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## About the Journal

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# ROOTING LIFE IN THE ETHIOPIAN CONSTITUTION AND POSITIVE LAW: A HOLISTIC APPROACH TO RIGHTS LEGISLATION

*Abadir M. Ibrahim*[*]

*Oh, come with old Khayyam, and leave the Wise*
*To talk; one thing is certain, that Life flies;*
*One thing is certain, and the Rest is Lies;*
*The Flower that once has blown forever dies.*

Omar Khayyam[1]

The article explores the intricate ways in which human rights are woven into a legal system. In order to fully understand any right, one has to be aware of the many intricacies that surround it. Especially those interested in the protection of human rights through legislation ought to approach the subject with a recognition of the multifaceted nature of rights and the many, and sometimes controversial, subtopics that accompany rights. Whereas the article takes up the matter in reference to Ethiopian law, the discourse on life is very likely to be drawn along the same topics and fault lines under other legal systems as well.

## INTRODUCTION

Reading trough the bill of rights in the Ethiopian constitution we stumble upon the right to life before any o there. There it stands, at the top of the list of the 'inalienable and inviolable'. The writers of

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[1] Edward FitzGerald (Edited by Christopher Decker), Rubáiyát of Omar Khayyám: A Critical Edition 184 (Univ. Press of Virginia 1997).

the constitution, our 'social contractors' as I would like to call them, employed two separate articles to emphasize that the right to life is every person's inviolable and inalienable right.[2] The right to life has also been gracefully crowned as the mother of all rights; the most important of all rights without which other rights could not be exercised.[3] Despite the passionate aura in which this right is exalted, however, it has so far not been seriously studied in academic writing. The article begins with a holistic discussion of life, and following old Khayyam it inevitably ends with death, that is, at least - the right thereto.

The main challenge that the article desires to tackle is to demonstrate how human rights are intricately woven into the fabric of positive law. By showing that intricacy, it is hoped to consequently show that anyone wishing to root a right, any right, in a domestic legal system, needs to reach into many branches of the law so as to meaningfully protect the right. It is hoped that the article will demonstrate why it is oft claimed that rights are interconnected and interdependent in so many ways. In the end, the article proposes to lawyers and especially to human rights lawyers that, due to the interconnected nature of rights, both with one another and with other positive laws, it is would be advantageous to incorporate or mainstream human rights into the teaching of other law subjects.

## I. ETHICAL MOORINGS OF THE RIGHT TO LIFE

When one thinks about the nature of any human right,

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[2] Although it is granted that all human rights are inviolable and inalienable by virtue of article 10, article 14 again states that "Every person has the inviolable and inalienable right to life…" Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995.(Hereinafter FDRE Constitution).

[3] Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994); Misganaw Kifelew*, Non-Derogable Rights Under the FDRE Constitution*, at 78 (2000); but also see H. J. McCloskey, *The Right to Life,* Mind, New Series, Vol. 84, No. 335., at 404 (1975).

or the right to life in particular, one is very likely to presume that the right is self-evident and universally applicable. Nevertheless, such a view is not defensible because it may stand on premises that are unstated, and possibly wanting, or a logic that is faulty. It is at any rate customary in legal discourse to find theoretical justifications and genealogies for one's stances or come to the stances through theoretical investigation.

Though this section does not undertake to justify the right to life in a thorough manner, it will explore some ethical and moral justifications of the right. It will cover just enough for the reader to take cues on how the right to life can and has been defended. Since it would be implausible for the article to simply presume a self-evident and universal right to life, lest it should risk philosophical naivety, it does set a minimally acceptable ground on which the right can be grounded only to continue on a positivist quest for the meaning of the right to life and how it is given fixture in the law.

Although it is contended that religion is a late comer to human rights discourse contemporary religious hermeneutic enterprises have resulted in complex religio-doctrinal views on human rights.[4] In the monotheistic traditions the right to life is usually based on religious convictions such as the creation of man from the image of God or the sacred nature of the human species.[5] The right may also be based on religious edicts that prohibit murder. Yet another way to argue in favor of the existence of the right to life is to refer to the possession of a soul by humans as opposed to animals, other "things", [6] inanimate objects and living non-humans. The right to life can be derived from the Christian and Muslim holy books in the form of edicts that prohibit murder such as the Bible's "[t]hou shall not kill"[7] and the Quran's "take not

[4] Rasa Ostrauskaite, *Theorizing the Foundation of Human Rights*, E-Journal., December 2001, Elaine Pagels, *Human Rights: Legitimizing a Recent Concept*, Annals of the American Academy of Political and Social Science, Vol.442, (Mar., 1979).

[5] Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, at 205.

[6] H. J. McCloskey, supra note 2, at 406.

[7] Holy Bible, King James Version, (Ohio: 1924) Exodus 20: 13,

life, which Allah hath made sacred except by justice and law."[8] The customary Gada system, a belief system indigenous to Ethiopia, posits that "*Waqa* gave [wo]man a place under the sun, [s]he is Waqa's creation independent of any one's will. Therefore h[er]is life should be respected."[9] Given that religion is taken rather seriously in Ethiopia, and many African countries, it is a worthwhile endeavor to explore religious and traditional discourse on how the right to life can be defended.

The natural rights tradition is one of the older theories to have dealt directly with the right to life. John Locke, the man who is credited for fathering the theory in Western academia, argued for the right to life in the following terms:

> *The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker...*[10]

Locke's argument is visibly theistic in its approach as were most other enlightenment philosophies. But that does not mean that the natural rights approach is necessarily religious since the theory could equally consistently be applied on evolutionary, anthropological or other empirical premises. Furthermore, the theory has today grown out of its religious connotations and has established a strictly secular tradition.[11] Read, thus, the right could be justified on the basis of human instinct of self-preservation and reproduction. Since it is only the fittest that will endure the cruelties

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Deuteronomy 5:17.

[8] Quran 6:151, Abdullah Yusuf Ali, THE HOLY QURAN: ENGLISH TRANSLATION OF THE MEANINGS (King Fahd Holy Quran Printing Complex 1987).

[9] Fikadu Hunduma, Forms of Restraints on the Power Process of the Gada Government from the Perspective of Modern Constitutional Principles, (Unpublished LLB Dissertation) Faculty of Law Addis Ababa University p.57 (1995).

[10] C.B. McPherson, *John Locke Second Treatise of Government*, (1980) at.10

[11] Ostrauskaite, supra note 4.

of nature, human beings could be said to have evolved in such a way that they need to protect their lives from wild beasts and other human beings as well. This theory gives a socio-biological ground for the protection of the right to life. It is because of the evolutionary process that human laws, morality, religion etc contain tenets that protect the right to life.

Jeremy Bentham's principle of "the greatest happiness of the greatest number" can also be used to build an understanding of a right to life. Imagine a world in which your life or the life of your loved ones can be taken by the next person on the street or any government official and without much consequence. Compare this world to one in which life is protected by the state. If it can be reasoned that the first situation will cause general social fear and anxiety (and thus greater unhappiness) and that you as well as the majority of the members of society will prefer the second situation then the right to life has been justified on utilitarian grounds. The best defense of rights in utilitarian philosophy is found in John Stuart Mill's *On Liberty* where he argued that individual rights and freedoms should not be interfered with as long as their exercise does not harm others.12

Positivist doctrine posits the existence of human rights not on any moral or metaphysical views but on the laws that are proclaimed by the state. Since the theory sees moral-philosophic justifications of rights as inherently subjective it focuses on positive law as an objectively ascertainable source of rights.[13] Therefore, the argument goes, the right to life exists only because it has been declared in the International Covenant on Civil and Political Rights, the FDRE constitution and other laws. Thus, whether the impetus to make laws comes from religion, philosophy or simply the decision of the sovereign positivist analysis would focus on how to craft the laws that result and how to interpret and enforce them.

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[12] Vincent Barry, *Philosophy: A Text with Readings*, (2nd ed. 1983) at 191-194. But also see *Consequentialism, Stanford Encyclopedia of Philosophy, (Thu Feb 9, 2006) available at* <http://plato.stanford.edu/entries/consequentialism/> accessed on 29/5/07.

[13] See H. L. A. Hart, *The Concept of Law* (2nd ed. 1994), for a notable account of positivism.

Whereas many of the approaches can be a basis for ethically grounding the right to life, this article adopts the positivist approach for three main reasons. First, such an approach begins with a post-ethics and post-formative point in the process of legislation thereby avoiding the moral controversies and debates that shape the law. It is extremely difficult to reject positive law as the most important source of human rights, the only concern being that the law can be potentially violative of an important moral edict. Second, positivist methodology is, as will be shown shortly, very practical in the technical construction of the notion of the right to life. Third, the article is primarily meant for the consumption of lawyers and law students especially those in the Ethiopian legal system. A positivist approach is therefore closer to home both in terms of technical understanding and professional contribution to a legal community that is trained in the positivist tradition.

## II. WHAT THE RIGHT ENTAILS: A HOHFELDIAN RENDITION

The right to life, in the Hohfeldian categorization, can be understood as a claim-right. When we say that '**A** has a right to life' we are asserting that **A** has a claim against others who owe him a corresponding duty to his right.[14] Another sense in which we can use the term is to denote that the right to life is a liberty-right. In that case when we say that '**A** has a right to life' what we mean is that **A** has the right to life in as much as **A** no duty not to live or live in a certain context. Understanding the right to life as a claim-right is very useful as we can distinguish three elements from this observation. First there is the right holder who is making the claim (that is A). Second, there is the right itself. Third there are those to whom a duty is ascribed.

The first element of a claim right leads us to the question

[14] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning***,** The Yale Law Journal, Vol. 23, No. 1. (Nov., 1913), at. 16-59. L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, University of Toronto Law Journal, Vol. 35, No. 1. (Winter, 1985), at. 86-93.

of who possesses or is capable of possessing rights. The answer to this question seems obvious at first sight since, by definition, it is only human beings that have a human right to life.[15] But it is not the clear and standard cases of humanness that we will find troublesome. It is rather in borderline and challengeable instances of humanness that the trouble lies. This article deals with future generations and fetuses as border line cases of humanness.

The second element of claim-rights concerns the nature of the rights. The nature of particular rights, from a positivist perspective, is matched if not defined by the correlating duties that they impose.[16] In this context we can discern two distinct features most claim-rights share: they are either negative claim-rights or positive claim-rights. The former are rights against others requiring inaction or non-interference. They could also involve a duty to discontinue an ongoing violation or interference. The later, on the other hand, impose a duty to take some kind of action. The main body of this article discusses the negative duty of the state and individuals to refrain from killing or infringing the right to life and other positive duties such as the duty to provide medical care or to clean the environment. The nature of the particular right also determines the scope of the right. That is, it determines what kind(s) of obligations are imposed and to what extent. With the scope of the right to life is raised the question of whether the right to life consists of a negative right not be prohibited from slaying one's self.

The third element is concerned with the identity of the duty bearers or addressees of the right or claim. Based on who the addressee is these are divided into rights *in personam* and rights *in rem*.[17] Rights *in personam* are claims held against a particular singled addressee. For example the state, international organizations or nongovernmental organizations could be potential candidates to be identified as bearers of human rights duties. Rights *in rem* on the

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[15] Jack Donnely and Rohda E. Howard, International Handbook of Human Rights, (1987) Ch. 1.

[16] Roscoe Pound, *Jurisprudence*, (Vol. II 1956) at137-45.

[17] Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life,* Philosophy and Public Affairs, Vol. 7, No. 2. (Winter, 1978), at 96.

other hand are held against the world at large.[18] We could therefore say that **A** who has a right to life has a claim against every other individual including the state and judicial persons not to be harmed in his right. A may also have a right *in personam* to be provided with basic sustenance from his parents if he were a child for example.

### *A. Duty Not to Kill*

The right to life is primarily intended to protect individuals from arbitrary deprivation of life by government officials through summary and arbitrary executions. Without the right to life the helpless individual is seen as vulnerable in front of the massive and oftentimes dangerous machinery of state administration. Thus by imposing a duty on the state, the right to life makes sure that the individual is unharmed. And when harm is done, the right obliges the state to take measures to fix that part of the state machinery which caused the harm. This much being said about the role of the right to life, the question that comes to the fore is: how exactly is it that life is protected from harm?

Let us start with a presumption. Let us assume that the state is not allowed to take the life of individuals under all foreseeable circumstances except one. This circumstance is one in which the state takes away life in its own defense, the defense of the society and/or the defense of the life of citizens. If we call this exception the "legitimate self-defense exception" we can say that any life taken except for a legitimate defense is illegal and a violation of the right to life.[19]

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[18] Jack Donnelly, Human Rights: Working Paper no 23, Graduate School of International Studies (2005) available at <http://www. du.edu/gsis/hrhw/working/2005/23-donnelly-2005.pdf> accessed on 23/3/07.

[19] The issue of legitimacy may of course be raised not only in the context of the legitimacy of the state's acts but also on the legitimacy of the state itself. The concern in the second situation arises where one enquires into whether an undemocratic state can use deadly force under any circumstance. We will pursue only the first context in this article since second context will require of us to go into questions of state legitimacy and social contract. Questions only

It is of no doubt that a state which kills individuals who are in arms to destroy its existence is in no fault. The state would in fact be at fault if it failed to eliminate or otherwise arrest such individuals because inaction could lead to its own death, the death and destruction of its society, and most certainly the death of numerous individuals. Thus, in a situation in which the state, its institutions or its peace is fired upon (as in an armed uprising, a war or a similar attack) it may legitimately defend itself by firing back.

Since the state, a constructed entity, cannot itself bear arms or fire a gun the criminal code refers to officials of the state when it gives permission to the state to defend itself. Article 68 of the criminal code states that acts in respect of public (state or military) duties, undertaken within the limits permitted by law, do not constitute a crime and are not punishable.[20] Article 77 (1) also states that:

> *An act done by an officer of a superior rank in active service to maintain discipline or secure the requisite discipline in the case of a mutiny or in the face of the enemy shall not be punishable if the act was the only means, in the circumstances, of obtaining obedience.*

These rules do not of course give the state a blank check on the fate of other's lives. Although state killing, or firing back, is envisaged under these situations it is only a last resort and when killing is absolutely necessary under the circumstances.[21] The state therefore may under no circumstances allow its police force to follow a shoot-to-kill policy as an exception to the right to life. Where life is lost in the operations of the police it should always make an investigation to ascertain if the death was necessary and justified.[22] A police officer who is found to have violated the right to life will most certainly be dismissed in addition to being

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remotely connected with the article.

[20] The Criminal Code of the Federal Democratic Republic of Ethiopia proclamation No.414/2004 9th of May, 2005 Addis Ababa.

[21] See, e.g. Article 79(1) of the Criminal Code.

[22] Andrew Le Sueur, Principles of Public Law, at 384. (2nd Ed. 1999).

prosecuted in a court of law.[23]

The principle that the police should use lethal force only out of necessity and when justified in the circumstances can be found in small a splinter in article 38(2) of the Federal Police Administration Council of Ministers Regulation No. 86/2003. It should however be noted that compared to the standards contained in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[24] and the Economic and Social Council's Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,[25] Ethiopian law falls too short since it does not have detailed legislative principles, substantive rules or procedures that deal with this matter. Although the law does set up the requisite institutions, the "Federal Police Discipline Committee" and the "Public Complaints Hearing Organ",[26] that could ensure that Federal police officers do not use lethal force in violation of the principles of necessity and justification, there are no rules of conduct or standards that these organs can enforce. This shortcoming is replicated at the state level as well.

The law still operates in protecting the life of uninvolved individuals even where the country is submerged in an all-out war. As long as one is not involved in conducting violence or partaking in hostilities one still has the right to have his life protected by the law. The law protects all civilians, the wounded, sick, and shipwrecked and prisoners of war as they do not fall under the "legitimate self-defense" exception to the prohibition against killing.[27] Even so, we know all too well that people tend to ignore the law in war where anarchy and savagery prevail. That seems to

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[23] See, Articles 52 cum 54 of Regulation No. 86/2003.

[24] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[25] Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

[26] See articles 68 and 22 of Regulation No. 86/2003 and Federal Police Commission Proclamation No. 313/2003 respectively.

[27] Criminal Code Articles 269-275.

be the reason why the constitution instructs the Parliament to set up a "State of Emergency Board" the same time a public emergency is declared.[28]

Although the prohibition from taking away the life of persons applies primarily to the state and its agents the proscription also extends, *in rem,* to all individuals. From the prospective of the duty bearers every single person has a duty to refrain from killing another. And from the point of view of the holder of the right he/she has a negative right not to be interfered with. And since *in rem* rights bestow upon the right holder a consequent right to defend the right from third party interference, the scope of the right could be said to include a right to preserve and defend life. The right to preserve and defend life could additionally be based on the principle of legitimate self-defense. After all, the criminal code allows the taking of another's life in circumstances of necessity and self-defense as long as the killing is the only proportionate alternative at the time.[29] Thus one who repels a threat to his own life by ending another's is not only licensed to do so but might even be considered as doing justice a favor.[30]

On the same principle we may also justify the society's (or the state's) use of coercion, including the destruction of life in order to secure its members from loss of their various guaranteed rights (to life, liberty, security etc…). This is to say that the death penalty may be imposed on those who violate basic interests of society as long as the imposition does not sink below some standards of justice. These standards are set forth in the FDRE constitution and the International Covenant on Civil and Political Rights. The following is a rough summary of those standards:

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[28] Article 93(5) of Constitution. Then again let's not lose sight of the controversy over whether the constitution makes the right to life derogable in contrast to article 4 of the ICCPR. Though we will not take up the issue of derogability due to the breadth of the subject (which deserves an article of it's own) it is important that the reader note the relative worth of the right in the legal system may depend on whether it is seen as derogable or not. See, Human Rights Committee, General Comment 6, supra note 2.

[29] Criminal Code Articles 75 and 78.

[30] See Philippe Graven, AN INTRODUCTION TO ETHIOPIAN PENAL LAW, at 220 (Oxford University Press 1965).

- The death sentence can be imposed only for serious crimes that are determined by the law;
- The law cannot impose a death sentence retroactively;
- The death sentence should not be imposed except by a competent court and by a final decision;
- Anyone sentenced to death should have a right to ask for pardon or commutation;[31] and
- The death sentence should not be imposed on minors and pregnant women.

Despite the existence of the second optional protocol to the International Covenant on Civil Political Rights,[32] which aims at the abolition of death as a criminal sanction, both international and national laws are far from abolishing the death penalty. Nonetheless efforts are being made at limiting the instances in which the sentence is passed and executed. The criminal code, for example, tries to mitigate the horrors of execution in addition to complying with the standards just mentioned.

The criminal code provides not only that the death sentence be reserved for grave crimes but to exceptionally dangerous criminals who had completed the crime in the absence of extenuating circumstances.[33] It also prohibits the execution of fully or partially irresponsible persons and seriously ill persons.[34] Regarding expectant mothers it provides not only that they should not be executed while pregnant but that their sentence may be commuted to rigorous imprisonment for life if their child is born alive and in need of nursing.[35] Furthermore the execution of the death penalty may be further limited by operation of laws that allow for amnesty, commutation or pardon as long as the interest of the

[31] The FDRE Constitution gives the power of pardon to the president of the republic, see article 71(7).

[32] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by general Assembly resolution 441128 (151121189).

[33] Article 117 of the Criminal Code

[34] Article 119 of the Criminal Code

[35] Article 120 of the Criminal Code

public is not adversely affected.[36]

Note that despite all the care taken to mitigate the ills of the death penalty the morality of the punishment is taken for granted by the constitution under Article 15. The constitution deals explicitly with the relationship of the right to life to the death penalty and that relationship has been presented as one of the state's legitimate right to defend the rights of its members against crime and criminals. But this by no means seals all issues concerning the death penalty since it may still be challenged on other fronts. We shall not deal with those since our prime concern here is with the right to life and not with the death penalty as such.

### *B. Duty to Preserve and Protect Life*

The state's duty towards the right to life is not limited to the broad idea of refraining from killing. The state is also required to take positive steps of legal, political and administrative nature in order to preserve and protect life and to ensure that any violations are considered and dealt with duly.

Criminalizing homicide,[37] genocide and war crimes that involve killing[38] may be considered as a first step towards fulfilling the state's positive obligation to observe the right to life. The state should also go beyond prohibiting direct killing and proscribe acts notorious for leading to direct killing. Such secondary measures towards fulfilling the state's positive obligation may take the form of prohibitions against and regulation of weaponry production, distribution and possession.[39] Or it may be manifested in rules that prohibit unlawful arrest, detention or mistreatment by government officials lest such acts should lead to the death of victims.[40] But

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[36] Articles 229-30 of the Criminal Code, Procedure of Pardon Proclamation. Proclamation No.395/2004 10th year No. 35 Addis Ababa-17th April, 1994.

[37] Articles 538 -544 of the Criminal Code

[38] Articles 269-272 of the Criminal Code

[39] Articles 481, 499, 808 of the Criminal Code.

[40] Articles 423, 424 of the Criminal Code, see, Fact Sheet No.6 (Rev.2), Enforced or Involuntary Disappearances The Office of the High Commissioner for Human Rights Geneva, Switzerland,

criminalizing killings and conditions that increase the likelihood of the loss of life may not suffice since without a criminal justice system, a police force, courts and correctional facilities the criminal law may be useless. And again, given an enforcement mechanism, state authorities ought to ensure the functioning of this mechanism as effectively and efficiently as feasible.

