DOMESTICATION OF INTERNATIONAL LAW STANDARDS ON THE RIGHTS OF THE CHILD WITH SPECIFIC EMPHASIS ON THE MINIMUM AGE FOR CRIMINAL RESPONSIBILITY: THE CASE OF ETHIOPIA

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DECLARATION

I declare that this is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources that I have used or quoted have been indicated and duly acknowledged by means of complete references.

Student

Signed…… Date……

Supervisor

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ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
APAP	Action Professionals Association for the People
AU	African Union
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EWLA	Ethiopian Women Lawyers Association
FCC	Federal Criminal Code (2005)
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JJPO	Juvenile Justice Project Office (Established under the Federal Supreme Court Ethiopia in 1999)
NGO	Non Governmental Organisation
PCE	Penal Code of the Empire of Ethiopia (1957)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund

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Chapter One: Introduction

1.1. Background

The practice of setting a minimum age for criminal responsibility of children has long existed in Ethiopia. The Fetha Negast and the 1930 Penal Code fixed this age at seven whereas the 1957 Penal Code and the now operational Criminal Code chose the age of nine as the minimum.[1]This research will examine the existing minimum age in the country in the context of international law.

As it is most often said, the United Nations Convention on the Rights of the Child (CRC/the Convention)[2] finalized in 1989 is a land mark in the history of childhood.[3] The Convention is one of the most universally accepted international legal instruments ratified by almost all states in the world. With the exception of the USA and Somalia, the Convention has been ratified by all states in the world.[4] The

[1]For a discussion of the history of the minimum age for criminal responsibility of children in Ethiopia s*ee* chapter four.

[2] United Nations Convention on the Rights of the Child of 20 November 89, GA Resolution 44/25, 44 UN GA Resolution Supp. No. 49, UN Doc A/44/736 (entered into force 2 September 1990)

[3] M. Freeman (1996) (Ed), Children's Rights: A Comparative Perspective, at 1; P.Alston and J. Tobin (2005), Laying the Foundations for Children's Rights, at ix.

[4]Somalia's inability to ratify the Convention is attributed to their lack of an internationally recognized government. Considering the fact that the US has met many of the requirements of the Convention and the expertise and resources it has to fully implement the CRC, Jaap argues, there is no sound reason why it should not ratify the CRC. *See* J. Doek (2006), 'What does the Children's Convention Require?' Emory Int'l L. Rev, Vol. 20 at 208; The current US administration has opposed ratifying the Convention because of serious "political and legal concerns that it conflicts with U.S. policies on the central role of parents, sovereignty, and state and local law." See the Report by the Secretary of State to

CRC is also said to be a landmark in United Nations (UN) standard setting.[5] Unlike other instruments in the UN system the CRC entered in to force in a very short period of time, just 9 months and has reached an unprecedented number of ratifications -193[6] which is all countries in the world but the two countries mentioned earlier.[7]

In the African context, we have the African Charter on the Rights and Welfare of the Child (ACRWC) which was adopted under the auspices of the Organization of African Unity (OAU) (now the African Union (AU)) and entered into force on the 29th of November 1999. The ACRWC following the CRC is said to be the second

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the Congress. October 2003, Part 2. The absence of these two countries from the list is the only thing that stands between the CRC and a claim to full –fledged universality. See P.Alston and J. Tobin (2005), Laying the Foundations for Children's Rights, at x.

[5] M. Pais (2000), Child Participation, at 2; P.Alston and J. Tobin (2005), Laying the Foundations for Children's Rights, at v, 2.

[6] For the status of ratification of the CRC, See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en [Last accessed on 17 May, 2009]

[7] M. Pais (2000), Child Participation, at 2; though it is not difficult to find superlatives to describe the achievements of the Convention, it is also equally easy to list the horrible abuses that continue to be committed against children. This is best captured by Mr. Kofi Annan when he said "[t]he idea of children's rights, then, may be a beacon guiding the way to the future – but it is also illuminating how many adults neglect their responsibilities towards children and how children are too often the victims of the ugliest and most shameful human activities." P. Alston and J. Tobin (2005), Laying the Foundations for Children's Rights, United Nations Children's Fund (UNICEF), at 2; For a discussion of the inherent weaknesses and achievements of the CRC See J. Doek (2003), 'The protection of children's rights and the united nations convention on the rights of the child: achievements and challenges', St. Louis U. Pub. L. Rev. Vol. 22; Also see A. Ramesh, 'UN Convention on Rights of the Child: Inherent Weaknesses', Economic and Political Weekly, Vol. 36, No. 22 (Jun. 2-8, 2001) available at http://www.jstor.org/stable/4410687, [Accessed on 28 October, 2008]

global and the first regional instrument that "identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic judicial or administrative proceedings."[8] At present, the ACRWC enjoys the ratification of 41 African states.[9]

The administration of juvenile justice is one major area where these two major international instruments in the areas of children have tried to set standards. By becoming a member to these instruments, State Parties (including Ethiopia)[10] have agreed to take all appropriate measures (which could be legal, political or administrative) to live up to the standards and terms of the treaties. Thus, the assumption is that all State Parties have the duty to domesticate the standards set by these instruments into their domestic legal system so that the rights of the child are fully realized at the national level.

One area of difficulty in juvenile criminal justice policy lies in providing appropriate legal mechanisms to reflect the transition from the age of childhood innocence through to maturity and full responsibility under the criminal law.[11] Along with the

[8] D. Chirwa (2002), 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' The International Journal of Children's Rights, Vol.10 at 157. As a regional treaty, the ACRWC has been described as "the most progressive of the treaties on the rights of the child" G.Van Bueren (1995), The International Law on the Rights of the Child at 402. For a discussion on ACRWC see Chapter 3 below.

[9] For the status of ratification of the ACRWC, See http://www1.umn.edu/humanrts/instree/afchildratifications.html). [Last Accessed on 20 April,2009]:

[10] Ethiopia became a state party to the CRC on 13 June 1991 and the ACRWC on 2 October 2002.

[11] G. Urbas (2000), The Age of Criminal Responsibility. Trends and Issues in Crime and Criminal Justice, No.181. Australian Institute of Criminology, available at

establishment of separate children's courts and detention centers, specific legal rules have also been developed to demarcate the position of children within the general criminal law.[12] In this regard the issue of the minimum age for criminal responsibility of children has attracted considerable attention and it has been a subject of considerable discourse in academic circles as well as amongst stakeholders in juvenile justice. It has also been a source of controversy in many jurisdictions that are in the process of reforming their laws relating to children in conflict with the law.

The minimum age for criminal responsibility - the age below which children are not held liable for their acts under penal law – varies widely from one country to the other.[13] In some countries children are held criminally liable at as low age as 7 whereas, in others the minimum age stands at 18 and above.[14] This disparity has been

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http://www.aic.gov.au/publications/tandi/ti181.pdf [Accessed 12 November, 2008]; Also see J. Fortin (2003), Children's Rights and the Developing Law, at 550.

[12] G. Urbas (2000), The Age of Criminal Responsibility. Trends and Issues in Crime and Criminal Justice, No.181. Australian Institute of Criminology, available at http://www.aic.gov.au/publications/tandi/ti181.pdf [Accessed 12 November, 2008]

[13] G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 26, 27; K. Johansson and T. Pal (2003), 'Children in Trouble with the Law: Child Justice in Sweden and South Africa', International Journal of Law, Policy and the Family Vol. 17, at 310; P. Graven (1965), An introduction to the Ethiopian Penal Law, at 145; I. Sagel-Grande (1991), 'Juvenile Delinquency and Age' in L. Boendermaker and P. van der Laan (eds.) The Future of the Juvenile Justice System, at 69.

[14] For example ,in India and Switzerland it is fixed at 7,United Kingdom 10, Canada and Netherlands 12, Niger 13, Germany and Uganda 14,and in Spain 16; Fact Sheet # 4, General Comment No.10: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [Accessed on 12 November, 2008]

regarded problematic demanding some kind of standard setting at an international level.[15] And this research paper will also try to explore available international law with a view to identifying existing standards relating to the minimum age for criminal responsibility of children.

Key Words (10)

CRC;
ACRWC;
Ethiopia;
Domestication;
Juvenile justice;
Children's rights;
Criminal responsibility;
Children in conflict with the law;
Federal Criminal Code of 2004 (FCC);
Minimum age for criminal responsibility

1.2. Statement of the Problem

Ethiopia is a country of rich traditions and is said to have a history of 3000 years. It has one of the oldest legal traditions in the world which can be exemplified by the *Fetha Negast* or the Law of the Kings. The modern legal reform in the country which was modeled after the continental European legal system, however, began in the 1950's with the massive codification of the legal system. Among the results of this

[15] CRC/C/GC/10 Para 16.

process, one was the 1957 Penal Code of the Empire of Ethiopia (PCE). This Code, which incorporated numerous provisions that fit in with children's rights [including of course those dealing with age of criminal responsibility], was in force for almost five decades.

Recently the country has undergone a major legal reform by replacing the 1957 Penal Code by the new Federal Criminal Code of 2004. Thus, the major question that the paper will try to answer is to what extent the new Federal Criminal Code (which came into force some 14 years after the CRC and 5 years after the ACRWC have come in to operation) has incorporated existing international standards pertaining to the age of criminal responsibility.

1.3. Aims of the Study

The following can be mentioned as the major aims of the study:

I) To identify the existing international standard on the minimum age for the criminal responsibility of children.

II) To see the extent to which Ethiopia has complied with these international standards.

III) To assess into the legal status of the two international legal instruments (the CRC and the ACRWC)[16] in the Ethiopian legal system and the extent to which they have impacted on the general juvenile criminal justice system and particularly on the minimum age for criminal responsibility of children.

IV) To recommend possible solutions that will increase the country's compliance with existing standards on the minimum age for criminal responsibility.

1.4. Methodology

Primarily, the research will be based on the analysis of available literature on the subject. As a result the research will primarily focus on primary sources which includes among others: international treaties (both global and regional), national legislations, soft law documents, reports of law reform commissions, state reports, general comments, and case law where applicable. Secondary sources used include: books, articles and other related literature. In this regard a significant number of internet sites have also been consulted.

[16] The CRC and the ACRWC are the only binding international instruments that are entirely concerned with children.

1.5. Overview of Chapters

By taking into account the maximum word limitation for a research paper, this paper will be divided into five chapters:

Chapter One: This chapter basically introduces the subject matter of the research paper. More particularly, it will provide the background, research question, aim, methodology, and outline of the chapters.

Chapter Two: This chapter discusses general matters as regards the minimum age of criminal responsibility and tries to introduce the concept of age of criminal responsibility.

