congo, Darfur (Republic of Sudan), Golan (Israel/Syria), Cyprus, Lebanon, Abyei (Republic of Sudan/South Sudan), India and Pakistan, Middle East. For more on the UNTSO, see generally 3 TERRY M. MAYS, HISTORICAL DICTIONARY OF MULTINATIONAL PEACEKEEPING (2011); SATISH CHANDRA & MALA CHANDRA, INTERNATIONAL CONFLICTS AND PEACE MAKING PROCESS: ROLE OF THE UNITED NATIONS (2006).

895. *See, e.g.*, UNHCR and Save the Children-UK, *supra* note 191.

896. *Id.*

897. *Id.*

898. UN General Assembly, *Letter Dated 24 March 2005 from the Secretary-General to the President of the General Assembly: Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, U.N. Doc. A/59/710 (Mar. 24, 2005).

of Jordan to the UN.⁸⁹⁹ Hence, when the Committee on Peacekeeping Operations⁹⁰⁰ requested the Secretary-General to provide a comprehensive report with recommendations on sexual abuse and exploitation by peacekeeping personnel, the Secretary-General reached out to Prince Zeid. This section discusses Prince Zeid's report on allegations of sexual abuse and exploitation in the Democratic Republic of Congo by UN peacekeepers.

Between May and September 2004, the UN Mission in the Democratic Republic of Congo ("MONUC")⁹⁰¹ received 72 allegations of sexual abuse and exploitation against UN peacekeepers.⁹⁰² These allegations were subsequently investigated by the UN's Office of Internal Oversight Services.⁹⁰³ In response to the large number of allegations, the Secretary-General, Kofi Annan, invited Prince Zeid to help "him in determining the nature and extent of the problem of sexual exploitation and abuse in peacekeeping missions."⁹⁰⁴ Prince Zeid subsequently travelled to the DRC in October 2004 and determined that "[s]exual exploitation and abuse appeared to be ongoing, thereby highlighting the inadequacy of current measures to address the problem in peacekeeping operations."⁹⁰⁵

Arguing that existing mechanisms to deal with the problem of sexual abuse and exploitation of children by peacekeepers were "ad hoc and inadequate to deal with the problem," Prince Zeid suggested that the effective way forward demanded "a radical change in the way the problem

899. *Id.* The Secretary-General believed that as the permanent representative of Jordan, a major troop- and police-contributing country, Prince Zeid (himself a former peacekeeper) would be in a position to bring an informed perspective to the problem of sexual abuse and exploitation and help in the design of effective solutions to the problem.

900. Press Release, Special Committee on Peacekeeping Operations begins Review of Report on Sexual Exploitation, U.N. Press Release, GA/PK/186 (Apr. 4, 2005).

901. The organization was officially referred to as the United Nations Organization Mission in the Democratic Republic of the Congo. The acronym "MONUC" is based on the mission's French name, which is *Mission de l'Organisation des Nations unies en République démocratique du Congo*. In 2010, the UN Security Council transformed MONUC into a stabilization force called the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) — the acronym is derived from the stabilization force's French name, which is *Mission de l'Organisation des Nations unies pour la stabilisation en République démocratique du Congo*. See UN, *Security Council agrees to convert UN mission in DR Congo into stabilization force*, UN NEWS (May 28, 2010), <https://news.un.org/en/story/2010/05/340012-security-council-agrees-convert-un-mission-dr-congo-stabilization-force>.

902. See U.N. Secretary General, *Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, U.N. Doc. A/59/661 (Jan. 5, 2005).

903. *Id.*

904. UN General Assembly, *supra* note 898.

905. *Id.*

is addressed in peacekeeping contexts.”⁹⁰⁶ After providing a thorough examination of the problem, based on his visit to the DRC, he presented the Secretary-General with a series of recommendations grouped under the four main areas of concern: (1) the UN’s existing rules on standards of conduct for peacekeeping personnel; (2) the investigation process; (3) organizational, managerial and command responsibility; and (4) individual disciplinary, financial and criminal liability.⁹⁰⁷

With respect to the UN’s existing rules, the Prince Zeid Report notes that a major problem in dealing effectively with sexual exploitation and abuse is that each peacekeeping operation may actually have as many as five categories of personnel, who are governed by different rules. He then suggested that the UN General Assembly should apply one set of rules to “all categories of United Nations peacekeeping personnel, including civilian police, military observers, members of national contingents, United Nations Volunteers, consultants and individual contractors.”⁹⁰⁸

With respect to the UN’s investigations of allegations of sexual abuse and exploitation, the Prince Zeid Report notes that such investigations require specialized expertise, which requires, inter alia, experts in military law. In addition, he recommends that the UN should establish a “permanent professional investigative mechanism to investigate complex cases of serious misconduct, including sexual exploitation and abuse.”⁹⁰⁹ Finally, he suggests that in order to enhance access to witnesses and evidence within the geographic area where the alleged abuses took place — that is, the peacekeeping area, troop-contributing countries should “hold on-site courts martial.”⁹¹⁰

With respect to organizational, managerial and command accountability, the Prince Zeid Report recommends “extensive training, an effective program of outreach to the local community, a data collection system to track the investigation and resolution of allegations of sexual exploitation and abuse and the establishment of a few full-time positions at Headquarters and in the field to coordinate action by missions on those

906. *Id.*

907. *Id.*

908. *Id.* at 4. Specifically, Prince Zeid’s Report recommends that the General Assembly apply “the rules set out in the Secretary-General’s bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13).” See UN Secretariat, *Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003).

909. UN General Assembly, *supra* note 898, at 4.

910. *Id.*

issues.”⁹¹¹ It was also recommended that measures to eliminate sexual exploitation and abuse should be incorporated into the “performance goals of managers and commanders” and that “managerial performance should be rated in accordance with the actual implementation of those goals.”⁹¹²

With respect to individual disciplinary accountability, the Prince Zeid Report recommended that the UN impose “strict disciplinary accountability for peacekeeping personnel who violate the Organization’s rules against sexual exploitation and abuse.”⁹¹³ Regarding individual financial accountability, the Prince Zeid Report recommended that the UN “peacekeeping personnel be held financially accountable for harm caused to victims as a result of their acts of sexual exploitation and abuse.”⁹¹⁴ In addition, Prince Zeid recommended that the UN General Assembly should “authorize the Secretary-General to require DNA and other tests to establish paternity in appropriate cases so as to ensure that peacekeeping personnel can be obligated to provide child support to so-called peacekeeper babies that they father and abandon.”⁹¹⁵

With respect to criminal accountability of military members of national contingents, the Prince Zeid Report recommended that the model memorandum of understanding signed between the UN and troop-contributing countries should “specifically provide that troop-contributing countries must ensure that their contingents are obligated to respect local law.”⁹¹⁶ Finally, with respect to criminal accountability of UN staff and experts on mission, the Prince Zeid Report noted that the “founders of the United Nations did not intend that the privileges and immunities of officials (staff have the status of officials) and experts on mission (civilian police and military observers have the status of experts on mission) should constitute a shield from national criminal prosecution for crimes committed in a State hosting a United Nations operation.”⁹¹⁷ Nevertheless, the absence of a functioning judicial system in many peacekeeping locations “means that it is not feasible to waive immunity in those jurisdictions.”⁹¹⁸

The Report went on to recommend that “the Secretary-General appoint a group of experts to advise him as to whether it would be feasible to draft an international instrument or use other means to ensure that United Nations

911. *Id.* at 5.

912. *Id.*

913. *Id.*

914. *Id.*

915. *Id.* at 6.

916. *Id.*

917. *Id.*

918. *Id.*

personnel are subject to criminal prosecution for defined crimes of sexual exploitation and abuse.”⁹¹⁹

2. The aftermath of the Prince Zeid Report

Prince Zeid’s comprehensive report on sexual exploitation and abuse by UN peacekeepers in the Democratic Republic of Congo and its recommendations were handed to the UN Secretary-General in 2005. The Secretary-General subsequently shared both the report and its recommendations with the UN General Assembly in a letter to the Assembly’s President on March 24, 2005. Nevertheless, on February 15, 2018, nearly 13 years after the Prince Zeid Report was released and 17 years after the UNHCR and Save the Children-UK report⁹²⁰ on sexual violence and exploitation of refugee children by peacekeepers in Guinea, Liberia and Sierra Leone was made public, the UN has admitted that 18 new sexual abuse claims were lodged against UN peacekeepers working in the DRC.⁹²¹ It appears that whatever measures the UN has implemented to deal with the sexual exploitation and abuse of children in Africa by peacekeepers are not working.

The head of the conduct and discipline unit at MONUSCO, Adama Ndao, confirmed the allegations and indicated that 14 of them involved mothers seeking financial support and care for peacekeeping babies — that is, children born out of “relationships” between peacekeepers and girls in the peacekeeping area.⁹²² He went on to proclaim that he and his organization and other competent UN structures were investigating all the allegations.⁹²³ Notably, in 2016, 18 allegations of sexual exploitation and abuse of children were registered against peacekeepers in the DRC⁹²⁴ and in 2014, peacekeepers in Central African Republic were accused of sexually abusing as many as 100 girls, with some of them claiming that “they were tied up, undressed, and forced to have sex with a dog by a French military commander.”⁹²⁵

919. *Id.*

920. UNHCR and Save the Children-UK, *supra* note 191.

921. *See 18 New Sexual Abuse Claims Against UN Peacekeepers in DRC*, NEWS24 (Feb. 15, 2018) <https://www.news24.com/Africa/News/18-new-sexual-abuse-claims-against-un-peacekeepers-in-drc-20180214>.

