

# THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE AFRICAN CHILD TODAY: PROGRESS OR PROBLEMS?

UCHÉ EWELUKWA OFODILE\*

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\* Associate Professor, University of Arkansas School of Law. S.J.D., Harvard Law School; LL.M. Harvard Law School; LL.M. (International Business Law), University College London; Diploma, The International Institute of Human Rights, Strasbourg, France. Fellow, Carnegie Council on Ethics and International Affairs 2003-2004. This paper is dedicated to Africa’s children—past, present, and future.

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## INTRODUCTION

Nadine Gordimer once observed that “everyone who ponders the Universal Declaration of Human Rights [(“UDHR”)]<sup>1</sup> inevitably will give particular attention to those Articles that pertain to circumstances with which he or she is personally involved.”<sup>2</sup> As a woman born and raised in Africa, and now as a mother with two young children, Article 25, which declares that “[m]otherhood and childhood are entitled to special care and assistance,”<sup>3</sup> has a special significance for me. Growing up in a culture where male children are always preferred and female children are subjected to the worst forms of abuses, the first paragraph of the preamble of the UDHR is also particularly poignant: “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of *all members* of the human family is the foundation of freedom, justice and peace in the world.”<sup>4</sup> From a normative and quasi-normative perspective, it is undeniable that the UDHR has had and continues to have a definite impact on children’s rights in Africa. In the past two decades, Africa

1. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

2. Nadine Gordimer, *Introduction to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND*, at vii (Yael Danieli et al. eds., 1999).

3. UDHR, *supra* note 1, art. 25(2).

4. UDHR, *supra* note 1, pmbl. (emphasis added).

has seen a proliferation of treaties, declarations, and resolutions, all acknowledging that African children have certain indivisible and inalienable rights. An increasing number of national constitutions now have children's rights directly built into them. In addition, conferences and seminars focusing on the right of the child in Africa are becoming common in the continent,<sup>5</sup> as are decisions and resolutions by regional organizations in the continent.<sup>6</sup> Nevertheless, it is readily apparent that ensuring the rights, welfare, and dignity of children in Africa is a monumental challenge. The agenda of child survival in the continent remains unfinished and unrealized.<sup>7</sup> According to the World Health Organization ("WHO"), children in sub-Saharan Africa "face the gravest challenges for survival."<sup>8</sup> Under-five mortality in Africa is the highest in the world.<sup>9</sup> Sub-

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5. See, e.g., First Pan-African Forum on the Future of Children, *The African Common Position as Africa's Contribution to the United Nations Gen. Assembly Special Session on Children*, PANAF/FORUM/CHD/DOC.10/REV.2 (May 28-31, 2001) available at <http://www.aumission-ny.org/documents/declaration-cairo-children.pdf> [hereinafter *African Common Position*] (building on previous regional and international agreements on children to arrive at a Pan-African standard); African Union [AU], *Report of the Tenth Ordinary Session of the Permanent Representatives' Committee*, 4-5 (June 28-29, 2005), available at <http://www.africa-union.org/Summit/JULY%202005/PRC%20Draft%20Rapporteur%20Report.pdf> (including maternal, newborn, and child health issues on the agenda for discussion at the meeting); International Committee of the Red Cross [ICRC], *Violence Against Girls in Africa During Armed Conflicts and Crises*, (May 11-12, 2006) (prepared by Florence Tercier Holst-Roness), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/violence-girls-conference-110506/\\$File/International-Policy-Conference.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/violence-girls-conference-110506/$File/International-Policy-Conference.pdf) (highlighting the complexity of issues that female children face in African conflict zones, such as sexual violence, internal displacement, and access to shelter and water, and suggesting methods to better protect them).

6. See African Economic Community, Council of Ministers, *Decisions & Regulation Adopted by the Seventy-Second Ordinary Session of the Council of Ministers & Seventh Ordinary Session of the AEC*, CM/Dec. 542 (LXXII) Rev. 1, (July 6-8, 2000) (urging AEC Member States to support Africa's input and involvement in the UN Special Session on Children, and requesting that the Secretariat develop an African common position on children).

7. See Press Release, World Health Organization Regional Office for Africa [WHO/AFRO], *16 June 2008: The Day of the African Child*, (June 16, 2008), <http://www.afro.who.int/press/2008/pr20080616.html> [hereinafter WHO/AFRO Press Release] (drawing attention to the plight of African children, and asking African leaders to turn their focus back toward improving the situation of children on the continent).

8. *Id.*

9. United Nations Children's Fund [UNICEF], *The State of Africa's Children*

Saharan Africa “has ten percent of the world’s population but accounts for fifty percent of the world’s under-five mortality.”<sup>10</sup> The future of children in the continent also appears very grim. “Out of the 46 countries which constitute the WHO African Region, only five are on track to meet the target for Millennium Development Goal 4 [(“MDG No. 4”)]<sup>11</sup> to reduce by two thirds the . . . under-five mortality” rate by 2015.<sup>12</sup> The continent also has the highest number of children living in especially difficult circumstances.<sup>13</sup>

Has the UDHR helped or hurt children in Africa? Is the UDHR relevant today and is it likely to be a tool for change in Africa sixty years hence? Judged by the theme of the year-long campaign launched by the United Nations Secretary-General in celebration of the sixtieth anniversary of the UDHR—“dignity and justice for all of us”<sup>14</sup>—African children are yet to enjoy the benefits of the revolution ushered in by the UDHR and may have been harmed by the illusions of progress fostered by the numerous resolutions, declarations, and conventions on the rights of the African child that it has inspired. Children in Africa still confront four persisting tyrannies that the UDHR does not effectively address: silence, culture, poverty and corruption, and globalization. Nevertheless, thanks to the UDHR,

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2008: *Child Survival*, 4 (2008), available at <http://www.unicef.org/childsurvival/files/SOAC.pdf>; see also WHO/AFRO Press Release, *supra* note 7 (“The average under five mortality rate in the African region is 165/1000 live births compared to 6/1000 live births in the industrialized countries.”).

10. WHO/AFRO Press Release, *supra* note 7.

11. See G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) (putting forth the Millennium Development Goals that were signed by 189 countries, including 147 heads of State and Government, in September 2000); G.A. Res. 60/1, ¶ 3, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (reaffirming the Millennium Development Goals, which include 8 goals, 21 targets and 60 indicators for measuring progress between 1990 and 2015, when the goals are expected to be met).

12. WHO/AFRO Press Release, *supra* note 7.

13. See *African Common Position*, *supra* note 5, 3 (characterizing African children as “the most disadvantaged in the world,” and noting that “[t]heir lives are often too short and their life chances are too limited”).

14. See United Nations, *The Universal Declaration of Human Rights: 1948-2008*, <http://www.un.org/events/humanrights/udhr60/> (last visited Oct. 5, 2009) (describing how on December 10, 2007, Human Rights Day, the Secretary-General launched a year-long campaign in the lead up to the 60th birthday of the UDHR on Human Rights Day 2008 explaining that the theme “reinforces the vision of the Declaration as a commitment to universal dignity and justice and not something that should be viewed as a luxury or a wish-list”).

change has come and there is reason for optimism for the future of African children.

This article reflects on the contributions of the UDHR to child protection efforts in Africa today and forecasts the likely impact of the UDHR in Africa over the next sixty years. Considering that “[c]hildren and young people represent more than half of Africa’s population” and “have the potential to be the engine that helps transform Africa,”<sup>15</sup> laws and policies affecting children are of strategic importance in the continent and must be taken seriously. Part I of this article reviews the provisions of the UDHR relating to children’s rights and also discusses other international and regional human rights instruments relating to children that the UDHR has inspired. Part II examines the impact of the UDHR on the evolution of children’s rights in Africa focusing particularly on the place of children in African constitutions. Part III analyzes four persisting problems that undercut child protection in Africa and discusses the extent to which the UDHR addresses these problems. In Part IV, discussions centre on the potential role of the UDHR in child protection efforts in Africa in the coming years. Some conclusions and suggestions are offered at the end.

## I. CHILDREN’S RIGHTS AND THE UDHR

Children are by no means the central focus of the UDHR. The word “children” or “child” appears only twice in the entire document, while the word “childhood” appears only once. Nevertheless, three Articles of the UDHR—Articles 16, 25, and 26—lie at the foundation of the last sixty years of development in children’s rights, and continue to impact the lives of children in Africa today.

### A. CHILDREN UNDER THE UDHR

Children are covered by the all-inclusive language of the UDHR which guarantees specific rights to “everyone.” The UDHR does not, however, clearly espouse the idea of children as rights holders but

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15. AFRICAN UNION ET AL., *THE YOUNG FACE OF NEPAD: CHILDREN AND YOUNG PEOPLE IN THE NEW PARTNERSHIP FOR AFRICA’S DEVELOPMENT* 41 (2004) available at [http://www.unicef.org/Publications/files/NEPAD\\_FINAL.pdf](http://www.unicef.org/Publications/files/NEPAD_FINAL.pdf) (last visited Oct. 5, 2009).

merely draws attention to their need for special protection. Article 25(2) provides that “[m]otherhood and childhood are entitled to special care and assistance” and that “[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>16</sup> Article 16(3) declares that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>17</sup> The UDHR does not define what “special care and assistance” childhood deserves or the protection that the family requires. Are these culturally determined, do these depend on the level of development of a country, or does a universal standard apply? Article 26 is also of paramount importance to children in Africa with its guarantee of the right to education and declarations that “[e]ducation shall be free, at least in the elementary and fundamental stages,” and that “[e]lementary education shall be compulsory.”<sup>18</sup> In a continent where illiteracy is widespread and where the promise of universal primary education remains but a distant dream for millions of children, Article 26 continues to provide a basis for deep introspection and soul-searching. Article 26 no doubt inspired the inclusion of a right to education in the United Nations Convention on the Rights of the Child (“CRC”),<sup>19</sup> the African Charter on the Rights and Welfare of the Child (“ACRWC”),<sup>20</sup> and the International Covenant on Economic and Social Rights (“ICESCR”).<sup>21</sup>

Although minimalist in its pronouncement on children’s rights, the UDHR in three articles creates a solid foundation for child protection in the ensuing years. The UDHR also continues to give hope to children and lovers of children in the continent that, because the

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16. UDHR, *supra* note 1, art. 25(2).