Chapter Three: This chapter will be devoted to the discussion of the international standards. Here, the emphasis is on a detailed discussion of the CRC and the ACRWC as to what they prescribe on the minimum age for the criminal responsibility of children. A discussion of the recommendations of the Committee on the Rights of the Child as regards the minimum age for criminal responsibility will be discussed here. Of particular importance will be General Comment No 10 of the UN Committee on the Rights of the Child. Other relevant international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will also be considered

Chapter Four: This will be devoted entirely to the discussion of the Ethiopian situation and it is where the "heart" of the research paper is housed. The relevant provisions of the Federal Criminal Code (FCC) on the minimum age for criminal responsibility will be the focal point of this chapter. Other relevant legislation will also be considered. Further to that, issues such as the status of international agreements in the legal system, history of the age of criminal responsibility in the country, and the general situation of children in the country will also be touched on.

Chapter Five: This chapter will provide conclusions and recommendations.

Chapter Two: The Minimum Age of Criminal Responsibility- General

2.1. Introduction

In this chapter the concept of the minimum age for criminal responsibility of children will be introduced. Attempt will be made to look at the minimum age from a historical perspective in an effort to lay down its historical development. The implication of lower minimum ages on some of the cardinal principles of the CRC is also considered in here. The chapter will, however, begin by establishing the meaning of the concept of the minimum age of criminal responsibility.

2.2. Meaning

The minimum age of criminal responsibility relates to "the age at which a person is considered capable of discernment (the capacity to distinguish right from wrong) and therefore bearing the responsibility for his criminal acts. It is the age from which the child is judged capable of contravening the criminal law"[17] It is the age at which a child stands before a court of law and faces state-determined consequences for her or his criminal or delinquent actions.[18] It also relates to the age below which children are

[17] G. Odongo (2007), A case for raising minimum age of criminal responsibility, available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December, 2008]; Also see J. Burchell & J.Milton (2005), Principles of Criminal Law, at 358. G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 26; G.Van Bueren (1995), The International Law on the Rights of the Child, at 173.

deemed to lack the mental capacity to commit a crime and be responsible for their acts.[19] Generally the minimum age of criminal responsibility can be defined as "the lowest statutory age at which children may potentially be held criminally liable for infringements of the penal law in a given country."[20]

The view that children are slow to develop mental capacity and an acknowledgement of the fact that the adult criminal justice system is not the best approach to deal with their misconduct finds reflection in the concept of an age of criminal capacity.[21]As a concept it has been known in almost all jurisdictions of the world throughout history

[18] Age of criminal Responsibility, available at http://www.ijjrproject.org/index.php?option=com_content&view=article&id=1:welcome-to-joomla [Accessed on 9 December, 2008]

[19] Royal College of Psychiatrists (2006), Child defendants: Occasional paper OP56 , London, at 60; J.Herring(2005),Criminal Law, at 355.

[20] D. Cipriani (2005) South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights, available at http://www.unicef .org/rosa/Criminal _Responsibility_08July_05(final copy).pdf [Accessed on 11 October, 2008]

[21] G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 130; G. Odongo (2007), A case for raising minimum age of criminal responsibility, available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December, 2008]; Also see D. Cipriani (2005) South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights, available at http://www.unicef .org/rosa/Criminal _Responsibility_08July_05(final copy).pdf [Accessed on 11 October, 2008]; Kelly-Anne Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems(Unpublished LLM thesis) at 4; C.Fried and N.Reppucci1 (2001), 'Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability', Law and Human Behavior, Vol. 25, No. 1, Special Issues on Children, Families, and the Law, at 46.

and the relevant provisions both in the CRC and the ACRWC on this issue thus simply follow on this historical recognition.[22]

The concept of the minimum age for criminal responsibility is related to what is known in criminal law as the defence of infancy. In most systems of criminal law before a person can be held culpable and, hence punishable, his behaviour must have contained an element of fault.[23] It is not enough simply to have performed a prohibited act; the requisite mental element (*mens rea)* as well as the *actus reus* or the wrongful act should also be there.[24] Thus, it is possible for one to escape criminal liability by showing that he /she was lacking a guilty mind, for example that the act was committed accidentally, or whilst in a state of automatism.[25]

[22] G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 130; G. Odongo (2007), A case for raising minimum age of criminal responsibility, available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December, 2008]

23 M. Happold, 'The Age of Criminal Responsibility for International Crimes Under International law', in Karin Arts, Vesselin Popovski (eds.) International criminal accountability and the rights of children, at 72.

24 M. Happold, 'The Age of Criminal Responsibility for International Crimes Under International law', in Karin Arts, Vesselin Popovski (eds.) International criminal accountability and the rights of children, at 72.

[25] M. Happold, The Age of Criminal Responsibility in International Criminal Law, available at www.wihl.nl/documents/cms_ihl_id57_1_Happold%20final%204.doc [Accessed on 02 December, 2008]; M. Happold, 'The Age of Criminal Responsibility for International Crimes Under International law', in Karin Arts, Vesselin Popovski (eds.) International criminal accountability and the rights of children, at 72.

In respect of one class of person, however, a lack of *means rea* [and hence no criminal liability] is presumed.[26] Here the condition of childhood exempts young people or children from criminal responsibility for their acts and they are regarded not to be responsible actors and are excused from punishment.[27] And "where this state of childhood ends and responsibility begins is in reality a gradual process with the child becoming more and more aware of his place in the order of things."[28] In most cases, however, "[t]he law does not reflect this reality…., but sets an arbitrary age of responsibility for the purposes of the criminal law".[29]

Thus, by virtue of their lack of mental capacity children at least some of them will escape criminal responsibility for their infringement of the criminal law.[30] This does not, however, mean that "they can do as they please, but merely that they are not the concern of the criminal law."[31] And it is not the case that official intervention in their

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26 M. Happold, The Age of Criminal Responsibility in International Criminal Law, available at www.wihl.nl/documents/cms_ihl_id57_1_Happold%20final%204.doc [Accessed on 02 December, 2008]

27 C. Clarkson and M. Keating (1990), Criminal Law: Text and Materials, (2nd ed), at 397; A. Simester and R.Sullivian (2000?), Criminal Law: Theory and Doctrine, (1st ed.) at 541.

28 C. Clarkson and M. Keating (1990), Criminal Law: Text and Materials,(2nd ed), at 397; A. Simester and R. Sullivian (2000?), Criminal Law: Theory and Doctrine, (1st ed) at 541.

29 C. Clarkson and M. Keating (1990), Criminal Law: Text and Materials,(2nd ed), at 398. Also see G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 26; J. Fortin (2003), Children's Rights and the Developing Law, at 550,

30 M. Happold, The Age of Criminal Responsibility in International Criminal Law, available at www.wihl.nl/documents/cms_ihl_id57_1_Happold%20final%204.doc [Accessed on 02 December, 2008]

31 P.Graven (1965), An Introduction to the Ethiopian Penal Law, at 146.

life is avoided.[32] The civil law and social welfare systems will be used to provide necessary interventions and support.[33]

2.3. Development of the minimum age of criminal responsibility

As was said above the notion of the minimum age for criminal responsibility of children has been known since ancient times.[34] The fact that children are unable to shoulder the same level of punishment that was inflicted on adults was recognized in many societies ever since human beings started to lead an organized life style.[35] In ancient societies where serious punishments were imposed for minor offences like theft, the need to protect children from the imposition of such punishments was given due consideration.[36] In his ideal penal code, for example, Plato expressed the view that "chastisement becomes appropriate at the age when the child becomes rational enough to make a systematic connection between its conduct and the treatment it

[32] Royal College of Psychiatrists (2006), Child defendants: Occasional paper OP56, London, at 59.

[33] Royal College of Psychiatrists (2006), Child defendants: Occasional paper OP56, London, at 59; J.Herring(2005),Criminal Law, at 355; Kelly-Anne Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 4. Also see CRC/C/GC/10 Para 31

[34] T. Saunders (1991), Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology, at 153.

[35] T. Saunders (1991), Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology, at 153.

[36] The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

attracts from his elders. To punish someone who could not make that connection would be pointless."[37]

The modern developments regarding the minimum age for criminal responsibility of children are very recent. The first international effort to raise the issue in express terms was made in the United Nations Standard minimum Rules for the Administration of Juvenile Justice of 1985 (the Beijing Rules)[38] which provided a complete and detailed framework for the operation of a national juvenile justice system.[39] Though not binding[40] *per se*, these Rules provided "a blue print for the various processes which should be applied to children caught up in youth crime"[41] Rule 4 of these rules provided that the minimum age for criminal responsibility of children should not be fixed at too low an age level.[42]

[37] T. Saunders (1991), Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology, at 153.

[38] Adopted by General Assembly Resolution 40/33 of 29 November 1985; In this regard mention should also be made of the International Covenant on Civil and Political Rights which also makes mention of the need that criminal procedures in relation to juveniles should take account of their age. See ICCPR, Article 14(4). A discussion of this Convention is made below in the next chapter.

[39] J. Fortin (2003), Children's Rights and the Developing Law, at 546; G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 4.

[40] Though the Beijing rules were written long before the coming in to force of the CRC, many of the fundamental principles have been incorporated in to the CRC. See A. Skelton (1996), Developing a juvenile Justice System for South Africa: International instruments and Restorative Justice, at 186.

[41] J. Fortin (2003), Children's Rights and the Developing Law, at 546. G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 5.

[42] Rule 4.1 of the Beijing Rules

The first binding international instrument that made an express mention regarding the age of criminal responsibility is the CRC. Article 40(3)(a) of the Convention imposes on State Parties the obligation to establish special laws and procedures regarding children accused of or convicted of criminal offences and requires the "establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[43] Chronologically speaking the second international instrument that raises the issue of the minimum age for criminal responsibility of children is the most acclaimed regional document ACRWC, which in Article 17(4) states that "[t]here shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." As will be seen in the next chapter, these two binding instruments do not provide specific age nor further guidance as to what might be an internationally acceptable age below which children should not be held criminally responsible.