922. *Id.*

923. *Id.*

924. *Id.*

925. *See ‘Bestiality’ Claims by Rights Group Against Peacekeepers in Central African Republic*, THE TELEGRAPH (UK) (Mar. 31, 2016), <https://www.telegraph.co.uk/news/2016/>

After coming into office on January 1, 2017, the new Secretary-General, António Guterres, officially acknowledged that sexual exploitation and abuse had become a major problem within the Organization.⁹²⁶ Investigative journalist Andrew MacLeod⁹²⁷ noted that senior UN officials, including former Secretaries-General Kofi Annan and Ban Ki Moon, have been saying publicly for many years that “something must be done” to deal with the problem of sexual exploitation and abuse of children by UN peacekeepers but the problem persists and has, as evidenced by recent reports, actually worsened.⁹²⁸ Hence, while top UN officials publicly commit to ending the scourge, refugee children in various countries in Africa continue to be sexually exploited and abused.⁹²⁹

D. Why peacekeeping and what are peacekeepers supposed to do?

The global concept of peacekeeping grew out of the need to deal with conflicts that arose in the aftermath of World War II, the process of decolonization in the former European colonies, and rivalries between the Warsaw Pact⁹³⁰ countries and those of the North Atlantic Treaty Organization (NATO).⁹³¹ The UN’s peacekeeping missions emerged out of the need to deal with conflicts, which at the time, could not be resolved by

03/31/bestiality-claims-by-rights-group-against-peacekeepers-in-centra/.

926. See, e.g., Andrew MacLeod, *The Scale of Sex Abuse at the Hands of UN Workers Could be Huge*, THE INDEPENDENT (UK) (Feb. 13, 2018), <http://www.independent.co.uk/voices/un-child-rape-sex-exploitation-united-nations-antonio-guterres-prosecutions-immunity-trial-a7956816.html>.

927. Andrew MacLeod, *The United Nations is Turning a Blind Eye to Child Rape Within Its Own Ranks*, THE INDEPENDENT (UK) (Mar. 25, 2017), <http://www.independent.co.uk/voices/united-nations-soldiers-paedophilia-un-child-rape-ngo-staff-a7648791.html>.

928. *Id.* See also *UN Announces New Approach to ‘Stamp Out’ Sexual Exploitation and Abuse*, UN NEWS, (Mar. 9, 2017), <https://news.un.org/en/story/2017/03/552982-un-announces-new-approach-stamp-out-sexual-exploitation-and-abuse#.WNVOLfmLSUI>.

929. See, e.g., Karen McVeigh, *Unicef admits failings with child victims of alleged sex abuse by peacekeepers*, THE GUARDIAN (UK) (Feb. 13, 2018), <https://www.theguardian.com/global-development/2018/feb/13/unicef-admits-failings-with-child-victims-of-alleged-sex-abuse-by-peacekeepers>; Mel Frykberg, *SA peacekeepers accused of sex exploitation, abuse in DRC*, IOL NEWS (South Africa), (Feb. 13, 2018), <https://www.iol.co.za/news/africa/sa-peacekeepers-accused-of-sex-exploitation-abuse-in-drc-13258267>.

930. The Warsaw Pact, officially known as the Treaty of Friendship, Cooperation and Mutual Assistance, was a defense pact entered into by the Soviet Union and several States in Central and Eastern Europe during the Cold War. It was created on May 14, 1955, in Warsaw, Poland. The Warsaw Pact was led by the Soviet Union. For more on the Warsaw Pact, see generally ERIK RICHARDSON, *NATO, THE WARSAW PACT, AND THE IRON CURTAIN* (2017).

931. For more on NATO, see generally PETER DUIGNAN, *NATO: ITS PAST, PRESENT AND FUTURE* (2000). NATO was and is led by the United States.

the feuding parties themselves through peaceful means. There was an urgent need to make certain that these conflicts did not degenerate into violent confrontations that could result in the deaths of many people and the destruction of a significant amount of property.⁹³² But, what were these peacekeeping missions supposed to accomplish? One thing that the peacekeeping operations were not expected to do was to resolve the underlying causes of the conflicts. Instead, they were supposed to serve as “holding operations designed to create space for mediators and others to work out a political solution and address the underlying causes of the conflicts.”⁹³³ In addition, peacekeepers “monitor and observe cease-fires, assist ex-combatants in implementing the peace agreements they have signed, demobilize combatants, and secure refugee camps.”⁹³⁴

Many of the Cold War rivalries between the West⁹³⁵ and the East⁹³⁶ that served as a major constraint to the effective deployment of peacekeepers to conflict-ravaged areas have dissipated with the significant reductions in tensions between the two major global blocs. In the post-Cold War era, the UN has established new peacekeeping modalities, which involve several types of activities, all designed to secure the peace, enhance peaceful coexistence between previously feuding parties, provide humanitarian aid, and aid in processes (e.g., elections) to form a post-conflict government. Nevertheless, in performing their duties, many peacekeepers have engaged in activities that have soiled the reputation of the UN and its other agencies (e.g., UNICEF) — some of the peacekeepers have been accused of engaging in the sexual exploitation and abuse of children in the context of peacekeeping. Specifically, peacekeepers have been accused of engaging in sexual activities with minors, sex-trafficking, soliciting prostitutes for sex, and pushing children into prostitution.⁹³⁷

Peacekeepers have also engaged in other behaviors that have reflected poorly on the UN. For example, in many countries which during the last several years have had UN peacekeeping missions,⁹³⁸ there are many

932. Manu Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions*, 27 BERKELEY J. INT'L L. 127 (2009).

933. *Id.* at 128.

934. *Id.* See also SECURITY, RECONSTRUCTION, AND RECONCILIATION: WHEN THE WARS END (Muna Ndulo ed., 2007).

935. Represented by the United States and the NATO alliance.

936. Represented the now-defunct Soviet Union (Union of Soviet Socialist Republics/USSR) and Warsaw Pact.

937. Ndulo, *supra* note 934, at 129.

938. Some of these countries include the Democratic Republic of Congo, Haiti, Kosovo, Sierra Leone, Guinea, Liberia, Côte d'Ivoire, and Central African Republic.

children who were fathered by UN soldiers and civilians and then abandoned. Unfortunately, the UN does not presently have programs in place to track and record “peacekeeper babies”⁹³⁹ that have been abandoned and left to wallow in despair and poverty while their fathers return to their countries of origin to continue with their lives.⁹⁴⁰ These abandoned children are left with mothers who do not have the financial resources to take care of them. Moreover, given the fact that their fathers are considered outsiders of the cultures or subcultures in which these children are born, the children are likely to be ostracized and prevented from participating fully in and benefiting from the life of their communities.⁹⁴¹ Besides the fact that many subcultures in Africa are extremely conservative and do not look very kindly on children fathered by people who are considered foreigners to the group, out-of-wedlock births are also frowned upon.⁹⁴²

Many of these peacekeeper babies result from the rapes of minors by peacekeepers.⁹⁴³ Mothers of these babies are often extremely young, immature, poor, and incapable of taking care of the children abandoned by their fathers. They are likely to resent the children because they are a reminder of the men who brutally raped them. That frustration is reflected in the words of a 14-year-old girl in Bangui, the Central African Republic, who alleged that she was raped by a UN peacekeeper from Burundi: “Sometimes when I’m alone with my baby, I think about killing him. He reminds me of the man who raped me.”⁹⁴⁴

VII. PROTECTING AFRICAN CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION: THE WAY FORWARD

A. Introduction

Many individuals and groups that advocate on behalf of African children have argued that UN efforts to deal with the sexual exploitation and

939. Kevin Sieff, *Members of a UN Peacekeeping Force in the Central African Republic Allegedly Turned to Sexual Predation, Betraying Their Duty to Protect*, WASH. POST (Feb. 16, 2016), http://www.washingtonpost.com/sf/world/2016/02/27/peace-keepers/?utm_term=.997829a664ba.

940. See, e.g., Junior D. Kannah, *UN Quietly Offers DNA Tests to Address ‘Peacekeeper Babies’ & Sexual Abuse Claims*, RT QUESTIONNAIRE MORE (June 14, 2015), <https://www.rt.com/news/267055-un-peacekeeper-babies-dna/>.

941. Ndulo, *supra* note 934, at 130.

942. *Id.*

943. Sieff, *supra* note 939.

944. *Id.*

abuse of children do not seem to be working.⁹⁴⁵ It has been reported that when the UN deals with allegations of sexual exploitation and abuse against its personnel, it applies one standard to military personnel and another to its non-military personnel.⁹⁴⁶ Once convicted, non-military personnel are subjected to immediate punishment. Nevertheless, with respect to military personnel, the procedure is for the UN to inform the appropriate troop-contributing countries and repatriate the soldiers to their home countries.⁹⁴⁷ Some observers have suggested that prosecutions of those who sexually abuse and exploit children could be more effective if they are conducted in and by the state where the abuse takes place, as well as in and by the troop-contributing state.

It has been argued that the sexual exploitation and abuse of children, especially girls, in conflict-ridden regions of Africa are due primarily to “poverty and vulnerability, unemployment, and cultures under which women’s roles are submissive.”⁹⁴⁸ Although these conditions make these children more vulnerable to sexual abuse and exploitation, experts have argued that the ability of peacekeepers to act with impunity is a much more important contributing factor.⁹⁴⁹ Many peacekeepers are aware of the fact that their potential individual liability is severely limited by the immunity granted them “from any type of criminal prosecution in the mission area by the United Nations or the host state, and which unfortunately shields them from criminal liability for sexual abuse and sexual exploitation.”⁹⁵⁰ Of course, peacekeepers are usually sent to locations that are under severe stress

945. See, e.g., Human Rights Watch, *Five Years On: No Justice for Sexual Violence in Darfur* (Apr. 6, 2008) <https://www.hrw.org/report/2008/04/06/five-years/no-justice-sexual-violence-darfur>; UN, *Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26 Special Session of the UN Human Rights Council* (Dec. 14, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21028&LangID>; Céline Fürer, *Sexual Exploitation and Abuse by United Nations Peacekeepers: A Quantitative Analysis of Variation of Sexual Exploitation and Abuse in UN Peacekeeping Operations in Africa*, Master’s Thesis, Peace and Conflict Studies, Department of Political Science, University of Oslo (Spring 2017), https://www.duo.uio.no/bitstream/handle/10852/57615/Master-Thesis_C-line-F-rer.pdf?sequence=1.

946. UN General Assembly, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, Report of the Secretary-General, U.N. Doc. A/62/890 (June 25, 2008).

947. The hope is that these soldiers will be punished by the countries that had sent them to participate in the UN peacekeeping mission. See, e.g., Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions*, 27 BERKELEY J. INT’L L. 127, 152 (2009). See also UN General Assembly, *supra* note 946.