The duty to prevent death may also, sometimes, lie on private citizens. The law imposes a duty to assist or a duty to rescue a person who is in an imminent and grave danger to his life.[41] Each individual, therefore, has a duty to assist a person who has been fatally knocked down by a speeding vehicle, an obligation to save a drowning person or a duty not to ignore a visually impaired person who is striding towards the edge of a cliff. The duty to assist becomes even more serious on those who belong to the medical profession or are otherwise under a professional or contractual obligation to lend aid.[42] Thus provided that there are no risks to one self, all individuals are expected by law to protect the right to life. The law in fact goes as far as punishing the reckless driver who puts the life of others at risk.[43]

### *C. The Right to Medical Care*

That a state should preserve and protect the right to life,

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<http://www.unhchr.ch/html/menu6/2/fs6.htm> accessed on 9/22/07. Declaration on the Protection of All Persons from Enforced Disappearance, proclaimed by the General Assembly in its resolution 47/133 of 18 December 1992, available at

<http://www1.umn.edu/humanrts/peace/docs/hrcom6.htm> accessed on 9/22/07. General Assembly resolution 33/173 Disappeared Persons (1979), available at

http://www.un.org/documents/ga/res/33/ares33r173.pdf> accessed on 9/22/07.

[41] Article 575 (1) of the Criminal Code

[42] Article 575 (2) Criminal Code

[43]Article 572 of the Criminal Code. See also, Neil A.F. Popovic, In Pursuit of Environmental Human rights: Commentary on the Draft Declaration of Principles on Human Rights and The Environment, Columbia Human rights Law Review, Vol. 27 ( spring 1996 ) at 515.

as its positive obligation, is not disputed. But what exactly fits the duty may not be as clear. Taken to a logical, although not necessarily a legal extreme the obligation may be extended to the provision of state funded medical care to those who might not survive without state help. So can the state, as the main supplier of public medical services, be held accountable for the death of those who could not afford private medical care?

The answer to this question is a mixed one. On the one hand the state cannot be expected to respond to and treat every patient whose life may be at risk. Not only will the state's budget be stretched between equally important social needs but its health budget may be allocated in such a why that not all needs are addressed at the same time. Allocation of resources to fight the AIDS epidemic may, for instance, mean that fewer cancer patients will be able to benefit from state funded medication. But this, on the other hand, does not mean that the state is responsible for the health, and therefore life, of its citizens. The state is indeed under a constitutional obligation to provide part of its resources for public health.[44]

Although the constitution does not contain detailed and robust provisions on the right to health, and its relation to the right to life, it does provide that the state should allocate "ever increasing resources" to public health.[45] Even if the country has limited resources,[46] it will be in violation if its health budget diminished every year. We could also say the same if the budget was poorly utilized or if it was not utilized at all.[47] Even though this much is clear about the state's obligations, the specific application of the

[44] Article 41(4) of the FDRE Constitution

[45] Ibid.

[46] Whether the country has addressed its health needs is immaterial because according to article 90 (1) of the constitution it will be held accountable only to the extent its resources permit.

[47] The nexus of the right to life with the state's budget (or fiscal policy) points to an indirect link or conflict with other rights that require the state's positive attention. For example, every cent spent on a school, an orphanage or a museum might have also been used in saving lives via the construction of hospitals or the purchase of nutrition rich food and medicine for a poverty or drought stricken village.

duty is not as clear. Therefore, it is expected that this aspect of the right to life is a field yet to evolve and to grow through judicial practice and jurisprudence.

The positive claim or a right to life *in person am* can also be raised by a deformed child against its parents or guardians. The law is clear on whether a mother can abort a fetus with a serious and incurable deformity.[48] But could the same rule be applied to a child with such a deformity after it has been delivered? It is certainly the case that once the deformed child is born it will be entitled to a negative right to life in the sense that it cannot be administered with a lethal injection or thrown into a river. But it is a difficult matter to decide if the child will be entitled to a positive right to medical treatment without which it would die. Jeffrey Parness and Roger Stevenson suggest that we should look into whether the child needs a 'life-saving' or a 'life-prolonging' medical treatment.[49] In the former case the child would die if it weren't for the medical treatment, but it would subsequently survive on its own. In the second case on the other hand the life of the child depends on the supply of medical treatment without which the child would die. The core of the suggestion is that the child ought to have a claim to medical treatment in the former case but not in the later.

### *D. The Right to a Safe and a Healthy Environment*

It is often said that human rights are interdependent and interrelated. The violation of one right usually entails the violation of another set of rights and it is usually the case that many rights cannot be respected unless some other rights are also respected. For example if the freedom of speech were abolished one could hardly imagine how the right to religion, assembly or democracy could have any value. And so it is with the right to life and the right to a clean and a healthy environment. Similar with the right to medical care, the right to a clean and a healthy environment can be

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[48] Article 551(c) of the Criminal Code.

[49] Jeffrey A. Parness and Roger Stevenson, *Let Live and Let Die: Disabled Newborns and Contemporary Law ,* University of Miami Law Review, Vol. 37 (November, 1982) at 70.

seen as part of the positive duties imposed on the state for the protection of life.

You certainly do not have to be a scientist to know that the most likely effects of environmental pollution on humans are the destruction of life and health. Radioactivity, contaminated drinking water, and toxic waste are most certainly the deadly ingredients of our environment.[50] The link between the right to life and the right to the environment is so close that it has been suggested to derive the right to the environment from the right to life.[51] Those countries whose constitution does not contain the right to the environment have often resorted to these rights in order to afford protection to the environment. The Indian Supreme court had once ruled that:

> *"It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the [Indian constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Article 21..."*[52]

Similar solutions have also been reached at by the respective judiciaries of Bangladesh, Pakistan, Tanzania and the

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[50] Laura Ziemer, *Environmental Harm as a Human Right Violation: Forging New Links*, available at <http://www.tibet.com/Eco/Green97/violation.Htm> accessed on 7/26.2006

[51] Conor Gearty, Understanding Human Rights, (1999) at 435. It has also been argued that the right to shelter and the right to conscientious objection are derivatives of the right to life. See Marc-Oliver Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference?*, Georgetown Journal on Fighting Poverty. Vol. 2. (Fall 1994) at 60. Emily N. Marcus, *Conscientious Objection as an Emerging , Human Right,* Virginia Journal of International law, Vol. 38 ( spring 1998 ) at 518

[52] Quoted by : Shyam Divan (et al) Environmental Law and policy in India, (2nd ed. 2002) at 51

Inter-American Commission of Human Rights.[53]

Although the link between the right to life and the right to a safe and a healthy environment can be established with relative ease the relation is somewhat narrow. This is because the former operates in the time dimension of the present while the later in the time dimension of both present and future. Which begs the question: Can future generations have the right to life? We will deal with the issue within the framework of the next title.

### *E. The Right to a Potential Life*

We have seen that the right to life may be infringed by actions that pollute and destroy our immediate environment. But another aspect of the right to a clean and healthy environment is that it raises the issue of time and space. Does the constitution recognize this right to presently living persons or does it also recognize the right of future generations?

Since protecting the right to a clean and healthy environment requires states, among other things, to incur astronomical costs in preventing, controlling and reversing the effects of pollution, developing countries have found their need to develop (and develop fast) at odds with the protection of the environment. Thus there is a real conflict between the right to development and the right to the environment.

The solution adopted by the Ethiopian constitution is that of "sustainable development."[54] According to what has come to be known the "Brundtland Report" sustainable development is a concept that implies development that meets the needs of the present generation without compromising the ability of future generations to meet theirs.[55] Thus by accepting the right of the

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[53] See the Yanomami case and the Velasquez Rodriguez case. Ibid, at.435

[54] FDRE Constitution Article 20.

[55] *Duty to Future Generations, Environmental change and International Law: New Challenges and Dimensions*: available at http://www.unu.edu/unupress/unubooks/uu25eeoo.htm accessed on 7/23/2006

peoples of Ethiopia to a sustainable development the constitution does not only try to solve the conflict between two rights but also a right of future generations to meet their needs of development and at the same time to live in a safe and a healthy environment.

Although we can argue in support of the right to life of future generations based on the principle of sustainable development and intergenerational equity we are still not in a position to compare this potential right with the right of presently living human beings. Future generations exist only in prospect and that prospect can conflict and often give way to different interests ranging from the need develop to capitalist greed and general indifference.[56] Nevertheless it is the duty of the present generations not to act in ways that might impair the same. The criminal law, in fact, aims towards the protection of the environment by criminalizing actions which might destroy the environment.[57] It is to be noted that the aggravating factor of criminal liability for environmental pollution is the consequence of serious damage to the life of persons or to the environment.[58] This formulation is understandable since damage to a potential life cannot be measured or proven in court. It is rather presumed that any serious harm to the environment is bound to destroy lives in the future.

Another issue which has an element of the time-space dimension is that concerning the abortion debate. The most common form of the anti-abortion stance is known hold that human life begins at the moment of conception or implantation. The fetus, as any other human being, has all the rights of humans including the right to life. And for this reason abortion is equated with murder pure and simple. Probably the best example of this stance can be found in the constitution of Ireland which states that:

> *The state acknowledges the right to life of the unborn and, with due regard to the equal rights of the mother, guarantees in its laws to respect and as far as possible, by*

[56] See David Worr, *The Right to Life and Conservation*, Journal of Conservation Biology, Vol.20 No.4 .937 (2006).

[57] See articles 517-521 of the Criminal Code

[58] Article519 (2) of the Criminal Code

*its laws to defend and vindicate that rights.*[59]

Not everyone opposed to abortion believes that a fetus is a human being. Some argue that the fetus, although not a human being, is a potential human being with a potential right to life. This position is premised on the fact that if nothing is done to prevent its normal development and if nature is allowed to run its course, the fetus would eventually become a human being.[60]

On the other side of the argument are those who reject the moral right to life of a fetus. Since various groups on both sides hold extremely divergent views we will only consider two from this side of the arguments. There are those who argue that abortion is women's moral right to reproductive self-determination. Therefore irrespective of the fetus they are inclined to see things from the women's perspective. While some hold that the fetus cannot be considered a human being until it is born, others hold that it can be considered a human being only if it satisfies some elements of humanness: sensation or physical likeness. McGinn, a moral philosopher who believes that consciousness and the sensation of pleasure and pain are the determining factors for life writes that:

> *What makes a fetus morally valuable is sentience when the fetal organism.....has become complex enough, by the division of cells and so forth, to have feeling and perception- consciousness- that is the time at which it's rights kick in. Awareness is what makes the difference, having an inner mental life. And the closer an embryo is to this insentient condition, no matter what its species, the less moral weight it has. The greater its sentience the more we have to take its interests into account.*[61]

When we look at the laws of Ethiopia we can notice that none of these theories apply to them with ease. We can approach the right of fetuses in Ethiopian law from the perspectives of our

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[59] Article 40 (3) (3°) of Bunreacht na hÉireann (Constitution of Ireland, enacted in 1937 last amended 24 June 2004).

[60] Dale Jacqette, Two kinds of Potentiality: *A Critique of MC Ginn on the Ethics of Abortion*, Journal of Applied philosophy, Vol. 18. No.1 at 79 (2001)

[61] Ibid.

civil law and criminal law.

The civil code makes it clear that fetuses are not human beings and that they have neither rights nor duties when it declares: "[t]he human person is the subject of rights from its birth to its death."[62] The fact that a fetus could be considered as having rights under exceptional circumstances[63] is immaterial in this context because an abortion will have an invalidating effect on the exception. That is, being born alive and viable is a necessary requirement for a fetus to be considered a person. An aborted child cannot be born alive and viable and, therefore, cannot be considered as a person under the provision of the second article of the Civil Code.

But when we look at the Criminal Code it looks as if it is protecting the right to life of the fetus. The title of the section which deals with abortion reads "Crimes against Life Unborn". This might be a strong indication that the law considers fetuses as humans or at least potential human beings as the penalty for abortion is very small compared to that of homicide.[64] Although the phraseology, "crimes against life unborn" could open the way for us to argue that the fetus may have a right to life, it should by no means be taken to imply a necessary connection since not everything that has a life has a right to life. It could be for reasons other than the protection of a *right to life* (say morality, social policy etc…) that the life of the unborn is protected.

I will contend here that the criminal code does not vest fetuses with a right to life. Fetuses are instead gifted with a potential right to life and are therefore potential human beings with no face and no name. It looks as if the main, if not exclusive,

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[62] Article 1 of the Civil Code of the Empire of Ethiopia, proclamation no.165/1960

[63] Ibid Article 2 (Where its interests so demand).

[64] The harshest punishment for abortion is preserved for individuals who effect an abortion without the consent of the pregnant woman and the punishment is set at a maximum of ten years (Art 547(2)). But the moment the child is born it is considered as a full fledged human being and its intentional murder will be punished with the maximum of the death penalty (Arts 544,539).

reason for the legislator's criminalization of abortion is on the ground of the moral and religious convictions of our parliamentarians and of society at large.[65] The two main numerically dominant religions in Ethiopia abhor abortion not because it is the killing of a human being but because it is seen as tampering with the Gods' creation. This may become evident when we look at the instances in which abortion may be allowed. The criminal code does not, for example, penalize the aborting of a child conceived by rape and incest. Allowing the abortion of a child conceived from incest brings out the moral and/or religious motivation of the legislator since incest is a victimless-moral crime. The code also does not penalize an abortion by a woman who is unfit to bring up the child because she is physically or mentally unfit or even because she is a minor.[66]

Although these exceptions are understandable they also show us that the code is not protecting a right inherent in the fetus. If it were, it would not have made sense to set-off the right to life with simple policy considerations. As we have shown throughout this paper the right to life is a very important right to be tampered with only in situations of individual or collective self-defense. So it may be theoretically self-contradictory for the criminal code to have claimed to set-off the right to life with, for example, the in-expediency for a minor or an infirm to raise a child. Or is it worth to trade-off the right to life for the shame of having a child of incest? Therefore the trade-off may be understood not if the fetus is considered a human being but if it is considered a potential human being with a potential right to life. This conclusion is further confirmed by the fact that these exceptions are no more applicable once the child is born.

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[65] Social research on the issue seems to indicate that there is a direct correlation between the opposition to abortion and conservatism. Even among conservatives the opposition to abortion correlates directly with the frequency of church (Mosque) attendance. Michael A. Cavanaugh, *Secularization and the Politics of Traditionalism: The Case of the Right-to-Life Movement,* Sociological Forum, Vol. 1, No. 2. (Spring, 1986), at 252.

[66] See Article 551 of the Criminal Code.

Distinguishing birth as a point of departure for the existence and exercise of the right to life could be criticized for being arbitrary; not based on any theoretical or moral grounds of justification. Is there much of a difference between 36 week old fetus and a child that was born on the 35th week? The criticism has a valid point to make. Yet it does not fallow from this that the fetus has the right to life before its date and time of birth. It only indicates that the law's choice of a point of reference for bestowing the right to life is an arbitrary one. The fact remains, however, that a fetus does not have a positive right to life. This conclusion is confirmed by the fact that these exceptions are no more applicable once the child is born.[67]

## III.THE RIGHT TO DIE

It is in the nature of most rights that they are claims of the right holder against society at large. In Hohfeld's famous contribution to the language of rights we can see that one of the connotations of "**A** has the right to **X**" is that **A** has a liberty with respect to **X**.[68] **A** as the right holder is at liberty and has the power to effect changes in **X**. As with most rights it is true that the right holder may do whatever he/she wishes with the right. If we take a random list from the constitution we can see that this connotation is valid for most rights. Take the right to privacy for example. The

[67] But then again, there are those who argue that even the infant cannot be considered as an entity that has a right to life. For example Michael Tooley, who conceives of rights as moral entitlements that human beings have because of their conceptual capacity to desire the entitlements, argues that infants are incapable of possessing rights. The incompatibility of Tooley's arguments with the one proposed in this article basically lies in the foundational argument for the existence of human rights. That is, my argument is founded on positive laws while Tooley is looking beyond the law for a moral basis of rights. See Michael Tooley, *Abortion and Infanticide, Philosophy and Public Affairs*, Vol. 2, No. 1. (Autumn, 1972), at. 37-65. See also Alan Carter, *Infanticide and the Right to Life*, *Ratio (new series)* X 1 April 1997 for an excellent exposition of Tooley's position.

[68] Andrew Heard, *Introduction to Human Rights Theories* (1997) available at <www.sfu.Ca/ Heard/ infro.html> accessed on 28/2/07.

right holder can if he/she wishes waive it and allow others to come into the private domain. The boxer could not go into the ring without giving up her physical security. The owner of property can use, utilize and dispose of his property whenever she wishes to do so.

Without further ado, the question that we ought to be struggling to answer is whether the same is true to the right to life. We will approach the issue from three different ways, we will first see if the right to refuse medical treatment implies the right to choose to end one's life. Then we will see if the right to life implies the right to commit active suicide. And the last point concerns whether the right to commit suicide carries with it a right to be assisted in the commission of suicide.

Medical treatment usually involves the invasion of bodily integrity. The civil code clearly provides that any person may at any time refuse to submit himself to a medical or surgical examination or treatment.[69] Medical or surgical intervention may also amount to willful injury and assault in criminal law in the absence of the patient's consent.[70] We may thus argue that a mentally competent adult can effectively refuse medical treatment even if it means that the refusal will eventually result in his or her death. Provided that there will be exceptions that make compulsory medical treatment possible in epidemic-like emergencies[71] the position here is that an individual may choose to end his/her life by refusing medical treatment or refusing to take food.

Let's call the situation in which one dies for refusing medical treatment a "passive suicide". The term is intended to apply to persons who may wish to die without actively extinguishing their lives. These for example may be people who wish to die in a hunger strike if their demands are not fulfilled (who

[69] Article 20 of the Civil Code

[70] See articles 69, 70 and 553.-560 of the Criminal Code.

[71] Article 17(2) of the Public Health Proclamation 200/2000, provides that a person infected with a communicable disease has a duty to cooperate for medical examination or vaccination. Read in conjunction with articles 440 and 806 of the Criminal Code and for extreme situations with article 93(1) of the constitution.

will eventually need medical attention if they get to that point). But the most likely persons to commit a passive suicide are people with religious convictions against any form of conventional or scientific medical treatment. Good examples of the second type are belief groups such as the Jehovah's Witnesses and some Christian denominations such as the "Christian Scientists".[72]

What we will call an "active suicide" is a situation whereby a person, whether sick or healthy, ends her own life by destroying at least one of her vital biological functions. This type of suicide has always been condemned by both religious and secular thinkers around the world. Aristotle, for example, had a synergetic view towards suicide. He argued that the individual is part of the community just as the fingers are part of the body.[73] Thus a person who kills herself is by effect causing an injury (or say bleeding) to the community at large.[74] Saint Thomas Aquinas' Argument as he puts it:

> *"… because naturally everything loves itself, and consequently every thing naturally preserves itself in being, and resists destroying agencies as much as it can. And therefore for anyone to kill himself is against a natural inclination, and against the charity wherewith he ought to love himself. And, therefore, the killing of oneself is always a mortal sin, as being against natural law and against charity."*[75]

Plato's argument is based on an analogy to the right

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[72] Faith Healing: *Two Large Christian Groups that Promote Faith Healing*, available at http://www.religioustolerence.org/medical2.htm accessed on 16/03/07. Although the issue has not been covered in this article consider the fact that the religious freedom of such groups (constitution Art 27 (4)) can and does clash head on with the right to life of children (unluckily) born to such families, see Seth M. Asser and Rita Swan, *Child Fatalities From Religion-motivated Medical Neglect,* Pediatrics Vol. 101 No.4 April 1998, at 625-629. available at <htpp://pediatrics.aappublications.org/cgi/content/full/101/4/625> accessed on 16/03/07.

[73] David G. Ritche, Natural Rights, 126 ( 1952) AT126

[74] "[A]nd he who through anger voluntarily stabs himself does this contrary to the right rule of life, and this the law does not allow; therefore he is acting unjustly. But towards whom? Surely towards the state, not towards himself. For he suffers voluntarily, but no one is voluntarily treated unjustly. Aristotle (translated by W. D. Ross), *Nicomachean Ethics* OverDrive, Inc. at 138

[75] David G. Ritche, Supra note 67, at 126.

holder of some property.[76] He sees life as a divinely bestowed gift or trust from God.[77] This would see life as belonging to God, to be used for his benefit, and not to be disposed at by anyone other than him. This view will most certainly rule out suicide (even passive suicide). It would even rule out various risky or unhealthy behaviors which God might regard as misuse of life. Although this view is prevalent in our country there are nevertheless instances where in suicide is deemed justified. Martyrdom for example is considered as a justified or even a glorified way of ending one's life. We can be confident that heroic suicide is part and parcel of the Ethiopian nationalistic narrative whereby the "heroic escape" of an unsuccessful patriot such as Emperor Tewodros is ceremoniously narrated every year.[78]

Plato's analogy is currently in vogue amongst liberal individualists, although this time the analogy is put in reverse. Similar to the right over property, the owner of life is seen as the absolute master of her right. Chetwynd. S.B while making the analogy argues:

> *If the right to life is like that of property rights understood in a negative sense, then it may be required to help me preserve my property …… but no one can require me to look after it in any particular way, again with the proviso that my use or lack of care of it does not harm others. If I want my house to fall down around me, and don't think the effort of saving it is worth making, that decision is mine alone, providing of course it does not injure anyone else as it falls down!* [79]

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[76] An identical concept can be found in Islamic theology reflected in both the major sources of doctrine and jurisprudence: the Quran and the Hadith. See Seyyed Hussein Nasr, *The Heart of Islam Enduring Values for Humanity*, Harper (2002) at 278. Dr Mohammad Taqi-ud-Din al-Hilali (et. al) (Trans.) *Translation of the Meanings of The Noble Quran in the English Language*, ( An-Nisa 29 ) at 111.