17. UDHR, *supra* note 1, art. 16(3).

18. UDHR, *supra* note 1, art. 26.

19. Convention on the Rights of the Child, G.A. Res. 44/25, arts. 28-29, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc A/Res/44/25 (Nov. 20, 1989) [hereinafter CRC].

20. Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child, ch. 1 art. 11, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, *available at* [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf) [hereinafter ACRWC].

21. International Covenant on Economic, Social and Cultural Rights [ICESCR], G.A. Res. 2200 (XXI) 51, art. 13 (Dec. 16, 1966).

UDHR represents “a common standard of achievement for all peoples and all nations,” the struggle must continue and victory will one day be won.<sup>22</sup>

#### B. DECLARATIONS AND TREATIES INSPIRED BY THE UDHR

The UDHR has inspired numerous international and regional resolutions, decisions, declarations, and conventions pertaining to children in Africa such as the Declaration of the Rights of the Child (1959),<sup>23</sup> the World Summit for Children (1990),<sup>24</sup> and the United Nations General Assembly Special Session on Children (2002).<sup>25</sup> The UDHR also provided a necessary basis and framework for resolutions 2003/85<sup>26</sup> and 2004/47<sup>27</sup> on the abduction of children in Africa through the United Nations Commission on Human Rights, the Security Council resolutions 1379 (2001) of 20 November 2001<sup>28</sup> and 1460 (2003) of 30 January 2003<sup>29</sup> on children in armed conflict, and the report of the Special Representative of the Secretary General for Children and Armed Conflict.<sup>30</sup> Most importantly, the UDHR

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22. UDHR, *supra* note 1, pmb1.

23. See Declaration of the Rights of the Child, pmb1., G.A. Res. 1386 (XIV), 19 U.N. Doc. A/4354 (Nov. 20, 1959) (referring to the UDHR twice in the short preamble to establish a normative framework and historical foundation for the Declaration).

24. See UNICEF, A Promise to Children, <http://www.unicef.org/wsc/> (describing the World Summit for Children as “the largest gathering of world leaders in history”).

25. UNICEF, United Nations Special Session on Children: World Leaders ‘Say Yes’ for Children, <http://www.unicef.org/specialsession>.

26. See U.N. Comm’n on Human Rights [UNCHR], *Abduction of Children in Africa*, E/CN.4/RES/2003/85, ¶ 1 (Apr. 25, 2003) (invoking the UDHR in the preamble as a foundational document to begin dealing with children abducted in Africa during armed conflict).

27. See UNCHR, *Abduction of Children in Africa*, E/CN.4/RES/2004/47, ¶ 1 (Apr. 20, 2004) (drawing on several international documents including the UDHR and CRC to further build upon UNCHR Res. 2300/85, *supra* note 26).

28. See S.C. Res. 1379, ¶¶ 4, 8(a), U.N. Doc. S/RES/1379 (Nov. 20, 2001) (pressing parties in a conflict to respect international humanitarian law, and to protect and assist children and other vulnerable groups in conflict zones).

29. See S.C. Res. 1460, ¶¶ 1, 8, U.N. Doc. S/RES/1460 (Jan. 30, 2003) (supporting an “era of application” of international normative standards for humanitarian law to further protect children in conflict zones).

30. UNCHR, *Rights of the Child*, E/CN.4/2003/77, at 3 (Mar. 3, 2003) (urging the “international committee to move forward in a concerted manner to achieve an ‘era of application’ of norms and standards for the protection of war-affected

inspired the CRC, a document that has had and continues to have a profound impact on how children are viewed around the world, and specifically in Africa. In the preamble to the CRC, State Parties recognized that “the United Nations has, in the [UDHR] . . . proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as . . . birth or other status,” and recalled that, “in the [UDHR], the United Nations has proclaimed that childhood is entitled to special care and assistance.”<sup>31</sup> In adopting the CRC, State Parties were also guided by the fact that the need to extend particular care to the child has been recognized in several international instruments including the UDHR and the International Covenant on Civil and Political Rights.<sup>32</sup>

The precise impact of the UDHR-inspired instruments on child protection in Africa cannot be measured. Nevertheless, these instruments have helped to raise awareness of the plight of children in the continent and have helped to galvanize some support for children living in especially difficult circumstances in the continent. Thanks to the CRC, African states now routinely submit reports on the situation of children within their territories to the Committee on the Rights of the Child.<sup>33</sup> In the process of completing these reports, African State Parties have been compelled, sometimes for the first time, to give serious thought and attention to the situation of children within their borders, to pass specific legislation in response to the “concluding observations” of the Committee on the Rights of the Child, or to amend offending laws. The process of state reporting under the CRC is also slowly but gradually generating interest and stimulating response from civil society groups in Africa.

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children”).

31. CRC, *supra* note 19, pmb1.

32. See International Convention and Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171; see also CRC, *supra* note 19, pmb1. (listing many international declarations and covenants concerned with the welfare of children that the parties were considering when crafting the Convention).

33. See, e.g., Burkina Faso, *Periodic Report Submitted Pursuant to Article 44, Paragraph 1, of the Convention on the Rights of the Child*, 11, delivered to the U.N. Committee on the Rights of the Child, CRC/C/65/Add.18 (Feb. 13, 2002); Kenya, *Periodic Report Submitted Pursuant to Article 44, Paragraph 1, of the Convention on the Rights of the Child*, 29, delivered to the U.N. Committee on the Rights of the Child, CRC/C/3/Add.62 (Feb. 16, 2001).



## II. THE UDHR AND THE EVOLUTION OF CHILDREN'S RIGHTS IN AFRICA: NATIONAL AND REGIONAL CHANGES

Because of the UDHR, a quiet revolution is underway in Africa. This revolution is seen in the number of national constitutions that now espouse the idea of children as bearers of rights, and in the growing number of regional declarations, resolutions, and treaties proclaiming the rights of children or calling attention to the situation of children in especially difficult circumstances. Instruments of note include the Declaration on the Rights and Welfare of the African Child,<sup>34</sup> the African Charter on Human and People's Rights ("Banjul Charter"),<sup>35</sup> the African Charter on the Rights and Welfare of the Children ("ACRWC"),<sup>36</sup> the Africa Declaration on Violence against Girls (2006),<sup>37</sup> and the African Common Position<sup>38</sup>—Africa's Contribution to the United Nations General Assembly Special Session on Children, Cairo 2001. At the sub-regional levels, numerous declarations have also been adopted, including the Maputo Declaration on the Use of Children as Soldiers (1999)<sup>39</sup> and the Accra Declaration on War-Affected Children in West Africa (2000).<sup>40</sup>

34. Org. of African Unity [OAU], Assembly of Heads of State & Gov't, Sixteenth Ordinary Session, Monrovia, Liberia, July 17-20, 1979, *Declaration on the Rights & Welfare of the African Child*, AHG/ST.4 (XVI) Rev. 1.

35. African Charter on Human and Peoples' Rights [Banjul Charter], *opened for signature* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

36. See ACRWC, *supra* note 20, pmb. (recognizing that human rights are non-discriminatorily extended to every person, and recalling African charters and declarations concerning the rights of children as its foundation).

37. See The African Child Policy Forum, Second Int'l Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, Ethiopia, May 11-12, 2006, *The Africa Declaration on Violence Against Girls*, ¶ 5, available at <http://www.africanchildforum.org/documents/2nd-ipc-declaration.pdf> (last visited Oct. 6, 2009) (invoking the UDHR, the CRC, and ACRWC as the conference's founding inspiration).

38. See *African Common Position*, *supra* note 5, ¶¶ 14, 17 (reaffirming that children's rights recognized in the CRC are universal in order to promulgate the "Africa Fit for Children" agenda to more adequately address the region's unique issues concerning the needs of African children).

39. African Conference on the Use of Child Soldiers, *Maputo Declaration on the Use of Children as Soldiers*, (Apr. 22, 1999), available at <http://chora.virtualave.net/maputo-declaration.htm>.

40. Econ. Cmty. of W. African States [ECOWAS] Conference, Accra, Ghana,

### A. CHILDREN AND CONSTITUTIONALISM IN AFRICA

Largely because of the UDHR's influence, children are increasingly featured in the constitutions of states in Africa. While some constitutions declare explicitly that children have certain guaranteed rights, others offer protection to children by indirectly guaranteeing protection for the family. Regardless of whether children are specifically mentioned, virtually all African constitutions have a chapter devoted to a bill of rights and all affirm the democratic values of dignity, equality, and freedom found in the UDHR.<sup>41</sup> In the preamble to the Constitution of Guinea, the people of Guinea proclaim "adherence to the ideals and principles, rights and duties established in the United Nations Charter, the Universal Declaration of the Rights of Man, the Charter of the Organization for African Unity and the African Charter on Human and Peoples' Rights."<sup>42</sup> Article 9 of the Constitution of the United Republic of Tanzania states that the "state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that . . . human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights."<sup>43</sup>

#### *1. Direct Explicit Guarantees*

Some of the constitutions contain specific references to children and clearly state that children have certain rights. For example, children are explicitly protected in the South African Constitution's Bill of Rights.<sup>44</sup> Section 28 is devoted exclusively to children's rights, and among the rights guaranteed is the "right to a name and a nationality from birth, the right to family care or parental care, or to appropriate alternative care when removed from the family environment, the right to basic nutrition, shelter, basic health care

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April 27-28, 2000, *Accra Declaration on War-Affected Children in W. Africa*, available at [http://www.refugeelawreader.org/c/171/lll.4.6\\_unaccompanied\\_minors](http://www.refugeelawreader.org/c/171/lll.4.6_unaccompanied_minors).