948. Ndulo, *supra* note 934, at 152.

949. *Id.*

950. *Id.*

due to war, sectarian conflict, natural disaster (e.g., an earthquake) or a combination of these, where the legal, police and judicial architecture may have been destroyed.⁹⁵¹ As a consequence, countries that host peacekeepers usually do not have the capacity to prosecute any peacekeepers accused of complicity in criminal activities.⁹⁵² Troop-contributing countries, on the other hand, may not be willing to prosecute their own nationals for crimes that they have committed abroad while participating in peacekeeping missions.⁹⁵³

Many scholars have argued that the UN's cosmetic changes are not likely to deal effectively with sexual abuse by peacekeepers.⁹⁵⁴ Some of these scholars argue that real change will only come about if, at least, three actions are taken and done so with immediate effect. First, there must be more openness and transparency in UN peacekeeping operations.⁹⁵⁵ Specifically, the mechanisms for victims to report abuse must be significantly improved and, in addition, new reporting requirements must be imposed on troop-contributing countries—at the very minimum, each peacekeeping mission must keep accurate records of allegations of abuse and publicly disclose information on the number of victims and perpetrators, “broken down by nationality, and the disciplinary action taken as a result of substantiated allegations.”⁹⁵⁶

Second, the rich donor countries should “provide legal, technical, and other assistance to help well-intentioned governments that are willing to hold their troops accountable but lack financial and other capacities to so.”⁹⁵⁷ Finally, developed countries, such as the United States, which is also a major contributor to peacekeeping missions, should take the lead to force all peacekeepers, regardless of their country of origin, to account for their actions.

B. The challenge of prosecution in and by host-state governments

It has been suggested that the exploitation and abuse of children by peacekeepers can be handled more effectively if the countries in which the

951. See, e.g., CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES (Deborah Isser ed., U.S. Institute of Peace, 2011).

952. Ndulo, *supra* note 934, at 152.

953. *Id.*

954. Stewart M. Patrick, *Sexual Abuse by Peacekeepers: Time for Real Action*, Council on Foreign Relations (Aug. 6, 2015), <https://www.cfr.org/blog/sexual-abuse-peacekeepers-time-real-action>.

955. *Id.*

956. *Id.*

957. *Id.*

crimes are committed are the ones to prosecute and punish the offending parties. Allowing the prosecution to take place in the territory in which the crime was committed, would provide more access to witnesses and necessary evidence, and enhance the ability of the victim “to appreciate that justice was done,” as well as function as a deterrence.⁹⁵⁸ However, this approach to justice for the victims of abuse and exploitation presents several challenges.

First, most peacekeeping operations usually take place in environments in which local legal and judicial institutions are not likely to be fully functional, due to a variety of causes, including for example, war, sectarian conflict, or natural disaster — the latter most likely created the conditions that brought the peacekeepers to the country. Second, even if a country in which the peacekeepers are located asserts “personal jurisdiction based on territorial jurisdiction,”⁹⁵⁹ it is likely to face a lot of challenges securing custody of peacekeepers who have been accused of involvement in sexual abuse and exploitation within the country. Given the extremely short time-frame for peacekeeping rotations,⁹⁶⁰ the peacekeepers being sought for prosecution by host state courts may have exited the jurisdiction.⁹⁶¹ Of course, the government of the host state can petition the authorities in the troop-contributing country to return the suspects to them for trial. Nevertheless, the extradition option is unlikely to be helpful because of at least two important problems — in addition to the fact that the host country may not have an extradition treaty with the troop-contributing country, the activity in question (e.g., prostitution, especially between consenting adults) may not be a crime in the country to which the peacekeeper has fled.⁹⁶²

Second, the age of consent differs across countries and jurisdictions — for example, the age of consent in Angola is 12 years, 13 in Botswana (males), Cape Verde, Chad, Democratic Republic of Congo (females), Lesotho, Madagascar, and São Tomé & Príncipe.⁹⁶³ Third, some political jurisdictions have laws that do not permit the extradition of nationals.⁹⁶⁴

958. Ndulo, *supra* note 934, at 153.

959. *Id.*

960. The time-frame for such rotations is usually 6 months. *See, e.g.*, Ndulo, *supra* note 934, at 153.

961. Ndulo, *supra* note 934, at 153.

962. *Id.*

963. *See, e.g.*, Benon Herbert Oluka, *Before You Marry or Even have Sex in Africa, Do you Know the Age of Consent? In Angola, it is 12 years*, MAIL & GUARDIAN AFRICA (South Africa) (Mar. 23, 2015), <http://mgafrica.com/article/2015-03-23-before-you-marry-or-even-have-sex-in-africa-do-you-know-the-age-of-consent-in-angola-it-is-12-years>.

964. For example, countries such as France and Brazil will not extradite their own citizens, no matter the circumstances. *See, e.g.*, Nick Giambruno, *The Best Countries for Your Escape Plan*, INTERNATIONAL MAN, <http://www.internationalman.com/articles/which-countries-can-the>

Fourth, the laws of many countries provide that military officers and personnel be tried only by “military tribunals for offenses committed within the context of military duties.”⁹⁶⁵ In addition to the fact that these military tribunals may not be quite suited for adjudicating sexual offenses, they may not be easily accessible to private individuals.

Fifth, the ability of any state to prosecute UN peacekeepers is hindered significantly by their immunity from prosecution. It has been stated that “the founders of the United Nations did not intend that the privileges and immunities of officials and experts on mission should constitute a shield from national criminal prosecution for crimes committed in a state hosting a United Nations operation where crimes have clearly been committed.”⁹⁶⁶ However, the International Court of Justice has ruled, in the case of Mr. Dumitru Mazilu, that “Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.”⁹⁶⁷ It follows that even though the sexual abuse and exploitation of children is completely contrary to the duties of any peacekeeper, the state hosting the mission would have to seek to have the immunity of affected UN personnel waived before it can proceed with any prosecutions.

Sixth, the UN may not be willing to waive immunity to allow host states to prosecute its personnel who are alleged to have been engaged in criminal activities while taking part in a peacekeeping mission. It has been argued that even though the UN may want to waive immunity, it might be unlikely to do so if it believes that the host country’s judicial system does not have the capacity or the will to deliver justice in accordance with standards prescribed by international human rights law.⁹⁶⁸ For example, in countries where the judiciary does not enjoy even minimum standards of judicial independence,

nsa-whistleblower-escape-to. *See also* Federal Law of Dec. 4, 1979 on Extradition and Mutual Assistance in Criminal Matters (Extradition and Mutual Assistance Law (ARHG)), BGBl (Federal Law Gazette) No. 59/1979.

965. Ndulo, *supra* note 934, at 153.

966. *Id.*

967. *Applicabilité de la Section 22 de l’Article VI de la Convention sur les Privilèges et Immunités des Nations Unies*, 1989 I.C.J. Rep. 177, 198, 29 I.L.M. 98 (15 décembre, 1989), <http://www.icj-cij.org/files/case-related/81/081-19891215-ADV-01-00-EN.pdf>.

968. Ndulo, *supra* note 934, at 154. For more on judicial independence, *see* ARTHUR T. VANDERBILT, AMERICAN BAR ASSOCIATION & NATIONAL CONFERENCE OF JUDICIAL COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY (1949); PROSECUTING WAR CRIMES: LESSONS AND LEGACIES OF THE INTERNATIONAL CRIMINAL FOR THE FORMER YUGOSLAVIA (James Gow, Rachel Kerr & Zoran Pajić eds., 2014).

or one in which the judiciary is pervaded by corruption, or “the legal system does not meet the minimum standards of a judicial system prescribed by international human rights law,”⁹⁶⁹ the UN might not be willing to subject its personnel to what would essentially be a “kangaroo-type court.”⁹⁷⁰

Seventh, when a state accepts the UN’s request to supply troops to a peacekeeping mission, it usually signs a Status of Forces Agreement (“SOFA”) with the UN as prescribed in Article 43 of the UN Charter.⁹⁷¹ The SOFA provides “specific terms for the conduct, privileges, immunities and jurisdictions of the military and civilian employees on such matters as criminal and civil jurisdiction.”⁹⁷² The UN also concludes a similar agreement with the mission’s host state.⁹⁷³ The SOFA effectively shields peacekeepers contributed by states from being prosecuted in host states.⁹⁷⁴ In addition to granting peacekeepers absolute immunity from being prosecuted in “host-country jurisdictions,” SOFAs also establish “exclusive jurisdiction of the troop-contributing peacekeepers’ nation of origin.”⁹⁷⁵ Accordingly, the troop-contributing state has exclusive jurisdiction to prosecute its troops, which are sent to participate in a peacekeeping mission and which subsequently have been accused of complicity in criminal activities.⁹⁷⁶

Scholars have argued that the absolute immunity granted the peacekeepers contributed by various states is in exchange for troop-contributing states pledging to exercise “criminal jurisdiction over their troops”⁹⁷⁷ and to prosecute “their troops where appropriate under the domestic laws of the troop-contributing country.”⁹⁷⁸ Nevertheless, the UN quite often does not secure these formal assurances.⁹⁷⁹ The suggested cure to

969. Ndulo, *supra* note 934, at 154.

970. *Id.*

971. U.N. Charter, at art. 43.

972. Ndulo, *supra* note 934, at 154.

973. UN Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, UN Doc. A/59/710 (Mar. 24, 2005), at para. 78, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/247/90/PDF/N0524790.pdf?OpenElement>.

974. Here, “host states” are the states that are hosting the peacekeeping mission and “troop-contributing states” are the states that provide each mission with troops.