2.3.1. The Principle of doli incapax

When one talks about the history or development of the age of criminal responsibility he/she should definitely raise about the principle of *dolis incapax* which is a common law principle that has for long regulated the case of minimum age for criminal responsibility in some parts of the world. This principle which presumes incapacity has a very long history and it is said to have existed for over 800 years.[44]

[43] CRC Article 40(3)(a)

[44] J. Fortin (2003), Children's Rights and the Developing Law, at 554; Also see Thomas Crofts (2003), 'Doli Incapax: Why Children Deserve its Protection' Murdoch University Electronic Journal of Law,

In its formative years the common law provided no definite solution as regards the age at which a juvenile should be held criminally liable.[45] Up to the 17th century in England, it was almost impossible for one to tell with certainty the minimum age below which a child would not be held responsible for a crime committed.[46] This was left to the individual judge to decide on a case by case basis by considering whether a child was old enough to stand trial.[47] However, during the time of Edward I the age of criminal responsibility was fixed at the age of seven which marked the beginning of a period where until the age of seven attained, no evidence that shows that the child knew that his/her conduct was wrong would avail.[48] This was because children below the age of seven had yet to acquire adequate discretion and knowledge and that they should not be punished.[49] But on certain occasions children below the age of seven were prosecuted.[50] This controversy was finally put to an end when the age of seven

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Vol. 26, Available at http://www.austlii.edu.au/au/journals/MurUEJL/2003/26.html [Accessed on 20 November, 2008]

[45] The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform[Accessed on 11 October, 2008]

[46] The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[47] The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[48] A. Photis (1987), "Criminal Responsibility of Infants" at 263, cited in The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[49] A. Photis (1987), "Criminal Responsibility of Infants" at 263,cited in The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[50] A. Photis (1987), "Criminal Responsibility of Infants" at 263, cited in The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

was confirmed as well as the rebuttable[51] common law presumption that children between the ages of seven and fourteen were also *doli incapax*.[52] This common law principle is still applied in many jurisdiction[53] but the question that needs to be asked is whether or not the circumstances and conditions which prevailed in medieval

[51] According to the rebuttable presumption of doli incapax a child is presumed doli incapax (unable to form criminal intent) unless the prosecution comes up with evidence rebutting the presumption. See D. Bedingfield (1998), The Child in Need: Children, the State and the Law, at 480-481.

[52] A. Photis (1987), "Criminal Responsibility of Infants" at 263, cited in The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[53] In England and Wales while those under the of 10 can not be found guilty of a criminal offence ,until 1998 the law presumed that those under 14 were also incapable of forming criminal intent. See J. Muncie (2002), 'Children's Rights and Youth Justice' in B. Franklin(Ed.) The New Handbook of Children's Rights: Comparative Policy and Practice. (2nd ed.), at 85; John Muncie (1998), ' ' Give 'em What They Deserve': The Young Offender and Youth Justice Policy' in Mary Langan (Ed.), Welfare: needs, rights, and risks, at 174. In South Africa the minimum age of criminal responsibility is 10 years and for children between the ages of 10 and 14 the doli incapax presumption is still retained. See Kelly-Anne Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 97. In Australia the statutory minimum age of criminal responsibility is 10 years. Between the ages of 10 and 14 years the rebuttable presumption of doli incapax which survives either in statutory form (Commonwealth, ACT, Tasmania, Northern territory, Western Australia and Queensland) or as part of the common law (New South Wales, South Australia and Victoria) operates. See G. Urbas (2000), The Age of Criminal Responsibility. Trends and Issues in Crime and Criminal Justice, No.181. Australian Institute of Criminology, available at http://www.aic.gov.au/publications/tandi/ti181.pdf [Accessed on 12 November, 2008].The statutory minimum age of criminal responsibility in Hong Kong is 10 years and the rebuttable presumption of doli incapax continue to apply to children of 10 and below 14 years of age. See The Law Reform Commission of Hong Kong Report on the Age of Criminal Responsibility in Hong Kong, available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]. In Scotland no child under the age of 8 years can be guilty of an offence and no child under the age of 16 years may be prosecuted for any offence except on the instruction of the Lord Advocate or at his insistence. See Scottish Law Commission (2002), Report on Age of Criminal Responsibility. No 185, available at http://www.scotlawcom.gov.uk. [Accessed on 11 October, 2008]

England and in the light of which the age of seven was set are still of relevance to the present day.[54]

2.4. Increased Minimum Age *v* the Cardinal Principles

Of the 41 Articles which make up the substantive part of the CRC, four articles are regarded as cardinal principles of the Convention. These provisions, found in Articles 2 (non- discrimination), Article 3 (the best interest of the child), Article 6 (the right to life, survival and development) and Article 12 (the views of the child/child participation), inspire the Convention.[55] These four Articles were selected by the CRC Committee, in its first session in 1991, and were grouped as general principles in the guidelines it prepared for reports that it drew for State Parties.[56] As it is usually said, the four principles embody the whole philosophy behind the Convention, which mainly centered on the thinking that children, as a distinct group, are equally right holders as adults.[57] These articles constitute what is known as the rights based

[54] The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

[55] The Federal Supreme Court Juvenile Justice Project Office (JJPO)(2008),Ethiopian Law and the Convention on the Rights of the Child, at 55;The ACRWC also shares this key principles of non discrimination (Article 3), the best interests of the Child (Article 4), participation of children (Article4 (2)), and the right to life, survival and development of the child (Article 5).

[56] Adopted by the Committee on the Rights of the Child at its 736th meeting (twenty-eighth session) on 3 October 2001.Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports(CRC/C/5,1991),General Principles, Paras. 25-47.

[57]The Federal Supreme Court Juvenile Justice Project Office (JJPO)(2008), Ethiopian Law and the Convention on the Rights of the Child, at 55

approach to the special care and protection that children are entitled to and reflect values about the treatment of children, their protection and participation in society.[58]

Setting a specific age for purposes of acquiring certain rights or for loss of certain protections is a complex matter.[59]And if not always the selection of a certain age is usually arbitrary.[60] The setting of an age will, however, help balance the "concept of the child as a subject of rights whose evolving capacities must be respected (acknowledged in Articles 5 and 14) with the concept of the State's obligation to provide special protection." [61]

The CRC Committee has made it clear that when State Parties provide minimum ages in legislation, it must be done within the context of the cardinal principles of the Convention, especially the principles of non-discrimination, the best interests of the child, as well as the principle of the right to life, survival and development.[62] In the

[58] Also see The Federal Supreme Court Juvenile Justice Project Office (JJPO)(2008), Ethiopian Law and the Convention on the Rights of the Child, at 55

[59] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 1; B. Mezmur (2008), The overarching definition of a child: What is in a number? available at http://www.africanchildforum.org/publications.asp [Accessed on 17 April, 2009]

[60] G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 26; J. Fortin (2003), Children's Rights and the Developing Law, at 550; Also see B. Mezmur (2008), The overarching definition of a child: What is in a number? available at http://www.africanchildforum.org/publications.asp [Accessed on 17 April,2009]

[61] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 1; B. Mezmur (2008), The overarching definition of a child: What is in a number? available at http://www.africanchildforum.org/publications.asp [Accessed on 17 April,2009]

[62] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 1; "States Parties have to apply systematically the general principles contained in articles

guidelines for periodic reports, the Committee requires State Parties to provide information regarding any minimum ages set in legislation, and in comments it encourages State Parties to review the definition of childhood and raise protective minimum ages, especially those relating to sexual consent, admission to employment and criminal responsibility.[63]

A lower minimum age for criminal responsibility is not in the best interest of children.[64] This can be seen in light of the impact of criminalization on children's future development.[65] As it was said in the previous section, earlier criminalisation of children tends to lead towards a criminal career.[66] Research has shown that it also leads to alienation from society and stigmatisation, creates problems of self-esteem and children tend to associate with other offending children which in the end creates barriers in the way of return to school or future employment.[67] Thus, too low a minimum age will be counter productive in the way of rehabilitating young children.[68]

2, 3, 6 and 12 CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40 of the CRC". See CRC/C/GC/10,Para.4

[63] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 1.

[64] It is generally expected from the side of State Parties that in all their decisions within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. See CRC/C/GC/10,Para.4b

[65] Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed on 12 Nov,2008]

[66] Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed on 12 Nov,2008]

[67] Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed on 12 Nov,2008]; A Response to the Juvenile Offenders (Amendment) Bill, (Raising the Minimum Age of Criminal Responsibility) available at http://www.aca.org.hk/app/posppr/3.2e.pdf; [Accessed on 9 October, 2008];

In most cases children who find themselves in trouble with the law are victims of neglect and abuse and mostly the causes for their misbehaviour are psychological or socio-economic problems.[69] There is a lot of research that show the link between criminal behaviour of children and poverty, fractured families, problems in schooling, and behavioural difficulties.[70] The argument is that too law an age for criminal responsibility will put at a disadvantage these children by taking them on the path of criminality rather than addressing their needs.[71]In other words the lower the age of criminal responsibility, the more discriminatory it will be.[72]

2.5. Conclusion

Very low minimum age of criminal responsibility is not in the best interest of children and over the years the there seems to arise a consensus that there is a pressing need to

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In most cases children in trouble with the law are further victims of discrimination, for example, when they try to get access to education or to the labour market. See CRC/C/GC/10,Para.4a

[68] The CRC Committee has made it clear that, the principle of the best interest of the child in the context of juvenile administration requires that "the traditional objectives of criminal law justice (repression/retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety." See CRC/C/GC/10,Para.4b

[69] CRC/C/GC/10,Para.4a

[70] Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed on 12 Nov, 2008]

[71] Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed on 12 Nov, 2008]

[72] States Parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. CRC/C/GC/10, Para.4a.This obligation basically emanates from Articles2 and 3 of the CRC and the ACRWC respectively.

protect children by putting in place increased minimum ages of criminal responsibility. Recognition of the fact that children are slow to develop their mental capacity and the fact that the ordinary criminal justice system is not the right choice to deal with offending children is behind this development. Criminalisation of children at a younger age would work against the overall objectives of society towards children and it will not assist them on the road to being integrated as responsible citizens playing a full role in society.[73] Instead, society should take up the responsibility to guide and educate children so that they will understand the consequences of their deviant acts and behaviour.[74]

[73]Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed 12 Nov,2008]

[74] Also see Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed 12 Nov,2008]

Chapter Three: The Minimum Age of Criminal Responsibility: The International Law Dimension

3.1. Introduction

As was said earlier in chapter one the issue of age and criminal responsibility is one of the central elements of an effective and child centred rights based juvenile justice system.[75] It has been accepted in many jurisdiction that childhood is relevant to the consideration of criminal liability. It is argued that the fact that children are slow to develop the necessary mental capacity to commit crimes and the fact that the criminal justice system is not the right place to deal with them forms the basis of the concept of age and criminal responsibility.[76] The Convention on the Rights of the Child has done nothing but incorporate in its provisions this age old understanding.[77]

[75] K. Johansson and T. Pal (2003), 'Children in Trouble with the Law: Child Justice in Sweden and South Africa', International Journal of Law, Policy and the Family Vol. 17, at 310; J. Fortin (2003), Children's Rights and the Developing Law, at 550.

[76] G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 130; G. Odongo (2007) A case for raising minimum age of criminal responsibility, available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December,2008]; D. Cipriani (2005) South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights, available at http://www.unicef .org/rosa/Criminal _Responsibility_08July_05(final_copy).pdf [Accessed on 11 Oct0ber, 2008].

[77] G. Odongo (2005) The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context, (Unpublished LLD thesis) at 130.

