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## Waging War on a Child's Right to Education in Africa

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# Waging War on a Child’s Right to Education in Africa

*Sydney Plummer*<sup>†</sup>

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## I. Introduction

Numerous international treaties<sup>1</sup> recognize education as a basic human right, but the realization of a child’s right to education during armed conflict often hinges on the distinction between state and non-state actors drawn in the aftermath of World War II.<sup>2</sup> The Geneva Convention of 1949 significantly strengthened protections for shipwrecked armed forces, wounded civilians, medical personnel, and prisoners of war.<sup>3</sup> However, the rules established

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<sup>1</sup> See *infra* Part III (discussing international treaties that recognize education as a basic human right).

<sup>2</sup> See *infra* Part IV (highlighting differences in the way post-WWII treaties cover state versus non-state actors).

<sup>3</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85;

under this Convention reflected the state-centric nature of armed conflict by governing only traditional state-to-state international conflict.<sup>4</sup> The body of international law<sup>5</sup> that developed in response to the Geneva Convention created a strict “dichotomy between the laws of international armed conflict and non-international conflict.”<sup>6</sup>

Today, as terrorism perpetrated by non-state actors has become the norm,<sup>7</sup> international humanitarian law lacks comprehensive mechanisms to hold non-state actors accountable for human rights violations.<sup>8</sup> For example, between 1970 and 2014, the Global Terrorism Database recorded 141,966 terrorist attacks in over 200 countries, with 2.58 percent of these attacks directed at educational facilities, students, and educators.<sup>9</sup> In response to the rise in non-traditional conflict, international humanitarian law first began to recognize non-state actors in the 1950s and 1960s when national liberation movements in Africa shed the yoke of colonialism.<sup>10</sup> Although the recognition of non-state actors offered promise for holding organizations and individuals responsible for violating the right to education, increasing internal conflicts and civil wars in the twentieth century,<sup>11</sup> coupled with a substantial increase in the

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Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>4</sup> See Seun Solomon Bakare, *Boko Haram and the Child’s Right to Education in Africa: Examining the Accountability of Non-State Armed Groups*, 18 AFR. HUM. RTS. L.J. 146, 167 (2018).

<sup>5</sup> International humanitarian law refers to the law of armed conflict. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 24 (2005).

<sup>6</sup> Darin E.W. Johnson, *The Problem of the Terror Non-State: Rescuing International Law from ISIS and Boko Haram*, 84 BROOK. L. REV. 475, 508 (2019).

<sup>7</sup> See *id.*, at 483–84 (noting the size and reach of non-state actors like Al Qaeda, ISIS, and Boko Haram); Bakare, *supra* note 4, at 167 (“[T]he reality of armed conflict today is less and less state centered.”).

<sup>8</sup> Bakare, *supra* note 4, at 167.

<sup>9</sup> The Global Terrorism Database is housed at the University of Maryland. Naveed Hussain, *Why Terrorists Attack Education*, GLOBAL COALITION TO PROTECT EDUC. FROM ATTACK (Feb. 22, 2016), <http://www.protectingeducation.org/news/why-terrorists-attack-education> [<https://perma.cc/WC93-XNHL>].

<sup>10</sup> See Johnson, *supra* note 6, at 508 (suggesting that the growth of national liberal movements and domestic armed opposition to colonial governments in the 1950s-80s forced the international community to address the treatment of non-state actors in international law).

<sup>11</sup> See, e.g., David McKenzie, *8 Million Children Have Been Forced out of School*

number of jihadist groups worldwide over the last decade, has left education under attack by terrorist organizations.<sup>12</sup>

When national liberation regimes in Africa forcibly overthrew colonial powers to gain independence during the mid-twentieth century, the United Nations (“UN”) General Assembly acknowledged the legitimacy and self-determination of these groups by granting them participation rights in UN bodies and at international conferences for the negotiation of treaties.<sup>13</sup> In response, representatives of the liberation movements and member states convened to establish the Geneva Conventions Additional Protocol I in 1977.<sup>14</sup> Protocol I granted additional immunities and protections to non-state actor liberation movements — protections previously afforded only to states — and termed these conflicts “international armed conflicts” to ensure that the domestic law of the host state applied to non-state actors during the transition period.<sup>15</sup>

However, in the twenty-first century, non-state actors — often terrorist organizations — have “disrupted the traditional dichotomy between states and nonstate actors under international law.”<sup>16</sup> While the international community ceded legitimacy to colonial liberation groups in Africa during the twentieth century, non-state actors today do not seek legitimacy from the global community, but govern their territory under a veneer of legitimate authority.<sup>17</sup> Increasingly, modern warfare involves non-state armed groups in mostly intra-state armed conflicts instead of warfare between two or more states.<sup>18</sup> As a result, non-state actors remain the “greatest violators of human rights,” but with international humanitarian law based on the premise that “war [is] between two or more states,”

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by *Growing Violence in West Africa*, CNN (Jan. 28, 2020), <https://www.cnn.com/2020/01/28/africa/sahel-violence-unicef-burkina-faso-intl/index.html> [<https://perma.cc/4RNC-VJU9>] (describing how security incidents result in school disruptions).

<sup>12</sup> Alynna J. Lyon, *The United Nations, New Wars, and the Challenge of Peace Operations*, 228 in *A NEW GLOBAL AGENDA: PRIORITIES, PRACTICES, AND PATHWAYS OF THE INTERNATIONAL COMMUNITY* (Diana Ayton-Shenker ed., 2018).

<sup>13</sup> Johnson, *supra* note 6, at 480–81.

<sup>14</sup> *Id.* at 508.

<sup>15</sup> *Id.* at 481, 508.

<sup>16</sup> *Id.* at 476.

<sup>17</sup> *Id.* at 476, 509.

<sup>18</sup> Bakare, *supra* note 4, at 167.

accountability for human rights violations committed by non-state actors is largely nonexistent.<sup>19</sup>

During armed conflict, states bear the responsibility of protecting children,<sup>20</sup> but mounting military expenditures can strip states of their capacity to protect a child's right to education.<sup>21</sup> Even though the "right to education has become indispensable and invaluable in a bid to eradicate poverty and to tackle socioeconomic challenges,"<sup>22</sup> this right is frequently lost during armed conflict. Attacks on schools occur often in West and Central Africa, and as of June 2019, violence and insecurity had closed 9,272 schools and denied 1.91 million children in the region the right to education.<sup>23</sup> A total of 40.6 million primary and secondary school-aged children remain out of school in West and Central Africa.<sup>24</sup> As attacks on education become the "new normal" in modern warfare,<sup>25</sup> international organizations must strengthen legal frameworks to hold non-state armed groups accountable for violating the right to education.<sup>26</sup>

The hostilities in West and Central Africa primarily stem from "ideological opposition to what is seen as Western-style education."<sup>27</sup> In Nigeria, the anti-education terrorist group, Boko

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<sup>19</sup> *Id.* at 167–68.

<sup>20</sup> Aisosa Jennifer Isokpan & Ebenezer Durojaye, *Impact of the Boko Harm Insurgency on the Child's Right to Education in Nigeria*, 19 POTCHEFSTROOM ELECTRONIC L.J. 2, 25 (2016).

<sup>21</sup> The challenge of paying for adequate education is especially difficult for poorer nations, which already struggle to pay for other budget items. *See* U.N. EDUC., SCI., AND CULTURAL ORG., MEETING COMMITMENTS: ARE COUNTRIES ON TRACK TO ACHIEVE SDG 4? 11 (2019), <http://uis.unesco.org/sites/default/files/documents/meeting-commitments-are-countries-on-track-achieve-sdg4.pdf> [<https://perma.cc/HHJ4-G2C6>].