975. Ndulo, *supra* note 934, at 154.

976. *Id.*

977. *Id.*

978. *Id.*

979. *Id.* See also Karishma Rajoo, *Sexual Abuse and Exploitation: Power Tools in Peacekeeping Missions*, 2005 CONFLICT TRENDS 17, 22 (2005, African Center for the Constructive Resolution of Disputes).

this quagmire is that the UN Security Council adopt a resolution requiring and making it mandatory that each state (1) undertake the prosecution of any of their peacekeeping troops that are found to be complicit in criminal activities while on a mission; and (2) provide the UN with data on actions taken by the judiciary system of the troop-contributing state in prosecuting alleged perpetrators of sexual abuse and exploitation in peacekeeping missions.⁹⁸⁰ The UN Security Council Resolution would be adopted in the context of Article 48 of the UN Charter.⁹⁸¹

Suppose a host country in Africa has the requisite jurisdiction to charge and prosecute peacekeepers who are alleged to have engaged in criminal activities in that country, what are the challenges that such a country might face? First, the country may not have the legal capacity to fully and effectively prosecute the alleged crimes. This may be due to several reasons, including a breakdown in legal, judicial, and police institutions because of the conditions (e.g., war, sectarian violence, natural disaster) that brought the peacekeepers to the country. Capacity to prosecute the alleged crimes could also be lacking because of the existence of high levels of corruption in the police and the judicial systems — where corruption is pervasive, institutions such as the police and the judiciary may lose legitimacy, especially in the eyes of citizens and hence, would be incapable of fully and effectively performing their functions.⁹⁸²

Second, because of local traditions and customs that generally discriminate against girls and women, officials in the host country may not consider sexual abuse and exploitation of females as an issue that needs serious judicial consideration. Where such abuse and exploitation is committed during war, officials may consider it simply as part of what happens in war — in some cultures, the raping of women is “seen as a means for the aggressor to

980. Ndulo, *supra* note 934, at 155.

981. UN Charter art. 48.

982. For example, in Mobutu Sese Seko's government in Zaire (now Democratic Republic of Congo), the forces of law and order (which included the national police and judiciary) were totally crippled by corruption and hence, were no longer able to deliver justice. In a study of Mobutu's Zaire, Gould and Mukendi noted as follows: In Zaire, “the whole bureaucratic structure has been converted into an instrument of self-advancement and enrichment by top officials. President Mobutu himself has acknowledged that corruption is probably the biggest Zairian sickness. On several occasions, he has made explicit references to abuses such as the case of army officials who divert for their personal profit the military supplies intended for frontline soldiers, *misuse of judiciary machinery for avenging disputes, selective justice depending on one's wealth and status*, smuggling of some exportable products such as coffee and diamonds and the non-repatriation of profits made on them, monthly salary payments to fictitious public officials and teachers, and massive evasion of import duties . . .” David J. Gould & T. B. Mukendi, *Bureaucratic Corruption in Africa: Causes, Consequences and Remedies*, 12 INT'L J. PUB. ADMIN. 427, 429–430 (1989) (emphasis added).

symbolically and physically humiliate the defeated men.”⁹⁸³ Such prejudices against women may create a political environment in which crimes against girls and women are not taken seriously.

Third, even if the host country has the legal capacity, it may not be willing to prosecute peacekeepers. The problem of sexual abuse and exploitation of children by peacekeepers has been known, even in Africa, for many years.⁹⁸⁴ Yet, it has been rare to find the prosecution of peacekeepers either by the host countries or the peacekeepers’ country of origin for their alleged complicity in sexual abuse and exploitation of children. South Africa, however, is the exception. It was reported in 2005 that South Africa had prosecuted two of its soldiers who were serving as peacekeepers for alleged engagement in rape and violence against children.⁹⁸⁵

C. Prosecution of peacekeepers by troop-contributing States

Under UN guidelines and the SOFA,⁹⁸⁶ the troop-contributing State retains the exclusive jurisdiction over the troops that it sends abroad to participate in peacekeeping missions. In fact, these countries usually make

983. Ndulo, *supra* note 947, at 155. For example, during the Rwandan Genocide, the rape of women and girls was quite common — these cruel and insidious crimes were committed against females and their families and subculture. See, e.g., BINAIFER NOWROJEE & HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996); JONATHAN TORGOVNIK, INTENDED CONSEQUENCES: RWANDAN CHILDREN BORN OF RAPE (2009); SABINE HIRSCHAUER, THE SECURITIZATION OF RAPE: WOMEN, WAR AND SEXUAL VIOLENCE (2014).

984. For example, in 1994, the United Nations appointed Graca Machel, the former first lady of Mozambique, to investigate the effects of armed conflict on children. The report, was released in August 1996, raised the issue of the sexual exploitation and abuse of children by peacekeepers. See Azad Essa, *Why Do Some Peacekeepers Rape? The Full Report*, ALJAZEERA (June 10, 2015), <https://www.aljazeera.com/indepth/features/2017/08/peacekeepers-rape-full-report-170804134221292.html>; UNHCR and Save the Children-UK, *Note for Implementing and Operational Partners by UNHCR and Save the Children-UK on Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission, 22 October – 30 November 2001*, https://www.savethechildren.org.uk/content/dam/global/reports/health-and-nutrition/sexual_violence_and_exploitation_1.pdf (last visited on Mar. 5, 2018).

985. See *UN Bans Peacekeepers from Sex with Congolese*, REUTERS, Feb. 10, 2005, <https://reliefweb.int/report/democratic-republic-congo/un-bans-peacekeepers-sex-congolese> (last visited on Mar. 5, 2018). See also *South African Troops Accused of Sex Abuse in DR Congo: UN*, TELESUR NEWS, Feb. 12, 2018, <https://www.telesurtv.net/english/news/South-African-Troops-Accused-of-Sex-Abuse-in-DR-Congo-UN-20180212-0017.html> (last visited on Mar. 5, 2018).

986. SOFA is the Status of Forces Agreement, signed between the United Nations and the troop-contributing State, as prescribed in Article 43 of the UN Charter.

sure that these troops remain part of their national armed forces.⁹⁸⁷ Legally, then, the UN's options for dealing with allegations of sexual misconduct against a peacekeeper who is not its employee may be quite limited. The UN could suspend and perhaps, remove the affected soldiers from active participation in the mission while it investigates the allegations. If the soldiers are found guilty of the alleged crimes, the UN would then expel them and send them back to their country of origin. Of course, there is no guarantee that once the convicted soldiers are returned to their country of origin, the country would honor the conviction and ensure that the convicted soldiers are dully punished.

As the evidence has shown, the UN has not been able to discipline its peacekeeping military personnel.⁹⁸⁸ In addition, many host countries are usually unwilling or do not have the capacity to prosecute the accused soldiers. Consequently, troop-contributing countries may be in the best position to prosecute their own soldiers or nationals who commit crimes, regardless of where these crimes take place, and this includes those soldiers who are serving in peacekeeping missions.⁹⁸⁹ Of course, international human rights jurisprudence dictates that all countries have a duty to prosecute any citizen who commits a crime, particularly if that crime involves the violation of an international human rights norm.⁹⁹⁰

If the crimes alleged involve those that fall within the purview or jurisdiction of the International Criminal Court ("ICC") and other conditions

987. See Karishma Rajoo, *Sexual Abuse and Exploitation: Power Tools in Peacekeeping Missions*, 2005 CONFLICT TRENDS 17, 22 (2005, African Center for the Constructive Resolution of Disputes).

988. See, e.g., *UN Peacekeepers exempted from war crimes prosecution for another year*, U.N. NEWS (June 12, 2003), <https://news.un.org/en/story/2003/06/71102-un-peacekeepers-exempted-war-crimes-prosecution-another-year>; Kathleen Jennings, *The Immunity Dilemma: Peacekeepers' Crimes and the UN's Response*, E-INTERNATIONAL RELATIONS (Sept. 18, 2017), <http://www.e-ir.info/2017/09/18/the-immunity-dilemma-peacekeepers-crimes-and-the-uns-response/>.

989. Ndulo, *supra* note 934, at 156.

990. See, e.g., Ndulo, *supra* note 934, at 156. See also *Velásquez-Rodríguez v. Honduras*, Inter-Am. C. H. Rights (Ser. C) No. 4 (1988). In this case, the Inter-American Court of Human Rights ruled that the human rights convention imposes an obligation on each State Party, which is to respect the rights and freedoms recognized by the convention and that an additional obligation is for each State Party to the Convention to ensure that every person in their jurisdiction can exercise fully and freely the rights recognized by the Convention. See *Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1998, http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

are met,⁹⁹¹ those crimes could be prosecuted by the ICC.⁹⁹² As an alternative, the concept of “universal jurisdiction” can be invoked and used to prosecute these crimes, provided that the state, which is taking on the duties of prosecuting the crimes has fully empowered its courts, preferably through legislation, to adjudicate cases under universal jurisdiction.⁹⁹³

Notably, however, the nature of peacekeeping operations may significantly contribute to the troop-contributing state's problems in prosecuting any of its troops that are alleged to have sexually abused and exploited children during their service in peacekeeping missions. For example, given the fact that the location of the crime is outside the territory of the troop-contributing country, the latter may find it quite difficult to secure the evidence that it needs to prosecute the soldiers. In addition, victims and other important witnesses to the crime are most likely located in the country that hosted the mission and the troop-contributing country may not be able to have effective access to them.⁹⁹⁴ It has been suggested that troop-sending countries could “hold field court martial proceedings in the peacekeeping zone.”⁹⁹⁵

With respect to prosecution by a third country under the concept of universal jurisdiction, securing tangible evidence, having effective access to witnesses, and obtaining custody of the suspects could present an insurmountable obstacle to the third country, especially given the fact that this country is not part of the mission and has no direct

991. For example, the State is a party to the Rome Statute of the International Criminal Court and the crime is an international crime. *See* Rome Statute, *infra* note 994.

992. The ICC has jurisdiction to prosecute specific crimes mentioned in its constituting statute—the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (July 17, 1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb3_0e16/0/rome_statute_english.pdf. Note that the Rome Statute was corrected by “process-verbaux” of November 10, 1998; July 12, 1999; November 30, 1999; May 8, 2000; January 17, 2001; and January 16, 2002. The Rome Statute entered into force on July 1, 2002. Article 5 of the Rome Statute details the crimes within the jurisdiction of the ICC and these include (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

993. Ndulo, *supra* note 934, at 156. For more on universal jurisdiction, *see* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004) & MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW (2005).