The Convention on the rights of the child is the first child specific binding source of international law.[78] At a regional level we have the ACRWC, which is the first regional treaty on the human rights of children. In the areas of juvenile justice, we have numerous non binding soft law[79] instruments[80] which among others include the Beijing Rules for the Administration of Juvenile Justice,[81] the Riyadh Guidelines for the Prevention of Juvenile Delinquency[82] and the Standard Minimum Rules for Juveniles Deprived of their Liberty (the Havana Rules).[83]

The discussion in this chapter will be focused on the consideration of the relevant international law relating to age and criminal responsibility with a view to

[78] Though not child specific, together with the CRC, we also have the International Covenant on Civil and Political Rights and the European Convention on Human Rights. A brief discussion of these is provided below in sections 3.5 and 3.6 respectively. Also see K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 8-9.

[79] In this regard General Comments issued by the CRC Committee also make important contribution to the development of 'soft law' on children's rights. For example in relation to the administration of juvenile justice the CRC committee issued General Comment No.10 (GC No.10) providing their interpretation of the Convention's provisions on children in conflict with the law. One of the key themes in GC No.10 is the minimum age of criminal responsibility. A detailed discussion of this is provided below in section 3.2.1.

[80]Though these Rules are not binding in international law, states are at liberty to adopt them. In this regard it should be mentioned that the CRC Committee in the examination of State Parties reports has consistently regarded the UN rules and guidelines relating to the administration of juvenile justice as providing relevant and detailed standards for the full implementation of Article 40 of the Conventionan ,and the Committee has also recommended that State Parties consider incorporating the provisions of these soft law instruments in to all relevant domestic laws and regulations dealing with children; General Discussion on "State violence against children" Report on the twenty-fifth session, September/October 2000, CRC/C/100, Para. 688.7

[81] Adopted by General Assembly Resolution 40/33 of 29 November 1985

[82] Adopted by General Assembly Resolution 45/112 of 14 December 1990

[83] Adopted by General Assembly Resolution 45/113 of 14 December 1990

establishing the existing standards as regards the setting of the minimum age of criminal responsibility.

3.2. The Minimum Age for Criminal Responsibility under the Convention on the Rights of the Child

Generally under Article 40 of the Convention, which is one of the two[84] provisions dealing with the administration of juvenile justice, State Parties are under the obligation to give recognition to the rights of every child who has allegedly acted contrary to the criminal law of the land and to take account of his or her age. More specifically Article 40(3) of the Convention requires that:[85]

> States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

Thus, Article 40(3)(a) though it does not specify any particular age, it imposes on State Parties the obligation to fix a minimum age for children who are alleged, accused or recognized to have infringed the penal law.[86] This is in line with the general principle in international law that criminal responsibility of children relates to

[84] The other one is Article 37 which deals with torture, degrading treatment and deprivation of liberty

[85] A similar obligation is imposed on State Parties under Article 17(4) of the ACRWC. See section 3.3 below.

[86] CRC Article 40(3) Para 1.

an age where they are capable of understanding the consequences of their acts.[87] By this, all children below the minimum age will not be held criminally liable for their acts and they are presumed to lack the necessary capacity to infringe the criminal law.[88]

As was claimed above, the CRC does not prescribe a particular age as the minimum a below which children will not be subjected to the rigours of the criminal justice system. A consideration of the *travaux preparatoires* to the Convention reveals that during the negotiations there was no specific discussion on the issue of minimum age for criminal responsibility of children.[89] The only reference was to recognition by State Parties of the rights of the child "accused or recognised as being in conflict with the penal law not to be considered criminally responsible before reaching a certain age".[90] Further to this the absence of a standard on this issue can also be discerned from the fact that there are in the world differences among states on the minimum

[87] G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 26 ; G. Odongo (2007) 'A case for raising minimum age of criminal responsibility'. Available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December,2008]; Also see Kelly-Anne Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems(Unpublished LLM thesis) at 32

[88] CRC Article 40(3)(a)

[89] G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 133.

[90] S. Detrick(1992), The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires, at 492-494. Also see G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 133.

ages they prescribe for the criminal responsibility of children[91] that range from as low as 7 to 16 years of age.[92] And this has made difficult the availability and implementation of the juvenile justice provisions in the CRC which is highly dependent on the availability of a clearly defined minimum age of criminal responsibility.[93]

In this regard the CRC Committee has been expressing its concern when the laws of State Parties are not in the "spirit" of Article 40(3) of the Convention.[94] Especially the Committee has frequently expressed its concern and criticism towards jurisdictions that have set their minimum age at an age of 12 or less.[95] Further to this, in its effort to encourage State Parties to comply with their obligation of setting an acceptable minimum age, in the Guideline for Periodic reports, the Committee under Article 40 requests for the provision of information on the minimum legal age for criminal responsibility of children below which children shall be presumed not to have the

[91] G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 133

[92] CRC/C/GC/10 para16; UNODC (2006) Criminal Justice Assessment Toolkit 2: Cross-cutting Issues Juvenile Justice at 4; Also see G. Odongo (2005), The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD thesis) at 133.

[93] K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 33.

[94] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 601.

[95] G. Urbas (2000), The Age of Criminal Responsibility. Trends and Issues in Crime and Criminal Justice, No.181. Australian Institute of Criminology, available at http://www.aic.gov.au/publications/tandi/ti181.pdf [Accessed 12 November, 2008]; CRC/C/GC/10 Para16; Also see R. Hodgkin and P. Newell, (2002) Implementation Handbook for the Convention on the Rights of the Child, at 602.

capacity to infringe the penal law."[96] The Committee has also expressed a particular concern in situations where no age has been fixed in law by State Parties.[97]

The general philosophy behind the Committee's firm stand against what it considers very low minimum age can be explained by referring to the Beijing Rules which can serve as providing guidelines for interpreting Article 40(3) of the Convention.[98] In terms of Rule 4 of these Rules "[i]n those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the fact of emotional, mental and intellectual maturity." Further explaining this, the official commentary to the Beijing Rules reiterates that:

> The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

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[96] Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports (UN Doc.CRC/C/5, 1991), Para 134; The Committee also makes a similar request under Article 1 see UN Doc.CRC/C/5,1991, Para 24.

[97] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 601.

[98] G. Urbas (2000), The Age of Criminal Responsibility. Trends and Issues in Crime and Criminal Justice, No.181. Australian Institute of Criminology, available at http://www.aic.gov.au/publications/tandi/ti181.pdf [Accessed 12 November, 2008];

> Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

The CRC Committee has also been against discrimination in relation to the minimum age, for example between boys and girls, or between children living in different parts of a country.[99] According to the Committee the reading of Article 40(3) (a) of the Convention does not allow the setting of two different minimum ages of criminal responsibility.[100]

Finally it can be concluded that except for some guidance that was provided by the non-binding Beijing Rules, until very recently it was left to the discretion of State Parties to fix the minimum age below which children can not be held liable for their criminal acts. However, with the advent of General Comment No 10 many State Parties "have found themselves in danger of violating international law."[101] The next sub-section will try to explore the developments GC No. 10 has brought about in the international normative framework regarding the setting of the minimum age of criminal responsibility.

[99] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 602.

[100] R. Hodgkin and P. Newell (2002), Implementation Handbook for the Convention on the Rights of the Child, at 603; Mexico SR.106, Para. 37.

[101] K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems(Unpublished LLM thesis) at 57.

3.2.1. General Comment Number 10

The CRC Committee regularly issues General Comments based on specific articles, provisions and themes with a view to assisting State Parties in fulfilling their obligations under the Convention.[102] Accordingly in 2007 the Committee issued General Comment No. 10 on Children's Rights in Juvenile Justice.[103] The Comment elaborates on Articles 37 and 40 of the Convention while at the same time taking in to account the cardinal principles enshrined in Articles 2, 3, 6 and 12 of the CRC, and other relevant international standards in the field of juvenile justice like the Beijing Rules.[104] And it is claimed that the Comment "serves as an historic juncture of the present state of affairs in juvenile justice systems all over the world, representing the intersection between children's rights and criminal justice."[105]

As the Committee puts it "[t]he experience obtained in the reviewing of States parties' performances in the field of juvenile justice are the reason for this General Comment, by which the Committee wants to provide the States Parties with more

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[102] Fact Sheet # 1: *General Comment No.10: Children's Rights in Juvenile Justice*. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet1_Childrens_Rights_in_JJ_EN.pdf [Accessed on 12 November, 2008]

[103]For more on the CRC Committee and its General Comments, See: http://www2.ohchr.org/english/bodies/crc/ [Accessed on 21 March,2009]

[104] Fact Sheet # 1: General Comment No.10: Children's Rights in Juvenile Justice. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet1_Childrens_Rights_in_JJ_EN.pdf [Accessed on 12 November, 2008]

[105] K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 44.

elaborated guidance and recommendations for their efforts to establish an administration of juvenile justice in compliance with the CRC."[106] As such it is hailed as being the "most elaborate and specific of all of the [General Comments] released by the [CRC Committee]"[107], and for setting firm standards.[108] It is also praised for addressing the totality of the system of juvenile justice.[109] It is criticised for being overly wordy and unrealistic.[110]

One area where the Comment provides guidance is the case of age and criminal responsibility.[111] The incorporation of age and criminal responsibility in the Comment is an important achievement in the sense that it is an addition to the existing legal framework regulating the matter which lacks consistency and clarity and marked by international and domestic disparities, coupled with contradictions among international instruments.[112] And it is because of these that the Committee found it

[106] CRC/C/GC/10 Para 2

[107] J Sloth- Nielsen (2008), International standards and justice for children: towards an eight step plan, available at http://www.africanchildforum.org/publications.asp [Accessed on 17 April,2009]

[108] J Sloth- Nielsen (2008), Antwerp 2008 Juvenile Justice, available at http://www.uwc.az.za/elearning [Accessed on 19 October, 2008]; It also "[s]ignificantly expands IL jurisprudence on juvenile justice, [and it is] hence valuable additional tool for juvenile justice development" J Sloth- Nielsen (2008),International standards and justice for children: towards an eight step plan, available at http://www.africanchildforum.org/publications.asp [Accessed on 17 April,2009]

[109] J Sloth- Nielsen (2008), Antwerp 2008 Juvenile Justice, available at http://www.uwc.az.za/elearning [Accessed on 19 October, 2008]

[110] J Sloth- Nielsen (2008), Antwerp 2008 Juvenile Justice, available at http://www.uwc.az.za/elearning [Accessed on 19 October, 2008]

[111] The main theme of the Comment is the establishment of a comprehensive policy for juvenile justice which includes among others prevention of juvenile delinquency, diversion from judicial proceedings, age of criminal responsibility, the guarantees for a fair trial, dispositions and deprivation of liberty including pre-trial detention and post-trial incarceration .See CRC/C/GC/10 Para 4.