<sup>22</sup> Sandra Fredman, *Procedure or Principle: The Role of Adjudication in Achieving the Right to Education*, 6 CONST. CT. REV. 165, 168 (2013).

<sup>23</sup> UNICEF CHILD ALERT, EDUCATION UNDER THREAT IN WEST AND CENTRAL AFRICA 3 (2019), <https://www.unicef.org/media/57801/file/Education%20under%20threat%20in%20wca%202019.pdf> [<https://perma.cc/NHJ8-EMWV>].

<sup>24</sup> *Id.*

<sup>25</sup> In 2019, there were 742 verified attacks on schools, with more than one-quarter of those attacks in five countries across West and Central Africa. The Central African Republic had a twenty-one percent increase in verified attacks on schools between 2017 and 2019. *Id.*

<sup>26</sup> Bakare, *supra* note 4, at 147.

<sup>27</sup> UNICEF CHILD ALERT, *supra* note 23, at 4.

Haram, which means “Western civilization is forbidden” in English, primarily targets schools, teachers, students, and educational facilities as part of its larger goal to establish an Islamic state governed by a strict interpretation of Sharia law.<sup>28</sup> Although current international legal frameworks in theory protect a child’s right to education during armed conflict, many states, including Nigeria, have failed to incorporate these non-self-executing treaties into their domestic law.<sup>29</sup> Attempts by the International Criminal Court (“ICC”) and the UN to impose individual liability on Boko Haram members and other non-state actors offer little promise of success.<sup>30</sup> Thus, based on the events that have transpired in Nigeria, international law needs to be overhauled to rectify the harm caused by the misalignment between: (1) non-self-executing international treaties that guarantee a right to education, and (2) domestic law that does not guarantee this right, or even offer a mechanism to hold state and non-state actors accountable for violating a child’s right to education. Unless international treaties can seamlessly translate into domestic law, the right to education in Africa will remain under attack.

Part II *infra* gives a brief overview of how intra-state warfare and structural adjustment programs affect a child’s right to education in Africa, before discussing the existing international legal framework and the Nigerian domestic legal framework that guarantee a right to education. Through the lens of the Boko Haram terrorist group, this article then highlights the current mechanisms (and lack thereof) for holding non-state actors accountable for human rights violations under international human rights law. By using Nigeria as an example, this article concludes by suggesting

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<sup>28</sup> GLOBAL COALITION TO PROTECT EDUC. FROM ATTACK, EDUCATION UNDER ATTACK 2018 93 (2018), [http://www.protectingeducation.org/sites/default/files/documents/eua\\_2018\\_full.pdf](http://www.protectingeducation.org/sites/default/files/documents/eua_2018_full.pdf) [<https://perma.cc/3TCP-AWBZ>] [hereinafter EDUCATION UNDER ATTACK].

<sup>29</sup> See Oluwafifehan Ogunde, *State Responsibility, Boko Haram and Human Rights Law*, LONDON SCH. OF ECON. (Apr. 9, 2019), <https://blogs.lse.ac.uk/africaatlse/2019/04/09/human-rights-boko-haram-nigeria/> [<https://perma.cc/A88P-PHTH>]; CONSTITUTION OF NIGERIA (1979), § 12.

<sup>30</sup> See Ewelina U. Ochab, *A Second Look at the International Criminal Court*, FORBES (July 16, 2017), <https://www.forbes.com/sites/ewelinaochab/2017/07/16/a-second-look-at-the-international-criminal-court/#6b37b0462c7e> [<https://perma.cc/HG4X-AC43>] (“However, the ICC is often criticised for being inefficient, excessively expensive, and ineffective, having secured only four convictions [Katanga, Lubanga, Bemba and Al Mahdi] in 15 years of work.”).

that a child's right to education be incorporated into domestic law to ensure that national legal frameworks parallel international legal standards. A child's right to education should no longer be just a laudable goal in a treaty that will never be implemented, but a reality for millions of children worldwide.

## II. Effects of Intra-State Warfare and Structural Adjustment Programs on Children in West and Central Africa

Armed conflict prevents the realization of a child's right to education by exacerbating the effects of mass poverty, underdevelopment, and violence for the one-third of the global total of primary school age children living in the region of West and Central Africa.<sup>31</sup> The Boko Haram insurgency in Nigeria, a country with a population of roughly 200 million,<sup>32</sup> has produced an "acute humanitarian and forced displacement crisis," with an estimated 2.1 million people displaced both domestically and internationally in 2015.<sup>33</sup> Likewise, an estimated 10 million children nationwide are unable to attend school.<sup>34</sup> Countries experiencing armed conflict see a lower quality and standard of education. In addition to forcing many African nations to transform schools into shelters for internally displaced people, armed conflict also disrupts the academic calendar and increases economic inequality, such that poorer children drop out of school to support their families.<sup>35</sup> Meanwhile, other students may leave school to form unorganized groups to fight the insurgency, like in the Borno state of Nigeria where the government pays a monthly allowance to such unorganized groups.<sup>36</sup>

With the number of schools forced to close due to increasing insecurity tripling between June 2017 and June 2019,<sup>37</sup> attacks on

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<sup>31</sup> *Education*, UNICEF, <https://www.unicef.org/wca/what-we-do/education> [<https://perma.cc/NC6K-5YTL>] (last visited Aug. 17, 2020).

<sup>32</sup> *Population, Total – Nigeria*, WORLD BANK, <https://data.worldbank.org/indicator/sp.pop.totl?end=2019&locations=ng&start=2019> [<https://perma.cc/9YEX-NG8P>] (last visited Aug. 19, 2020).

<sup>33</sup> Eleonora Bertoni et al., *Education Is Forbidden: The Effect of the Boko Haram Conflict on Education in North-East Nigeria*, 141 J. DEV. ECON. 1, 3 (2019).

<sup>34</sup> A.C. ONUORA-OGUNO, DEVELOPMENT AND THE RIGHT TO EDUCATION IN AFRICA 2 (2018).

<sup>35</sup> Bakare, *supra* note 4, at 164.

<sup>36</sup> Isokpan & Durojaye, *supra* note 20, at 18–19.

<sup>37</sup> *Education in Peril in West and Central Africa*, UNICEF (Aug. 23, 2019),

school infrastructure represent the “greatest development setback for countries.”<sup>38</sup> Denying the right to education represents a “denial of the full enjoyment of other rights,”<sup>39</sup> as education is a “gateway right.”<sup>40</sup> Without education, societies remain underdeveloped and youth cannot participate fully in democracy, the business sector, or in the promotion of cultural and linguistic diversity.<sup>41</sup>

However, the right to education remains an abstract right in many African societies as a result of structural adjustment programs (“SAPs”) implemented in Nigeria<sup>42</sup> and other developing nations<sup>43</sup> by the World Bank and International Monetary Fund.<sup>44</sup> During the 1980s and 1990s, international financial institutions provided loans, grants, and debt forgiveness programs to financially distressed nations to curtail impending bankruptcy and to stimulate African economic development, but the aid came with a catch.<sup>45</sup> To receive

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<https://www.unicef.org/stories/education-peril-west-and-central-africa>  
[<https://perma.cc/E9VC-3UB7>].

<sup>38</sup> Bakare, *supra* note 4, at 158.

<sup>39</sup> ONUORA-OGUNO, *supra* note 34, at 5.

<sup>40</sup> Foluke Ifejola Adebisi, *Decolonising Education in Africa: Implementing the Right to Education by Re-Appropriating Culture and Indigeneity*, 67 N. IR. LEGAL Q. 433, 438 (2016).