994. Muna Ndulo, *supra* note 934, at 156.

995. Ndulo, *supra* note 934, at 157. This, of course, would involve the cooperation of many parties, including especially the host country (that is, the country where the mission is located) and the United Nations. In the case where the forces of law and order no longer function properly, it may be quite difficult for the troop-contributing country to secure the necessary support from the host government to be able to conduct a viable court martial proceeding.

connection to the alleged crimes.⁹⁹⁶

D. The problem of peacekeeper babies

As mentioned, one of the enduring consequences of the sexual abuse and exploitation of young girls in Africa by peacekeepers are the many abandoned “peacekeeper babies” that can be found in many former and present peacekeeping locations throughout the continent.⁹⁹⁷ Peacekeeper babies are children that have been fathered by peacekeepers and abandoned by their fathers. Many of these children are products of illegal liaisons with minors, many of whom are children themselves.⁹⁹⁸ Over the years, the UN has generally ignored the abandoned babies fathered by its peacekeeping personnel, just as it has failed to deal with the latter’s sexual abuse and exploitation of African children.⁹⁹⁹

Nevertheless, in response to pressure from human rights activists, the UN has gradually warmed up to the idea of determining how many of these babies exist, where they are, and what to do to assist them.¹⁰⁰⁰ No one, however, knows exactly how many children have been fathered by UN peacekeepers since the organization first started sending out people to secure the peace in the world’s troubled areas.¹⁰⁰¹ Some estimates are that as many as 6,600 babies were fathered by UN peacekeepers in Liberia¹⁰⁰² Thousands

996. Ndulo, *supra* note 934 at 157.

997. See, e.g., Kevin Sieff, *Members of a U.N. Peacekeeping Force in the Central African Republic Allegedly Turned to Sexual Predation, Betraying their Duty to Protect*, WASH. POST (Feb. 27, 2016), http://www.washingtonpost.com/sf/world/2016/02/27/peace-keepers/?utm_term=.6170812af18b.

998. Sieff, *supra* note 997. For example, in Central African Republic, journalists found a 14-year old girl who told them how a Burundian peacekeeping soldier brutally raped her and left her pregnant with the baby boy that she later delivered. *See id.*

999. Sieff, *supra* note 997. See Karen McVeigh, *Haitian mums seek support from UN troops for ‘peacekeeper babies’*, THE GUARDIAN (UK) (Dec. 15, 2017), <https://www.theguardian.com/global-development/2017/dec/15/peacekeeper-babies-mums-haiti-support-un-troops>.

1000. See, e.g., Cara Anna, *Facing ‘peacekeeper babies’, UN now offers DNA testing*, SACRAMENTO BEE (June 13, 2015), <http://www.sacbee.com/news/nation-world/world/article23971291.html>; *‘Peacekeeper babies’ an unintended consequence of sending in the United Nations*, AP NEWS (June 13, 2015), <http://nationalpost.com/news/world/peacekeeper-babies-an-unintended-consequence-of-sending-in-the-united-nations>; Olivera Simić & Melanie O’Brien, *‘Peacekeeper Babies’: An Unintended Legacy of United Nations Peace Support Operations*, 21 INT’L PEACEKEEPING 345 (2014).

1001. See *‘Peacekeeper babies’*, *supra* note 1000.

1002. Nicola Johnston, *Peace Support Operations*, in INCLUSIVE SECURITY, SUSTAINABLE PEACE: A TOOLKIT FOR ADVOCACY AND ACTION 33, 41 (2009), <https://www.inclusives>

more have been fathered by peacekeepers in Guinea, Sierra Leone, Democratic Republic of Congo, Central African Republic, and other African countries where peacekeepers have been sent to secure the peace and protect people displaced by war and sectarian violence.¹⁰⁰³

In the laws of many countries, including those in Africa, fathers usually have the responsibility to take care of their children financially and otherwise, even if they are not married to their mothers. For example, the constitution of Kenya mandates 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.”¹⁰⁰⁴ There, however, are major problems regarding support when it comes to peacekeeping children. First, since the fathers of these children are most likely to be foreigners and not members of the mother’s subculture, members of the latter are unlikely to consider the child one of theirs and hence, capable of receiving the group’s protection.¹⁰⁰⁵ For example, mothers of many children who were fathered and abandoned by UN peacekeepers who came to Haiti to stabilize it after many years of political turmoil, have stated that they and their children have been systematically discriminated against by members of their communities.¹⁰⁰⁶

Second, once the peacekeeper returns home, he is no longer in the country or location where the child was or is born. Perhaps, more importantly is the fact that the father, who has now returned to his country of origin, is no longer under the jurisdiction of the host country and its courts. Consequently, the host country cannot utilize some of the domestic laws that protect children to force the father of the peacekeeper child to live up to his responsibilities as a father.¹⁰⁰⁷ Thus, the host country’s lack of jurisdiction

ecurity.org/wp-content/uploads/2013/05/101864251-Toolkit-for-Advocacy-and-Action.pdf.

1003. See, e.g., SABINE LEE, CHILDREN BORN OF WAR IN THE TWENTIETH CENTURY (2017) & MELANIE O’BRIEN, CRIMINALIZING PEACEKEEPERS: MODERNIZING NATIONAL APPROACHES TO SEXUAL EXPLOITATION AND ABUSE (2017).

1004. CONSTITUTION art. 53(1)(e) (2010) (Kenya).

1005. See, e.g., Institute for Justice & Democracy in Haiti, *Ten Mothers of 11 Children Abandoned by UN Peacekeepers Bring a Legal Action to Recover Child Support and Establish Custody*, <http://www.ijdh.org/2017/12/topics/law-justice/for-immediate-release-ten-mothers-of-11-children-abandoned-by-un-peacekeepers-bring-a-legal-action-to-recover-child-support-and-establish-custody/>.

1006. See *Haitian Women Seek Support for Children Fathered by UN Troops*, VOA NEWS, (Dec. 12, 2017), <https://www.voanews.com/a/haitian-women-seek-support-children-fathered-united-nations-troops/4161001.html>.

1007. This would include taking legal action to force the father to take a paternity test and where paternity is established, compelling the father to support the child and the child’s mother. In fact, if such a wayward father were a local resident, the host country courts could garner his wages and send them directly to the child’s mother.

over the father is a major problem in any efforts to get justice for the child and the mother.

Third, most of the fathers often deny paternity. Unfortunately, establishing paternity is quite difficult, since young mothers usually know the peacekeepers by only their first names or names that turn out to be false as the peacekeepers who engage in illegal sexual activities with them make efforts to hide their true identities. An effective solution, of course, would be for the UN to help these young mothers with the resources that they need to collect DNA materials from the suspected fathers and undertake the necessary tests to definitively determine the paternity of their babies. Once a child's paternity has been determined, then, the UN, the host country, and the troop-contributing country should work together to make certain that the peacekeeper meets, at the very minimum, his financial obligations to the child.

In his study of sexual abuse and exploitation by peacekeepers in the Democratic Republic of Congo ("DRC"), Prince Zeid recommended that the UN General Assembly grant the UN Secretary-General the right to require that DNA be used to establish paternity in cases of children alleged to have been fathered by peacekeepers.¹⁰⁰⁸ In his program budget for the biennium 2016–2017 titled "Special measures for protection from sexual exploitation and abuse: a new approach,"¹⁰⁰⁹ the UN Secretary-General did suggest the establishment of a DNA collection protocol.¹⁰¹⁰ Despite this effort by the UN, a more effective process would require a convention, not only to enhance the collection of the DNA samples but also to "facilitate the execution of maintenance orders issued in peacekeeping countries in the home states of peacekeepers."¹⁰¹¹ Although the convention would make certain that court orders issued by a domestic court can be enforced in foreign jurisdictions, the problem is that the provisions of the convention would only

1008. UN General Assembly, *supra* note 898.

1009. U.N. Secretary General, *Rep. of the Secretary-General: Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, UN Doc. A/71/818 (Feb. 28, 2017).

1010. See U.N., *Paternity Claims*, CONDUCT IN UN FIELD MISSIONS, <https://conduct.unmissions.org/remedial-paternity> (last visited on Mar. 5, 2018). The UN states that "[w]here a child has been born as a result of sexual exploitation and abuse by United Nations or related personnel, the UN will work to facilitate the pursuit of claims of paternity and child support." See *id.* The report goes on to state that "[a] DNA sample collection protocol was developed [in 2014] and field missions were provided with DNA paternity collection kits and guidance for their use. Where national legislation of a Member State permits the use of DNA samples for testing for paternity, the UN can facilitate the collection and transmission of samples for testing." See *id.*

1011. Ndulo, *supra* note 934, at 158.

apply in and bind only countries that are States Parties to the convention.¹⁰¹²

Many of the people and groups that work to eliminate sexual exploitation and abuse argue that this type of violence against girls and women is “rooted in inequality, discrimination, male domination, poverty, aggression, misogyny and the entrenched socialization of sexual myths.”¹⁰¹³ The evidence, as discussed earlier, appears to support these claims. Thus, while the short-term strategy is to fully and effectively address the sexual exploitation and abuse of children in the peacekeeping missions, the long-term policy should be based on examining customary and traditional practices that violate the rights of children and condone sexual violence against girls and women and bring them in line with international human rights norms. Unfortunately, in conflict-plagued zones, social and political structures that could have been utilized to eliminate or modify these negative cultural and traditional norms have actually been destroyed. Hence, it is necessary for host governments, most likely with the help of international actors,¹⁰¹⁴ to create legal and other institutions that can fully and effectively prosecute those responsible for the sexual exploitation and abuse of children, ensure an end to impunity, and bring national laws and institutions in line with international human rights norms.¹⁰¹⁵ This should include the criminalization of sexual exploitation and abuse in the context of peacekeeping missions.¹⁰¹⁶

After the September 11, 2001, terrorist attacks on the World Trade Center in New York, the UN Security Council (“UNSC”) adopted Resolution 1373,¹⁰¹⁷ which provided steps and strategies for combating international terrorism. Resolution 1373 directed all States to pass legislation to criminalize

1012. It has been suggested that the model SOFA should be amended to allow the UN to directly take money out of the daily allowances paid to “any soldier found culpable of sexual exploitation and abuse” and that money placed in a trust fund for victims of sexual exploitation and abuse and that “claims for child support from victims” should be processed “in accordance with the laws of the troop-contributing country and that Staff Rules should [be] amended to compel staff and experts on mission to make child support payments.” See Ndulo, *supra* note 934, at 158, fn. 214. This process, nevertheless, would only be effective as long as the peacekeeper in question remains a peacekeeper. Once his term of service is completed and he returns home, the UN is no longer able to make any deductions from his salary and/or allowances.