necessary to provide State Parties with clear guidance and recommendations in their effort to determine an appropriate minimum age of criminal responsibility.[113]

According to the understanding of the Committee, the obligation of State Parties to set a minimum age under Article 40(3) (a) of the Convention means the following:[114]

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below the MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interest;[115]

- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years (see also hereafter para. 19 – 21) can be formally charged and subject to penal law procedures. But these procedures, including the final dispositions, must be in full compliance with the principles and provisions of the CRC as elaborated in this General Comment.[116]
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In line with Rule 4 of the Beijing Rules the CRC Committee has recommended to State Parties not to fix a minimum age that is too low and increase an existing low

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[112] Fact Sheet # 4, General comment No.10: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [Accessed on 12 November, 2008]; CRC/C/GC/10 para.16

[113] CRC/C/GC/10 Para.16; Fact Sheet # 4, General comment No.10: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [Accessed on 12 November, 2008]; CRC/C/GC/10 para.16

[114] CRC/C/GC/10 Para.16

[115] CRC/C/GC/10 Para.16

[116] CRC/C/GC/10 Para.16

minimum age to an internationally acceptable level which takes in to account the facts of emotional, mental and intellectual maturity of children.[117] The Committee concludes that "a minimum age of criminal responsibility below the age of 12 years is considered not to be internationally acceptable."[118] State Parties are further suggested by the Committee "to increase their lower [minimum ages for criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level."[119]

In addition to these, GC No.10 recommends that those State Parties with a minimum age higher than the age of 12 should not decrease it.[120] According to the Committee a higher minimum age of 14 or 16 will contribute to a juvenile justice system which in accordance with Article 40(3) (b) of the Convention, "deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected."[121] In relation to this State Parties are expected to submit detailed information as regards the treatment of children who fall below the minimum age of criminal responsibility when they come

[117] CRC/C/GC/10 Para.16

[118] CRC/C/GC/10 Para.16

[119] CRC/C/GC/10 Para.17; Fact Sheet # 4, General comment No.10: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [Accessed on 12 November, 2008];

[120] CRC/C/GC/10 Para.17

[121] CRC/C/GC/10 Para.17

in conflict with the law along with the available arrangements put in place to ensure that their treatment is fair and just as that of children at or above the minimum age.[122]

In conclusion, the coming of the General Comment in 2007 was an important achievement in the sense that it put to a close the ambiguities surrounding Article 40(3) (a) of the CRC regarding where an appropriate minimum age of criminal responsibility should be fixed.[123] The next section will try to look into the stand adopted by the ACRWC with regards to the minimum age of criminal responsibility.

[122] CRC/C/GC/10 Para.17; Further to this the Committee "expresses its concern about the practice of allowing exceptions to a minimum age for criminal responsibility in cases where the child, for example is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States Parties set a [minimum age for criminal responsibility] that does not allow, by way of exception, the use of a lower age". *See* CRC/C/GC/10 para.18; And those children "whose age cannot be proven to be above the minimum age should not be formally charged in a penal law procedure (the benefit of the doubt principle)" Fact Sheet # 4, General comment No.10: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [Accessed on 12 November, 2008]; Also see CRC/C/GC/10 para.19

[123] J Sloth-Nielsen (2007) 'General Comment no.10 (Children's Rights in Juvenile Justice) Released A New Vision for Child Justice in International Law' in Article 40, Vol.9, No.1, at 1; Also see G. Odongo (2008), 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context' in J Sloth-Nielsen(ed) Children's Rights in Africa: A Legal Perspective, at 149; K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 50.

3.3. The Minimum Age for Criminal Responsibility under the African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC/the Charter), the first regional treaty on the human rights of children, is said to be a self-standing instrument and was necessitated due to the fact that the CRC had not addressed the unique challenges facing African children.[124] Next to the CRC the Charter is also said to be the second global and the first regional binding instrument "that identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic judicial or administrative proceedings."[125] Leaving aside the debate that surrounds the importance of the Charter as a separate regional instrument, it has been instrumental in the protection and promotion of the rights of the African child. As it is put in the preamble of the Charter "...the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in

[124]Adopted at the 26th ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 11 July 1990 and entered into force on 29 November 1999 (nine years later) after obtaining the requisite number of ratifications. In terms of Article 47(3) of the Charter, it will enter in to force after it has received 15 ratifications. See F. Viljoen (2000) 'The African Charter on the Rights and Welfare of the Child' in C. Davel (ed) Introduction to Child Law in South Africa, at 224; D.Olowu (2002), 'Protecting Children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', The International Journal of Children's Rights Vol.10, at 128.

[125] D. Chirwa (2002), 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' The International Journal of Children's Rights Vol.10 at 157. For a critique of the ACRWC see D.Olowu (2002), 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child', The International Journal of Children's Rights Vol.10.

conditions of freedom, dignity and security." And the Charter will continue to compliment the CRC in the protection of the human rights of children in Africa.

In relation to the administration of juvenile justice the ACRWC devotes an article which is similar to Article 40 of the CRC.[126] The ACRWC makes reference to the minimum age for criminal responsibility in Article 17(4), but like its counter part in the Convention, it does not specify a particular age as the minimum age for criminal responsibility of children.[127] Thus, State Parties to the Charter are left with out any

[126] ACRWC Article 17 captioned –' Administration of Juvenile Justice' states :

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused in infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

[127] The other provision relevant to the administration of juvenile justice is found under Article 30 which deals with children of imprisoned mothers.

guideline on how this Sub Article should be interpreted. Thus as things stand today the only way out for these countries would be to rely on the jurisprudence developed by the CRC Committee as regards the interpretation of Article 40(3)(a) in General Comment No. 10.[128]

The Committee of Experts on the Rights and Welfare of the Child (the ACRWC Committee),[129] the body established to monitor the enforcement and implementation of the Charter[130], has not provided any guidance in this respect by way of general comments like the practice under the CRC's Committee. So far the Committee has received State Party reports[131] from Nigeria, Egypt, Rwanda and Mauritius.[132] And so far it considered that of Egypt and Nigeria in its 12th meeting in November 2008.[133]

[128] Also see K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 71.

[129] The Committee of experts was formally established in 2001 at the 37th Lusaka Conference of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU).As per Article 33 of the Charter the Committee has 11 members of 'high moral standing' with expertise in the area of children's rights serving in their personal capacity. Further more in terms of Article 42 the Committee has a broad mandate: to protect and promote the rights in the ACRWC, as well as monitor states' compliance, interpretation of the ACRWC as well as other tasks as entrusted to the Committee by the AU Assembly, the Secretary General of the OAU or the United Nations (UN) on issues relating to children in Africa. *See* A. Lloyd (2002), 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' African Humans Rights Law Journal, Vol.2, at 12.

[130] ACRWC Article 42(b)

[131] In terms of Article 43 of the Charter State Parties are expected to submit their initial reports to the committee of experts two years after ratifying the Charter.

[132] See B. Mezmur and J Sloth- Nielsen (2008), 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' African Human Rights Law Journal, Vol. 8, at 604.

[133] K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 74.

Thus, State parties to the Charter will have to look in to the guidance provided by the CRC's General Comment No.10 to live up to their obligations arising from Article 17(4) of the Charter.

3.4. The International Covenant on Civil and Political Rights

The International Covenant on Civil and political rights (ICCPR) is a UN treaty based on the Universal Declaration of Human Rights of 1948.[134] The ICCPR together with the other major international instruments is applicable to everyone (children included)

[134] The ICCPR currently has 164 States Parties.. The ICCPR was opened for signature at New York on 19 December 1966 and entered in to force (ten years later) on 23 March 1976. For the status of ratification of the ICCPR see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [Last accessed on 17 May, 2009]; The ICCPR is monitored by the Human Rights Committee with permanent standing to consider periodic reports by State Parties on their compliance with the Convention. Members of the Human Rights Committee are elected by the State Parties but they do not represent any State Party. The Covenant has got two optional Protocols: The optional Protocol on individual complaints (Entered in to force on 23 March, 1976 in accordance with Article 9) and the Optional protocol on the abolishment of the death penalty (entered in to force on 11 July, 1991 in accordance with article 8 (1)). The ICCPR and ICESCR have their roots in the same process that led to the Universal Declaration of Human Rights. As the UDHR was not expected to impose binding obligations, the United Nations Commission on Human Rights began drafting a pair of binding Covenants on human rights intended to impose concrete obligations on their parties. Due to disagreements between member states on the relative importance of negative Civil and Political versus positive Economic, Social and Cultural rights, two separate Covenants were created. These were presented to the UN General Assembly in 1954, and adopted in 1976. See P. Sieghart (1983), The International Law of Human Rights, at 25-26.

with out discrimination on any ground, so with out discrimination to age.[135] The ICCPR also contains express provisions conferring special protection to children as required by their status as minors.[136]

Regarding the minimum age of criminal responsibility , the ICCPR does not say much except for the reference made to age under Article 14(4) which provides that "[i]n the case of juvenile persons the [criminal] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation." [137] However, as Van Bueren puts it, much of the provisions encompassed under Article 40 of the CRC are *de novo* (the one referring to the minimum age for criminal responsibility (40(3) (a)) being one of these) and as such it can not be regarded a failure for earlier instruments like the ICCPR not to make express reference to the minimum age for criminal responsibility. [138]

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[135] J. Smith (1998), 'The rights of the child' in M. Castermans-Holleman, J. Smith, G J H van Hoof, P. Baehr (Eds.), The Role of the Nation-State in the 21st Century: Essays in Honour of Peter Baehr, at 163

[136] A case in point is Article 24 which provides that:

> 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
> 2. Every child shall be registered immediately after birth and shall have a name.
> 3. Every child has the right to acquire a nationality.

[137] Article 14 (4) of the ICCPR is said to be far more limited and only provides that procedures concerning juveniles should take in to consideration their age and the desirability of promoting rehabilitation. *See* G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 7 and 25.

[138] G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 7.

Article 14(4) of the ICCPR does not define the term "juvenile persons."[139] In this regard the Human Rights Committee observed that the age at which a child attains majority in civil matters and becomes ready for criminal responsibility should not be set unreasonably low.[140] The Human Rights Committee further expressed its disapproval of what it considered very low minimum age for criminal responsibility of children in its concluding observations on reports submitted by State Parties.[141]

3.5. The European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms also known as the European Convention on Human Rights (ECHR) was adopted under the

[139] Nowak argues that since the term is principally used in connection with criminal law it "undoubtedly describes those years in a person's life beginning with the age of criminal responsibility and ending with the majority age." Though the determination of these two age limits is left to the discretion of member states, they are however under the obligation to establish specific age limits. M Nowak ,UN Covenant on Civil and Political Rights: ICCPR Commentary, at 265

[140] Human rights Committee, General Comment N 17(1989) Para 4; Considering the fact that many of the provisions under article 40 of the CRC are based on Article 14 and 15 of the ICCPR and the other UN non binding guidelines/rules, the direction set in the Human Rights Committee's General Comments will help State Parties to the CRC implement their obligations arising from Article 40 of the CRC. See S. Detrick (1999), A Commentary on the United Nations Convention on the Rights of the Child, at 679-682.