41. See, e.g., S. AFR. CONST. (1996), §§ 7-39 ("Bill of Rights"); BOTS. CONST. ch. II ("Protection of Fundamental Rights and Freedoms of the Individual"); BASIC LAW OF THE REPUBLIC OF GUINEA tit. II ("Liberties, Duties and Fundamental Rights"); MALAWI CONST. ch. IV, §§ 15-46 ("Human Rights").

42. BASIC LAW OF THE REPUBLIC OF GUINEA, pmbi.

43. TANZANIA CONST. art. 9(f).

44. S. AFR. CONST. § 28.

services and social services, and the right to be protected from maltreatment, neglect, abuse or degradation.”<sup>45</sup> Most significantly, section 28(2) declares that “[a] child’s best interests are of paramount importance in every matter concerning the child.”<sup>46</sup>

The Constitution of the Kingdom of Swaziland also devotes a whole article—Article 29—to the “Rights of the Child.”<sup>47</sup> Several rights are guaranteed including “the right to be protected from engaging in work that constitutes a threat to the health, education or development,” freedom from abuse, torture, or inhuman and degrading treatment, right to free education in public schools, and the “the right to be properly cared for and brought up by parents or other lawful authority in place of parents.”<sup>48</sup>

## 2. Direct but Limited Guarantees

The constitutions of a few countries, while declaring that children have certain rights, limit the scope of those rights to a few arenas, and to education in particular. The Constitution of the Fourth Republic of Togo is an example.<sup>49</sup> The Constitution guarantees the right to education and freedom from exploitation.<sup>50</sup> Article 35 declares that the state recognizes the right of all children to education, and further declares that education is mandatory for children of both sexes until the age of fifteen.<sup>51</sup> Article 36 decrees that “[t]he state shall protect minors against all forms of exploitation and manipulation.”<sup>52</sup> Article 12 of the Constitution of Benin similarly provides that “the state and public authorities shall guarantee the education of children and shall create conditions favourable to this end.”<sup>53</sup> In the same vein, Article 23 of the Constitution of Burkina

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45. *Id.* (providing also for state-appointed counsel in certain legal proceedings, and for the protection of children during armed conflict).

46. *Id.*

47. SWAZ. CONST. § 29.

48. *Id.*

49. TOGO CONST. arts. 35-36.

50. *Id.*

51. *Id.* art. 35 (mandating also that the state endeavor to “create[] favorable conditions” for the education of children and to provide that education free of charge).

52. *Id.* art. 36.

53. BÉNIN CONST. tit. II, art. 12; *see also id.* tit. II, art. 13 (making primary education mandatory, and providing for “progressively free public education” in

Faso indirectly grants children a right to education by imposing on parents the duty to educate their children.<sup>54</sup>

### *3. Direct but Couched Guarantees*

Some constitutions, while mentioning children, do not declare them to be bearers of rights but merely acknowledge their need for special protection. What special protections the children are entitled are not always defined. For example, Article 30 of the Constitution of Angola declares that “[c]hildren shall be given absolute priority and shall therefore enjoy special protection from the family, the State and society with a view to their all-round development.”<sup>55</sup> Article 14 of the Constitution of the Republic of Sudan (“Children and Youth”) provides that the State “shall care for children and youth, protect them from physical and spiritual exploitation and neglect, and shall implement policies for moral care and national education and religious values to ensure good future generations.”<sup>56</sup> Article 24 of the Constitution of Burkina Faso provides that “[t]he state shall endeavour to promote the rights of the child.”<sup>57</sup> However, the rights of the child that the state must work to promote are not explicitly stated.

### *4. Indirect Protection*

Borrowing from Article 16 of the UDHR, the majority of constitutions make no mention of children but explicitly call for the protection of the family unit. Article 29(1) of the Constitution of Angola states that “[t]he family . . . shall be protected by the State, whether based on marriage or de facto union.”<sup>58</sup> Other examples include Article 23 of the Constitution of Burkina Faso<sup>59</sup> and Article 84 of the Constitution of Cape Verde.<sup>60</sup>

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state-sponsored public schools).

54. BURK. FASO CONST. tit. I, ch. IV, art. 23 (“The parents have the natural right and the duty . . . to educate their children.”).

55. ANGL. CONST. pt. II, art. 30.

56. SUDAN CONST. pt. I, § 14.

57. BURK. FASO CONST. tit. I, ch. IV, art. 24.

58. ANGL. CONST. pt. II, art. 29(1).

59. BURK. FASO CONST. tit. I, ch. IV, art. 23 (“The family is the basic unit of society. The state owes it protection.”).

60. CAPE VERDE CONST. pt. II, tit. VI, art. 84(2) (“The family must be protected by society and by the State to create conditions for the accomplishment

While the constitutions of a few countries make no reference to children (e.g., Tunisia, Zimbabwe, Zambia, and Tanzania), the constitutions of most countries in Africa make some reference to children's rights and/or child protection. A review of African constitutions reveals that as far as children are concerned, and with respect to the important task of setting standards, some victories can be celebrated. First, the fact that a good number of the constitutions devote a section or two to children is significant and suggests an increasing appreciation of the precariousness of childhood in Africa. Second, the fact that most of the constitutions define a child as anyone under the age of eighteen is also significant because it indicates the gradual emergence of a new, arguably borrowed, image of childhood and an extended period of childhood that may yet prove useful to children on the continent.<sup>61</sup>

Constitutional provisions protecting children's rights or guaranteeing the protection of children is just a first step, however. Whether there is a willingness to translate guaranteed rights into practical realities for children is doubtful, as the experiences of children in armed conflict in countries like Sudan, Uganda, and the Democratic Republic of the Congo reveal. Furthermore, subjected to close scrutiny, some of the constitutions reveal glaring defects. First is the constitutionally-created tension between the rights of children and those of their parents, as well as the absence of clear guidelines on how to reconcile those tensions. Second is the ambiguity created by the stipulation of a host of guaranteed rights on the one hand, and the imposition of duties on children coupled with the absence of clear guidelines on how to balance the rights and the duties of children on the other hand. Consider, for example, the Constitution of the Kingdom of Swaziland. According to Article 29(5), "[c]hildren have the duty to respect their parents at all times and to maintain those parents in case of need."<sup>62</sup> Although Article 29(2) prohibits subjecting children to abuse or torture or other cruel inhuman and degrading treatment or punishment, it exempts "lawful and moderate chastisement for purposes of correction."<sup>63</sup>

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of its social function and for the personal fulfillment of its members.").

61. See, e.g., S. AFR. CONST. ch. 2, § 28(3) ("[C]hild" means a person under the age of 18 years.").

62. SWAZ. CONST. ch. 3, art. 29(5).

63. *Id.* art. 29(2).

## B. AFRICAN CHILDREN AND REGIONAL EFFORTS

### 1. *Children's Rights and the Organization of African Unity*

Imprints of the UDHR are evident in the 1963 Charter of the Organization of African Unity (“OAU”),<sup>64</sup> the 1979 Declaration on the Rights and Welfare of the African Child,<sup>65</sup> and the Banjul Charter.<sup>66</sup> Although the words “child” and “youth” do not appear in the OAU Charter, one of the organization’s stated purposes is “[t]o promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.”<sup>67</sup> In the preamble to the OAU Charter, the Heads of African States and Governments were “[p]ersuaded that the Charter of the United Nations and the Universal Declaration of Human Rights . . . provide a solid foundation for peaceful and positive cooperation among States,” were “[c]onscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,” and were “[c]onscious of [their] responsibility to harness the natural and human resources of [their] continent for the total advancement of [their] peoples in all spheres of human endeavour.”<sup>68</sup> The Constitutive Act of the African Union (“AU”), the successor to the OAU, follows the same tradition. One of the stated objectives of the AU is to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.”<sup>69</sup> While children

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64. See Charter of the Org. of African Unity, *opened for signature* May 25, 1963, 479 U.N.T.S. 69 (entered into force Sept. 13, 1963) [hereinafter Charter of the OAU] (invoking the UDHR in the preamble as a “solid foundation for peaceful and positive cooperation among states”). The Charter was eventually abrogated and replaced by the Constitutive Act of the African Union adopted in Lome, Togo on 11 July 2000. See *infra* note 69 and accompanying text.

65. OAU, *supra* note 34.

66. See Banjul Charter, *supra* note 35, ch. 4, art. 60 (declaring that certain international law, including the UDHR, shall provide the inspiration and applicable principles for the Charter).

67. Charter of the OAU, *supra* note 64, art. II, § 1(e).

68. *Id.* pmb. (declaring further the desire to perpetuate similar principles and institutions among all African countries).

69. Constitutive Act of the African Union art. 3(e), *opened for signature* July 11, 2000, 2158 U.N.T.S. 36 (entered into force May 26, 2001) [hereinafter Constitutive Act of the AU].

are not mentioned in the Constitutive Act,<sup>70</sup> “respect for democratic principles, human rights, the rule of law and good governance” is listed as one of the principles guiding the organization.<sup>71</sup> Moreover, one of the objectives of the AU is to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”<sup>72</sup>

## 2. *Children and the African Charter on Human and People’s Rights*

Although African children were not the primary focus of the Banjul Charter,<sup>73</sup> the imprint of the UDHR is visible. In its preamble, State Parties reaffirmed “the pledge they solemnly made . . . to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Universal Declaration of Human Rights.”<sup>74</sup> The word “child” appears only once in the Banjul Charter in Article 18(3), which requires Member States to “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”<sup>75</sup> While children are beneficiaries of the rights guaranteed to “everyone,” with respect to children’s rights, the normative content of the Banjul Charter is somewhat inadequate. The Banjul Charter neither recognizes the peculiar problems and challenges that African children face nor does it address those problems. Most troublesome from a child rights perspective are the “claw-back” clauses and the imposition of certain duties within Article 29 stipulating that the individual shall also have the duty “to respect his parents at all times, to maintain them in case of need” and “to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation.”<sup>76</sup> Whether these provisions

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70. *Id.*, art. 4(1).

71. *Id.*, art. 4(m) (including promotion of gender equality as another one of the stated objectives).

72. *Id.*, art. 3(h).

73. Banjul Charter, *supra* note 35.

74. Banjul Charter, *supra* note 35, pmbl.

75. *Id.*, pt. I, ch. 1, art. 18(3).