[77] Ibid

[78] See Taddese Beyene, Richard Pankhurst, Shiferaw Bekele, *KASA AND KASA: Times and Images of Tewodros II and Yohannes IV (1855-1889),* (June 1990).

[79] S.B Chetwynd, *Right to life, Right to Die and Assisted Suicide*, Journal of Applied Philosophy, Vol21, No2, at 178 (2004)

Such views of the right to life are very individualistic and hold that any interference with one's wish to end one's life would violate the absolute right over life. Since Ethiopian laws do not prohibit suicide it may be validly argued that the constitutional right to life embraces a right to take away one's life whenever and under any circumstance one wishes. It should be cautioned, though, that the law does not say anything about the reasons of not proscribing suicide. It could very well be that the prohibition of suicide is not a practically enforceable rule. Since the legislative material explaining the legislator's intents does not explain this point, it leaves the reasons to the reader's imagination.

Although suicide, whether passive or active, is not prohibited by law it is nevertheless unlawful to help another person to end her life. One could be sentenced up to ten years for instigating or assisting a person who had attempted or committed suicide.[80] Furthermore, if the person who wishes to die falls into a comma or is otherwise incapable of performing the final act, the person who performs the act in her stead will be liable for homicide.[81] If we interpret these rules in light of our conclusion about active suicide we could point out some social-policy issues that may be behind this law. The first is that we cannot know whether the assistant is acting from ulterior motives, or may have over-persuaded the potential suicide in order to gain from the death. A second one may be that potential murderers may find a convenient way of pretending to fulfill the wish of their victim thus misleading justice. This may be particularly troubling in a country where investigation methods and technologies are basic.[82] It may also be feared that allowing assisted suicide may devaluate the worth of life since there will be a score of people, including doctors, who are known to have killed a patient, a spouse, a mother, a friend etc… and is still walking amongst us and sanctioned by the law. Therefore the argument is that, in Ethiopian

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[80] Article 542 of the Criminal Code.

[81] Articles 538-541 of the Criminal Code.

[82] **መስፍን ማሬ ወልደ ጊዮርጊስ**, ***የወንጀል ምርመራ ዘዴዎች እና ቴክኒኮች*** (***መስከረም*** 1999 ***ዐ.ም***) at 1-6.

law, the right to life stretches far enough to include a right to end one's life although it falls short of the right to be assisted to commit suicide.

## CONCLUSIONS

Although a claim cannot be made for an exhaustive exposition of all the legal aspects of the right to life, we have touched upon the main issues concerning the subject. Among the issues discussed in some detail included whether the right to life entails a negative duty on society and state, first, to abstain from wanton killing, and second, not to interfere with the liberty of individuals concerning the disposition of their lives. While the first of these conclusions is the least controversial (if at all) the second will go down the throat of many very slowly and begrudgingly. It is hoped than that the second conclusion, as well as other conclusions and arguments in the article, will stir enough disagreement to start scholarly debates on Ethiopian law and policy. Given how we borrow most of our laws, lest we should reinvent the wheel, it is unlikely that serious debates have taken place in what the public views are on many of these issues.

Another issue that we have discussed was that the right to life entails some positive duties. The first of these duties is that of preserving and protecting life, imposed primarily on the state and also on private citizens (albeit in a limited way). We have also seen that the state has a positive duty to provide medical care to its citizens; a duty that it could relieve itself of by providing and efficiently unitizing an ever-increasing health budget. The third set of positive duties concerns the state's duty to keep the environment safe and healthy. We saw that despite the fact that environmental concerns are considered as human rights of their own kind, their protection is inseparably interwoven with the protection of the right to life.

Another interesting issue that we pursued concerned the fact that the right to life operates in a time-space continuum of the present and the future. In other words, as you and I can talk of our claim to a right to life so can we of the right to a potential life of

potential human beings. Yet the salient difference between us and potential humans, such as future generations and fetuses, is that they are incapable of standing up for their right and are, therefore, at the mercy of those of us who wish to make a claim in their stead. Furthermore, the law itself distinguishes between "us" (of the present) and "them" of the future by giving a better protection to us.

Finally, a significant take away of this article is an observation of how the right to life is interconnected with other rights and is also intricately woven into the legal system. Life is, as a starter, at the base of all other rights as most rights can be exercised and claimed only where one is alive. Additionally, the right to life is interconnected with other rights such as the right to a safe and healthy environment, sustainable development, the right to medical care, women's rights and the right to have access to judicial remedies to punish violators or to protect one's self from violations. The fact that the right to life is not a mere hortatory international or constitutional declaration comes out when one sees how as it is connected to a web of legal issues in all fields of the law and policy. In addition to international, constitutional law and a plethora of law related ethical and policy issues this article has touched upon domestic human rights law, civil law, criminal law, law of persons, police/military codes of conduct, humanitarian law, administrative law, medical law, amnesty/pardon law and environmental law. It is then for this reason that any legislative work on human rights protection, education, or the study thereof, needs a thorough and holistic approach without which rights enforcement and discourse would be hollow.

# AN ASSESSMENT ON THE REASONABLE ACCOMMODATION OF STUDENTS WITH DISABILITIES IN JIMMA UNIVERSITY

*Aytenew Debebe**

Today many students with disabilities in Ethiopia are managing to get admitted to higher education, passing all the hurdles through elementary and secondary education levels. In order to meet the needs of these students, the provisions of the Convention on the Rights of Persons with Disabilities on reasonable accomodation measures should be taken by states members. Ethiopia is a member of this Convention and the higher education institutions have to work towards the accomodation of these students so that they could compete on an equal basis with other students.

The researcher has carried out an assessment on the extent of the reasonable accomodation of students with disabilities at Jimma University. The study is carried out based on structured and semi-structured interviews with the relevant university adminsitration personnels, students, lecturers coupled with a ppersonal observation.

The findings of the research show that the university's facilities are mainly designed based on "ablesim"-for students who have no disabilities. The teaching methodology, the curriculum, the reader materials and the books, internet access and computers, the design of class rooms, office buildings and dormitories, the roads and other infrustructure, and many other things do not meet the standards set by the Convention on the Rights of Persons with Disabilities. This is in effect a violation of the rights of students with disabilities to access education on an equal basis with others as set under article 24 of the Convention on the Rights of Persons with Disabilities.

## INTRODUCTION

There is an undisputed recognition by international human rights law that persons with disabilities[1] have a right to an

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[1] The UN Convention on the Rights of Persons with Disabilities (here in after the CRPD) under article 1 prefers to define persons with disabilities than to give hard fast meaning for disability. This is partly attributed to the evolving nature of the nature of disabilities and the protections that would be afforded to the group with the dynamism of society and law. The definition of persons with disabilities under article 1 runs as: "persons with disabilities include those

inclusive education at all levels ranging from the elementary to higher education on an equal basis with others.[2] Despite this understanding and a series of committments towards inclusive education, students with disabilities suffer from a pervasive and disproportionate physical and academic barriers at schools due to multi-faceted problems.[3]

In Ethiopia, too, however a good number of students have managed to be admitted to higher education, the universities' facilities are mainly designed for students who have no disabilities. The teaching methodology, the curriculum, the design of class

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who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." So in general, an individual with a disability is defined as anyone with a physical or mental impairment that substantially limits one or more major life activities, such as walking, seeing, hearing, speaking, working, or learning. The American with Disabilities Act (ADA) under Section 12102 defines disability to include
(A) a physical or mental impairment that substantially limits one or more major life
activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such impairment. The lists conditions that may be considered a disability may hence include but are not limited to: anxiety, attention deficit/hyperactivity disorder, deafness/hearing, depression, epilepsy, heart disease, learning disorders, orthopedic, speech, or visual impairments. But throughout those definitions the important bench mark is, whether the impairment hinders ones' full and effective participation in society on an equal basis with others

[2] To list the most important ones: Convention on the Rights of Persons with Disabilities, 2006 (Article 24), International Covenant on Economic, Social and Cultural Rights, 1966 (Articles 2 and 13; General Comments 5 and 13) Convention on the Rights of the Child, 1989 (Articles 2 and 28; General Comments 1 and 9) UNESCO Convention against Discrimination in Education, 1960 (Articles 1, 3 and 4) African Charter on Human and People's Rights, 1981 (Articles 2 and 17) African Charter on the Rights and Welfare of the Child, 1990 (Article 11)

[3] Report of The Special Rapporteur On The Right To Education, Implementation of General Assembly Resolution 60/251 Of 15 March 2006 Entitled "Human Rights Council" The Right To Education Of Persons With Disabilities Human Rights Council Fourth Session Item 2 Of The Agenda, 19 February 2007

rooms and dormitories, the roads in campus, the reader materials and the books, internet access and computers and many other academic and physical facilities are designed based on ableism.[4] This will inevitably limit the effectiveness of these students to become academically competitive on an equal basis with other students.

The most pertinent international human rights instrument, CRPD which Ethiopia has ratified, too, sets a duty up on member states, among other things, to adopt measures towards a reasonable accommodation of persons with disabilities.[5] To ensure the implementation of this duty, states must make sure that schools have provided services that can reasonably accommodate students with disabilities. Specifically, higher education institutions are required to make reasonable modifications in their practices, policies and procedures, and to provide supportive systems and services for students with disabilities, without imposing an undue financial and administrative burden on the institutions and without causing fundamental modifications on the nature of the goods, services, facilities provided by the institutions.[6]

Reasonable accommodations can take many forms, depending on the individual student's needs. Modifications that universities might be required to make to their policies, practices and procedures to accommodate students with disabilities may

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[4] Ableism refers to the physical and social ways that people with impairments and lived experience of disability are marginalized, excluded, or otherwise prevented from participating in world and accessing their basic rights.

[5] The text of the CRPD under the definitions part offers a definition of reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

[6] Report of The Special Rapporteur On The Right To Education, Supra at note 3; Guidelines for Reasonable Accommodations of students with disabilities in University of Virginia, available at http://www.doe.virginia.gov/testing/participation/lep_guidelines.pdf, accessed on October 23,2014

include: not assessing penalties for spelling errors on papers or exams, allowing course substitutions for certain required or pre-requisite courses, allowing extra time on exams, allowing a reduced course load and extended time within which to complete degree requirements, providing housing accommodations for a student's personal care assistant and make modifications to the design of buildings.[7]

In addition to these policy and practice modifications, universities need to adopt inclusive infrastructures and provide supportive aids and services. These may also take many forms, depending on the individual student's needs, which may include but not limited to qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments, note takers; qualified readers, provision of assistive technology, coordination of accessible housing needs, tape-recorded or digitally recorded texts, or other effective methods of making visually delivered materials available to individuals with visual impairments or learning disabilities, class materials in alternative formats (e.g. texts in Braille, on audiotape, or as digital files), acquisition or modification of equipment or devices.[8]

The CRPD requires states parties in this respect to take measures including: facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.[9]

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[7] Rights of Students with Disabilities in Higher Education, A Guide for College and University Students available at http://www.disabilityrightsca.org/pubs/530901.pdf, accessed on December 21/2014

[8] Ibid, A Guide for College and University Students

[9] CRPD, supra at note 6, Article 24(3)(a,b,c)

The aim of this article is to assess the extent of the reasonable accommodation of students with disabilities in Jimma University. This assessment involves checking the policy and legislative frameworks, the existence of a separate coordination body, academic accommodation and physical accommodation measures. This is carried out based on a structured and semi-structured interview with the officials of the university, students with disabilities and lecturers who offer courses to students with disabilities coupled with the personal observation of the author.[10]

Accordingly, this article is organized in to three parts: the first one discussing on the normative standards of the reasonable accommodation of students with disabilities, the second part on the Ethiopian laws which acknowledge the duty of reasonable accommodation and finally an assessment of the conditions of reasonable accommodation in Jimma University.

## I. THE HUMAN RIGHTS STANDARDS TOWARDS REASONABLE ACCOMODATION OF STUDENTS WITH DISABILITIES

The right to education is enshrined in the 1948 Universal Declaration of Human Rights (hereinafter UDHR) for every individual irrespective of difference based on sex, religion, race, color, ethnicity, nationality, and other status.[11] Reaffirming this pledge, the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICECSCR) solemnly declared the right to education for all without discrimination.[12] Although these two instruments do not refer explicitly to inclusive education for persons with disabilities, certain elements of the right to education implicitly serve to promote the concept. Notably, article 13 of the ICESCR highlights education's role of enabling, "all persons to

[10] The fact that author teaches at the University helped him to get first hand information on the physical and academic facilities, and the challenges faced by the students.

[11] UDHR, article 26

[12] ICESCR, Supra at note 2, Article 13, Article 2

participate effectively in a free society". Again, the principle was reiterated in the Convention on the Rights of the Child, but this time more explicitly in its articles 29 and 23; the former by focusing on the purposes of education and the latter, relating specifically to children with disabilities, by imposing an obligation on States to ensure that children with disabilities have "effective access to and receive education, training, health-care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development".

Latter in 1990, the World Conference on Education for All and the 1993 United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, urge States to ensure that the education of persons with disabilities is an integral part of the education system.[13] Moreover, the Convention on the Rights of the Child[14], the Salamanca Statement and Framework for Action on Special Needs Education adopted in 1994 by the World Conference on Special Needs Education have all established the obligation of States to ensure an inclusive education system. Inclusive education, as enshrined in the Salamanca Declaration connotes that education is provided for all within the regular education system. Focused on children and young people, the Declaration calls on States to ensure that children with "special educational" needs must have access to regular; that is mainstream schools. The Declaration underlines that inclusion is the most effective means of combating discriminatory attitudes and achieving education for all.

In September 2006, the Committee on the Rights of the Child adopted its General Comment No. 9 on the rights of children with disabilities. This General Comment specifically views inclusive education as the goal of educating children with disabilities and indicates that States should aim at providing "schools with appropriate accommodation and individual support" for these

[13] In fact in 1960, UNESCO adopted its Convention against Discrimination in Education; however it doesn't carry a binding force. Unfortunately, these two subsequent documents have no also binding nature.

[14] CRC , Supra at note 2, Articles 23 and 29

persons.[15]

However, all of these efforts were not enough to establish a clear enforceable right towards the equalization of opportunities for students with disabilities at all levels of education. As a result, students continue to suffer from pervasive and disproportionate physical and academic barriers in education institutions due to non-inclusive setup.

With the increased involvement of governments, advocacy groups, community and parent groups, and in particular organizations of persons with disabilities, in December 2006, the General Assembly in its resolution 61/106 adopted the CRPD. The cornerstones of the Convention are inclusion, parity of participation, full enjoyment of rights and dignity for people with disabilities, with additional attention given to the juxtaposition of other factors of exclusion and discrimination, such as combinations of gender, age, childhood, poverty and disability.[16] The CRPD is noteworthy on many levels. It unifies in one international document a range of human rights recognized for people with disabilities, and reaffirms the "universality, indivisibility and interdependence" of human rights.

In seeking to improve access to education for the majority of those with disabilities, the CRPD recognized inclusive education.[17] Accordingly, nations must 'ensure an inclusive education system at all levels'. Under this Convention, the right to education of persons with disabilities encompasses a right to 'not [be] excluded from the general education system on the basis of disability' and access to 'an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live' [18]

In this respect, the CRPD establishes a duty of reasonable accommodation on the states towards inclusion of persons with disabilities. Because, full inclusion is closely linked

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[15] Committee on the Rights of the Child, general comment No. 9 on the rights of children with disabilities (CRC/C/GC/9, para. 64).

[16] CRPD, Supra at note 9, General principles, Article 3

[17]. Ibid, CRPD article 25

[18] .Ibid, CRPD, (Art. 25 (2)(a))(Art. 25 (2)(b))

with ensuring non-discrimination and successful implementation hinges on the provision of reasonable accommodation.[19] Para (2) of article 24 is cornerstone and enshrines inclusive education by ensuring that persons with disabilities are not excluded from mainstream education. Reasonable accommodation as defined in Article 2 of the Convention is enshrined in Para (c) of article 24.[20]

In exceptional circumstances where the general education system cannot adequately meet the support needs of persons with disabilities, States Parties shall ensure that effective alternative support measures are provided, consistent with the goal of full inclusion."[21] Obviously, the goal of full and effective inclusion cannot be met, if "some" are left out. As a result Para (d) of article 24(2) covers the necessary support to ensure full and effective inclusion within mainstream education and Para (e) enshrines the support necessary to ensure that in case of non-inclusive settings, the same standards of academic and social development are upheld. When this is read in conjunction with Para 3 (c), it is clearer that deaf, blind and deaf-blind persons in particular should benefit from this provision.[22]

Para 3 details the skills that should be taught,

> "(a)*facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of*

[19] These issues are explicitly covered in Paras (2) (c) & (5) of Article 24 of CRPD

[20] With regard to the cost involved in providing accessible and inclusive education, it might be appropriate to recall the notion of progressive implementation, compare Article 4 Para 2.

[21] Ibid, CRPD, Paras (d) and (e)

[22] The ICESCR committee in its General Comment No 13 outlined the basic features on the right to receive education to include

- Availability – educational institutions providing quality education have to be available in sufficient quantity.
- Accessibility – available to everyone without discrimination:
- Acceptability – the form and substance, including method of teaching have to be relevant, culturally appropriate and of good quality.
- Adaptability – flexible so as to adapt to the needs of changing societies.

*communication and orientation and mobility skills, and facilitating peer support and mentoring;*

*(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;*

*(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.*

The reference to "most appropriate languages" in (c) does not explicitly refer to sign languages, which should be added though. Para (4) is important in that it calls for training and awareness for all teachers, not just those who work with persons with disabilities. Para (5), as is mentioned above, includes a specific reference to reasonable accommodation.

Based on what is discussed above, Article 24, paragraph 3, of the CRPD imposes a duty up on the States to ensure appropriate languages and modes and means of communication for the individual and environments which maximize academic and social development for students. This means the students should be afforded with an academic system that could reasonably accommodate their needs and a physical environment that doesn't create an obstacle on their day to day activities in the learning environment. Therefore, the measures of accommodation of students with disabilities can be taken in to two broad forms- academic accommodation and physical accommodation.

Academic accommodation means to take measures so as to make the curriculum and the modes of delivery accommodative of the needs of students with disabilities. This requires a proactive consideration of students with disabilities in the design of curriculums and a periodic revision of existing curriculums. Moreover, there should be a room for course substitution and course exemption for students with visual impairments where a curriculum change is not affordable. In the delivery of courses, the teaching methodology should be mind full of the students with impairments. For instance, the student who is visually impaired may exhibit problems in one or more of the following areas:

inability to utilize visuals such as films, graphs, demonstrations, and written materials; difficulty in taking traditional paper and pencil tests; need for a longer period of time to complete assignments; difficulty in focusing on small-group discussion when there is more than one group functioning; and need for a variety of low-vision aids to integrate the classroom. Therefore in those courses that necessarily require unimpaired vision, the students should be allowed to substitute courses or get exemption within the limit set by the University. Because a student is visually impaired, it should not be assumed that she cannot participate in all educational activities.

Last but not least, when exams are administered, students with visual impairment cannot sit with the others in the same room since they need an assistance of a scriber which involves narration by the student. Therefore, such students should be afforded with an exam setting free from destruction and nuisance.

Physical accommodation on the other hand includes the modes of announcement and notices to get necessary information about the day to day operation in their program of study, including, class schedules, exam schedules and other relevant notices; the accessibility of buildings including the class room, libraries, administration offices, cafeterias, dormitories, roads and others. All the above should be accommodative of the needs of students with disabilities. Unless the notices and announcements in the institutions are considerate of students with disabilities, that will make them ignorant about the day to day operation of the institution or at the very best dependents on their friends. The ableist design of buildings which ignores especially students with mobility problems, who use wheelchairs, crutches, etc is another bulwark against the effectiveness of students in their day to day academic and social development activities in the institutions. The non accessibility of the class rooms, the administration buildings, the dormitories, the buses, the offices of instructors will obviously imply that the students with mobility problems are going to miss classes, contacts with their instructors, and other important places.

Moreover, for the safety of students with visual, hearing

and mobility problems alike, there must be traffic signs for drivers in campus so that they notice the presence of these students who can't hear or see the conventional traffic signals.

## II. THE ETHIOPIAN LAWS ON REASONABLE ACCOMMODATION OF STUDENTS WITH DISABILITIES

When we see the Ethiopian legal framework on the right to inclusive education and reasonable accomodation of students with disabilities, apart from the Constitution,[23] there is a clear and most pertinent provision in the higher education proclamation about the measures of reasonable accomodation for students with disabilities.[24]

The proclamation specifically requires the institutions to make their facilities and programs amenable to use by students with disabilities.[25] This includes reasonable modification measures to relocate classes, develop alternative testing procedures, and provide different educational auxiliary aids in the interest of students with physical challenges.[26] These are related with the academic accommodation of the students with disabilities.

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[23] Ethiopia has ratified the CRPD in 2010, which implies that the Convention has become part and parcel of the law of the land according to article 9(4) of the FDRE Constitution. This further implies that the constitution under chapter three should be interpreted in accordance with the convention, as per article 13(2). More specifically, the constitution under article 41(5) declares

"The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian." However not directly related to inclusive education, there are also proclamations on preferential employment right clause in 2007, A human right oriented Employment legislation in 2008, accessibility or building legislation in 2009 and 2011, disability inclusive national development plan2011 which show the trend of normative standards towards inclusion of persons with disabilities in different fields.

