

The Protection of Child Soldiers under the Ethiopian Law

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Abstract

The proliferation of civil wars in different parts of the world has enabled us to witness the participation of children on the front line. Among the measures taken to prohibit the recruitment of children and their participation in hostilities is the endorsed international humanitarian and human rights standards prohibiting child soldiering. This article aims to examine the legal frameworks of Ethiopia in protecting children against recruitment and participation in armed conflict. The issue of protection was scrutinized from the perspective of pre and post recruitment or participation of children in hostilities. To do so, primary legal sources, such as FDRE Constitution and other subordinate laws are analysed. Further, officials working in different institutions were interviewed to better analyse the adequacy of the laws in protecting children against recruitment and participation in armed conflict. This article argues that while Ethiopia has tried to protect child soldiers by enacting different laws with direct and indirect relevance to their participation in armed conflict, these laws are limited to governing national armed force. In other words, the recruitment of children by armed groups in Ethiopia is not criminalized as per existing laws.

Keywords: *child soldiers, humanitarian law, children's rights, criminal law, military law*

Introduction

Though participation of children in armed conflicts is not a current phenomenon, it has been intensified on account of the proliferation of internal armed conflicts. The global trend and data on child soldiering indicate that there are roughly three hundred thousand child soldiers

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around the world, of which Africa accounts for approximately 40 percent (Oyewole 2018:8). Despite the existence of international laws that prohibit the recruitment and participation of children in hostilities, none provided definition of child soldiers other than using age category and mode of participation in conflict. A comprehensive definition that compromises the discrepancy among the laws has been provided by the non-binding Cape Town Principle which states;

Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.⁴²⁰

This definition, though having no force of law, is an innovative approach in the protection of children from participating in armed conflicts in any capacity. Not only does it bring up the age of participation from 15 to 18, it also expands protection for children whose role in the armed forces or groups is ancillary as opposed to the accustomed protection from direct participation.

Despite the promulgation of international norms and the contribution of scholarly works on child soldiering, there remain normative and theoretical paradoxes. Defining a child soldier is a hard-hitting task as there are different puzzles in the attempt to define the concept. The term child soldier brings to mind a situation in which an infant is considered a soldier (Rosen 2005:8). This seems the reason for the absence of an express definition of a child soldier in the international instruments dealing with the same. The theoretical arguments on the capacity or otherwise of child soldiers to exercise free choice are the sources of the paradox on child soldiering and hinder the commitments to reduce, if not prevent, the problem (Catarina 2011:4).

Some international human rights law instruments, notably, the Optional Protocol on the Involvement of Children in Armed Conflict (hereunder OPCRC) create double standard

⁴²⁰ UNICEF, Cape Town Principles and best Practices (1997), available; [https://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (hereunder Cape Town Principle)

obligations on member states, including Ethiopia. They extend the protectable age from 15 to 18 on the one hand and also impose an obligation on state parties to regulate the activities of armed groups on the other hand. Hence, as per the OPCRC, the government of Ethiopia is expected to regulate its own security force and the activities of other non-state actors so that no child below 18 is recruited or participate in armed conflict. For instance; Ethiopia has ratified the OPCRC on May 14 2014,⁴²¹ African Charter on the Rights and Welfare of the Child (hereafter ACERWC) on October 02 2002,⁴²² and ILO Convention 182 against Worst form of Child Labour on September 02 2003.⁴²³ These instruments provide for the protection of children below 18 years from participating in armed conflicts.

Ethiopia has an obligation to ensure the enforcement of these international human rights laws ratified by the country irrespective of circumstances such as the existence of armed conflict or guerrilla war. Devising strategies to prevent the recruitment of children and criminalizing the same via legislation are some of the obligations stipulated under the OPCRC. Regardless, the involvement of children in armed conflict in Ethiopia, as seen in the case of the Tigray People Liberation Front (hereunder TPLF) and the Oromo Liberation Front (hereunder OLF Shene), evidenced in different image and video sources, has become an alarm to evaluate the laws. This is, however, without concluding that it is only the above-mentioned groups that involve children in their rank.

In light of this, the need to explore the existence and effectiveness of legal protection for children against recruitment and participation in armed conflict in Ethiopia spurred the present study. This article investigates the effectiveness of Ethiopian laws in protecting children against recruitment and participation in hostilities. The term protection in this article encompasses measures taken to prevent the recruitment of children, including, but not limited to criminalization of child recruitment and enlistment. In doing so, the study presents the general overview of international standards governing child soldiering and explores the legal frameworks of Ethiopia that protect children against recruitment and participation in

⁴²¹ UN Treaty Data Base, <https://tbinternet.ohchr.org/layouts/TreatyBodyExternal/Treaty.aspx/>

⁴²² African Committee of Experts on the Rights and Welfare of the Child, ratification table, <https://www.acerwc.africa/ratifications table/>

⁴²³ NORMLEX, ratification by countries, <https://www.ilo.org/dyn/normlex/enf/>

armed conflict. The study also incorporates the perspectives of practitioners to better analyse the adequacy of the laws in protecting children against recruitment and participation in armed conflict.