<sup>41</sup> Klaus D. Beiter, *Is the Age of Human Rights Really Over? The Right to Education in Africa— Domesticization, Human Rights-Based Development, and Extraterritorial State Obligations*, 49 GEO. J. INT’L L. 9, 62 (2017).

<sup>42</sup> The Structural Adjustment Program was introduced in Nigeria in 1986. WORLD BANK, NIGERIA STRUCTURAL ADJUSTMENT PROGRAM: POLICIES, IMPLEMENTATION, AND IMPACT, REPORT NO. 13053-UNI ii (1994).

<sup>43</sup> The Global North imposed structural adjustment programs on much of the Global South and the majority of Africa. Some of the African nations that implemented SAPs include, but are not limited to Kenya, Zimbabwe, Madagascar, Ghana, Benin, Togo, Rwanda, Comoros, Jordan, Algeria, and Tanzania. See *Documents & Reports*, WORLD BANK, <https://documents.worldbank.org/en/publication/documents-reports> (search in search bar for “Structural Adjustment in Africa”) [<https://perma.cc/E8GN-F754>] (last visited May 6, 2020) (providing a curated search with reports for nations that have undergone similar programs).

<sup>44</sup> See Gloria Emeagwali, *The Neo-Liberal Agenda and the IMF/World Bank Structural Adjustment Programs with Reference to Africa*, in CRITICAL PERSPECTIVES ON NEOLIBERAL GLOBALIZATION, DEVELOPMENT AND EDUCATION IN AFRICA AND ASIA 3 (Dip Kapoor ed., 2011) (arguing that SAPs were products of policies favored by Wall Street, with little regard for their disastrous effects on recipient countries’ economic growth or individuals’ lives).

<sup>45</sup> During the mid-1970s, commodity booms in several African nations resulted in high export earnings and banks willingly loaned African nations money. However, during the late 1970s and early 1980s, oil prices increased significantly while commodity prices

this money, nations had to meet stringent conditions<sup>46</sup> that required them to restructure their entire economies.

SAPs mandated the removal of subsidies on health, education, and social services and forced African nations to significantly reduce their social spending, which crippled the education sector, resulting in low access to quality education and high dropout rates.<sup>47</sup> In Nigeria, public spending per student decreased by 32.96 percent between 1984 and 1988, and the share of education in the national budget fell by almost 8 percent.<sup>48</sup> This structural adjustment was accompanied by downward trends in purchasing power, the gross enrollment ratio, female participation in education, and the completion rate, as inflation rates increased from 10 percent in 1980 to 51 percent by 1989.<sup>49</sup> SAPs laid the foundation for an inadequate and inaccessible public education system that continues to plague the war-torn nation more than thirty years later, as the World Bank continues to link education funding to “repressive macro-economic conditionalities.”<sup>50</sup>

The introduction of economically-oriented SAPs in Nigeria ushered in a human capital approach to education that “is not rooted in human rights,” but rather focused on increased productivity, economic growth, and global competitiveness.<sup>51</sup> The human capital approach to education still largely drives education policy today and

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for tea, cocoa, coffee, and phosphates collapsed as the global recession halted demand. The global recession caused balance of payments crises across the world, and by the early 1980s, many African nations were on the brink of bankruptcy and “turned to the World Bank, IMF, and bilateral agencies for assistance.” *Structural Adjustment in Africa*, ENCYCLOPEDIA OF AFRICA (Henry Louis Gates, Jr. & Kwame Anthony Appiah eds., Oxford University Press 2010); *see also* Emeagwali, *supra* note 44, at 3.

<sup>46</sup> Common conditionalities included: (1) the “transfer of over 50% of the domestic budget to the creditors”; (2) the devaluation of domestic currency; (3) a liberalization of trade; (4) the privatization of industries, and (5) the removal of subsidies on health, education and social services. Emeagwali, *supra* note 44, at 3.

<sup>47</sup> *Id.* at 3; ONUORA-OGUNO, *supra* note 34, at 132.

<sup>48</sup> Joel B. Babalola et al., *Education Under Structural Adjustment in Nigeria and Zambia*, 34 MCGILL J. OF EDUC. 79, 79 (1999).

<sup>49</sup> *Id.* at 88–90 (discussing how in Nigeria, “primary schools were faced with the problem of low completion rate following [the introduction of structural adjustment], as evidenced by the fact that “[o]ut of the 2,762 million 1986 primary school cohort, 5 percent did not complete primary [grade] four by 1989, and 56 percent of those dropping out before completing primary [grade] four were girls.”).

<sup>50</sup> Beiter, *supra* note 41, at 45.

<sup>51</sup> *Id.* at 61.

poses a threat to the realization of the child's right to education.<sup>52</sup> The consolidation of the education sector within the larger economy prioritizes learners as "assets" to prevent decreasing returns on investment, which ignores the "intricac[ies] of the right to education" intimately connected with the realization of other economic, political, and civil rights.<sup>53</sup> A human rights perspective to schooling that views education as a social or positive right, instead of a negative right, must be adopted by Nigeria and the larger international community.<sup>54</sup> Education as a social right imposes an onus on the government to ensure that education remains available and affordable for all children.<sup>55</sup> The right to education must be recognized in the midst of ongoing, violent civil wars and cultural strife that have been exacerbated by the long-lasting effects of "colonial thought"<sup>56</sup> and structural adjustment programs that destabilized the economy and civil society of African nations.<sup>57</sup>

Because a human capital approach to education "will lead to a more deplorable state of access to education in sub-Saharan African countries," human capital should be developed within a rights-based perspective that empowers individual children during armed conflict.<sup>58</sup> African nations recognize the "importance of education in the development of human capital," but increasing expenditures on defense leave limited funding for education in areas where schools, teaching materials, and records have been completely obliterated by conflict.<sup>59</sup> During times of insurgency, the risk of

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<sup>52</sup> See generally *id.* at 61–62 (discussing the negative effects of the "human capital" approach and describes multiple ways the approach fails to fully develop the personalities of young adults as future members of society).

<sup>53</sup> ONUORA-OGUNO, *supra* note 34, at 129–131.

<sup>54</sup> *Id.* at 124–25 (arguing "that as much as the government owes the individual the obligation not to prevent access to educational institutions it equally owes the duty to ensure the positive responsibility of assuring the availability and accessibility of education.").

<sup>55</sup> *Id.* at 126.

<sup>56</sup> Adebisi, *supra* note 40, at 450.

<sup>57</sup> See generally Babalola et. al., *supra* note 48, at 82 ("Observers of the working of the SAP have pointed out that various provisions of the program have contributed to retrenchment, retirement, unemployment, social inequality, poverty, and reduction in the quality of life."); ONUORA-OGUNO, *supra* note 34, at 131 (discussing the negative effect of SAPs on a person's access to social services).

<sup>58</sup> ONUORA-OGUNO, *supra* note 34, at 135.

<sup>59</sup> Isokpan & Durojaye, *supra* note 20, at 13.

out-of-school children being recruited by armed groups, subjected to gender-based violence, and targeted by traffickers increases significantly.<sup>60</sup> Girls face an increased risk of rape, sexual exploitation, abduction, early pregnancy, and child marriage in West and Central Africa — a region where four in ten girls are married before the age of 18.<sup>61</sup> After Boko Haram kidnapped 276 girls from a government secondary boarding school in Chibok, Borno, Nigeria on April 14, 2014, many girls remain too apprehensive to return to school<sup>62</sup> because Boko Haram specifically opposes the education of girls.<sup>63</sup> Boko Haram frequently uses stigmatized victims of sexual violence as suicide bombers, with 41 percent of Boko Haram attacks in 2014 carried out by female suicide bombers.<sup>64</sup>

While the Nigerian government remains primarily responsible to provide a remedy for the millions of children currently deprived of their right to education, other international initiatives may offer working solutions in the interim.<sup>65</sup> In response to the #BringBackOurGirls social media movement following the Chibok abduction in 2014, the UN Special Envoy for Global Education launched the Safe Schools Initiative in Nigeria.<sup>66</sup> This initiative protects schools from attack by reinforcing school infrastructure, training staff as school safety officers, creating teacher-student-parent defense units, consolidating schools through zoning in the most at-risk locations, distributing school-in-box kits with learning materials to internally displaced learners, and transferring students to schools in safer parts of the country.<sup>67</sup> Similarly, for children in

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<sup>60</sup> Bakare, *supra* note 4, at 164.

