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Editor's Note

Children's Rights in Contemporary Ethiopia

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The adoption of the UN Convention on the Rights of Children (CRC) brought about a significant shift in the global discourse on child rights.[1] The key guiding principles in the CRC related to equality, best interest of the child, life, survival and development and participation have attracted the attention of academic and policy research across the globe. In addition to the binding international human rights treaties, several declarations, principles, guidelines, standard rules and recommendations were adopted at different times with the intention of protecting the rights of children. The first regional children's treaty, the African Charter on the Rights and Welfare of the Child, on its part, encompasses a wide array of rights and obligations for a better advancement of children's rights in the continent.[2] The aforementioned human right treaties and different legal instruments have played a quintessential role in protecting the rights and welfare of children, providing incontestable scales of moral fortitude, and offering practical guidance to states.

The right based approach adopted by studies focusing on children and childhood across time and spaces have for long outlined the scientific foundation for research paradigms and initiatives protecting children's rights and interests.[3] The notion of childhood is complex referring to a life phase of the age group defined as children, and also a cultural construction of the social and economic structure of communities.[4] As Ncube (1998) argues the normative universality achieved in the definition and formulation of children's

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1 Holzscheiter, Anna, Jonathan Josefsson, and Bengt Sandin. 2019. "Child Rights Governance: An Introduction." *Childhood* 26(3): 271-288.

2 Llyod, Amanda. 2002. "A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child." *African Human Rights Law Journal* 2(1): 11-32.

3 Smith, Anne. 2015. *Enhancing Children's Rights: Connecting Research, Policy and Practice.* Palgrave Macmilan.

4 Norozi, S. Ali and Torill Moen. 2016. "Childhood as a Social Construction." *Journal of Educational and Social Research* 6(2): 75-80.

rights has to contend with diverse and varied cultural and traditional conceptions of childhood, its role, its rights and obligations.[5]

Ethiopia has ratified numerous international conventions regulating various aspects of the rights of children. The country has further set up national policies, strategies, laws and institutional frameworks related to protection of children's rights. Even though such measures play a significant role in promoting the rights and interests of children, they rarely guarantee the effective implementation of rights constituted in the various instruments. In the context of Ethiopia's diverse socio-cultural environment, social norms and cultural values contribute towards both the protection and violation of rights of children. This volume, focusing on children's right in contemporary Ethiopia, hence aims to present articles that address the theme from different perspectives and a broad range of disciplines, which will contribute to a greater understanding of children's rights in the Ethiopian socio-cultural milieu.

This EJHR issue, thematically focused, publishes high quality papers with a critical perspective on wide variety of perspectives on children's rights. The contribution by Ayalew et al. explores the violations faced by children living in conflict-affected areas, the magnitude of the violations, as well as the impact it has on the rights and welfare of children in Ethiopia. Belayneh's article critically examines the legal and practical framework of deprivation of liberty of children who come in conflict with the law in the Ethiopian child justice system. The contribution by Dureti and Asrat critically reflects on the policy choice that drove the legislator to ban inter-country adoption and the raison d'etre of the Cassation bench's landmark decisions in light of the best interest of the child and Ethiopia's international human rights commitments. The contribution by Yitaktu et al. engages with child right violation in reference to child marriage by presenting the socio-cultural and religious framing of marriageable age. Binayew and Haimanot's

[5] Ncube, Welshman. 1998. "Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture." In *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*. Welshman Ncube (Ed). Ashgate.

contribution on its part explores the impact of cultural and social norms that violate children's right by referring to the case of Mingi cultural practice among the Kara community in South Omo in Ethiopia. The contribution by Abel and Fasil underscores the existing legal gaps in criminalization of recruitment of children by armed groups, terrorist organizations and paramilitaries in Ethiopia.

The publication of this themed volume on children's rights is of great significance. First, it contributes to the existing gap of literature on children's rights in Ethiopia. Furthermore, the diversity of the contributions is of great significance to the academic contribution it makes to conceptual, theoretical, and methodological discussions on children's rights research.

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State Obligation towards Children in a Conflict Situation: The Case of Ethiopia

Ayalew Getachew Assefa, Adiam Zemenfes Tsighe, and Meseret Kifle Ande[6]

Abstract

The article examines the obligations of Ethiopia to protect children in conflict situations and the accountability framework against non-state actors in the context of armed conflict. It presents arguments on the various legislative, administrative and judicial measures the Government of Ethiopia is required to put in place to mitigate the impact of a conflict on children's rights. The article also explores the importance of a comprehensive, appropriate and inclusive accountability mechanism to address deliberate harm or failure to protect children and navigates the kinds of supports and services that should be availed for children affected by conflicts. The authors recognise that the intensity, scope and impact of the violence inflicted on children in conflict situations could fall under various governing laws, such as international humanitarian and criminal laws. However, it would be important to note that the arguments in the article are informed by a child rights-based approach to protecting children in conflict situations.

Keywords: *children, conflict, African children's charter, transitional justice, state obligations, Ethiopia*

Introduction

Conflict has become a gloomy reality in many African countries as a significant number of them are experiencing frequent and protracted conflicts. Children living in such situations bear the

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brunt as they are more likely to be killed, displaced, separated from their families, abducted, trafficked, sexually assaulted, and maimed. Beyond being passive victims in conflicts, children also become active participants as they could, and increasingly so, be recruited by armed forces with assigned combat roles. In Ethiopia, millions of children are being severely affected by the conflicts that erupted in the Northern part of the Country.

Against the backdrop of these facts, the article aims to preview the main aspects of violations faced by children living in conflict-affected areas as well as the impact it has on the rights and welfare of children in Ethiopia. The article takes stoke of the regional and international human rights instruments, standards, policy directions and initiatives that provide for the protection regime for the rights of children in conflict situations. In particular, the article explores the obligations prescribed in the African Charter on the Rights and Welfare of the Child and the principles in the ACERWC's General Comment on Article 22 of the African Children's Charter. The central argument of this article would be informed by a child rights-based approach to the protection of children in conflict situations focusing on international and regional child rights norms and standards.

Children in a Conflict Situation: Concepts and Impact

The protection of child rights in conflict situations is internationally recognized and founded in various international humanitarian laws and regional human rights laws. It is, however, imperative to set the context and scope of the group of children this article makes reference to while using the term 'children in conflict situations'. While international humanitarian law is mainly designed to govern situations of armed conflict, both international and non-international, international human rights law extends protection to children in armed conflict and other situations that can be assimilated to armed conflict in terms of their impact on the rights of children. In the African Charter on the Rights and Welfare of the Child (ACRWC), Article 22 provides that state party's obligation to protect children affected by armed conflict extends to situations of tension and strife. The extension of the protection of children's rights in these situations is guided by the similar impact it infuses on children and

the desire to accord higher protection in cases of tension and strife (ACERWC 2020: Para 18-19). The General Comment on Article 22 of the ACRWC further provides that the rules and principles of the protection of children's rights can be applied in cases of crises, emergencies, and national disasters where such circumstances also result in violation of children's rights (ACERWC 2020: Para 23).

The International Committee of the Red Cross uses the term 'other situations of violence' to refer to cases that are not classified as international or non-international armed conflict in line with the Geneva Conventions of 1949 and the Additional Protocol II,[7] but require its similar response or intervention to affected persons (ICRC 2017). Therefore, for the purpose of this article, children in a conflict situation include those in international and non-international armed conflicts, children in situations of tension, strife, and other violent situations such as riots, demonstrations, mass arrests, sporadic violence and any other similar instances, which have large scale impact on the rights and welfare of children. A child rights-based approach to the protection of children in a conflict situation requires that emphasis is put on the impact of the situation than what the actual instance of violence means under international humanitarian law. In light of this, this section intends to shed some light on the impacts of conflict and violence on children's rights.

Any conflict has a ruinous effect on the realisation of children's rights enshrined under international and regional instruments. As the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) notes:

> *Conflict leaves societies, especially children, with devastating scars. Children suffer unspeakable violence and injustice, including injuries and death, displacement, loss of family, the trauma associated with witnessing acts of violence and recruitment into armed forces or groups. The involvement of children in armed conflict violates every right of the child, including the right to life, education, health and family (ACERWC 2016a: 1).*

[7] International Committee of the Red Cross (ICRC) 1949, art 2 and 3; ICRC 1977b, art 1

The 2022 report of the UN Special Representative of the Secretary-General for Children and Armed Conflict shows that the impact of conflicts on children has increased globally as the past few years marked increase in violations against children. These violations range from killings and maiming to recruitment and use of children, the denial of humanitarian access, and child abduction (UN SRSG CAAC 2022b).

Recruitment of children into armed forces is one of the common and direct impacts of conflict on children's rights. The involvement of children in hostilities takes various forms; they may take part in conflicts as direct combatants, or may be used to provide support to armed forces as cooks, porters, messengers, and very often used for sexual purposes (UN General Assembly 2007). Such involvement of children in an armed force (state military or security force or non-state actors with arms engaged in conflict) constitutes a violation of the rights of children enshrined under international human rights laws and amounts to a war crime under international humanitarian law.[8]

Killing and maiming of children in conflict and violence situations is identified as one of the six grave violations, as it also directly contradicts the protection under Article 5 of the ACRWC. The patterns of killings and maiming of children in armed conflict include "deliberate targeting, indiscriminate and excessive use of force, indiscriminate use of landmines, cluster munitions and other weapons and use of children as human shields" (UNSC 2009b: para 2). Children are also the most affected by landmines placed during conflicts as they do not take the precaution to avoid casualties after the active conflict has ended.[9]

Another threat posed on children during conflict is sexual violence, which has long been used as a weapon of war and takes various forms in conflict situations including rape, forced pregnancy, sexual

[8] OAU 1990, art 22; UN General Assembly 1989, art 38(3); UN General Assembly 2000, ICRC 1949, ICRC 1977a, art 77 (2); ICRC 1977b, art 4(3)(c); International Labour Organization (ILO) 1999, art 1 and 3.

[9] UN General Assembly 2022, para 111-113.

slavery, sexual humiliation, forced prostitution, and child marriage.[10] Sexual violence is used with a motive to advance military objectives such as terrorizing, humiliating and punishing an enemy community, ensuring compliance of recruited children and others, and clearing a certain group of or place.[11] The impact of sexual violence in conflict situations leads to sever trauma and psycho-social impact on children and creates a sense of impunity and tolerance for such violence even after the conflict ends.[12] Survivors of sexual violence are unlikely to be provided with remedy and rehabilitation services due to the destruction or disruption of services as a result of conflict and violence. Even though sexual violence has not been recognized as a grave breach by the Geneva Conventions and the Additional Protocols, it has been recognized by the UN Security Council as a grave violation of children's rights in conflict situations.[13]

The denial of humanitarian access is another grave violation that is on the rise, as it has increased by over 300% between 2015 and 2017.[14] Denial of humanitarian access to children in conflict situations can occur due to movement restrictions of aid workers and supplies, attacks on aid workers, insecurity due to continued hostilities as well as landmines, attacks on humanitarian assets, and bureaucratic administrative impediments.[15] Moreover, counter-terrorism measures and related sanctions and donor requirements hinder the delivery of humanitarian aid to children.[16] If a certain party in a conflict is designated as a terrorist group, counter terrorism measures do not allow humanitarian workers to provide goods and services to those communities due to the strictly applied clauses in counter terrorism measures.[17] This denial of humanitarian access is one of the main factors, which puts children at risk of

10 UN Division for the Advancement of Women 1998, 3.
11 Bastick, Grimm, and Kunz 2007, 14-15; UN General Assembly 1996, para 94.
12 Ibid.
13 UNSC 2008; UNSC 2009a.
14 Save the Children 2019, 22.
15 Watchlist on Children and Armed Conflict and Institute of International Humanitarian Affairs 2022, 12-13.
16 Ibid.
17 Ibid

dying in conflict situations as a result of disease and starvation.[18] Furthermore, it leads to an increased recruitment and use of children for military purposes, sexual slavery, malnutrition, and disruption of education.[19]

Another impact is attacks on schools and hospitals, which affects the realization of children's right to education and health. Children's right to access education is hindered as schools are destroyed and/or occupied by militants, students and teachers are targeted and abducted.[20] Lack of access to health services also has a devastating impact including lack of immunization, malnutrition, untreated injuries, and exposure to resurgence of outbreaks, which further result in increased child mortality.[21] Furthermore, conflict compromises food security of children as food production is interrupted; means of transportation is destructed, and cost of living increases.[22]

Separation of children from their parents and caregivers takes places as conflicts and violence boom, which is a violation of the ACRWC.[23] Separation of children materializes in various instances such as recruitment of children, attacks and subsequent displacement, killing of parents and care givers, and abonnement of children born as a result of sexual violence during conflict.[24] When children are separated from their parents for any of the reasons and if they are not accompanied by an adult, they become highly susceptible to recruitment, abduction, sexual exploitation, child labor, trafficking, as well as malnutrition and infectious diseases.[25]

It should be noted that while conflict disproportionally affects children in general, some situations further exacerbate the impact on children. Children in rural areas, girls, children with disabilities,

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18 Save the Children 2018, 5.
19 Watchlist on Children and Armed Conflict and Institute of International Humanitarian Affairs 2022, 16-17.
20 Save the Children 2013, 4.
21 ACERWC 2016a, 42-43.
22 Ibid 44.
23 ACRWC, art 19.
24 ACERWC 2016, 58.
25 Ibid, 70-80.

children on the move, children of undocumented parents and children of economically disadvantaged parents/groups face additional vulnerabilities that increase the risk of violations.[26]

Responding to the challenges that children in conflict situation are facing, a range of international and regional human rights laws are established. The section below examines selected instruments relevant to the protection of children in conflict situations.

International and Regional Legal Frameworks: Initiatives for the Protection of Children in a Conflict Situation

There are various areas of laws that regulate matters of children in conflict situations including humanitarian law, human rights law, and international criminal law. Applicable instruments include the four Geneva Conventions of 1949[27] and their two Additional Protocols,[28] the Convention on the Rights of the Child (CRC)[29] and its Optional Protocol on the Involvement of Children in Armed Conflict (OPAC),[30] the African Charter on the Rights and Welfare of the Child (African Children's Charter),[31] and the Rome Statute.[32]

Beyond these normative frameworks, various resolutions, standards, policies and programs have been established to respond to the challenges of children in conflict situation. Particularly, 1996 was a crucial year for the international child protection movement in the context of conflicts. Graça Machel presented her ground-breaking report to the UN General Assembly in 1996, highlighting the disproportionate impact of war on children and identifying

26 UN Human Rights Council 2022, paras 21-26 and 34-36.
27 ICRC 1949.
28 ICRC 1977a; ICRC 1977b.
29 UN General Assembly 1989.
30 UN General Assembly 2000.
31 OAU 1990.
32 UN General Assembly 1998, The Authors note that Ethiopia is not yet a party to the Rome Statute, however, it is important to note that most of the major provisions of the Rome Statute reflect customary international law and, to that extent, are therefore binding.

them as the primary victims of armed conflict.[33] The UN Security Council (UNSC) has also passed a number of resolutions covering a wide range of protection issues concerning children affected by conflicts.[34]

At regional level, the African Union Peace and Security Council (PSC) has been regularly engaging matters of children in conflict situations since 2014. The PSC has issued various communiques and statements, drawing the obligations of members' states of the African Union towards children affected by conflicts.[35]

The matter has also been dealt with global and regional development policies, such as the Sustainable Development Goals, where an agreement is reached to end the recruitment and use of child soldiers.[36] Similarly, targets for Goal 18 of Agenda 2063's First Ten-Year Implementation Plan include ending all forms of violence, child labor exploitation, child marriage, human trafficking and recruitment of child soldiers. Africa's Agenda for Children (Agenda 2040) also provides a useful guidance to states.[37]

The above-mentioned normative instruments and standards provide states' obligations towards children in conflict situation. However, considering the relevance of the African Children's Charter and the CRC, the discussion below largely focuses on these two instruments and the work of their monitoring bodies. International humanitarian

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33 UNICEF 2015; Her report played a significant role in strengthening the applications of the international and regional normative frameworks through progressive policies, resolutions and standards geared towards protection of children in conflict situation both at the global and regional level. For instance, the global report led to the adoption of the General Assembly's Resolution 51/77, which created the mandate and recommended that the Secretary-General appoint a Special Representative on the impact of armed conflict on children**.** The resolution also requested that the Special Representative prepare reports on the situation of children affected by armed conflict to be presented to the UN General Assembly and Human Rights Council.

34 UNSC 1999; UNSC 2000; UNSC 2001; UNSC 2003; UNSC 2004; UNSC 2005; UNSC 2009b; UNSC 2011; UNSC 2014; UNSC 2015; UN SRSG CAAC 2022b; and Mezmur 2005.

35 AUPSC 2022; AUPSC 2021; AUPSC 2020); AUPSC 2019); AUPSC 2018; AUPSC 2017; AUPSC 2016; AUPSC 2016; AUPSC 2015; AUPSC 2014.

36 United Nations 2015, Target 8.7.

37 Aspiration 9 states, "Every child is free from the impact of armed conflicts and other disasters or emergency situations"; ACERWC 2016b.

law provisions pertaining to the protection of children are also discussed to the degree that they are applicable to the topic at hand.

The protection of children in the context of armed conflict is addressed under the ACRWC,[38] CRC[39] and OPAC. In addition, the monitoring bodies of these treaties, namely the ACERWC and the Committee on the Rights of the Child (CRC Committee), also contribute to strengthening the normative framework through their general comments and concluding observations. The ACERWC, in particular, has devoted a general comment to Article 22 of the Charter, which is solely concerned with the protection of children in armed conflict.[40] There is no derogation clause in the CRC or the ACRWC. In the absence of a derogation clause, the CRC and, by extension, the African Children's Charter are believed to be applicable at all times, including during emergencies.[41] Hence, as stated by Graça Machel in her landmark study of the impact of armed conflict on children, CRC "recognizes a comprehensive list of rights that apply during both peacetime and war".[42]

According to Article 22 of the ACRWC, the recruitment or direct participations in hostilities of any child under the age of 18 in both international and internal armed conflicts is prohibited.[43] This provision also applies to 'children in situations of internal armed conflicts, tension, and strife'.[44] While both the Charter and the CRC require for states to protect and care for children who are affected by armed conflict,[45] the later imposes an additional obligation on states to ensure their social reintegration as well as their physical and psychological recovery.[46] The provisions of the CRC are further reinforced by OPAC, which requires to take all feasible measures to demobilize or otherwise release from service persons under 18 and to provide all appropriate assistance for their physical

38 OAU 1990, art 22.
39 UN General Assembly 1989, arts 38 and 39.
40 ACERWC 2020.
41 Aptel 2018; Kuper 1997, 46.
42 Machel 1996: para 227.
43 OAU 1990, art 22(2).
44 OAU 1990, art 22(3).
45 OAU 1990, art 22(3) and UN General Assembly 1989, art 38 (4).
46 UN General Assembly 1989, art 39.

and psychological recovery and their social reintegration, when necessary.[47]

In its General Comment on children in conflict situation, the ACERWC stresses the importance of reading the clause in light of Article 1 of the Charter.[48] It has emphasized the importance of putting in place necessary administrative, legislative, and judicial measures to protect conflict-affected children and providing access to quality health care and education.[49] This obligation also requires that children who are allegedly associated with armed forces or designated terrorist organizations be treated first and foremost as victims,[50] and that special juvenile justice standards be applied when dealing with such children.[51] The effective implementation of this provision also necessitates establishing accountability, monitoring, and reporting mechanisms as well as allocating adequate human and financial resources to children's rehabilitation, reintegration, reunion with their families, providing effective victim assistance as well as redress and compensation.[52]

The CRC Committee has similarly expanded on the obligations under Articles 38 and 39 in its general comments and concluding observations. In particular, it has emphasized the importance of paying special attention to girls, who are especially vulnerable to gender-based violence in the context of armed conflict.[53] In the same vein, the Committee recommends the development of gender-sensitive mental health care in order to support the recovery and reintegration of children affected by armed conflict, as well as the provision of qualified psychosocial counselling.[54] The Committee has emphasized the importance of identifying and demobilizing unaccompanied or separated former child soldiers in order to facilitate their reintegration into society, as well as

47 UN General Assembly 2000, art 6(3).
48 ACERWC 2020,, para 43.
49 ACERWC 2020, para 44.
50 CRC Committee 2005, para 56.
51 ACERWC 2020, paras 26 and 44.
52 ACERWC 2020, para 48.
53 CRC Committee 2005, para 47.
54 CRC Committee 2005, para 48.

providing psychosocial support.[55] In addition, it urges states to establish a comprehensive system of age- and gender-appropriate psychological support and assistance for unaccompanied and separated children affected by armed conflict.[56]

The Role of the General Principles in the Context of Children in Conflict Situations

Apart from the specific provisions dealing with children in armed conflict, the implementation of all rights recognized in the ACRWC and CRC including the protection of children in situations of conflict should be guided by the four General Principles found in both instruments, namely the (1) principle of non-discrimination, (2) the best interests of the child, (3) the right to life, survival, and development, and (4) child participation. The CRC Committee notes that the four general principles should not be subject to derogations even in times of emergency.[57] In its report of the 2017 Day of General Discussion on Children in Armed Conflict, for instance, the CRC Committee noted that none of the provisions in Articles 2, 3, and 4 "admits derogation in time of war or emergency".[58]

Regarding non-discrimination, both the ACRWC and CRC state that all children are entitled to the rights without discrimination on any grounds, including but not limited to parent's or legal guardian's race, ethnicity, gender, sex, language, religion, political or other opinion, national and social origin, disability, birth or other status.[59] The non-discrimination obligation extends to the duty of states to actively identify children and groups of children who need special measures to reduce or eliminate conditions that give rise to discrimination.[60] In the application of this principle in situations of conflict, the ACERWC has emphasized the importance of ensuring that vulnerable children, such as refugee and internally displaced

55 CRC Committee 2005, para 56.
56 CRC Committee 2005, para 60.
57 Hodgkin and Newell 2017.
58 CRC Committee 1992, para. 67; Hodgkin and Newell 2017.
59 OAU 1990, art 3 and UN General Assembly 1989, art 2(1).
60 ACERWC 2018b, para 4.1.

children, are not discriminated against when it comes to access to basic services such as education, health, birth registration and social protection.[61] The CRC Committee has identified children in conflict or humanitarian disaster situations to whom special attention should be given in addressing their rights.[62] It further emphasises special consideration need to be given to the rehabilitation and social reintegration of children with disabilities as a result of armed conflicts.[63] Applying the principle of intersectionality in addressing the particular vulnerability to multiple forms of discrimination, the CRC Committee highlights the need to provide special assistance to refugees and displaced girls with disabilities, such as preventative assistance, access to adequate health and social services, including psychosocial recovery and social reintegration.[64]

In terms of the best interests of the child principle, states are required to ensure that the child's best interests is the primary consideration in all actions affecting them.[65] In the context of armed conflict, this obligation entails the prevention of recruitment and radicalization of children by armed groups, protection of children from the impacts of conflict, and the protection of children from violations such as abductions, killing, and maiming, sexual violence, and exploitation.[66] It also requires states to prevent the destruction of essential infrastructure for children, such as schools, as well as the obstructing of access to humanitarian assistance.[67] The best interests of children should also be upheld by intensifying the registration of births, which is crucial to access services such as immunization, maternal health care, and access to basic services.[68] Furthermore, adherence to the principle of the best interests of the child in conflict situations requires allocation of adequate resources to the justice

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61 ACERWC 2020, para 39; ACERWC 2016, paras 3 and 57.
62 CRC Committee 2013.
63 CRC Committee 2006b, para 78
64 CRC Committee 2006b, para 79.
65 The CRC requires that the child's best interests be *a* primary consideration in all actions concerning children, whereas the ACRWC requires that the child's best interests be *the* primary consideration. ACRWC, art 4(1) and CRC, art 3(1).
66 ACERWC 2020, para 27.
67 ACERWC 2020, para 27.
68 ACERWC 2020, para 29.

systems to enable them investigate violations against children in armed conflict and bring the perpetrators to justice.[69]

The only right defined as inherent in the ACRWC and the CRC is the right to life. This obligation is broader than the negative obligation of non-interference and imposes a positive obligation on states to take the necessary legislative, administrative, and other positive measures to ensure the child's inherent and inalienable right to life and survival.[70] In addition, ensuring that children develop their personalities, talents, and mental as well as physical abilities to the fullest in accordance with their developing capacities is essential to the effective implementation of this right.[71] Hence, fulfilling the rights of a child under Article 22 entails creating an environment in which a child can exercise all of his/her rights, including the right to health, adequate nutrition, shelter, and education, as well as the provision of access to humanitarian assistance.