76. *Id.*, pt. I, ch. 1, art. 29 (asserting that societal morals and familial harmony underlie the requirements that children respect and care for their parents).

amount to tacit endorsement of child labor and harmful customary practices is unclear and robs the Banjul Charter of much efficacy.

3. *The African Charter on the Rights and Welfare of the Child*  
("ACRWC")

The ACRWC<sup>77</sup> does not mention the UDHR. However, in the preamble to the Charter, Member States reaffirmed "adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the OAU and in the United Nations and in particular the CRC; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child."<sup>78</sup> By virtue of its definition of the word "child" the Charter affords protection to all human beings in Africa below the age of eighteen years.<sup>79</sup> The ACRWC provides for the freedom from discrimination,<sup>80</sup> adopts the best interest of the child as a guiding principle,<sup>81</sup> guarantees to every child a right to life, and prohibits the death penalty for crimes committed by children.<sup>82</sup> The ACRWC has received wide ratification. As of February 2009, the ACRWC has been ratified by forty-five of the fifty-three countries in the continent.<sup>83</sup>

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77. ACRWC, *supra* note 20.

78. *Id.* pmb1.

79. *Id.* ch. 1, art. 2.

80. *See id.* ch. 1, art 3 ("Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.").

81. *See id.* ch. 1, art. 4(1) (mandating that authorities consider the best rights of the child in all matters concerning children).

82. *See id.* ch. 1, art. 5(1)-(3). Other rights guaranteed in the ACRWC include traditional social and economic rights such as freedom of expression and association, education, and privacy. *Id.* ch. 1, arts. 6-14.

83. *See* Africa-Union.org, List of Countries which have Signed, Ratified/Accessed to the African Charter on the Rights and Welfare of the Child, <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (last visited Oct. 26, 2009) [hereinafter List of Countries - ACRWC] (indicating that the following countries have signed but not ratified the ACRWC: Somalia, Central African Republic, Djibouti, Swaziland, Tunisia, and Sahrawi Arab Democratic Republic). The Democratic Republic of Congo and Sao Tome & Principe have neither signed nor ratified the instrument. *Id.*



#### *4. Summary of Regional Efforts*

The UDHR has inspired and continues to inspire developments in laws relating to children in most countries in Africa. For countries where the important task of standard setting has been completed, the UDHR remains relevant and continues to expose the short-comings of African leaders in terms of their failure to vigorously implement the law that exist on paper. The ACRWC is the first regional treaty on the rights of children. By codifying the responsibility of the state, community and individuals in the protection of children, the ACRWC places the rights of children in the continent on a firm legal basis. Unfortunately, the ACRWC suffers from lack of effective implementation. Although the ACRWC provides both a system of state reporting and a complaints mechanism, neither procedure is fully operational. The first members of the Committee of Experts were elected on July 10, 2001, and even though they had their first meeting from April 29 to May 3, 2002, the Committee has yet to make its mark. Numerous challenges face the Committee of Experts including: the failure of states to nominate suitably qualified individuals to the Committee; the lack of a functional secretariat; the lack of resources; the lack of commitment by State Parties to their reporting obligations; the lack of expert legal counsel to assist the Committee; and an absence of strong cooperation between the African Commission and the Committee of Experts. In short, while African leaders have been quick to pay lip-service to the UDHR and adopt binding legal instruments to protect children in the continent, they have been slow in seeing to the effective implementation of the instruments they adopted. When it comes to human rights in general and children's rights in particular, non-prioritization and lack of demonstrated commitment is a major problem at both national and regional levels.

### III.AFRICAN CHILDREN, THE UDHR, AND THE FOUR TYRANNIES

The UDHR makes sweeping claims for the right of the individual but does not appear to address peculiar problems present in Africa that impinge on child survival and development. Specifically, the UDHR does not directly address four tyrannies that children in Africa have faced in the past and continue to face today: culture,

poverty, corruption, and globalization. Consequently, although the continent is not short on statements, declarations and conventions avowing respect for the rights of children, gross violations of the rights of children in the region persist.

#### A. THE TYRANNY OF CULTURE

Harmful cultural and religious practices perpetrated on children in Africa remain significant impediments to the realization of the goals of the UDHR and undercut Article 1, which states that “[a]ll human beings are born free and equal in dignity and rights.”<sup>84</sup> Harmful traditional practices visited on women, particularly widows, also undermine the rights of children in Africa because frequently when women suffer, their children suffer. Consequently, practices such as harmful burial rituals and discriminatory inheritance laws harm not only women but children. In much of Africa, a widow does not have any right to property left by her deceased husband but is immediately dispossessed upon the death of her spouse.<sup>85</sup> Widows who are childless and widows who have only female children live in a very precarious, miserable situation. Sadly, the judiciaries in most African countries appear to lack the courage to declare discriminatory and harmful traditional practices unconstitutional and void. For example, in the Nigerian case of *Nezianya v. Okagbue*, the Nigerian Supreme Court upheld patently discriminatory customary rules on inheritance by holding that a widow’s possession of her deceased husband’s property, regardless of the period of possession, does not translate into bona fide ownership of the property.<sup>86</sup> Similarly, in *Nzekwu v. Nzekwu*, the Supreme Court of Nigeria restated that a widow’s dealing with her husband’s property must receive the consent of his family and that a widow cannot claim her husband’s property as her own.<sup>87</sup>

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84. UDHR, *supra* note 1, art. 1.

85. Uché U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424, 428 (2002) [hereinafter Ewelukwa, *Post-Colonialism*].

86. *Nezianya v. Okagbue*, [1963] 3 N.S.C.C. 277, 280 (Nigeria) (“It is abundantly clear that a married woman, after the death of her husband, can never under Native Law and Custom be a stranger to her deceased husband’s property; and she could not, at any time, acquire a distinct possession of her own to oust the family’s rights of ownership over the property.”).

87. *Nzekwu v. Nzekwu*, [1989] 2 N.W.L.R. 373, 377 (Nigeria) (conceding that

Female children in Africa have their own cross to bear and are victims of a culture that treats women as second class citizens. The position of female children in African societies raises serious questions about entrenched inequality, indifference, and injustice because frequently “[t]he girl child suffers double jeopardy as a result of the intersection of age and gender.”<sup>88</sup> First, age disables the girl child in Africa because many cultural traditions greatly circumscribe the political and legal rights of children.<sup>89</sup> Second, gender imposes additional disabilities on the girl child; boys are raised to believe that maleness signifies unparalleled power and unquestioned authority, while girls are raised to meekly accept their inferior status.<sup>90</sup> In this respect, reports by States Parties to the CRC are very revealing. While the constitutions of most countries in Africa guarantee freedom from discrimination, a significant number of states nevertheless identify persisting customary rules and practices as a major factor affecting the fundamental rights of girls in the continent. For example, in Burkina Faso, where the principles of non-discrimination and equal protection under the law are integral parts of the constitution,<sup>91</sup> the government admits that “[i]n reality . . . discrimination between girls and boys persists where schooling is concerned.”<sup>92</sup> In its report, the Kenyan government

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the widow nonetheless retains occupation rights, but that those are “subject to good behaviour”).

88. Uché U. Ewelukwa, *The Girl Child, African States, and International Human Rights Law—Toward a New Framework for Action*, in *ENGENDERING HUMAN RIGHTS: CULTURAL AND SOCIOECONOMIC REALITIES IN AFRICA* 133 (Obioma Nnaemeka & Joy Ngozi Ezeilo eds., 2005) [hereinafter Ewelukwa, *The Girl Child*].

89. *Id.*; see also Elizabeth Colson, *African Society at the Time of the Scramble*, in *COLONIALISM IN AFRICA 1870-1960, VOLUME 1: THE HISTORY AND POLITICS OF COLONIALISM 1870-1914*, 58-59 (L.H. Gann & Peter Duignan eds., 1969) (explaining the importance of cults, West African religions, and the principle of collective responsibility to West African traditions, and noting that community elders hold a great deal of power because of and within those traditions).

90. See Ewelukwa, *The Girl Child*, *supra* note 88, at 133-34 (indicating that boys attend school at disproportionately higher rates than girls, and that rates in rural areas are even more disproportionate); see also *id.* at 137 (noting that, because girls do not attain the same level of education as boys, girls are often forced to step into mothering types of roles at earlier ages).

91. BURK. FASO CONST. tit. I, ch. I, arts. 1, 4.

92. Burkina Faso, *Periodic Report Submitted Pursuant to Article 44, Paragraph 1, of the Convention on the Rights of the Child*, 11, delivered to the

states that “[a]lthough the Laws of Succession Act (Cap. 160, Laws of Kenya)<sup>93</sup> treats boys and girls equally, Kenya is still basically a patriarchal society. Rights of inheritance are still to a great extent restricted to the male members of the family. This discriminates against female children.”<sup>94</sup>

Not even in adulthood, whether married or single, does the girl child get any relief from the harsh operation of customary law rules. Thus, in the Zimbabwean case of *Magaya v. Magaya*,<sup>95</sup> the Supreme Court of Zimbabwe dealt a damaging blow to the legal right of female children and women in the country by declaring that the eldest surviving child of an African man who died intestate was not entitled to be appointed heir to the late-father’s estate where that child was female, and where there were surviving sons able to act as heirs.<sup>96</sup> The Court also concluded that although the preference of males was discriminatory, it was not contrary to the anti-discrimination clause in Zimbabwe’s constitution, which did not prohibit discrimination based on sex at the time.<sup>97</sup> In the Nigerian case of *Onwuchekwa v. Onwuchekwa*, the court upheld a customary law which stipulates that a married woman, together with any property she has, is owned by her husband.<sup>98</sup>

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*U.N. Committee on the Rights of the Child*, CRC/C/65/Add.18 (Feb. 13, 2002).

93. Kenyan Law of Succession Act, Cap. 160, Laws of Kenya, available at [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (last visited November 10, 2009).