1013. Ndulo, *supra* note 934, at 159.

1014. In Africa, such external actors can include the African Union and its various organs, as well as regional organizations such as the East African Community (EAC), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC), and the Economic Community of West African States (ECOWAS).

1015. Ndulo, *supra* note 934, at 158–159.

1016. Ndulo, *supra* note 934, at 159.

1017. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

terrorist acts and make certain that sentences handed out to those convicted of terrorist acts reflect the seriousness of these dastardly acts.¹⁰¹⁸ In addition to Resolution 1373, the UNSC also established an in-house Committee to monitor the implementation of the Resolution.¹⁰¹⁹

Given the fact that UNSC resolutions are binding on all member States of the UN Organization, the UNSC was, as argued by several scholars,¹⁰²⁰ “legislating for the world.”¹⁰²¹ It has been suggested then, that a similar resolution as the one enacted by the UNSC after the September 11, 2001, terrorist attacks could be passed to enhance the ability of both the UN and the global community to reduce impunity and promote “uniformity in the handling of sexual abuse and sexual exploitation violations in peacekeeping missions.”¹⁰²² But, how can the UNSC make sure that member States abide by the resolution and do, indeed, prosecute their nationals who engage in sexual abuse and/or exploitation? It is suggested that the UNSC should establish an in-house Committee to which all member States would be specifically required to report all the actions that they have taken with respect to all their nationals who have been accused of sexual abuse and exploitation. Such a resolution could also include the wherewithal for peacekeeper children to secure, at the very minimum, financial support from their fathers, regardless of where they are located. Enforcement, however, is most likely to require some type of international legal instrument that would allow for the enforcement of foreign child support orders, as well as making it possible for mothers of peacekeeper children to take legal action in the home country of their child’s father to gain access to necessary financial resources.

1018. According to paragraph 1 of Resolution 1373, “all States shall: (b) [c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.” *See id.* Paragraph 2(e) states that “all States shall: (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”

1019. The establishment of the Committee is provided for in paragraph 6 as follows: The Security Council “Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution.” *See id.* (emphasis in original).

1020. *See, e.g.,* Ndulo, *supra* note 934.

1021. *Id.* at 160.

1022. *Id.*

Assistance to victims of sexual abuse and exploitation must be made part of a comprehensive and sustainable response to the problem of sexual abuse and exploitation in peacekeeping missions.¹⁰²³

Sexual abuse and exploitation in peacekeeping missions is a problem that has both domestic and international dimensions and hence, its solution will require both domestic and international laws. While all countries must strengthen their national laws and institutions to make certain that they have the capacity to deal fully with this insidious problem, the UN should provide the leadership to enact the necessary international laws that are required to fight this scourge and provide an environment in which peacekeeping missions no longer create opportunities for peacekeepers to sexually abuse and exploit children.

VIII. SUMMARY AND POLICY RECOMMENDATIONS

Throughout Africa, children are routinely abused and exploited as (1) sex objects; (2) tools in the production of various goods and services (e.g., cocoa and gold; services such as child pornography and prostitution); and (3) “child soldiers” to fight on one side or the other in civil wars and sectarian conflicts. African children are exploited and abused by both domestic and external or foreign actors — such actors include, but are not limited to, family members and community leaders; and foreign exploiters of Africa’s children include international criminal gangs engaged in the production of child pornography, sex trafficking (which includes sex tourism), and the illegal harvesting and sale of organs. With respect to the use of children in military conflicts, exploiters include state and non-state actors.¹⁰²⁴

The subjection of children to extreme abuse, exploitation and degradation is common in virtually all African countries, although such abuse and exploitation seem to be more heightened in countries where the rule of law has been destroyed either by civil war, some type of prolonged

1023. *Id.* at 161.

1024. In many civil wars in Africa, both government and rebel armies make use of child soldiers. *See, e.g.*, Human Rights Watch, *More Than 120,000 Child Soldiers Fighting in Africa* (Apr. 18, 1999), <https://www.hrw.org/news/1999/04/18/more-120000-child-soldiers-fighting-africa> & Anne-Lynn Dudenhoefter, *Understanding the Recruitment of Child Soldiers in Africa*, CONFLICT TRENDS 2016/2 (Aug. 16, 2016), <http://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/>. Extremist groups, such as Boko Haram (Nigeria/Cameroon/Niger/Chad) and the Lord’s Resistance Army (Uganda, DRC, South Sudan, and Central African Republic) are known to have recruited and used children as soldiers. *See, e.g.*, THE LORD’S RESISTANCE ARMY: MYTH AND REALITY (Tim Allen & Koen Vlassenroot eds., 2010); VIRGINIA COMOLLI, BOKO HARAM: NIGERIA’S ISLAMIST INSURGENCY (2015), MIKE SMITH, BOKO HARAM: INSIDE NIGERIA’S UNHOLY WAR (2015).

sectarian conflict, or pervasive corruption. Where corruption is pervasive, even if the country has laws against behaviors or practices that are harmful to children, the forces of law and order usually do not enforce the laws and as a consequence, abusers and exploiters are likely to act with impunity and continue with their abusive behaviors.¹⁰²⁵

African children are also subject to sexual exploitation and abuse for religious reasons. For example, Ghana, Togo, and Benin practice a form of ritual servitude known as “fetish shrine” in which girl children are routinely abused and exploited sexually by the shrines’ priests.¹⁰²⁶ In other African countries, such as Senegal, children are forced by their religious teachers, to roam the streets begging for money that is used primarily to benefit their teachers and the owners of the schools.¹⁰²⁷

Criminal gangs, working with domestic groups, also engage in the abduction and sale of children to harvest their organs and sell them in the illegal global organ transplantation market. In 2013, the *New York Post*¹⁰²⁸ reported that “[a] young girl had been smuggled out of Africa [into Britain] and sold for organ harvesting.”¹⁰²⁹ Corruption, dysfunctional governments,

1025. For example, according to the UN Secretary-General’s study on violence against children, the abuse and exploitation of children is present in every country in the world, “cutting across culture, class, education, income and ethnic origin,” despite the fact that these countries have laws that prohibit and criminalize the abuse and exploitation of children, as well as the fact that these countries are signatories to many international human rights conventions. See, e.g., PAULO SÉRGIO PINHEIRO, WORLD REPORT ON VIOLENCE AGAINST CHILDREN: UNITED NATIONS SECRETARY-GENERAL’S STUDY (2006), <http://www.unviolencestudy.org>; Unicef, *A National Study on Violence Against Children and Young Women in Swaziland* (Oct. 2007), https://www.unicef.org/swaziland/Violence_study_report.pdf.

1026. For more on the Trokosi system in Ghana, see generally BRITISH COUNCIL (GHANA), REPORT OF THE SECOND NATIONAL WORKSHOP ON TROKOSI SYSTEM IN GHANA: SECURING THE INALIENABLE RIGHTS OF WOMEN AND CHILDREN IN TROKOSI BONDAGE (1998); LINDA M. GILLARD, TROKOSI (2010); DANIEL MAWULI TSİKATA, CULTURAL PRACTICES AND EXCLUSION OF GIRLS FROM EDUCATION: THE TROKOSI SYSTEM OF THE SOUTH-EASTERN GHANA (2008); BEATRICE KORANKYEWA QUIST, THE TROKOSI SYSTEM AND ITS IMPACT ON WOMEN IN GHANA (2005); AFRICAN WOMEN AND CHILDREN: CRISIS AND RESPONSE (Apollo Rwomire ed., 2001). For the practice in Togo and Benin, see ROBERT LOUIS TEGENKAMP, WHY BAD STUFF HAPPENS TO GOOD PEOPLE: THE FINAL ANSWER (2015); AUGUSTINE SHERMAN, TROKOSI (2016) & MARTIN A. KLEIN, HISTORICAL DICTIONARY OF SLAVERY AND ABOLITION, 2ND EDITION (2014).

1027. See THE EXPLOITED CHILD (Bernard Schlemmer ed., 2000). See, especially, the chapter titled *Child Labor and Socialization in Senegal*.

1028. See *Little Girl Sold for ‘Organ Harvesting’*, NEW YORK POST (Oct. 20, 2013), <https://nypost.com/2013/10/20/little-girl-sold-for-organ-harvesting/>.

1029. *Id.* See also Ogu Eji Ofo Annu, *African Children Menaced by European (Organ Harvesting) Charity*, RASTA LIVEWIRE, (Jan. 16, 2008), <https://www.africasource.com/rasta/sesostris-the-great-the-egyptian-hercules/african-children-menaced-by-european-orga>

and improvements in technology, especially communication technology (e.g., the Internet and social media), have all contributed significantly to the trafficking of African children to exploit their organs.

The trafficking of African children for illegal organ harvesting is not limited to illegal gangs, as evidenced by the case of Netcare KwaZulu, a global healthcare conglomerate. In 2010, the healthcare behemoth admitted in open court that it had paid poor South African children to have their organs harvested and sold to wealthy foreign clients.¹⁰³⁰

During the last several decades, UN peacekeepers have been accused of engaging in the sexual exploitation and abuse of African children in peacekeeping missions. The abuse and exploitation of African children by UN peacekeepers and humanitarian aid workers has become a major issue, not just for Africans but for the global community. Even though the UN has promised,¹⁰³¹ in several public pronouncements, to deal fully and effectively with the problem of exploitation and abuse of children by its personnel and contractors, the problem persists.¹⁰³² In fact, as late as February 2018, new allegations of sexual misconduct were still being lodged at UN peacekeepers.¹⁰³³

n-harvesting-charity-agencies-the-zoes-ark-project/; Hannah Roberts, *Egyptian Organ Traffickers Bought Women and Children from People Smugglers so They Could Kill Them to be Used in Illegal Transplants, Claims Supergrass*, DAILY MAIL.COM (UK) (July 4, 2016), <http://www.dailymail.co.uk/news/article-3673918/Egyptian-organ-traffickers-bought-women-children-people-smugglers-kill-used-illegal-transplants-claims-supergrass.html>; ALEXIS A. ARONOWITZ, HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS (2009); Dominique van Heerden, *Hunting for Humans: Malawian Albinos Murdered for their Bones*, CCN NEWS (June 7, 2016), <https://www.cnn.com/2016/06/07/africa/africa-albino-hunted-bones-malawi/index.html>.