With regards to the principle of child participation, states are required to ensure participation of children in all matters affecting the child.[72] In the context of conflict, the application of this principle necessitates that children's participation in conflict resolution, recovery, transnational justice, and reconstruction efforts should be ensured.[73] In this regard, the needs of vulnerable children, including those with disabilities, must receive special attention.[74]

Other Pertinent Rights affected by Armed Conflict

In times of armed conflict or emergencies, the rights recognized by the ACRWC and CRC remain applicable where other provisions relevant to the protection of such children should remain in effect, such as the right to education[75], health,[76] adequate standard

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69 ACERWC 2020, para 26.
70 OAU 1990, art 5(1); UN General Assembly 1989, art 6(1); Nowak 2005, 17-8.
71 ACERWC 2020, para 41.
72 OAU 1990, art 7 and UN General Assembly 1989, art 12.
73 ACERWC 2020, para 34.
74 ACERWC 2020, para 32.
75 OAU 1990, art 11; UN General Assembly 1989, art 28.
76 OAU 1990, art 14; UN General Assembly 1989, art 24.

of living,[77] protection from all forms of torture, inhuman or degrading treatment, physical or mental injury or abuse, neglect or maltreatment including sexual abuse,[78] and parental care and protection.[79]

Protection of children's right to education in times of conflict requires the prevention of attacks on or targeting educational institutions, facilities, students, staff, as well the use of schools for military purposes.[80] To this end, as mentioned above, the AU Peace and Security Council and UN Security Council have both expressed concern about the attacks on infrastructures, in particular schools and health facilities, which prevent children from accessing social services.[81] Furthermore, the militarization of schools is strongly condemned, and states are urged to take effective countermeasures.[82] The importance of facilitating the continuation of access services, including education and health care, in times of armed conflict and post-conflict is emphasised and states are further urged to pay special attention to girls' equal access to education. [83]

Moreover, states are under obligation to "take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse."[84] Establishing a child protection unit that looks into and gathers data relating to child abuse, exploitation, and sexual assault is one example of such measure.[85]

Moreover, the realisation of children's right to health in the context of conflict situations necessitates that children have continued access to basic healthcare including sexual and reproductive health,

77 UN General Assembly 1989, art 27.
78 OAU 1990, art 16; UN General Assembly 1989, art 34 and 37.
79 OAU 1990, art 19; UN General Assembly 1989, art 9.
80 UNSC 2015, para. 7 and UNSC 2018, paras. 15-16 .
81 AU PSC 2021, para 3; UNSC 2015, UNSC 2018, para 14.; UNSC 2014, para 17.
82 AU PSC 2021, para 3; UNSC 2014, para 18.
83 UNSC 2021; UNSC 2015; UNSC 2018, para 14.
84 OAU 1990, art 16(1).
85 ACERWC 2020, para 64.

maternal care, psychosocial support, HIV testing, basic nutrition, and immunizations.[86] The provision of services for sexual and reproductive health, therapy for trauma and counselling, and, if necessary, additional forms of assistance such as material and financial support must form part of demobilisation programs.[87]

International Humanitarian Law

Both the ACRWC and CRC require states to commit to upholding the rules of international humanitarian law (IHL) in armed conflicts that affect children.[88] IHL provides protection for children involved in armed conflict, regardless of whether the conflict is international or not.[89] The 1949 Third and Fourth Geneva Conventions and its Additional Protocols of 1977 (API and APII) are the primary sources of IHL application to the protection of children.[90] These sources contain set of rules that provide children particular protection due to their specific vulnerability. In the case of non-international conflict, Article 3 of the Fourth Geneva Conventions and APII are applicable.

Article 3 of the 1949 Geneva Conventions is unique with its addition, where governments opted for the first time to control what they termed "armed conflict not of an international character" within the framework of an international treaty.[91] The provision states that children must "in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."[92] To this effect, some conducts are prohibited at all times and in all places, including violence against life and person, cruel treatment and torture,

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86 ACERWC 2020, para 68.
87 ACERWC 2021.
88 OAU 1990, art 22(1) and UN General Assembly 1989, art 38 (1).
89 Aptel 2018.
90 Aptel 2018.
91 ICRC 1949. Common article 3 was one of the first norms of international law to address what governments traditionally considered to be an exclusively domestic concern. Hence, the provision codifies basic safeguards in non-international conflict settings that would otherwise be beyond the purview of international law.
92 ICRC 1949, common art 3(1).

outrages to human dignity such as humiliating and degrading treatment, and the taking of hostages.[93]

In addition, APII[94] to the Geneva Conventions provides special protection for civilian children in non-international armed conflicts. In particular, Article 4(3) of APII provides that children who are involved in non-international armed conflicts get education, family reunion, evacuation, protection against being recruited by armed forces, and protection from death sentence.[95]

The Impact of Conflict on Children in Ethiopia: Setting the Context

The war which began in November 2020, between the Ethiopian government and Tigrayan forces, has garnered attention on a global scale.[96] By July 2021, the conflict had spilled over to the neighbouring regions of Afar and Amhara.[97] Although the conflict in the north received the majority of media coverage, disputes over regional borders and violence between communities and religions were on the rise across the country.[98] Allegations of serious violations of international refugee law, humanitarian law, and human rights law have been made against all parties,[99] including attacks on civilians and infrastructures, as well as delaying and preventing access to humanitarian aid.[100]

As the report of the joint investigation conducted by the Office of High Commissioner for Human Rights (OHCHR) and the Ethiopian Human rights Commission (EHRC) indicated, children suffered disproportionately as a result of the conflict.[101] They have been directly and indirectly affected by the conflict in Tigray and

93 ICRC 1949.
94 It is important to point out that APII has been ratified by Ethiopia.
95 ICRC 1977, art 4(3).
96 Human Rights Watch (HRW) 2022a.
97 HRW 2022a; OHCHR and EHRC 2021; Global Centre for the Responsibility to Protect 2022.
98 The Armed Conflict Location & Event Data Project (ACLED) 2022.
99 OHCHR and EHRC 2021.
100 OHCHR and EHRC 2021.
101 OHCHR and EHRC 2021, para 330.

surrounding regions, resulting in violations of rights recognised in international human rights standards, including the African Children's Charter and the CRC, including but not limited to the right to life, survival and development, health, education, adequate standard of living, and family protection.[102]

The recruitment of children to actively participate in hostilities is one of the conflict's other direct effects in Ethiopia.[103] There have been reports of children allegedly being used as soldiers to form a 'human wave' to overpower opposing forces, resulting in numerous child fatalities and injuries.[104] Furthermore, children have been subjected to physical harm, sexual violence, and trauma as a result of the conflict, witnessing the killing or rape of close family members by opposing forces,[105] with millions of women and children requiring gender-based violence services.[106]

The displacement of children has also been a devastating effect of the conflict. According to a report by the Internal Displacement Centre, 3.6 million people were forcefully displaced because of conflict and violence by the end of 2021.[107] Although the conflict in the north was the primary cause of internal displacement in Ethiopia in 2021, there were intercommunal violence in other areas.[108] Overcrowded IDP sites worsens the already subpar sanitation and hygiene conditions, increasing the risk of cholera and other disease outbreaks.[109] The destruction of basic services and lack of means to re-establish livelihoods pose additional risks to IDPs returning to their original homes.[110] Aside from internal displacement, the conflict has forced thousands to seek refuge in Sudan.[111] As of February 2022, more than

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102 OHCHR and EHRC 2021, para 341.
103 BBC News 2021; Teshome 2021.
104 AllAfrica 2022; OHCHR and EHRC 2021, para 330; HRW 2021b.
105 OHCHR and EHRC 2021, paras 330 and 334-35.
106 UNICEF 2022a.
107 Internal Displacement Centre (IDMC) 2022.
108 IDMC 2022.
109 UNICEF 2021a.
110 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) 2022a.
111 USA for United Nations High Commissioner for Human Rights (USA for UNHCR) 2022.

23,750 Ethiopians, many of whom are separated or unaccompanied children, were registered in the Tunaydbah camp, in Sudan.[112]

Children have not only suffered the direct effects of the conflict, but also its indirect effects, such as separation from parents or caregivers and becoming orphans.[113] According to recent estimates, at least 204,500 unaccompanied and separated children require family tracing.[114] Many of these are living in unofficial camps, in unsafe and appalling conditions, where they are vulnerable to neglect and sexual and physical abuse in the absence of adult caregivers.[115] Due to exposure to the widespread violence and lack of parental care, many children who have been separated from their parents also suffer from severe trauma and require psychosocial and other services.[116]

In addition, the destruction of infrastructure has resulted in children having less or no access to basic public services.[117] In respect of children's access to education, the total or partial destruction of more than 8,660 schools in Ethiopia, 70 percent of which were in Afar, Amhara, and Tigray,[118] has resulted in 2.53 million children not attending school nationwide as of May 2022.[119] Many schools have also been converted into IDP shelters, temporarily depriving children of their right to education.[120]

The looting and destruction of medical facilities has also made it difficult for children to access basic health care services such as medication and immunizations.[121] According to recent estimates, 1.3 million children aged 6 and 59 months are not receiving routine vaccinations.[122] Some children have also died as a result of insufficient healthcare or lack of life-saving interventions to combat

112 USA for UNHCR 2022.
113 UNICEF 2021b.
114 UNICEF 2022a.
115 Save the children 2021.
116 OHCHR and EHRC 2021, para 330.
117 OHCHR and EHRC 2021, para 330; UNICEF 2020.
118 OCHA 2022b.
119 OCHA 2022a.
120 UNICEF 2020.
121 OHCHR and EHRC 2021, para 339.
122 UNICEF 2022a.

malnutrition.[123] In Tigray, for example, nearly half of pregnant and nursing women were found to be severely undernourished, indicating a high risk of maternal deaths and low birth weight infants.[124] The conflict in Northern Ethiopia resulted in children under the age of five, an estimate of 1.2 million children, requiring treatment for severe acute malnutrition.[125] It is further estimated that 5.1 million children need clean water and sanitation.[126]

Ethiopia's Legal Framework for Children in a Conflict Situation

Ethiopia's obligation towards children in general and to children in a conflict situation in particular is drawn from various legal instruments established both at international and domestic levels. Ethiopia is a party to major global and regional child rights instruments established to ensure the rights of children are protected in all circumstances, including in conflict situations. As a state party to global and regional treaties, Ethiopia is obliged to respect, protect and fulfil human rights of all persons, including children, within its territory and subject to its jurisdiction, without discrimination.[127]

With regard to obligations under international criminal law, though Ethiopia is not yet a party to the Rome Statute of the International Criminal Court, it is important to note that most of the major provisions reflect customary international law and, to that extent, are binding in Ethiopia. Such principles, which remain binding as they form part of customary international law, include prohibitions against war crimes, crimes against humanity, and genocide.

As mentioned above, the most relevant provisions that are applicable to the protection of children's rights in a conflict situation are found in the African Children's Charter, the CRC and its Optional Protocols on the Involvement of Children in Armed Conflict. Ethiopia has ratified the African Children's Charter on 02 October

123 OHCHR and EHRC 2021, para 341.
124 UNICEF 2021b.
125 UNICEF 2022a; UNICEF 2022b.
126 UNICEF 2022a.
127 OHCHR and EHRC 2021, para 29.

2002 and deposited the ratification instrument to the African Union Commission on 27 December 2002.[128] Similarly, it has also ratified the CRC and its OPCAC on 14 May 1991 and 14 May 2014 respectively.[129] These instruments, as discussed below, require state parties to take a range of measures to protect the rights of children, including the rights to life, education, health, adequate standard of living and development, and ensure protection and care of children who are affected by armed conflict.[130]

At the domestic level, being the primary source of legislative authority, the Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution), prescribes provisions regarding some aspects of children's rights.[131] Article 36 of the FDRE Constitution covers some fundamental rights of the child such as, the right to life, name and nationality; child care and parental responsibility; and the right not to be subjected to corporal punishment and exploitative practices. The best interests of the child and non-discrimination against children born out of wedlock are also part of Article 36 of the FDRE Constitution. Article 41 of the Constitution also provides additional protection in the context of economic and social rights.[132] The Constitution, however, does not specifically address protection, which should be provided to children in a conflict situation, nor does it prescribe the age of recruitment to armed groups. Similar provisions are also prescribed in the Regional States Constitutions.[133]

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128 See ACERWC Ratifications Table; FDRE 2003a.

129 See OHCHR n.d.

130 UN General Assembly 1989, art. 38(4); OAU 1990, art. 22(3).

131 It is important to note that in addition to what is provided under article 36, the FDRE Constitution enumerates fundamental rights and freedoms under its Chapter III covering the whole range of human rights, which could also apply to children's rights as necessary.

132 FDRE 1995, art 41(5).

133 See for instance, article 36 of the Constitution of Amhara Regional State; article 36 the Revised Constitution of Oromia Regional State; article 36 of the Constitution of Harari Regional State; article 36 of the Constitution of Tigray Regional State; article 36 of the Constitution of South Nation Nationalities and Peoples Regional State; article 37 of the Constitution of Benishangul Regional State; and article 37 of the Constitution of Gambela Regional State.

The FDRE Constitution recognises that all international instruments ratified by Ethiopia form an integral part of the law of the land.[134] The Ethiopian Federal Supreme Court Cassation Bench[135] has interpreted the phrase "integral part" to mean that courts should interpret primary laws issued by the House of People's Representatives in light of the principles contained in the FDRE Constitution as well as human rights conventions ratified by Ethiopia.[136] Furthermore, Article 13 provides that constitutional provisions on human rights shall be interpreted in line with international human rights instruments ratified by Ethiopia, and these are deemed to serve as general standards for interpretation of the law. As per the provision of Article 9(4) of the Constitution, ratified treaties automatically become part of the domestic legal system and prevail over national legislation in cases of conflict.[137] Therefore, being a state party to the African Children's Charter and Optional Protocol to the CRC on the involvement of Children in Armed Conflict, Ethiopia is obliged to take all feasible measures to prevent the recruitment or use of children under the age of 18 by non-state armed groups and to ensure that members of armed forces under 18 do not take direct part in hostilities.

134 FDRE 1995, art 9(4).

135 FDRE 2021a, art 10(1)-(2).

136 Tsedale Demissie vs. Kifle Demissie (Vol. 5, Case No. 23632).

137 This implies that the international treaties ratified by Ethiopia can be invoked before domestic courts, but this rarely occurs in practice. This is mainly because the Proclamation establishing the *Negarit Gazette* requires all federal or regional legislative, executive and judicial organs as well as any natural or juridical person to take judicial notice of laws including international treaties ratified and promulgated on the national gazette of the country. As Birmeta and Alemu write 'the effort geared towards giving legal effects to human rights conventions on children and women appears to be inadequate. A systematic attempt aimed at full domestication of the international instruments to which Ethiopia is a party to, leaves much to be desired'. This challenge is also noted by the CRC Committee where it states 'Ethiopia has not yet promulgated the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in its official law gazette, the *Negarit Gazet*'. See Alemu and Bir Studies 2012, 25; CRC Committee 2006a, para. 9.

In addition to the Constitution, provisions dealing with children's rights are available scattered in different legislation.[138] In addition, Ethiopia has established various polices and strategies. For instance, since 2002, where Ethiopia ratified the African Children's Charter, over fifty policies that are relevant to matters of child rights were adopted by the Government and its machineries.[139]

The above-mentioned legislation, policies and standards, though they do not deal directly with children in conflict situation, consist of provisions and principles where Ethiopia's obligations towards children in such situations can be inferred. It is also important to note that, protections under the general bill of rights provided under Chapter Three of the FDRE Constitution,[140] and the criminal liabilities in the 2004 Criminal Code of Ethiopia[141] also provide obligations of the state, which can also apply to children in conflict

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138 These include the Civil Code (FDRE 1960), the Criminal Code (FDRE 2004); the Criminal Procedure Code (FDRE 1961), Nationality Law (FDRE 2003b); the Revised Federal Family Code (FDRE 2000a), Public Health Proclamation (FDRE 2000); Proclamation concerning the Rights to Employment for Persons with Disabilities(FDRE 2008); Vital Event Proclamation on the Amendment of the Registration of Vital Events and National Identity Card Proclamation (FDRE 2017, as amended by FDRE 2002); Proclamation to Provide for the Prevention and Suppression of Trafficking in Person and Smuggling of Migrants (FDRE 2020a, repealed FDRE 2015, gives specific protection to children from trafficking, adopts a definition for a child in line with child rights standard); the Anti-terrorism Proclamation (FDRE Proclamation 2020b); Labour Proclamation (The new Labour Proclamation, FDRE 2019, has increased the minimum employment age from 14 years to 15 years to harmonize it with the international law); Refugees Proclamation (FDRE 2019); Proclamation on Organizations of Civil Societies (FDRE, Proclamation 2019b); the Food and Medicine Administration Proclamation (FDRE 2019a increased the alcohol consumption age to 21 years).; and Ethiopia's Overseas Employment Proclamation.

139 For detail list of policies and strategies relevant to children's rights see the FDRE first periodic report to the ACERWC on the Status of implementation of the African Children's Charter (2020).

140 As noted in the report of the joint investigation by OHCHR and EHRC, while the Constitution envisages the provisional suspension of human rights in the event of a state of emergency, there are certain rights that are non-derogable, including freedom from inhuman treatment and the right to equality and non-discrimination. Criminal liability for gross violations of human rights which constitute crimes against humanity shall also not be barred by period of limitation or commuted by amnesty or pardon. See OHCHR and EHRC 2021, para 54.

141 Title II of the 2004 Criminal Code under 'Crimes in violation of international law' (arts. 270-280 of the 2004 Criminal Code) provides comprehensive provisions which, among others, cover war crimes.

situation. The 2004 Criminal Code specifically prohibits recruiting children as members of defence forces to take part in armed conflict. The Criminal Code prescribes that recruitment of children in armed conflicts amounts to a war crime committed against the civilian population.[142]

Looking at child rights regime in Ethiopia, one may note the lack of a comprehensive and consolidated child rights law. It is in consideration of such gap that the ACERWC, in its concluding observations and recommendations to the Government of Ethiopia, states "the Committee notes with concern that there is no separate, comprehensive child law and thus recommends for the adoption of such law by the State Party".[143] Despite the recommendations, the laws and provisions concerning children's rights are found scattered in various domestic legislation including in the Constitution, family law, labour law, and criminal law. Considering this challenge, there is a need to ensure that every child across Ethiopia is given equal and effective protection and care regardless of the social background, economic condition, or religion of the child or the child's family. Having a consolidated and comprehensive child rights law can be one way of addressing the challenge as it enhances synergy, inter-sectoral coordination and cooperation among all actors.

Ethiopia's Obligations for Children Affected by Conflicts: From Prevention to Redress

As discussed in the previous sections, states are the primary duty bearers to undertake measures in favour of children in conflict situation. In situations where the conflict involves non-state actors, as noted in the ACERWC's General Comment (Article 22), states have an obligation to protect children from violence perpetrated by these actors.[144] The obligation to prevent violations can be looked at from two approaches: (1) a holistic obligation to conflict prevention and (2) specific/targeted obligations to prevention of violence against children. The former requires identification of root

142 FDRE 2004, art. 270(M).
143 ACERWC Insert year, para 5
144 ACERWC 2020, para 52-53.

causes of conflicts, where the state assumes the obligation to adopt a comprehensive approach towards the prevention of conflict and its recurrence by including aspects of the rule of law, democracy, respect for human rights, ensuring development and national reconciliation in its prevention strategies.[145] Hence, addressing the root causes of conflicts requires the Government of Ethiopia to take strategic and practical responses to challenges of economic and social disparities, end impunity by strengthening national judicial institutions, and ensure accountability.

The specific/targeted aspect of prevention requires the Government of Ethiopia to take all possible measures to prevent violations of children's rights in conflict situations, including employing all its efforts to prevent the recruitment and use of children by all parties. The Government of Ethiopia has an obligation to train its military not to use children in any way in hostilities and about their obligations under international humanitarian and child rights laws.[146]

The crucial step taken by the parties in the conflict to end the conflict in the Tigray region with the signing of the peace agreement, among others, provides respect for human rights, protection of civilians, humanitarian access and rehabilitation.[147] In the peace agreement, the parties agreed to end violation of children's rights including the recruitment of children, support family reunification, provision of humanitarian aid, and implementation of disarmament, demobilization, and reintegration programs.[148]

As discussed in the previous sections, rape and other forms of sexual violence are one of the grave violations against children during conflict situations. The joint investigation report of the OHCHR and EHRC highlights that sexual violence has been used against children by the armed forces and groups in the conflict

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145 UNSC 2006, 2; African Union insert year, para 1.

146 ACEWRC 2020, para 56.

147 Agreement for Lasting Peace Through the Permanent Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and Tigray People's Liberation Front (TPLF), 02 November 2022, Accessed on 23 February 2023 https://igad.int/wp-content/uploads/2022/11/Download-the-signed-agreement-here.pdf

148 Ibid.

in the Tigray Region. In this regard, the Government of Ethiopia has the obligation to provide instruction to its military, police, and security personnel, both at the federal and regional levels, on their responsibility to prevent sexual violence against children. As the UN Security Council's Resolution notes, an intentional and special measures for survivors of sexual violence and prosecution of perpetrators need to be in place.[149] Providing an easily accessible reporting mechanisms for victims is also a crucial intervention required from the state.[150] Such reporting mechanisms should be comprehensive and available to all children affected by the conflicts including those who have been displaced due to attacks.[151] Lack of witness protection is one of the main reasons for lack of prosecution of perpetrators of sexual violence in conflict situations.[152] Hence, the Government should ensure the protection of victims and witnesses as well as provide access to justice including reparations.