94. Kenya, *Periodic Report Submitted Pursuant to Article 44, Paragraph 1, of the Convention on the Rights of the Child*, 29, delivered to the U.N. Committee on the Rights of the Child, CRC/C/3/Add.62 (Feb. 16, 2001) [hereinafter *Kenya Report*].

95. *Magaya v. Magaya*, 1999 (1) ZLR 100 (S) (Zimbabwe).

96. *Id.* at 104-05 (relying on domestic customary law rather than constitutional or international law in order to reach its decision); see also E.K. Quansah, *The Status of Women in Zimbabwe: Veneria Magaya v. Nakayi Shonhiwa Magaya* (SC 210/98), 43 J. AFR. L. 248, 248-51 (1999) (criticizing the *Magaya* decision as ignoring the principle of *stare decisis* and further confusing the interpretation of Zimbabwean anti-discrimination laws).

97. *Compare Magaya*, 1999 (1) ZLR 100, 105 (citing the Constitution of Zimbabwe as it existed in 1999 as protecting against discrimination based on “race, tribe, place of origin, political opinions, colour or creed”), with THE CONSTITUTION OF THE REPUBLIC OF ZIMBABWE art. 23 (protecting against discrimination based on “race, tribe, place or origin, political opinions, colour, creed, sex, gender, marital status or physical disability) (emphasis added).

98. (1991) 5 N.W.L.R. 739 (Nigeria).

An intractable problem in post-colonial Africa, therefore, is the tension between protected rights and preserved cultures. The simultaneous application of differing systems of law—common law, customary law, and Sharia law—and the largely unwritten nature of African customary law pose serious challenges to the effective protection of children in Africa. What prevails is an unpredictable, largely inconsistent, and highly discretionary legal system that privileges those in positions of power. The UDHR neither problematizes culture, nor offers a clear solution to the problems posed by culture; indeed, the UDHR even appears to complicate the issue. While Article 27 declares that “[e]veryone has the right to freely participate in the cultural life of the community,”<sup>99</sup> Article 29 goes on to declare that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible.”<sup>100</sup> The two provisions, which may be perfectly acceptable in Western societies where the dominant culture emphasizes the individual, offer little guidance on how to resolve thorny issues that arise when individual rights collide with cultural rights as they so often do in African societies.

The ACRWC attempts to address the problem posed by harmful cultural practice. Article 1(3) provides, rather ambiguously, that “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”<sup>101</sup> Article 21 obliges States Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.”<sup>102</sup> The term “all appropriate measures,” which is undefined, is vague at best. The ACRWC does not offer a comprehensive list of social and cultural practices that are harmful to the welfare, dignity, normal growth and development of the child, but it does offer some guidance.<sup>103</sup> However, to the extent that the

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99. UDHR, *supra* note 1, art. 27.

100. *Id.* art. 29.

101. ACRWC, *supra* note 20, art. 1(3) (describing the responsibilities of States Parties under the ACRWC).

102. *Id.* art. 21.

103. *Id.* art. 21(1) (listing the following as harmful to children: “customs and practices prejudicial to the health or life of the child” and “those customs and

ACRWC presently lacks effective implementation mechanisms, it is not likely that the benefits of Article 1(3) and Article 21 will be felt in the continent in the near future.

While the constitutions of a few countries (for example, the South African Constitution) endorse the principle of the “best interest of the child,” most other constitutions either avoid the issue or preserve discriminatory and, arguably, harmful customary law. Thus, even in countries where human rights are constitutionally guaranteed and discrimination on the basis of sex is expressly prohibited, the constitutions nevertheless allow a wide exception for matters of personal law such as adoption, marriage, burial, and inheritance. In this respect, Kenya offers a good example. Although the Kenyan Constitution guarantees fundamental rights and freedom to every person in Kenya irrespective of sex, and guarantees equal protection to all citizens,<sup>104</sup> the Kenyan Government readily admits that “[t]he Constitution and the Kenya Citizenship Act (Cap. 170, Laws of Kenya) contain provisions which discriminate on the grounds of gender. A child whose father is Kenyan automatically becomes a Kenyan citizen regardless of where he or she is born. But a child who is born outside of Kenya to a Kenyan mother and a non-Kenyan father only becomes a Kenyan citizen if he/she applies for citizenship.”<sup>105</sup> Moreover, Section 82(4) of the Kenyan Constitution excludes from the reach of the equal protection clauses any law that pertains to “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law,” virtually preserving discriminatory customary law rules.<sup>106</sup>

## B. THE TYRANNY OF SILENCE

A free and open society is necessary for the enjoyment of rights in the UDHR. Political pluralism where freedom of expression is encouraged and freedom of information is not seen as a threat to the state is a necessary antecedent. In Africa, however, silence significantly threatens and hampers child protection efforts. Walls of

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practices discriminatory to the child on the grounds of sex or other status”).

104. KENYA CONST. ch. V, §§ 70, 82(1).

105. *Kenya Report*, *supra* note 94, at 28 (acknowledging that the effects of the conflict between Kenyan customary law and constitutional law have been “widely criticized”).

106. KENYA CONST. ch. V, § 82(4).

silence around issues that have serious implications for child survival and development are literally destroying the lives of children in the continent.<sup>107</sup>

The institutionalized silencing of children—the pervasive belief that children should be seen and not heard—is, perhaps, the most dangerous and damaging of all silences in Africa. Although the UDHR provides for the right to freedom of opinion and expression<sup>108</sup> and states that “[e]veryone has the right to freedom of peaceful assembly and association,”<sup>109</sup> the voices of African children do not count, and yet Africa is one region where children’s voices should count given their active participation in the economy. Child labor and exploitation are commonplace in the region.<sup>110</sup> Forty-one percent of children in Africa work.<sup>111</sup>

A major problem lies in the fact that in Africa today there are competing images of childhood. On the one hand is a vision of

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107. See generally Lisa Forman, *Both Medium and Message: HIV/AIDS, Information and Communication in Africa*, 1 I/S: J. L. & POL’Y INFO. SOC. 171 (2004/2005). These include: walls of silence surrounding HIV/AIDS, silence regarding harmful cultural and religious practices, silence regarding violence against children in the private sphere, and silence about growing practice of child trafficking and slavery. Walls of silence surrounding HIV/AIDS is one reason why Africa accounts for seventy percent of people living with HIV/AIDS and ninety percent of children orphaned by AIDS. While the first wall of silence around HIV/AIDS (the failure of African leaders to speak openly about HIV/AIDS) has been largely broken, a second wall of silence persists in the form of silence in the wider society over a host of vital issues related to the epidemic such as sexual violence, the harmful effects of polygamy, and male promiscuity.

108. UDHR, *supra* note 1, art. 19.

109. *Id.* art. 20.

110. See, e.g., International Confederation of Free Trade Unions [ICFTU], *Internationally Recognised Core Labour Standards in Sierra Leone*, Geneva, Feb. 9 – 11, 2005, available at <http://www.icftu.org/www/pdf/clssierraleone2005.pdf> (noting that 71.6% of children between the ages of five and fourteen in Sierra Leone work).

111. Cornell University School of Industrial & Labor Relations [ILR], *Child Labor in Africa*, International Labor Organization (2005), available at <http://digitalcommons.ilr.cornell.edu/child/10/> (follow “download” link) (last visited Oct. 18, 2009) (defining child labor as “all forms of work by children under . . . 15 years [of age] or the age of completion of compulsory schooling subject to some exceptions”). In Rwanda an estimated 400,000 children work, many as domestic servants. *Id.* In Tanzania about 4,600 children work in small-scale mining. *Id.* In Kenya, about 1.9 million children between the ages of five and seventeen are working, many as coffee pickers. *Id.*

childhood as a period of time for children to play and learn before being legally recognized as adults upon reaching the age of eighteen—a vision dominant in Western societies.<sup>112</sup> On the other hand, there is another vision of childhood as a period of training for the eventual assumption of adult responsibilities—a vision dominant in Africa. As Bart Rwezaura rightly notes, “[c]hildhood has always been viewed in Africa as the time to learn, to build character and to acquire the social and technical skills necessary to perform the future roles of adulthood.”<sup>113</sup> Analyzed both in terms of the structural relationship between children and adults and in terms of the social, political, and economic positioning of children, the modern conception of childhood conceives of children as “the other,” developing but not yet fully developed, and in a benign relationship with adults, whereby “[a]dults are givers and providers, children are receivers and consumers; adults are protectors, children are protected; adults are thought to be mature, rational and strong, children are perceived as immature, irrational and vulnerable.”<sup>114</sup> The UDHR does not explicitly endorse any particular vision of childhood. Implicitly, children enter the picture only insofar as they are still in the period of childhood, are vulnerable, are part of a family unit, and are deserving of protection. In a continent like Africa, with an ever increasing number of child-headed households and homeless children, the UDHR’s emphasis on the family may indirectly rob certain categories of children of a meaningful voice in the community insofar as a family is assumed to comprise of married couples and their offspring.

In developing countries, whether in Africa or elsewhere, scholars are increasingly voicing dissatisfaction at what is perceived to be a Western conception of childhood, naturalized and globalized through the agency of the United Nations and other international

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112. M. Abdul Hannan, *The Globalisation of Child Policy: A Study of the Significance of the UN Convention on the Rights of the Child, 1989*, 1 J. COMMONWEALTH L. & LEGAL EDUC. 77, 79 (2002).

113. Bart Rwezaura, *Competing ‘Images’ of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa*, 12 INT’L J. L. POL’Y & FAM. 253, 255 (1998) (observing that childhood often does not last as long in African societies as it does in the West).