[141] For example in its "Concluding Observations" at the hearing in November 1999 of Hong Kong's report, the Human Rights Committee expressed its concern that "… the age of criminal responsibility is 7 years and ….[that] [t]he age of criminal responsibility should be raised so as to ensure the rights of children…". Concluding Observations: Hong Kong UN Doc. CCPR/C/79/Add. 117, Para 17; The Law Reform Commission of Hong Kong report on The age of Criminal Responsibility in Hong Kong ,available at http://www.info.gov.hk/hkreform [Accessed on 11 October, 2008]

auspices of the Council of Europe in 1950.[142] The ECHR established the European Court of Human Rights. This Court was ceased of a case involving issues of age and criminal responsibility in the two cases of T v UK and V v UK.[143] The court held that there was no commonly accepted minimum age for the imposition of criminal responsibility in relevant international law texts or in Europe but it stated that children charged with an offence should be treated in a manner that takes in to account their age.[144] Thus, all this culminates in one conclusion that there is currently a wide disparity in the minimum age for criminal responsibility of children not only globally but also in the same region like Europe.[145]And that the work of the CRC Committee under GC no.10 is commendable and it will help in dealing with this problem.

3.6. Conclusion

The CRC and the ACRWC fall short of prescribing a particular age as the minimum age for criminal responsibility of children. As things stand today there is no internationally binding standard as regards the age at which criminal capacity should be imputed.[146] However, the guidance provided by the CRC Committee through

[142] The Convention was opened for signature on November 4, 1950 in Rome, and it was ratified and entered into force on September 3, 1953.

[143] ECtHR, T v UK, Application No. 24724/94; ECtHR, *V v UK*, App. No. 24888/94.

[144] ECtHR, *V v UK*, App. No. 24888/94

[145] G. Van Bueren (2006) 'Article 40: Child Criminal Justice', in A. Alen, F.Ang, E. Berghmans and M. Verheyde (Eds.) A Commentary on the United Nations Convention on the Rights of the Child, at 27.

[146] Also see G. Odongo (2007) A case for raising minimum age of criminal responsibility, available at http://www.africanchildforum.org/Documents/age_of_cri_response.pdf [Accessed on 12 December,2008]

General Comment No.10, which also makes a direct reference to the UN non -binding Beijing Rules, is important in the sense that it has made it clear now that very low minimum ages are unacceptable and that 12 years of age is the absolute minimum age at which State Parties should at the minimum fix the age for criminal responsibility of children.

Chapter Four: The Minimum Age of Criminal Responsibility-The Ethiopian Case

4.1. Introduction

In the previous chapter we have tried to look at the available international law in an attempt to establish the existing standards as regards the setting of the minimum age of criminal responsibility. In this chapter, we will try to explore the stand taken in Ethiopia on this matter. In this process we will be looking in to the relevant provisions of the new Federal Criminal Code of the country (FCC). It is claimed that the new Criminal Code which replaced the 1957 Penal Code of the Empire of Ethiopia (PCE) has made positive changes as regards the administration of juvenile justice in the country. Examining whether or not the FCC is in agreement with existing international law standards concerning the minimum age of criminal responsibility is the central theme of this chapter. This will in particular be done by evaluating the Code and other relevant laws in light of the requirements set forth by the CRC Committee under General Comment No 10, which, as was claimed in chapter one, reflects existing international standards on the issue of the minimum age for criminal responsibility of children. While doing this, however, various other points relevant to the discussion will be touched on.

4.2. Situation of Children in Ethiopia

As one of the least developed countries in the world, the situation of children in Ethiopia is one that is marred by a series of economic, social and cultural problems.[147] This and the rapid population growth in the country have posed a serious difficulty on the way of realizing the rights and well-being of children in the country.[148] This is particularly true in relation to expanding education, health care and other basic services.[149] Today children in the country are faced with problems of homelessness (especially those of street children), child labour and addiction to different kinds of drugs including khat.[150] They are also faced with the problems of displacement due to

[147] UNICEF Ethiopia, Overview, available at http://www.unicef.org/ethiopia/overview.html [Accessed on 13 February, 2009]; Also see CRC/C/129/Add.8 28 Oct. 2005 Paras.8-16

[148] UNICEF Ethiopia, Overview, available at http://www.unicef.org/ethiopia/overview.html [Accessed on 13 February, 2009]; Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 5, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc. [Accessed on 10 February, 2009]; Also See CRC/C/129/Add.8 28 Oct. 2005 Paras.8-11,135,144-145,149,

[149] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 5, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc. [Accessed on 10 February, 2009]; Currently only half of children in the country have access to health services, and little more than half attend even basic education. UNICEF Ethiopia, current situation available at http://www.unicef.org/ethiopia/overview.html Accessed on 13 February, 2009]; Also *See* African Child Policy Forum (2008). The African Report on Child Wellbeing: How child-friendly are African governments?, at 5.

[150] Roberta Cecchetti (2001), Rights of the Child in Ethiopia: Report Concerning the Application of the Convention on the Rights of the Child by the Federal Democratic Republic of Ethiopia, OMCT country reports at 9, available at www.omct.org [Accessed on 12 February, 2009]; CRC/C/ETH/CO/3 1 Nov. 2006, Para 69-70; Also see CRC/C/15/Add.144 21 Feb. 2001, Para.74-75;CRC/C/15/Add.67 24 Jan 1997, Para.33&35. Khat pronounced [□kæt]; Ge'ez □□ *čāt*), is a flowering plant native to Ethiopia and parts of East Africa and the Arabian Peninsula. It contains chemicals that can cause excitement, loss of appetite and euphoria. It is classified by the World Health Organization as a drug of abuse that can produce mild to moderate psychological dependence.

man made and natural calamities.[151] Early marriage[152], abduction, child prostitution and other harmful traditional practices like female genital mutilation/incision[153] are also rampant in the country.[154]

Though children are highly valued in the country, their needs and rights do not seem to have been given the necessary attention.[155] The prevailing traditional and cultural beliefs of the society, their attitudes and other practices have for long deprived children of their basic rights.[156] Furthermore, Ethiopia is a country that suffers from

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[151] This has been noted by the CRC Committee, and among others the continuing incidence of natural disasters, including draught and floods and the recurrent armed conflict in the country have negative impact up on the respect for children's rights. *See* CRC/C/15/Add.144 21 Feb. 2001, Para.10. Also see CRC/C/ETH/CO/3 1Nov. 2006, Para 35.

[152] For example, in the Amhara region, 50 % of girls are married before the age of 15 (Lawn and Kerber (eds.) 2006), cited in African Child Policy Forum (2008). The African Report on Child Wellbeing: How child-friendly are African governments? at 33.

[153] For example between 2002 and 2007, 74% of girls and women aged 15-49 have been mutilated or cut in the country. See UNICEF (2009), The State of the World's Children: Maternal and Newborn Health, at 37.

[154] Roberta Cecchetti (2001), Rights of the Child in Ethiopia: Report Concerning the Application of the Convention on the Rights of the Child by the Federal Democratic Republic of Ethiopia, OMCT country reports at 9, 13-14, available at www.omct.org [Accessed on 12 February, 2009]; CRC/C/ETH/CO/3 1Nov. 2006, Para 59; Also see CRC/C/15/Add.67 24 Jan 1997, Para.14; CRC/C/15/Add.144 21 Feb. 2001, Para.64 -65. CRC/C/129/Add.8 28 Oct. 2005 Para 222

[155] Roberta Cecchetti (2001), Rights of the Child in Ethiopia: Report Concerning the Application of the Convention on the Rights of the Child by the Federal Democratic Republic of Ethiopia, OMCT country reports at 9, available at www.omct.org [Accessed on 12 February, 2009]; Also see **መብራቱ ዮሃንስ፣ወጣት ጥፋተኞች በህብረተሰቡ ውስጥ ሆኖ መታረም** (Community Based Correction)፣ **ልውይይት የቀረበ፣ ድሬዳዋ፣ታህሳስ** 19፣20 (1995), at 2. (Conference paper available in Amharic)

[156] Certain traditional practices and customs prevailing in many of the rural areas hamper the effective implementation of the CRC, especially as regards the girl child. CRC/C/ETH/CO/3 1Nov. 2006, Para 59; CRC/C/15/Add.67 24 Jan 1997, Para.8. Also see UNICEF Ethiopia, current situation available at http://www.unicef.org/ethiopia/overview.html [Accessed on 13 February, 2009]; The African Child

widespread and severe poverty.[157] And children are the hardest hit by the chronic poverty in the country. As such all unmet child rights in the country have the serious poverty in the country as their major underlying cause.[158] In simple words, it can be said that "the poverty and ignorance that pervades the society is nowhere more overtly observed than in the condition of children in the country."[159]

Turning to juvenile justice, various research indicate that the number of crimes committed by children is on the rise.[160] Not only have the increasing number of the offences, but also the seriousness of the offences and the proportion committed by

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Policy Forum and Save the Children Sweden (2006), Sticks, Stones and Brutal Words: The Violence against Children in Ethiopia, available at: www.africanchildforum.org. [Accessed on 21 April, 2009]

[157] Per capita income is estimated by the World Bank and UNICEF at US$100-110, the lowest in the world. And one third of the population survive on less than 1 USD a day.

[158] The CRC Committee also expressed its concern about the negative effects of poverty on the situation of children in the country. This is especially manifested by the high infant and child mortality, widespread malnutrition, low levels of school enrolment, education and low immunization and health services coverage. *See* CRC/C/15/Add.67 24 Jan 1997,Para.12; CRC/C/15/Add.144 21 Feb. 2001,Para.52 In addition to this, The Committee further notes the country's continuing serious socioeconomic problems and the situation of human rights in general ; CRC/C/ETH/CO/3 1Nov. 2006, Para 53-54,61; Also s*ee* CRC/C/15/Add.144 21 Feb. 2001,Para.11.