One of the main strategies for durable child protection in the aftermath of the recruitment and use of children in conflict situations is disarmament, demobilization, and reintegration (DDR) of children.[153] Pursuant to the peace agreement, comprehensive strategies need to be in place to free children from armed groups, disarm them and provide them with medical care, psycho-social support, and reunification services. Delivering an adequate DDR service for children requires for the Government to establish appropriate reception centres for disarmed and freed children as well as rehabilitation centres and train DDR officials. As the ACERWC notes, DDR processes need to make sure that children associated with armed groups are considered primarily as victims, thus, should not be detained for their mere association with such groups.[154]

The Government of Ethiopia also assumes the obligation to rebuild and reconstruct affected communities and areas. Hence,

149 UNSC 2008.
150 Bastick, Grimm, and Kunz 2007, 200.
151 UN General Assembly 1996, para 110.
152 UN Division for the Advancement of Women 1998, 18-19.
153 UNSC 2009b, 4.
154 ACERWC 2020, para 58-59.

the reconstruction of communities affected by war have various components including but not limited to physical, economic, cultural, political and psychosocial aspects.[155] In ensuring reconstruction, special attention should be given to survivors of violence, their rehabilitation and reintegration into their communities and the continuation of their education. Focus should be on providing psychosocial support as part of the reintegration assistance, long-term and sustainable funding for mental health and psychosocial programming and integration of mental health and psychosocial services in all humanitarian responses for all children directly and indirectly affected by armed conflict.[156]

Post-conflict Transitional Justice Processes

After two years of fighting in the north, there are now actions taken by the fighting parties to resort to peaceful means of resolving disputes. It is, however, a recurring challenge that parties in conflicts tend to neglect the role of children in peace processes, despite the disproportionate impacts that they face. Children should be able to exercise their agency in making themselves an integral part of efforts to prevent conflict and build peace.[157]

Most of the peace initiatives in relation to the conflict in the North has been political talks led by continental bodies such as the African Union, which resulted in peace deal between the Ethiopian Federal Government and the TPLF concluded in November 2022 and the establishment of the National Dialogue Commission in the same year.[158] These processes, however, work better through translational justice programs and policies tailored to the Ethiopian context. In January 2023, the Ethiopian Ministry of Justice published a discussion paper titled "Ethiopia-policy options for transitional justice". However, more needs to be done to rectify the overwhelmingly gross human rights violations, abuses, and distractions stemming mainly from the recent war as well as the ongoing conflicts. Hence,

155 UN General Assembly 1996, 241.
156 UNSC 2015; UNSC 2018.
157 Ibid
158 FDRE 2021b.

the authors argue, establishment of a transitional justice mechanism as defined by the AU Transitional Justice Policy (AU TJ Policy) plays a paramount role. As defined by the African Union Transitional Justice Policy,

> *[t]ransitional justice refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation*.[159]

Section 2 of the AU TJ Policy identifies what is considered to be the major elements of any Transitional Justice process in Africa; these include peace processes, transitional justice commissions, the African traditional justice mechanisms, reconciliation and social cohesion, reparations, redistributive (socio-economic) justice, memorialization, diversity management, justice and accountability, political and institutional reforms, human and peoples' rights. Guided by the principles included in the AU TJ Policy, it is high time for Ethiopia to install a comprehensive (involving all the elements mentioned above) and inclusive transitional justice policy. The inclusive nature of such policy requires, beyond involving warring, dissident groups, and marginalised groups, the active participation of children, with due consideration to their particular needs, challenges and rights of children. The AUTJ Policy recognizes that children are most vulnerable in situations of conflicts as they are affected in a particular manner, including as direct targets of violence through killings, acts of mutilation or torture, abductions, recruitment as well as enrolment as soldiers and sexual violence. The policy states,

> *All transitional processes, including peace and justice processes, should take account of the disproportionate impact of violence on children and youth…and make adequate*

[159] African Union 2019, Sec 1(19).

provision for children as victims, irrespective of their roles, in accordance with the African Charter on the Rights and Welfare of the Child.[160]

The principle of the best interests of the child should guide the measures that are adopted in transitional processes to cater for children affected by violence, including IDPs and refugees. As discussed in the sections above, and in accordance with the AU TJ policy, children who were forced into armed groups, the best interests of the child entail alternative accountability processes other than judicial proceedings.[161]

In operationalizing the national dialogue commission and reconciliation processes, child rights approach to transitional justice requires for a planned and targeted engagement of children in the procedures. Such engagements should be guided by the best interests of the child principle, including prioritizing the child's anonymity, privacy, and age appropriate and child-friendly consultations. The process should adopt child-centred approaches from the formulation of TJ processes to execution of all the elements. Particularly, children's participation in criminal proceedings as witnesses should be used only as a measure of last resort for major cases involving crimes against children and using child-friendly procedures.[162]

The Ethiopian Government has an obligation to take concrete steps towards ending impunity to ensure that children in conflict or recovering from conflict get closure with past abuses committed and to prevent future instances of abuses.[163] Moreover, the Government should be invested in a full range of justice and reconciliation mechanisms, including the establishment of special courts and tribunals and truth and reconciliation commissions, as such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the

160 African Union 2019, art 105.
161 African Union 2019, art 106.
162 Ibid.
163 UNSC 2006, 3; ACERWC 2016b, Aspiration 9

rights of the victims.[164] Elements of a child-centred procedures require putting in place confidential, child-friendly and age-appropriate proceedings. Moreover, it is vital to draw lessons on how the procedures ensure participation of children, particularly girls, as well as greater accountability for crimes committed against children, whether by Government forces or non-state actors, in the justice and accountability processes.[165]

Finally, this article argues that involving children in transitional justice systems not only enhances their agency and autonomy but also ensures the realisation of justice, as children are present in different capacities during conflicts. The words of children during the June 2004 children's summit in Rwanda are vital in this regard, they uttered "Gacaca (traditional judicial system) did not include the participation of children. Children mentioned that they saw what happened during the genocide of 1994 and knew that some of the adults were not telling the truth".[166]

Conclusion

The article notes that ensuring the full spectrum of children's rights calls on various stakeholders. However, the principal duty bearer, which is responsible to uphold civil, political, economic, social and cultural rights of children, including in the context of conflict, is the state. The article examines the situation of children in the current conflicts in Ethiopia and highlights the major duties of the state as a party to major international and regional human rights instruments. As stated in Article 22 of the ACRWC and other international instruments, Ethiopia assumes the obligation to ensure that children benefit from the rights, protection, and care that they are entitled to in the context of armed conflict, in accordance with human rights and international humanitarian law. In the conflicts witnessed in the country, violations, including recruitment of children into the armed forces, killings, sexual violence, distraction of basic services, denial of humanitarian access and separation from families, have

164 UNSC 2006, 3.
165 African Union 2019, art 81(vii).
166 UNICEF 2001.

been identified. Therefore, the state has the obligation to protect children from such violence in conflict situations. Beyond matters of protection, Ethiopia should also empower its children to be forces for peace and conflict prevention. Installing the transitional justice processes, normative and institutional measures must be in place to ensure that children are integral to successful efforts to prevent conflict and build peace.

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Deprivation of Liberty of Children in the Ethiopian Child Justice System: A Legal Analysis and Evidence from Practice

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Abstract

The international child rights standards provide that deprivation of liberty of children shall be a measure of last resort and for the shortest period of time. This article, thus, aims to examine the legal and practical framework of deprivation of liberty of children in the Ethiopian child justice system in light of these standards. The study found out that the principles of 'deprivation of liberty as a measure of last resort' and 'for the shortest appropriate period' are not provided in the Ethiopian justice system. On the contrary, the Criminal Code makes deprivation of liberty of children after conviction a measure of first resort. This is the case for home arrest and corrective detention. Further, although imprisonment can be imposed after the failure of the measures, courts impose it on children who committed a crime for the first time. The duration of corrective detention and imprisonment in Ethiopia can normatively be considered 'shortest'. In practice, however, courts sentence children to corrective detention for a period exceeding the maximum provided in the law. There is also a risk of prolonged curative detention. Hence, the Ethiopian child justice system needs normative revision and practical reconsideration to enforce the rights of children as enshrined in the international child rights standards.

Keywords: *deprivation of liberty, child justice, last resort, Ethiopia*

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Introduction

At the center of the child justice system is deprivation of liberty of children who committed crimes. Going beyond the criminal justice system that prohibits arbitrary arrest and detention under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR),[168] the Convention on the Rights of the Child (CRC)[169] provides two specific guarantees. It reiterates that children should not be deprived of their liberty arbitrarily, and provides that arrest, detention, or imprisonment shall be a measure of last resort and for the shortest appropriate period (Article 37(b)). This has also been recognized in Rule 17.1(b) and (c) of the UN Standard Minimum Rules for the administration of Juvenile Justice (Beijing Rules).[170] These are the guiding principles of the child justice system, which are not found in the adult criminal justice system (Schabas and Helmut 2006:81-82). The purpose of this article is, therefore, to assess the Ethiopian child justice system in light of these principles; the legal frameworks of the Ethiopian child justice system relating to deprivation of liberty of children[171] need critical examination and practical scrutiny for its compliance with the guiding principles.

The study[172] purposively focused on Addis Ababa, Arba Minch, Hawassa, Bahir Dar, Debre Markos, and Finote Selam, where there is a relatively advanced system of administration of child justice,

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168 Adopted December 16, 1966, entered into force March 23, 1976, 999 UNTS 171.

169 Adopted November 20, 1989, entered into force September 2, 1990, 1577 UNTS 3.

170 Adopted November 29, 1985, UNGA Res.40/33.

171 The term 'children' used in this article refers to those aged from nine to fifteen years of age. This is because the special procedural rules (Article 172 (1) and (4)) only apply to this group of children (Criminal Procedure Code of Ethiopia 1961, Proclamation No.185, Negarit Gazeta Extra Ordinary, Year 21st, No. 7, art 3) and the special measures and penalties of the Criminal Code are principally applicable to them (see Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414, Federal Negarit Gazeta, arts 157, 176 and 177). Therefore, the term 'child' or 'children' refers to this group unless the context provides otherwise.

172 This article is extracted from data collected for a PhD thesis (from January 11, 2022 to May 30, 2022) which is underway. Therefore, the reach of the study area, the number of respondents and court cases analysed should be seen in light of this fact.

have diversion centers[173] and for convenience purposes. In these selected areas, data was obtained through interviews with police officers, judges, guardians and children, and analysis of court decisions involving children below the age of 15.

Defining Deprivation of Liberty, Arrest, and Detention

Definitions for the terms 'deprivation of liberty', 'arrest' and 'detention' are not provided neither in CRC and ICCPR nor in the works of the CRC Committee. Rather definitions of these terms are found in the Havana Rules and the Human Rights Committee (HRC). The Havana Rules define deprivation of liberty as

> *any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative, or other public authority.*[174]

Similarly, the HRC defines it as a more severe restriction of motion within a narrower space than mere interference with the liberty of movement and includes police custody, remand detention, and imprisonment.[175] The Committee also defines arrest as "any apprehension of a person that commences a deprivation of liberty" and detention as "the deprivation of liberty that begins with the arrest and continues in time from apprehension until release".[176]

The Guiding Principles

The general principle of the child justice system is provided under Article 40(1) of the CRC. According to this provision, treatment of every child alleged, accused, or recognized as having infringed the penal law shall be

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173 At present, the centers are not functional. The researcher observed that the center in Arba Minch is used for another purpose. The center in Hawassa is alleged to be active but it has not received children in recent years and is not known by justice actors.

174 United Nations Rules for the Protection of Children Deprived of their Liberty (the Havana Rules) (adopted December 14, 1990 UNGA Res. 45/113), Rule 11(b).

175 Human Rights Committee, General Comment No.35, Article 9 (Liberty and Security of a Person) (December 16, 2014), CCPR/C/GC/35 (HRC, General Comment No.35), para 5.

176 Ibid, para 13.

> *in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*[177]

To reinforce this grand principle, the following principles are entrenched so far as deprivation of liberty of children is concerned.

Prohibition of Arbitrary or Unlawful Arrest and Deprivation of Liberty

Prohibition of arbitrary or unlawful deprivation of liberty is not unique to child rights standards. It is contained in the Universal Declaration of Human Rights (UDHR), ICCPR, and other regional human rights standards. This prohibition is also reiterated under Article 37 of the CRC. Article 37(b) provides that a child shall not be deprived of his/her liberty unlawfully or arbitrarily.

Unlawful detention and arbitrary deprivation of liberty are two overlapping concepts.[178] Unlawful detention is deprivation of liberty that is not imposed on such grounds and in accordance with such procedures as established by law.[179] The reference to 'law' is not confined to domestic law. According to the HRC, unlawful detention is detention that violates domestic law and is incompatible with the requirements of Article 9 or any other relevant provision of the Covenant.[180] Thus, detention in conformity with the law requires not only that the domestic law permits detention (formal element) under particular circumstances, but also conforms to the national and international human rights safeguards (substantive element) (Tobin and Hobbs 2019:1471). When it comes to arbitrary detention, there is no clear definition in international law. The Working Group on Arbitrary Detention has defined it as detention that is contrary

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177 The same stipulation is made under the African Charter on the Rights and Welfare of the Child (adopted July 1, 1990, entered into force November 29, 1999), art 17(1) and (3).

178 HRC, General Comment No. 35, para 11.

179 Ibid.

180 Ibid, para 44.

to human rights provisions of major international human rights instruments.[181] In this regard, the HRC noted that detention may be authorized by domestic law and nonetheless be arbitrary. It added,

> *[…] arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality (para 12).*[182]

Deprivation of Liberty as a Measure of Last Resort

Article 37(b) of the CRC provides that arrest, detention, or imprisonment of children shall only be used as a measure of last resort. The CRC Committee on its part recommends that no child shall be deprived of his/her liberty unless there is a genuine threat against public safety. It also encourages state parties to fix an age limit below which children may not be deprived of their liberty.[183] Pretrial detention should not be used except in the most serious cases and only after community placement has been carefully considered.[184] The grounds of pretrial detention should also be specified in the law, which is primarily for ensuring appearance at court proceedings and if the child poses an immediate danger to others.[185] The Beijing Rules on their part provide that restrictions on the personal liberty of a child shall be imposed only after careful consideration and shall be limited to the minimum (Rule 17.1(b)).[186] The same rule also provides that children should not be deprived of their liberty (as a penalty) unless they are guilty of committing a violent crime against a person or have been involved

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181 Commission on Human Rights (199), Report of the Working Group on Arbitrary Detention, U.N.Doc. E/CN.4/1997/4, para. 87, citing E/CN.4/1992/20, Annex 1.

182 see also Nowak (2005: 225); Schabas and Sax (2006:76)

183 Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (September 18, 2019) CRC/C/GC/24, para 89 (CRC Committee, General Comment No. 24). See also Havana Rules, Rule 11 (a).

184 CRC Committee, General Comment No. 24, para 86.

185 Ibid, para 87.

186 See also Beijing Rules, Rule 19; the Havana Rules (Rules 1 and 2) and Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (Recommended by ECOSOC Res 1997/30), para 18.

in persistent serious offense and that there is no other appropriate response. The phrase 'no other appropriate response' should not be interpreted as an absence of alternative measures, but to situations where other measures are not suitable or beneficial to the child (Liefaard 2019:331). In other words, a custodial sentence should not be imposed on a child for the reason that there is no other suitable placement (Hamilton 2011:91-92; UNODC 2013:109). Thus, non-custodial measures should be the norm, with detention only being used where they are not considered appropriate or effective (Kilkelly 2011:21). This is one of the most fundamental principles underpinning a rights-compliant child justice system (Kilkelly, Forde and Malone 2016:13).

This principle is informed by the negative effect of detention and removal of a child from his/her family (OHCHR 2003:420; Kilkelly, Forde, and Malone 2016:13; Nowak 2019:130 ff).[187] The negative effects of deprivation of liberty on children have been the subject of scholarly comments (Goldson 2005; Fagan and Kupchik 2011; Lambie and Randell 2013; Cilingiri 2015; Nowak 2019) and have led scholars such as Goldson and Kilkelly (2013:370-71) to call for abolition of child imprisonment altogether for the reasons that imprisonment is, (1) dangerous to the safety of children, (2) ineffective in reducing recidivism, (3) unnecessary (many in detention pose minimal risk to the public), (4) obsolete (there are other effective treatment options), and (5) wasteful of state resources and inadequate (detention centers are ill-equipped to address the needs of children). In this regard, Penal Reform International (2012:1) stated that:

> *[t]he removal of children from their family and community networks as well as from educational and vocational opportunities at critical and formative periods in their lives, can compound social and economic disadvantage and marginali[z]ation.*

Studies also show that detaining children makes them more likely to commit further crimes (Goldson 2005:82; Lambie and Randell 2013; Cilingiri 2015). This is because,

[187] See also CRC Committee, General Comment No.24, para 77.

> *[C]hildren detained in prisons are more likely to be damaged in the short term through the trauma of the experience and in the long term will find it more difficult to return to school or obtain employment or vocational training and are therefore more likely to be a burden on the economy and society at large, rather than being able to contribute to its advancement and healing in times of economic crisis. (Moore 2013:9)*

Deprivation of Liberty for the Shortest Period

When arrest, detention, or imprisonment of children is inevitable, it must be for the shortest appropriate period.[188] According to Tobin and Hobbs (2019:1472), 'appropriate period' replaced the term 'possible period' after a fierce debate during the drafting of the Convention as some delegations argued that rehabilitation could/ should take some time. Hence, for imprisonment, what constitutes the shortest appropriate period directly links with the length of time considered to be appropriate to reintegrate the child and help him/ her assume a constructive role in society (Hamilton 2011:93; Manco 2015:63; Liefaard 2019:332).

Further, Liefaard (2019:332) argues that "state parties are compelled to limit the duration of deprivation of liberty as much as possible and that appropriateness should also be understood in the light of the impact of deprivation of liberty on children, including the level of security." In this regard, the CRC Committee recommends that the duration of pretrial detention shall be stipulated in the law[189] and should not be more than 30 days.[190] Moreover, legal provisions providing that a sentence for a child shall be half of that of an adult do not fulfil this purpose. In all cases, legislation should oblige a court to determine the period needed to provide the child with the required intervention (Hamilton 2011:93). Nonetheless, a maximum penalty for children that reflects the principle of the 'shortest

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188 CRC, Article 37(b); Beijing Rules, Rule 17.1 (b) and (c) and 19; Havana Rules, Rules 1 and 2; Vienna Guidelines, para 18.

189 CRC Committee, General Comment No. 24, para 87.

190 Ibid, para 90.

appropriate period' as contained in Article 37(b) of the CRC must be provided in the law.[191]

This principle, by implication, prohibits the imposition of life imprisonment on children without parole. This prohibition is unique to the CRC (Tobin and Hobbs 2019:1463). According to the OHCHR (2003:229), life imprisonment would ipso facto be contrary to the rule of detention for the shortest appropriate period and denies the child a chance of reintegration. The period to be served before consideration of parole "should be *substantially* shorter than that for adults and should be realistic and the possibility of release should be regularly reconsidered."[192]

To ensure observance of the principle that detention or imprisonment should be for the shortest appropriate period, conditional release of children or parole needs to be entrenched in the national child justice laws. The Beijing Rules explicitly recognizes early release of children from detention centers and it shall be granted at the earliest possible time (Rule 28.1)[193] upon evidence of satisfactory progress towards rehabilitation. This applies also to 'offenders who had been deemed dangerous at the time of their institutionalization'.[194] As this phrase indicates, the nature or seriousness of the offense is not relevant to consider release of a child.

The CRC does not mention conditional release in its Articles (37 and 40). The Committee briefly mentions it under the heading 'deprivation of liberty including post-trial incarceration'. Though captioned in this way, the explanatory paragraphs talk much about pretrial detention.[195] The Committee obliges states to provide regular opportunities to permit early release from custody[196] without further delving into what should be the period to be served before release or the interval of time for review.

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191 Ibid, para 77.

192 Ibid, para 81; Emphasis added.

193 See also United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) (adopted 14 December 1990 UNGA Res.45/110), Rule 9.4.

194 Commentary to Rule 28.1 of the Beijing Rules; Emphasis added.

195 CRC Committee, General Comment No. 24, paras 82-88.

196 Ibid, para 88.

Deprivation of Liberty of Children in the Ethiopian Child Justice System

Prohibition of Arbitrary or Unlawful Arrest and Deprivation of Liberty

Unlike the CRC and the ICCPR, the term 'arbitrary' is not used in the Ethiopian child justice system. Instead, the FDRE Constitution states that no one shall be deprived of his/her liberty except on grounds and in accordance with procedures as established by law (Article 17(1)). Though the provision uses the term 'arbitrary' in sub-article 2, the Amharic version provides that no one can be arrested except in accordance with the law. In other words, the Constitution prohibits only unlawful deprivation or arrest of a person. Therefore, what makes the deprivation legal or arbitrary is the presence or absence of a domestic law to that effect.

However, as indicated above, arbitrary deprivation of liberty is detention that is contrary to the major international human rights standards. Thus, the presence of national law that allows the arrest or detention of a person will not save the deprivation from being arbitrary. This interpretation is in line with the provisions of the CRC and ICCPR that first prohibit arbitrary deprivation of liberty and then enjoin deprivation to be made on such grounds and procedures as established by law.[197] As discussed above, deprivation of liberty must be appropriate, predictable, reasonable, necessary, and proportionate. Hence, measured against these elements, deprivation of liberty of a child in the Ethiopian child justice system is arbitrary as corrective detention[198] and house arrest[199] are measures of first resort, which is contrary to the CRC.

Furthermore, under the Criminal Procedure Code (CPC) the arrest of children has an element of arbitrariness and fails the test of appropriateness or reasonableness as complainants are allowed

197 See CRC, art 37 (b) and ICCPR, art 9 (1).
198 Criminal Code, art 162.
199 Ibid, art 161.

to arrest a child (Article 172(1)).[200] The same authorization seems to exclude an arrest warrant as it is unlikely for these persons to ask court warrant as they may not have legal knowledge. The absence of cross-reference to the adult provision also seems to exonerate police from securing authorization (arrest warrant) from the court. Nonetheless, if the arrest is necessary, it shall be with an arrest warrant in warrantable cases. Otherwise, there will be few limitations to interfere in the liberty of children (Fisher 1970:132). It is also difficult to envision any advantage that these deviations from similar adult procedures could bring to the child. All judges interviewed said that there were no instances where police asked arrest warrant and courts issued it. This is a violation of the rights of the child and discriminatory treatment. Police officers attributed this to the fact that children are less dangerous and easily accessible (they do not hide).[201] These, however, are not the considerations provided in the law. Under the CPC, arrest warrant is a rule while arrest without a warrant is an exception (Article 49). This makes arrest in the Ethiopian child justice system arbitrary as it violates the accepted international standards; appropriateness and reasonableness.[202]

Deprivation of Liberty as a Measure of Last Resort

According to Article 37(b) of the CRC, arrest or detention of children shall be a measure of last resort. Further, Article 40(4) of the Convention requires states to make available a wide variety of non-institutional dispositions for children found guilty of a crime. The Ethiopian child justice system does not explicitly restate these principles. The arrest of a child is not the last resort in Ethiopia as Article 172(1) of the CPC provides that children must be immediately taken to the nearest *woreda* (district) court by the police, public prosecutor, parent or guardian, or complainant. This act of taking

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200 It seems for this reason that the draft Criminal Procedure and Evidence Code (2021) has omitted complainants from the list of authorized persons (art 373 (1)).

201 Interview with Sergeant Woinshet Habtam, Investigating Officer, Women and Children Unit, Arba Minch City Police Department (January 11, 2022); Interview with Investigating Officer, Lideta Sub City Police Department (April 20, 2022).

202 HRC, General Comment No.35, para12.

the child to the nearest court amounts to arrest (Fisher 1970:132). Moreover, the provision seems to exclude summoning the child as it gives the power to arrest for a complainant and prosecutor. Therefore, this provision of the Code is not in line with the rule that the arrest of a child shall be a measure of last resort as enshrined under Article 37(b) of the CRC and Rule 17 of the Beijing Rules. Police should use summons to avoid stigmatizing effect of arrest (Fisher 1970:132). It could also avoid the potential physical and psychological harm that may ensue from effecting the arrest (Fisher 1966:471). This, however, is rarely practiced as noted by some police officers interviewed; all children and/or parents interviewed have also revealed that their cases were initiated with arrest by the police or local security forces (*Militias*).

Regarding pretrial detention, the Ethiopian child justice system is more protective than the international and regional standards by indirectly prohibiting pretrial detention. Article 172(4) of the CPC provides that where the case requires adjournment or transfer to the higher court, a child shall be handed over to the care of his/her parents, guardian, or relative and in default to a reliable person who shall be responsible for ensuring his/her attendance at the trial. Further, a child arrested must be brought to court immediately. These mean a child should not be confined in police stations or detained pending trial.

The Draft Criminal Procedure and Evidence Code has, however, incorporated exceptions relating to the seriousness of the crime, the possibility of hindering the process, and the potential for joining other criminals (Article 373(6) and 376(2)). These exceptions, however, are negative developments and will make the system fail to comply with the principle that detention shall be a measure of last resort. The practice also recognizes the risk of revenge as a ground for pretrial detention[203] in addition to grounds such as safety

[203] Interview with Selamawit Anesa, Defense Counsel, Hawassa City High Court (March 16, 2022).

of the victim,[204] absence of parents,[205] and character of the child or parents[206] whereby all except the first are not compliant with the principle of detention as a last resort.

Despite the allegation that children with parents will not be detained, the study found that such children ended up in pretrial detention by the police[207] or the court including remand to prison without any justification. According to police officers, detention in a police station occurs when a child with no parent is arrested over the weekend, on holidays, or in the evening. Another ground of detention is when the case arises on a day other than the trial date; courts in Addis Ababa have fixed days assigned for child justice cases. Although police claimed that they brought children to the court on a day other than the trial date,[208] analysis of court cases shows that the first court appearance are mostly on the date of the trial. This implies children have been in detention until the date of trial (first appearance).

The Addis Ababa Rehabilitation and Remand Center hosts children as a pretrial detention center. As observed from the record of the Center, majority of the children are on remand including those who have parents/relatives in Addis Ababa; some courts ordered remand to the Center although the children have relatives and without any justification to that effect.[209] In some cases, this order

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204 Phone interview with Leuleselassie Liben, Judge, Child Justice Bench, Federal First Instance Court (FFIC), Lideta Division (July 20, 2022).

205 Interview with Degitu Asfaw, Judge, Children Bench, Bahir Dar City Woreda Court (February 2, 2022); Birkie Tilahun, Judge, Bahir Dar Zuria Woreda Court (February 4, 2022). This is also confirmed by a number of court files analyzed.

206 Interview with Leuleselassie Liben, Note 38. He mentioned one particular case that the child does not consider the act as a crime and the parents were using and still wants to use the child as a source of income through his begging.

207 Interview with Aman, a Child suspected of theft, FFIC, Yeka Division (May 17, 2022); Tamir Mengistu, Parent, FFIC, Lideta Division (July 7, 2022).

208 Interview with Deputy Inspector Zebenay Adane, Women and Children (cases) Investigation Team Leader, Gulele Sub City Police Department (April 29, 2022); Ermias Gacheno, Women and Children (cases) Investigation Officer, Bole Sub City Police Department (April 29, 2022).