[24] Ethiopian Higher Education Proclamation, proclamation No. 650/2009

[25] Ibid Article 40(1)

[26] Ibid, 40(2)

In addition to the above measures of reasonable accommodation to academically accommodate students with disabilities, the institutions are required to ensure that the class rooms, residence buildings, administrative buildings and other infrastructure are able to accommodate the needs of the students with disabilities. This means, building designs, campus physical landscape, computers and other infrastructures of institutions shall take into account the interests of physically challenged students.[27] Moreover, in order to assist students with disabilities to be equally competitive, measures of academic accommodations including tutorial sessions, exam time extensions and deadline extensions are required to be introduced.[28]

This provision is a direct reference to inclusive education and measures of reasonable accommodation in higher education institutions in Ethiopia. It requires the institutions to make all the necessary and possible adjustments to let students with disabilities be considered in the mainstream education system, to the extent resources permit.

## III. THE EXTENT OF REASONABLE ACCOMMODATION OF STUDENTS WITH DISABILITIES IN JIMMA UNIVERSITY

### *A .Introduction*

Like many low income countries, disability in general and reasonable accommodation of students with disabilities in higher education is rarely discussed in Ethiopia. Yet, the number of students managing to be admitted to higher education is growing and now it poses a serious question for universities about whether they provide a reasonable accommodation for this group of students.

Reasonable accommodation of students with disabilities requires a combination of legislative and administrative measures. The administrative measures can be divided in to two: measures of

[27] Ibid 40(3)
[28] Ibid 40(4)

academic accommodation and measures of physical accommodation, in which a combination of the two would help to enhance the accessibility of education for students with disabilities in higher education institutions.

In the coming part, the legislative framework, the coordination of services and the extent of academic and physical accommodation for the students will be analyzed in the context of Jimma University.

### *B. Policy and Legislative Framework*

Adopting appropriate legislation, developing policies or national plans of action, are important starting points to inclusion for all. The CRPD under article 4(1) requires specific laws and policies, in general legislative measures to be taken in order to implement the commitments undertaken in the convention. Unfortunately, there is often a lack of national legislation, policy, targets, and plans – or at least significant gaps in them – for reasonable accommodation of students with disabilities.[29] Overall there is a lack of information for governments about how to translate international standards, such as Article 24 of the CRPD, into practice.[30]

In other words, a specific law is necessary to implement the duties of states imposed up on states by the CRPD. One of strategies for inclusion of students with disabilities identified by the Special Rapporteur on Inclusive Education is to create appropriate legislative frameworks and set out ambitious national plans for inclusion. Since the needs of students with disabilities are often neglected, general international conventions and national laws are usually insufficient.

In Jimma University, there is no specific law to regulate the accomodation of the needs of students with disabilities. Disability accommodation policies would have been helpful in the determination of the beneficiaries of the disability services, the type of service available and the mechanism of complaint hearing. The

[29] Special Rapporteur, Supra at note 4

[30] Ibid

lack of a legislative framework will make the proper accommodation of the students with disabilities arbitrary.[31]

However it has no a policy or comprehensive action plan, Jimma University has a plan for appropriate teacher training, access to school buildings, and the provision of additional learning materials and support.[32]

### *C. Coordination Body: "Focal Point for Disabilities"*

Another very important measure for reasonable accommodation of students with disabilities is to establish a coordination body with a mandate of following up the disability claims and services in a certain institution. This coordination body is supposed to work on the determination of who is eligible for disability services and benefits, consider complains raised by students with disabilities in accommodation of their needs, following up policy making and implementation in relation to students with disabilities.

Jimma University has no such coordination body; the available services are coordinated by the Students' Services Directorate. Ato Ewnetu Hailu, Director for Students' Services at Jimma University, said that however there is an understanding with the higher officials of the University on the needs of students with disabilities, it is considered expensive to establish a separate coordination organ in the university for the time being.[33]

### *D. The Availability of Services for Academic Accommodation at Jimma University*

It's recently that Jimma University started to admit

[31] Far too often the national education policies has not mentioned disabilities or inclusive approaches however the country is very close to universal primary education. Key gaps included a lack of targets or plans and weak data collection to feed into planning.

[32] Interview with Ato Ewnetu Hailu, Director for Students' Services at Jimma University, interview held on October 22,2014, Jimma

[33] Ibid, Interview with Ato Ewnetu Hailu

students with disabilities. The common areas of disability observed in the university are visual impairment and mobility problems.

As mentioned above, there is no a separate focal body to follow-up the provision of services for students with disabilities. But the Director for Students' Services carries out the duty in addition to many other duties given by the university administration. Ato Ewnetu Hailu, the Director for Students' Services mentioned that the university provides the materials necessary for students with visual impairments and mobility problems.

For students with visual impairments, the University provides Braille books borrowing from Addis Ababa University, White cane, tape recorders; arrange exam readers and scribers, who are paid by the university. However the students complain that there is no provision of the recorders and Braille books for all the courses and they are too much dependent on their friends and lecture notes from the lecturers to cope up with the existing situation.[34] There are no computers suited for blind students. All the computer labs in the university are not thoughtful of the needs of the students with visual impairments.

In addition, there is no an accommodating curriculum, like course substitution and exemption for the visually impaired students who are not able to attend courses which involve arithmetic works, especially at the departments of sociology and psychology on statistics and quantitative research methodology courses. But the lecturers may have their own reasonable measure taking in to consideration the difficulties their students may suffer from. But due to the absence of any policy framework, the lecturers are working only out of intuition and sympathy and that lacks normative standard and consistency.[35]

Tutorial sessions, exam time extensions and deadline extensions which are required to be introduced by the higher education proclamation are non-existent in the practice of Jimma

[34] Interview with Shegaw Birhanu, fifth year law student who has visual impairment, interview held on October 23, 2014, Jimma

[35] Interview with Addisu Tegegne, a lecturer of social work, Jimma University, interview held on December 26,2014

University.

In the law school, where there are about five blind students, they don't have an option to substitute or to be exempted the tax law course which has also an arithmetic work. It's up to the discretion of the course lecturer to accommodate them.[36]

For students with visual impairments, separate exam rooms are not available; they are obliged to take their exams at the corridors of classes, full of nuisance and distraction.[37]

### *E. The Availability of Services for Physical Accommodation at Jimma University*

Jimma University has about four campuses offering different fields of study. The students with visual impairments who are mostly in the fields of social sciences, governance and law are attending their study at the main campus. The students with mobility problems who use wheelchair and crutches are however attending their education throughout all colleges.

The modes of announcement and notices to students about the day to day operations in their study ignore students with visual impairments as it is designed based on the idea of ableism, only based on print media. If students with visual impairments should compete equally with others in higher education, they should have to get necessary information about the day to day operation in their program of study, including, class schedules, exam schedules and other relevant notices. This destined the students to be dependent on friends who can manage to tell them about the notices and that will in turn affect their effectiveness in their study.

When we observe the physical accessibility of the buildings in Jimma University, it is mostly constructed on the basis of ableism, without giving due regard to students who use a

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[36] Interview with Yosef Alemu, tax law lecturer, Law School, Jimma University, interview held on October 26, 2014

[37] Interview with Destaw, a second year law student who has a visual impairment December 27, 2014

wheelchair and a crutch. The student's clinic which is at the ground floor of the Students' complex can be accessed by wheel chair user students. Moreover, the university gives dormitories for these students at the ground floor with a special bathing room design which accommodates students who use wheelchairs, which is a very commendable measure. There is also a separate library for students with disabilities close to their dormitories.

Beyond that, not a single building of the university has an elevator. All academic and administrative buildings above the ground floor are not easily accessible by person using wheelchairs, unless they are supported by others. It is possible to verify this assessment by taking sample buildings.

The Green building is one of the huge buildings constructed in Jimma University having four storeys to serve as a resource center. But when we see the way it is constructed, we cannot find any consideration to students who use wheelchairs and crutches. Even the ground floor is not accessible as there is no any way to drive a wheelchair, since it has breaks and steps in front of the main gate of the ground floor. This problem is, too, observed at the newly built Social Science and Humanities College building, where administrative and lecturer's offices situate.

The students' complex building, which hosts mainly the registrar office, the student's directorate offices and the student's clinic, has a road constructed for wheelchair users leading to the main gate. However, a student who uses a wheelchair can't access the offices above the ground floor, where many of the student's affairs are carried out. Ato Ewnetu Hailu said that he would go everytime down to the floor to talk to students who use wheel chairs, which seems very much unrealistic. The main hall of the university which is situated at the College of Agriculture and Veterinary Medicine can't be accessed by a wheel chair user since it has steps and breaks which do not allow driving a wheelchair. All the other buildings across the university are ignorant of the needs of the students with disabilities.[38]

[38] In fact the Construction Proclamation 624/2009 under article 33(4) any building, which is more than 20 meters above the ground floor, shall be provided with a lift or other similar service. This is customarily accepted that

This barrier created on students with mobility problems will have a further implication on their effectiveness in their study and complicate to manage their lives in campus. Infrastructure services have a central role as a facilitator or barrier based on their design. As a result, the role of properly designed infrastructure is particularly important in the efforts to provide equal access to education for all without discrimination.

The other very important factor that affects the education and life of students in campus is the accessibility of roads in campus. The roads have breaks and steps that cannot mitigate the difficulty of the persons using wheelchair and for visually impaired students, too. Since the roads are not suitable for them students with disabilities are unable to access many offices of the academic and administration services at the university.[39] This in turn affects the competiveness of the students in their study and in fact a threat to their life and security of their person, because they are unable to move without difficulties and they are destined to be dependent on someone else.

For what is worse, there are no traffic signs for driving in campus so that they can be wary of students with hearing and visual impairments. A combination of these problems exposes their life and security to danger in addition to its implication on their academic performance.

But this is not a total rejection of the limited adjustments made by the University in making the roads accessible, however it's very much limited. Parallel to the main road at the main campus, there is an adjustment for wheel chair users, however it is only one single way and the main road is not comfortable to drive wheel chair. Moreover, in some areas it is beyond their capacity to roll their wheelchairs and climb the mountainous road.

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buildings above ground plus four should have a lift. But this cannot be used to defend the claim of students who are admitted to the universities based on an assumption that they would get equal treatment with the others.

[39] Interview with a health science student (who asks his identity be kept anonymous) who use wheelchair. He says he needs the support of his friends to drive his wheelchair in campus since the road has ups and downs, interview held on October 25,2014

Because of this, students are observed assisted by other persons to drive the wheel chair.

Generally the problem relating to the design of the infrastructure in Jimma University play its own role in limiting the academic and social life of students in addition to the lack of academic accommodations. Added to the problems resulting from the social construction of our society, the design of the infrastructure at the university is becoming a barrier affecting students with disabilities in their educational and personal activities during their stay in campus.

## CONCLUSION

The movement towards inclusive education has received much support in recent years. Despite this, students with disabilities are still experiencing different obstacle in their academic and personal life at the mainstream education system. Among other obstacles, the discrepancy that exists between the normative framework and the resources available for realizing the right to inclusive education, as well as the lack of genuine political will to achieve this goal are the critical ones. Students with disabilities at higher education face various forms of discrimination in educational settings. This results in education systems in which persons with disabilities are denied the right to education as enshrined in article 24 of the Convention on the Rights of Persons with Disabilities

The researcher find out that, students with disabilities in Jimma University are still experiencing serious difficulties and facing barriers to the full enjoyment of the rights enshrined in the CRPD and other national and international human rights standards. The barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which students with disabilities encounter in their daily lives.

Jimma University has to act now to halt the marginalization of students with disabilities from the mainstream education system, and minimize the gap in the delivery of academic and physically accommodating measures. It should work to ensure that students with disabilities are not academically and personally affected in the

inclusive education system.

Curriculums must be re-evaluated and developed to meet the needs of students with disabilities. Modification in training programmes for teachers and other personnel involved in the educational system must be achieved in order to fully implement the rights of students with disabilities to inclusive education and reasonable accommodation.

Finally, the measures of reasonable accommodation at Jimma University must no longer be seen as a marginal policy issue, but as central to the achievement of high quality education for all learners, and the development of more inclusive societies. In order to effectively respond to the real needs and issues 'on the ground', it is important to ensure that the voices of students with disabilities are included in policy planning processes and monitoring.

# INTERCOUNTRY ADOPTION: LOSS OF IDENTITY OF A CHILD?

*Yitages Alamaw Muluneh**

Intercountry adoption is regarded as one means of child care in the modern time. As it involves physical displacement across borders,[1] it implies not only the total and definitive rupture of the relationship of the adopted child with his or her biological parents, but also transfer of the adopted child to a country with completely different culture and a complete change in identity of the adopted child almost always without his or her consent. Thus, some critics on intercountry adoption emphasise on the effect of intercountry adoption on the right of the child to culture. They say that intercountry adoption results in 'the loss of a child's cultural heritage' and consequently 'leads to the loss of the child's identity.'[2] As a result, they tend to reject the institution of intercountry adoption. In this work, the writer argues that, first, intercountry adoption can be regarded as one acceptable means of alternative care to children without losing sight of its effect on their cultural right. Second, the legal regime governing intercountry adoption at the international level includes safeguards that protect cultural rights of children during intercountry adoption and hence it is possible to balance the right with other rights of the child.

## INTRODUCTION

Adoption, which is the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents,[3] is

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[1] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Article 2(1).

2 Martin, J. 'The good, the bad, and the ugly? A new way of looking at the intercountry adoption debate,' 13 *U.C. Davis Journal of International Law and Policy*, 2007, p.174.

[3] Garner B.A (ed.), *Black's Law Dictionary*, 7th ed., 1999, p.50. Adoptive parent is a parent by virtue of legal adoption. *Id*, p.1137. Adoption literally refers to the voluntary act of taking someone's child into one's own family and legally raising him or her as the child of such family. *Cambridge Advanced Learner's Dictionary*, 2003.

one of the areas of concern in relation to children. This process or institution is not a new phenomenon.[4] It can be traced back to the period of Old Testament, at least.[5] Since then, though some scholars claim that adoption has been a universal practice, it has been prevalent in most parts of the world.[6]

Originally adoption matters were governed by some traditional norms. Today, however, adoption is regulated under both national and international laws and should be made in accordance with formal legal procedures prescribe therein. Moreover, despite expected changes owing to changes in human life realities, adoption has been practiced for various reasons since the beginning. Generally, it could be argued that it had been chiefly used to realize the needs of adults, for instance, adults that need to adopt a child due to their inability to have one for natural/biological or medical reasons, much more than the needs of children. This is because members of the international community have not viewed children as subjects of rights until recently.

Be that as it may, adoption may be effected with parents of children and others, known as adoptive parents. These adoptive parents may be relatives or friends, or complete strangers. They may also be nationals or residents of the same country with the adopted child and/or his or her parents, or non-nationals or non-residents of such country. Therefore, adoption may take place within the country where the adopted child resides and he or she may live with the adoptive family there; or, adoption may take place within or outside the country where the adopted child is a national and resident and he or she may live with the adoptive parents in another country where the adoptive parents reside or where the adoptive parents are nationals. The later context of adoption is

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[4] Ryan, C. Intercountry Adoption: Past, Present and Future Concerns Regarding its Existence and Regulation, p.132, available at https://sisterinlaw.murdoch.edu.au/index.php/sisterinlaw/article/view/3/32 accessed on 6/01/2015.

[5] Albrecht, S. Intercountry adoption: A Swiss perspective, unpublished, University of Cape Town, School for Advanced Legal Studies, p.5.

[6] Ibid; Ryan at note 5 above, p.132.

technically referred to, in this work, as 'intercountry adoption'.

As intercountry adoption involves physical displacement across borders,7 it implies not only the total and definitive rupture of the relationship of the adopted child with his or her biological parents, but also transfer of the adopted child to a country with completely different culture and a complete change in identity such as name, family ties and nationality, of the adopted child almost always without his or her consent because of his or her age. Thus, some critics on intercountry adoption, like Martin, emphasise on the effect of intercountry adoption on the right of the child to culture. They say that intercountry adoption results in 'the loss of a child's cultural heritage' and consequently 'leads to the loss of the child's identity.'[8] As a result, they tend to reject the institution of intercountry adoption.

It is undeniable that intercountry adoption may involve transfer of a child to a country that has a culture different from his or her country of origin. This article examines whether such fact relating to the culture of the adopted child makes intercountry adoption subject to outright rejection. Particularly, it seeks to address two specific issues: *Is intercountry adoption effected/conducted in accordance with the international legal framework for intercountry adoption in such a way that the child loses his or her identity?* And, *is there any attempt in this framework to balance the right to culture and identity on the one hand and the other rights on the other hand of adopted child?*

The writer presents his work in six sections. The first section deals with the historical antecedents of intercountry adoption. The second section dwells on the issue of nomenclature. The third section gives a brief account of child care as enshrined under the United Nations Charter on the Rights of the Child, 1989 (UNCRC), and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC). The fourth section provides a short overview of the purposes of the Hague Convention and the system

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[7] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Article 2(1).

[8] Martin, J. 'The good, the bad, and the ugly? A new way of looking at the intercountry adoption debate,' 13 U.C. Davis Journal of International Law and Policy, 2007, p.174.

it establishes. The fifth section discusses the place of the right to cultural identity in intercountry adoption. Lastly, a short conclusion and recommendation would be presented under the sixth section.

## I. HISTORICAL ANTECEDENTS

Like I said above, unlike its reasons and prevalence, scholars are relatively at a consensus that adoption has been practiced for long. However, this is not true for adoption in both contexts discussed above. As far as intercountry adoption is concerned, it is a recent development. It has been said that situation of children after World War II, existence of many orphans among others, has given rise to the concept of intercountry adoption.[9] During and after the Korean and Vietnamese War, intercountry adoption 'truly received global awareness.'[10] Since then, intercountry adoption has been practiced for different reasons[11] and existed with two of its faces: one face 'as a heart-warming act of good will that benefits both child and adoptive family' and the other face as 'child trafficking or baby selling.'[12]

By now, intercountry adoption is increasing (involving the transfer of more than 30,000 children each year from over 50

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[9] Ibid; Hillis, L, 'Intercountry Adoption Under the Hague Convention: Still an attractive option for homosexuals seeking to adopt?' *Ind. J. Global Legal Stud.*, Vol.6, 1998-1999, p.239.

[10] Ryan at note 5 above, p.135; Katz, L.M., "A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (1995) 9 *Emory Int'l L. Rev.* 283, 286.

[11] Demographic and humanitarian reasons and "the ideology of 'solidarity with the Third World'" can be mentioned as some of positive reasons. See UNICEF, Intercountry Adoption, Innocenti Digest, p.2, available at http://www.unicef-irc.org/publications/pdf/digest4e.pdf, accessed on 06/01/2015.

[12] Smolin, D.M, 'The two faces of intercountry adoption: The significance of the Indian adoption scandals,' *Seton Hall Law Review*, Vol. 35:403, 2005, pp. 403-404.

countries)[13]as the number of orphaned and abandoned children is increasing in the world due to conflicts, HIV/AIDS, natural disaster, poverty, and other reasons related to adoptive parents-particularly some parents do not want to give birth.[14] This is particularly true for Africa where poverty and HIV/ADIS have been plugging the life of its people. Thus, in between 2005-2009, at least, three highly publicized intercountry adoption cases in Africa revitalized concerns over the rights of children in intercountry adoption. These cases were the Madonna case in Malawi, the Angelina case in Ethiopia and the Zoe's Ark case in Chad.

Moreover, intercountry adoption is a sensitive area of concern as it (may be used) is susceptible to be used as a cover to child trafficking. In other words, intercountry adoption provides incentive and opportunity for child trafficking to occur.[15] The world has witnessed grave cases of human trafficking particularly of children and women who were illegally sent to various countries for

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[13] J Masson 'Intercountry adoption: a global problem or a global solution?' Journal of International Affairs, Columbia University School of International Public Affairs, 2001, p.1. In addition, the number of adoptable children in the West and developed countries has become insignificant. Marlene Hofstetter and Terre des hommes Lausanne, International Adoption, The Global Baby Chace, p.2, available at http://www.childtrafficking.com/Docs/hofstetter_2004_the_global_baby_chase_7.pdf, accessed on 06/01/2015.

[14] Albrecht cited above at note 6, p.11; Ryan cited above at note 5, p.133; ATD Fourth World, How poverty separates parents and children: A challenge to human rights, available at http://www.un-ngls.org/atd-study-poverty.pdf, accessed 0n 06/01/2015; ...Policy breif: Intercountry adoption in emergencies, 2005, available at http://www.adoptioninstitute.org/publications/2005_Brief_ICA_In_Emergencies_April.pdf, accessed on 26/10/08. 'The combination of poverty, ineffective legislation and bureaucracy in donor countries, with money and desperation for children in receiving countries, provides the perfect climate for trafficking and sale to flourish.' Discussion Paper 34 (1994) - Review of the Adoption of Children Act 1965 (NSW), 12. Inter-Country Adoption in an International Perspective , p.5.

[15] See M Jimenez "Trafficking in Central America: The case of Honduras" (1993) 10(1-2) *International Children's Rights Monitor* 6.

prostitution and other sorts of forced or exploitative labour. Human trafficking is highly despised act that is condemned by the global community as a global or transnational crime;[16]as an organized crime[17]as though trafficking in persons may be committed by an individual or a couple, in most cases it involves an organized criminal group; and, as a crime against humanity under international law.18

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[16] United Nations Convention Against Transnational Organized Crime, Nov. 2, 2000, art. 3(2). For scholarly discussions on this matter, s*ee generally* L Smith & M Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER FORUM WORLD AFFS. 155, 157-58 (2004); *The Role of the Government in Combating Trafficking in Persons – A Global Human Rights Approach: Hearing Before the Subcommittee on Human Rights and Wellness of the House Comm. on Gov't Reform*, 108th Cong. 85-86 (2003) (prepared statement of M Y. Mattar, Co-Director, The Protection Project of the Johns Hopkins University School of Advanced International Studies.). Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 20, 2000, art. 17. In order to effectively combat trafficking in persons, states should discharge the following five main international obligations in accordance with the U.N. Protocol: '1) recognizing trafficking in persons as a specific and serious crime, 2) undertaking measures with respect to the prevention of trafficking in persons, 3) providing protection for the victims of trafficking, 4) guaranteeing repatriation of the trafficked victims, and 5) prosecuting the cases of trafficking.' M. Y. Mattar 'State Responsibilities in Combating Trafficking in Persons in Central Asia,' *Loy. L.A. Int'l & Comp. L. Rev.* [Vol. 27:145-222], especially 168-210.