1030. See *South African Hospital Pleads Guilty to Organ Trafficking Case*, THE TELEGRAPH (South Africa) (Nov. 10, 2010); *S African Hospital Group Pleads Guilty in Organ Scandal*, BBC NEWS (Nov. 10, 2010), <http://www.bbc.com/news/world-africa-11725536>; Fatima Hassan and Sam Sole, *Kidneygate: What the Netcare Bosses Really Knew*, MAIL & GUARDIAN (Apr. 29, 2011), <https://mg.co.za/article/2011-04-29-kidneygate-what-the-netcare-bosses-really-knew>.

1031. Mike Hanna, *UN Secretary General Promises to Tackle Sexual Abuse by Peacekeepers*, ALJAZEERA, (Mar. 10, 2017), <https://www.aljazeera.com/video/news/2017/03/secretary-general-promises-tackle-sexual-abuse-peacekeepers-170310095052386.html>.

1032. Inna Lazareva, *Broken Promises for the Children of Bangui Abused by Peacekeepers*, THE GUARDIAN (UK) (Mar. 28, 2017), <https://www.theguardian.com/global-development/2017/mar/28/broken-promises-children-bangui-reports-peacekeepers-abuse-central-african-republic>; Sanam Naraghi Anderlini, *UN Peacekeepers' Sexual Assault Problem*, FOREIGN AFFAIRS (June 9, 2017), <https://www.foreignaffairs.com/articles/world/2017-06-09/un-peacekeepers-sexual-assault-problem>; Jeni Whalan, *Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping*, International Peace Institute (Aug. 2017), <https://www.ipinst.org/wp-content/uploads/2017/08/IPI-Rpt-Dealing-with-Disgrace2.pdf>.

1033. Alice Cuddy, *More than 150 Allegations of Sexual Misconduct at UN Agencies in*

While there are international and regional legal instruments that can help in the fight against the sexual abuse and exploitation of children, a national governing process undergirded by the rule of law is the key to success. Of course, international law is important, especially regarding the need for multilateral cooperation to minimize the exploitation and abuse of children across international borders. However, the governing process in each African country where the child lives is more important and critical. It is the quality of a country's laws and institutions that can determine the extent to which its children are protected and their rights enforced. The abuse and exploitation of children, regardless of who is carrying it out, usually occurs in the jurisdiction of some country and hence, the legal and judicial institutions of such countries are and must be a critical part of the effort to eradicate these insidious practices. Where traditional, customary and religious practices are harmful to children, the legal and judiciary institutions of the country where this is taking place are very important to the elimination of these practices.¹⁰³⁴

The protection of children or the elimination of sexual abuse and exploitation of children should be the concern of all nations. Nevertheless, a country's ability and capacity to protect its children from the various forms of abuse and exploitation is determined, to a great extent, by the nature of that country's governing process: how well are the civil servants and political elites constrained by law so that they do not act with impunity and engage in behaviors (e.g., corruption and a failure to enforce the laws) that make children vulnerable to abuse and exploitation? In countries with governing processes that are undergirded by the rule of law and hence, adequately constrain the state, the sexual exploitation and abuse of children is most likely to be minimized, especially given the fact that those who engage in harmful behaviors to children would be brought to justice by the forces of law and order. However, in countries pervaded by corruption, the legal and

2017, EURONEWS, (Feb. 24, 2018) <http://www.euronews.com/2018/02/24/more-than-150-allegations-of-sexual-misconduct-at-un-agencies-in-2017>; *Victims Claim UN Peacekeepers Sexually Abusing Women and Children in Central African Republic*, CBN NEWS (Jan. 17, 2018), <https://www1.cbn.com/cbnnews/world/2018/january/victims-claim-un-peacekeepers-sexually-abusing-women-and-children-in-central-african-republic>; Karen McVeigh, *Unicef admits failings with child victims of alleged sex abuse by peacekeepers*, THE GUARDIAN (US Edition) (Feb. 13, 2018), <https://www.theguardian.com/global-development/2018/feb/13/unicef-admits-failings-with-child-victims-of-alleged-sex-abuse-by-peacekeepers>.

1034. Although international actors, including nongovernmental organizations such as Human Rights Watch, Save the Children-UK and even multilateral organizations such as the United Nations and its various agencies, can plead with national governments to enforce laws against the abuse and exploitation of children, as well as pass legislation to criminalize certain behaviors which are harmful to children, the task of preventing violence against children is the purview of national governments, where the abuse and exploitation usually takes place.

judicial institutions may actually function to protect child traffickers and molesters, effectively increasing the chances that children would be exploited and abused. Thus, in countries with governing processes that are undergirded by the rule of law, those people who engage in the sexual exploitation and abuse of children are most likely to be brought to justice.

Throughout the continent, traditions and customs are often used to justify the abuse of human rights, including especially those of girls and women. For example, female genital mutilation (“FGM”), forced child marriage, ritual servitude, discrimination against girls and women in the provision of food, education, and health services, and the myth that having sex with virgin girls can cure and cleanse a man of various ills, including HIV/AIDS or lack of sexual virility, are all practices that are based on custom and tradition and which harm children.

The critical question is: What should be done, especially in the African countries, to eradicate the exploitation and abuse of children? The remaining part of this article examines various policy options that African countries, as well as the international community, can develop and implement to deal fully and effectively with the exploitation and abuse of children. This part of the article begins by revisiting the commercial sexual exploitation and abuse of African children. Many factors have left African children highly susceptible to commercial sexual exploitation and abuse. The continent has a very young population — a significant proportion of Africans are under age 15 years. While such a young population presents Africa with significant opportunities for economic growth and development, it also forces the continent to face many challenges, one of which is vulnerability of this young population to commercial sexual exploitation and abuse. Vulnerability to abuse and exploitation among Africa’s youth can be minimized if national governments provide these citizens with effective opportunities for self-actualization. Specifically, if African governments provide their young citizens with adequate opportunities for education, training and skills development, as well as jobs, this will significantly reduce overall vulnerability, as well as idleness, and the temptation for children to engage in activities that often render them susceptible to exploitation. For example, children who attend school are exposed to activities that provide them with opportunities to develop necessary skills for them to participate competitively and gainfully in the economy as adults. More importantly, children are protected and are out of harm’s way while in school. Hence, providing children, regardless of their economic and social circumstances, opportunities to attend school, must be part of a comprehensive policy package to deal fully and effectively with their exploitation and abuse.

Although many African economies have achieved significant levels of economic growth during the last several decades, poverty remains a major

concern. The continent remains one of the regions in the world where income and wealth inequality are a major problem and extreme poverty remains a major challenge to policy makers. Poverty has been determined to be a major contributor to child exploitation and abuse. For example, it has been estimated that over 30 million children in Africa have been driven into the streets by poverty — many of these children are extremely vulnerable to various forms of abuse, including sexual exploitation.¹⁰³⁵ Girls who live on the streets are extremely vulnerable to commercial sexual exploitation and abuse. It is incumbent upon governments to protect street children, provide them with opportunities for self-actualization, seek and deal with the factors and conditions that contribute to and create homelessness in children, and provide a more nurturing environment for children regardless of their economic and social background.¹⁰³⁶

Education is a very important tool for girls and women to use to fight their abuse and exploitation. For example, girls who attend school, instead of roaming the streets, are more likely to stay out of harm's way. In addition, they can develop the skills needed to evolve into gainfully employed and productive adults and thus minimize the chances of falling into poverty. Of course, educated girls and women can participate in the political system and help shape the nature of a country's institutions. It is important then, that national governments eliminate the conditions that contribute to poor school attendance and high drop-out rates, especially among girls. The emphasis should be on each government ensuring that all children are provided with effective opportunities to attend school and develop the essential skills to function as productive adults.

Throughout Africa, there is systemic discrimination against girls and women. Most of the practices that discriminate against girls and women have their foundations in the cultures and traditions of many of the continent's

1035. *See, e.g.*, POONAM SONDHU GARG, *STREET CHILDREN: LIVES OF VALOR AND VULNERABILITY* (2004) (arguing that street children are extremely vulnerable to sexual abuse and exploitation).

1036. One important contributor to homelessness among many children in Africa is extreme poverty, especially among rural households. Then, there is the problem of "AIDS-orphans" — that is, children who are orphaned through the death of both parents from AIDS. Many of these children end up as street children in urban areas with no one to take care of them. Without parental guidance and care, they are unlikely to attend school and hence, forfeit the opportunity to develop the skills and competences that they would need to function as productive adults. Governments, then, must develop effective policies to deal with extreme poverty generally, and poverty among children, including especially street children, particularly. Public policy should emphasize the rescue of vulnerable children and the provision of opportunities for them to have a "normal childhood," as well as develop the skills and competences that they will need to function as productive adults. Such child-inclusive policies would significantly minimize their vulnerability to sexual exploitation and abuse.

ethnocultural groups, as well as in some religions. Each African country must undertake a comprehensive review of traditional and customary practices that are harmful to children and enact necessary legislation to eliminate or modify such practices. Each African government must make sure that the traditions and customs of all its subcultures, as well as the country's laws, reflect international human rights norms.¹⁰³⁷

Of course, in some African countries, there have arisen various practices that do not have their foundations in the culture and customs of any specific ethnocultural group — these practices, nevertheless, are quite harmful to children. For example, in recent years, there has emerged in various South African “townships,” including Soweto, a practice referred to as “jackrolling” (i.e., gang rape). It was determined that boys who participate in this insidious activity consider it fun even though it is characterized by extreme violence against young girls. Hence, it is important that governments fight and eliminate attitudes and practices that have normalized violence against girls and women.¹⁰³⁸

Civil wars and violent sectarian conflict are major contributors to the exploitation and abuse of children. These events create humanitarian crises and force many people, including children, into refugee camps, and hence, render children susceptible to abuse and exploitation. Further, the violence associated with civil wars and sectarian conflict may actually directly impose harm on children. African governments must proactively seek to eliminate the conditions that produce civil wars and violent sectarian conflict. For example, where a country has a governing process undergirded by the rule of law, all subcultures within the country can have available to them various legal tools and mechanisms to peacefully resolve conflict. Within such a constitutional order, aggrieved subcultures or those people and groups that feel marginalized by public policies, can use available legal tools to petition the government for redress of their grievances. Individuals that can easily use the law to organize their private lives (e.g., start and run a business for

1037. For example, a practice or tradition that offends any provision of the Convention on the Rights of the Child (“CRC”) should be prohibited or modified. Should a country choose to seek modification in cultural or traditional practices that are considered harmful to children or are not in conformity with provisions of the CRC, the outcome of the modification process must be practices that no longer offend children and which conform with provisions of international human rights norms.