209 Rahel vs Police, FFIC, Arda Division, File No.196604 (January 14, 2021); Natnael vs Prosecutor, FFIC, Lideta Division, File No.282849 (September 7, 2020) ; Esayas vs Police, FFCI, Bole Division, File No.137714 (April 8, 2022); Abebe vs Police, FFIC, Nifas Silk Lafto Sub City Division, File No.179422 (April 26, 2022).

is made by revoking the previous order of handing the child to parents or relatives for their failure to bring children on the date adjourned,[210] which can be ensured by giving warning to parents or guardians or as a last resort by making them criminally liable.[211]

Children were also remanded to prison by courts pending their case though they have parents or guardians. These were mostly in homicide cases[212] where the pretrial issues are the jurisdiction of first instance courts. By considering the seriousness of the crime and ignorance of the provision of Article 172(4) of the CPC, children were remanded to prison where segregation from adults is not practicable.

The measures envisaged in the Criminal Code that could be imposed on a child found guilty of a crime do not also comply with this principle. This is particularly the case for home arrest. Home arrest is a measure of first resort in the Ethiopian child justice system.[213] It applies to crimes of small gravity,[214] including petty offenses.[215] According to the HRC, house arrest is one instance of deprivation[216] that should be a measure of last resort as per Article 37(b) of the CRC.

The measure of admission to a corrective center (corrective detention) seems to satisfy the test by requiring bad character or antecedent of a child as a condition in addition to the seriousness

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210 Minyahil vs Prosecutor, FFIC, Lideta Division, File No.288247 (June 24, 2021); Aytenew vs Addis Ketema Sub City Police, FFIC, Lideta Division, File No.290056 (April 29, 2021); Sisay vs Prosecutor, FFIC, Lideta Division, File No.257967 (June 17, 2018). In the latter two cases, the reason is not mentioned.

211 Failure to produce an accused person, in this case the child, that the parents took under the obligation to bring him during trial, is a criminal act under Article 448 of the Criminal Code.

212 Interview with Kidane, a Child accused in East Gojjam Zone High Court (Debre Markos, February 28, 2022); Belete, a Child accused in the West Gojjam Zone High Court (March 11, 2022); Misikir and Zinabu vs Prosecutor, East Gojjam High Court, File No.0223322 (February 11, 2020). In one case that involved theft, the child was in prison until the final judgement although he has a sister (Yihenew and others vs Prosecutor, Jabi Tehnan Woreda Court, File No.0202889 (August 9, 2019).

213 Criminal Code, arts 157 with 161.

214 Ibid, art 161, para 1.

215 Ibid, art 750 (2).

216 General Comment No.35, para 5.

of the crime.[217] That means it will not be imposed on a child who commits a crime for the first time irrespective of the seriousness of the crime if he/she has no bad character or antecedent. However, lack of precision on what constitutes bad character or antecedent would make the measure fail the test. It may not necessarily mean the presence of prior conviction. In that sense, a child with a history of bad character may face this measure if he/she commits a serious crime for the first time. Interpreting the term 'antecedent' as implying prior conviction will not make corrective detention a measure of last resort, but instead, a second resort. Despite the requirement, judges that sentenced children to corrective detention have never mentioned in their judgment that children have bad character or antecedents. This makes the first resort nature of corrective detention clearer.

Further, though the imposition of corrective detention is not mandatory under Article 162 of the Criminal Code, it is not clear what measure could the court, wishing to exercise this discretion, impose on a child. The only measure that remotely relates to corrective detention is supervised education as it can be imposed for serious crimes[218] and the character of the child is a determining factor. However, the condition of the child differs. In the case of Article 159, the child is exposed to corruption, (i.e., developing a bad character (explicit in the Amharic version)) while in the case of Article 162, the child has already developed that character. The other measures (reprimand and home or school arrest) cannot apply as they are applicable for only minor crimes or crimes of small gravity[219] and curative detention applies to children in need of medical treatment.[220] Courts in the exercise of this discretion may suspend a sentence as a measure of first resort instead of sending a child to corrective centers. However, it is not clear in the law when to impose corrective detention and when to suspend imprisonment so far as the gravity of the crime is concerned.

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217 Criminal Code, art 162.

218 Ibid, art 159. The provision does not make any qualification as to the nature of the crime. What matters for the imposition a measure of supervised education is the personal characteristics of the child. Hence, it can be argued that this measure can apply for serious crimes.

219 Criminal Code, arts 160 and 161 respectively.

220 Ibid, art 158.

Therefore, failure of the laws to expressly state the last resort nature of deprivation of liberty together with the exhaustive list of mutually exclusive measures under the Criminal Code and the lack of clear demarcation between scenarios for corrective detention and suspension of a sentence would make the measure to fail the test as courts do not have other measures in their hands than corrective detention. This could make corrective detention a measure of first resort. Examination of court cases also affirmed that corrective detention is imposed on children who committed crime for the first time[221] and suspension of imprisonment is the rarest measure.[222] In practice, children were sent to corrective centers for a crime that does not warrant admission to corrective detention such as theft.[223] Moreover, admission to a rehabilitation center is a measure of first resort when the person, including a child, is found guilty of vagrancy.[224]

Imprisonment of children (one form of deprivation of liberty) on the other hand is a measure of 'last resort' though not explicitly stated. Article 166 of the Criminal Code provides that courts may impose penalties including imprisonment after the measures provided under Articles 158-162 have been applied and failed. Therefore, the plural term '*measures'* and the phrase '*have been applied and faile*d' indicate that imprisonment is a measure of last resort. That means, the court should try all available measures before imposing imprisonment on the child irrespective of the seriousness of the crime (Fisher 1970:122). Further effort in making imprisonment a measure of last resort is provided under Article 168 in that imprisonment applies

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221 Minyahil vs Prosecutor, Note 44; Yabibal vs Addis Ketema Sub City Police, File No. 282686 (February 1, 2021); Abebe vs Police, Note 43; Esayas vs Police, Note 43.

222 The researcher found only three cases. Article 171 of the Criminal Code is the most unknown provision among judges next to Article 166. When asked whether they have suspended a penalty, most judges refer to the adult provisions (arts 190-200) while few others believe that probation should not apply to children.

223 Asmare vs Police, FFIC, Bole Division, File No.137714 (March 18, 2022). Abebe vs Police, Note 43; Esayas vs Police, Note 43. The researcher also observed similar cases from the record of the Addis Ababa Rehabilitation Center.

224 Vagrancy Control Proclamation, 2004, Proclamation No.384, Federal Negarit Gazeta, 10th Year, No.19, art 10 (2). The researcher, however, did not find a case involving vagrancy.

only when the crime is serious, which is punishable with rigorous imprisonment of ten or more years or with death. Not only that the crime should be serious, but the child must also be "incorrigible and is likely to be a cause of trouble, insecurity or corruption to others." This condition further pushes imprisonment toward the principle. This is the first scenario where imprisonment shall be imposed. In practice, however, courts impose imprisonment on children who committed crime for the first time.[225]

The last resort nature of imprisonment is not known by judges. More tellingly, a judge noted that 'sentencing a child to imprisonment or not for serious crimes is personal to judges as there is no corrective center' and implied there are children below the age of 15 in prisons.[226] One judge mentioned that she sent children to prison in exceptional (serious) cases.[227] Another judge reinforced this and noted "since the other measures like supervised education and home arrest are not effective, we send children to adult prisons."[228]

Judges at the highest judicial hierarchy (the appellate and cassation division) at both the regional and federal levels are not immune from this knowledge gap. In two practical cases involving children who committed crime for the first time,[229] the regional appellate courts and the regional cassation bench in one of the cases confirmed the decision of the lower courts and only reduced the duration of the imprisonment. The Federal Supreme Court Cassation Bench[230]

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225 Fisiha vs Prosecutor, Gamo Zone High Court, Appellate File No.40765 (May 14, 2021); Abeba vs Prosecutor, Hawassa City High Court, File No.28731 (October 28, 2020); Gedefaw vs Prosecutor, Hawassa City High Court, File No.28727 (September 29, 2020); Interview with Gizachew Admassu, Judge, Gamo Zone High Court (January 15, 2022); Mekonen Balew, Judge, East Gojjam High Court (February 14, 2022); Limenih Mihretie, Defense Counsel, East Gojjam High Court (February 22, 2022); Yeshiwas Abere, Prosecutor, South Gondar Zone (August 5, 2022).

226 Interview with Bayeh Embiale, Judge, Bahir Dar and its Surrounding High Court (February 11, 2022).

227 Interview with Birkie Tilahun, Note 39.

228 Interview with Sera Chalachew , Judge, Bahir Dar Zuria *Woreda* Court (February 4, 2022).

229 Fisiha vs Prosecutor, SNNPR Supreme Court, Appellate File No.36008 (August 6, 2021); Addisu vs ANRS Prosecutor (see Addisu vs ANRS Prosecutor, Federal Supreme Court Cassation Division, File No.118130 (December 9, 2016).

230 Addisu vs ANRS Prosecutor, ibid.

then suspended the imprisonment relying on the best interest of the child, the absence of a corrective center in the region concerned, and a rule that mandates segregation of children from adults. It did not recall the last resort nature of imprisonment as enshrined under Articles 166 and 168 of the Criminal Code.

The other potential contributing factor to the breach of the principle that 'imprisonment shall be a measure of last resort' is the absence of corrective centers in the regions; Rehabilitation Center is established only in Addis Ababa. If judges comprehend the last resort nature of imprisonment and want to impose an alternative measure, corrective detention is the possible measure as it applies to serious crimes. However, the absence of such centers would force judges to imprison children. In those above-mentioned cases where children were sentenced to imprisonment, judges have never justified the imprisonment of children with the absence of corrective centers. On the contrary, the presence of corrective center on the implementation of the principle is evidenced from cases entertained in Addis Ababa. Children in Addis Ababa who committed serious crimes as defined under article 168 of the Criminal Code were sent to the rehabilitation center, not to prison.

The second scenario for imposing imprisonment, transferring a child from corrective detention to prison where his/her conduct or the danger he/she constitutes renders it necessary,[231] diminishes the last resort nature of imprisonment for two reasons. First, the transfer seems the case even before the child has served detention period fixed by the court and without trying extension of the duration or imposing stringent conditions. Second, the criterion is too general and vague, which is susceptible to misinterpretation.

Arrest, Detention, or Imprisonment for the Shortest Period

Regarding arrest and pretrial detention, the Ethiopian child justice system provides better protection as a child arrested should be brought immediately to court[232] and there is no pretrial detention.[233]

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231 Criminal Code, art 168 (2), para 2.
232 CPC, art 172 (1).
233 Ibid, art 172 (4).

In practice, however, children spend days, weeks, and even months in police stations[234] or on remand.[235] Most judges interviewed said that police do not bring children to court on the same day of arrest.[236] In this regard, one judge said that "when we ask children, they told us that they were detained in a police station for days despite the allegation of the police that they arrested them on the same day of court appearance."[237] This fact is also affirmed by children that were detained in stations for about a month.[238] Analysis of court files also shows that police brought children to court on the same day of the crime only in two cases.[239] In the rest of the cases, children were detained in the police station for one day to a couple of months before they appear in court.[240]

Further, the vagrancy control proclamation no. 384/2004 allows police to detain a person for up to 48 hours (Article 6(2)) and that a vagrant has no right to bail (Article 6(3)) as the proclamation overrides other laws including the CPC on matters covered by it (Article 14). This is exacerbated by the broad list of activities that constitutes vagrancy; many of them are related to streetism,[241] which is a typical situation for many children who committed crime in Ethiopia. The period of pretrial detention for vagrant cases, as a rule, is 38 days (28 days for investigation and 10 days for prosecution)

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234 For instance, in the case between Fitih and Akaki Kaliti Police, FFIC, Akaki Kaliti Division, File No.102046, the child was in pretrial detention for seven months (excluding Pagume) while in the case between Abinu and Prosecutor, Arba Minch City First Instance Court, File No.30419 and Ayele and Prosecutor, Gamo Zone High Court, File No.40547, the children were in detention for five and six months respectively excluding Pagume.

235 Interview with Kidane, Note 46 and Belete, Note 46 where Kidane was on remand for four months while Belete was for nine months.

236 Emphasis added and the practice is gauged against this parameter instead of the literal meaning of the term could imply.

237 Interview with Bayeh Embiale, Note 60.

238 Interview with Addis, a Child suspected of theft, Federal First Instance Court, Yeka Division (May 17, 2022); Tamir, Parent, Federal First Instance Court, Lideta Division (July 7, 2022).

239 Biruk vs Yeka Sub City Police, FFIC, Yeka Division, File No.176877 (2022); Rahel vs Police, FFIC, Note 43.

240 The cases analyzed arose in the cities and, hence, remoteness of the area cannot be a justification.

241 See for instance Article 4 (4), (6), (8), (10).

(Article 7(1) and 8(1) respectively). This fails to comply with the 30 days recommended by the CRC Committee.[242]

A measure for the treatment (admission to a curative institution) shall for such time as is deemed necessary by the medical authority and may continue until the child attains 18 years old.[243] The justification is the inability of the court to fix the duration as the measure is dependent on the personal circumstances of the child such as mental state and addictions. The court cannot reasonably forecast when the measures will address the root causes of criminality. The measure shall continue until the authority deems it achieved its purpose and apply to the court for variation[244] or until the child attains 18 years of age. This will subject a child to unsupervised prolonged detention. This is because the code does not entrust the court with the power to supervise the enforcement of the measures or review them except that it authorizes the same to vary the orders upon the recommendation of the management of the institutions.[245] This risk can be eased to some extent by Article 180 of the CPC, which allows the court to vary the order on its initiation. However, this provision is not a guarantee unless the law specifically mandates the court to supervise the enforcement of these measures by, for instance, requiring the supervising authorities to report regularly the status of the child under their mandate.

The duration of corrective detention shall not be less than 1 and exceed 5 years.[246] Hence, the maximum period to be served in corrective detention is 5 years unless the child is released conditionally[247] or varied and reduced by the court under Article 163 of the Criminal Code and/or Article 180 of the CPC. Given that this measure applies to 'serious crimes' (Amharic version) including those stated

242 CRC Committee, General Comment No.24, para 90.
243 Criminal Code, art 163 (1).
244 This is more explicit in the Amharic version of Article 164 (1), para 2.
245 Ibid, art 164.
246 Ibid, art 163 (2).
247 Ibid, para 3.

under Article 168 of the Criminal Code,[248] the period of corrective detention can be considered the 'shortest' period and complies with the principle as enshrined under the CRC. Nonetheless, in reality, the duration extends beyond the maximum length stated in the Code.[249]

Article 161 of the Criminal Code requires the court to determine the duration of the restraint in a manner appropriate to the circumstances of the case and the degree of gravity of the crime committed. It is difficult to envision why the law failed to fix the duration while it does so for corrective detention. Nonetheless, at least home arrest shall be for the shortest period as it deprives a child of his/her liberty. Hence, as this measure applies to 'crimes of small gravity', and the maximum duration of corrective detention is 5 years, it is possible to argue that the maximum duration of home arrest shall be lower than 5 years. Regardless, leaving the duration open will invite variation in terms of the time fixed by the court and may fail the test of the 'shortest period'. In one case where a child is sentenced to this measure for a crime punishable with simple imprisonment of up to 5 years, the court fixed the duration to 4 years,[250] while another court fixed it to 1 year for a crime punishable up to 10 years of rigorous imprisonment.[251] Apart from the discrepancy and stark contrast, 4 years of home arrest is not the shortest period.

The period of imprisonment under Article 168(2) of the Criminal Code shall not be for less than 1 year and may extend to 10 years. This complies with the principle of 'imprisonment for the shortest period'. Full compliance with this principle requires courts to proportionately convert the actual penalty stated under Article 168(1) to the one provided under Article 168(2). That is, 1 year imprisonment shall be imposed for crimes punishable with 10 years

248 Though the Code does not define the seriousness of the crime, this author argues that the seriousness shall include the ones stated under Article 168 as corrective detention deprives the liberty of the child and, at least, it must apply for serious crime to allay its being a measure of first resort.

249 The author observed duration up to 17 years from the record of the Addis Ababa Rehabilitation Center.

250 Kibrom vs Prosecutor, Hawassa City High Court, File No.31809 (February 10, 2022).

251 Abdu vs Bole Police, FFIC, Bole Division, File No 134712 (March 16, 2022).

of rigorous imprisonment and the duration shall increase when the penalty increases and the maximum period of 10 years shall be for crimes punishable with death. The article was not able to gauge the practice in light of this caveat as almost all judges that sentenced children to imprisonment did not do that based on Article 168; they fix the duration as per the provision violated.[252] The one judge that relied on Article 168 did not first determine the actual penalty (after taking aggravating and mitigating circumstances) and convert it accordingly. He rather, relied on the penalty stated under the provision violated, which is from 13 years to 25 years and sentenced the child to 10 years imprisonment.[253]

Another effort towards this principle is the recognition of the conditional release of detained or imprisoned children. A child serving a measure of corrective detention[254] or a penalty of imprisonment[255] can be released conditionally if the requirements of the law are fulfilled. Thus, a child may be released after he/she has served one year of corrective detention.[256] The precondition of serving one year is favorable to children in some respect compared to adult cases where two-thirds of the imprisonment must be served.[257] On the other side, fixing minimum period of one year may also have negative repercussions. For instance, a child sentenced to one year detention may not be released conditionally although the requirements set down under Article 202 are fulfilled.

Regarding conditional release from prison, Article 168(3) of the Criminal Code simply cross-refers to Article 113, which again cross-refers to Article 202. This in other words means that there is no special privilege accorded to children and that the ordinary rules applicable to adults apply to children. For instance, a child has to serve two-thirds of the imprisonment before being conditionally released even though his/her behavior significantly improve and warrants that he/she will be of good conduct when released.

252 Abeba vs Prosecutor, Note 59; Gedefaw vs Prosecutor, Note 59.
253 Fisiha vs Prosecutor, Note 59.
254 Criminal Code, art163 (2).
255 Ibid, art168 (3).
256 Ibid, art 163 (2), para 3.
257 Ibid, art 202.

This position can be challenged by virtue of the principle of 'imprisonment for the shortest period' and the negative effect of imprisonment on children.

Conclusion

Examination of the Ethiopian child justice system shows that arrest of a child is not a measure of last resort and is also arbitrary as every complainant is allowed to arrest a child and is made without warrant in warrantable cases. The principle 'deprivation of liberty as a measure of last resort' is not stated in the Ethiopian child justice system. Further, police custody and pretrial detention are not allowed in the Ethiopian child justice system for non-vagrant cases. The practice is not in line with the CPC and children were detained in police stations and remand homes/prisons for days to months pending the disposition of their cases. Deprivation of liberty as a punishment is not also a measure of last resort as home arrest and corrective detention are measures of first resort. Imprisonment on the other hand is a measure of last resort in the law, which shall be imposed after the failure of the measures but not in practice.

Deprivation of liberty in the Ethiopian child justice system is not fully compliant with the principle of 'shortest period'. This is because curative detention is enforced without court supervision and will cease if the management of the curative center believes that it attains its goal. This will subject the child to unsupervised prolonged detention. The fact that the duration of home or school arrest is not fixed in the Code invited prolonged detention of a child as a result of the lack of a uniform standard to determine the duration. Though the duration of corrective detention may be normatively compliant with the principle, in practice, courts sentence children to a lengthy period beyond the maximum period provided in the law. The same is true about imprisonment. Though the maximum duration of imprisonment is 10 years, in practice a child is sentenced to 20 years.[258] A special (lower) threshold of served sentence is not accorded to children for conditional release from prison. Hence, the Ethiopian child justice system needs normative revision and

[258] Gedefaw vs Prosecutor, Note 59.

practical reconsideration to ensure that deprivation of liberty of a child is a measure of last resort and for the shortest period.

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Inter-Country Adoption of Ethiopian Children by Foreigners of Ethiopian Origin: Best Interests of the Child at Crossroads

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Abstract

*A*doption is an age-old customary practice in Ethiopia. Parallel to the customary practice, the 1960 Civil Code and then the Revised Federal Family Code gave legal recognition to both domestic and inter-country adoption. However, in 2018, the House of Peoples' Representatives issued Proclamation No. 1070/2018 amending the Revised Federal Family Code, which banned inter-country adoption. In 2020, the Federal Supreme Court Cassation Division Bench gave an interpretation to the ban as not applicable to foreigners of Ethiopian origin. Further, in another recent decision, the Court extended the interpretation as not applicable to foreigners who are adopting their Ethiopian spouse's child(ren), introducing a new approach of relative inter-country adoption. Following, this article examines the policy choice that resulted in the ban of inter-country adoption and the *raison d'etre* of the Cassation bench's landmark decisions in light of the best interest of the child and Ethiopia's international human rights commitments. In doing so, it employs a doctrinal analytical approach focusing on case analysis. The article ends with a conclusion that, the current legal stance of the legislature and the judiciary need redirection towards a stringent assessment for permission than a blanket ban, which needs investment in institutional infrastructure and the socioeconomic aspect of domestic alternative care but is definitely respectful of children's best interests and compliant with Ethiopia's international human rights commitments.

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Keywords: *adoption, best interests of the child, child right, Gudiffacha, Ethiopia*

Introduction

Adoption, in general, refers to a type of family placement where parental duties of biological/birth parents are fully and irrevocably transferred to new parents (adoptive parents).[260] Such mechanism is deemed to provide similar family environment for children deprived of parental care. Historically, adoption served the interests of adults and not children, supporting the needs of childless couples, providing an heir or continuity of a family's lineage or for religious purposes. Today, the focus has changed into a more child-centered approach where emphasis is given to providing a home or family environment for a child rather than providing a family with a child.[261]

Inter-country adoption (ICA), also known as international adoption, can be defined as: "a practice in which children in a position of need, and/or in the absence of their biological parents, are sent from their country of origin to an awaiting adopting family in another country, usually in the developed world".[262] It can be considered a legal transaction in which the formal legal responsibility for a child is transferred to the adoptive parents; thereby terminating the legal status of the biological/birth parents or legal guardians and tutors. Accordingly, ICA can be perceived as a permanent alternative care resorted to after reasonable efforts[263] have been made to determine that a child cannot remain with his/her family of origin, cannot be cared for by members of the foster or adoptive family, or cannot be

260 See The Revised Family Code Proclamation, Proc. No. 213/2000, Neg. Gaz. Extra Ordinary issue, Year 6, No.1. Article 180-196.

261 See the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993.

262 By judicial decision, in both definitively severs all ties with the child's biological family and equates his/ her status to that of a biological child of the adopters. See the RFC of Ethiopia, Supra note 1, Article 181.

263 There are two steps, checking availability of alternative care at home and then assessing capacity to parenting of the adopter.

cared for in the child's country of origin in any suitable manner.[264]

As a country with a significant number of orphans and highly vulnerable children, Ethiopia has been a major sending country in ICA (Selman 2013). Data analyzed by the central authorities of 23 receiving states revealed that Ethiopia ranked third among the top 10 sending countries for inter-country adoption between 2004 and 2013 (Ballard et.al. 2015). Orphaned children in Ethiopia are not necessarily deprived of a family environment as the country has strong and age-old cultural coping mechanisms, where kinship care and customary adoption are known to provide family environment for such children (Bunkers, Rotabi and Benyam 2016). However, it is argued that ICA is threatening these traditions where extended families that have the responsibility of bringing up and caring for such vulnerable children are targeted to give up the children for ICA.[265] While ICA is claimed to exploit vulnerable and poor families, it is also argued to be an effective way to find permanent homes for millions of orphans, institutionalized children, and street children. Where kinship and orphanage center based alternative care options, which have been relied upon for long, are not found to be adequate to cope up with the enormously increasing number of children in need of an alternative care, ICA is seen as the unsurpassed option (Phillips 2013).

The international human rights legal regime also provides for ICA in the absence of alternative care mechanism in the country of origin. This requirement, a well-established principle known as *the principle*

264 The definition of inter-country adoption, which can be derived from the Hague Convention, is: The creation of a permanent and legal child-parent relationship between a child habitually resident in one country (State of origin) and a couple/person habitually resident in another country (receiving State). See the Hague Convention, supra note 2, Article 2.

265 Adoption statistics from the French and US embassy in Ethiopia revealed that 245 out of 392 ICA cases processed in 2009, 81 % of the adoptions were relinquishments respectively. 39% and 18% of these were relinquishments by extended family members respectively. Of these 59 % (43 from Oromia and 16 from Amhara) where the indigenous practice of *gudiffacha* is known to be strong. See Kelley McCreery et. al. (2016)

subsidiarity,[266] emphasizes that children should be raised in a family environment and remain in the care of their birth family or kinship and they could be taken for ICA placement only up on verification that the biological family and kinship group is not able to care for the child, or there is no opportunity for a domestic adoption, and that the child meets the nation's criteria (McCreery et.al. 2016).