[17] United Nations Convention Against Transnational Organized Crime, Nov. 2, 2000, art. 2(a).

[18] See generally U.N. Convention, *supra*, arts. 5-13. *Id.* In order to be classified as crimes against humanity, the above acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *Id.* art. 7(1). The definition of "crimes against humanity" in the Rome Statute of the International Criminal Court includes, inter alia, "enslavement," "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," and "rape, sexual slavery, enforced prostitution, forced pregnancy . . . or any other form of sexual violence of comparable gravity." Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(c), (e) & (g), U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999, 1004 [hereinafter Rome Statute of the ICC]. According to the ICC Statute, the term '"enslavement' means the

In addition to this experience, even child trafficking in the field of intercountry adoption has been an increasing phenomenon since 1960s. This has resulted from the fact that more and more couples from the developed countries of the West and the North want to fulfil their desire to become parents by adopting a child from the South and the East; and, at the same time, the children who need protection through intercountry adoption have become less and less, which in turn has made intercountry adoption to follow the common laws of the market: the offer searches the demand and the demand tracks the opportunities, with a great deal of assistance from globalization, the means of communication and travel facilities all over the world. This has resulted in baby-buying and baby-selling scandals.[19]

Particularly in some countries, intercountry adoption was conducted through offensive acts like some birth mothers received illicit payments in connection with surrendering their babies for adoption;[20] declaration of paternity by a 'father' abroad as the child

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exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(c), (e) & (g), U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999, 1004 [hereinafter Rome Statute of the ICC].

[19] Generally see Smolin, D.M. 'Intercountry Adoption as Child Trafficking,' Valparaiso University Law Review, Vol.39, No.2, 2004, p.281; Dillon, S. 'Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming The United Nations Convention on the Rights of the Child With the Hague Convention on Intercountry Adoption,' Boston University International Law Journal, Fall 2003. UNICEF said that between 1993 and 1997, the number of adopted babies from foreign countries registered for leading industrial nations grew from 16,000 to 23,000. UNICEF Warns of Growing Criminal Role in Baby Trafficking, Deutsche Presse-Agentur, July 31, 2000. See also AIDS, Child Trafficking Major Problems in Asia-Pacific, Agence France Press, May 7, 2003 ("Children are being trafficked for labour, sexual exploitation, forced marriage, begging and adoption."), available at http://www.hcch.net/e [hereinafter Hague Convention].'

[20] Bartholet, Elizabeth. 1988-. "International Adoption: Overview." In *Adoption Law and Practice*. Edited by Joan H. Hollinger, et al., 1-43. New York: Matthew Bender Publisher. P. 128; 'International Adoption: Current Status and Future Prospects,' *The Future of Children* 1 (Spring 1993) 89-103; 'Beyond

being his in presence of the biological mother; registering the child by the adoptive parents as their offspring in the country of origin; kidnapping a child and making the adoption with the consent of a 'false mother' for adoption; taking a child with a new identity by telling the biological mother that the baby died shortly after birth; and, adoption taking place through forged documents (false birth certificate, false consent of the mother, etc.) or without fulfilling legally prescribed requirements. This has proved that the ugly fact about children- 'Children are vulnerable members of every society and have been subject to various forms of abuse'- applies to the case of intercountry adoption as well, as children have suffered abuses of their rights in the name of intercountry adoption. As a result, the international community has attempted to prevent abuses of children's rights by formulating conventions which set standards for States' treatment of children.

With respect to the regulation of intercountry adoption, attempts to provide a legal framework to regulate the same have dated back almost to the same period whereby the practice of intercountry adoption has become popular, the 1950s. In the mid-1950s, there was a consultation on how to address problems relating to intercountry adoption at international level.[21] Since then, there have been various declarations and conventions relating to intercountry adoption adopted at the international level.[22] Towards the end of 1980s, the global community has identified that prevention of child trafficking and sale shall be put as a high priority on the international agenda. G Parra-Aranguren, in her Explanatory Report on the Convention on Protection of Children and Co-operation of Intercountry Adoption, has stated the reasons

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Biology: The Politics of Adoption and Reproduction,' *Duke Journal of Gender Law and Policy Vol.*2 (Spring 1995) pp.5-14; 'International Adoption: Propriety, Prospects and Pragmatics,' *Journal of the American Academy of Matrimonial Lawyers Vol.*13 (Winter 1996) , pp.181-210; 'What's Wrong With Adoption Law?" *The International Journal of Children's Rights* Vol.4, 1996, pp263-272.

[21] UNICEF, Intercountry Adoption, Innocenti Digest, p.2.

[22] Id, pp.2-5; Van Loon, H. 'Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption' *The International Journal of Children's Rights*, Vol.3, 1995, pp.463-464.

for including the subject of intercountry adoption with priority in the Agenda of the Seventeenth Session of the Special Commission on general affairs and policy of the Hague Conference on private international law were summarized by the Permanent Bureau of the Conference as follows:

> (i) a dramatic increase in international adoptions which had occurred in many countries since the late 1960s to such an extent that intercountry adoption had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment;
> (ii) serious and complex human problems, partly already known but aggravated as a result of these new developments, partly new ones, with among other things manifold complex legal aspects; and
> (iii) insufficient existing domestic and international legal instruments, and the need for a multilateral approach.[23]

The Permanent Bureau mentioned that insufficiency of the international legal instruments to meet the present problems caused by intercountry adoptions shows that the following requirements are necessary:[24]

> (a) a need for the establishment of legally binding standards which should be observed in connection with intercountry adoption;[25]
> (b) a need for a system of supervision in order to ensure that these standards are observed;[26]

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[23] J.H.A. van Loon, "Report on intercountry adoption", Prel. Doc. No 1 of April 1990, pp. 6-7; *cf. Proceedings of the Sixteenth Session (1988)*, Tome I, *op. cit.*, pp. 181-185.

[24] "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2..

[25] This informs (in what circumstances is such adoption appropriate; what law should govern the consents and consultations other than those with respect to the adopters?). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

[26] This is about (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward; should measures of control be imposed upon agencies active in the field of

> (c) a need for the establishment of channels of communications between authorities in countries of origin of children and those where they live after adoption;[27] and there is, finally,
> (d) a need for co-operation between the countries of origin and of destination.[28]

At the same time, a similar concern developed in the UN too. Thus, in 1986 the General Assembly of the United Nations adopted an important Declaration, known as the Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986, by consensus.[29] This Declaration laid down the principle that intercountry adoption was only to be considered as a placement option if a child could 'not be placed in a foster or an adoptive family or [could] not in any suitable manner be cared for in the

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intercountry adoption, both in the countries where the children are born and in those to which they will travel?). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

[27] This is (it would be conceivable, for example, to create by multilateral treaty a system of Central Authorities which could communicate with one another concerning the protection of children involved in intercountry adoption). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

[28] This informs (an effective working relationship, based on mutual respect and on the observance of high professional and ethical standards, would help to promote confidence between such countries, it being reminded that such forms of co-operation already exist between certain countries with results which are satisfactory to both sides). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

[29] General Assembly of the United Nations adopted by consensus the *Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, 1986.

country of origin'.[30] In addition, The United Nations Commission on Human Rights appointed a Special Rapporteur to investigate the problem relating to intercountry adoption in 1990.[31] This has culminated in the adoption of the most important convention in the modern intercountry adoption: The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (Hague Convention, hereinafter), which provides for detailed rules that govern intercountry adoption. This Convention would be emphasized on in this work.

## II. INTERCOUNTRY ADOPTION: DEFINITION, PURPOSES, CONTENTIONS

Generally speaking, intercountry adoption, which is also known as 'international adoption', may simply be defined as a/the process by which adults that are habitual residents in one country take another person's child that habitually resides in another country into their own family and legally raise him or her as their own child. As a result, it involves the movement of a child across international boundaries for the purposes of adoption. In line with this, Jareborg submitted that intercountry adoption is a practice that seeks to involve 'a child living in one country, the prospective adoptive parents living in another country, and the transfer of the child to that country to live there with the adoptive parents.'[32]

The Hague Convention does not categorically define intercountry adoption. However, Art.2 of the Convention suggests

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[30] Id, Article 17.

[31] The mandate of the Special Rapporteur was created by the Commission on Human Rights by resolution 190/68 for one year in 1990. The mandate was extended to two years and then again for three years from 1992. The Special Rapporteur furnishes annual reports to the Commission updating his progress.

[32] Jareborg, M.J., 'Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption,' *Nordic J. Int'l Law,* Vol.63, (1994), p.185.

the elements any definition to the term should include. Having regard to those elements, intercountry adoption may possibly be defined as adoption in which a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin, and that creates a permanent parent-child relationship. This definition tells that intercountry adoption exists if and only if the following requirements are fulfilled:

- The child to be adopted shall be a habitual resident in one Contracting State ('the State of origin');
- The adoptive parent (s) shall be spouses or a person habitually resident in another Contracting State ('the receiving State');
- The child shall be moved from the State of origin to the receiving State to live with the adoptive parents;
- There shall be adoption of the child either in the State of origin or in the receiving State; and,
- The adoption shall create a permanent parent-child relationship.

At this juncture, it is important to note that though the Hague Convention requires adoption, it neither requires the adoption to take place in the State of origin nor does it prohibit movement of a child to the receiving State for the purpose of adoption. Moreover, the Hague Convention considers intercountry adoption as intercountry adoption *per se* only where it involves a child and adoptive parents from two Contracting States to the Convention.

### *A. Intercountry Adoption: the Contested Nature*

Many legal institutions or mechanisms have not been the results of consensus. There have been, more often than not, arguments for and against them for various reasons be it political,

philosophical, practical, economic, social or others. As far as intercountry adoption is concerned, it is no exception. Intercountry adoption has been a contentious institution. Based on the idea reflected in their writings, scholars advocated for differing value positions and they can generally be classified into three value positions: abolitionists, pragmatists and promoters.[33]

Abolitionists have focused on the negative impact that intercountry adoption can have on child welfare systems in sending countries.[34] They emphasize that intercountry adoption diverts professional resources (social workers, lawyers and courts) from the needs of many children to service a few foreign adopters. Abolitionists argue that if the money spent on adopted children was applied to children's services in sending countries, the lives of large numbers of children could be improved.[35] Abolitionists further stress that intercountry adoption undermines the development of better local services, especially having regard to the material position of local adopters in light of the material standards of foreigners.[36] They are also worried about the neo-colonialism and ethno-centricity inherent in decisions whereby children are adopted 'in their best interests' from poor, emerging states into rich, powerful countries.[37] They remain concerned about the effect of seeing the export of children as a solution to a country's child care problems, in addition to questioning the impact on the well-

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[33] J Masson, at note 14 above, p.2.

[34] Ibid.

[35] Triseliotis, J. 'Intercountry Adoption: Global Trade or Global Gift?' Adoption and Fostering, Vol.24, No.2 (2000) pp. 45-54; Ngabonziza, D 'Moral and Political Issues Facing Relinquishing Countries' Adoption and Fostering, Vol.15, No.4, (1991), pp.75-80.

[36] Hoelgaard, S. 'Cultural Determinants of Adoption Policy: a Colombian Case Study,' Int. Journal of Law, Politics and Family, Vol.12, (1996), p.241.

[37] Olsen, L.J., 'Live or Let Die: Could Intercountry Adoption Make the Difference?' *Penn State International Law Review,* Vol.22, (2003-2004), p.490; Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" *Ariz. J. Int'l & Comparative Law,* Vol.20, (2003), p.709.

being of those adopted. They argue also that intercountry adoption is not in the best interests of the child, as it involves uprooting a child from his or her birth country and raising him or her in a foreign country, and thereby strips the child of his or her group link and deprives a child of his or her ethnic and cultural background, and exposing him or her to an increased risk of discrimination.[38]

For abolitionists, the adverse impacts of intercountry adoption extend to the sending countries too. If prospective adopters prefer foreign babies to local children who need adoptive parents, intercountry adoption may also prevent the development of domestic adoption for hard to place children. 'Their opposition to intercountry adoption is also based on concerns about abuse, particularly abduction and coercion, to meet demands for children, and the way that accepted practices, such as requiring donations to orphanages, can easily develop into corruption, possibly even the selling of children.'[39]

On the opposite direction, there are promoters of intercountry adoption. The promoters emphasize the way that individual children can be helped by intercountry adoption in contrast to abolitionists' views about the impact on children and society generally. They, in general, place emphasis on what is in the best interests of the child by taking the concept of the best interests of the child broadly. Accordingly, they perceive intercountry adoption as 'an ideal solution bringing together parents with homes, love and care to offer and children who (desperately) need families.'[40] They suggest that intercountry adoption is in the best

[38]Thompson, N.S., 'Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions' *Wisconsin Int'l Law Journal,* Vol. 22, (2004) p.453.

[39] Wallace, S.R., at note 38 above, p.710. It 'has led to the creation of black markets for baby selling. With the high demand for foreign babies persisting in industrialised nations, activities such as kidnapping, child abduction, child trafficking and financial exploitation have become prevalent in sending countries, where entrepreneurs will take advantage of the demand with the expectation of the high return. *Ibid.*

[40] Kirton, D. 'Intercountry Adoption in the UK Towards an Ethical Foreign Policy?' in P. Selman, Intercountry Adoption: development, trends

interests of the child as it allows a child to grow in a loving family environment, as opposed to institutional care, and some times represents the only realistic opportunity at being part of a permanent family.[41] It enables children to receive food, shelter and care, even if it occurs in a country different to where the child was born.[42] It 'saves' children from poor and unsanitary conditions in country where they were born.[43]

Promoters further say that the problems of intercountry adoption are associated with too much bureaucracy, which restricts the number of families who can be assisted, increases the time taken to arrange adoptions, encourages the avoidance of formal procedures and allows the exploitation of adopters.[44] Unlike the organizations who seek both the promotion and close regulation of intercountry adoption, scholars with the value position of promotion are more usually associated with the rejection of controls and acceptance of the notion that, like natural parents, those seeking to adopt should not be subject to assessment or restrictions.[45]

Given the abolitionists and promoters as value positions that refer to two opposite poles of arguments on intercountry adoption, pragmatists seem to fall in between these extremes. Pragmatists admit the need for the institution of intercountry adoption and at the same time believe in the need for regulating intercountry adoption as a way of eliminating abuses and improving standards in a practice that will continue.[46] This compromised value position has been the basis that led to a range of unilateral, bilateral and international statements and measures, particularly the

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and perspectives, British Association for Adoption and Fostering (BAAF), 2000, p.74.

[41] Thompson, N.S., at note 39 above, p.452.

[42] Liu, M, 'International Adoption: An Overview,' *Temp. Int'l & Comp. Law* Journal, Vol.8, (1994), p.193.

[43] Wallace, S.R., at note 38 above, p.706.

[44] J Masson, at note 14 above, p.2.

[45] Id, pp.2-3.

[46] Id., p.3; Carlson, R.R., the Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption,' *Tulsa Law Journal*, Vol. 30, (1994), p.243.

development of the Hague Convention, that are intended to improve practice in intercountry adoption.[47]

## III. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 1989, AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, 1990

The United Nations Convention on the Rights of the Child, 1989 (CRC) and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) provide for the rights of the child at global and regional (African) levels, respectively. As their name by itself depicts, they are human rights conventions. They provides for fundamental rights of children as separate and distinct group or subjects of international human rights.[48] The former could be taken as elaboration of the right of children 'to special care and assistance'[49]provided under the Universal Declaration of Human Rights, (UDHR), 1948.[50] Whereas, the later provides the African version of the CRC or the later is adopted with a view to give children's rights an African perspective; a means to realize the duty to 'ensure the protection of the rights of ... the child as stipulated in international declarations and conventions' imposed upon states under Art.18 (3) of the African Charter on Human and Peoples' Rights, 1981 (ACHPR);[51]and the elaboration of the right of

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[47] Van Loon and G. Parra-Aranguren, 'Explanatory Report on the Convention on Protection and Co-operation in Respect of Intercountry Adoption,' Hague Conference on Private International Law (1993).

[48] Ibid.

[49] Universal Declaration of Human Rights, 1948 (UDHR), adopted and proclaimed by the General Assembly of United Nations, General Assembly resolution 217 A (III) of 10 December 1948, Article 25 (2).

[50] Toope, S.J. 'The Convention on the Rights of the Child: Implications for Canada,' in *Children's Rights: A comparative perspective,* Freeman, M. (ed.), Dartmouth publishing company limited, England, 1996, p.35.

[51] African Charter On Human and Peoples' Rights, 1981. Art.18 (3) reads 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international [sic] of the rights of the woman and the child as

children 'to special care and assistance' as enshrined under the UDHR as per Art.18 (3) of the ACHPR.

Thus, as all African states, except Somalia, are Party States to the CRC, and many of these states are again Party States to the ACRWC, children in many African states enjoy double protection of most of their rights. Of course, African children enjoy a better protection under the ACRWC than under the CRC. For instance, the ACRWC extends protection to all persons under the age of 18 as it defines a child as a person 'below the age of 18 years' under Art.2, unlike Art.1 of the CRC, which allows exclusion of some persons below the age of 18 years based on domestic laws. The ACRWC provides also a more comprehensive protection for children in armed conflicts, refugee children and children under disabilities.[52]

However, the CRC and the ACRWC exhibit glaring similarity than disparity. Of particular significance is the fact that they embody the same cardinal principles that are regarded as giving breath to the rights of the child they contain. The principles are four in number. The CRC and ACRWC and the rights enshrined therein are founded on these four cardinal or basic principles: the principle of non-discrimination (art.2; art.3), the principles of best interests of the child (art.3; art.4), the principle of the right to life and maximum survival and development (art.6; art.5), and the principle of participation (art.12; art.7).[53] Therefore, regard should be had to these principles in applying and

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stipulated in international declarations and conventions.'

[52] Gose, M., The African Charter on the Rights and Welfare of the Child: An assessement of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child, Community Law Centre, University of the Western Cape, Cape Town, South Africa, 2002, p.140.

[53] Hodgkin, R. and Newell, P., Implementation Handbook for the Convention on the Rights of the Child, *Fully revised edition,* United Nations Children's Fund 2002, p.1; Gose, M., The African Charter on the Rights and Welfare of the Child: An assessement of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child, Community Law Centre, University of the Western Cape, Cape Town, South Africa, 2002, p.17.

interpreting the provisions under both instruments.

Be that as it may, though these child rights instruments deal with various rights under different provisions, some of the rights and one of the cardinal principles – the principle of the right to life and maximum survival and development (art.6; art.5) would be most relevant for the purpose of this work. They possess paramount significance as they provide for the rights of the child to identity, culture, to be cared for by her/his parents or family environment on the one hand, and other rights, like the right to life, on the other.[54] The rights highly associated with the topic under discussion would be briefly dealt with in the subsequent sub-sections.

### *A. The Right of a Child to Life, Survival and Development under the CRC and the ACRWC*

As the sub-title says, here, I deal with the right of a child to life, survival and development under the CRC and the ACRWC. The approach I follow would be such that norms and values common to both instruments would be simply discussed, but where peculiarity or/and some sort of emphasis is required with respect to one of the instruments, specific reference to that instrument would be made.

One of the cardinal principles of the rights of the child is principle of the right to life and maximum survival and development (CRC art.6; ACRWC art.5). This principle should be given due consideration while interpreting and applying the other rights of children. This principle is consisting of three highly interrelated rights: the right to life, the right to survival and the right to development.

### *B. The Right of a Child to His or Her Culture and Identity under the CRC and the ACRWC*

Evaluation of whether transfer conducted under the

[54] CRC, Arts6-11 & 18-21, and ACRWC Arts5, 19-20 & 24-26, 29-30.

international framework for intercountry adoption in such a way that the child loses his or her identity has to begin with the contents of these rights under CRC, ACRWC and the Hague Convention as these are the most important instruments relating to intercountry adoption at international level.

The right to identity is, literally speaking, the right to know 'who a person is, or the qualities of a person ... which make' him or her different from others.[55] If one applies this to the case of children, child right to identity signifies child's right to know who he or she is. This includes the rights of a child to name, nationality, and know his or her family.[56] The right of a child to his or her identity has been protected by the CRC and the ACRWC to a reasonable degree, at least. This protection can also be inferred form the duty of the state to provide for birth registration, to allow children to preserve their identity, refrain from arbitrary deprivation of identity and obligation to ascertain identity of children speedily when arbitrary deprivation occurs.[57] At this point mention should be made that the ACRWC is somehow weak as it lack the latter three state duties.

Having such protection, states are obliged to ensure the right of the child to his or her identity under the CRC and ACRWC to all children regardless of their status.[58] This right may not be compromised or lessened for a child is subject or has entered a state through intercountry adoption. Otherwise, it amounts to discrimination based on status of a child. Hence, it is clear to see that the right to identity of a child is protected under the CRC and the ACRWC even during the time of intercountry adoption.