Current Trends of Child Soldiers in Ethiopia: An Overview

Though the exact figure is unknown, there are reports that indicate child soldiers have been used in the current internal conflict in Ethiopia, particularly in the Northern part. BBC news on 19th of August 2021 brought two important issues that revealed the involvement of children alongside the TPLF force. First, two boys of age 17 and 10 told BBC that they were forcefully recruited by the TPLF force and sent to Afar region.⁴²⁴ Second, TPLF's spokesperson said "we did not forcefully recruit children and if there is a problem with regard to teenagers, although 18 is the legal age to join the army, these are children whose parents have been subjected to untold suffering by the Eritreans, by Abiy's forces, and by Amhara expansionists."⁴²⁵ This statement indicates children were used in the conflict alongside TPLF and also suggest that children willingly joined the TPLF forces. Using Photographer Finbar O'Reilly's photo shots as a source, the New York Times also published a short article that, inter alia, presents child soldiers as young recruits who aspire to revenge massacres, ethnic cleansing and extensive sexual violence that has occurred in the Tigray region (New York Times 2021).

In September 2021, the Global Centre for the Responsibility to Protect provided that among the human rights abuses committed by all warring parties in Ethiopia, it has received reports about the use of child soldiers (GCR2P 2021). An open letter submitted to the UN Secretary General, António Guterres, by 18 international agencies working on human rights on May 31st 2022, urges the Secretary General to include Ethiopia in its shaming list alleging the fact that the conflict in the country has shown different abuses of children's rights though their

⁴²⁴ BBC News, Tigray crisis: Ethiopian teenagers become pawns in propaganda war, 19 August 2021, <https://www.bbc.com/news/world-africa-58189395>

⁴²⁵ Ibid.

recruitment and use in armed conflict was not clearly mentioned.⁴²⁶ The Watchlist recommendations for the Secretary-General's 2022 Annual Report on Children and Armed Conflict also briefly mention the use of child soldiers in the conflict in Ethiopia by reiterating the findings of the joint investigation of the Ethiopian Human Rights Commission (EHRC) and Office of the High Commissioner for Human Rights (OHCHR) about the violations and abuses carried out by the local Tigrayan youth group known as 'Samri'. The recommendations stated that though there is no clear evidence as to the involvement of underage children, the fact that they were young, and reiterating UNICEF's finding that young children in Tigray have had fear of recruitment by the warring parties, the Secretary-General should include Ethiopia in the list of countries with a new situation of concern and authorize further investigation.⁴²⁷

Despite the limitations of official data indicating how and by whom child soldiers were used in current internal conflicts in Ethiopia, the Ethiopian government and rival forces have been accusing one another for using child soldiers in direct hostilities. Though the government has been broadcasting the video of children who were surrendered to the Ethiopian National Defence Force, all other reports and statements on child soldiering are of a secondary nature.

An Overview of International Standards governing Child Soldiering

International Humanitarian Law

International Humanitarian Law (IHL) does not define a child other than providing two categories of children; below 15 for armed conflict and below 18 for criminal punishment. Neither does it define child soldiers other than demarcating the category of age and the mode of participation prohibiting recruitment and participation. Though the fourth Geneva

⁴²⁶ See for instance an open letter submitted by 18 organizations to the UN Secretary General, António Guterres on May 31, 2022, concerning the 2022 Annual Report on Children and Armed Conflict.

⁴²⁷ Watchlist on Children and Armed Conflict, "A Credible List": Recommendations for the Secretary-General's 2022 Annual Report on Children and Armed Conflict, April 2022, <https://watchlist.org/publications/a-credible-list-recommendations-for-the-secretary-generals-2022-annual-report-on-children-and-armed-conflict/>

Convention tried to mention children in some of its provisions, its intention was not to accord them a special protection. It is with the coming into force of the two additional protocols (AP I and II) in 1977 that IHL started to regulate the recruitment and involvement of children in armed conflicts. These two protocols also expand the jurisdiction of IHL as AP II was made to regulate non- international armed conflict (NIAC), including child soldiering.

The issue of child soldiering was first regulated by the two protocols to the four Geneva Conventions though the scope of protection varies based on the nature of prohibited participation and the legal phraseology used to provide obligation of states and armed groups to the international armed conflict (IAC), which has been provided as follows;

*The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.*⁴²⁸

In the case of NIAC, though the adverse party fighting with a formal army of states have no legalized combatant status, obligation of both parties for the sake of protecting children is provided as follows; “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”⁴²⁹

Though both protocols impose restrictions on participation in hostilities of persons under the age of 15 years, the imposition by AP II is brief and strict. There is a clear departure from AP I in two respects. First the obligation imposed on armed forces or groups is absolute. Rather than using the vague phrase 'feasibility', it employs an obligatory framing. Unlike the obligation under AP I, it is an obligation of result, not of means (Mathew 2000). The second departure of this protocol is the scope of the obligation imposed on parties to the conflict.

⁴²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 77(2), June 8, 1977, 1125 U.N.T.S.

⁴²⁹ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art 4 (3), (c) , Jun. 8, 1977, 1125 U.N.T.S. 609

Parties may not be relieved from their obligation by ensuring that they do not recruit children below 15 years of age and by preventing direct participation of such children in conflict like the AP I. They are rather obliged to protect children from any kind of participation in armed conflict without differentiating the mode of their participation.