<sup>61</sup> *Id.* at 164–65; UNICEF CHILD ALERT, *supra* note 23, at 10.

<sup>62</sup> Isokpan & Durojaye, *supra* note 20, at 10–13.

<sup>63</sup> Bakare, *supra* note 4, at 164.

<sup>64</sup> Bertoni et al., *supra* note 33, at 3.

<sup>65</sup> Isokpan & Durojaye, *supra* note 20, at 25.

<sup>66</sup> JUSTIN VAN FLEET, SAFE SCHOOLS INITIATIVE: PROTECTING THE RIGHT TO LEARN IN NIGERIA 1 (2015), [https://gbc-education.org/wp-content/uploads/2015/01/SSI\\_Nigeria\\_October2015\\_Compressed.pdf](https://gbc-education.org/wp-content/uploads/2015/01/SSI_Nigeria_October2015_Compressed.pdf) [<https://perma.cc/5DPK-PNER>].

<sup>67</sup> The Safe Schools Initiative has helped almost 50,000 children displaced from their homes in Nigeria by Boko Haram by transferring students in high-risk areas in the three states of emergency to one of forty-three federal community colleges. UNICEF has partnered with the Nigerian government to “provide education to children living in internally displaced camps, with over 28,000 enrolled in a double shift system as of December 2014.” To date, “683 teachers have been trained and over 35,000 school bags

crisis-stricken areas that cannot attend school, the United Nations International Children's Emergency Fund ("UNICEF") and the Radio Education in Emergencies Programme deliver nine months of broadcast lessons in literacy and mathematics to ensure the right to education remains accessible.<sup>68</sup> The opening of several UNICEF-supported community learning centers in West and Central Africa also provides a safe place for children to learn basic reading and mathematics, and to play and write about their family and community history.<sup>69</sup>

### III. Existing Frameworks that Guarantee a Child's Right to Education in Africa

International humanitarian law protects the fundamental right to education, as education is an "inalienable human right"<sup>70</sup> and an "indispensable means of realizing other human rights."<sup>71</sup> Although numerous international and regional treaties guarantee a child's right to education,<sup>72</sup> the extent to which this right is binding during armed conflict between states and non-state actors remains controversial and will be discussed in Part IV.<sup>73</sup> Nevertheless, the Fourth Geneva Convention<sup>74</sup> protects a child's right to education during armed conflict:

The *Parties to the conflict*<sup>75</sup> shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that . . . the exercise of . . . their

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with learning materials and 400 school-in-a-box kits have been distributed to support internally displaced learners." *Id.*

<sup>68</sup> UNICEF CHILD ALERT, *supra* note 23, at 5.

<sup>69</sup> *Id.*

<sup>70</sup> Tavassoli-Naini Manuchehr, *Education Right of Children During War and Armed Conflicts*, 15 *PROCEDIA - SOC. & BEHAV. SCI.* 302, 302 (2011); Bakare, *supra* note 4, at 150.

<sup>71</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter *Covenant on Economic, Social and Cultural Rights*]

<sup>72</sup> *Id.*

<sup>73</sup> Manuchehr, *supra* note 70, at 304; Bakare, *supra* note 4, at 168.

<sup>74</sup> Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 24, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*].

<sup>75</sup> Italicized for emphasis.

education [is] facilitated in all circumstances.”<sup>76</sup>

The Fourth Geneva Convention extends to all “parties to the conflict,” which includes both states and non-states.<sup>77</sup>

Additional international legal frameworks guarantee a child’s right to education, but most, if not all, of these are non-self-executing treaties that require additional legislation by signatory countries to protect the right to education.<sup>78</sup> Moreover, most of these treaties guarantee a broad right to education concerned more with the establishment of elementary and secondary schools than with the protection of a child’s right to education during armed conflict.<sup>79</sup> Article 78 of the Protocol Additional to the Geneva Conventions provides the most protection for education during armed conflict by requiring that, “[w]henver an evacuation occurs . . . each child’s education, including his religious and moral

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<sup>76</sup> Geneva Convention Relative to the Protection of Civilian Persons in Times of War, *supra* note 74, art. 24.

<sup>77</sup> *Id.* See Int’l Comm. of the Red Cross [ICRC], *Commentary of 2016 Article 3: Conflicts Not of an International Character* 388 (2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3> [<https://perma.cc/L3FW-4Y9X>].

<sup>78</sup> See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]; Covenant on Economic, Social and Cultural Rights, *supra* note 71; G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter Elimination of All Forms of Discrimination].

<sup>79</sup> For example, Article 26(1) of the Universal Declaration of Human Rights guarantees that “everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.” Universal Declaration of Human Rights, *supra* note 78, art. 26. Article 28 of Convention on the Right of the Child states that “primary education [should be] compulsory and available free to all . . . [to] encourage regular attendance at schools and the reduction of drop-out rates.” G.A. Res. 44/25, Convention on the Right of the Child (Nov. 20, 1989). Article 13 of the International Covenant on Economic, Social and Cultural Rights provides that “Parties to the present Covenant recognize the right of everyone to education . . . [as] primary education shall be compulsory and available free to all” and “the development of a system of schools at all levels shall be actively pursued.” Covenant on Economic, Social, and Cultural Rights, *supra* note 71, art. 13. Article 14 of the International Covenant on Economic, Social and Cultural Rights requires “[e]ach State Party to the present Covenant which . . . has not been able to secure . . . compulsory primary education, free of charge [must] work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” *Id.* art. 14. Finally, Article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women requires “Parties [to] take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.” Elimination of All Forms of Discrimination, *supra* note 78, art. 10.

education as his parents desire, shall be provided while he is away with the greatest possible continuity.”<sup>80</sup> In addition to the robust protection afforded to a child’s right to education at the international level, several regional treaties guarantee a child’s right to education.<sup>81</sup> These treaties include: Article 17 of the African Charter on Human and Peoples’ Rights;<sup>82</sup> Articles 4(1),<sup>83</sup> 5(2),<sup>84</sup> and 11<sup>85</sup> of the African Charter on the Rights and Welfare of the Child; and Article 13 of the African Youth Charter.<sup>86</sup>

Unlike other human rights treaties, the African Charter “does not allow for state parties to derogate from their treaty obligations during emergency situations.”<sup>87</sup> Thus, it follows from this premise that states who have ratified the African Charter “owe a duty to guarantee the right to education in times of armed conflict,”<sup>88</sup> such that governments should be held accountable for non-state actors’ actions with regard to education. The premise stated in the African Charter remains unrealized for many states, whose laws are often haphazard or inadequate for this purpose.<sup>89</sup> Therefore, these states must revise their laws to guarantee their citizens the right to education.

For example, in 1983, Nigeria ratified the African Charter on Human and People’s Rights in accordance with Section 12(1) of the then Constitution of Nigeria, which provided: “No treaty between the Federation and any other country shall have the force of law

<sup>80</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 78, June 8, 1977, 1125 U.N.T.S. 3.