As far as the right to identity of a child under the Hague Convention is concerned, it is possible to see that the convention tries to protect the right of the child to his or her identity. This can be seen particularly from Article 4 and Article 16. The former Article requires the counselling and due information as to the

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[55] Cambridge Advanced Learner's Dictionary, Cambridge University Press, 2003.

[56] CRC, Article 7 (1), 8 (1). ACRWC Articles 6 & 19.

[57] Ibid; Id, Articles 7 (2) & 8 (2); ACRWC, Article 19.

[58] CRC, Article 2, ACRWC, Article 3.

consequences of their consent to persons, institutions and authorities whose consent is necessary in the process of intercountry adoption, 'in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin.'[59] It also emphasises on the consent of able children and other persons.[60] The latter Article obliges the Central Authority of the State of origin to 'prepare a report including information about his or her identity... background, social environment ... medical history including that of the child's family...'[61] hence, even during intercountry adoption the right to identity of a child is protected under the normative frame work of intercountry adoption at international level.

It may be argued that these two provisions may be criticized as offering less protection for the right to identity of a child to the level under the CRC and the ACRWC but the Hague Convention it not without any kind protection to child's right of identity. The defects under the Hague Convention may be cured by reading its provisions in light of states' obligations and the rights of children under the CRC and the ACRWC. It, therefore, is not valid to out rightly conclude that intercountry adoption deprives a child of his or her identity.

Moreover, the right to identity is different from the right to culture as the later is specific and the former is broad. Therefore, it is not acceptable to conclude that deprivation of cultural right during intercountry adoption, if any, is equivalent to 'the loss of the child's identity.' This does not mean that culture does not form part of identity of a child; rather, it is to say that identity of a child is much more than the culture of a child. Culture of a child may form only part and parcel of his or her identity, not the whole identity of a child.

The right to culture: when one comes to the right of a child to his or her culture under the CRC, the ACRWC and the Hague Convention, he or she can see that the CRC provides that 'due regard shall be paid [by State Parties] to the desirability of

[59] Hague Convention, Article 4 (c)(1).
[60] Id, Article 4 (c) (2)-(4), (d).
[61] Id, Article 16 (1) (a).

continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background' while a child is placed in an alternative care domestically.[62] Alternative care is a care that should be provided for when a child is deprived of his family environment permanently or temporarily and includes adoption.[63] Hence, the CRC obliges States to give 'due regard' to the protection of cultural rights of children in the process of adoption. This shows that the protection of this right is left to States. Such soft obligation is practically valid as the right of the child to be loved and cared for or get family environment through alternative care triumphs over his or her right to culture.[64] But this should not be taken to mean that states may shy away from their international obligation to protect cultural rights of children. States should try their best to protect cultural right of children while at same time providing alternative care, in our case adoption, to children deprived of their family environment temporarily or permanently. This should be a principle guiding domestic adoption.

As far as intercountry adoption is concerned, the CRC provides that intercountry adoption should be entertained only '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.'[65] Hence, states are allowed to consider intercountry adoption only at last resort. This by itself has an implication on the cultural right of a child as it shows that only where other rights in the best interests of the child trump that the right to culture of a child may be disregarded.[66] Furthermore, the CRC provides that states should provide for 'safeguards and standards equivalent to those existing in the case of national adoption'[67]in cases of intercountry adoption. One of such safeguards and standards is that 'due regard shall be paid [by State Parties] to the desirability of continuity in a child's upbringing and to the child's ethnic, religious,

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[62] CRC, Article 20 (3), ACRWC, 25 (3).
[63] Ibid & Id, Article 20 (1).
[64] Dillon, cited at note 20 above, p.200.
[65] CRC, Article 21 (b).
[66] CRC, Article 21; cited at note 20 above, p.200.
[67] CRC, Article, 21 (c).

cultural and linguistic background' as mentioned above. From this, it is possible to read that states should give 'due regard' to cultural rights of children while intercountry adoption should be made.

Another worth noting provision of the CRC as far as the right to cultural identity of a child is concerned is Article 30.[68] This provision protects the cultural right of children from religious, cultural and ethnic groups, and indigenous people. It, however, is not meant cultural rights to trump above other rights of the child.[69]

The ACRWC provides for more or less similar standard the CRC as far as the protection of cultural rights and intercountry is concerned. It provides that in case of domestic adoption 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.'[70] With respect to intercountry adoption, 'safeguards and standards equivalent to those existing in the case of national adoption' should be provided.[71] Similarly, intercountry adoption should be made at last resort.[72] Hence, it protects cultural rights in the same way as the CRC. The arguments made in relation to the CRC equally apply to the case of ACRWC.

As far as the Hague Convention is concerned, it is provided that the Central Authority of the State of origin shall 'give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background.'[73] Hence, cultural right of a child is recognized and protected. It could also be argued that, under this Convention, cultural right of a child is protected in three ways. First, the Convention obliges the Central Authority of the State of origin to 'give due consideration' to the right while determining adoptability of a child. Secondly, it obliges the Central Authority of

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[68] Davel, T. 'Intercountry adoption from an African perspective,' in *Children rights in Africa: A legal perspective*, Sloth-Nielsen, J. (ed.), Ashgate publishing company limited, England, 2008., p.261.

[69] Mezmur B., As painful as giving birth: A reflection on the Madonna adoption saga, unpublished, p.13.

[70] ACRWC 25 (3).

[71] Id, Article 24 (c).

[72] Id, 24 (b); Davel, cited ate note 69 above, p.260

[73] Hague Convention, Article 16 (1)(b).

the receiving State to determine the suitability of prospective adoptive families.[74]This duty may be interpreted progressively to include a duty to consider the position of prospective adoptive families in relation to cultural right of a child to be adopted. Thirdly, recognition process of adoption provided under the Convention may also be taken as a means to protect cultural rights of a child through interpretation.[75] For instance, a state may refuse recognition of intercountry adoption made without any or due consideration of cultural rights of a child.

## IV. PURPOSE OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Like I said in the introduction part, there have been various international instruments in the international arena about intercountry adoption. This shows that the Hague Convention is not a Convention on a new concept, rather is a Convention prepared with a view 'to establish common provisions' regulating intercountry adoption taking the previous attempts into account.[76] Hence, one of the purposes of the Hague Convention is unifying and explaining substantive and procedural rules that govern intercountry adoption of children at global level while at same time affirming attempts to regulate same made in the past.[77] Accordingly, it serves to insure that the laws in both receiving State and State of origin work harmoniously.[78]

In addition, the Hague Convention is adopted with a view to not only institutionalize intercountry adoption but also 'establish safeguards to ensure that' such adoptions are made in the best interests of the child.[79] It also establishes safeguards to ensure the protection of fundamental rights of children as provided under

[74] Id, Article 5 (a) and Article 15.

[75] Id, Articles 23-27.

[76] Id, preamble para.6.

[77] Rosenblatt, J. *International Conventions Affecting Children*, Martinus Nijhoff Publishers, 2000, p.87.

[78] Ibid.

[79] Hague Convention, Article 1(a) (b).

international law during intercountry adoptions are carried out.[80]

Furthermore, the Hague Convention has the purpose of preventing child abduction, sale and trafficking by regulating the way by which intercountry adoption should be made.[81] Therefore, it has been said that the Hague Convention is adopted not only to protect rights and interests of children but also 'to create rules of procedure, conduct, choice of law, international recognition of adoption decrees, and to establish institutions for international oversight and cooperation.'[82] This conclusion, however, should not be taken to mean that the Convention is limited to the interests of children. Rather, it is designed broadly to ensure the interests of 'both the birth and prospective adoptive parents' as well.[83]

Lastly, the Hague Convention has the purpose of supplementing the details of intercountry adoption contemplated under the Convention on the Rights of the Child, 1989 (CRC).[84] It reaffirms the priority of the need to bring up children in a family environment[85]and protection or enforcement of their rights under international law as a whole.[86]

To conclude, the Hague Convention 'reflects widely shared international opinion' as it governs and legitimizes intercountry adoption deemed to be important alternative care put as last option for children.[87] It also helps in reducing the number of adoption scandals as it reinforces existing rules against baby-buying and other improper practices.'[88] It can, further, 'be used to demonstrate that internationally adopted children will be protected

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[80] Id, Article 1 (a).

[81] Id, preamble para.5.

[82] Carlson, R.R., at note 47 above, p.245.

[83] Graff, N.B., 'Intercountry adoption and the Convention on the Rights of the Child: Can the free market in children be controlled?' *Syracuse Journal of International Law and Commerce*, Vol.27, 2000, p.237.

[84] Convention on the Rights of the Child, 1989 (CRC), Article21.

[85] Hague Convention, preamble paras 1 & 2.

[86] Id, Article 1 (a); Grraf, cited at note 84 above, p.420.

[87] Bartholet, E. 'International Adoption,' in *Children and youth in adoption, orphanages, and foster care*, Askeland. L (ed.), Greenwood Publishing Group Inc., (2005), p.114.

[88] Ibid.

against sale and exploitation, and that the world community approves of such adoption as a good option for children.'[89] Hence, it has to be employed to change an attitude that sees intercountry adoption as child selling or trafficking. This is possible for the Convention particularly if all states in the world ratify it and work towards its implementation.

## V. THE PLACE OF THE RIGHT TO CULTURAL IDENTITY IN INTERCOUNTRY ADOPTION

Under this section, the writer discusses the place of cultural rights of the child and the balancing to be done in relation to the cultural right of a child on the one hand and other rights on the other. This will be done in relation to the contents of these rights under CRC, ACRWC and the Hague Convention.

Examination of the CRC, ACRWC and the Hague Convention as to whether the formulation of any of these instruments implies cultural identity should be given primacy over other rights of the child or not leads to the following conclusions. These conclusions should, however, be approached with caution. This writer says that because in the ideal world human rights are supposed to be interrelated, interdependent and indivisible. Therefore, it is not acceptable to put them hierarchically. The same is true about children's rights as they are human rights. But in the real world, things are different. The right to life, the right to survival and development, the right to education and the right to family environment may sometimes become in the best interests of the child than the right to culture.

For instance, if one considers a situation of an orphan child living in poverty with no education, he or she can see that such child is deprived of his or her right to family environment, education, and the right to health and food and living in such situation with his or her culture is much more less than protection to the child.[90] Therefore, if these rights can not be protected in his

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[89] Ibid.

[90] Dollin, cited at note 20 above, p.220.

or her country, it would be in the best interest of the child to arrange for any other possible alternative care, the most important being intercountry adoption. Such proposition is acceptable in light of 'all the best to our children' than letting them die in 'loyalty to their culture.'[91] This analysis takes us to the conclusion that if protection of one right becomes in the best interests of the child, one favors the protection of this right at the cost of other rights. This fact of the real world is the main thesis upon which the conclusions below are dependant.

First, the primary concern in case of intercountry adoption is the best interests of the child under the CRC, ACRWC and the Hague Convention.[92] This implies that intercountry adoption may be made even if the child is deprived of his right to cultural identity as long as the adoption is in the best interests of the child. A child should not be deprived of his right to survival and development under the guise of protecting his or her right to culture. For instance, a child in Ethiopia who is starving may better be subject to intercountry adoption at last resort than letting him or her die in Ethiopia with a view to protect his or her cultural right.

Second, the right of the child to cultural identity should not be taken to the level of depriving children their right to family environment. 'Leaving children in institutions, not to mention on the streets, is not dealing with children, and no idea of group rights allows us to do that.' Therefore, it is not acceptable to prohibit intercountry adoption on the ground of the right to culture of a child and let him or her leave without family environment. Family environment is not comparable with cultural right. As a result, the right to cultural identity of a child should not be presented as a ground for objection to intercountry adoption.[93] Especially, in the eyes of the safeguards to protect the cultural right of children, intercountry adoption should not be lifted to the level of 'cultural genocide' or whatever name is attributed to it. Some even argue that intercountry adoption is better than placing children in

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[91] Mezmur, cited above at note 70, p.14.

[92] CRC, Article 21, ACRWC, 25 (3) & Hague Convention, Article 1 (a).

[93] Dollin, cited at note 20 above, p.220.

institutional care as it offers children a family environment, which is lacking in institutional care.[94] They also say that the right to culture of a child 'can hardly be taken so far as to suggest that remaining in institutional care in the country of origin is to be preferred to intercountry adoption."[95]

To conclude, the place of the cultural right of a child is concerned it is important to consider this quote.

> [T]he argument that culture should supersede and/or disallow intercountry adoptions might make a mockery of the best interests principle. If the best interests of the child means anything at all, let alone being "*the* paramount consideration", preserving cultural identity should be seen as a means, and not necessarily an end in itself, in considering alternative care for children deprived of their family environment. International law seems to be in consensus that, *as much as possible*, an attempt should be made to protect and safeguard the cultural background of the child. But this should not be done at the cost of depriving a child of a family environment … since living in an orphanage [let alone in the streets][96] can by no standards be equated with a family environment.[97]

## CONCLUSION

Intercountry adoption may involve transfer of a child from one country (country of origin) to another (receiving country) whose culture is completely different. Therefore, there might sometimes be a tension between the right to culture and best interests of a child to be available for intercountry adoption. In such cases, one has to carefully try to balance the two rights. The balancing should be done by adhering to the rules discussed above in relation to protection to the right to culture of a child. In particular, intercountry adoption should be considered only if there is no any possibility of alternative care for a child in his home country and the intercountry adoption to be made is in the best

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[94] Mezmur, cited at note 70 above, p.15.

[95] Id, p.223.

[96] Where many children in poor countries live as there are no enough numbers of orphanages.

[97] Mezmur, op cit pp14-15.

interests of the child. This enables the protection of the child as much as possible as the child stays in his home country unless that is impossible or not in the best interest of the child. Secondly, states should give priority to send children in intercountry adoption to a country with similar culture than to a country with completely different cultures when they are encountered with such choice. This may mitigate the impact of deprivation of the right to culture of a child. Thirdly, States Parties to the Hague Convention should strengthen their Central Authorities so that information about children are properly kept to protect the right to identity of children. Hence all states should ratify the Convention to protect the rights of children.

# COMMUNICATIONS PROCEDURE UNDER THE 3RD OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD: A CRITICAL ASSESSMENT

*Zelalem shiferaw Woldemichael*[*]

Until very recently, the Convention on the Rights of the Child (the CRC) was devoid of an international Complaints Mechanism. Consequently, children were not entitled to present claims alleging violations of their rights at an international level and get remedy. Analyzing the detrimental impact that absence of international Complaints Mechanism under the CRC may pose on children, the General Assembly of the UN adopted the 3rd Optional Protocol (OP) of the CRC on 19 December 2011.The instrument entered in to force on 14 April 2014.

Admittedly, children are vulnerable groups of the society. Accordingly, an international Complaints System devised for children is expected to take in to account the special nature of children. This article will assess the 3rd OP of the CRC adopted by the UN and examine whether the key Procedures introduced in it (i.e., Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure) incorporate provisions that take in to account the special status and vulnerabilities of children. The article will also scrutinize other provisions of the OP having important implication on the application of the key Procedures of the OP.

## INTRODUCTION

The Convention on the Rights of the Child (the CRC) is an innovative international instrument that deals solely with the rights of children.[1] It was adopted in response to appalling atrocities perpetrated against children in the form of abuse, violence, neglect

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[1]The CRC was adopted by the UN General Assembly Resolution 44/25 of 20 November 1989.It entered into force on 2 September 1990

and exploitation.[2] There was also a need to ameliorate serious violations of rights inflicted on children as a consequence of deficient health care, limited opportunity for basic education, sexual exploitation and involvement in armed conflicts.[3] The CRC is augmented by two Optional Protocols: the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography (OPSC) and the Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OPAC), designed to address sexual exploitation and recruitment and use of children in armed conflicts respectively.[4]

Even if the adoption of the CRC may signify a step forward in the recognition of the rights of children, it is not an end in itself. In order to make children beneficiaries of the rights guaranteed under the instrument, it is quite indispensable to complement it with a well established monitoring system. Monitoring mechanisms generally play significant role in developing a meaningful international human rights system. Without effective monitoring mechanisms, countries that ratify or accede to specific human rights instruments will not be in a better position to assess their own performance in promoting effective realization of the enumerated rights.[5] It will also become difficult to hold States accountable for failing to implement the rights guaranteed in the instruments.[6] From the very outset, many States do not have an independent internal mechanism to guarantee adherence to standards that govern the treatment of individuals.[7] International monitoring, hence, is central to ensure that human

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[2]UNICEF, 'Hand Book on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography',(UNICEF, 2009),p.1

[3] OHCHR, Fact Sheet No.7/Rev.1,'Complaints Procedure ' p.1

[4] Both instruments were adopted by the UN on May 25,2000 and entered in to force in 2002

[5]Andrey Chapman, 'A "violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights'(1996), *18 Human Rights Quarterly1* pp.23-26,at.23

[6] ibid

[7]Patricia Watt, 'Monitoring Human Rights Treaties',p.215,Available at <http:// www.edocfind.com.> accessed on 09/04/2011

rights are fully realized in the domestic spheres of such States.

Until very recently, the monitoring mechanism of the CRC did not employ Communications Procedure. Hence, individuals / groups of individuals were denied the opportunity to present their claims at times when violations of their rights guaranteed in the CRC and its Optional Protocols are perpetrated against them. Consequently, the monitoring mechanism envisaged in the CRC was criticized for being incomplete and ineffective.[8] Findings of researches have disclosed that the existing monitoring mechanism of the CRC is fraught with defects.[9]Given this shortcoming, introducing communications Procedure under the CRC appears to be quite indispensable.

It is interesting to note that the possible challenge the absence of Complaint Procedures may pose on the enjoyment of children's rights guaranteed under CRC has been critically considered by the UN. Through the Resolution it adopted in June 2009 (A/HRC/RES/11/1), the Human Rights Council (HRC) of the UN decided to establish an Open Ended Working Group (OEWG) to explore the possibility of elaborating OP to the CRC to provide a Communications Procedure.[10] After successive deliberations, the OEWG came up with a document incorporating procedures for bringing communications before the CRC Committee. The document was adopted by the HRC and presented to the General assembly of the UN for final approval.[11] On 19 December 2011, the document was adopted and opened for signature and ratification by the General Assembly resolution 66/138. After the fulfillment of the minimum number of

[8]The Cradle-The Children Foundation, Available at <http:// www.edocfind.com.> accessed on 09/04/2011, p.2 see also Ursula Kilkelly above, p.311'

[9]Mieke Verheyde and Geert Goedertier, 'Commentary on the United Nations Convention on the Rights of the Child: Articles 43-45, the UN Committee on the Rights of the Child', (Martinus Nijhoff Publishers, 2006),p.44

[10]For the full account of the substance of the Resolution, visit <http://www2.ohchr.org /english/ bodies/ hrcouncil /OEWG/index.htm>

[11]Visit http://www.crin.org/NGOGroup/childrightsissues/ComplaintsMechanism

instrument of ratification set out in it,[12]the OP to the CRC providing communications Procedure for the CRC entered in to force on 14 April 2014.[13]

## I. DEFINING COMMUNICATIONS PROCEDURE

Communications Procedures established to monitor the implementation of international instruments refers to those procedures that allow individuals, groups or their representatives who claim that their rights have been violated by a State that is party to an international human rights Convention to bring a complaint before the relevant Committee' established under the treaties.[14] The complaint procedures, in general, deal with issues like: who may bring communications? Against whom can communications be brought? What type of information should a communication address? When can a communication be filed? And so on. The procedures, moreover, provide the steps that are normally involved in considering communications.

Complaints Procedures may be either 'individual' or 'collective'. Under Individual Complaints Procedures, only individual victims or group of victims are given an opportunity to present communications to the Committees. Collective Complaints Procedures, on the other hand, allow others such as Non Governmental Organizations (NGOs), National Human Rights Institutions (NHRIs) and Ombudsman Institutions to bring communications on behalf of a group. Such procedures are particularly relevant where there are large group of victims, systemic issues are at stake or the victim group lacks organizing capacity. Unlike Individual Communications, Collective Communications do not involve disclosure of the identity of victims, since, from the very beginning, no victim requirement is

[12] See Article 19 of the instrument

[13]Visit http://www.crin.org/NGOGroup/childrightsissues/ComplaintsMechanism

[14]NGO group for the CRC, 'Campaign for a new Optional Protocol to the CRC establishing a Communications procedure' (November 2010),p.7,Available at <http://www.edocfind.com> accessed on 34/04/2011

set out under the Procedures.[15]

## II. KEY PROCEDURES OF THE OPTIONAL PROTOCOL

The OP in its current form comprises three key Procedures: Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure. The following discussion will critically examine whether these Procedures are framed in a way that promotes the rights of children.

### *A. Individual Communications Procedure*

*1. Standing and scope of the Procedure.*-Pursuant to Article 5 of the OP, communications may be brought by or on behalf of an individual or group of individuals within the jurisdiction of a State Party to the Optional Protocol claiming to be victims of a violation by the State Party of any of the rights set forth in the CRC, OPAC or OPSC.[16] The term 'individual' referred under the Article was inserted to denote that in addition to 'children', 'individuals' who are not children at the time of submission of communications but had been victims of violations of their rights by the time they were children can bring communications to the CRC Committee.[17]

The OP also allows submission of communications on behalf of children.[18] However, the potential risk that may transpire

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[15]Holly Cullen, 'The Collective Communications Procedure of the European Social Charter: Interpretative Methods of the European Committee of Social Right' (2009)*, Human Rights Law Review*, p.64

[16] Among the core UN treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and the International Convention for the Protection of All Persons from Enforced Disappearance (CED) entitle only 'individuals' to lodge petitions to the respective Committees. The remaining instruments authorize 'individuals' and 'Group of individuals' to bring communications to the respective Committees.