Prohibiting only direct participation seems advantageous for children who incidentally come in contact with armed forces or groups. However, in some situations where difficulty arises to identify the direct/indirect dilemma, children will be the object of attack by an adverse party. This is a case where children transport munitions up to the front line, serve as spies, and perform other equally risky activities.⁴³⁰ The ICC also ruled in its Decision on the Confirmation of Charges against Lubanga during the pre-trial stage that scouting, spying, sabotage, or the use of children at checkpoints, as couriers, bodyguards for commanders, or guards of military objects though are not directly linked to combat,⁴³¹ since they are not related to the hostilities, falls under the category of active participation.⁴³²

The jurisprudence of the Special Court for Sierra Leone (SCSL) in its judgment against the former president of Liberia, Charles Taylor, ruled that assigning children to guard mines amounts to participating in armed conflict; mining areas were at risk of being attacked by the adverse party that in turn put children in direct danger of hostilities.⁴³³ To identify the nature of children's participation, the ICC employs the 'exposure test', which connotes that if indirect participation of children has the potential of exposing them to military attack, it is then categorized as active participation.⁴³⁴ Hence, the issue of whether the participation of children in armed conflict is active or ancillary is to be determined on a case-by-case basis.

The protocols also extend their protection to those children below the age of 15 and captured by the adverse party while directly participating in armed conflicts. A child below 15 who is captured during an IAC is entitled to careful protection and has the right to stay in a separate

⁴³⁰ Ibid, p. 36

⁴³¹ Prosecutor vs. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges (ICC01/04-01/06, Para. 261-263, 29 January 2007), p.90-91

⁴³² Ibid, Para. 262

⁴³³ Prosecutor vs. Charles Taylor, Judgment (SCSL-03-01-T, Para. 1459, 18 May 2012), p.517

⁴³⁴ Prosecutor vs. Thomas Lubanga Dyilo, Judgment (ICC-01/04-01/06, Trial Chamber I, 14 March 2012, Para. 915), p. 399

section, and the death penalty should not be executed on him/her.⁴³⁵ Concerning NIAC, captured children below 15 are entitled to care and dignity, religious and moral education, and reunion with their families.⁴³⁶

Prohibition on the recruitment and direct participation of children below 15 years of age is a customary international humanitarian law. Under Rule 136, it has been provided that even though some states advocate for 18 years of age blanket protection and apply it in their domestic jurisdiction, such practice has not attained the status of customary international law due to the absence of common practice among states. Hence, the age of 15 was provided as a benchmark to prohibit recruitment of children in both IAC and NIAC (Henckaerts and Beck 2005).

International Human Rights Law

International human rights law has established the basis for the protection of the rights of children through general human rights norms and principles as well as by providing a specific set of rights to children. In the context of child soldiers, although there are some gaps, there are specific and general recognitions of rights and protections for such children found in exceptional circumstance.

Convention on the Rights of the Child (CRC) and its Optional Protocol on the Involvement of children in Armed Conflict (OPCRC)

A single and comprehensive instrument dealing with the rights of children came into force in September 1990. Arguably, CRC is shaped more or less by the universalist approach to childhood. As per Article 1, a child is "every human being below the age of eighteen years unless, under the law applicable to the child, a majority is attained earlier".⁴³⁷ However,

⁴³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 77 (3), June 8, 1977, 1125 U.N.T.S.

⁴³⁶ Supra note 14, Art. 4 (3), (D)

⁴³⁷ Convention on the Rights of the Child, Art. 1, adopted on 20 November 1989, entered into force on 2 September 1990

contrary to such standard definition, CRC creates an anomaly by creating a room where a child of 15 years of age may become a soldier. It provides that; “States parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities”.⁴³⁸

As a global standard of protection for children, the convention was expected to incorporate robust protective provisions. Rather it falls short of adequate protection for every child from the effect of armed conflict by introducing a lower age for children to engage in armed conflict. Compared with the innovative protection introduced by AP II, CRC provides less obligatory language and covers only direct participation of such children. The CRC only retains the provisions of Article 77 of AP I rather than introducing new protective elements as global child rights standard. Hence, the shortcomings of the protocol discussed above are applicable *mutatis mutandis* to the CRC.⁴³⁹

These shortcomings, nonetheless, would not negate its vitality in guaranteeing children’s protection. As a child rights instrument, it provides a twofold obligation on member states as far as the protection of child soldiers is concerned. Not only are states expected to refrain from recruiting and participating children below the age of 15 in their armed forces, but as the primary duty bearer, they are also duty-bound to protect children from the act of non-state armed groups. Therefore, unlike IHL, international child rights law obliges states to regulate the activities of armed groups.

The CRC subsequently has rectified its shortcomings and improved the protection of child soldiers from direct participation in conflicts through the adoption of its Optional Protocol on the Involvement of Children in Armed Conflict (hereunder OPCRC), which increased the scope of protection. Article 1 of the protocol provides that “states parties shall take all feasible

⁴³⁸ Ibid, Art. 38 (2)

⁴³⁹ The soft nature of the phrase feasible measure and the absence of protection for indirect participation are some of the shortcomings that can be used here.

measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".⁴⁴⁰

Though the protocol raised the minimum age to participate in armed conflicts to 18 years, this provision as well is not without defects. Similar to the CRC and AP I, this optional protocol imposes an obligation of conduct with a weak language of feasibility requirements (Daniel 2000). The obligation of taking feasible measures is open-ended and it is difficult to identify its scope. States may misuse such vague standard and declare that they had taken all feasible measures while they had not. Instead, other obligatory framing such as necessary measures, must ensure that, similar phrases can address such vagueness (Ibid).