ICA is accepted as a child protection measure and a lifesaving act by some while others oppose it owing to the fact that, it is not in the child's best interests to be removed from his/her family and community, and should be legally banned. The foremost argument for ICA relies on the moral ground, which views the practice as a humanitarian or philanthropic response to impoverished children in developing nations who do not have the means to ensure the recognition of their basic rights in their birth environment (Olsen 2004). Proponents also point out the inadequacy of orphanage and foster care facilities in sending countries as, "children abandoned, killed, left in dismal orphanages, or living on the streets bear horrific testimony to the pressing need for adoption" (Smolin 2005:281).

Through the legalization accorded to it by international human rights instruments, particularly the 1989 Convention on the Rights of the Child (CRC), the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption (Hague Convention) and the 1990 African Charter on the Rights and Welfare of the Child (ACRWC), and its formal nature, ICA is argued to provide a 'permanent' family environment in a way that informal coping mechanisms cannot. Hence, ICA is preferred over long-term foster care and other informal arrangements, which may not constitute being cared for 'in a suitable manner' serving 'the best interest of the child'.

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[266] Note that the principle of subsidiary is well established principle throughout the world that adheres and advocates for the protection of children. And hence the principle of subsidiary should be adhered to. According to the preamble to the UN Convention on the Rights of the Child, children should grow up in a family environment, in an atmosphere of happiness, love and understanding. Birth family, which may also be referred to as the biological family, consists of the birth mother, birth father and the constellation of genetically related family members that includes siblings, aunts, uncles, grandparents, etc. See, Guidelines for Action on Intercountry Adoption of Children in Africa Draft Preamble p.1.

On the other hand, opponents of ICA argue that the adoption of children of impoverished families to citizens of wealthy and powerful nations is morally unjust and only "serves the interests of those adults who want to become parents" (Bartholet 2008:151). Further, it is believed that children are best served in their own community of origin, enjoying their racial, ethnic, and cultural backgrounds. Placing children in the hands of adoptive parents, from foreign countries, who are largely dissimilar, can lead to loss of identity thus fostering an environment of potential ethnic, racial, and other forms of discrimination. The dangers of child laundering, child trafficking, and the coinciding exploitation and abuses of adopted children is also another concern (Dillion 2003).

There is a growing concern among countries and children's rights advocates as serious risks and challenges have presented themselves. The ICA system has been criticized in its entirety for having no effective means of preventing the practice from degenerating into illicit child trafficking. ICA does not in fact provide a "guarantee of permanency" when some adoptions break down. In Liberia, for example, a significant increase in the number of cases in which adoptive parents decided to terminate their relationship with the children they adopted was cited as one factor in the decision to temporarily ban ICA.

The law is instrumental in governing the procedures and dealing with the risks and controversies surrounding it. The Ethiopian legal regime has recognized ICA as an alternative for forsaken children since the adoption of the Civil Code in 1960 and explicitly regulated it under the Revised Federal Family Code (RFC), receiving both support and opposition. The opposition gained momentum especially after the catastrophic death of an Ethiopian child named Hanna Williams by her adoptive parents in the U.S. in 2011. Following, the House of Peoples' Representative banned ICA by issuing the Revised Family Code Amendment Proclamation No. 1070/2018. Regardless, in two cases, the Federal Supreme Court Cassation Division Bench (FSC Cassation Bench) interpreted the Proclamation as not prohibitive of ICA by foreigners of Ethiopian origin and foreigners adopting the children of their Ethiopian spouses by referring to the best interests

of the child. The sections below thus explore the controversies and the discontent thereof by examining the texts of the Proclamation and the interpretation of the FSC Cassation Bench decision in light of the principle of the best interest of the child and pertinent human rights norms Ethiopia is bound by.

Inter-Country Adoption and the Best Interest of the Child: Literal analysis

The principle of the best interests of the child is a notion that dates back to the 1959 declaration of the rights of the child and one of the four fundamental principles[267] guiding the realization and implementation of the CRC (Wouter and Gamze 2020). The principle is laid down in Article 3(1) of the CRC as: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The same notion is also expressed in several other provisions of the CRC. Article 9 refers to the best interest of the child in light of separation from parents while Article 20 indicates care and special protection to be accorded to a child who is deprived of his/her family environment. Article 37(3) also provides for the separation of a child prisoner from adults unless it is considered it is not in his/her best interest.

Nonetheless, the main problem in this regard is the literal meaning, the context and the contest of the phrase "*the best interest of the child*". In determining what it means to make the best interests of a child a primary consideration, it should be noted that the term is vague

[267] Fundamental principle that underpins the interpretation of the entire convention are the principles of non-discrimination, participation, and survival. The Vienna program of action links and gives equal weight to the principles of non-discrimination, best interest, survival and development and the view of the child in respect of the CRC. See office of the High commissioner for human rights, fact sheet No 10 (Rev 1), the rights of the child, http://www.unhchr.ch/htm/menu6/2/fs10/htm These principles are the anchoring principles guiding each and every rights implementation in the promotion and protection of the rights of the child.

and there is no authoritative and universal definition providing clear meaning (Wouter and Gamze 2020). In this regard, the notion is said to have issue of indeterminacy, which subjected the interests of children to be manipulated and used as a disguise for other adverse agendas (Cantwell 2014). However, the legislative history of the CRC and General Comments of the Committee on the Rights of the Child (CRC Committee) provide guidance on how States are to implement the principle as per their obligations under article 3(1) and the convention in general. In this regard, the following key points should be taken into consideration.

First, children's interest needs to be *a primary consideration*.[268] This shows that determination of the best interests of a child is evaluated by several factors and balancing different competing interests. The CRC Committee has emphasized the principle is dynamic and flexible and that any assessment of a child's best interests must be individualized (Tobin year?). In addition, when balancing different interests, state parties have to be willing to prioritize children's interests as a rule, especially in cases of actions with patent effects on the children in question.[269] By requiring the interests of children to be prioritized, the CRC is the only treaty requiring interests of a particular group to be treated as a primary consideration (Tobin year?). States have, therefore, granted a special status to children's interests and this supports the idea that in the event of equivalency between competing interests, those of children's interests should prevail (Ibid). Second, the principle of the best interests of the child is to be applied as a fundamental interpretative legal principle, guiding the interpretation of legal provisions towards the choice that most effectively serves the child's best interests.[270] Third, in all matters affecting children, assessing possible impacts on how and why the final decision is respectful of the child's best interests should

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268 The 1980 working group text had referred to the best interests to be *"the paramount consideration"* but this phrase was changed as several states considered it to be too broad due to concerns that the competing interests of other parties may be at least as important as or more important than children's best interests. Similarly, the formulation of the children's best interest being the primary consideration was rejected in favor of the less decisive wording, *'a primary consideration'*.

269 CRC General Comment 14 and CRC Article 1 para. 3.

270 See CRC General Comment 14.

become an integral part of the decision-making process.[271] Finally, the best interests of the child is substantive right on its own.[272]

The obligation to make children's best interests a primary consideration applies to both public and private bodies and parents as well. The application of children's best interests as a primary consideration and the balancing of competing interests therefrom is based on predictions about the impacts of present decisions on children's futures, which is necessarily speculative (Tobin year?). While states and parents enjoy the margin of discretion with respect to the determination of their children's best interests, future impacts of current decisions and balancing competing interests for the case of ICA, however, receives a relatively clearer parameter under the CRC and AWCRC (Ibid). Article 21 of the CRC provides;

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall; […] (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. (emphasis added).

Similarly, article 24 adoption of the ACWRC provides;

> State Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall: […] (b) recognize that inter-country adoption *in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's* care, if the child cannot be placed in a foster or an adoptive family or *cannot in any suitable manner be cared for in the child's country of origin* (emphasis added)

[271] Ibid
[272] bid

Both instruments have narrowed down the margin of determination of the future impacts of ICA on adopted children, which is considered only where there is no suitable alternative means of childcare in the child's country of origin.

It is also important to note that the CRC articulates a stronger obligation of protection in that a child's best interest must be *'the paramount consideration'* in the case of adoption, a term that was rejected as being too decisive to be a general norm/rule under Article 3. This shows that a strong emphasis is given to the best interests of the child as trumping all other competing interests in the case of ICA. The ACRWC provides for a peculiar safeguard by requiring a child should not be placed in a country outside the ambit of the CRC or the ACRWC by way of inter-country adoption.

Both the CRC (Article 20(3)) and the ACWRC (Article 25(3)) also requires best interests should be balanced with continuity in the child's upbringing and in due considerations of the child's ethnic, religious or linguistic background. The instruments therefore call for ICA as a last resort, entrenching the principle of subsidiarity. The Hague convention also discourages ICA, however ensures that where such adoptions take place, it will be regulated to secure the best interests of the child concerned while respecting his or her fundamental rights (Article 1(A)) (Trynie 2010). This principle of subsidiarity, however, should be applied in the context of the best interest principle and should not lead to rigid administrative practices (Ibid).

To enable the successful operation of the subsidiarity principle, responsible bodies processing ICA must be capable of exploring domestic solutions and alternative care in the child's home country (Trynie 2010). Further to ensure subsidiarity in the process of ICA, applying the best interest of the adopted child as '*the paramount consideration*' demands the final decision and the entire process of ICA to be directed at the enhancement of the growth and development of the child. The interest, in this regard, include, but is not limited to, the capacity of the adopter to parent. Therefore, ICA cannot be considered against the best interest of the child principle. Even though the concern over ICA was in the international arena, the

regulation of it through the legal and policy mechanisms emerged late in the late 1980s.[273]

The Legal and Policy Framework of Inter-Country Adoption in Ethiopia

The CRC, ACRWC, the Federal Democratic Republic of Ethiopia Constitution, the RFC, Proclamation No 1070/2018, the FSC Cassation decisions and the 2017 National Children's Policy are the major legislative and policy frameworks regulating adoption in Ethiopia. The section below discusses the interplay of these legal and policy documents in light of the principle of the best interests of the child.

The Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child

Article 20 of the CRC provides that state parties "shall provide special protection and assistance to children who no longer have a family or who are temporarily deprived of their family". These children have the right to alternative care, provided by the state. Article 20 lists four possible types of alternative care: foster care, *kafalah* (a form of open adoption recognized in Islamic law),[274] adoption, or placement in a suitable institution when other options are not available. Both Article 24 of the ACRWC and Article 21 of the CRC explicitly declare that the best interests of the child should be '*the paramount consideration*' in any adoption procedure. Furthermore, the article provides that ICA may only be considered "as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

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273 In this regard, it could be emphasized that the first leap that was taken to protect the best interest of the child in time of adoption was in 1997 World Conference on Adoption and Foster Placement. Following on this conference, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was drafted and subsequently adopted by the UN General Assembly in 1986. See UN General Assembly, A/RES/41/85, 3 December 1986.

274 See for more, Assim, Usang Maria, (2009), In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option.

Laying the normative base, the CRC requires that the best interests of the child be "the paramount consideration" in any adoption decision and sets the principle of ICA as subsidiary to all suitable domestic solutions to the child's situation. While echoing, for the most part, the wording of the CRC, Article 24 of the African charter demonstrates a more peculiar approach in obliging states to "establish a machinery to monitor the wellbeing of the adopted child" once he/she is in the receiving country. The Hague convention,[275] on the other hand, sets out principally

> to establish safeguards to ensure that ICA takes place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law, […] to establish a system of cooperation among contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.

It is thus designed to build upon the basic obligations enshrined in the CRC by putting in place guarantees, procedures and mechanisms that facilitate states, individual and collective compliance with those obligations. It thus sets minimum standards for ICA on the basis of a number of principles.[276]

The Federal Democratic Republic of Ethiopia Constitution

The FDRE Constitution under Article 9(4) states, "all international agreements ratified by Ethiopia are an integral part of the law of the land". In this regard, the provisions of the CRC and ACRWC, regarding ICA are an integral part of the laws of Ethiopia. The Constitution is by far an advanced document when it comes to the right of a child. In addition to its mechanism of incorporating

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275 Ethiopia is not a state party to the convention but it could provide interpretative guide for the CRC implementation.

276 See, in this regard CRC Committee General Comment No. 6

the international human rights instruments,[277] it also dedicated a specific provision to extend its protection to the rights of children.[278] Under Article 36, it provides protection to the rights of the child by the right to know and be cared for by their parents. In addition, the Constitution under Article 36 obliges the government to provide an alternative means of care and allocate resources to facilitate rehabilitation and assistance to children who are left without parents or guardian under Article 41(5). More importantly it specifically incorporates the phrase 'best interest of the child', stating: "in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child". The Constitution addresses the principle of the 'best interest of the child' by calling for 'primary consideration' than 'a primary consideration' in decisions affecting children.

The Revised Federal Family Code

The RFC designates the father and mother of the child as the primary care takers. In the absence of parents, the RFC gives the responsibility to guardians and tutors. In its provisions governing adoptive filiation (Articles 180-196), the RFC recognizes both domestic and ICA while putting stringent precautionary requirements for the latter.

> *Article 193. — Where the Adopter is a Foreigner.*
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> 1) Where the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the wellbeing of children, after collecting and

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277 FDRE Constitution Article 9 (4) makes all international human rights documents that the country adopted the integral part of the law of the land. And hence, the child right documents that were adopted by the country are now the integral part of the law of the land-both the CRC and the ACRWC. It has ratified the CRC on 14 May 1991 without any reservation and it was proclaimed by Parliament on 19 January 1992. Following the ratification, the statement of accession was published in 1992 in the Negarit Gazeta, which was the official law gazette of the then existing Government, and made its first initial report in 1995, and the second report 1998, and the third in 2005, and its latest and combined 4th and 5th Periodic report in April 2012. Ethiopia also became a party to the ACRWC, after it accede it on 2 October 2002. 2001.

278 The FDRE Constitution, Article 36 (5)

analyzing relevant information about the personal, social and economic position of the adopter, gives its opinion that the agreement is beneficial to the child.

2) Notwithstanding the provisions of Sub-Art. (1) of this Article, where the court thinks that the agreement is not beneficial to the child, it may disregard the opinion of the authority and reject the agreement.

3) Where the court finds that the information provided by the concerned authority is insufficient, it may order the authority to conduct further investigation and submit additional information. It may also order other individuals or organizations to provide any relevant information in their possession or to give testimony.

Article 194. — Power of the Court.

1) An agreement of adoption shall be of no effect unless it is approved by the court.

2) Before approving the agreement of adoption, the court shall decisively verify that the adoption is to the best interest of the child.

3) Without prejudice to the provisions of Articles 192, 193 and Sub-Art. (2) of this Article, the court, before approving the agreement of adoption, shall take the following into consideration:

(a) the opinion of the child about the adoption,

(b) the opinion of the guardian or tutor of the child if he has not previously given his consent;

(c) The capability of the adopter to raise and take care of the child;

d) *where the adopter is a foreigner, the absence of access to raise the child in Ethiopia*; (emphasis added)

e) the availability of information which will enable

the court to know that the adopter will handle the adopted child as his own child and will not abuse him.[279]

4) The court shall take special care in investigating the conditions provided in

Sub-Art. (3) (e) of this Article, where the adopter is a foreigner.

The RFC echoes the ACWRC and CRC's stance that ICA should be a last resort. It also bestows the ultimate decision to the courts notwithstanding concerned administrative bodies' opinion on the benefits of ICA in a given case; courts verify that adoption is to the best interest of the child and may disregard ICA agreements that are otherwise recommended by the concerned administrative bodies. However, these provisions of the RFC are now repealed by proclamation 1070/2018, which also in effect repeals the specific sections of alternative childcare guideline of 2009 that deals with ICA "in order to harmonize the RFC with the National Child Policy".[280]

The Revised Family Code (Amendment) Proclamation No. 1070/2018: The Bases for Exclusionary Approach

The 2017 National Child Policy with which the RFC is sought to be harmonized through Proclamation 1070/2018 provides as;

> Children separated from their family temporarily or permanently for various reasons are receiving different care and support services through the expansion of domestic alternative care options. ICA was one alternative child care option, though in addition to not fully compensating for the love and care the children

[279] This assessment shall include cautious verification of availability of legal frameworks that protect the child and enable his/her treatment as one's own child in the foreign adopter's country. See RFC's Hateta ze mikniyat p. 50. Such approach is in line with the ACRWC's stipulation that ICA should happen where the adopter's country is either in the CRC's or ACWRC's scope of application

[280] See preamble of the Revised Family Code (Amendment) Proclamation No. 1070/2018, Neg Gaz., Neg Gaz.,24th year, No 26.

> have missed in their natural homes, there is a downside of children experiencing identity crisis and other problems that will affect them psychologically and socially. It is *advisable* to support orphan and vulnerable children only through domestic alternative care options instead of pursuing the option of ICA.[281] (emphasis added)

In dealing with children in difficult circumstances, the policy recognizes government's efforts in alleviating vulnerability as a result of loss of parents but success has not been achieved at the desired pace.[282] The question then is, where there is no such success of strong domestic alternative care, who takes the responsibility for the children?

The proclamation banned ICA to enable children to be raised in their own culture, saving them from identity crisis as provided in the National Child Policy. Yet, this extended presumption only works where there is enabling environment in the domestic arena, availability and adequacy of domestic alternatives for significant number of forsaken children, while due consideration to the child's ethnic and linguistic background and maintaining domestic adoption in this regard is in line with the requirements of ACWRC and CRC. It is, however, not a sole factor to consider ICA. Such a ban is also not cogent as it is wrongly premised on homogeneity of Ethiopian society. Otherwise, domestic adoptions should raise a concern for children's identity crisis since Ethiopia is a multi-cultural, multi-religious and multi-ethnic country.

Compatibility of the Supreme Court's Decisions: Problematizing the Paradox?

In the process of the ICA, the courts play a paramount role to make sure that the best interest of the child is guaranteed. All actions of the judiciary need to be in line with the four fundamental CRC principles. However, in most cases the courts only take into consideration the absence of option for national adoption.

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281 See FDRE National Child Policy, April 2017, Section 1.1.5 page 7.

282 Ibid Section 1.1.6, page 9.

In Ato Wondossen Tadesse Yisma et. al. case the court reasoned that the diaspora proclamation allows foreigners of Ethiopian origin to actively take part in the country's concern and the RFC amendment proclamation, which bans ICA, has no intention of excluding them from such benefits although the minute of the proclamation had not raised issues in that aspect and direction. Further, in the W/ro. Arsema Elias et.al case, the court interpreted the proclamation as not applicable to a foreigner who adopts his Ethiopian wife's child. In doing so, the court held that the proclamation has not been intended to ban foreigners who adopt their spouse's children, thereby introducing a new approach called "relative inter-country adoption".

Thus, in the above two cases, where the applicants challenged the banning of ICA on the ground of similar origin, it seized the opportunity to equate foreigners of Ethiopian origin with Ethiopians reasoning that they have similar culture and social outlook with the adopted child citing the diaspora proclamation-assimilative approach.

In Wondossen Tadesse Yisma et. al. and Arsema Elias et. al., the FSC Cassation bench interpretatively sets an exception to the ban as follows. In Wondossen Tadesse Yisma et. al, (File No 189201, March 11, 2020), the application was filed by parents to have their daughter adopted by her maternal aunt who is an Ethiopian born American citizen. The lower courts rejected the application stating that the new proclamation 1070/2010 had intentionally left out Ethiopian born foreigners from its ban on the basis of the National Child Policy, which is designed with a view to enable children maintain their Ethiopian (surrounding's) culture, and social values, despite the country's exceptional treatment of such foreigners in other social, administrative and economic affairs.[283] The applicants argued the adopter has been supporting the child throughout her life and wants to take her as per the 'culture' and has indicated in all forms at her country of citizenship that the child is hers.[284] The FSC

283 See FSC File No. 189201, Para 1.
284 Ibid Para 2.

cassation court framed the issue of including or excluding foreigners of Ethiopian origins in the ICA ban in light of Proclamation 270/1994 that state governing benefits accorded to the Ethiopian diaspora (Articles 3, 5 and 6). It reasoned that the formulation of the benefits accorded and restrictions placed on the Ethiopian diaspora under the proclamation is indicative that the lists of rights and restrictions are not exhaustive.[285] Hence, it would be inappropriate to consider that they be treated as other foreigners[286] provided that foreigners of Ethiopian origin are given responsibility for Ethiopia's growth and prosperity because their birth place is Ethiopia and its people are their people.[287] The court then stated that prohibiting foreigners of Ethiopian origin from adopting their relatives by consanguinity is a result of not comprehending the responsibilities bestowed upon the Ethiopian diaspora.[288]

As per the court's analysis, the difference between Ethiopian born diaspora and Ethiopian children is only that of citizenship; they have common culture and identity and should not be assumed to have desire/tendency to change the children's identity. Noting that the adopter, being the aunt of the child, has been providing while she has no legal obligation and had her registered as her own child in the US, the court stated that this reveals she has respect for the Ethiopian culture of supporting each other "የመረዳዳት ባህል". Having common cultural background, being a relative by consanguinity, and living in the USA where there are many Ethiopians or Ethiopian born people, the child can grow in a conducive environment without relinquishing her Ethiopian identity.[289] Having stated all these factors, the court rests its judgment concluding that the lower courts have committed a basic error of law by not realizing the role of the diaspora in Ethiopia's growth and prosperity and improving

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285 This interpretation is however contradictory to the legislature's intent, which is to completely ban ICA. See The Federal Democratic Republic of Ethiopia, the 5th House of Peoples' representatives, the 3rd year tenure, 2nd regular meeting, unpublished Minute, the FDRE parliament's library.

286 See FSC File No. 189201, Para 8

287 Ibid

288 Ibid

289 Ibid

the lives of their fellow Ethiopians and not making the child's best interest a primary consideration.[290]

While the final decision creates an exception for foreigners of Ethiopian origin subject to evaluation by the lower courts that the criteria for adoption are fulfilled by the applicants, the reasoning and implementation of the decision are problematic for different reasons.[291] The first problem in this regard is, the basis and criteria for assessment by lower courts. Where the sections of the proclamation providing guideline are repealed and the amendment proclamation failed to formulate the ban in a clear legislative text, instead of providing the relevant provisions are repealed, it would be important to clearly provide how the lower courts committed a basic error of law and how they shall interpret the proclamation. The court's reasoning also falls short of making the best interests of the child at the center of analysis and the paramount consideration in the courts interpretative endeavor. Framing the issue as to whether or not the Ethiopian diaspora is eligible to adopt pays little regard to the interests of children and rather promotes the best interests of the diaspora falling short of making the final decision respectful of children's interests as required under Ethiopia's international obligations. Cultural similarity of the adopter and adoptee are only a piece of the puzzle in evaluating ICA in light of the best interests of the child.

The argument based on citizenship also does not hold water for different reasons, at least theoretically. From the perspective of state's obligation, to ensure children's wellbeing and best interests, a child adopted by a foreigner residing in Ethiopia could be argued to be in a better situation of 'safety' than a child adopted by an Ethiopian diaspora living in the US, a non-state party to the CRC, by the mere fact that the state has a better vantage point to ensure the rights of children in its territory.

290 Ibid

291 The cassation bench returned the case to the lower courts to make an assessment of the adopter's capacity and fulfillment of the legal criteria

Further, in the W/ro. Arsema Elias et.al case (File No 215383, May 30, 2022), the court interpreted the proclamation as not applicable to a foreigner who adopts his Ethiopian spouse's child. The court, in doing so, held that the proclamation has not been intended to ban a foreigner who adopts his wife's child recognizing 'relative inter-country adoption'.[292] While the decision of the court might have been able to exert a strong signal, its seemingly proactive effort in protecting the rights of the child from different considerations deserves commendation. Indeed, the jurisprudence emanating from the cassation court can be of great importance to the judicial organ of the government in the interpretation of the rights of the child in respect of ICA. However, it did not take into consideration the best interest of the child in the deliberation. Central to any case is the arduous task of analyzing the key principle 'the best interest of the child'. The exclusion of the Ethiopian diaspora and foreigners married to Ethiopians does not solve the problem created by the legislature, except problematizing the already existing paradox.

Conclusion

The adoption of the Revised Family Code Amendment Proclamation No. 1070/2018 affirms Ethiopia's government position of the need to ban the practice of ICA. Significantly, however, the adoption of the proclamation has not totally precluded ICA with the particular socio-cultural considerations of the diverse actors, which have subscribed to its normative framework. The call for abandoning the practice has been justified in terms of the social and cultural diversity between the child and the adapting parents, but not in the best interest of the child.

It has been argued that an approach, which is a solution to these differences, infuses legitimacy to the ban and therefore efficacy to

[292] Relative adoption refers to situations in which a stepparent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely noncontroversial: children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting in a generous and caring manner by taking on the responsibility for these children.

the whole institutional arrangement of ICA. The practice of ICA is expected to be in line with the internationally accepted principles and standards. The defining character of ICA as an alternative care system is its being the last resort. The corollary of this is that a rule or norm, which does not command adequate legitimacy, will not enjoy sufficient observance or support. However, the National child Policy's stance on ICA should be construed as a call for strengthening domestic alternative care system that would eventually abolish ICA and not a demand for its immediate ban without providing strong suitable alternative in the child's country of origin.