114. Barry Goldson, *Theorizing History: Social Construction and Reconstruction*, in ‘CHILDHOOD’ IN ‘CRISIS’? 18 (Phil Scranton ed., 1997).



development agencies.<sup>115</sup> For example, in launching a new Child Research Program in 1998, the Council for the Development of Social Science Research in Africa (“CODESRIA”), a front-line social science research center based in Dakar, Senegal, questioned the modern idea of childhood as what it referred to as the “quarantined childhood.”<sup>116</sup> According to the concept paper on the Child Research Program:

Through actual colonialism and cultural imperialism the ideas of childhood and the child have been globalized. Some of these ideas might not be appropriate for African contexts in which children have economic and other responsibilities to fulfill within families and communities, are not the sentimental core of nuclear families but rather part of an inter-generational system of interchange and mutual responsibilities, and (in recent history at least) have been important political protagonists.<sup>117</sup>

The critical question facing children’s advocates in Africa—a question not addressed by the UDHR—is this: is it wise to foster a vision of childhood as a time of play in a continent where poverty is endemic and children need to work to eat? Hannan argues that the Western vision of childhood, which delays adulthood until the age of eighteen, “is a luxury that many developing countries simply cannot afford.”<sup>118</sup> At present, the institutionalization of a particular, arguably Western conception of childhood in Africa without the necessary supporting social welfare frameworks means that some experiences of childhood in Africa are ignored and sometimes outlawed, thus inadvertently turning poor children into outlaws to be contained and, perhaps, eliminated. On the other hand, those dismissing legal instruments such as the UDHR, the ACRWC, and the CRC as embodying a Western notion of childhood, while simultaneously demanding norms that better reflect the African conception of children, may unwittingly create a situation in which children are

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115. See Hannan, *supra* note 112, at 85 (arguing that a Western-style childhood is unattainable for many developing world children).

116. CODESRIA *Child Research Programme (1998-2000)*, CODESRIA BULL. (Dakar, Senegal), 1997, at 19.

117. *Id.*

118. See Hannan, *supra* note 112, at 79; see also *supra* text accompanying notes 112-115 (comparing Western and African notions of childhood).

neither protected by native laws and customs nor protected by modern law. One solution is to accept the normative developments ushered in by the UDHR but emphasize the participatory rights of children. By working within the existing normative framework, supporting efforts to increase the participation of children in decision making, and ensuring that the voices of all children—particularly economically active children—are heard, African nations can make certain that the experiences of all children count without compromising their right to special protection.

### C. THE TYRANNY OF POVERTY AND CORRUPTION

The UDHR does not problematize poverty. Yet child poverty in Africa is at the root of the human rights abuses children experience in the continent. Poverty is at the root of child labor and child trafficking in the continent; of the 9.2 million children that died in 2007 before they reached their fifth birthday, almost half (4.5 million) were in Africa.<sup>119</sup> Furthermore, extreme poverty is a major contributor to hunger and childhood malnutrition in Africa together with inadequate caring practices for children, low education levels, and poor access to health services.<sup>120</sup> According to UNICEF, in sub-Saharan Africa about one-quarter of all children under five are underweight.<sup>121</sup>

Neither does the UDHR address human greed. Corruption and greed make a mockery of commitments made by African leaders to apply the best interest principle in all cases involving children and

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119. See UNICEF, Childinfo, Child Mortality Database, *last updated* Dec. 2008, <http://www.childinfo.org/mortality.html> (identifying a close connection between child mortality rates and poverty). According to UNICEF,

Rapid declines in under-five mortality (more than 50 percent) have been seen in Latin America and the Caribbean, Central and Eastern Europe and the Commonwealth of Independent States (CEE/CIS), and East Asia and the Pacific. However, there remain many countries with high levels of child mortality, particularly in sub-Saharan Africa and South Asia. Studies show that “child mortality is considerably higher among children living in rural areas and in the poorest households” indicating that a majority of children die from preventable diseases.

*Id.*

120. *Id.*

121. UNICEF, Childinfo, Statistics by Area/Child Nutrition, *last updated* Jan. 2009, [http://childinfo.org/undernutrition\\_status.html](http://childinfo.org/undernutrition_status.html).

their pledges to give priority to the child in the allocation of resources.<sup>122</sup> In Nigeria in 2008, while thousands of children died from hunger, malnutrition and easily preventable childhood diseases, investigations revealed that \$300 million disappeared from the coffers of the Ministry of Health without the notice of the Minister of Health, who happened to be a woman, a mother, a grandmother, and a pediatrician.<sup>123</sup> The money was allegedly shared by top ministry officials and by members of the Nigerian House of Representatives.<sup>124</sup> Corruption is endemic in Africa. Traditional systems of checks and balances, where they once existed, have all but disappeared and ordinary citizens are left without meaningful ways to hold their leaders accountable for their actions. What slavery and colonialism did not destroy, African leaders seem determined to destroy. Instead of embracing change, governments are cracking down on anti-corruption activists. For example, in late December 2008, four Gabonese civil society activists and anti-corruption campaigners—Grégory Ngbwa Mintsu, Marc Ona Essangui, Georges Mpage, and Gaston Asseko—were arrested and detained in Libreville.<sup>125</sup>

Corruption is a serious crime against humanity and yet is not addressed in the UDHR. The Rome Statute of the International Criminal Court (“International Criminal Court Statute” or the “Rome Statute”) lists as crimes against humanity certain acts “when

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122. See ECOWAS Twenty-Fifth Session of the Authority of Heads of State and Government, Dec. 20-21, 2001, Dakar, Senegal, *Declaration A/DCL.1/12/01 on the Decade of a Culture of the Rights of the Child in West Africa (2001-2010)*, 4, A/DCL.1/12/01, available at [http://www.chr.up.ac.za/hr\\_docs/african/docs/other/ecowas1.doc](http://www.chr.up.ac.za/hr_docs/african/docs/other/ecowas1.doc) [hereinafter *ECOWAS Declaration*] (undertaking “[t]o ensure, in the performance of our duties, that we fully discharge our responsibility to give priority to the child in the allocation of resources”); see also ACRWC, *supra* note 20, ch. 1, art. 4(1) (“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”).

123. Ise-Oluwa Ige, *Don't Quash Charges Against Grange, Others, EFCC Begg Court*, VANGUARD (Nigeria), June 6, 2008.

124. *Id.*

125. See Reporters Without Borders, *Climate of fear takes hold following arrests of two journalists and three civil society members* (January 7, 2009), <http://www.unhcr.org/refworld/docid/49670b6e9.html> (expressing concern about the government's failure to provide any reasons for detaining journalists and civil society activists, and speculating that their detention stemmed from their participation in a meeting with a prominent activist).

committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>126</sup> The key words are “widespread,” “systematic,” “civilian population,” and “knowledge.” Although the key acts listed in the statute are murder, extermination, enslavement, and enforced disappearance of persons, the statute also lists as a crime against humanity, “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>127</sup> While no international tribunal to date has concluded that corruption constitutes a crime against humanity, applying the evolutionary theory of treaty interpretation—which assumes that human rights treaties are living documents that must be interpreted in light of changing realities—it can be argued that systemic corruption is a crime against humanity and should be punished.<sup>128</sup> It could also be argued that systemic corruption violates some provisions of the UDHR and the ACRWC such as the right to life provision and the right to survival and development.<sup>129</sup> The African Commission has also applied this theory in a case involving the environmental damage in Ogoniland, located in the Niger Delta region of Nigeria.<sup>130</sup>

The case for imaginatively using the UDHR and the other instruments it has inspired to address corruption is very strong. Corruption is illegal everywhere in Africa, but everywhere it is woven deeply into the fabric of everyday life. Corruption is costing Africa more than \$148 billion a year, increasing the cost of goods by

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126. Rome Statute of the International Criminal Court art. 7, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90.

127. *Id.*

128. See Uché Ewelukwa, *Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs*, 9 YALE HUM. RTS. & DEV. L.J. 85, 102 (2006) [hereinafter Ewelukwa, *Litigating the Rights of Street Children*] (asserting that the evolutionary theory of treaty interpretation requires considering not only the relevant text, but also the context in which the text is operating).

129. See UDHR, *supra* note 1, art. 3 (right to life); ACRWC, *supra* note 20, art. 5 (right to survival and development).

130. See generally Justice C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, 1 AFR. J. LEGAL STUD. 129 (2005) (discussing the African Commission's increasingly liberal interpretation of the African Charter).

as much as twenty percent, deterring investment, and holding back development.<sup>131</sup> Sadly, most of the cost of corruption falls on the women, children, and the poor.<sup>132</sup>

#### D. THE TYRANNY OF GLOBALIZATION

Globalization is wreaking its own havoc on Africa to the detriment of children and other vulnerable groups in the continent. Sadly, the UDHR does not directly address globalization. For one thing, the UDHR is silent about the role of the main drivers of modern globalization—transnational corporations and international financial and trade institutions. Furthermore, the UDHR does not address the dominant orthodoxy of our time—the orthodoxy of the free market economy and the disengagement of the state from the important task of social welfare provision.

Economic liberalization accompanying globalization is exacerbating the gap between rich and poor in sub-Saharan Africa. In many parts of Africa, the pressure of globalization has led to child trafficking, sexual exploitation, and forced labor. Because of globalization and the increased demand for export products, slavery lingers in the continent in the export-oriented industries such as the cocoa and flower industries.<sup>133</sup> Africa has the greatest incidence of economically active children. About forty-one percent of children in the region are economically active, according to the International Labor Organization (“ILO”).<sup>134</sup> The ILO estimates that on average,

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131. Elizabeth Blunt, *Corruption ‘Costs Africa Billions’*, BBC, Sept. 18, 2002, <http://news.bbc.co.uk/2/hi/africa/2265387.stm>.

132. *Id.*

133. *See generally*, International Labour Office [ILO], International Programme on the Elimination of Child Labour [IPEC], Statistical Information and Monitoring Programme on Child Labour [SIMPOC], *Every Child Counts: New Global Estimates on Child Labour* (April 2002), available at <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=742> (providing estimates of the number of children enslaved or employed in several different categories of work); Kate Manzo, *Modern Slavery, Global Capitalism & Deproletarianisation in West Africa*, 32 REV. AFR. POL. ECON. 521 (2005) (exploring reasons for the persistence of slavery in the modern age). *But see* Alessandro Cigno et al., *Globalisation and Child Labour* in HARNESSING GLOBALIZATION FOR CHILDREN: A REPORT TO UNICEF (Giovanni Andrea Cornia ed., 2003) (arguing that “there is no empirical evidence that globalization increases child labour and that if anything, globalization reduces child labour”).