Prohibiting only direct participation is another weakness that the protocol shares with the CRC and AP I of the Geneva Convention. In other words, while it allows states to recruit children below 18 so long as it is voluntary, it totally banned armed groups from recruiting children below 18 to engage them in direct armed conflict.⁴⁴¹ As the primary obligations in relation to human rights fall on states, such prohibition on armed groups entails an additional obligation on states to make sure that armed groups in their territory do not recruit and use children below 18 years in hostilities.⁴⁴² In addition, the minimum age of voluntary recruitment of children provided in the CRC, which is 15 years, is increased to 16 years.⁴⁴³ States are obliged to ensure that the recruitment is free from any form of coercion.⁴⁴⁴

However, the conditions set forth by the protocol for voluntary recruitment are vague and with less possibility of being respected by States. For instance, economically disadvantaged parents may send their children for a promise of reward; countries with poor human rights and child protection records may not provide adequate safeguard as required by the protocol. In addition, the proof of age requirement needs a well-organized birth registration system to ascertain the age of the child. However, in most developing countries including

⁴⁴⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children into Armed Conflict, Art.1, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002

⁴⁴¹ Supra note 28, Art. 2 and 4 (1)

⁴⁴² Ibid, Art. 4 (2)

⁴⁴³ Ibid, Art. 3 (1)

⁴⁴⁴ Ibid, Art. 3 (2)

Ethiopia, people rarely register events of birth, which results in fabricated birth records and age claims.⁴⁴⁵

Neither the convention nor the protocol however expressly provides for the criminal responsibility of child soldiers. Notably, the protocol, which specifically deals with the protection of children from armed conflict, remains silent with regard to their responsibility for the crime they commit during their participation. There is also an indication that the protocol considers child soldiers as victims who need treatment for their physical and psychological recovery and social reintegration rather than legal accountability.⁴⁴⁶ However, the possibilities for criminalizing children for their criminal acts have been incorporated in different provisions of the CRC, with no reference to child soldiers.⁴⁴⁷ In addition, the criminal liability of any child under international law has not been regulated by the CRC as it does not provide minimum age of criminal responsibility both for international and domestic crimes. The discretion to decide on such age has been left to member states⁴⁴⁸ with a recommendation that such age must not be too low.⁴⁴⁹ Indicating the variation among states in setting minimum age of criminal responsibility, the CRC Committee announced that it considers age of criminal responsibility below the age of 12 years as against international standards and recommends states to adhere to this minimum standard and continue to increase it to a higher age level.⁴⁵⁰

The aim of any criminal law is shaping the behaviour of an individual, and in case of children, to intervene in their lives using the law as early as possible to ensure the best interest of the child and development of children. Though the CRC Committee does not mention participation in armed conflict, this provision related with juvenile justice can be analogically taken to remind states that child soldiers should primarily be dealt with other protective

⁴⁴⁵ See for instance CCRC, Consideration of Reports Submitted by States Parties under Art.44 of the Convention, Concluding Observations: Ethiopia (2015) 69th Session, CRC/C/ETH/CO/4-5, Geneva, Para 33.

⁴⁴⁶ OPCRC, Art. 6 (3)

⁴⁴⁷ CRC, Article 37, 39 and 40

⁴⁴⁸ Ibid, Art. 40 (3) (a)

⁴⁴⁹ See rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (1985) G.A. Res. 40/33, U.N. Doc A/RES/40/33

⁴⁵⁰ CCRC, General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/24 para 33

measures, such as education and family care, and the root cause for their participation must be addressed by government rather than sticking to their punishment.

African Charter on the Rights and Welfare of the Child

It can be said that the African Charter on the Rights and Welfare of the Child (ACRWC) is the only regional human rights instrument that provides better protection for child soldiers. Unlike the CRC, it does not provide an exception to 18 years in the definition of a child.⁴⁵¹ Concerning child soldiers, it provides that, “states parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child”.⁴⁵²

The phrase 'necessary measure' was a missing one in the provisions of the CRC and AP I dealing with child soldiers. Unlike the vague requirement of 'feasible measures', 'necessary measures' objectively identified prevention from recruitment and involvement of children in hostilities. The innovative provision of the ACRWC is Article 22(3), which extends the obligation of member states to provide protection and care for children affected by armed conflict to situations of tension and strife.⁴⁵³ The immediate registration of birth of a child as provided under Article 6(2) of the Charter is also vital in strengthening the protection of children through evidence of their age, and birth certificate.

ILO Worst Forms of Child Labour Convention-182

Among the rationales behind the adoption of ILO's Convention-182 is the need to take immediate and comprehensive action by member states to remove children involved in worst

⁴⁵¹ African Charter on the Rights and Welfare of the Child, Art.2, adopted in Addis Ababa, Ethiopia, on 11 July 1990, entered into force on 29 November 1999

⁴⁵² Ibid, Article 22 (2)

⁴⁵³ Ibid, Art. 22 (3)

form of labour and to provide rehabilitative and integrative support.⁴⁵⁴ The Convention-182 defines a child as anyone below the age of 18 while forced recruitment of children into the armed force is recognized as the worst form of child labour and act of slavery that member states must eliminate by taking all immediate and effective measures.⁴⁵⁵ The convention set forth clear and strict obligation that should be adhered to by member states.

States parties to Convention-182 are duty-bound to take measures, including the enactment of penal laws and other measures for the prevention of children's participation in all worst forms of child labour including recruitment of child soldiers and ensure their rehabilitation and reintegration to society. Generally, forcefully recruited children are considered to be victims that need rehabilitation by member states without the imposition of criminal penalty.⁴⁵⁶

International Criminal Law

International criminal law (ICL) also plays an unprecedented role in the prevention of child soldiering by prosecuting individuals who recruit and use children below the age of 15 in armed conflict. In addition to the permanent International Criminal Court (ICC), specialized criminal tribunals such as the international criminal tribunal for former Yugoslavia (ICTY), and the international criminal tribunal for Rwanda (ICTR) have extended the protection of children from recruitment by prosecuting the perpetrators and recruiters.