[159] Roberta Cecchetti (2001), Rights of the Child in Ethiopia: Report Concerning the Application of the Convention on the Rights of the Child by the Federal Democratic Republic of Ethiopia, OMCT country reports at 9, available at www.omct.org [Accessed on 12 February, 2009];

[160] Forum on Street Children (1998) "Manual on Community Based Correction", Addis Ababa, Ethiopia, cited in Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc. [Accessed on 10 February, 2009]; The Federal Supreme Court Juvenile Justice Project Office (JJPO), Problem identification Survey on Institutional rehabilitation service for juvenile Delinquents, JJPO Papers, Vol. 1, at 1. Also see Action Professionals' Association for the People (APAP), INNOCENT OFFENDERS available at http://www.apapeth.org/Docs/Innocent%20Offenders.pdf [Accessed on 10 March, 2009]

children, compared to adults become of serious concern.[161] In most cases, the problem of juvenile delinquency is observed in urban areas of the country like the capital Addis.[162] It is also the case that most offenders are migrants from the rural parts of the country where various social services are lacking, and according to recent research close to 70% of child offenders are children who migrated to the urban areas.[163] These children mostly migrate to the urban areas in search of better opportunities such as education, employment and sometimes in search of family members who are migrants themselves or residents in the urban areas.[164] Some of these children are also reported to be runaway children who came to the cities to escape either from parents who subject them to cruel forms of corporal punishment or due to the lack of proper care and attention.[165] The high rate of school dropouts and school leavers is also regarded

[161] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 5, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc. [Accessed on 10 February, 2009]; According to statistics obtained from the Federal Police Commission between 1998-2002 "the number of minors in the age cohort of 9-18 years who committed a crime reported to the police was 177,651. It may be noted that 14 per cent of these alleged criminals were girls." CRC/C/129/Add.8 28 Oct. 2005 Para 218; And the alleged crimes range from "attempted murder through rape to pick pocketing." CRC/C/129/Add.8 28 Oct. 2005 Para 219

[162] Save the Children UK, Child Situation Analysis for Ethiopia, (2004) at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February,2009];The majority of inmates at the Addis Ababa remand centre come from the urban areas of the country especially from Addis Ababa, Dire Dawa, Awassa, Fitche and other regional towns. Interview with Ato Yonas Sisay, Deputy Head of the Training and Remand Home of Addis Ababa, Addis Ababa, 15 July, 2008.

[163] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February, 2009]

[164] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February,2009]

[165] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February, 2009];

as cause for the increased child delinquency seen in the country.[166] In most cases the cause for this is poverty in that when parents are unable to provide these children with the minimum level of subsistence, they would go out to the street to try their luck, "either by doing odd jobs like hawking small items or begging, or committing crimes"[167]

As things stand today in the country there is in place a range of legislation that is aimed at protecting the needs and rights of children. Some of this legislation are 'CRC compatible', while others are not.[168] The next section will briefly discuss the existing legal framework in place to protect the rights of children in the country.

In Ethiopia corporal punishment is a common form of punishment perpetrated against children. Furthermore the now repealed PCE sanctioned certain forms of corporal punishment. *See* Article 172 of the PCE.

[166] For some data on this See UNICEF, Primary School years ,available at http://www.unicef.org/ethiopia/children_394.html [Accessed on 12 April, 2009]

[167] Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 53, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc ; [Accessed on 10 February, 2009]; **መብራቱ ዮሃንስ፣ወጣት ጥፋተኞች በህብረተሰቡ ውስጥ ሆኖ መታረም** (Community Based Correction)፣ **ልሙይይት የቀረበ፣ ድሬዳዋ፣ታህሳስ** 19፣20 (1995), at 2-4. (Conference paper available in Amharic); It should also be noted that the number of orphaned children is on the rise. For example, in 2005 there were an estimated 4.8 million orphan children in the country. African Child Policy Forum (2008), The African Report on Child Wellbeing: How child-friendly are African governments? at 5.

[168] Following the ratification of the CRC in 1991, an initial assessment of existing laws revealed that the major laws and policies in the country were by and large sufficient to implement the CRC save for some differences for which an independent committee was established to "iron out" the differences. *See* Save the Children UK, Child Situation Analysis for Ethiopia, (2004) at 19, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February,2009];The CRC Committee also appreciated the establishment of this committee(the Inter ministerial Legal Committee) to "review national legislation and its compatibility with the provisions of the Convention, through the establishment of committees on the rights of the child at the national, regional, Zonal and Woreda levels, as well as through the adoption of a National Plan of Action and the

4.3. Legal Framework for the Protection of Children

Following the fall of the dictatorial *Derg* regime[169] in 1991, Ethiopia adopted a new Federal Constitution in 1995 (Constitution of the Federal Democratic Republic of Ethiopia/The FDRE Constitution).[170] The new Constitution in many instances greatly improved the legal protection accorded to children in the country. Mention should also be made of the various state constitutions, which take after the Federal Constitution, and accord the same protection to children as does the Constitution.[171]

The FDRE Constitution devotes an article which embodies basic rights pertaining to children. Article 36 of the Constitution provides:

1. Every child has the right:
   (a) To life;
   (b) To a name and nationality;

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establishment of a ministerial committee to monitor its implementation." CRC/C/15/Add.67, 24 Jan, 1997, Para.5. In this regard the new National Plan of Action for Children (2003-2010) has been welcomed by the CRC Committee. CRC/C/ETH/CO/3 1Nov, 2006, Para 12.

[169] For a number of reasons, ideology amongst them, the socialist *Derg* regime did not ratify the CRC, but an autonomous Children's Commission was established that facilitated the care and support for orphans and poor children. As claimed by many, political indoctrination was also part and parcel of the activities of the commission. See Save the Children UK (2004), Child Situation Analysis for Ethiopia, at 19, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc ; [Accessed on 10 February, 2009];

[170] Federal Democratic Republic of Ethiopia Constitution, Proclamation No. 1/1995, Federal Negarit Gazeta, 1st Year No.1.

[171] See A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008];

(c) To know and be cared for by his or her parents or legal guardians;
(d) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
(e) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.

2. In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.

3. Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.

4. Children born out of wedlock shall have the same rights as children born of wedlock.

5. The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.

This provision of the Constitution is said to have been based on the provisions of the CRC to which Ethiopia has been a party since its ratification of it in May 1991.[172] In addition to the CRC, Ethiopia is also a signatory to the ACRWC to which it acceded on 2 October 2002. Thus, these two major conventions on the rights of children also form part of the legal framework for the protection of the rights of children. According to Article 9(4) of the Constitution all international agreements to which the country is a party are incorporated and become laws of the land up on ratification.

[172] Save the Children UK, Child Situation Analysis for Ethiopia, (2004) at 19, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc [Accessed on 10 February,2009];

Furthermore, Article 13(2) of the Constitution also provides that "[t]he fundamental rights and freedoms specified in this Chapter [*chapter three*] shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia". This Article also strengthens the above assertion in that not only it domesticates/incorporates international human rights instruments into the legal system but also makes them the standards for the interpretation of the Bill of Rights section of the Constitution.[173] Thus, as one of the international human rights instruments ratified by Ethiopia, the CRC and ACRWC enjoy this status stipulated in Articles 9(4) and 13(2) of the Constitution and can be well regarded as forming part of the domestic legal regime governing the rights of children.[174] There are, however, different legal issues raised as regards the status of these international agreements in the country's legal system. These and other issues in this regard will be considered in the next section.

Also forming part of the legal frame work in the areas of children are the various laws found in the country which were enacted to deal with different legal relationships.[175] Unlike the case in other jurisdiction, Ethiopia does not have a separate and

[173] A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008]; Also see F Nahum (1997),Constitution for a Nation of Nations: the Ethiopian Prospect, at 109.

[174] In this regard it should be noted that other international agreements like the ICCPR, CEDAW, ICESCR and others to which the country is a party and which affect children also fall in this category.

[175] A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008]

comprehensive legislation dealing with all aspects of the rights of children (Children's Act/Proclamation)[176] Currently what we have in the country are different piece of legislation that affect children in different ways. Notable in this regard are the 1960 Civil Code of the Empire of Ethiopia, the Federal Criminal Code, the Labour Proclamation, the Revised Federal Family Code and the various revised family codes of the states forming the federation and other piecemeal legislations.[177]

4.4. The Status of International Agreements in Ethiopia

As it was pointed out earlier, though international agreements are incorporated in to the legal system of the country through the constitutional provisions in articles 9 and 13, there is still some dispute involving them.[178] The countries ratification of such international agreements "might goad one in to raising several questions of constitutional significance".[179] These questions among others pertain to two major

[176]In its concluding observations the CRC Committee has expressed its concern at the lack a systematic legislative review and adoption of a comprehensive Children's Code. See CRC/C/ETH/CO/3 1November 2006, Para 8.

[177]A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008]

[178] To date the country has ratified a number of international agreements including numerous human rights instruments such as the famous 1966 UN Human Rights Covenants and many others including of course the CRC and the ACRWC.

[179] I. Ibrahim (2001), The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, Journal of Ethiopian Law,Vol.20, at 113.

legal issues.[180] The first one relates to whether or not ratified international human rights covenants can directly be applicable along with other domestic legislation without the need for them to be published in the official law gazette[181] of the country.[182] The related question of whether or not the duty to take judicial notice of such treaties arises on the part of the judiciary and others without such treaties being published in the official gazette also arises here.[183] The second legal issue pertains to where such international agreements would be placed in the ladder of hierarchy of domestic laws of the country, if they are regarded as part and parcel of the country's domestic laws.[184] Also the fact that the Constitution is ambiguous, if not silent on the matter, is the other reason that needs to be mentioned here.

[180] I. Ibrahim (2001), The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, Journal of Ethiopian Law,Vol.20, at 113;
Also see A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008];

[181] Currently the official law gazette at the federal level is known as Federal Negarit Gazettee. Prior to the coming in to force of the Constitution (which established a federal state structure) and Proclamation No 3/1995 which established the Federal Negarit Gazette the official law gazette was called Negarit Gazette. The various states that make up the federation have their own law gazettes on which they publish state laws. To mention some Magalata Oromia (State of Oromia), Debub Negarit (Southern Nations, Nationalities and People's regional state (SNNP)),Addis Negarit (City administration of Addis Ababa).

[182] I. Ibrahim (2001), The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, Journal of Ethiopian Law,Vol.20, at 113.

[183] In terms of Article 2(3) of Proclamation No 3/1995, "[a]ll federal or regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of laws published in the Federal Negarit Gazeta." According to Article 2(1) of the same proclamation, all laws of the Federal government shall be published in the official law Gazette.