<sup>81</sup> Bakare, *supra* note 4, at 153–54.

<sup>82</sup> African Charter on Human and Peoples’ Rights, art. 17, June 27, 1981, 1520 U.N.T.S. 217 (“Every individual shall have the right to education.”).

<sup>83</sup> African Charter on the Rights and Welfare of the Child, art. 4(1), July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 [hereinafter African Youth Charter] (“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”).

<sup>84</sup> *Id.* art. 5(2) (“State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.”).

<sup>85</sup> *Id.* art. 11 (“Every child has the right to an education, to develop his or her personality, talents and mental and physical abilities to their fullest potential.”).

<sup>86</sup> *Id.* art. 13 (“Every young person shall have the right to education of good quality.”).

<sup>87</sup> Bakare, *supra* note 4, at 154.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

except to the extent to which any treaty has been enacted into law by the National Assembly.”<sup>90</sup> Though the Nigerian constitution protects “core fundamental rights,” the Constitution does not protect the right to education.<sup>91</sup> Instead, the right to education remains a nonjusticiable “fundamental objective[] and principle[] of state policy” — meaning that citizens cannot legally hold the government accountable for violating such a right solely on the basis of the Constitution.<sup>92</sup> While the Nigerian Federal High Court recognized a justiciable, basic right to education in *Legal Defence and Assistance Project v. The Federal Ministry of Education*<sup>93</sup> by combining section 18(3) of the Nigerian Constitution<sup>94</sup> and section 1 of the Compulsory Free Universal Basic Education Act of 2004,<sup>95</sup> Nigeria has yet to amend its Constitution or enact enabling legislation to guarantee the right to education in times of armed conflict. Thus, new self-executing international treaties must be drafted to make the right to education legally binding on the signatories, so state actors can safeguard education from attack by non-state actors during times of conflict.

#### IV. International Law and Non-State Actors

Under the traditional approach of international law that originated with the Fourth Geneva Convention of 1949, only states bore specific rights and obligations to enforce international treaties, participate in armed conflicts, be held responsible for breaching another’s legal obligations,<sup>96</sup> and prevent non-state actors from violating the rights of third parties.<sup>97</sup> Because states bear the

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<sup>90</sup> Chudi Nelson Ojukwu, *Enforcement of the African Charter on Human and Peoples’ Rights as a Domestic Law in Nigeria*, 25 INT’L LEGAL PRAC. 140, 140 (2000).

<sup>91</sup> *Id.* at 156. See CONSTITUTION OF NIGERIA (1979), ch. IV (listing the following as fundamental rights: right to life, right to dignity, right to personal liberty, and right to freedom of thought, conscience and religion).

<sup>92</sup> Bakare, *supra* note 4, at 156.

<sup>93</sup> *Id.*

<sup>94</sup> CONSTITUTION OF NIGERIA (1979), § 18(3) (“Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide.”).

<sup>95</sup> Compulsory, Free Universal Basic Education Act of 2004 (2004) § 1 (Nigeria).

<sup>96</sup> Jean-Marie Kamatali, *The Application of International Human Rights Law in Non-International Armed Conflict: From Rhetoric to Action*, 4 J. INT’L HUM. LEGAL STUD. 220, 236 (2013).

<sup>97</sup> Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. SOC’Y OF INT. L. 563, 565 (2017).

primary duty to protect human rights in conflict zones within their territory,<sup>98</sup> the international community adopted a rigid distinction: “only Governments can violate human rights and thus, [] armed groups are simply committing *criminal acts*.”<sup>99</sup> The UN High Commissioner for Human Rights has also endorsed this distinction by maintaining that “[s]tates are [] sole[ly] responsible for human rights violations,” such that the acts of non-state groups are not human rights violations, but crimes.”<sup>100</sup> As a result, only UN member nations shoulder the responsibility to “promote universal respect for, and observance of, human rights.”<sup>101</sup>

While the traditional conception of international law “protects the rights of individuals against states,” the distinction often breaks down in times of armed conflict.<sup>102</sup> Under the Vienna Convention on the Law of Treaties, treaties are only binding between state parties because states, and states alone, conclude treaties.<sup>103</sup> Whereas sovereign states protect human rights by ratifying human rights treaties,<sup>104</sup> non-state terror groups lack legitimacy generally and as successor governments and, therefore, have no obligation to enforce treaties.<sup>105</sup> Although non-state rebel groups lack legitimacy by international standards, these groups are not entirely disorganized. For example, in 2015, Boko Haram controlled over 20,000 square miles of territory in Nigeria and established “sharia courts and a system of governance modeled after ISIS’ system in Iraq and Syria.”<sup>106</sup> In many nations, the influence and prevalence of rebel groups has displaced national judicial mechanisms that traditionally redressed human rights violations and made it difficult

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<sup>98</sup> Johnson, *supra* note 6, at 495.

<sup>99</sup> Kamatali, *supra* note 96, at 236 (emphasis added).

<sup>100</sup> U.N. Comm. on Human Rights, E/cN.4/1997/3, Annex, ¶ 47 (1996); Kamatali, *supra* note 96, at 239.

<sup>101</sup> U.N. Charter art. 55(c).

<sup>102</sup> Johnson, *supra* note 6, at 494–95.

<sup>103</sup> Kamatali, *supra* note 96, at 235.

<sup>104</sup> Johnson, *supra* note 6, at 494. The United Nations Charter in Article 55 calls upon states to “respect[] and promot[e]” human rights and “fundamental freedoms for all without distinction as to race, sex, language, or religion.” Other human rights treaties include: International Covenant on Civil and Political Rights, UN Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

<sup>105</sup> Johnson, *supra* note 6, at 495.

<sup>106</sup> *Id.* at 491–92.

for legitimate governments to protect human rights during armed conflict.<sup>107</sup>

Nonetheless, a consensus exists among scholars in the international legal community that international humanitarian law, specifically Common Article 3 of the Geneva Convention and the Additional Protocols to the Geneva Convention, remains binding on rebel groups.<sup>108</sup> Common Article 3 imposes obligations upon “each Party to the conflict,” with “conflict” defined to include non-international armed conflicts that occur in “the territory of one of the High Contracting Parties.”<sup>109</sup> Thus, it follows that “each Party to the conflict” includes both states and non-state rebel groups because Article I of the Additional Protocol II to the Geneva Convention applies to armed conflicts between (1) “armed forces of a High Contracting Party” and (2) armed groups that exercise control and conduct military operations within the territory of a High Contracting Power.<sup>110</sup> The Appeals Chamber of the Sierra Leone Special Court bolstered this international consensus in 2004 by holding that: “it is well settled that all parties to an armed conflict, whether states or nonstate actors are bound by international humanitarian law, even though only states may become parties to international treaties.”<sup>111</sup>

Nevertheless, some scholars argue that international human rights law has adopted what has been termed the “not-a-cat” syndrome.<sup>112</sup> According to international law scholar, Philip Alston,<sup>113</sup> the “not-a-cat” syndrome presumes that non-state actors

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<sup>107</sup> *Id.* at 495; PETER HYLL-LARSEN, THE RIGHT TO EDUCATION FOR CHILDREN IN VIOLENT CONFLICT 5 (2010) <https://unesdoc.unesco.org/ark:/48223/pf0000191225> [<https://perma.cc/HMQ3-KEQQ>].

<sup>108</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Kamatali, *supra* note 96, at 233–34; Int'l Comm. of the Red Cross [ICRC], *The Geneva Conventions of 1949 and their Additional Protocols* (2010), <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [<https://perma.cc/JK9H-LHVR>].

<sup>109</sup> Kamatali, *supra* note 96, at 234–35.