The ICC, as the only permanent international criminal court, bans the recruitment and use of children below 15 years of age in both international and non-international armed conflicts and categorizes such act as a war crime.⁴⁵⁷ The ICC statute has taken a fundamental step in protecting child soldiers by making their enlistment, conscription and participation in armed

⁴⁵⁴ Worst Form of Child Labour Convention No. 182, Adopted on 17 June 1999 by the General Conference of the International Labour Organisation at its 87th session and was entered into Force on 19 December 2000 (hereunder WFCLC) See paragraph three of the preamble

⁴⁵⁵ Ibid, Art. 1

⁴⁵⁶ Ibid, Art. 7 (2)

⁴⁵⁷ The Rome Statute of the International Criminal Court, Article 8 (2) (b, 26) and (e, 7), July 17, 1998, U.N. Doc.A/Conf.183/9 (1998)

conflicts a war crime. On the contrary, other instruments only prohibit such acts or impose an obligation on states to protect children in armed conflict without placing the consequences of violating the prohibitions. Moreover, the phrase 'actively participate' delineates direct and indirect participation of children in armed conflicts based on the 'exposure test'.⁴⁵⁸ The other important innovative protection in the ICC is that though children below 15 years of age do not directly participate in armed conflict, their mere recruitment is a war crime.⁴⁵⁹ In this regard, the prosecution of Thomas Lubanga for the first time since the establishment of the court has laid down a precedential value in the protection of children by prosecuting child recruiters. The Rome Statute, however, remains silent as to the criminal responsibility of child soldiers. By excluding children below the age of 18 from the jurisdiction of the court,⁴⁶⁰ it considers child soldiers as victims of armed conflict.

In a nutshell, despite the theoretical controversies spinning the issue of child soldiering, the international legal frameworks have been on a path of crucial development. The desire that the international community expressed to fight the problem may be envisaged from the promulgation of AP I and AP II that prohibit the recruitment and involvement of children below 15 in international and non-international armed conflicts respectively and the Rome statute that criminalizes such acts. The adoption of the CRC's optional protocol on children in armed conflict marks a remarkable development of the legal norms in the protection of children from the effect of armed conflict.

Protection of Child Soldiers under Ethiopian Laws

Similar to international instruments dealing with the prohibition of the recruitment and participation of children in armed conflict, no definition of a child soldier is provided under any of the Ethiopian laws. The legal frameworks protecting children from recruitment and participation in armed conflicts in Ethiopia consist of IHL and international and regional

⁴⁵⁸ Prosecutor v. Thomas Lubanga Dyilo, Judgment, (ICC-01/04-01/06, Trial Chamber I, 14 March 2012, Para 618), p.282

⁴⁵⁹ The Rome Statute, Article 8 (2) (b, 26) and (e, 7)

⁴⁶⁰ Ibid, Art. 26

human rights instruments ratified by Ethiopia, the FDRE Constitution, and subsidiary laws. There are also different policies with direct and indirect implications for children in general and child soldiers in particular.

The 1995 FDRE Constitution

As the supreme law of Ethiopia and as a document that endorses international human rights instruments, the Constitution is a primary guarantee for protecting children from armed conflict. Though the constitutional principles of equality and non-discrimination guarantee children to enjoy all rights and protections provided under the constitution on equal footing with adults, the Constitution also incorporates provisions that specifically aim to protect the rights of children under Article 36 though with no reference to a specific category and special protection to child soldiers (Girmachew and Yonas 2006).

It provides for the right of a child not to be subject to exploitative practices, neither to be required nor permitted to perform work, which may be hazardous or harmful to his or her education, health or well-being.⁴⁶¹ Though the Constitution does not provide explicit protection for children from recruitment and participation in armed conflicts, the right to be protected from exploitative practices and hazardous works includes protection from child soldiering, which is exploitative and affects their education, health or well-being as provided under the ILO Convention-182 (emphasis added).

The other provision of the Constitution with direct relevance for child soldiers is Article 36 (2) that provides the principle of the best interest of the child, which should be considered as 'the primary consideration' by public and private welfare institutions, courts, administrative authorities, or legislative bodies while undertaking actions concerning children.⁴⁶² However, in the context of Ethiopia, there is no specific guideline providing a detailed explanation of this principle and the manner of its application on children participated in armed conflict. Constitutional referral to international human rights instruments ratified by Ethiopia to

⁴⁶¹ FDRE Constitution, Article 36 (1d)

⁴⁶² Ibid, Art. 36 (2)

interpret its human rights provisions is crucial to take lesson from the CRC's jurisprudence concerning the principle of the best interest of the child.

The CRC Committee has provided that this principle aims to ensure the full and effective realization of the rights provided in the Convention and such realization is only attained by the engagement of all actors, to secure the holistic physical, psychological, moral, and spiritual integrity of the child and promote his or her human dignity.⁴⁶³ Any rehabilitation and reintegration measure should be assessed by its importance for the child and the child's capacity to take the measure. As a fundamental guiding principle in the application of children's rights, this principle serves three crucial purposes; (1) its application would affect the substance of the right; (2) it also serves to interpret legal provisions with more than one interpretation, and (3) is a procedural right that regulates any action or decision to be made in line with the interest of a child.⁴⁶⁴ The CRC Committee also interpret this principle to be related with the child's right to life, to be heard and protection against discrimination.