In the context of ensuring the best interest of the child, the desire for appropriate and full protection has called for a rigorous measure (including repealing the new proclamation and reinstating the previous family law provisions), not only founded upon adoption of laws, but also strict post adoption follow-up. This approach decries the trumping of ensuring the best interest of the child in favor of protecting the rights of the child. However, the call for a distinctively child friendly approach to the implementation of the rights of a child call into question some practices, which impact negatively on the rights of the forsaken child. The challenge, therefore, is how to guarantee the rights of children adequately while at the same time ensuring illicit ICA practices are not protected under the guise of the best interest of the child.

This article suggests that the success of ensuring the best interest of the child in the context of ICA depends to a large extent on the level of the pre and post adoption follow-ups by the appropriate organs, rather than banning or allowing the practice via legislation, which is against the four fundamental principles of the CRC, mainly of the best interest of the child. It demonstrates that the best interest of the child is a paramount consideration in the process of ICA. It argues the ban and exclusion of foreign adopters of Ethiopian origin, rooted in various sociopolitical and cultural justifications, is not as centered on the principle of the best interest of the child as required of Ethiopia under its international human rights obligations.

However, the exclusion of the ban for foreigners of Ethiopian origin will in some cases be similar with other foreigners, which

could have enjoyed the privilege but are incompatible with the general principles of the international and regional children rights standards. It is therefore suggested that the general privilege accorded to foreigners of Ethiopian origin should be invoked in order to revoke the legitimacy of these discriminatory practices that go against the best interest of the child. This approach calls for a two-stage process: first repealing the proclamation and making it compatible with CRC and ACRWC; and secondly, reinstating the repealed RFC provisions specifically article 193 and 194.

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Socio-cultural and Religious Framings on Marriageable Age in Amhara Regional State

Yitaktu Tibebu, Meron Zeleke and Wouter Vandenhole[293]

Abstract

Existing literature shows the social perception attached to child marriage is often conflicting with the legal definition. This insight holds the dichotomized view of layering contestation in two levels: the internal community against the external norm change agents of the state and non-state actors. Accordingly, this article attempts to identify the gap in research by exploring and documenting the internal contestation among local key norm holders on their understanding of marriageable age. By taking a closer look at how religious leaders, community elders, parents, and adolescent girls and boys in Kuwarit *woreda* of Amhara Regional State comprehend marriage and girls' marriageable age, the article unpacks the translation of the globally defined girls' marriageable age to a local context. After exploring the international laws vis-à-vis local social norms, the article presented competing and changing local considerations and framings on the age of marriage for girls and their justification. It, then, argues rectifying the fears of local norm holders in relation to delaying girls' marriage until legally accepted age is important and necessary by understanding the socio-cultural and religious framing of girls' marriage.

Keywords*: child Marriage, marriageable age, Ethiopia*

Introduction

Legislation on age of marriage dates back to the 1948 Universal Declaration of Human Rights (UDHR),[294] where, under Article 16,

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[294] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

it sets the foundation for what constitutes 'full age' to start a family when there is 'free and full consent.'[295] It was then followed by the Convention on the Abolition of Slavery, which implicitly prohibited child marriage, considering it as an institution or a practice alike slavery. The Convention requested state parties to abolish parental arranged marriages for the sole purpose of getting dowry, undertaken against the will of a bride.[296] It is essential to highlight both documents do not explicitly mention the minimum age of marriage.[297] It was in the Convention on the Consent to Marriage, Minimum age of Marriage, and Registration of Marriage that child marriage was broadly and explicitly addressed.[298] The Convention on the Consent to Marriage, Minimum age of Marriage, and Registration of Marriage required member states to set protective minimum age and denounce the betrothal and subsequent marriage of children as void.[299] It also requested member states to abolish customs inconsistent with the Convention's provisions.[300] In addition, the 1965 recommendation on Consent to Marriage, Minimum age of Marriage, and Registration of Marriage,[301] though a non-binding instrument, recommended the minimum age of marriage to be 15 with an exception clause.[302]

Many subsequent relevant legislations such as the 1979 Convention for the Elimination of All Forms of Discrimination against Women

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295 Providing free and full consent entails 'non-coercive agreement to the marriage with a full understanding of the consequences of giving consent,' see (ACHPR and ACERWC 2017: 5)

296 See UN Economic and Social Council (ECOSOC), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, Article 1 (C) (i); See also (Gaffney-Rays 2011)

297 Supra note 2.

298 UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962 (the Convention has 16 state signatories, but not signed by Ethiopia)

299 Ibid at Article 2

300 Ibid

301 See UN General Assembly, Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1 November 1965, See Principle II

302 The convention stipulates a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

(CEDAW)[303] outlaws the betrothal and marriage of a child but do not specify acceptable minimum age of marriage.[304] Later in 1989, it was the United Nations Convention on the Rights of the Child (CRC)[305] that provided the definition.[306] The CRC and CEDAW committees jointly requested states to set 18 as the minimum age of marriage, for both boys and girls.[307]

The African Human rights instruments also set the age limit for marriage as 18.[308] Unlike the 'flexible' global legal regime set by CRC, legislation against child marriage in the continent follow a 'strict' or no exception clause.[309] Regardless, the minimum age of marriage for girls is below 18 in eleven African countries.[310] Most of these countries have different legal standards for boys and girls, which is discriminatory. For example, girls can marry at 15 but boys at 18 in Niger, Republic of Congo (DRC), Cameroon, Gabon,

303 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 1

304 See CEDAW Article 16(2), which reads: "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

305 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577

306 CRC defined child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." See CRC, Article 1.

307 UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, Joint General Recommendation No. 31 (2014): The Committee on the Elimination of Discrimination against women/ General Comment NO. 18 of the Committee on the Rights of the Child (2019) on Harmful Practices, 8 May 2014

308 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November 2005, Article 6 (a) and (b); See also The African Charter on the Right and Welfare of the Child, Article 21(2); The Addis Ababa Declaration on Ending Child Marriage in Africa, 23rd session of the African Committee of Experts, 11 April 2014.

309 The SADAC Protocol on Gender and Development provisions is an exception. It reiterates the free and full consent and 18 years minimum age requirements but provides a legal loophole for lowering the age, considering the best interest and welfare of children's requirement.

310 See (ACPF and Plan 2019 : 69)

Seychelles, and Tanzania. In Senegal, the minimum age is 16 for girls and 18 for boys, while in Burkina Faso it is 17 for girls and 20 for boys. Sudan has the lowest legal age of marriage at 10 for girls and 15 for boys. It is Guinea-Bissau and Zambia that have the same minimum age of 16 for both girls and boys.

Nevertheless, the existing exceptions in domestic laws based on parental consent, socio-cultural and religious reasons create a loophole for underage marriage practices to persist. The decision of the African Court on Human and Peoples' Rights against Mali clearly evidence these grounds shall not be taken as a force majeure defence to relieve the State from complying with its obligations on international marriageable age of 18.[311] However, African countries still top the list in the world's highest rates of child marriage; 18 out of the 20 countries are from the continent.[312]

In Ethiopia, the Constitution denounces child marriage as a 'harmful' practice[313] and a crime under the criminal code,[314] with the existing comprehensive protection accorded by the adopted international and regional human rights instruments such as

311 See APDF & IHRDA v Republic of Mali (046/2016) [2018] AfCHPR 15; (11 May 2018) (African Court on Human and Peoples' Rights) Decision of 11 May 2018. Republic of Mali enacted a Family law stipulating marriageable age of 18 for boys, while girls can marry by 15/16 with parental consent (of their father). During the litigation, the country has raised force majeure as a defence since the initial draft of its Family Law was changed due to wider community protests. Mali was obliged to frame girls marriageable age to fit in with Islamic law, and hence, failed to comply with the universal marriageable age of 18 and 'free and full consent' standards. However, the Court ruled against the State, with the justification that its Family Law violates the ratified provisions at the African Charter on the Rights and Welfare of the Child (see Articles1(3), 2, 3, 4 and 21); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (see Articles 2(2), 6(a) and (b), and 21(2)); and CEDAW (see Articles 5(a), 16(a) and (b)).

312 ACPF & Plan, supra note 20.

313 See Article 35 (4) of the FDRE Constitution, which guarantees that "… Customs and practices that… cause bodily or mental harms to women are prohibited."

314 Criminal Code [Ethiopia], Proclamation No. 414/2004, 9 May 2005, available at: https://www.refworld.org/docid/49216b572.html, Article 648 stipulates "who so ever concludes marriages with a minor apart from circumstances permitted by relevant family code is punishable with rigorous imprisonment not exceeding three years if the victim is 13 years or above and not exceeding seven years is she is below 13"

CEDAW, CRC, and the African Charter on the Right and Welfare of the Child (ACRWC).[315]

The Revised Family Code that came into force in 2000 raised the minimum marriageable age from 15 to 18 for girls,[316] and child marriage has been specified as voidable.[317] Nonetheless, the Ethiopian legal regime does not contain a blanket prohibition of marriage under 18, and marriage from the age of 16 is allowed under the permission of the Minister of Justice for 'serious cases'.[318]

The existing legal loophole that allows the age of marriageable age to lower to 16 was faced with counterarguments considering

315 Ethiopia signed CEDAW on 8 July 1980 and ratified it on 10 September 1981. Under Article 9 (4) of the FDRE Constitution, CEDAW has become part of the law of the land but has yet to be justiciable. Proclamation 10/1992 and Proclamation 283/2002 confirm the notices of ratification for CRC and ACRWC, respectively, without publishing the full texts of CRC and ACRWC. Under the Ethiopian legal system, judicial notice is possible when laws are published under its official law Gazetta, Federal Negarit Gazetta. Consequently, arguments are often raised on the justifiability of the treaties. Counter-arguments state that the Cassation Bench of the Federal Supreme Court renders decisions based on CRS and ACRWC, showing the gap is already addressed, and they have already become integral parts of the laws of Ethiopia. See Girmachew and Yonas (2012)

316 Ethiopia had discriminatory minimum age of marriage under the Civil Code. For establishing marriage, the man shall be 18, but the law lowered the marriageable age to 15 years for girls. See Article 581 (1), The Civil Code of Ethiopia (1960). Negarit Gazette, Proc. No. 165/1960, Year 19, No. 2.

317 Federal Negarit Gazetta of the Federal Democratic Republic of Ethiopia, The Revised Family Code Federal Negarit Gazetta, Issue number 1/2000, See Article 31(1) & (2). Hence, one cannot apply for validation after they have attained full age.

318 Indicates judicial authorization is an exception for lowering the legal marriageable age of girls in both at the Federal (see supra note 30) and Amhara Regional Family codes (see Article 18(2), Amhara National Regional Family Code, Proclamation No. 79/2003 A Proclamation to Approve the Amhara National Regional State Family Code," 2003. However, according to the in-depth interview with the justice office (AA001, April 27/22, Bahir Dar), there is no regulation for defining 'serious cause' justifying marriage to be lowered, and the justice office has made practically no decision under this article. According to an in-depth interview with AD6 (on May 27, 2022 in Addis Ababa,) the only reason that justifies emancipation is the protection of girls' rights, and no decision has been made based on this article in any case. The respondent claims that there is no practical legal gap.

'sexual consent'[319] and 'age of majority'.[320] Marriageable age[321] often coincides with the age of the majority. The age of sexual consent is not clearly defined under the Ethiopian law but can be inferred from the Criminal Code to be 18.[322] Hence, allowing 16 as marriageable age creates a legal loophole that allows statuary - rape.

Legal developments on raising or lowering girls' marriageable age and its effect on the prevalence of child marriage is an important issue to consider. Recent studies noted that the deterrence effect of the law through raising the statutory marriageable age had not helped decline the practice (Collin et.al. 2017; Batyra and Pesando 2021). Recent experiences from India and Indonesia show that "economic and cultural considerations primarily contribute to child marriages among women", regardless of raising the age of marriage.[323] Correspondingly, based on the experience of Mali, lowering the legal 'cut-off' age may also have the adverse effect of intensifying the prevalence.[324]

Despite unequivocal legal responses to outlaw the practice, the sustained prevalence of child marriage has resulted in an intense discussion among scholars (Batyra and Pesando 2021). One myriad of reasons behind the practice's persistence is that child marriage involves different and often conflicting legal and social

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319 Sexual consent refers to "the age at which a person is legally capable of agreeing to marriage (without parental consent) or to sexual intercourse. If a person over the age of consent has sexual intercourse with a person under the age of consent, the older person may be prosecuted for statutory rape re-gradeless of whether the younger person consented to the act." See Garner, B. A. (2004). Black's Law Dictionary (8th Edition). USA: Thomson West Publishing Co.

320 Age of majority refers to "the age at which a person is granted by law the rights and responsibilities of an adult." See Merriam – Webster Dictionary. https://www.merriam-webster.com/legal/age%20of%20majority accessed 22 April 2023. See also (Garner 2004). Black's Law Dictionary defines it as "the age at which a person is legally capable of agreeing to a contract, maintaining a lawsuit, or the like."

321 Marriageable age can be defined as the legally acceptable age at which one can establish a family.

322 Criminal Code, supra note 28, Article 626 (1)

323 Ibid

324 Batyra (2022) studied the impact of lowering the statutory minimum age at marriage on the incidence of girls' child marriage in Mali when the legal marriageable age was reduced from 18 to 16; the prevalence inclined from 59% to 79%.

definitions (Hodgkinson, Winny and Esther 2016). Apart from the legal definition, a closer look at what "child" and "marriage" means in different cultures is essential. Any disparity between the legal and social/or cultural definition of child marriage hinders the implementation of child marriage laws at the grass-root level. Bunting is also sceptical about the efficacy of law in defining and addressing child marriage by arguing that "a uniform marriageable age and a narrow rights-based analysis misses the complexity of marriage and age" (2015:17). She claims the importance of considering the local socio-economic contexts and the design of culturally relevant international strategies (Ibid). Accordingly, this article digs into the conceptualization of 'child', 'marriage', and 'girlhood' among the local community of Kuwarit *woreda,*[325] Amhara region, Ethiopia, and explores existing internal contestations, along with their justifications for girls' 'marriageable age'.

Study Area and Source of Data

The empirical data used in this article is gathered from the Amhara region, Kuwarit *woreda*. Due to the high prevalence of child marriage,[326] the *woreda* is identified for implementing UNICEF-UNFPA Global Program to Accelerate Action to End child marriage.[327] Kuwarit is a *woreda* with a population of 142,712 (69,507 Male, 73,205 Female) with 87% rural community, all followers of Orthodox Christianity.

The study adopts a phenomenological approach that aims to learn from the experiences of the local community in the study setting. The findings are drawn on primary data collected from March

325 *woreda* is an administrative unit in Ethiopia which has equivalent meaning with a district.

326 See "Ethiopia Demographic and Health Survey" 2016; "National Costed Roadmap to End Child Marriage and FGM/C 2020-2024 of Ethiopia Ministry of Women, Children, and Youth" 2019, p.63; Jones, Emirie, et al. 2016

327 UNICEF/UNFPA Global Program is a multi-donor (eight) and multi-stakeholder program implemented across twelve countries to end child marriage. Phase I (2016-2019) focused more on strengthening institutions, while Phase II (2020-2023) aimed to engage critical actors, support adolescent girls, engendering laws/policies, and improve evidence. It also plans to continue in the third Phase (2024-2030).

21st to April 29th 2022 through in-depth interviews involving 23 adolescents[328] (12 female), 27 parents (10 female), 5 Priests (all male), 3 community elders (all male), and 4 community facilitators (2 female).[329] Semi-structured key informant interviews were also held with 3 (all female) health extension workers, 5 (all male) school directors, 3 women gender focal teachers, and 2 women development army leaders. Besides, *woreda* and regional focal persons/experts of UNICEF and UNFPA, and government stakeholders (8 female) serving as 'harmful traditional practice' (HTP) eradication committees.[330] In addition, the findings were triangulated using 14 focus group discussions (FGDs) with community members.

Local Conceptualizations of "Marriage"

Marriage is conceptualized as a celebration,[331] source of pride,[332] a life,[333] and a milestone[334] parents must achieve before death; "*salmot leyat,"* (shows parents' strong wish to see their daughters' being married, and see grandchildren before their death.)[335] In the study area, marriage is a means by which parents become part of the happiness of their children; "*yelejen adugna ley"* [egger to see

328 WHO defines adolescence as age that ranges from 10 to 19. Accordingly, in this study, girls from 10 -13 are referred as 'young/early adolescents,' from 14 to 17 as 'middle adolescents' age, and those 18 -19 as 'late adolescents' age. See https://www.who.int/health-topics/adolescent-health

329 Community facilitators are selected by the initiative of UNICEF - UNFPA project to provide continuous awareness to eliminate harmful practices and, more importantly, child marriage in their community.

330 HTP committee comprises 15 members: Women Mobilization Lead (Chair), Youth Mobilization Lead (Vice Chair), Culture and Tourism (secretary), and representatives from Administrative Office, Education, Health, Agriculture, Justice, Police, Social Affairs, Court, Women Association, Youth Association, Government Communication, and Religious Institutions.

331 In-depth interview with CM 01 and CM 02, March 30/2022

332 In-depth interview with A04, April 1/2022, Kuwarit

333 In-depth interview with Elder 01, April 6/2022, Kuwarit; Elder 03, April 15/2022, Kuwarit

334 In-depth interview with A04, April 1/2022; 10 out of the 17 male in-depth interview Parents and Elder 01, April 6/2022, Kuwarit; Elder 03, Elder 02, April 11/2022, Kuwarit

335 FGD with 007 Girls, March 30/2022, Kuwarit; In-depth interview with A 01, April 3/2022, Kuwarit

my daughters' happiness or joy].[336] "*bet mesrat"* [being able to establish an independent livelihood by having a family and living in their own separate house] indicates marriage is a pivotal stage in leading their own life.[337] It is also a phase where they start to become independent; "*bota masyaz"* [ensuring the well-being of their daughters].[338]

Marriage is honored, and its celebration is a deep-rooted tradition adhered to by the community, involving social sanctions on those who deviate.[339] Parents have an active and vital role in fulfilling their responsibility regarding the wedding ceremony and building strong collaboration among neighbours, locally known as "*akolkuway meshome"* or "*wenfel masemelse*' [claiming back debt]. Each neighbouring family contributes 50-100 *Injera* [sourdough flatbread], three pots of '*wot'* [stew], and three containers of '*madega tella'* [local alcoholic drink].

Prior from the wedding preparation, the request for betrothal and therefore initiating marriage, locally known as *"wel meyaze,"* is a right solely given to the father of the groom;[340] the bride-to-be or her parents cannot initiate the marriage. When the couples agree to get married without the initiation by the parents, the girl is shamed by indicating "*jenjena agebache"* [she flirted him to marry her]. In this case, parents often incline to accept the marriage out of fear that the girl might run away, though this is an exceptional situation.

The betrothal recognized under Article one of the Amhara Regional family law envisages marriage promised by couples who have attained the majority. In contrast to the law, however, the local

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336 Supra note 46 - 48

337 Ibid.

338 Ibid.

339 Ibid. Those who have not celebrated marriage by inviting the neighbourhood are considered 'greedy' and belittled. Will be named as the person who has not still seen the flower/*'adugna'* (means happiness) of their child. They will be ashamed in times of social gatherings (*Idir', 'Senbete',' mahber'*)

340 The betrothal recognized under the Amhara Regional family law envisages marriage promises by a girl and a boy who have attained the majority. See Article 1. In contrast to the law, the study shows that the two parties involved in the betrothal are the marrying families.

custom shows that the two parties involved in the betrothal are the marrying families. It is a process that not only comprises of creating a marital relationship between families, but also sharing resources such as land/cattle.[341]

Adolescent girls do not worry about 'who' they marry or the quality and duration of their married life, as they see divorce as an 'easy' option.[342] On the other hand, parents are more considerate of the person their children marry to maintain family honor. Therefore, in contrast to the law,[343] the local conception of marriage puts the parents central to the decision-making process in determining age of marriage, selection of partners and providing consent. The study respondents identified that selecting the 'right' family involves many factors and depends on the interpretation of the marrying families. The informants also stated 'right' family might imply, but not limited to, marrying off their daughter's seeking wealth,[344] and even, on the contrary, to a boy who is from a low-income family but systematically for getting unpaid labor (locally known as "*kanjaye*" or "*wesenaye new*").[345] In contrast, girls are socialized to take passive roles in providing meaning and making the ultimate decision or giving informed consent. "I do not know the groom, I have not seen him before, even once. I trust my family has done the required checking because they will not push me into a miserable life", noted an adolescent girl interviewed in this study.[346] Another study informant stated, "I consented to marry the groom whom I do not know because it is a usual practice in our community."[347]

Local Definition of Marriageable Age

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341 FGD with 007 Girls, March 30/2022, Kuwarit; FGD with 005 Girls, April 18/2022, Kuwarit.

342 Noted by 5 out of the 12 in-depth interview adolescent girls.

343 Consent of the marrying couples, who have attained majority, is the foundation of marriage as per the preamble and Article 11, See Amhara National Regional Family Code, 2003, Supra note 29.

344 FGD with 005 Girls, April 18/2022, *Kuwarit*

345 In-depth interview with A04, April 1/2022; A01, April 3/2022, *Kuwarit*; Some parents marry off their girls to ensure the groom's presence after he supports them with his free labour.

346 Case 3 Adolescent Girl 06, April 17/2022, Kuwarit

347 Adolescent Girl 08, April 12/2022, Kuwarit

In *Kuwarit*, the community defines a child [*hitsan*], and therefore unable to take the responsibility of marriage, to be under the age of 8. The age group of 9 to 14 is referred as young [*kutara* or *tadagi*], signifying the phase where girls prepare themselves for marriage; and those beyond the age of 15 are considered as youth [*wetate*], a fully grown and independent individual who is beyond parental control.[348]

In the community, girls are betrothed, and even married, at the age of 4,[349] and become 'socially appropriate' to marry them off after the age of 12,[350] where one transitions into becoming a 'girl' and no longer seen as a child. At this point of transition, as shown in the study by Jones et al. (2020), parental arranged marriages aim to control girls' sexuality.

Marrying off girls at a very young age, locally known as "*chagula merget*"/ "*daweja medeqdeq,*"[351] is seen as a protective factor from sexual violence such as rape or fear of becoming a lone women after

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348 Key informant interview with CM 01, 30 March/2022, Kuwarit; AA03, April 21/2022, Finote Selam; AA004, March 28/2022, Bahir Dar; See also Ethiopian National Youth Policy that similarly identifies ages of 15-29 as a youth, https://www.youthpolicy.org/national/Ethiopia_2004_National_Youth_Policy.pdf

349 In-depth interview with CM 01, March 30/2022, Kuwarit; FGD 006, April 2/2022, Kuwarit; FDG 008, April 19/2022; In-depth interview with A07, April 2/2022, Kuwarit; FGD with 001 Boys, April 17/2022, Kuwarit; 4 out of the 12-adolescent girl in-depth interview participants stated less than five years of age girls are married off in their locality for the purpose of undergoing through *chagula merget*"/ "*daweja medeqdeq.*" Girls at this age will not have sexual intercourse with the groom since it is their mothers who will take them carrying in their back to the family of the groom and return them home.

350 FGD with 005 Girls, April 18/2022, Kuwarit; 3 out of 12 in-depth interview adolescent girls; FGD 001 Boys. The age of 11/12 is considered as socially acceptable age for girls to marry, and they are also expected to consummate marriage. The central justification, according to the findings of the study, is that it is the critical age/time for the parents to be in the 'driving seat' for selecting the groom keeping family honour. Besides, there is a wider belief in the community that age of 15 is viewed as "age of consent for girls." Entailing parents will lose control in deciding selection of 'whom' their daughter is going to marry.