<sup>110</sup> *Id.*

<sup>111</sup> Kamatali, *supra* note 96, at 233–34; Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), ¶ 22 (May 31, 2004).

<sup>112</sup> Kamatali, *supra* note 96, at 236.

<sup>113</sup> Philip G. Alston is the John Norton Pomeroy Professor of Law at NYU Law. He teaches international law, human rights law, economic and social rights, and strategic human rights litigation at NYU Law. Philip G. Alston, NYU L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=>

“get away” with human rights violations because the non-state group is “not-a-state.”<sup>114</sup> Hence, the strict distinction between state and non-state actors makes accountability for human rights violations virtually impossible and begs the question, if rebel groups are not bound by international human rights treaties, who can hold them accountable? Because the actions of Boko Haram and similar groups show that, at the most basic level, they do not value human life, why would they value education and respect human rights law? Therefore, countries must enact domestic laws to protect a child’s right to education, which will continue to remain under attack in today’s non-state-actor dominated warfare.

## V. Cultural Legitimacy and the Right to Education

The colonization of Africa by European powers during the nineteenth century left the continent with a racially stratified, subpar education system that has yet to be completely erased.<sup>115</sup> Under British rule in Nigeria, only 3.4 percent of the colonial tax in 1935 was spent on education, which ushered in a century of limited educational funding and disparities that still hinder progress in the nation today.<sup>116</sup> The colonial relationship, “predicated on presumed African inferiority,” silenced “African history, knowledge, and autonomy” through forced assimilation and a requirement that African people only use colonial languages.<sup>117</sup> Colonial education stressed disempowerment and subjugation to stifle all resistance by the African people and, as a result, conversing in indigenous languages continues to be banned in most African schools.<sup>118</sup> Children in many African societies do not speak the language of school instruction at home, which creates a dissonance between individual students and their culture and society at large.<sup>119</sup> Therefore, for the right to education to be fully realized in many African societies, indigenous knowledge must not be suppressed, but prized for its unique ability to improve global agriculture,

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19742 [<https://perma.cc/3YUV-7NTU>] (last visited Sept. 7, 2020).

<sup>114</sup> Kamatali, *supra* note 96, at 236.

<sup>115</sup> Adebisi, *supra* note 40, at 434.

<sup>116</sup> *Id.* at 443.

<sup>117</sup> *Id.* at 435.

<sup>118</sup> *Id.* at 443–45.

<sup>119</sup> *Id.* at 445–46.

ecology, medicine, and the arts.<sup>120</sup> Culture must be at the heart of the right to education, so that colonial constructions of “otherness” and inferiority do not continue to be perpetuated in the education system.<sup>121</sup>

Additionally, the realization of the right to education depends largely “on the level of cultural legitimacy accorded to children’s rights norms” in Africa.<sup>122</sup> The conception of childhood in much of Africa diverges from Western societies and the right to education must be domesticized and “targeted at development based on African realities” to promote local ownership.<sup>123</sup> Accordingly, the right to education in Africa must be tailored to each nation’s history with structural adjustment programs that address colonialism, civil wars, and deeply rooted cultural norms — and not be based on Western ideals. The right to education must be implemented in Africa “without killing the African soul.”<sup>124</sup>

The lived realities of many children in Africa differ drastically from the global experience.<sup>125</sup> For instance, a global consensus has eliminated the most egregious forms of child labor worldwide, but in Africa, children often have to work for family survival.<sup>126</sup> In Article 31 of the African Charter on the Rights and Welfare of the Child, a child’s responsibility includes “work[ing] for the cohesion of the family” and “provid[ing] assistance in case of need.”<sup>127</sup> Hence, to accurately reflect African social norms, “learn and earn”<sup>128</sup> approaches to education must be tolerated to ensure that children do not drop out of the education system forever.<sup>129</sup> Some education is better than no education, especially during times of insurgency. Moving forward, international humanitarian law should treat the right to education as a “genuinely African right with

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<sup>120</sup> Adebisi, *supra* note 4040, at 445.

<sup>121</sup> *Id.* at 442.

<sup>122</sup> Beiter, *supra* note 41, at 29.

<sup>123</sup> *Id.* at 30.

<sup>124</sup> Adebisi, *supra* note 40, at 442.

<sup>125</sup> Beiter, *supra* note 41, at 30.

<sup>126</sup> *Id.*

<sup>127</sup> African Youth Charter, *supra* note 83, art. 31.

<sup>128</sup> “Learn and earn” approaches to education refer to policies that allow child labor so long as it does not jeopardize a child’s right to education. See Beiter, *supra* note 41, at 31–32.

<sup>129</sup> *Id.*

which Africans can identify” to overcome the bleak reality that sub-Saharan Africa may not achieve universal completion of primary education until 2080.<sup>130</sup>

## VI. Education Within the Domestic Legal Frameworks in Nigeria

International humanitarian law treats schools as protected civilian objects that “benefit from the humanitarian principles of distinction and proportionality.”<sup>131</sup> But until countries make the right to education justiciable, the right will never be fully realized for millions of children caught in the crossfire of widespread insurgency. For rebel groups not bound by the principles of distinction and proportionality, attacks on education effectively destabilize civil society and destroy the “hopes and ambitions of a whole generation of children.”<sup>132</sup>

In Nigeria, Boko Haram and its security forces destroyed roughly 1,500 schools between January 2014 and December 2016, killing 1,280 teachers and students.<sup>133</sup> With 57 percent of schools in the Borno state of Nigeria closed as of September 2017, almost 3 million children in northeastern Nigeria lacked access to education.<sup>134</sup> While rebel groups remain mostly to blame for denying children their right to education during armed conflict, the government of Nigeria is not entirely innocent.<sup>135</sup>

The Nigerian constitution protects the “security and welfare of the people,” but Section 12 of the Constitution effectively prohibits the translation of international law into domestic law by “provid[ing] that no treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”<sup>136</sup> Although Nigeria is a party to several international human rights

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<sup>130</sup> *Id.* at 32, 40.

<sup>131</sup> *Attacks on Schools and Hospitals*, U.N., <https://childrenandarmedconflict.un.org/six-grave-violations/attacks-against-schools/> [<https://perma.cc/6TR3-77A2>] (last visited Oct. 10, 2020).

<sup>132</sup> Bakare, *supra* note 4, at 158.

<sup>133</sup> EDUCATION UNDER ATTACK, *supra* note 28, at 177.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Ogunde, *supra* note 29; CONSTITUTION OF NIGERIA (1979), § 12.

treaties that guarantee the right to basic education,<sup>137</sup> with the “provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child . . . incorporated into the [Nigeria] Child’s Rights Act of 2003[,]”<sup>138</sup> the African Charter on Human and Peoples’ Rights remains the only treaty incorporated into domestic law.<sup>139</sup> Despite the African Charter being binding on Nigeria, the Nigerian Supreme Court<sup>140</sup> has consistently held that “the provisions of the African Charter are not superior to the Constitution.”<sup>141</sup>

The right to free education in section 18(3)(a) of the Nigerian Constitution is unenforceable, like all other rights provided for in Chapter 2 of the Constitution.<sup>142</sup> Thus, the child’s right to education, which is justiciable under the African Charter, but not under the Nigerian Constitution, “cannot hold in the light of the inconsistency rule”<sup>143</sup> in Section 1(3) of the Nigerian Constitution.<sup>144</sup> The Economic Community of West African States Community Court of Justice reaffirmed this position in *SERAP v. Nigeria*<sup>145</sup> by holding that the federal government of Nigeria did not deny over five million children the right to education when it

<sup>137</sup> These international instruments include the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples’ Rights, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. Aisosa Jennifer Isokpan & Ebenezer Durojaye, *The Child’s Right to Basic Education in Nigeria: A Commentary on the Decision in SERAP v. Nigeria*, 26 AFR. J. INT’L & COMP. L. 639, 639 (2018).