International human rights instruments ratified are recognized as the law of the land and interpretative principles concerning human rights provisions of the Constitution. The fact that Ethiopia has accepted the OPCRC that contains critical and detailed provisions for the protection of child soldiers in 2014 coupled with the above constitutional provisions provides better protection for children against recruitment and participation in armed conflict. However, as this is a general recognition of the instruments, there must be an enabling legislation to implement the constitutional provisions as per the standard of the provisions of the protocol, which is non-existent.

FDRE National Children's Policy (NCP)

National policies that benefit Ethiopia's children are found in different government sectors. However, since these policies do not address the rights of children in a comprehensive

⁴⁶³ CCRC, General Comment No. 14, 'on the rights of the child to have his or her best interests taken as a primary consideration' (2013) 62nd session, CRC/C/GC/14, Para 4 and 5

⁴⁶⁴ Ibid, Para.6

manner ⁴⁶⁵ and children only benefit from them as any Ethiopian citizen, a National Children's Policy that aims to be broader and more inclusive was issued in 2017. The policy tries to address different human rights issues, unlike the previously scattered policies. This policy document noted that, at the time of its issuance, children below 18 years of age, as a definition used in the document, constituted 52% of the total population of Ethiopia.

As its objectives, the NCP has explicitly set out the creation of an enabling environment for the promotion and protection of children's rights via the prevention and elimination of social, economic, and harmful traditional practices and abuses, which pose obstacles to their proper upbringing.⁴⁶⁶ It is issued based on three fundamental pillars that are crucial for the protection of children in general and child soldiers in particular; children's development and growth, prevention and protection of children from social, economic, and political hardships, and providing rehabilitation, care, and support for children in difficult circumstances.

The policy is of great significance for the protection of children against recruitment and participation in armed conflicts. There are no well documented figures linking Ethiopia to the involvement of children in armed conflicts and their recruitment by dissident armed groups until the issuance of this policy. This seems the reason why it does not reserve many provisions dealing with the effect of armed conflict on children. However, this does not mean that the policy is devoid of provisions dealing with armed conflict. The last two pillars of the policy; prevention and protection of children from social, economic, and political hardships, and providing rehabilitation, care, and support for children in difficult circumstances are directly relevant to protecting child soldiers against the effect of armed conflict as it is a result of either political, social, or economic problems. The rehabilitation scheme of the policy also tends to consider child soldiers as victims of adult conduct, and focuses on their social and family reunification rather than aggravating their trauma through strict application of the formal justice system.

⁴⁶⁵ Centre for Human Rights Studies, Addis Ababa University, 'Baseline Study for a Comprehensive Child Law in Ethiopia' (2013) p.67

⁴⁶⁶ The Federal Democratic Republic of Ethiopia National Children's Policy, (April 2017), P.13.

The policy also incorporates various provisions that aim at protecting children against recruitment and participation in armed conflicts. Some of the major issues the policy aims to address concerning children's civil rights and protections include creating a system of vital events registration for children and ensuring its implementation, protecting children from any form of sexual, physical, and psychological abuse, exploitation of labour and trafficking, and ensuring speedy trial in cases involving children and a child-friendly justice system.

The policy also directly mentions the participation of children in armed conflict and its impact on their physical and psychological development,⁴⁶⁷ which makes it the first policy or law in Ethiopia to mention the issue of child participation in armed conflict. It aims to create an enabling environment for the prevention and control of the involvement of children in armed conflict, drug production, trafficking, and other similar illegal activities. However, a policy is a general guideline that needs specific legislation for its implementation. It is not clear, for the time being, what enabling environment prevents recruitment and participation of children in armed conflict and how the policy aims to replicate the same. Hence, there must either be an enactment of new laws or a revision of the existing laws for the implementation of this policy. However, the emphasis given by this policy on the importance of birth registration system⁴⁶⁸ can be taken as a move to creating this enabling environment for the prohibition of child soldiering, at least on the side of the government. A robust birth registration system is also important to induce the criminal responsibility of non-state actors for recruiting underage children in their rank so long as those children possess birth certificate. In other words, birth certificate may limit the discretion of non-state actors to claim that they were unable to identify the real age of the child being recruited.

An overall analysis of the children's policy indicates the fact that it mostly focuses on creating a child-friendly environment for their upbringing, protecting them from abuse and exploitations, resulting from different natural and manmade social, economic and political disasters, and focusing primarily on their rehabilitation and care and expanding and strengthening child-friendly tribunals.⁴⁶⁹ However, unless enabling legislation is enacted for

⁴⁶⁷ Ibid, at 19

⁴⁶⁸ Ibid, at 9

⁴⁶⁹ Ibid, at 21

the detailed implementation of this policy on these and other promissory policy issues, they would remain an aspiration.

Vital Event Registration Laws

Registration of birth of a child is a crucial prerequisite for better protection of children from recruitment and participation in armed conflict. Birth registration is “the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government.”⁴⁷⁰ It has been provided as the right of a child in different human rights instruments, with corresponding strict duty of parents, or persons in charge of the child and the state. For instance, CRC stipulates that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents”.⁴⁷¹ The ACRWC also affirms the above provision in its stipulation; “every child shall be registered immediately after birth”.⁴⁷²

As indicated in these instruments, birth registration is crucial for the enjoyment of different rights. Among the bulks of rights that a child enjoys as a result of his being within a certain age category, is the right to be protected from recruitment and involvement in hostilities (Yihdego et.al. 2020). However, as a child cannot exercise this right by himself/herself, it is the duty of his/her parents or caretakers to facilitate such registration.