[17] visit http://www.crin.org/law/CRC_complaints/

[18]The issue as to who can represent the child/children was debated. China wanted to limit representatives to adults with close connection to the child.

during representation is that representatives may manipulate children and promote their own interest through bringing the Communication. Analyzing this, many delegations during the initial drafting stages expressed concern that the Optional Protocol should envisage mechanisms that help to avoid the potential manipulation of children by their representatives.[19] The first and second drafts responded to this potential danger through explicitly requiring the CRC Committee to determine whether considering communications brought on behalf of child/children is in the 'best interests' of the child/children. Article 6(5) of the second draft, for example, provides: "Where the author of a communication is acting on behalf of a child…the Committee shall determine whether it is in the best interests of the child or group of children concerned to consider the communication."[20]In the current Optional protocol, this provision is omitted.

In the opinion of the present writer, the OP has minimized the safeguard envisaged in the earlier drafts. The CRC Committee, as per the Optional Protocol, is merely required to ascertain whether communications on behalf of a child (children) is brought with their consent. Article 5(2) reads: "Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent." Under Article 3 of the Optional Protocol, it is provided that "The Committee shall include in its rules of Procedure safeguards to prevent the manipulation of the child by those acting on his/her behalf and may decline to examine any communication that it considers not to be in the child's best interests."

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Other States such as Slovenia and organizations like **UNICEF**, the **European Disability Forum**, **National Human Rights Institutions** and NGO **Group for the CRC**, however, **argued against** placing any further limitations on the representation of children in bringing complaints. The Chair-person explained that the issue can be determined by the Committee 's Rules of Procedure (Visit http://www.crin.org/law/CRC_complaints/)

[19] Visit http://www.crin.org/law/CRC_complaints/

[20] Visit http:// www.crin.org

As can be noted, the straight forward language imposing a duty on the CRC Committee to determine whether considering communications is in the best interests of the child/children is now excluded. The provision seems to reflect the opinion of some groups such as the NGO group for the CRC and the CRC Committee which suggested during the drafting process that the best interests principle should be applied in situations when the consent of the child/children concerned has not been clearly established.[21] In other words, the Committee, pursuant to this view, will apply the best interests principle when the author of the communication represents a child victim without satisfying the Committee that the child/children concerned have given a valid consent.[22]

This mode of application of the best interests principle contradicts the CRC. It is clearly stated under Article 3(1) of the CRC that: "in all actions concerning children…the best interests of the child shall be a primary consideration." The phrase 'a primary consideration' denotes that decisions should at least incorporate an understanding of their effect on children's best interests.[23] The relevance of applying the principle is further anchored by the phrase 'in all actions concerning children' implying the application of the principle to encompass any action that directly or indirectly affects children.[24]

Furthermore, there is no authoritative ground which justifies the CRC Committee to give primacy to the child/children's right to

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[21]Comments by the Committee on the Rights of the Child, supra note 28, p.6 the CRC Committee has elaborated that the principle of 'best interests' of the child would be construed necessarily as being a matter of general application by the Committee in its consideration of communications under the Optional Protocol.

[22]*Joint Submission presented by International Catholic Child Bureau (ICCB), International Save the Children Alliance and et al,* (U.N.Doc. A/HRC/WG.7/1/CRP.5),p.6

[23] UNICEF, Handbook on Legislative Reform: Realizing Children's Rights,(Vol.1,2008),p.80

[24] J. Todres 'Emerging limitations on the rights of the child: The UN Convention on the Rights of the Child and its early case law' (1998) 30 *Columbia Human Rights Law Review* 159.p.170

be heard and apply the best interests principle in limited cases when the child/children's valid consent is not established.[25] To create conformity with the CRC, the Optional Protocol should have been framed to impose a duty on the CRC Committee to determine whether considering communication is in the best interests of the child/children concerned. The Committee should do this whether the child consents or not. Nevertheless, this should not be construed to undermine the importance of the views of the child. In determining the best interests of the child/children, the Committee should give paramount consideration to the views of the child/children involved in accordance with their age and maturity. As the CRC Committee in its General Comment emphasized, the two rights (i.e., the right of the child to have his/her best interest be a primary consideration and the right of the child to be heard) are complementary to each other.[26] The Committee will be greatly assisted in determining what is in the child's/children's best interests if it gives due weight to the views of the child/children in accordance with their age and maturity.[27]

The scope of the OP in relation to Individual Communications is comprehensive. No distinction is made by the OP in imposing obligation on States with respect to the three instruments (i.e., the CRC, OPAC and OPSC). If a State is a party

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[25] This is against the extreme position hold by some scholars such as Michael Freeman who concede that recognition of the child's best interests underpins all the other provisions in the Convention (For further information read Michael Freeman, 'A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child', (Martinus Nijhoff,2007))

[26]CRC Committee, General Comment No. 12 (2009):'The Right of the Child to be Heard' U.N Doc.CRC/C/GC/12,para 74

[27]The laws of many States also provide that the views of the child should be taken in to account in determining the best interests of the child. The Ecuadorian children's code of 2002, for example, provides:"…the best interest principle "may not be invoked … without previously listening to the opinion of any child who is able to express one". (see UNICEF, " The Right of Children To Be Heard: Children's Right To Have Their Views Taken In To Account And To Participate In Legal And Administrative Proceedings'(2009),p.8 )

to the CRC, OPAC or OPSC, ratifying the OP will entail an obligation on it to receive communications alleging breach of the rights guaranteed in to the instrument (instruments) to which it is a party. Earlier drafts contained opt-out options in relation to Individual Communications.[28] Even though States may be parties to the OPAC and/or OPSC, at the time of signing, ratifying or acceding to the OP, they were granted the possibility of limiting the competence of the Committee to receive and consider communications which relate to the OPAC and /or the OPSC. In the OP, such option is dropped.

Under the OP, moreover, States cannot select certain rights from the CRC, OPAC or OPSC and limit the competence of the Committee to receive and consider communications alleging breach of such rights. This comprehensive approach in general is advantageous since it enables children to enforce civil, political, economic, social and cultural rights guaranteed under the CRC. On top of this, such approach helps to avoid hierarchy among the rights guaranteed under the three instruments (i.e., the CRC, OPAC and OPSC) and reinforce the indivisibility, interdependence and interrelatedness of the rights reaffirmed in the Preamble.[29]

*2.Admissibility***.-**In order for the merits of a communication to be considered by the CRC Committee, the communication is expected to pass through an admissibility test. The provisions of the OP on admissibility mainly replicated the existing precedent in other Complaint Procedures. The admissibility requirements enumerated in the OP are discussed below.

As with other Complaint Procedures, it is provided in the OP that a communication will not be rendered admissible if it is anonymous.[30] This requirement makes possible for the CRC Committee to know the particulars of the communication (i.e., name, age, profession and other information relating to the complainant). Furthermore, it is provided in the OP that communications will not be declared admissible if they are not

[28] See Article 2(2) of the first draft and Articles 6(2) of the second draft
[29] See Para 3 of the Preamble to the OP
[30] Article 7(1)(a)) of the OP

made in writing.[31] Clearly, this provision will not promote the effective use of the Communications Procedure by children. It may be daunting for children to adequately express their real feeling through a written communication. Bearing this in mind, the OP should have envisaged other forms of submissions such as video or oral submissions.

Exhausting domestic remedies is also required before submitting complaints to the CRC Committee. Unless communications satisfy the Committee as to the exhaustion of local remedies, they will not be declared admissible.[32] This rule, nevertheless, will not apply where the application of the remedies is *unreasonably prolonged* or u*nlikely to bring effective relief*. The OP, like other international Complaint Procedures, does not prescribe the yardstick to be employed in determining whether the application of domestic remedies is unreasonably prolonged.

The writer, however, holds the view that the best interests principle should guide the CRC Committee in determining whether domestic remedies are unreasonably prolonged or not. As demonstrated in the findings of scientific researches, violations of children's rights entail detrimental effect on children physically, mentally and emotionally often extending well in to old age.[33] To address such serious consequence, children should be offered prompt remedies for violations inflicted on them in the domestic spheres of States Parties. Applying the best interests principle will enable the Committee to take in to account the detrimental impact that delays may entail on children. Important experience may be drawn from the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in this regard. In its first decision, the Committee ruled that a Court process which lasted for more than six years without considering the merits of a suit submitted by Center for Minority Rights Development on behalf of children of Nubian descent in Kenya cannot be

[31] Article 7(1)(b)) of the OP

[32]Article 7(1)(e) of the OP

[33]Malcolm Langford and Sevda Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child' (2010), 28 Nordic Journal of Human Rights 2, p.395

considered to be in the best interests of children of Nubian descent.[34]

In the drafting process of the OP, some delegations opposed the non-application of the rule at times when domestic remedies are 'unlikely to bring effective relief' as the CRC Committee could not be in a position to prejudge on the outcome of any internal remedy.[35] This proposal, nonetheless, did not get approval by the majority of delegations and, as a result, was not included in the OP. As it stands, the position of the majority of delegations seems to be plausible. There are instances which enable prejudging the outcome of domestic remedies. In some circumstances, pursuing cases of a certain nature before domestic Courts may be found to bear no effective remedies. Subjecting children to exhaust domestic remedies involving such types of cases may lead children to suffer and incur unnecessary wastage of time and resource thereby weakening their ability of defending their case before the CRC Committee. The African Commission has expounded that complainants will not be required to exhaust local remedies if they prove to the satisfaction of the Commission that local remedies do not offer prospect of success (i.e., are ineffective).[36]

It is also worthy to note that the OP does not clarify whether the exhaustion of domestic remedies rule will apply whenever local remedies are not available. Many treaty bodies exempt the application of it whenever there are no such remedies.[37] If children are relieved from pursuing domestic remedies in such cases, it will help them to directly access the CRC Committee

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[34]*Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian descent in Kenya) v.The government of Kenya,* (Communication: No. Com/002/ 2009, Para 32)

[35]*Report of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure*, U.N. Doc.A/HRC/17/36, p.14

[36] *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000),Para 32

[37]OHCHR, 'Frequently asked Questions about Treaty Body Complaints Procedure' Available at http://www.2ohchr.org/english/bodies/petition/docs/23 faq pdf, accessed on 23/03/2011.

without wasting their time and resources. Accordingly, the CRC Committee should in its Rules of Procedure or future practice exempt the application of domestic remedies rule in such cases.

As pointed out under Article 7(1) (h) of the OP, a communication will not be rendered admissible if it is not submitted within one year after the exhaustion of domestic remedies except in cases where it is demonstrated by the author that it had not been possible to submit the communication within this time limit. The one year period set forth in this provision was subject to heated debate in the drafting process. Poland expressed support to either six months or one year following the exhaustion of domestic remedies.[38] France and Greece favored a one year provided safeguards to be included for cases where this is not possible while Czech Republic and Sweden preferred a six months period.[39] Brazil and other groups including the **ICJ** totally opposed the fixing of time limit. Brazil, for example sternly argued that imposing a time limit would weaken access to justice and make the Complaints Procedure less child friendly.[40] In the end, the precedent in the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR) (Article 3(2) (a)) which prescribes one year was adopted.[41]

The present writer believes that fixing time frame will not promote the interest of children. It should be analyzed that fixing time frame may entail far reaching consequence on children, in particular, on those found in rural areas or poor countries.[42] It goes

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[38] NGO Working Group for the CRC Complaints Mechanism, 'Complaints Mechanism: Reaction to Chairs Proposal' Available at http://www.crin.org/law/CRC_complaints/accessed on 2/06/2011

39 ibid

[40] ibid, The NGO Coalition for a CRC Complaints Mechanism, elaborating on its position explained that setting a time limit for submitting a communication would particularly disadvantage children who are often not aware of such limits until the deadline has passed.

41 Pursuant to Rule 91(f) of the Rules of Procedure of the Committee on ICRD, moreover, complainants are required to submit communications six-months after exhausting the available domestic remedies.

42 Malcolm Langford and Sevda Clark, 'A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft'

without saying that bringing communications at international level, among others, demands knowledge about the Procedures of international Complaints Mechanisms and financial resource. Children located in rural areas or poor countries, on the other hand, lack the necessary knowledge and resource to vindicate their rights by the instrumentality of international Complaints Procedures. Hence, it would be quite unreasonable to expect children affected by such constraints or any one representing them to bring communications to the CRC Committee within one year after the exhaustion of domestic remedies. Ostensibly, this provision is particularly detrimental to children located in Africa, where there is poor practice of utilizing International Complaint Procedures which might have resulted from lack of awareness, financial constraints and other related factors.[43]

Under the Preamble, States Parties have emphasized on the importance of establishing Complaint System that responds to the real difficulties children suffer in pursuing remedies for violations of their rights.[44] Fixing time limit for bringing communications after the exhaustion of domestic remedies, on the other hand, contradicts with this commitment since it undermines the effective use of the Complaint Procedure by children.

It is also worth noting that the potential danger becomes even higher whenever domestic remedies are unavailable to children. As noted above, the OP is not clear whether the exhaustion of domestic remedies rule will apply in cases where domestic remedies are not available to children. And it is yet to be seen in the jurisprudence or Rules of Procedure of the CRC Committee how the one year period will apply in such instances. Presumably, the one year period in the CRC Committee's jurisprudence will be considered to start running as of the time the

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(2011), p.6

[43] Peter Newell indicated that of communications declared admissible by the African Commission, an incomplete review suggests only one submitted by/on behalf of children.( see Peter Newell, supra note 217,p.8). Moreover, there is inadequate use of the Communications Procedure established under the ACRWC since, up until now, only two cases are brought to the ACERWC.

[44] See Paragraph 5 of the Preamble to the OP

facts that gave rise to the complaint arose.[45] Undoubtedly, the potential risk that may materialize as a consequence of time fixing will exacerbate in such occasions. This is because, in common parlance, victims or their legal representatives who exhaust domestic remedies are more likely to be aware of the existence of international remedies.[46] It follows, therefore, that the probability for an individual victim or his/her legal representative who has not accessed local remedies (owing to their non-existence) to know the availability of international legal options is low. Consequently, the one year period prescribed for submitting complaints after the exhaustion of domestic remedies will more likely lapse without being used by the individual victim. This will, in effect, lead to discriminating children located in States where there are no domestic remedies against those children located in States where there are such remedies.

It is, perhaps, provided under the OP that if the author presents good cause demonstrating that it was impossible for him/her to submit a complaint within one year after the exhaustion of domestic remedies, the CRC Committee may admit it. However, this is not an appropriate safeguard to the potential risk envisaged above since, for obvious reasons, the Committee will not accept communications that delayed as a consequence of lack of awareness as to the existence of international Communications Procedures. The other core UN treaties, except that of the

[45] The European Court of Human Rights has approached the issue in similar fashion. The Court, in line with interpreting Article 35(1) of the ECHR, which requires communications to be submitted within six months after the exhaustion of domestic remedies explained:"… where no domestic remedies are available, the six-month period runs from the date of the act alleged to constitute the violation of the Convention (see Malcolm Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009), 27 *Nordic Journal of Human Rights1*,p. 23).Under the Rule of Procedure of the Inter-American Commission(Article 32),it is provided that in cases where domestic remedies can not be pursued, the deadline for bringing Communications after the exhaustion of domestic remedies will start to run as of the alleged violation of rights occurred.

[46] ibid

Optional Protocol to the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICRD), do not fix time limit for submitting communications after exhausting domestic remedies.[47] It is unfortunate that although delegations were observed to oppose new innovations on the ground that they are not practiced in the Communications Procedures of the existing UN treaties, they were not found to object the inclusion of this new detrimental element in to the OP.

The OP has also outlined other admissibility requirements. It is, for instance, provided that a communication will not be considered on its merits if it constitutes an abuse of the right of submission of communications or is incompatible with the provisions of the CRC and/or the OP thereto.[48] What really constitutes an abuse of the right of submission of communications is not mentioned in the instrument. However, the CRC Committee can deal with this rule by drawing a lesson from the experience of other treaty bodies like the Human Rights Committee. Incompatible communications, as can be deduced from the trend in other international instruments, are communications that do not allege violations of rights guaranteed under the CRC or its OPs.[49]

According to the OP, the CRC Committee may also decline to consider communications if it finds communications to be manifestly ill founded or not sufficiently substantiated[50] or the facts

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[47] The regional human rights instruments, nevertheless, stipulate time period for submitting complaints after the exhaustion of local remedies. The ECHR and the ACHR under Articles 35 and 46 respectively provide six months. The Guidelines of the ACERWC (under Chapter Two Part III) and the ACHPR (Article 56(6) require communications to be submitted within 'reasonable time' after the exhaustion of local remedies. Some authorities have commented that the phrase 'reasonable time' may entail the effect of prejudizing valid claims since what is reasonable for one commissioner may not be necessarily so to the other. (See Sabelo Gumeddze, supra note 55 p.134 The UN 1503 Procedure likewise adopts reasonable time period.

[48] Article 7(1)(c) of the OP

[49] See, for example, Article 56(2) of the African Charter on Human and Peoples 'Rights

[50] Article 7(1)(f) of the OP

that are the subject of communication occurred prior to the entry in to force of the OP for the State Party concerned except in cases when it is proved that the facts that are the subject of communication continued after that date.[51] In dealing with admissibility criteria the OP has overlooked some important issues. There is, for example, no explicit mention made in the OP addressing whether communications should be considered if they are exclusively based on information disseminated through the mass media. Under the admissibility rule of the Complaint System of the African Charter on the Rights and Welfare of the Child (CRWC), communications that are based exclusively on media will not be admitted.[52] The ACHPR in the same manner unequivocally states under Article 56(4) that communications will not be rendered admissible if they are based on news disseminated through the mass media.

As can be gathered from the elaboration made by the African Commission on Human and Peoples' Rights, it appears to be that the requirement is set to enhance the credibility of communications. The Commission in *Jawara v.The Gambia* held: "…There is no doubt that the media remains the most important if not the only source of information…the issue therefore should not be whether the information was given from the media, but whether the information is correct."[53] The fate of communications written in disparaging or insulting language is not also settled. Such issues are dealt with under the ACHPR and the UN 1503 Procedure.[54]

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[51] Article 7(1) (g) of the OP

[52] See Chapter Two, Part III of the Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child (ACERWC 8/4)

[53] *Jawara v.The Gambia,* supra note 276,Para 26

[54] Under Article 56(3) of the ACHPR, it is provided that communications should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the organization of African Unity. If they are found to be written as such, they will be declared inadmissible. Similar requirement is stipulated under the 1503 Procedure (ECOSOC.Res.1503 [X]VIII] revised by ECOSOC Res.2000/3 of June 2000)

This rule helps to ensure respect for State Parties and their institutions.[55]

*3.Interim Measures* **.-**The OP has incorporated provisions on Interim Measures (also called Provisional Measures) that help to avoid irreparable harm to the victim/ victims of alleged violations.[56] Article 6 (1) of the OP provides

> At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations..

Some individual experts in the drafting process argued that the phrase 'in exceptional circumstances' contained in the provision may encourage the trend of restricting the application of Interim Measures to cases concerning death penalty and deportation. Consequently, they preferred the phrase to be changed so as to enable the provision to serve for all possible irreparable damages.[57]

To enhance the protection of children, it would have been more advantageous to have a provision which empowers the CRC Committee to avoid any harm on the allegedly victim child/children while the Committee is processing the communication. Due to their special nature, violations may pose detrimental effect on the wellbeing and development of children. The very purpose of establishing Communications Procedure to children may be defeated if the CRC Committee is made to tolerate the infliction of harm on children and solely strive to avoid potential irreparable damages to children that may result as a consequence of deportation, execution of death penalty, extradition

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[55] Sabelo Gumeddze, Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal*,,p.130

[56] Article 6 of the OP

[57] Malcolm Langford and Sevda Clark, supra note 33,p.6 In the Complaint Procedures of the other core UN treaties Interim Measures are similarly provided to avoid potential irreparable damages to children.(see for example, Article 5 of the Optional Protocol to the CEDAW, Article 5 of the Optional Protocol to the ICESCR and Article 4 of the Optional Protocol to the CRPD)

and the like. To this effect, it is quite preferable to follow the approach taken in the African regional human rights system. The Guidelines of the ACERWC under Chapter 2 Article 2 (IV) (1) provides:

> When the Committee decides to consider a Communication, it may forward to the State Party concerned, a request to take provisional measures that the Committee shall consider necessary in order to prevent any other harm to the child or children who would be victims of violations.

It should also be underscored that in order for Interim Measures to play their designed purpose of avoiding infliction of harm on children, they should be made to have strict application. State Parties should be bound to take the measures whenever the CRC Committee requests them. The wording of Article 6 of the OP stated above, however, does not seem to enshrine legally binding provisions to this end. The respondent State, pursuant to the provision, is merely required to consider the request made by the CRC Committee to take Interim Measures. It is up to the State to decide whether taking Interim Measures is justified under the circumstances or not. No explicit obligation is imposed on States to take Interim Measures in accordance with the request by the Committee. This is contrary to the position held by some States in the drafting stage such as Liechtenstein who proposed the inclusion of an additional language to require that States take all appropriate steps to comply with such requests.[58] The CRC Committee subscribing to this view held that: "…the OP should be framed in a way making explicit the obligation of States Parties to take all the necessary steps to comply with Interim Measures."[59] Other OPs to the UN treaties have also adopted similar phraseology in this regard.[60] The trend in the practice of the UN treaty bodies,

[58] NGO Working Group for the CRC Complaints Mechanism, supra note38. The majority of States, including the U.S, to the contrary, wished the provision dealing with Interim Measures to reflect that Interim Measures are not considered binding. They emphasized that the decisions on whether to take Interim Measures must rest with States.