<sup>138</sup> *Id.*

<sup>139</sup> Ogunde, *supra* note 29.

<sup>140</sup> See Isokpan & Durojaye, *supra* note 7, at 642 (discussing *Abacha v. Fawehinmi*).

<sup>141</sup> *Id.* at 643.

<sup>142</sup> *Court Declares Free, Compulsory Basic Education an Enforceable Right*, PUNCH (Mar. 1, 2017), <https://punchng.com/court-declares-free-compulsory-basic-education-an-enforceable-right/> [<https://perma.cc/3NUN-FEAU>].

<sup>143</sup> Isokpan & Durojaye, *supra* note 137, at 643 (“Section 1(3) of the CFRN [Constitution of the Federal Republic of Nigeria] 1999 provides that if any other law is inconsistent with the provisions of the constitution, the constitution shall prevail and that other law shall to the extent of its inconsistency be void.”).

<sup>144</sup> *Id.*

<sup>145</sup> Registered Tr. of the Socio-economic Rts. and Accountability Project (SAREP) v. Fed. Republic of Nigeria and Universal Basic Education Commission (UBEC), ECW/CCJ/JUD/07/10, Community Court of Justice of the Economic Community of West African States [ECOWAS Court of Justice] (Nov. 30, 2010); Isokpan & Durojaye, *supra* note 137, at 640.

misappropriated funds originally allocated to ten states in Nigeria.<sup>146</sup> Although the Court acknowledged that “embezzling, stealing or even mismanagement of funds meant for the education sector will have a negative impact on education,” this action did not “amount to a denial of the right to education” because the government’s duty to provide education stops at the allocation of funds.<sup>147</sup>

As a result of *SERAP*, the “justiciability of, as well as the obligation of the Nigerian government towards the realization of the child’s right to basic education” remains, at minimum, unsatisfactory.<sup>148</sup> With Nigerian government security forces occupying dozens of schools for military purposes between 2013 and 2016 and using these schools as detention or killing centers between,<sup>149</sup> the government, in addition to Boko Haram, continues to deny children their right to education. Even though international and regional human rights instruments protect this right, the right to education cannot be fully realized in armed conflict until the right is made justiciable under the Nigerian Constitution.<sup>150</sup> But with widespread corruption at the national level,<sup>151</sup> increasing intervention at the international level may be a viable option for protecting children’s right to education during armed conflict.

## VII. Mechanisms That Hold Non-State Actors Accountable for Human Rights Violations

The failure to implement international treaties that protect a child’s right to education via Nigerian domestic law suggests that overhauling international law may be just one solution among many to protect children’s right to education. International criminal law remains a practical solution to hold armed groups, specifically the members of armed terrorist groups, accountable for violating a this right during armed conflict.<sup>152</sup> The ICC’s jurisdiction over crimes

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<sup>146</sup> Isokpan & Durojaye, *supra* note 137, at 646.

<sup>147</sup> *Id.* at 643.

<sup>148</sup> *Id.* at 640.

<sup>149</sup> EDUCATION UNDER ATTACK, *supra* note 28, at 181–82.

<sup>150</sup> Isokpan & Durojaye, *supra* note 137, at 646.

<sup>151</sup> The Special Board of Inquiry cleared “senior military officers of human rights crimes under international law in a report unavailable to the public and Nigerian officials holding mass trials for Boko Haram suspects in secret.” *Africa 2019*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/africa/report-africa/> [https://perma.cc/KRU4-9UN7] (last visited Oct. 10, 2020).

<sup>152</sup> Kamatali, *supra* note 96, at 236.

vis-à-vis the Rome Statute allows “individual criminal liability [to be imposed] upon those who commit international crimes,” which include war crimes and crimes against humanity.<sup>153</sup> Under Article 8(2)(e)(iv) of the Rome Statute, it is a war crime to “intentionally direct attacks against buildings dedicated to . . . education.”<sup>154</sup>

Although the Rome Statute only holds individuals of a State Party accountable, Nigeria is a party to the Rome Statute,<sup>155</sup> and therefore, the ICC can charge individual members of Boko Haram with war crimes.<sup>156</sup> Between 2009 and 2019, the Office of the ICC Prosecutor identified ten potential cases of war crimes and crimes against humanity related to the conflict between Boko Haram and Nigerian Security Forces (“NSF”).<sup>157</sup> Seven potential cases concerning members of Boko Haram include targeted attacks against education (including schools, teachers, and schoolchildren) and the civilian population (including attacks against girls and women), recruitment and use of children to participate in hostilities, and attacks against personnel or objects involved in humanitarian assistance.<sup>158</sup> Likewise, three potential cases concerning the NSF include recruitment and use of children to participate in hostilities, attacks against the civilian population and killings, torture, or ill-treatment of military aged males suspected to be Boko Haram members or supporters in northeast Nigeria.<sup>159</sup>

The ICC was not designed as a substitute for national courts or to override the authority of signatory countries.<sup>160</sup> Therefore, the ICC typically only exercises its prosecutorial authority when states are “unable or unwilling genuinely to carry out an investigation and

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<sup>153</sup> Bakare, *supra* note 4, at 166; Rome Statute of the International Criminal Court, July 1, 2002, art. 5, 2187 U.N.T.S. 90.

<sup>154</sup> Rome Statute of the International Criminal Court, *supra* note 1533, art. 8(2)(e)(iv); Bakare, *supra* note 4, at 153.

<sup>155</sup> Rome Statute of the International Criminal Court, *supra* note 1533, at 600.

<sup>156</sup> Bakare, *supra* note 4, at 166–67.

<sup>157</sup> INT’L CRIM. CT. OFF. OF PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019 47 (2019), <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> [<https://perma.cc/5W4Q-KPT2>] [hereinafter ICC PROSECUTOR REPORT]

<sup>158</sup> *Id.* at 50.

<sup>159</sup> *Id.*

<sup>160</sup> INT’L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 1 (2013), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [<https://perma.cc/9CW8-SC8W>].

prosecute the perpetrators.”<sup>161</sup> However, the Office of the Prosecutor may initiate an investigation without state approval if the ICC has proper jurisdiction.<sup>162</sup> In the case of Nigeria, the government has failed to engage in any investigative and prosecutorial activities with respect to the identified abuses and the “repeated commitment of the Nigerian authorities to provide the Office with relevant information . . . has not materialized.”<sup>163</sup> Henceforth, with regard to protecting a child’s right to education, the Office of the Prosecutor may have to assume the primary responsibility of the Nigerian state to prosecute leaders and members of Boko Haram and NSF who have committed war crimes.<sup>164</sup> Although the ICC “focus[es] its investigations and prosecutions on those who . . . bear the greatest responsibility for such crimes,”<sup>165</sup> prosecution of top terrorist leaders will send a strong message to other members that “intentionally directing attacks against buildings dedicated to education”<sup>166</sup> will not be tolerated by the international community.

Holding individuals accountable through the ICC is not without drawbacks. Three out of the five permanent members of the UN Security Council, including the United States, are not party to the ICC.<sup>167</sup> Therefore, the lack of support from the United States threatens the legitimacy of the institution because the ICC has not “seem[ed] to have prevented potential criminals from being violent” and its work “is not guaranteed to deter criminals.”<sup>168</sup> Moreover, trying a member of a terrorist group after a conflict may even incite further violence and attacks on education, while wasting time the ICC could use to prosecute individuals committing more heinous crimes.<sup>169</sup> Nonetheless, an ICC indictment provides some recourse

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 4 (discussing how the ICC has jurisdiction for the crimes specifically enumerated in the Rome Statute).