Ethiopia launched its first comprehensive legislation for the registration of the vital event, including birth, in 2012 with a Vital Events Registration and National Identification proclamation No. 760/2012. However, it took four years for the commencement of the registration process as it began on 06 August 2016,⁴⁷³ two years after the establishment of the Federal Vital Events Registration Agency (VERA) in 2014. Proclamation No. 760/2012 was

⁴⁷⁰ UNICEF, “Birth Registration Right from the start”, Innocenti Digest, No. 9 (2002), p. 2

⁴⁷¹ CRC, Art. 7 (1)

⁴⁷² ACRWC, Art. 6 (2)

⁴⁷³ UNICEF, Vital events registration kicks off in Ethiopia (2016) Available: <https://unicefethiopia.org/2016/08/04/vital-events-registration-kicks-off-in-Ethiopia/>. (Retrieved on 15/04/2022)

amended in 2017 by a new Proclamation No. 1049/2017 for making the registration system universal.

Though the existence of the law is an important step to protect child soldiers in Ethiopia, it has different shortcomings that may hinder an effective registration of birth. The requirement for the presence of both parents at the registration facility to register birth⁴⁷⁴ and imposing a penalty for late registration⁴⁷⁵ are the shortcomings of these laws. Research by Fisker et.al. (2019) indicates strict administrative pre-requests have the potential of hindering birth registration efforts as parents or guardians may hesitate to register their child once the deadline has passed. The Committee of Experts on the ACRWC also provides that attaching penalties for late registration of birth is a barrier that discourages parents from registering their children hence recommends for allowing late registration with no penalty.⁴⁷⁶ Therefore, any effort in the protection of children in general and child soldiers in particular, must furnish flexible legislation on birth registration that takes financial problems and social realities into consideration. It should be emphasised that the primary indicator evidencing the real age of every child is the birth certificate that is a result of birth registration. Both for states and non-state actors who try to recruit individuals in their rank, especially for governmental actors, the importance of birth certificate is not questionable. Even for those non-state actors, though they may not strictly adhere to age requirement, birth certificate would better serve to identify the age of a child and criminalize their act of recruiting the same.

Military Laws of Ethiopia

In the aftermath of the political reform in Ethiopia in early 2018, the HPR has repealed Proclamation No. 809/2013 of Defense Forces in 2019 and introduced a new law that came into force in the same year. Proclamation No. 1100/2019, which was enacted on the 19th day of January 2019, and Regulation No.460/2019 issued by the FDRE Council of Ministers

⁴⁷⁴ Registration of Vital Events and National Identity Card Proclamation, Proclamation No. 760/2012, Article 17 (3) and 24 (2), Neg. Gaz. Year 18, No. 58,

⁴⁷⁵ Ibid, Art. 18 (3)

⁴⁷⁶ African Committee of Experts on the Rights and Welfare of the Child, concluding observation, South Africa, (2019) Para. 13

(hereunder COM) on February 21st of 2020 are the military laws of the country. Though these are the general laws enacted and issued by the HPR and COM respectively, there are directives and military manuals issued by the Ministry of Defense (MoD) to regulate internal affairs of the military.

As a principle, military service in Ethiopia is voluntary as provided in the proclamation⁴⁷⁷ and regulation.⁴⁷⁸ However, there may be situations where Ethiopian nationals who are of age are compelled to give military service in times of crisis or emergencies.⁴⁷⁹ The ministry also periodically issue different criteria that recruits must fulfil to join the military. Regardless, membership as recruits in the Military of the FDRE is open only for those who are between the age of 18 and 22 and physically fit.⁴⁸⁰ As far as the prohibition of recruitment of children by an armed force of the states is concerned, this law provides relatively better protection than the OPCRC since the recruitment process is voluntary and restricted to only 18 and above. The OPCRC also encourages such kinds of laws that provide better protection.⁴⁸¹ This protection is also in line with Ethiopia's obligation under the ILO Convention-182 that asserts member states to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour, including recruitment of children in armed conflict.

Against this backdrop, some remarks about the shortcomings of these laws are worth mentioning. The applicable body of laws do not make any provision as to the treatment of children recruited and captured while involving in conflict with the military force. In other words, the law does not anticipate the possibility of the Ethiopian National Defense Forces (ENDF) encountering children on the battlefield. Absence of a clear provision in turn would give discretion to members of the military to treat these children arbitrarily.

⁴⁷⁷ FDRE Defence Forces Proclamation, Proclamation No.1100/2019, Article 5 (1) Neg. Gaz. Year 25, No. 19,

⁴⁷⁸ FDRE Defence Forces Council of Ministers Regulation, Regulation No.460/2019, Article 17 (1) Neg. Gaz. Year 26, No. 17,

⁴⁷⁹ FDRE Criminal code, Proclamation No. 4014/2004, Article 284 and the ff

⁴⁸⁰ FDRE Defence Forces Council of Ministers Regulation, Regulation No.460/2019, Article 17 (1) (d) Neg. Gaz. Year 26, No. 17,