[59] Comments by the Committee on the Rights of the Child, supra note 28,p.7

[60] See, for example, Article 5 of the OP to ICESCR, Article 5 of the OP to

however, indicates that they resemble towards making requests for Interim Measures legally binding. In spite of the absence of clear language in the first OP to the International Covenant on Civil and Political Rights (ICCPR) and its Rules of Procedure imposing a duty on States to take Interim Measures, the Human Rights Committee in Communication No.869/1999, for example, held that:

> A State commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the covenant, or render examination by the Committee moot and the expression of its views nugatory and futile.[61]

In its General Comment, the Committee further stressed the compulsory nature of Interim Measures by affirming that: "failure to implement such Interim or Provisional Measures is incompatible with the obligation to respect in good faith the Procedure of Individual Communication established under the Optional Protocol."[62] Under the Guidelines of the ACERWC, States Parties to the ACRWC are required to take Interim Measures whenever the ACERWC requests them. As can be noted from the above provision, States Parties are not simply expected to consider the requests for Interim Measures. Rather, they are bound to take the measures in accordance with the request by the ACERWC.

Arguably, failure to make Interim Measures legally binding up on States may entail serious consequence on children located in Africa, where there is poor practice by States of complying with Interim Measures.[63] The execution of Ken Saro-Wiwa by the Nigerian government despite the request made by the African

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the CEDAW Article 4 of the OP to CRPD, and Rule 92 of the Rules of Procedure of the Human Rights Committee

[61] *Joint NGO Submission to the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to Provide Communications Procedure,* Available at *http://www.crin.org/ resources/infoDetail asp?=report,* accessed on 10/03/2010

[62] Human Rights Committee, General Comment No.33, Para 19

[63] Lilian Chenwi, 'Correcting the Historical Asymmetry Between Rights: The Optional Protocol to the International Covenant on Economic Social and Cultural Rights' (2009), 9 *African Human Rights Law Journal* p.39

Commission for Provisional Measures clearly illustrates the need for making Interim Measures legally binding.[64]

It is also worthy to note that the provision does not fix time limit within which the State concerned should respond to the request made by the CRC Committee to consider Interim Measures. Given the absence of clear terms imposing a duty on States to take Interim Measures, the non-existence of such time frame may further weaken the effectiveness of Interim Measures. Similar shortcoming also exists in the Complaint Procedures of the other core UN treaties. The Rules of Procedure of the African Commission offers important lesson in this regard. Under Rule 101(4), it is stated that the respondent State should, within two weeks of the receipt of the request for provisional measures, report back to the commission on the implementation of the provisional measures requested. There is no equivalent provision in the text of the Rules of Procedures of the UN treaty bodies. It is advisable that the CRC Committee should address this issue in its Rules of Procedure to promptly avoid potential harms to children and guarantee the celerity of the Procedure.

*4. Transmission of Communications.*-On receiving communications, the CRC Committee will, confidentially and as soon as possible, notify the respondent State about the substance of the communication.[65] The OP has unconditionally permitted disclosure of the identity of the complainant to the respondent State. Article 8(1) reads:

> Unless the Committee considers communications inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present protocol confidentially to the attention of the State Party concerned as soon as possible.

The OP provided lesser threshold of protection as compared to other Complaint Procedures such as the ICRD (Article 14(6)) and Rules of Procedure of the Committee on International Convention on the Eliminations of all forms of

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[64] See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, (2000) AHRLR 212 (ACHPR 1998), Paras 8, 9 and10

[65] Article 8(1) of the OP

Discrimination against Women (CEDAW) (Rule 69), which require the consent of the complainants to be established before permitting disclosure. Part of Article 14(6) (a) of CERD, for example, outlines:

> The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent.

Apparently, this provision remains to be problematic for the complainants concerned. It has failed to take in to account the negative consequence that may ensue to children as a result of the disclosure of their identity to the respondent State. As vulnerable groups of the society, special protection measures should have been afforded to them while bringing communications. Given this fact, the 'protection measures' envisaged under Article 4 of the OP which seeks to prevent unnecessary suffering of children due to communications will not be complete without shielding children from the possible harm that may be inflicted on them as a consequence of revealing their identity to the respondent State.

*5. Friendly Settlement.*-Primarily targeting at protecting the rights of children without a prolonged examination of communications by the CRC Committee, the OP has brought in to it a Friendly Settlement Procedure.[66] Although Friendly Settlement Procedures are hailed for providing favorable solutions in a prompt manner, it needs critical scrutiny whenever applied in the context of children. This is mainly due to the fact that unlike the settlement between States, Friendly Settlements between an individual and a State are imbalanced and inevitably raise concerns about the relative powers of the two parties.[67] In particular, the Procedure may bring about undesirable consequences on child victims who run a great risk of manipulation in the process and agreeing to settlements potentially contrary to their interests.[68] Realizing such consequence, a number of States during the negotiation process stressed that any Friendly Settlement should respect the obligations

[66] Article 9 of the OP
[67] Joint NGO Submission to the OEWG, supra note 61, p.11
[68] ibid

set forth in the CRC and its OPs.[69] This is also reflected in the provision of the OP (Article 9(1)) since it emphasizes that:

> The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the obligations set forth in the Convention and/or the Optional Protocols thereto.

This mandate of the Committee is bolstered by the clear stipulation enunciated under Article 2 of the OP which empowers the Committee to play its key role in preventing the possible manipulation of children and misuse of the Procedure through applying the principle of best interests of the child in supervising the process of Friendly Settlements.

In particular, Friendly Settlement processes involving African States should be closely scrutinized. Given their poor human rights record, African States may not live up to their duty of respecting the rights of the child while pursuing the Friendly Settlement process. In practice, it is also tested since in *Modise* case (*John K. Modise* v. *Botswana,* Communication 97/93), the Botswana government was found violating the human rights of the complainant in the Friendly Settlement process.[70] The CRC Committee is expected to be quite prudent in determining whether pursuing Friendly Settlement of the matter involving African States is in the best interests of the child/children involved.

### *B. Inter-State Communications*

Inter-State Communications are the other key Procedures of the OP. Although Inter-State Communications experienced no usage by States under other UN treaties so far[71], the OP has included the Procedure and allowed States to present claims alleging breach of any of the rights guaranteed under the CRC and its OPs. States Parties are given the liberty to either accept or decline from

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[69] Report of the OEWG, supra note 35,p. 18

[70] Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008),p.83

[71] Report of the OEWG, supra note 35, p. 21

recognizing the competence of the CRC Committee to receive and consider Inter-State Communications in respect of the CRC and/or its OPs.[72] And such declaration may at any time be withdrawn by the State concerned.[73] The OP further provided that the Committee shall make available its office to the parties concerned for friendly solutions of the matter subject to communication.[74] In such occasions, it seems sound to argue that the CRC Committee, pursuant to the mandate entrusted to it under Article 2 of the OP, is required to ascertain whether Friendly Settlement options are in the best interests of the child/children concerned.

It should be acknowledged that the provisions of the OP dealing with Inter-State Communications in general brought no new element on the existing precedent. This may be part of the reason why the Procedure was not given much attention and failed to be discussed at length. The other reason for the absence of due concern to it might have emerged as a result of non-use of it by States in other UN treaties. Some delegations expressed doubts on the potential significance of the Procedure on this ground.[75]

Seen in light of the paramount advantage that can be obtained from the Procedure as a result of its special nature, the shadow of doubt expressed on the potential contribution of the Procedure appears to be unjustifiable. Inter-State Communications have preferable aspects over Individual Communications in some respects. As opposed to Individual Communications which require communications to be submitted by individuals or group of individuals alleging breach of rights committed by States Parties 'within their jurisdiction',[76] Inter-State Communications enshrined under Article 12 of the OP do not make any reference to States Parties' jurisdiction.[77] Accordingly, Inter-State Communications

[72] Article 12(1) of the OP

[73] Article 12(4) of the OP

[74] Article 12(3) of the OP

[75] Report of the OEWG, supra note 35, p. 21

[76] See, for example, Article 5(1) of the Optional protocol to the ICESCR, Article 2 of the Optional Protocol to the CRPD

[77] Inter-State Communications under other Complaint Procedures of the UN treaties likewise do not make any reference to States Parties' jurisdiction.

may be used to address extra-territorial violations of children's rights. This will in effect imply that an act or omission contrary to the CRC and its OPs committed by States Parties having an impact on children outside their jurisdiction may be challenged by other States Parties through Inter-State Communications. This has been practically observed in Africa where an Inter-State Communication was instigated against the Republics of Burundi, Rwanda and Uganda for serious violations of the human and peoples' rights of individuals including children in the various provinces of the Democratic Republic of Congo by the armed forces of Burundi, Rwanda and Uganda.[78] Introducing the Procedure under the CRC may help to address similar extra-territorial violations of children's rights by States Parties. It also opens the door for possible developments in international jurisprudence relating to the application of the provisions of the CRC and its Optional Protocols. However, the above discussion should not be understood to imply that Inter-State Communications will only serve to address extra-territorial violations of children's rights. The absence of reference to any territorial jurisdiction may also enable States Parties to bring to an end child rights violations committed by States Parties within their own jurisdiction.

The other advantage of Inter-State Communications that result from their special nature is that the Procedures enable children to vindicate their rights through a more powerful entity-a State. It is an important asset to enhance the effective enforcement of children's rights as a State Party is in a better position to represent the interest of a child (children) whose rights are violated by another State Party. In this connection, it is essential to note that when the alleged violation committed by a State Party affects the rights of individuals under the jurisdiction of another State Party, the latter's sovereign interest might also be affected.[79] Accordingly,

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See, for example, Article 41 of the ICCPR, Article 21 of CAT, Article 76 of CMW and Article 11 of ICRD

[78] *Democratic Republic of Congo (DRC)* v. *Burundi, Rwanda and Uganda* (Communication 227/99), Twentieth Activity Report 2006

[79] Christian Courtis and Magdalena Sepúlveda, 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR? 27

Inter-State Communications may, in addition to assisting in protecting children's rights, help to safeguard the sovereign interests of State Parties.

The role being played by the Procedure under regional systems also shades light on its potential significance under the CRC. In the European regional human rights system, for example, the number of Inter-State complaints that appear in Strasbourg has shown increment from time to time.[80] Although few in numbers, the complaints have resulted in significant milestones in the protection of human rights by the European Court of human Rights.[81] As far as the situation in Africa is concerned, although Inter-State Communications are not practiced to the extent one may wish, some positive signs have been detected indicating its potential use. Inter-State Communication, as considered above, has already reached the African Commission.

In this regard, the impact of opt-in options should also be critically analyzed. On the face of poor record of utilizing Inter-State complaints under the existing UN treaties, the presence of opt-in clauses may further weaken the contribution of the Procedure in the CRC regime. With the existence of the opt-in clauses, moreover, it would be difficult to ensure similar level of protection to all children located in State Parties to the OP since children located in States where the State has accepted the competence of the Committee to receive and consider Inter-State Communications will be afforded better protection than children located in States where the State has not made such acceptance of the Competence of the Committee. To avoid discriminatory treatment of children and enhance effective protection of their rights, it is essential to make accepting the Procedure mandatory as in the case of the CERD.

### *C. Inquiry Procedure*

The OP has also incorporated provisions setting out Inquiry Procedure. Pursuant to Article 13 of the OP, the Committee is

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Nordic Journal of Human Rights1,p.59

[80] Liz Heffernan, supra note 327,p.25

[81] ibid

required to undertake an inquiry if it receives 'reliable' information indicating 'grave' or 'systematic' violations by a State Party of the rights set forth in the CRC and its OPs.

Yet, the Committee can not undertake investigation if the State has made a declaration indicating that it does not recognize the competence of the Committee to conduct an inquiry in respect of the CRC and/or its OPs.[82] As can be gathered from Article 13(2), the inquiry is provided to be conducted confidentially based on the information submitted by the concerned State as well as other reliable information available to it. The Committee may in addition designate one or more of its members to conduct an inquiry and report to it urgently. Whenever the circumstances warrant and with the consent of the State Party concerned, the inquiry may involve visit to the State's territory.[83]

Inquiry Procedures, like Inter-State Communications, comprise distinct features that introduce additional advantages to children. Like Inter-State Communications, Inquiry Procedure may also serve to address extra-territorial violations of child rights. This is due to the fact that the Procedure makes no reference to jurisdictional limitation. Hence, acts or omissions committed by States Parties having impact on the rights of children outside their jurisdiction, such as grave or systematic violations of child rights that may occur in a State Party as a consequence of forceful attack or invasion by another State Party may be addressed by Inquiry Procedure.

Indeed, Inquiry Procedure adds some further advantages on Inter-State Communications. Under Inquiry Procedure, violations that are 'systematic' in their nature can be addressed. Moreover, under this Procedure, the identity of the complainant is irrelevant; NGOS, NHRIS and even States can initiate an Inquiry without necessarily involving victims of violations and disclosing their identity to the respondent State or the public. This is particularly important for children who may risk reprisal as a consequence of initiating an Inquiry against their government.

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[82] Article 13(7) of the OP

[83] ibid

If we visualize its practical importance in the context of Africa, the Procedure may, without necessarily involving victims of violations, enable NGOs, NHRIS and States to instigate inquiry and halt child rights violations in Africa, such as those in Sudan who have been sustaining grave violations of their rights.[84] What is important to note here is that unlike Inter-state Communications which require communications to be brought from a State Party to the OP that specifically declared to accept the competence of the CRC Committee to receive and consider Inter-state Communications[85], Inquiry Procedure do not fix limitation on those who can initiate an inquiry. Hence, even a state which is not party to the OP is entitled to utilize the Procedure.

Nevertheless, it should be noted that the Procedure consists of some detrimental aspects that impede its potential significance. In spite of the strong objection by some States such as France,[86] the OP, for example, has provided opt-out option in relation to the Procedure.[87] State Parties are granted the possibilities of restricting the competence of the CRC Committee to conduct an Inquiry in respect of the rights set forth in the CRC or its OPs. In order to strengthen the role to be played by the Procedure and reaffirm the indivisibility, interdependence and interconnectedness of human rights set forth under the Preamble, the OP should have avoided the option like that of the OP to the CED.[88] The inquiry, moreover, cannot be conducted without securing the consent of the concerned State. The Procedure, as a result, will not have application if the concerned State objects it. This will inevitably undermine its effectiveness.

### *D. Other Key Aspects*

The OP is also composed of other key aspects that facilitate the

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[84] Visit http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6150459/k.96D1/South_Sudan.htm

[85] See Article 12(2) of the OP

[86] Visit http://www.crin.org/resources/infodetail.asp?id=2398

[87] See Article 13(7) of the OP

[88] Look at Article 33of the Optional Protocol to the CED.

effective use of the OP and implementation of the views and recommendations of the CRC Committee. Under Article 15, for instance, the need for international assistance and co-operation is emphasized for the purpose of assisting States in the implementation of the views and recommendations of the Committee.

Few delegations suggested that new fund for the purpose of assisting States in the implementation of the recommendations of the CRC Committee should be established. The proposal was not accepted since other delegations argued that it would weaken Article 45 of the CRC and should not be dealt under a procedural instrument.[89] Establishment of funds is not a new innovation within the UN treaties. Some human rights treaties, such as the OP to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has already provided for the establishment of fund with a view to helping States in the implementation of the recommendations made by the Sub-Committee on Prevention. Through establishing trust fund under the OP to the ICESCR, agreement has been reached that States (especially third world States) need assistance in implementing Economic Social and Cultural (ESC) rights. The CRC also comprises ESC rights. It is not clear why States declined to recognize the importance of establishing special fund for implementing the recommendations of the CRC Committee. This may, in particular, affect children in Africa where the capacity of majority of States to give effect to the recommendations of the CRC Committee is questionable. To enhance effective implementation of the recommendations of the CRC Committee by States parties it would have been advantageous if the OP

[89] Report of the OEWG, supra note 35, p.22. Article 45 of the CRC entitles specialized agencies, the United Nations Children's Fund and other United Nations organs to be represented at the consideration of the implementation of the CRC as fall within the scope of their mandate. The argument advanced by the delegations in this regard seems to evolve from the fear that creating trust fund to assist States in the implementation of recommendations of the Committee will minimize the contribution they render in accordance with the above provision of the CRC

provided for the establishment of a new fund.

Furthermore, the OP has envisaged provisions that aim at advancing the awareness of the public in relation to the OP and the views and recommendations of the Committee in particular with regard to matters involving the State Party by appropriate and active means and in accessible formats to adults and children alike, 'including those with disabilities'.[90] A proposal was made by some delegations to make reference to 'child friendly' means.[91] The proposal did not get adequate support as a result of which the OP failed to include this requirement in its text. Although there is no explicit mention of this requirement in the provision, it is plain to note that the clause 'in accessible formats to adults and children alike' in it gives clue as to the existence of duty on States Parties to provide access to the OP and the views and recommendations of the Committee in a child friendly means.

The importance of ensuring 'child-sensitive Procedure' is also highlighted in the OP.[92] Article 3 states that the Committee should guarantee child sensitive Procedure while adopting its Rules of Procedure. The OP does not give clue on the notion underlying it. Some delegations referred to the definition provided in the 'UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime' which define it as:"An approach that balances the child's right to protection and that takes in to account the child's individual needs and views'.[93] The Committee is expected to deal with the details of it in its Rules of Procedure.

## CONCLUSION

The adoption of an OP under the CRC monitoring system is an important step forward in the monitoring system of the CRC. By way of presenting the possibilities of enforcing the rights of children through complaints system, it will enhance the protection of the rights of children. An important point worthy of emphasis,

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[90] Visit http:// www. crin.org /law/CRC_ complaints

[91] Report of the OEWG, supra note 35,p. 22

[92] See Paragraph 7 of the Preamble Part and Article 3 of the OP

[93] ECOSOC Res 2005/20.July 22,2005

however, is the fact that since the OP is devised to protect the rights of children, it is reasonably expected that the Procedures introduced in it take in to account the special status and vulnerabilities of children. This article has assessed the key Procedures of the Op in light of this requirement. The Op introduced three key Procedures: Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure. Through critical assessment of the OP, it has been deduced that the following aspects of the Procedures demand reconsideration.

Under Individual Communications Procedure, the OP allows submission of communications on behalf of children. The instrument, nonetheless, has failed to proactively deal with the potential manipulation of children by their representatives. Earlier drafts of the OP required the CRC Committee to consider whether communications submitted on behalf of a child is in the best interests of the child represented. At the final stage, this mechanism was not taken up since it failed to galvanize adequate support by the majority of States. As with other Complaint Procedures, the OP sets out admissibility requirements. As considered in the discussion, the OP failed to clarify the phrase *unreasonably prolonged* under the requirement of exhausting local remedies. It has been argued that given the special nature of children, the best interests principle should be deployed in determining whether local remedies are unreasonably prolonged or not. Communications are also required to be submitted within one year after the exhaustion of domestic remedies unless it is proved that it was impossible to do so within the prescribed time. This requirement is shown to be disadvantageous to those children located in poor countries (like those in the African continent) who lack adequate knowledge and financial resources to institute international complaints within the prescribed time.

It has been considered that children are not entitled to bring complaints to the CRC Committee without first exhausting local remedies. Such requirements should generally promote the protection of the rights of children. In view of this, the requirement of exhausting domestic remedies, it is argued, should be guided by

the best interests principle so as to enable does not prescribe the yardstick to be employed in determining whether the application of domestic remedies is unreasonably prolonged.

The OP has introduced interim-measures for the purpose of avoiding irreparable damages to children while the CRC Committee is considering communications. The OP, however, has made no meaningful advancement to acknowledge the special nature of children in establishing the Procedure. As with the trend in the Complaint Procedures of other UN treaties, such measures are provided to be taken in exceptional cases to avoid irreparable damages to children. Given the serious consequence that human rights violations may pose on children, it is suggested that the OP should have empowered the CRC Committee to order interim-measures to avoid any harm on children. Furthermore, the measures are not made to have strict application. Some States, in particular, those in Africa, are observed to ignore requests for interim-measures. Hence, the problem may exacerbate if lenient approach is taken by the OP.

The manner of transmission of communication provided in the OP also demands improvement. Although disclosure of the identity of the complainants to the respondent State potentially puts children at risk, the OP made no safeguard and entitles the respondent State to know the identity of complainants. This is even lower than the standard provided under the Complaint Procedures of other UN treaties like the ICRD and Rules of Procedure of the Committee on the CEDAW.

Although there is insignificant use of inter-state Complaint Procedures by States under other complaint Procedures of the UN treaties, the Op has introduced the procedure. The Procedure is advantageous for children since it enables to enforce their rights by a more powerful entity-State. However, the Opt-in option, which makes States Parties subject to the Procedure only if they recognize the competence of the CRC Committee to receive inter-state complaints through declaration, should be re-examined. The option may weaken the contribution of the procedure since States may decline to accept it.

The establishment of inquiry Procedure is instrumental to

enhance the effectiveness of the OP in ensuring protection of the rights of children..Inquiry may be carried out by the CRC Committee if it is notified as to the existence of grave or systematic violations children's rights by a State Party. The complaint may be lodged by NGOs, NHRIs and States Parties. This Procedure is also fraught with defects which undermine its potential significance. Opt-out option, which entitles States Parties to avoid the use of inquiry Procedure by the CRC Committee against them is provided.

Fortunately, the door for potential improvement is not totally closed. The OP under Article 21 has inserted the possibilities of making an amendment to it up on the fulfillment of the required formalities. It is hoped that State Parties will, at some point on time, opt to rectify the drawbacks attached to the Procedures through amendment so as to improve the efficiency of the OP in protecting the rights of children.