134. Press Release, ILO, *Child Labour Risks Growing in Africa OAU and ILO*

more than thirty percent of African children between ten and fourteen are agricultural workers. In West Africa, trafficking of children is widespread and increasing.<sup>135</sup>

Although the UDHR does not directly address child labor, its declaration states that “[a]ll human beings are born free and equal in dignity and rights” and that “[t]hey are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>136</sup> This declaration is relevant now more than ever before. The first step would be comprehensive data on the effect of globalization on children.

Promoting respect for children in Africa requires comprehensive action aimed at bringing about attitudinal and behavioral change in all areas of public and private life. Under the influence of the UDHR, African has experienced impressive normative changes in the area of children’s rights at both the regional and national levels. Yet, while legislative measures are a pivotal tool in advancing the rights of children, even more important are credible efforts at enforcement. Experience has shown that normative and quasi-normative human rights instruments, while relevant first steps, do not themselves translate into change.

#### IV. UDHR AND THE AFRICAN CHILD: THE NEXT SIXTY YEARS

Looking forward to the next sixty years, there is room for optimism. African culture has never been static but has always changed with the times. Article 27(1) of the UDHR states that “[e]veryone has the right to freely participate in the cultural life of the community.”<sup>137</sup> Article 21 declares that “[e]veryone has the right to participate in the government of his country directly or through freely chosen representatives.”<sup>138</sup> Drawing inspiration from the

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*Convene Tripartite Meeting*, Feb. 4, 1998, [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WCMS\\_008003/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008003/index.htm) (last visited Oct. 18, 2009) (comparing Africa’s forty-one percent to twenty-one percent in Asia and seventeen percent in Latin America).

135. *Id.*

136. UDHR, *supra* note 1, art. 1.

137. UDHR, *supra* note 1, art. 27(1).

138. *Id.* art. 21.

UDHR, the time has come for African children, children's rights advocates, and those who believe that "[a]ll human beings are born free and equal in dignity and right"<sup>139</sup> to join forces to usher in a new culture of respect for the rights of children in Africa.

#### A. THE PROMISE OF CHANGE

There are signs of change, willingness to change, and renewed efforts to create a culture of respect for the rights of children.<sup>140</sup> Since 1991, when it was first initiated by the OAU, the Day of the African Child has been celebrated on the sixteenth of June every year.<sup>141</sup> NGOs and international organizations are increasingly using the Day of the African Child to draw attention to various issues relevant to children, such as child trafficking<sup>142</sup> and child participation.<sup>143</sup> The new AU Award for Children's Champion in Africa sponsored by the AU could go a long way in galvanizing action on behalf of children at the grassroots level.<sup>144</sup> Signifying perhaps a willingness to address the tyranny of silence, the 2008 theme was the "Right to Participate: Let Children be Seen and Heard."<sup>145</sup> At the sub-regional level,

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139. *Id.* art. 1.

140. See PlanUSA, *Hip Hop Artists Sing to Plan's Tune*, May 9, 2008, <https://www.planusa.org/contentmgr/showdetails.php/id/438053> (last visited July 20, 2009) (reporting that in May 2008, hip hop artists from several West African countries and members of AURA (Artistes Unis pour le Rap Africain) performed a music concert in Lomé, Togo, aimed at spreading the message of children's rights and advocating for a compassionate approach towards children).

141. See WHO/AFRO Press Release, *supra* note 7 (commenting that the Day of the African Child was instituted as a way to commemorate a group of children who were murdered when marching in Soweto, South Africa to bring attention to the substandard nature of their education).

142. Press Release, UNICEF, Day of the African Child 2007 (June 16, 2007), available at [http://www.unicef.org/media/media\\_40005.html](http://www.unicef.org/media/media_40005.html).

143. Press Release, UNICEF, On the Day of the African Child, UNICEF Highlights the Importance of Child Participation (June 16, 2008), [http://www.unicef.org/media/media\\_44456.html](http://www.unicef.org/media/media_44456.html) [hereinafter On the Day of the African Child].

144. African Union, Eighth Meeting of the AU Committee of Experts on the Rights and Welfare of the Child [ACRWC], Nov. 27 – Dec. 1, 2006, *Report*, 1 (explaining that "[t]he First AU Award for Children's Champion in Africa . . . was awarded to the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) at the Banjul Summit in July 2006").

145. See On the Day of the African Child, *supra* note 142 (addressing the importance of child participation in discussions including global warming, health, and development).

ECOWAS declared the decade 2000-2010 to be the decade of a culture of the rights of the child in West Africa and now has a website dedicated to children's causes.<sup>146</sup> Nevertheless, only a periodic monitoring of the situation of children in Africa will ensure that commitments are kept, best practices shared, partnerships strengthened, and action accelerated.

Although still in conception phase, a new ECOWAS initiative for a peer review on the situation of children holds a lot of promise.<sup>147</sup> The peer review mechanism is a political and technical monitoring mechanism whose mandate is "to ensure progress in the achievement of objectives and the implementation of concrete measures in favour of children."<sup>148</sup> Equipping the Committee of Experts to perform its function under the ACRWC has enormous potential, and could likely yield a huge dividend. However, because it is crippled by chronic under-funding, lack of training, and marginalization within the African Union Commission, and because it continues to be disregarded by State Parties, the Committee is presently irrelevant in Africa and risks becoming obsolete.

The future of children will depend on how states in Africa chose to address the tension between protected rights and preserved cultures. Much will depend on the judiciary. In the past decade, some judges have shown a willingness to embrace change and boldness to adopt the evolutionary theory of interpretation. In the Nigerian case of *Ukeje v. Ukeje*, the court held that the Igbo native law and custom that disentitled female children from sharing in their deceased

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146. See ECOWAS, *Declaration on the Decade of a Culture of the Rights of the Child in West Africa (2001-2010)*, Declaration A/DCL.1/12/01 (Dec. 20-21, 2001) (recognizing the central place of the child in sub-regional development efforts and proclaiming that turning attention toward children would help alleviate poverty).

147. ECOWAS, ECOWAS Peer Review on the Situation of Children, Introduction, <http://www.ecowas.int/ips/ii/child/en/index2.php?file=home> (last visited Oct. 19, 2009).

148. See ECOWAS, ECOWAS Peer Review on the Situation of Children, Objectives and Principles, <http://www.ecowas.int/ips/ii/child/en/index2.php?file=objectif> (last visited Oct. 19, 2009) (hoping that the Peer Review will "allow the adoption of policies and practices leading to the full realization of children's rights through the achievement of the objectives of the sub-regional operational framework of action, within the overall context of the objectives adopted at the United Nations General Assembly Special Session on Children and of the Millennium Development Goals").



father's estate was unconstitutional and void.<sup>149</sup> In another case, *Amusan v. Amusan*, the court ruled that under Yoruba customary law, all children regardless of sex were entitled to inherit their parent's land.<sup>150</sup> And, in *Uke v. Iro*, the court declared that the rights of all sexes were protected under the Nigerian constitution and that "any law or custom that seek to relegate women to the status of second class citizens are law and custom fit for the garbage and should be consigned to history."<sup>151</sup>

In conclusion, judges have a major role to play in translating black-letter law into practical and positive realities for children and in promoting a new culture of respect for children in Africa. As Judge Lanja of the South African Constitutional Court aptly noted:

Courts do have a role to play in the promotion and development of a new culture "founded on the recognition of human rights," in particular, with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored. One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution.<sup>152</sup>

#### B. THE PROMISE OF NEW INFORMATION COMMUNICATION TECHNOLOGIES

New information and communication technologies ("ICTs") are fast destroying the walls that kept societies apart and the silence that visited human rights abuse in Africa.<sup>153</sup> ICTs mean that not only are

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149. [2001] 27 W.R.N. 14 (Nigeria Ct. App.).

150. [2002] F.W.L.R. 1385 (Nigeria Ct. App.).

151. [2001] 11 N.W.L.R. 196, 198-99 (Nigeria).

152. *State v. Williams* 1995 (3) SA 632 at ¶ 8 (S. Afr.) (internal citations omitted).

153. See Forman, *supra* note 107, at 186-92 (observing improvement in the availability of ICTs in Africa, but noting that the continent still has a significant

human rights abuses becoming more visible, but also information about good governance and best practices can be more readily shared. Due to ICTs, judgments from different national courts directly or indirectly affirming children's rights need not remain buried in the pages of court documents but can be more readily shared with colleagues across the continent. In the past decade, the South African Constitutional Court has rendered a number of decisions bearing on children's rights that could be shared with judges in other countries to, at the very least, stimulate internal debate about the status of children, and at best, influence the practices in other states. In *State v. Williams*, the South African Constitutional Court was called to determine whether the sentence of juvenile whipping was consistent with the provisions of the Constitution.<sup>154</sup> The Court concluded that corporal punishment was unconstitutional on the grounds that it was contrary to rights and freedoms enshrined in the constitution.<sup>155</sup> According to the Court, juvenile whipping "was a violation of the dignity of both the minor as well as that of the person administering the whipping."<sup>156</sup>

The South African Constitutional Court has also offered an expansive interpretation of the "best interest of the child" clause found in the South African Constitution.<sup>157</sup> In *Minister for Welfare and Population Development v. Fitzpatrick and Others*, the issue was the constitutional validity of Section 18(4)(f) of the Child Care Act (Act 74 of 1983) which proscribed the adoption of a child born of a South African citizen by non-citizens.<sup>158</sup> In a judgment delivered by Justice Goldstone, the Court found the provisions of Section 18(4)(f) to be in conflict with Section 28(2) of the Constitution, which explicitly requires that the best interests of a child be "paramount" in issues involving children.<sup>159</sup> Significantly, the Court concluded that

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amount of progress to make).

154. *Williams*, 1995 (3) SA 632 at ¶ 1.

155. S. AFR. CONST. § 10 (right to dignity); *id.* § 11(2) (freedom from torture or any cruel, inhuman or degrading treatment or punishment).

156. *Williams*, 1995 (3) SA 632 at ¶ 17.