<sup>163</sup> ICC PROSECUTOR REPORT, *supra* note 157, at 52.

<sup>164</sup> *Id.* at 52.

<sup>165</sup> INT’L CRIM. CT., *supra* note 160, at 17.

<sup>166</sup> The ICC considers “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals” to be a war crime that falls within the court’s jurisdiction. *Id.* at 14.

<sup>167</sup> Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 THIRD WORLD Q. 800, 803 (2013).

<sup>168</sup> *Id.* at 803–10.

<sup>169</sup> *Id.* at 810.

for the millions of children denied their right to education by cutting off the blood supply to terrorist groups dependent on high-profile leaders for success.

In addition, the UN, pursuant to General Resolution 1612 (2005), has established a “systemized method of gathering data on violations of the rights of children” that creates a starting point to rectify the wrongs committed by non-state terrorist groups.<sup>170</sup> The Monitoring and Reporting Mechanism (“MRM”) requires information to be reported on six grave violations committed against children in times of armed conflict including,<sup>171</sup> (1) killing and maiming of children; (2) recruitment and use of children by armed forces and armed groups; (3) sexual violence against children; (4) attacks against schools or hospitals; (5) abduction of children; and (6) denial of humanitarian access for children.<sup>172</sup> While it is clear that the Nigerian government has failed to ensure that children do not participate in the hostilities,<sup>173</sup> in July 2014 the UN indicted Boko Haram for two such grave violations: the killing and maiming of children, and attacks on schools and hospitals.<sup>174</sup> In response, the UN formally established a country-specific MRM task force on “children affected by armed conflict to monitor and report on violations of the rights of children in Nigeria.”<sup>175</sup> Although ongoing violence has restricted access to conflict areas to report such violations, the UN, unlike the Nigerian government, has not turned a blind eye to the children who specifically need their right to education protected during armed conflict.<sup>176</sup>

### VIII. Conclusion

In the twenty-first century, “new wars,” or “internal armed conflicts waged primarily by non-state actors” who use small arms and target civilians, have increased significantly in the international

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<sup>170</sup> Isokpan & Durojaye, *supra* note 20, at 15.

<sup>171</sup> S.C. Res. 1612, ¶ 12 (July 26, 2005).

<sup>172</sup> S.C. Res. 1539, ¶ 10 (Apr. 22, 2004).

<sup>173</sup> The Civilian Joint Task Force, which the Office of the Prosecutor considers to be under the umbrella of the Nigerian Security Forces, committed the war crime of “conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) of the [Rome] Statute.” See ICC PROSECUTOR REPORT, *supra* note 157, at 50.

<sup>174</sup> Isokpan & Durojaye, *supra* note 20, at 15.

<sup>175</sup> *Id.* at 15–16.

<sup>176</sup> *Id.* at 16.

arena.<sup>177</sup> Most conflicts today are neither state-centered nor operate within the boundaries of one country.<sup>178</sup> As of 2018, roughly four times as many Sunni Islamic militants operated around the world than on September 11, 2001, demonstrating the ever-increasing prevalence of this type of warfare.<sup>179</sup> Despite the changing nature of global conflict, international human rights law remains reluctant to adapt existing international frameworks to hold non-state actors accountable for human rights violations.<sup>180</sup> Non-state groups prey upon civilians and children forced out of school due to conflict,<sup>181</sup> but the traditional state-based approach to international law provides limited, if any, recourse for human rights violations — especially in the context of the child's right to education in Africa.<sup>182</sup>

As a result, states continue to bear the primary responsibility of providing, respecting, and protecting a child's right to education as guaranteed in numerous international and regional treaties.<sup>183</sup> Although states, in theory, are obligated to prevent third parties from violating a child's right to education,<sup>184</sup> the destruction of national education infrastructure by armed terrorist groups only exacerbates poverty, socioeconomic inequalities, and the learning gaps between rural and urban African schoolchildren.<sup>185</sup> Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights have been interpreted to protect a child's right to education during armed conflict, but until countries incorporate international treaties into their domestic law, the realization of the right to education remains in question.<sup>186</sup>

Non-state actors have no internationally recognized obligation

<sup>177</sup> Lyon, *supra* note 12, at 228.

<sup>178</sup> *Id.*

<sup>179</sup> Eric Schmitt, *Two Decades After 9/11, Militants Have Only Multiplied*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/terrorism-islamic-militants.html> [<https://perma.cc/ZC29-Z5EL>].

<sup>180</sup> Kamatali, *supra* note 96, at 236.

<sup>181</sup> Roughly 42 percent, or 10.5 million, children of primary school children in Nigeria are currently out of school. Isokpan & Durojaye, *supra* note 137, at 646.

<sup>182</sup> Katamali, *supra* note 96, at 236.

<sup>183</sup> Isokpan & Durojaye, *supra* note 137, at 645–46.

<sup>184</sup> *Id.* at 645.

<sup>185</sup> Julius Agbor, *Poverty, Inequality and Africa's Education Crisis*, BROOKINGS (Sept. 26, 2012), <https://www.brookings.edu/opinions/poverty-inequality-and-africas-education-crisis/> [<https://perma.cc/P6CE-SRTK>].

<sup>186</sup> Bakare, *supra* note 4, at 152, 155; Adebisi, *supra* note 40, at 438.

to protect the right to education.<sup>187</sup> Thus, terrorist groups like Boko Haram, who vehemently oppose Western-style education, will continue to attack children's access to education.<sup>188</sup> While the Nigerian Constitution loosely protects education, the child's right to education is not justiciable due to its placement in Chapter II, as Chapter II only provides objectives and principles to shape state policy.<sup>189</sup> As a result, international human rights law must be strengthened to protect the child's right to education during armed conflict, as states should no longer bear the sole responsibility for protecting and promoting human rights.

In addition, the vestiges of colonialism and structural adjustment programs prevent the full realization of the right to education in Africa.<sup>190</sup> The dependence of African nations on international financial and governmental institutions for aid often forces states to be beholden to international norms that conflict with their cultural values and "African identity."<sup>191</sup> International human rights law needs to more fully incorporate the African perspective into its discourse, as "the human rights mosaic" remains "incomplete and undemocratic" without it.<sup>192</sup> The right to education under international humanitarian law should consider the "particular positionality, historicity, and needs of populations" against the backdrop of war, political chaos, high-child marriage rates, high rates of illiteracy, and child labor.<sup>193</sup>

In sum, war is no longer between two or more states and non-state armed groups commit human rights abuses daily. While the UN Security Council imposed targeted financial sanctions, an asset freeze, and an arms embargo on Boko Haram in 2014,<sup>194</sup> ideological opposition to education remains a central tenant of the terrorist group. Therefore, international law needs to implement domestic legislation protecting the child's right to education so that national

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<sup>187</sup> Bakare, *supra* note 4, at 166.

<sup>188</sup> Bertoni, *supra* note 33, at 1.

<sup>189</sup> Isokpan, *supra* note 137, at 639.

<sup>190</sup> Adebisi, *supra* note 40, at 446–50.

<sup>191</sup> *Id.* at 450–51.

<sup>192</sup> *Id.* at 439.

<sup>193</sup> *Id.* at 433, 439.

<sup>194</sup> Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Adds Boko Haram to Its Sanctions List, U.N. Press Release SC/11410 (May 22, 2014).

legal frameworks parallel international legal standards.<sup>195</sup>

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<sup>195</sup> HYL-LARSEN, *supra* note 107, at 5.