1038. BBC, *South Africa's Rape Shock*, BBC NEWS (Jan. 19, 1999) <http://news.bbc.co.uk/2/hi/africa/258446.stm>; Staff Reporter, *The Horrific Reality of South Africa's Rape Problem Will Shock You*, HUFFPOST (Sept. 1, 2017), http://www.huffingtonpost.co.za/2017/08/31/the-horrific-reality-of-south-africas-rape-problem-will-shock-you_a_23192126/; Rebecca Davis, *How Rape Became South Africa's Enduring Nightmare*, THE GUARDIAN (UK) (Sept. 29, 2015) <https://www.theguardian.com/world/2015/sep/29/south-africa-rape-nightmare-crime-stats>.

profit) and deal with the various problems that they encounter daily are not likely to engage in violent protests. In fact, subcultures that can use the law to deal with their perceived or actual political and economic marginalization are less likely to opt for violent and destructive mobilization — they can, for example, put up candidates for election to public office. These groups are not likely to resort to the type of sectarian violence that has produced civil wars in countries such as Liberia, Sierra Leone, Nigeria, South Sudan, and Libya.

In many communities in southern and eastern Africa, interstate transportation of goods for commercial purposes has emerged as an important contributor to the sex trafficking of girls. For example, many truck drivers who transport goods from Somalia for sale in Kenya, often bring with them Somali girls for sale in the brothels of Nairobi, Mombasa, and other locations in Kenya.¹⁰³⁹ Unfortunately, corruption or general government dysfunction, including lack of capacity, often means that existing laws against such crimes against girls and women are not enforced.¹⁰⁴⁰ There is a need, in many African countries, to build institutions undergirded by the rule of law in order to promote and enhance good governance and specifically improve respect for the rights of children.

The inability of many African countries to manage natural disasters, such as floods, earthquakes, and droughts, has contributed significantly to the exploitation and abuse of children. For example, in 2014, after floods displaced thousands of families in south-eastern Zimbabwe, 3,000 of them were placed in a transit camp called Chingwizi, where the children were subsequently exposed to abuse and exploitation.¹⁰⁴¹ Each African country must find ways to manage natural disasters effectively in order not to create opportunities for the exploitation and abuse of children.¹⁰⁴² This can be

1039. U. S. Department of State, *Kenya: 2016 Trafficking in Persons Report*, <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258795.htm> (last visited on Mar. 11, 2018).

1040. The Government of Somalia collapsed in 1991 and the country eventually descended into a civil war from which it has not yet been able to extricate itself. As a consequence, it currently has a dysfunctional government that is not capable of fully maintaining law and order. *See, e.g.*, TERRENCE LYONS AND AHMED I. SAMATAR, *STATE COLLAPSE, MULTILATERAL INTERVENTION, AND STRATEGIES FOR POLITICAL RECONSTRUCTION* (1995).

1041. *Sex-for-food at Chingwizi Camp*, *NEWSDAY* (May 25, 2014), <http://www.newzimbabwe.com/news-15933-Sex-for-food+at+Chingwizi+camp/news.aspx>.

1042. When displaced families are placed in transit camps, as was the case with 3,000 families in south-eastern Zimbabwe, they usually find themselves in a position in which they must depend on humanitarian aid providers for survival. These aid workers can exploit the vulnerabilities of the displaced people for personal gain. It is no wonder that in Zimbabwe's Chingwizi Transit Camp, the flood victims accused government aid workers and police officers of extracting sexual favors from them in exchange for food, water and medicines. *See id.*

accomplished by effective planning for such disasters and setting aside resources that can be used to deal with these disasters and provide necessary services to the displaced people. Providing food, housing, sanitation, including especially to children, would ensure that households do not become vulnerable to exploitation. Of course, even if governments are adequately prepared to deal with natural disasters, the failure to eradicate corruption in the civil services can frustrate the ability of the government to deliver services effectively and fully to displaced people and hence, render the latter susceptible to exploitation and abuse.¹⁰⁴³

Many practices, such as Trokosi in Ghana,¹⁰⁴⁴ which have their foundations in religion, impose significant harm on children. As discussed earlier, it is incumbent upon African governments to use public policy to educate the people about these harmful practices and the legislative process to outlaw or criminalize them and generally minimize the negative impact of these practices on the rights of children.

Throughout Africa, more and more young people are seduced by Western consumption habits, including especially the desire for expensive luxury goods (e.g., designer handbags for women and girls, iPhones, and expensive watches). Reinforced, virtually on a daily basis, by exposure to TV and the Internet, children and young adults struggle to belong and conform to a new value system that emphasizes the consumption of expensive foreign goods. Unable to secure the financial resources needed to purchase entry into this consumption-induced value system, many young girls are often forced to turn to a “sugar daddy” or secure an “African uncle.”¹⁰⁴⁵ In addition to criminalizing or reenforcing laws against sex with minors, the government should help families and communities develop a different value system, one that emphasizes proper childhood development and minimizes premature engagement in sexual activities, either voluntarily or involuntarily. Where necessary, the government should treat the “sugar-daddy” phenomenon as what it is — sexual exploitation and abuse of children — and criminalize it. Adults involved in this practice should be prosecuted as part of the process to eradicate this insidious institution.

During the last several decades, “child sex tourism” (“CST”) has become a very important contributor to the sexual exploitation and abuse of

1043. See, e.g., Mari Legagnoux, *Trading Sex for Food in Zimbabwe*, Borgen Magazine (Aug. 1, 2014), <http://www.borgenmagazine.com/trading-sex-food-zimbabwe/>.

1044. Trokosi is common in Ghana, Togo, and Benin.

1045. The “African uncle” is just a politer way for underage girls to introduce their “sugar daddy” to their friends. Sugar daddies and African uncles are usually older, rich men, who engage in sex with young girls in exchange for money. See, e.g., BBC, *Why Have a ‘Sugar Daddy’?*, BBC NEWS (Aug. 18, 2005), <http://news.bbc.co.uk/2/hi/africa/4145674.stm>.

children. Every year, many tourists, from as far away as Germany, Italy, and Switzerland, come to various locations in Africa¹⁰⁴⁶ to have sex specifically with children. Dealing effectively and fully with CST should begin with efforts to reduce bureaucratic corruption and enhance the enforcement of national laws, especially those against sex with children. Each African government should revisit existing legal frameworks, close legal loopholes, and strengthen national laws. In addition, the government should provide services to vulnerable children, including providing them with opportunities for education and training. The government should make a concerted effort to reduce the need in children to sell their bodies in order to secure the necessities of life (e.g., food, housing, clean water).

International law can provide significant assistance to African countries as they find ways to more effectively deal with the sexual exploitation and abuse of children. International legal instruments that deal with the rights of children, such as the UN Declaration of the Rights of the Child (1959),¹⁰⁴⁷ have introduced such important and foundational concepts as the “best interests of the child,”¹⁰⁴⁸ ten principles that embody the rights that children should enjoy, and other such principles as the right of a child to a name and nationality, and the right of a child to receive an education. African governments can use the provisions of these international legal instruments to improve and strengthen their national laws and to enhance the ability of their legal systems to protect children.¹⁰⁴⁹

Other international legal instruments emphasize the abolition of child labor¹⁰⁵⁰ and four principles that can be emphasized as part of national legislation to protect children against abuse and exploitation and enhance their ability to grow up into productive citizens.¹⁰⁵¹ There are, of course, other international legal instruments that offer African countries ways to deal with child pornography, child prostitution, the sale of children for

1046. Popular locations include the Jinja District in Uganda; the cities of Malindi, Mombasa, Kilifi and Diani in Kenya; Cape Town, Johannesburg, Port Elizabeth and Durban in South Africa; Zanzibar (United Republic of Tanzania); and various cities in The Gambia and Senegal.

1047. G.A. res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959).

1048. *Id.*

1049. *Id.*

1050. Convention concerning Minimum Age for Admission to Employment (I.L.O. No. 138), June 19, 1976, 54 Stat. 1705, 1015 U.N.T.S. 29).

1051. *See, e.g.*, G.A. Res. 44/25, *Convention on the Rights of the Child* (Sept. 2, 1990). The four Ps are: “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 assistance for their basic needs.” *See* VAN BUEREN, *supra* note 297, at 101.

prostitution, as well as for the harvesting and sale of organs, and how to protect handicapped children.¹⁰⁵²

Finally, there is the exploitation and abuse of African children by peacekeepers and humanitarian aid workers. The sexual exploitation and abuse of children in Africa by peacekeepers and aid workers is a complex problem that has both domestic and international dimensions. Its solution, hence, requires the participation of both domestic and international judicial and legal institutions. Although it is critical that all African countries strengthen their national laws and institutions to garner the necessary capacity to deal fully and effectively with the problem of sexual exploitation and abuse of children, the UN must provide the leadership necessary to develop an international legal regime that can help fight this insidious crime. The UN must also help create an environment in which each peacekeeping mission will no longer function as a venue and vehicle for the wanton exploitation and abuse of children, including those in Africa.

1052. For example, the *African Charter on the Rights and Welfare of the Child 1990*; the *International Covenant on Economic, Social and Cultural Rights 1966*; the *International Covenant on Civil and Political Rights*; the *Convention on the Rights of Persons with Disabilities 2006*; and the *African Charter on Human and People's Rights 1981* (Banjul Charter).