351 The term 'celebrating marriage ceremony' better describes *chagula merget*"/ "*daweja medeqdeq*' than 'marriage at the young age.' However, sometimes the latter meaning seems more fitting as '*chagula regta keneber*' – refers to the girl married at the young age. This ambiguity is created because marriage celebration is viewed as marriage per say (with or without consummation of marriage) in the study locality.

her prime age passes, which are both considered to bring shame and ignominy to the girl and her parents. Loosing virginity, under any circumstances, including rape, before marriage is unacceptable according to the norms. And therefore, if a girl marries at a young age ("*chagula regta keneber*"), age of sexual intercourse is not that relevant. Moreover, the girl will not be socially sanctioned or insulted as "*kumo ker*" [unwanted/ a spinster].[352] Kuwarit *woreda* culture and tourism office noted, "the age beyond 16 is frustrating for parents due to the wildly held belief that girls will lose their virginity, locally known as '*wedket*' [meaning loss]. Rather than letting them lose their virginity, parents often prefer to marry them early." Mainly for this reason, among many others, parents prepare for marriage when a girl shows signs of puberty, physical change, which is taken as a sign of being a woman and thus ready for marriage.[353] Other sign of readiness for marriage, according to the community, include becoming rude (disrespecting family) and not listening to parents, which is seen as a sign of rebelling. [354] Girls in an FGD also mentioned, once they reach the age of ten, "most parents usually believe that [they have] the sexual urge,"[355] and thus must be controlled.

The age of marriage is also affected by the preference of the groom. Age is lowered for marriage with deacons[356] compared to marriage with others, locally known as "*yechewa gabicha*,"[357] which has an equivalent meaning to 'marriage with ordinary people.'

The study has also shown marriageable age preference is different among parents. While mothers prefer to lower the marriageable age to 11/12,[358] male parents stated the 'right' age of marriage to be

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352 Supra note 77.

353 In-depth-interview with HE 01 and HE 02, April 8/2022, Kuwarit

354 Ibid, In-depth interview with Priest 02 and Priest 03, April 9/2022, Kuwarit.

355 April 18/2022, Kuwarit

356 Supra note 55

357 In-depth interview A01, April 1/2022, Kuwarit; and in-depth interview with 10 out of 17 male Parents.

358 It is 2 out of 10 female parents' in-depth informants show the marriageable age for girls. In 2 female parents only FGDs, all the informants stated girls' child marriage is not practiced in their locality.

between 15 and 17.[359] Men value biological readiness and expressed their fear of dishonour if girls lose their virginity before marriage.[360] On the other hand, female parents focused on celebrating marriage while their daughters are in their prime age when their beauty is intact, and they highlighted their fear related to becoming *kumo ker*[361] than loss of virginity.[362] One of the female parents stated, "I do not know the appropriate age, but if I am lucky, I want to marry off my daughter as a teen and beautiful…at the age of 12."[363] Similarly, the other female parent stated, "the appropriate age is 16/17, but I want to marry my daughter at 11/12 because I do not want her to become *kumo ker* and face social sanction."[364]

Adolescents reported lower age of marriage for girls, where girls stated they sometimes get married when they are infants and 'carried at the back of their mothers'. However, the common marriageable age is 12/13.[365] Other study participants share similar views that girls from the age of 3-9 are married off, [366] while most girls are usually married at the age of 12/13.[367] Meanwhile, adolescent boys mentioned 5 to 15/16 as the usual girls' marriageable age in their locality.

Furthermore, adolescent boys preferred pushing girls' marriageable age to the legal age, which they stated was 15-20. Their justification

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359 In one man only FGD, the informants agreed 15 -17 the appropriate girls' marriageable age (FDG Men 002, April 2/2022, Kuwarit). The other men only FGD did not concur on marriageable age. Some participants argued as ten years is an appropriate age, while others 15-18 years, and one of them argued 18 -20 (FGD 003, 10 April/2022, Kuwarit); in the in-depth interview, 9 out of the 17 men stated that 15-17 years is the appropriate marriageable age.

360 Ibid

361 *Kumo ker* is a derogatory term that labels unmarried women as "unwanted." See Meron (2018)

362 Female Parent 7, April 9/2022, Kuwarit; Female Parent 03, April 4/2022, Kuwarit

363 Female Parent 7, April 9/2022, *Kuwarit*

364 Female Parent 03, April 4/2022, *Kuwarit*

365 See Supra note 58 & 59

366 In-depth interview with CM 01, March 30/2022, *Kuwarit;* FGD 006, April 2/2022, *Kuwarit;* FDG 008, April 19/2022; In-depth interview with A07, April 2/2022, Kuwarit; FGD with 001 Boys, April 17/2022, *Kuwarit*; 4 out of the 12-adolescent girl in-depth interview participants stated less than five years of age girls are married off in their locality.

367 FGD with 005 Girls, April 18/2022, *Kuwarit*; 3 out of 12 in-depth interview adolescent girls; FGD 001 Boys

centres on striking a balance between ensuring virginity and maturity of the girls for shouldering domestic work. Girls also preferred the age of marriage to be 18 and above to give them time to complete school and secure a job.[368]

In the discussion with adolescents, change in marriageable age has been observed in the area because of girls' educational success. Girls who want to pursue their education have been challenging their parents by reporting[369] to the authority or running away from their locality.[370] Their impact has, however, been limited because family respect[371] as it prevents most girls from resisting marriage arrangement by parents. Parents are not deterring girls from education like in previous days but contest the benefit/achievement of educated girls and resort to the comparative advantage of underage marriage.[372] Study informant from the government stakeholder similarly highlighted that: -

> *The main issue is, does education leads to economic betterment for supporting their family? The answer is no. Let alone supporting their family; most will be unemployed. Moreover, those who manage to get a job in the government sector still depend on their farmer parents, and their salary does not even cover their living costs. So, parents are vigorously contesting the value of educating their daughters (In-depth interview with AA02, April 22, 2022, Finote Selam).*

The other important implication from the study is that underage marriage's economic value seems to be a strongly held driving factor from both parents' and adolescent girls' standpoints. In the study area, marriage is a steppingstone for girls that choose labor migration in adjacent localities, locally known as "*bereha*." A closer look into girls' "willingness" shows it is not a free choice but

368 FGD with 008, April 19/22, *Kuwarit*

369 In-depth interview with 8 out of 12 Adolescent Girls; FGD 004 Boys, *Kuwarit*; FGD 005 Girls, 18 April, *Kuwarit*; In-depth interview A02, April 5/2022, *Kuwarit*; In-depth interview with CM 01 and CM 02, March 30/2022; A001, March 29/2022, *Kuwarit*; HE 01 & 02, April 8/2022, *Kuwarit*

370 Ibid

371 Ibid

372 Ibid

enforced, for the lack of other economic opportunities. In addition, middle-adolescent girls who have not married at the age of 15 face stigma from peers, which pressures others into marrying early. "My friends always annoy me, tease me, by saying shepherd of her parents' cattle," says an adolescent interviewed in the study.[373] These findings concur with the recent findings in India and Indonesia[374] showing that economic and cultural reasons are key drivers of girls' underage marriage. Furthermore, in the study area, one can validly imply that the economic aspect seems to be more influencing than the cultural reasons behind girls' child marriage. The study indicates girls' underage marriage is yet a tradition, but at the same time, it evidences existing social norm changes on the existence of consensual adolescent girls and boys-initiated marriage.

Educational attainment gives agency to girls, but their voice is 'limited' due to unemployment and their perception of viewing marriage as an alternative means of livelihood. Accordingly, when girls do not perform well in their education, disagree with their parents, or want to claim assets (inheritance), they consider marriage as the only option and best alternative. This finding differs from the result of the study by Presler-Marshall et. al. (2021) that shows adolescent girls' aspiration for education is getting stronger and has positive support from most parents/caregivers involved in the study.

Parents still have autonomy in fixing girls' marriageable age because they attach a strong meaning to 'marriage'. Moreover, the study shows marriage is an accountability shouldered by parents to ensure their daughters' well-being and independent livelihood. On the other hand, for girls, marriage is part of their life that they are compelled to pass through in their 'childhood' or at most in their 'young' age, and even a 'choice' (opting for economic betterment or means of livelihood) when they reach middle/late adolescence; hence, married under legal 'cut-off' age. Consequently, parents take the responsibility not only 'to whom' their daughter going to marry but also to fix their marriageable age.

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373 In-depth interview with Ad Girl 08, April 16/2022, Kuwarit

374 See Batyra and Pesando 2021; Collin, Talbot, and World Bank 2017

Unpacking the views of the community in the study area shows that girls' marriageable age is determined socially, providing 'acceptable' reasons behind girls' marriageable age below the legal 'cut off' age.

Local Government Responses for Enforcing Laws on Marriageable Age

Harmful 'traditional' practice (HP) eliminating committee[375] has been established from *woreda* to the regional level as a nationwide initiative,[376] including in the study area. The committee, in Kuwarit *woreda*, actively works with non-state actors (UNICEF and UNFPA) and has recognized the importance of engaging key opinion makers, religious fathers, and community elders as agents for educating the community on marriageable age as of 2020/21.[377]

In line with the theory of Vernacularization,[378] the local agents have been given the mandate to lead community awareness raising.[379] The theory's central idea is the importance and necessity attached to local framing for ensuring the applicability of the global norms, on marriageable age, at the national and grassroots level. According to this framework, accepting '18 as marriageable age' requires a precondition to be adopted into the existing "local ideologies."[380]

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375 See supra note 42.

376 National Committee on the Eradications of HTPs had been established by the Regional Women Affairs Bureaus in collaboration with non- governmental organizations (particularly Ethiopian Women Lawyers Association). The committee has been established in most regional states with an ultimate purpose of eradicating the practice of child marriage and abduction through mobilizing the community. See (Cedaw /C/Eth/ 2009); See also Ethiopian Global Database on VAW (2009). https://evaw-global-database.unwomen.org/en/countries/africa/ethiopia/2009/national-committee-on-the-eradication-of-harmful-traditional-practices accessed 23 April 23, 2023.

377 See also the Addis Ababa Declaration on Ending Child Marriage that recognizes the central role of religious fathers and local elders; UNICEF and UNFPA support the budget.

378 Vernacularization theory, developed by the late Sally Engle Merry, refers to the "process of appropriation and local adoption of global women/girls' human rights ideas and strategies" (Levitt and Merry 2009:446)

379 In-depth interview with A001, March 29/2022, Kuwarit; every Sunday after the collective religious prayer

380 Ibid.

Due to the impunity of child marriage law,[381] the local government resorts to community-wide awareness raising and compulsory age estimation before the marriage ceremony. Regardless, child marriage continues to be prevalent in the area, imposing fine[382] or prosecution has been very challenging for government authorities.[383] As a result, neighbors do not usually report to authorities, as indicated by one informant who stated, "no one will report to the local authority unless that person is malignant".[384]

The awareness raising on the appropriate marriageable age does not seem to have successfully met the intended purpose. FGD informants expressed the fundamental gap stating, "despite broader community awareness has been conducted in the past two years, parents are unable to identify the age appropriate for marriage, while most still need to be convinced to change their attitude".[385] There is internal contestation among religious fathers, community elders, and government stakeholders on marriageable age of girls.

The study reveals that some local government authorities have contested the appropriateness of legal marriageable age. Some argue for increasing, and others for lowering the minimum age of marriage by following the religious (Orthodox Church) reasoning, and socio-culturally based framings respectively.[386] The socio-cultural-based framing allows marriage below adulthood. The debate among the clergy, on the other hand, raises the age limit beyond legal adulthood, while the counterargument allows the

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381 Existing literature shows that legal impunity contributes significantly to Ethiopia's child marriage prevalence. See (FDRE Ministry of Women 2019)

382 The justice office at Kuwarit *woreda* has worked with each *kebele* local administration to fix to impose fines on parents who undertake child marriage. The fine varies from *kebele* and ranges from 50 to 10,000 ETB.

383 In-depth interview with A001, March 29/2022, Kuwarit; A002, A003, & A004, March 31/ 20/2022, Kuwarit. Even if girl's child marriage is widely prevalent, no prosecution except for one case under police investigation during the data collection. Government stakeholders are having a pertinent challenge of evidence and witness for persecution. Community members usually conduct girl's child marriage underground.

384 Adolescent Girl 9, April 17/2022, Kuwarit

385 FGD 008, April 19/2022, Kuwarit

386 This study used the term 'socio-cultural' because the framing mainly follows physical appearance for girls fixing girls' marriageable age, which is based on the existing social /cultural norms.

biblical marriageable age for girls to be below the legal 'cut off' age.

On December 15, 2021, ninety-one priests at Kuwarit *woreda* condemned elders and community members who facilitated betrothal of child brides and participated in the wedding celebration. Nonetheless, their statement is vague in clearly indicating the appropriate marriageable age.

The local government provides significant attention to religious fathers' partnership in eliminating child marriage. The head of the women mobilization office, who selected and trained religious fathers, stated, "the contribution of religious fathers is significant since no single marriage will be undertaken without getting a blessing from Priests."[387] However, an informant indicated, "most religious fathers are not yet convinced about legal marriageable age,"[388] showing the gap in mobilizing religious fathers.

Two controversial views of religious fathers are identified in the current study. Based on the life of Adam and Eve, most clergies teach marriageable age for girls shall be 15 and 30 for men based on the age they were created by God.[389] In contrast, other clergies refer to the same story but teach that the marriageable age shall be 22 and 37 for women and men, respectively. They contend that Eve was created by God at the age of 15 and stayed together with Adam in Eden Garden for seven more years before consummating their marriage when they started to live on Earth. Religious fathers who support increasing girls' marriageable age to 22 condemn clergy who preach the marriageable age of girls as 15 on the ground that "they mix culture with religion and preach the culture claiming that it is religious doctrine. They also contest our interpretation as new canon law".[390]

Religious justification for the betrothal of young girls to deacons is also contested. Some clergy argues that this ensures virginity for the betrothal ceremony, not the actual marriage, while other religious

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387 In-depth interview with A001, March 29/2022, Kuwarit
388 In-depth interview with A001, March 29/2022, Kuwarit
389 In-depth interview with Priest 01, April 2/2022, Kuwarit; with A01, April 3/2022; with A02, April 5/2022, Kuwarit
390 Ibid.

fathers who advocate for 22 as girls' marriageable age have put the consent of both spouses as a prerequisite for marriage. They contend that not only marriage, but also betrothal shall be based on the full consent and initiation of the future spouses and requires attaining the age of 22 and 37, including for betrothal.[391]

The same gap has also been noticed with the community elders where some still disagree with the legal marriageable age and argue that it shall be lowered. One of them stated, "as a principle, it is convincing to delay girls' marriage till 25, let alone 18 years, but she will already lose her virginity by the age of 7 and 8".[392] Furthermore, according to the study's findings, community elders, even after they received training from the local government, suggest 15 as an appropriate marriageable age for girls. They justify this as "her uterus is ready for pregnancy, her body is matured, and her blood vessels are relaxed. Nevertheless, if she is lower than that, her uterus will be damaged; she will be a fistula victim".[393]

An interview with Kuwarit *woreda* culture and tourism office also showed community elders propagate the wildly held belief that "adolescent girls who attain 13 and beyond years should not sleep alone; if so, they will get the evil spirit." Similarly, adolescent boys stated, "elders are the ones who facilitate betrothal of underage girls, and hence, most of them are not supportive of eliminating girl's child marriage".[394]

The debate that centers on accommodating local elders' views of lowering the legal marriageable age to 15 mainly relies on the

391 In-depth interview with Priest 01, April 2/2022, Kuwarit

392 In-depth interview with Elder 03, April 15/2022, Kuwarit. Their justification is related to misconceptions about girls' sexuality discussed in the first section of this article.

393 In-depth interview with Elder 01, April 6/2022, Kuwarit

394 FGD with 004 Boys, April 18/2022, Kuwarit

physical maturity and 'interest'[395] of middle/late adolescent girls[396], which are not plausible in terms of "the best interest of the child" legal standard[397] and also it is against the Ethiopian law on the age of sexual consent.

Regardless of the attempts by the government, it still remains a fact that girls are married off from the age of 4 and 5. Such girls are raised among the groom's family until they reach the age of 12 or 13, where they often request to start living together and start a family of their own.[398] According to the *woreda* officials, it is highly likely that 'early' adolescent girls will be raped by the groom, even if they return to their parents later, ending their marriage with divorce. An interview with Kuwarit *woreda* culture and tourism office indicated that "12 is considered as '*akeme hywan'* (socially appropriate age for marriage), and often they are expected to give birth by the age of 16".[399] A study by Jones et al. (2015) indicates many communities in Ethiopia do not consider marriage after 15 as child marriage.[400] Comparatively, the current study identified a relatively lower age as socially appropriate age of marriage for girls. In support of that, three of the government informants strongly argued during an FGD discussion that "if the marriageable age is lowered to 15,

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395 'Interest' indicates middle/late adolescent girls will be married only if they consent for the arranged marriage by their parents. According to the findings of the study parents will not force an adolescent girl after attaining 15 or more years. This age is culturally considered as the age of consent. From adolescent girl in-depth participants of the study, most (8 out of 12) consented for the arranged marriage by their parents. In-depth interview with Adolescent Girl 03, April 6/2022*, Kuwarit;* In-depth interview with Adolescent Girl 04 & 05, April 10/2022*, Kuwarit;* In-depth interview with Adolescent Girl 06, April 11/2022*, Kuwarit*; In-depth interview with Adolescent Girl 08, April 12/2022*, Kuwarit*; In-depth interview with Adolescent Girl 09, April 17/2022*, Kuwarit*; In-depth interview with Adolescent Girl 10, March 31/2022*, Kuwarit* ; In-depth interview with Adolescent Girl 11, April 14/2022*, Kuwarit*.

396 See supra note 38.

397 Young girls' marriage is linked with rampant multi-faced adverse outcomes see (Batyra and Pesando 2021c)

398 In-depth interview with A04, April 1/2022, Kuwarit.

399 Conducted on April 1/2022, Kuwarit.

400 See also Hamilton (2020). The age of puberty indicates the capacity of reproduction and is taken as a guide for determining the marriageable age of girls in most cultures. Research from Ethiopia by Presler – Marshall et al. (2020) also shows the first incidence of menstruation as an indicator of marriageable age.

the community will accept it. At 14/15, girls have already started menstruation which triggers sexual urges. Moreover, hence, 18 is very late".[401] Another government informant from a separate interview also stated, "the current 14 years old girls are more mature than the previous 18 years, so the interest of adolescent girls themselves coupled with the social pressure necessitates lowering the legal marriageable age".[402] No government participant openly argued to the contrary, despite an attempt is made to facilitate discussion in this regard. This shows that government officials are bound by their cultural views on one hand and their role in implementing the national law, eventually creating dual loyalty. Accordingly, building local government stakeholders' capacity shall be made, mainly because they can be used as an entry point to resolve the contestation on girls' marriageable age.

In line with vernacularization theory, religious-based framing that raises girls' biblical marriageable age to 22 shall be broadly used to convince the grassroots community to delay girls' marriage since *Kuwarit woreda* holds only Orthodox Christians. This framing fits with the statutory law on marriageable age in terms of the pre-requisite it sets for concluding betrothal agreement and consent elements in addition to satisfying the minimum marriageable age requirement. Besides, it has a strong religious 'ideology' base and seems to have a potential to be successfully used for convincing parents. However, refuting the counterargument interpretation of biblical girls' marriageable age of 15 is a challenge. The study also shows that the clergy widely hold the counterargument; till rejected, this interpretation will keep on validating the socio-cultural base of the marriage age setting. Both the religious based framing of 15 and socio - culturally based framings are unacceptable considering Ethiopian commitment to be abided by the international and regional laws on marriageable age.[403] Moreover, as per the recent decision

401 FGD 010, April 20/2022, Kuwarit

402 AA04, April 22/2022; Finote Selam; In-depth interview with AA002, April 29/2022, Bahir Dar

403 See supra note 22.

of the African Court on Human and Peoples' Rights against Mali, religious and cultural reasons will no longer be a viable ground.[404]

The other aspect of the implication of existing contestation shows that parents are in the 'driving seat', but all the local norm holders have a role in fixing 'appropriate' girls' marriageable age in their local setting. Accordingly, it is essential to rectify the fears of all local norm holders about delaying girls' marriage till legal adulthood, in addition to a human rights-based approach that empowers girls to resist child marriage. Protection of virginity is a justification for fixing low marriageable age for girls at first marriage, as voiced by male parents, religious fathers, local elders, and boys. The wildly held belief in the protective factor of "*chagula merget,*" *'kumo ker'* social sanction, and misconceptions about girls› sexuality are the central justifications for setting girls› marriageable age below 18. This implies state and non-state actors shall employ continuous awareness raising targeting a change in these gender social norms. This study shows gaps in awareness raising through the top-down community mobilization approach. Hence, the awareness raising shall include active community participation being guided by community dialogue programs.

Conclusion

Local communities have been using both socio-cultural and religious-based framings to determine age of marriage. And thus, the age of 18 as marriageable age needs to be more convincing for the community. However, the local context consideration and framing of girls' marriageable age in Kuwarit *woreda* unveils internal debate and contestation among different local actors. This requires due attention and is important to highlight that the contestations have minimal significance for impacting the statutory law. Lessons from recent studies show that neither increasing nor decreasing girls' marriageable age contributes to declining the practice's prevalence. The focus should, instead, must be on the justifications to be used as a ground for framing girls' marriageable age at the community level. Accordingly, international laws on marriageable age shall

404 See supra note 18.

be made to be framed with what is already locally acceptable to make it binding at the grass root level. In this regard, education is a key framing used by girls to resist and delay marriage till legal adulthood. Besides, religious-based framing that rises girls' biblical marriageable age to 22 is the most useful. Furthermore, in-depth customized research shall be undertaken to identify the internal debates among the diverse local norm holders to reveal their respective influence and identify central norm holders against the statutory girls' marriageable age.

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Children and the Mingi Curse among the Kara Community

Binayew Tamrat and Haimanot Alemayehu[405]

Abstract

There is a dominant discourse emphasizing the values of traditional practices in enhancing social cohesion, unity and cooperation in Ethiopia. Though this is an undisputed truth, there are untold accounts about the demerits of traditional practices negatively affecting societal groups specially women and children in different societies. Mingi curse is one such cultural practices that severely affects children, girls and women in the South Omo Zone. Though its severity ranges from infanticide and death of those individuals identified as cursed, to affecting the number of the Kara community, this practice did not catch the attention of scholars and policy makers. Apart from the anecdotal notes about the practise, there is no comprehensive research done on the theme. By taking the Kara community of Hamer *woreda* as a case, this article examines the socio-cultural grounds of the practise, its commonality among the Kara community and consequences of Mingi as a traditional practice. Regardless of prior initiatives in countering Mingi curse tradition, the practice is still prevalent among the Kara community. This paper thus discusses the various factors that contributed to sustain the practice despite the various efforts made by different stakeholders. By drawing on the ethnographic study and lived experience of the study participants, the article elucidates how the Mingi practice violates human rights in the form of structural violence.

Keywords: *mingi curse, child abuse and violence, South Omo, structural violence*

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Introduction

The Hamer *woreda* (district) of South Omo zone is well known for the 'exotic' traditions that highly attract cultural tourism in the area. South Omo zone in Southern Ethiopia is often praised for cultural diversity and being home to over fifteen ethnic groups. Some of the cultural practises widely known as tourist attraction acts include Evnagadi among the Hamer, Bull jumping ritual, *kael* ceremony among the Bodi ethnic group in South Omo etc. Among these traditions are practices that have been shared and are part of the identity of the group beholding and practicing them, of which some are deemed as 'harmful practices'. Health workers and the educated members of the Kara community and the young generation in general consider Mangi as irrelevant and harmful practice. As cited in Ermias and Azmach (2016:70), the Hamer *woreda* Health center identified seven harmful traditional practices (HTPs) widely practiced in the district. These include female genital mutilation, teeth extraction, forced abortion, Mingi, polygamy, inheritance marriage, and whipping;(beating) from among which Mingi is described as being the most prevalent practice in Kara Communities residing in Hamer *woreda* (Ermias and Azmach 2016).

Mingi is a practice where infants, considered as cursed, are either abandoned and thrown away or killed. It refers to children born out of wedlock and/or those born with physical disabilities (Anele 2016; Gorebo 2020). The term Mingi also translates into a social outcast and cursed person (Belaynesh 2012). All these definitions point to the core principle of the practice, which is denying "a cursed child" the right to live. There is a societal consensus that raising such children will call for group affliction causing misfortunes to the community. Because the curse deprives an infant or a child the right to life and the right of the mother to raise her child, there have been reports by the local government and non-governmental organizations, both local and international, working in South Omo zone referring to the practice as HTP and calling for its abolition (USAID 2021). Mclean (2021) pointed that the practice has come to an end since 2012 "due to the efforts of educated members of the Kara community such as Lale Labuko, who is the founder of Omo

Child."[406] Hack (2012) also stated that the Kara community stopped Mingi for demographic reasons; the mingi practice has affected the Kara community by highly reducing the community's population and therefore there was a need to end the practice. Regardless of these claims, though the efforts of the educated and some community members who strived to stop the practice cannot be denied, Mingi is still prevalent (Wharton 2018). There are community members who are ardent supporters of the practice as part of the culture that is more than a harmful practice. In light of this, this article attempts to examine the cause, practice and consequence of Mingi among the Kara community of the South Omo with a focus on the rights perspective.