157. See S. AFR. CONST. ch. 2, § 28(2) (codifying the best interest of the child as "paramount" to matters involving children).

158. *Minister for Welfare and Population Dev. v. Fitzpatrick* 2000 (3) SA 422 (CC) at ¶ 1 (S. Afr.).

159. S. AFR. CONST. 1996 ch. 2, § 28(2).

Section 28(2) creates a right independent of those specified in other sections of the Constitution.<sup>160</sup>

The problem that arises from multiplicity of intersecting constitutional values and interests—a common problem in Africa—was taken up in *Christian Education South Africa v. Minister of Education*, a case brought by an association of 196 Christian independent schools.<sup>161</sup> The question before the Court was whether Section 10 of the Schools Act, by prohibiting corporal punishment in all schools, violated the rights of parents of children in independent schools who, in line with their religious convictions, had consented to the “corporal correction” of their children by teachers.<sup>162</sup> In a unanimous decision rendered by Justice Sachs, the Court assumed without deciding that the appellant’s religious and community rights had been limited, but concluded that the limitations were “reasonable and justifiable in an open and democratic society” and, thus, permissible under the limitation clause of the South African Constitution.<sup>163</sup> The Court took into consideration the importance of the child’s constitutionally-guaranteed right to dignity and right to be free from all forms of violence and the importance of creating uniform norms and standards crucial to educational development.

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160. See *Fitzpatrick*, 2000 (3) SA 422 (CC) at ¶¶ 17-18 (according to the Court, “the ‘best interests’ standard, appropriately, has never been given exhaustive content in either South African law or in comparative international or foreign law”). “It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.” *Id.*

161. *Christian Educ. South Africa v. Minister of Educ.* 2000 (4) SA 757 (CC) (S. Afr.).

162. *Id.* ¶ 1. The appellants had argued that “corporal correction” (the term they used for corporal punishment) was a vital aspect of Christian religion and that the blanket prohibition of its use in all schools was unconstitutional and void. *Id.* The appellant cited several passages of the Bible including: Proverbs 22:6, Proverbs 22:15, Proverbs 19:18, and Proverbs 22:13-14, all of which could be interpreted as approving of corporal punishment for children. *Id.* ¶¶ 2-4.

163. See *id.* ¶¶ 27-30, 52; see also S. AFR. CONST. § 36 (requiring that the following be considered when limiting rights guaranteed under the South African Bill of Rights: “(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”).

Significantly, the Court also noted that the child's "best interest" right is not excluded where the religious rights of the parents are involved.<sup>164</sup>

South African courts do not have a monopoly on progressive judicial opinions. Decisions from other jurisdictions, even decisions that are retrogressive, can also be readily shared to stimulate debate. Even as the globalization of markets wreaks havoc on the most vulnerable, efforts must be made to harness globalization in ways that benefit children. In the next sixty years, ICTs can be used to combat the tyrannies that African children currently face. The UDHR already lays a strong foundation for harnessing globalization for children with Article 27(1), which provides that "everyone has the right . . . to share in scientific advancement and its benefit."<sup>165</sup> It is imperative that ICTs be used to improve the condition of the lives of children in all corners of the globe.

### C. THE PROMISE OF INSTITUTIONAL PARTNERSHIPS AND EXCHANGES

Institutional partnerships and exchanges across nations and across continents hold a lot for promise for Africa's renewal. Institutional partnership between regional human rights bodies in Africa and their counterparts in Latin America and Europe will go a long way in strengthening the monitoring and implementation of mechanisms under the ACRWC and the Banjul Charter. The common thread joining all the existing regional and international human rights bodies is the UDHR. The Committee of Experts could benefit from the work of the Inter-American Commission and Court of Human Rights and from the United Nations Committee on the Rights of the Child. For example, the Inter-American human rights bodies confront abuses of children's rights very similar to those the Committee of Experts confronts. Those international bodies have also had the opportunity to grapple with one of the biggest tragedies of our time—the problem of children sleeping and working on the

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164. *Christian Educ. South Africa*, 2000 (4) SA 757 (CC) ¶ 41.

165. UDHR, *supra* note 1, art. 27(1).

street. On November 19, 1999, the Inter-American Court of Human Rights (“IACHR”) rendered a landmark decision in *Villagrán Morales v. Guatemala*, a case involving the abduction, detention, and murder of street children in Guatemala.<sup>166</sup> Very significant in the case was the Court’s bold adoption of the evolutive theory of treaty interpretation to give meaning to otherwise vague treaty provisions.<sup>167</sup>

#### D. THE PROMISE OF NEW LEADERSHIP

Leadership is needed from the public sector, the private sector, and the civil society. Only decisive and bold leadership from the public sector will ensure that promises made and commitments undertaken are considered seriously by all levels of government and judiciously enforced. The civil society must play a leading role in giving meaning to lofty legal rules and principles, giving voice to children, and highlighting abuse whenever and wherever it occurs. Lastly, the private sector can play a role in generating jobs and economic opportunities, and in investing in communities where they operate. Fortunately, one is beginning to see signs of change. The civil society in Africa is slowly but steadily making strides in promoting human rights awareness and holding governments accountable for the commitments they undertake. Within the context of the New Partnership for Africa’s Development (“NEPAD”), African leaders have pledged that “[i]n fulfilling its promise, [NEPAD] must give hope to the emaciated African child that the 21st century is indeed

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166. See “Case of the Street Children” (*Villagrán-Morales et al.*) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999). See generally Ewelukwa, *Litigating the Rights of Street Children*, *supra* note 128, at 86 (pointing out that Guatemala violated the Inter-American Convention on Human Rights and that the Court “awarded damages totaling \$508,865.91 against Guatemala in favour of the surviving relatives of the murdered children”).

167. See *id.* at 102 (“The evolutive theory holds that “when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration, but also the system within which it is [inscribed].” Article 19 of the IACHR provides that “[e]very minor 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.” Article 19 does not define the term “child” and does not go into any details about the nature of protection minors require. Nevertheless, drawing on related human rights instruments including the CRC and the American Declaration of the Rights and Duties of Man, the Court was able to lacunae in Article 19. See *Case of the Street Children*, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999).

Africa's century."<sup>168</sup> Children are identified as the cornerstone for Africa's New Partnership. NEPAD also recognizes that "unless something new and radical is done, Africa will not achieve the International Development Goals."<sup>169</sup> Whether NEPAD will bring about African renaissance remains to be seen.

## CONCLUSION

Thanks to the UDHR and the subsequent international, regional, and sub-regional instruments that it has inspired, African leaders have made many impressive commitments to children on the continent. Investing in children and promoting a culture of respect for the rights of children is an imperative that the continent cannot ignore. As aptly noted in the African Common Position, "[t]he prospect for the socio-economic transformation of the continent rests with investing in the young people of the continent. Today's investment in children is tomorrow's peace, stability, security, democracy and sustainable development."<sup>170</sup> However, although the obligations enshrined in the CRC and ACRWC are legally binding, there is still little evidence that African leaders actually treat the provisions of these documents as state obligations. Furthermore, because the traditional image of childhood continues to exert its influence in many ways and because of systemic poverty and social dislocation in Africa today, progress will be slow.

Legal reform must be seen as a process that involves not just formal adoption of treaties and domestic laws but also sustained effort to promote a new awareness of the values and principles embodied therein. Moreover, laws that seek to promote a new vision of childhood must necessarily be matched by new commitments by states to invest in children and develop new forms of social security for families given the gradual but steady demise of the extended family system. As Martin Chanock rightly notes, "[f]amily law reform in Africa appears to involve a clash between the customary law and the modernizing ambitions of the post-colonial states."<sup>171</sup>

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168. The New Partnership for Africa's Development [NEPAD], *Framework Document*, 59, ¶ 205 (Oct. 2001).

169. *Id.* ¶ 70.

170. *African Common Position*, *supra* note 5, at 2.

171. Martin Chanock, *Neither Customary Nor Legal: African Customary Law in*

The UDHR calls for the protection of childhood and implicitly endorses a modern, arguably Western, conception of childhood.<sup>172</sup> Moreover, the UDHR fails to address the challenge posed by systemic poverty to effective protection of human rights. In sub-Saharan Africa today, the problem lies in the gap between the prescriptions of formal law and the social and economic conditions in the continent; how the continent arrives at a synthesis of children's rights and child welfare in the context of extreme poverty is a real challenge. The result is a tension between the formal construction of the best interest of the child and the material or cultural conception of the best interest of the child. At a conceptual level, children are now recognized as having a moral and legal right to maintenance by their parents.<sup>173</sup> However, underneath and alongside the official conception of childhood is a different reality shaped by the cultural and material circumstances of a vast number of Africans.

In the coming years, the full normative impact of the UDHR in Africa will be felt when the local judges assume their rightful role in the important task of ensuring justice for all and regional human rights institutions—including the African Court of Human Rights, the African Commission, and the Committee of Experts—begin the important task of norm interpretation and human rights enforcement. Applying the evolutionary theory of treaty interpretation and drawing inspiration from the UDHR, it is possible for Africa to create a better world for its children, or at the very least give them hope that tomorrow will be better than yesterday. A hopeless generation is a lost generation, and a lost generation is a lost continent. The responsibility falls on all. Drawing inspiration from the UDHR, the struggle must continue because “every individual and every organ of society, keeping [the UDHR] constantly in mind,” is required to “strive by teaching and education to promote respect for these rights

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*an Era of Family Law Reform*, 3 INT'L J.L. & FAM. 72, 72 (1989)

172. See *supra* notes 112-115 and accompanying text (discussing the differences in African and Western conceptions of childhood).

173. See John Parry-Williams, *Legal Reform and Children's Rights in Uganda – Some Critical Issues*, 1 INT'L J. CHILD. RTS. 49, 51 (1993) (noting that the Ugandan Penal Code makes it “an offence to withhold from a child the necessities of life whereby the child's health may be injured”).

and freedoms and *by progressive measures*, national and international, to secure their universal and effective recognition and observance.”<sup>174</sup>

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174. UDHR, *supra* note 1, pmb1.