⁴⁸¹ OPCRC, Art. 5

The absence of birth certificate as a mandatory requirement for recruitment of individuals to the military is the other pitfall of the laws as the absence of such certificate would pave a way for the recruitment of underage children.⁴⁸² Though the military guideline requires the provision of birth certificate, 10th grade transcripts and mental and physical fitness of the recruits is considered in the absence of birth registration.⁴⁸³ This, in turn, creates loopholes in the protection of children for two reasons: (1) despite the educational qualification provided as a requirement, a person who has attained at least sixth grade may be recruited in some scenarios, and (2) recruiters may use the absence of birth certificate as a pretext to recruit underage children who completed 10th grade in their early age. Children below 18 years of age, but who are physically fit, may be recruited as a result of the negligence of the recruiters and due to the absence of a strong age verification procedure.⁴⁸⁴ The only post-recruitment filtering mechanism the ministry uses is supervising the capacity of the recruits to cope up with the training process.⁴⁸⁵ The jurisprudence of the CRC Committee is also vital as its recommendation concerning the recruitment of children in the armed force shows the gap in the recruitment process. Making 18, a minimum age requirement for recruitment, ignores the absence of adequate birth registration to prevent the recruitment of children.⁴⁸⁶

The FDRE Criminal Code

The FDRE criminal code (hereunder the code), in its provision of crimes against international law under title II, provides that the recruitment of children below 18 years to participate in armed conflict is a war crime. It provides that;

Whoever, in time of war, armed conflict or occupation organizes orders or engages in, against the civilian population, and in violation of the rules of public international

⁴⁸² Interview with Selamawit Girmay, Childrens' rights coordinator at Ethiopian Human Rights Commission, on 03/05/2022

⁴⁸³ Interview with Major Getinet Kinde, legal advice and document preparation team leader at the General Directorate of Military Prosecutor in the Ministry of Defence, on 06/05/2022

⁴⁸⁴ Ibid

⁴⁸⁵ Ibid

⁴⁸⁶ CCRC, Consideration of Reports Submitted by States Parties under Art.44 of the Convention, Concluding Observations: Ethiopia (2006) 43rd Session, CRC/C/ETH/CO/3, Geneva, Para. 67 and 69

*law and of international humanitarian conventions: Recruiting children who have not attained the age eighteen years as members of defence forces to take part in armed conflict.*⁴⁸⁷

It should be noted that the Amharic version gives better meaning of such prohibition than the English counterpart. However, one can still argue that the prohibition against recruitment of children and their use in hostilities has not been fully covered under the criminal code. The recruitment of children in times other than war, occupation, and armed conflict was not explicitly prohibited. There are different conflicts that are short of being qualified as war or armed conflict. If the prohibition is made under the heading of war crime, other conflicts in which children may be involved would remain unchecked. In addition, the close reading of the above provision indicates that recruitment of children per se is not a crime as the provision uses the term “to use them in conflict”. Hence, recruitment of these children for ancillary tasks both in the military and other non-state actors is not criminalized.

Although there are some positive aspects in the military laws of Ethiopia regarding the recruitment procedure, the existing instruments are not adequate to extend better protection for children. Ethiopia’s ratification of different international instruments dealing with child soldiering, notably the OPCRC, and the recognition by the Constitution of these international standards as parts of the laws of the country may indicate that Ethiopia has strong legal protections against the recruitment of children. As available reports on the current armed conflict in the Northern part of Ethiopia have revealed, the country has limitations to ensure the implementation of the laws (Briana 2021). The existence of the OPCRC, as the critical international instrument providing fundamental protection for children from armed conflict, is not made known to the military and the public in general despite the fact that it is part of Ethiopian laws. It is also to be recalled that disseminating the protocol in local languages is one of the duties of the state parties, which is absent. Though the military law refer to the age for recruitment and voluntary recruitment, it does not incorporate provisions to extend holistic child protection such as child rights and protection awareness and sensitization to members of the armed force. Regrettably, the recruitment of children and their use in

⁴⁸⁷ Supra note 80, Article 270 (m)

hostilities by parties to the conflict was narrowly criminalized from the perspective of war crime.

Conclusion

Ethiopia has ratified OPCRC and other human rights instruments regulating the issue of child soldiering, protecting children from recruitment and participation in armed conflict. There are some laws and policies, if properly implemented, that would provide better protection for child soldiers.

As far as the scope of protection of these laws is concerned, the existing laws do not specifically mention the protection of these children as their main objective. In addition, they are not on par with the international standard of protection provided in the above-mentioned instruments. Although Ethiopia has committed itself to protecting children as per the standard provisions of the OPCRC, part of the Ethiopian laws and tools of interpretation of the human rights provisions, this protocol has not been adequately interpreted in domestic arena via enabling legislations.

The international obligation of Ethiopia concerning the enjoyment of human rights of children is threefold; the obligation to respect, protect and fulfil. Abstaining from recruiting children in its armed force is one of the obligations that Ethiopia undertakes to respect children's rights. To that effect, MoD provides that the minimum age for recruitment is 18 years, however without strict age verification mechanisms in place. The CRC Committee and Committee of Experts to the ACRWC noted in their recommendation that states must furnish adequate birth registration facilities to protect children from age-related abuses. However, due to the lack of implementation of the mandatory requirement of birth certificate, the recruitment procedure of the ministry sometimes resulted in children joining the force, which is against the standard of the protocol.

The criminal code also tries to criminalize the recruitment of children below 18 years of age for their participation in armed conflict by making such an act a war crime under Article 270(m). However, their recruitment for ancillary role is not yet criminalized under the same

code. Meanwhile, the recruitment and use of children in hostilities other than armed conflict remains unregulated.

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