The study leading to this publication drew on qualitative research design based on both primary and secondary sources. Data was collected in 2021 through focus group discussions (FGD) and structured personal interviews with community members, government officials and health professionals.

Conceptual framework: Violation of Rights in Cultural Practices: Reflection on Structural Violence

The United National General Assembly adopted in November 1989 the *Convention of the Rights of the Child* (United Nations. This was one of the conventions that was signed and ratified by most countries around the globe. There are some cultural practises violating rights of children around the globe often framed along cultural rights. socio-cultural constraints are often raised as factors that put children at risk of abuse and impeding the implementation of international, regional and national laws (Al-Saadoon 2021). The social acceptance of these abuses often transforming into social norms put children in a fragile position in communities that consider children as a mere parental possession denying their agency and their being an independent fully-fledged rights-holders

[406] Omo Child is a name of Charity organization working on relieving cursed, Mingi, and Children. Together with film maker John Rowe, Lale founded the Omo Child Shelter. Lale is a young and first educated member of a Kara community. See Lale Labuko - National Geographic Society for more details.

(Bouah and Sloth-Nielsen, 2021). Johan Galtung (1969) coined the term 'structural violence' and classified violence into three typologies: physical/direct violence, indirect/structural violence, and cultural violence (Galtung 1969, 1990). Direct violence is when one personal(individual) actor inflicts physical and psychological harm against another or a group of persons and prohibits them from meeting their basic needs or other life goals by preventing from acting into their full potential (Galtung 1969). When the harm that impedes the individuals and/or societal groups is embedded in the social structures, norms, systems and institutions, it is called structural violence; unlike physical violence, structural violence is a process (Galtung 1990). Meanwhile, cultural violence is when some aspects of culture are used to justify the wrong act as righteous (Galtung 1990).

By revising the earlier conception given by Galtung, other scholars gave structural violence their own operational meanings. The American Medical Anthropologist, Paul Farmer, further publicized the notion of structural violence describing it as a "social arrangement that puts individuals and population in harm" (Farmer et al. 2006:1687).Besides recognizing direct and structural violence, Bourgois introduced symbolic violence, which is used in reference to misrecognition of one's reality for the sake of internalized humiliation and legitimization of inequality and in a hierarchical social structure on the basis of gender and race (Bourgois 2001).

Structural/indirect violence occurs in four different ways. Structural violence occurs by omission when a responsible authority or anybody who have the capacity to protect a victim failed from averting the harm or injury due to negligence (Galtung, 1990; Salmi, 2000). It can also be by mediation when a certain activity or interaction with the natural and or social environment for any intended purpose harms an individual or a societal group indirectly (Salmi 2000). Third, structural violence by repression is when human rights violations occur such as civil rights violations, the right to equality before the law, and violation of political rights (Keenth 2007). Fourth and last, structural violence by alienation, takes place when higher rights such as the right to psychological, emotional, cultural or intellectual

integrity, are deprived. Racism and prejudicial practice against a particular group, social ostracism, and cultural repression can be taken as cases in point to structural violence by alienation (Galtung 1990; Salmi 2000).

According to UNICEF 2018, discrimination of children grounded and based on notions of purity and pollution, is at the core of how society based structural violence operates. The religious underpinnings of the socio-cultural system are central to how such discrimination operates. Often such cultural segregation is understood as an ideological framework to identify children into groups, cultural framings are hence one ground of structural violence (UNICEF 2018).

Setting the Scene

Hamer *woreda* is one of the eleven districts of South Omo zone in Southern Nations, Nationalities and peoples Regional State (SNNPR) Ethiopia, occupied by different ethnic groups including the Hamer, Erbore and Kara (USAID 2021:10). The district covers a total area of 5,742km2 and is divided into 35 *kebeles* (neighborhood) with Dimeka as its administrative center. (Samuel & KANEKO, 2020). Like other parts of South Omo zone, Hamer district is sparsely populated practicing pastoralism or livestock production (USAID 2021:9). Hamer is the largest ethnic group residing in the area with a population of 54,583 (81.4%) followed by Arborie with a population of 10,333 (15.4%) and Kara, which has a population of 2,129 (3.2%) (Haile and Mengistu 2011:25). linguistically the language of the Kara can be considered as part of the Hamar-Banna-Bashada cluster

The Kara, the smallest ethnic groups of the *woreda* in terms of population size, lives in three *kebeles* known as Kara Luboq; Kara Dus and Kara Korcho. The economy of Kara community highly depends on flood retreat or recessional farm on the side of Omo River, producing sorghum, corn, sugarcane and beans. They also engage in pastoralist life such as rearing cattle and goats. Since their villages are located on the side of Omo River, their livelihood is heavily dependent upon the river for cultivation and for drinking water (Mclean 2021). According to the oral tradition, they came

to the present territory from a region south of the Sudan where a segment detached itself and came to the Omo Delta day, the Kara people reside in three main villages: Labuk, Dus, and Korch. Kara speaks Kara-appo, a South Omotic language that is a dialect of Hamar and Banna. They refer to themselves and their region by the name "Kara. The Ukuli (bull jumping) boys' age-rite ceremony is the biggest and most important ritual in the karo's lives, signifying the boys' transit to adulthood. Furthermore, the Kara are known for body paint using the white color, obtained from the plaster, the yellow, coming from a local mineral, and the red, obtained from the earth rich in iron.

Mingi of Kara Community: Cause, Practice and its Consequence

Local informants noted that the tradition surrounding Mingi curse is old and hence there is no time frame inferring to the origin of the practise. However, some Kara elders narrated that the beginning of the practise dates back to the era when the Kara community suffered a series of bad harvests.[407] These were days when the community's agricultural production was affected by bad weather and locust. The elders narrate the widely held belief that the afflictions of bad harvest resulting in starvation were part of the multifaceted curse whereby the time is also said to be marked by the birth of children with some sort of physical deformities.

Since then, there have been different ways in identifying and labelling Mingi. Gorebo (2020:5) identified eleven ways of identifying and declaring people as Mingi seven of which are linked with children while the other four were associated with women and girls. Informants further mentioned the term Mingi can refer to animals that behave 'abnormally'; therefore, the Kara community consider Mingi as related both to people and cattle.[408]

For girls, pregnancy before marriage is considered as a taboo and thus a child born out of wedlock is considered to be cursed, which makes the girl a Mingi. Unlike most rural communities in

[407] Interview with a community elder, Kara Dus *kebele*, November 2021
[408] Interview with, Health Officer, Karamus Health center, November 2021

Ethiopia whereby virginity is associated with suppressing women's sexuality and preventing divorce and unfaithfulness, among the Kara, virginity is discouraged among girls. However, conceiving and bearing a child before marriage is strictly forbidden. One of the key informants described a girl Mingi as:

> *The first Mingi (curse) occurs on girls. According to the community's tradition, when a girl conceives and bears a child out of wedlock, she is declared as a Mingi and the fetus/ infant born out of the informal union is considered as cursed and hence should not be allowed to grow.*[409]

A girl who kept her virginity by abstaining from sexual intercourse before marriage is also considered as Mingi. As pointed out in Gorebo (2020:4), pre-marital abstinence from sex makes a Kara girl or woman Mingi. In order to get a good or wealthy husband, a girl or woman is required to have sexual intercourse and conceive and abort three or four times as a guarantee to fertility. A woman that passed through such experience before marriage is believed to have good fertility and can become a good wife. On the other hand, a Kara girl who bears or conceived a child before marriage and refuses to abort as per the cultural norms is labelled as Mingi and is marginalized by her own community.

The other instance leading to the labelling of women as Mingi relates to consequent child bearing; a woman who gives birth to a second child while breast feeding another infant is considered as a Mingi. In this regard, Kara elders insist that a woman who bears her first child has to breastfeed until the child is fully grown up (Belaynesh 2012). However, if the mother conceives her second child while breastfeeding the first one, both the mother and the new fetus is also identified as Mingi. It is forbidden among the Kara to have a second child before an initiation ritual undertakes for the first born. An informant explained the process as follows:

> *There is a Kara tradition that prescribes community members to bear the second child after the first one starts walking properly and moving independently. There is a local rite of*

[409] Interview with a community elder, Kara Dus *kebele*, November 2021

> *passage ritual, the initiation of the first born, marking his/her readiness for life. On this occasion, the local community is gathered to celebrate the occasion with feast. Food is prepared, neighbours and relatives are invited and fossae is made and eaten with milk. Then the guests anoint themselves with butter and give recognition to the child. This ceremony marks the rite of passage that the couple are free to have their next child.*[410]

Another scenario where a girl is considered Mingi is when she disobeys her parents and local elders and marries a man who failed to jump bulls, as required in the customs. Similar to the Hamer, the Kara community has cattle jumping ceremony where a man who failed this test is chided as weak and "not being better than a woman". Thus, marrying such a weak man makes the bride Mingi along with the child born within this relationship (Gorebo 2020).

The other instance leading to the labelling and identification of a child as a Mingi is associated with birth deformities. Normally, infants' lower milk teeth are the first to grow. In those rare occasions when the upper milk teeth grow first, an 'abnormality' according to the Kara community, the child is locally identified as Mingi (Ermias and Azmach 2018).

> *When the milk teeth of a child grow, they should grow from the bottom. However, if it grows from the top, the Kara community leaders believe that this is a manifestation of abnormality and a curse as the child's development is not following the natural course of events. Such children are considered as having some spiritual affection and cursed by God. Keeping such children with birth deformities is considered to call affliction on the local community such as causing drought, marital disputes and other challenges.*[411]

Twin birth (bearing two infants at once) is also considered as a curse and an 'abnormality' and hence both babies are considered as Mingi and condemned to death (Ermias and Azmach 2018).

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410 Interview with a community elder, December 2021

411 Interview with a community elder, November 2021

From the brief discussion on the attributes of Mingi, it is suffice to say children and women of the Kara Community have been affected the most. Though its sources, as explained by elders, is not predetermined and considered as God-given, the cause of some types of Mingi such as for girls is caused by a "greedy or irresponsible husband", as noted in the quote below.

> *Even though the husbands know the consequences of conceiving while breast feeding, they force their wives to have sexual intercourse. When unwanted pregnancy happens, she and her infant can be classified as Mingi for violating the Community's norm. If pregnancy occurs, the family agrees on abortion. Until then, the society ostracizes the wife.* [412]

Afflictions associated with Mingi

For the Kara community, Mingi is beyond a traditional practice; it is strongly associated with the culture and belief system. The community leaders believe that their community should be guided by norms and rules, which they inherited from their fathers and forefathers. Thus, Mingi as traditional practice persistently continued among the Kara community where every child declared as Mingi by the community elders is condemned to death (Belaynesh 2012). Once a Kara child is declared cursed, the parents should abandon the infant, leaving her/him to be eaten by hyenas or crocodiles (Ermias and Azmach 2018).

The afflictions associated with Mingi are guided by the rule that "the word of elders is not to be questioned". It is elders who make decisions for the society, either on their own or as councils of elders. Much has not been written about cultural explanation as to why Mingi and other infanticide practices are committed (Epple 2020:30). But strong belief in curse and the existence of the community is one of the main reasons for the practice to persist (Epple 2020). In relation to this point, there are three major justifications given for the death of a Mingi child; (1) a belief that unless a Mingi child is eliminated, the family and/or the whole community would suffer

[412] Interview with a community elder, November 2021

from a disaster, (2) if the cursed child is left or rescued, there is a strong belief that this would call for drought or famine, and (3) a belief that there will be no good harvest. Community elders also believe that allowing Mingi child to survive invites evil spirits to come to their land. Therefore, aborting the illegitimatly concieved foetus or eliminating the cursed child after performing a purification ceremony is believed to be a solution for averting the calamities (Epple 2020).

Though there is no documented data, some scholars such as Gorebo (2020:2) confirmed that about 300 children die each year from the Kara community as Mingi. To avoid this practice, some members of the Kara community leave their home and community. An indication to this, informants recounted, is the presence of the Karamajong cluster, the former Kara community who have left Ethiopia for Uganda; Karamajong means (old Kara) referring to those who fled against this act.[413]

Mingi as Violence against Kara Infants, Girls and Women

The effect of this traditional harmful practice is multifaceted. It is an act against humanity and human rights including children's right to life (Epple 2020). As stipulated in the FDRE Constitution, Article 36, a child has the right to life, to be free from harmful and hazardous acts and to be free from inhuman treatment. Article 36(4) states that children born out of wedlock shall have the same rights as children born in wedlock. In such manner, Mingi is a crime that violates constitutionally granted rights. It is also a criminal act that goes against the rights of parents and mothers in particular. The impact of Mingi, however, goes beyond human rights violations and affects the whole community that practice it.

Furtehrmore, Mingi as a traditional harmful practice is violence that occurs in different forms. As provided in the FDRE constitution Article 35(1)(2), women and girls have equal rights with men in getting protection. Women also have equal rights with men in marriage affairs. However, the community custom encourages Kara

[413] Interview with Kara Community member, Jinka, November 2021

men to force their women and girls, among others, to commit sexual intercourse. Informants confirmed that marital conflict is very common in Kara village sometimes leading up to shooting. However, no one intervenes knowing the fact that the husband is forcing the wife to commit sex that can end up in unwanted pregnancy and therefore Mingi. This harm is not only a human rights violation and physical violence, but it is also structural violence.

To explain how this human rights violation becomes structural violence, it is pertinent to borrow Galtung's explanation that states, "When one husband beats his wife there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance there is structural violence" (Galtung 1969:171). Violence against Kara women and girls is not an individual case. It is custom-based violence that is mainly committed by men.

As stated in the FDRE Constitution, Article 35(9), similar to other women of the country, Kara women have the right to access family planning education and information. However, the women in this community do not have the right to conceive and bear an infant outside the 'rightful' way; they also do not have the right to decide on their own affairs. Implicitly family planning is a community affair left to the husband and the decision of community elders. All the practice mentioned is structural or norm-based violence that resulted in physical, psychological, and emotional violence against Kara women and girls. It also involves psychological violence against the child declared as Mingi and his/her family such as the mother, sister, father, and other relatives.

As a solution, the government has recently started to intervene through different mechanisms including awareness creation and training for elders and community leaders. Government offices and NGOs who work in the health sector had devised their own strategies to address the Mingi curse. To that end, about three major intervention strategies are devised for implementation through family planning promotion and access to family planning information and method. The first was to avoid all possible ways of giving birth before marriage and to increase the intervals between the first and second birth. The second strategy was to encourage

elders and community leaders to give up children categorized as Mingi to be supported by NGOs and government organizations. The third was to make community elders and community members reach a common agreement and express their commitment to stop the practice through a public declaration (Ermias and Azmach 2018:37). However, since the larger part of the Hamer *woreda* is overwhelmingly remote with little or no infrastructure, the effort was not as effective as intended (Haile and Mengistu 2011).

It was, however, after the establishment of Omo Child, a humanitarian local organization led by Lale Labuko and his wife Gido Sura in 2009 that meaningful measures began to be undertaken in minimizing Mingi killings. Besides awareness creation about the harmful practice and its effect, the organization has rescued several children who were to be thrown. In addition, Omo Child provides basic necessities such as food, housing, clothing, healthcare, and most importantly education to the rescued children. In 2012, Lale and his colleagues convinced Kara elders to end the harmful traditional practice. The decision and agreement to end the practice were not however conclusive or binding but contributed to minimize the practice in Kara. Though this is the case in Kara, in other communities such as Hamar and Bana, Mingi remained intact and undiminished (Wharton 2018). Explaining how OMO Child contributed to the decrease of the harmful practice, one informant stated the following;

> *After OMO Child was established, children identified as Mingi in Kara community started attending school. They saw that rescued children were properly learning and did not get sick after wearing a blanket and after drinking coffee. So, a new group of Kara community began to resist Mingi as harmful traditional practice. They started to argue that what their community had considered a curse and that the story that regarded the children as cursed was wrong. The new group also began to resist the tradition saying that 'what our elders told us about the curse is a verbal threat and not valid'. We know that one Nyangatom who was a Mingi is now a Doctor working with us. Some of them even began to*

regret saying that 'if we had already given and supported our children like Lale, our children would have become doctors'. The Kara people believe in action than to be told what needs to be done. […] Lale Labuko practically showed them what he believed. [414]

Another argument that convinced the Kara community to minimize the Mingi practice is related to population size. The numerical inferiority of the Kara in the woreda and thus their vulnerability to threat from other dominant groups has led for many to begin condemning the practice, which affected their size. As an informant argues;

Now they (Kara) see what other communities were doing; they were continuously breeding without having such harmful traditions like Mingi. A family belonging to those communities can have up to 12 children. Now the surrounding community with greater population size puts pressure on them (Kara), especially during conflict.[415]

A prior study conducted states that though it shows a decrease, Mingi is still practiced underground in the towns and widely practiced in remote areas (Belayenesh 2012). Women and Children Affairs bureau also confirmed that Mingi is still prevalent in Hamar woreda both among the Hamar and Kara Communities.

We proved that one woman participated in the killing of her child due to Mingi and she was accused and imprisoned for 4 years. After the law was passed to prevent children from being killed as Mingi and they started to grow up, there is an indirect coercion on the children. For instance, 3 children who were raised by their grandparents passed away from starvation. This happens because when a girl marries another husband, she cannot take a child she had from her previous relationship. In such circumstances, the child is usually given to his grandparents. Since the grandparents support the

414 Interview with member of the community and active participant in the community affairs, Jinka,

415 Interview with an expert at Women and Children Affairs office, Demika

> *practice, they did not feed the children or take care of them just because they think that the children are born illegally and hence cursed. And as a result, the children die due to lack of food.*[416]

Informants also recounted that the new generation of young girls embrace their ascribed Mingi identity. They prefer to live as Mingi, saying "I am now altogether with my Mingi-ness".[417] This is one of the reasons that the Hamer and Kara girls are not allowed to attend formal education, which the community blames for the development of such attitude among girls (Yohannes 2020:379).

Conclusion

Socio-cultural practises undermining the rights of children often enhance the vulnerability and fragile status they have in a society. The cultural underpinnings of some practises like Mingi can be considered as one of the possible reasons why children's rights are nowadays widely violated in different settings around the globe. Mingi as a traditional harmful practice is one of the prevalent practices in South Omo Zone, especially among the Hamar, Bena and Kara. Mingi as a traditional practice has various sources and causes, mainly related to the idea of curse. Though Kara women and girls are the main victims of the HTP, the community has also been highly affected. Elders' word, among the Kara community, is unquestionable and enabled the practice to prevail into the 21st century. Regardless of the existence of progress among the community, Mingi has still strong supporters who consider it as part of a "useful" culture. In the face of this divided instances of the community, several scholars and experts working at different levels should make exerted and well-coordinated efforts to fight the practice. Unless an attempt is made to address the structural foundation engrained in the societal culture by working along with members of the community as agents of change, it is not possible to bring meaningful change among the Kara people. The cultural grounding of the Mingi practise and the lived experience of children

416 Interview with Kara Dus Health Center Nurse
417 Interview with Kara Dus Health Center Nurse

among the Kara clearly exhibits that despite the acknowledgement of the value of safeguarding children's rights and despite the progress achieved, too many childhoods are cut short.

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The Protection of Child Soldiers under the Ethiopian Law

Abel Ketema and Fasil Mulatu Gessesse[418]

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

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soldiering indicate that there are roughly three hundred thousand child soldiers 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.*[419]

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

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

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 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,[420] African Charter on the Rights and Welfare of the Child (hereafter ACERWC) on October 02 2002,[421] and ILO Convention 182 against Worst form of Child Labour on September 02 2003.[422] 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.

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420 UN Treaty Data Base, https://tbinternet.ohchr.org/layouts/TreatyBodyExternal/Treaty.aspx/

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

422 NORMLEX, ratification by countries, https://www.ilo.org/dyn/normlex/enf/

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 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.[423] 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."[424] 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).

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

424 Ibid.

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 recruitment and use in armed conflict was not clearly mentioned.[425] 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.[426]

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.

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425 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.

426 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-listrecommendations-for-the-secretary-generals-2022-annual report-on-children-and-armed-conflict/

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 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.*[427]

[427] 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.

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."[428]

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. 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.[429] 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,[430] since

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428 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

429 Ibid, p. 36

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

they are not related to the hostilities, falls under the category of active participation.[431]

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.[432] 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.[433] 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 section, and the death penalty should not be executed on him/her.[434] Concerning NIAC, captured children below 15 are entitled to care and dignity, religious and moral education, and reunion with their families.[435]

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

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431 Ibid, Para. 262

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

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

434 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.

435 Supra note 14, Art. 4 (3), (D)

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".[436] However, 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".[437]

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

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

437 Ibid, Art. 38 (2)

as global child rights standard. Hence, the shortcomings of the protocol discussed above are applicable mutatis mutandis to the CRC.[438]

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 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".[439]

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).

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438 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.

439 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

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.[440] 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.[441] In addition, the minimum age of voluntary recruitment of children provided in the CRC, which is 15 years, is increased to 16 years.[442] States are obliged to ensure that the recruitment is free from any form of coercion.[443]

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 Ethiopia, people rarely register events of birth, which results in fabricated birth records and age claims.[444]

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

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440 Supra note 28, Art. 2 and 4 (1)
441 Ibid, Art. 4 (2)
442 Ibid, Art. 3 (1)
443 Ibid, Art. 3 (2)
444 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.

social reintegration rather than legal accountability.[445] 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. [446] 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 states[447] with a recommendation that such age must not be too low.[448] 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.[449]

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 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

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445 OPCRC, Art. 6 (3)

446 CRC, Article 37, 39 and 40

447 Ibid, Art. 40 (3) (a)

448 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

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

child.[450] 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".[451]

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.[452] 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 form of labour and to provide rehabilitative and integrative support.[453] 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.[454] The convention set forth clear and strict obligation that should be adhered to by member states.

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450 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

451 Ibid, Article 22 (2)

452 Ibid, Art. 22 (3)

453 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

454 Ibid, Art. 1

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.[455]

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.[456] The ICC statute has taken a fundamental step in protecting child soldiers by making their enlistment, conscription and participation in armed 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'.[457] The other important innovative protection in the ICC is that though children below 15 years of age do not directly participate

455 Ibid, Art. 7 (2)

456 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)

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

in armed conflict, their mere recruitment is a war crime.[458] 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,[459] 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 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

458 The Rome Statute, Article 8 (2) (b, 26) and (e, 7)
459 Ibid, Art. 26

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.[460] 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.[461] 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 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

460 FDRE Constitution, Article 36 (1d)
461 Ibid, Art. 36 (2)

of all actors, to secure the holistic physical, psychological, moral, and spiritual integrity of the child and promote his or her human dignity.[462] 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.[463] 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 manner [464] and children only benefit from them as any Ethiopian citizen, a National Children's Policy that aims to be broader and more inclusive

462 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

463 Ibid, Para.6

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

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.[465] 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.

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[465] 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,[466] 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 system[467] 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,

466 Ibid, at 19
467 Ibid, at 9

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.[468] However, unless enabling legislation is enacted for 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."[469] 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".[470] The ACRWC also affirms the above provision in its stipulation; "every child shall be registered immediately after birth".[471]

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

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468 Ibid, at 21

469 UNICEF, "Birth Registration Right from the start", Innocenti Digest, No. 9 (2002), p. 2

470 CRC, Art. 7 (1)

471 ACRWC, Art. 6 (2)

registration process as it began on 06 August 2016,[472] two years after the establishment of the Federal Vital Events Registration Agency (VERA) in 2014. Proclamation No. 760/2012 was 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 birth[473] and imposing a penalty for late registration[474] 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.[475] 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.

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472 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)

473 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,

474 Ibid, Art. 18 (3)

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

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 (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 proclamation[476] and regulation.[477] However, there may be situations where Ethiopian nationals who are of age are compelled to give military service in times of crisis or emergencies.[478] 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.[479] 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.[480] 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.

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

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

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

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

480 OPCRC, Art. 5

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.

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.[481] 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.[482] This, in turn, creates loopholes in the protection of children for two reason: (1) despite the educational qualification provided as a requirement, a person who have 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, maybe recruited as a result of the negligence of the recruiters and due to the absence of a strong age verification procedure.[483] The only post-recruitment filtering mechanism the ministry uses is supervising the capacity of the recruits to cope up with the training process.[484] 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

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

482 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

483 Ibid

484 Ibid

minimum age requirement for recruitment, ignores the absence of adequate birth registration to prevent the recruitment of children.[485]

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 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 conf1ict.*[486]

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.

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485 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

486 Supra note 80, Article 270 (m)

Ethiopia's ratification of different international instruments dealing with child soldering, 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 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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