[184] It should be stressed that such issues of law arise in international law jurisprudence as a result of the controversy that surrounds the relationship between international law and municipal law In this regard there are two widely accepted approaches/theories that have for long been a subject of endless

Regarding the first issue relating to the internal application of ratified treaties in the country one would need to consider the two constitutional provisions under Articles 9 and 13 on the one hand, and Article 71 of the Constitution together with Article 2(3) of the Federal Negarit Gazette Establishment Proclamation on the other hand.[185]

As it was said earlier, in its Article 9(4) the FDRE Constitution explicitly states that all international agreements ratified by the country become an integral part of the laws of the country. Further to that, sub article (2) of Article 13, in relation to the human rights section of the Constitution, imposes that interpretation of the section should be done in a manner conforming to the international human rights instruments to which the country is a signatory. Thus, looking at these two provisions one would be in a position to argue that international [human rights] treaties would automatically be internally applicable by the mere act of ratification without any precondition. However, there is another constitutional hurdle to this. Article 71 of the Constitution, which enumerates the powers and functions of the Federal President, provides that "[h]e shall proclaim in the Negarit Gazette laws and international agreements

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controversy among legal scholars. These are the doctrines of monism and dualism. According to the monist approach international and domestic laws have identical sources and that courts of law can invoke international agreements without the need for an enabling domestic legislation. According to the dualists the two have different sources and subjects which means that before international agreements can be applied domestically an enabling legislation is mandatory, and the Ethiopian take on this matter seems to favour the Monist approach. A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study**,** African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17, 2008]

[185] See I. Ibrahim (2001), 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law, Vol.20, at 120-121.

approved by the House of Peoples' Representatives in accordance with the Constitution."[186] In the light of this provision, it would be possible to argue that publication of international agreements, like other ordinary laws, is a precondition before they can be active internally. This position is further strengthened when one considers Proclamation No.3 of 1995.[187] According to Article 2(3) of this law, "[a]ll Federal or regional legislative, executive and judicial organs as well as any national or juridical person shall take judicial notice of laws published in the Federal Gazette." In other words what this means is that law is that which is published in the Negarit Gazette.

Thus, the Constitution and the other laws discussed above are vague as to whether publication is a pre-condition for ratified international human rights instruments to take legal effect in the country.[188] In the opinion of this writer, however, the first

[186] Federal Democratic Republic of Ethiopia Constitution(1995), Art 71(2); See I. Ibrahim (2001), 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law, Vol.20, at 121,125.

[187] This Proclamation replaced the earlier Negarit Gazette Establishment Proclamation No.1 of 1942. I. Ibrahim (2001), 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law, Vol.20, at 120-121.

[188] This vagueness in the law is also reflected in academic circles in the country. For some, ratification of treaties by the House of Peoples' Representatives is sufficient for them to have legal effect domestically, and for citizens to invoke them to enforce their rights before courts of law. For these people, who base their arguments on Article 9(4) of the Constitution, an international convention is part and parcel of the law of the land up on ratification by the HPR and that publication adds nothing to their validity, which they acquired by the single act of ratification. G. Amare, 'The Ethiopian Human Rights Regime: Federal Democratic Republic of Ethiopia's Constitution and International Human Rights Conventions Ethiopia has Ratified' Paper presented to the international conference on the establishment of the Ethiopian Human Rights Commission and the Institution of Ombudsman, 18th - 22nd of May, 1998, Addis Ababa, Ethiopia cited in I. Ibrahim, 'The place of International Human

position would hold much water. Notwithstanding other benefits of it, publication of laws is meant for the purpose of bringing the law to the knowledge of citizens so that they will be able to invoke the letter of the law to enforce their rights. And, denying citizens the opportunity to enforce their rights based on international human rights instruments for the sole reason that they do not appear in an official law gazette does not seem to stand scrutiny. And, as things stand today, such international instruments are readily available via the internet which makes their accessibility or publication relatively much simpler.[189]

Coming to the second issue regarding the status of international agreements in the ladder of hierarchy of Ethiopian laws, as in the first case ,there is not an agreed upon answer though it can be said that the answer would become a little bit easier when it

Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law,vol.20, August 2001, at 124-121. The other group of scholars take the view that publication in the official law gazette of the country is a necessary condition (*Conditio necessitatis*) for ratified human rights instruments to have legal effect domestically. In the words of Professor Ibrahim "publication is a requirement for conventions as much as it is for all other laws enacted by the House of Peoples' Representatives" See generally I. Ibrahim, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law,vol.20, August 2001, at 124-125 ; for a further discussion on this see **መንበረፀሐይ ታደሰ ፤ የኢትዮጵያሕግና ፍትህ ገጽታዎች ፡ ህዳር** 1999 **፣ አዲስ አበባ ፣** at 166 – 170.(book available in Amharic)

[189]It should be mentioned here that the CRC Committee in its concluding observation on the periodic reports of the country has repeatedly expressed its dissatisfaction at the fact that the Convention has not been published in the Official Gazette of the country. CRC/C/ETH/CO/3 1Nov. 2006, Para 8; Also see CRC/C/15/Add.144 21 Feb. 2001, Para.14; CRC/C/15/Add.67 24 Jan 1997, Para.22. "General technical difficulties" were cited as the major reason for the government's failure to publish the CRC in the official law gazette. CRC/C/SR.676 18 Jan.2001, Para.68

comes to the case of international human rights agreements.[190] The Constitution is not also clear on the matter. Article 9(4) of the Constitution simply states that international agreements are part of the law of the land. It does not say where they should be placed hierarchically *vis a vis* the Constitution itself and other domestic legislations like for example proclamations.[191]

However, as was said above, the situation becomes a bit clearer when it comes to international human rights instruments. This is due to the wording of Article 13(2) [192] of the Constitution which, as was discussed earlier, makes it clear that interpretation of chapter three of the Constitution should be done in a manner conforming to "the principles in the UDHR, International Covenants on Human Rights and international

[190] A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008] **;** Professor Ibrahim argues that any attempt to find straight answers to questions concerning the domestic application and the position of ratified international human rights instruments in the ladder of hierarchy of Ethiopian laws in light of the FDRE Constitution is a challenging task. This, he says, is for three major reasons which he enumerates as: Firstly, the Constitution's provisions are too vague to assist in finding direct answers to the questions. Secondly, Federal Ethiopia has as yet not enacted legislation on treaty making procedures capable of elaborating the Constitution's provisions on matters relating to international conventions. And thirdly, the House of Federation, the second house of the Ethiopian parliament whose powers include the adjudication of constitutional issues, has not yet come up with pertinent decisions providing guidance on the interpretation of the provisions of the Constitution. See I. Ibrahim, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution', Journal of Ethiopian Law,vol.20, August 2001, at 114.

[191] Under the existing law making process, Proclamations are primary legislations issued by the Parliament. Other subordinate legislations include regulations and directives that are issued by the Council of Ministers and specific Ministries respectively. See Articles 55 and 77(13) of the FDRE Constitution.

[192] See A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008]

instruments adopted by Ethiopia".[193] It is also provided in Article 9(1) of the Constitution (also known as the supremacy clause of the Constitution) that "[t]he Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect." Thus, from the reading of these two provisions, it would be safe to conclude that international human rights instruments are on par, if not above, the FDRE Constitution.[194] But here it should be stressed that "resorting to the international sphere is allowed only when the constitutional sphere is found to be ambiguous. It is only then that interpretation is justified."[195] Thus, as one of the international human rights instruments adopted by Ethiopia the CRC and the ACRWC enjoy this status. And, anything done in the country in the sphere of children's rights should be gauged against the standards set out primarily under the CRC and ACRWC, and other relevant human rights instruments.

[193] FDRE Constitution Article 13(2); Also See A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [Accessed on September17,2008]

[194] For a discussion on the status of international agreements vis avis other domestic laws including state laws See A. Bogale (1999), Hierarchy of Laws within the Present Federal legal Structure of Ethiopia (Unpublished LL.B thesis, Addis Ababa University), at 44-60.

[195] A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [accessed on September17,2008]; A. Bogale (1999), Hierarchy of Laws within the Present Federal legal Structure of Ethiopia (Unpublished LL.B thesis Addis Ababa University) at 44.

4.5. Minimum Age of Criminal Responsibility in Ethiopia

4.5.1. Age of Criminal Responsibility in Pre - FCC Era

In this section attempt will be made to look in to the case of age and criminal responsibility in the country from a historic point of view. In this regard a brief discussion of the stand that was adopted by the past two criminal codes of the country will be made. Prior to that however, a short description of the situation as it existed in the *Fetha Negast* (the law of the kings),a canonical law which was for long a source of law in "pre-code" Ethiopia, will come first.

The *Fetha Negast* (the law of the kings), a codified law book of the Coptic Orthodox Church of Alexandria, introduced in Ethiopia during the reign of Emperor Zär'a Ya'eqob in the 15th century, has for long been the law governing different aspects of legal relationships in the country.[196] Before the enactment of the 1930 Penal Code, religious edicts also played an important role in the country as they were also embodied in the *Fetha Nagast*.[197] Though it did not totally replace the application of customary laws of the different groups in the country, the *Fetha Negast* enjoys a prominent place in the legal history of Ethiopia, as it served both as a transitional law and contributed numerous principles of civil and criminal law that were later taken up

[196] A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 194,189. For a detailed discussion on the the *Fetha Negast* see for instance A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 188-194; J. Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2 at 268-272.

[197] A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 35; Steven Lowenstein, 'The Penal System of Ethiopia', Journal of Ethiopian Law, Vol. II, No 2, at 383-384.

in the modern codes of the 1960s.[198] Its application was so broad that throughout the Christian areas of the country, it was applied by the church while in the non-Christian areas of the Empire, together with the varied customary laws, remained the only applicable penal law until 2 November, 1930, the day of the official coronation of Emperor Hailesilassie I, when the first modern and codified Penal Code of 1930 was promulgated.[199]

This being generally the case, part two of the *Fetha Negast* contains provisions dealing with civil, commercial, constitutional and criminal matters; and the punishments that follow different offences specified therein.[200] It is in this part of the code that we find provisions that talk about the diminished capacity of children to be held liable for their criminal activities. One good example here would be Article 47 Number 1656 which provides: [201]

> Homicide is divided in to two parts. The first concerns one who does not deserve punishment.TS39.This relates to the one who does not

[198] A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 189.

[199] S. Lowenstein (1965), 'The Penal System of Ethiopia', Journal of Ethiopian Law, Vol. II, No 2, at 384; Also see J. Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2 at 268-269.

[200] A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 193; Jean Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2, at 268

[201] The way the Fetha Negast is organized is in such a way that those referred to as articles are like chapters having numerous numbers under them, and the articles generally refer to one area of law like for instance Articles 44-50 deal with penal law. More specifically Article 47 talks about homicide and its spiritual and earthly punishments. See J. Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2

> have the use of reason, and the one who is not over seven years of [202]age.

Next comes, the Penal Code of 1930.The first of its kind, this code was the first leap forward the country made along the roads of modernizing its laws.[203] This code can be regarded as watershed between pre-code,-customary- and *Fetha Negast*- law dominated Ethiopia and the modern codified law era.[204] Though this code had its own shortcomings, compared to the earlier *Fetha Negast* it was considerably more advanced and sophisticated.[205] Similar to the *Fetha Negast* this Code also had a provision that set a minimum age for criminal responsibility of children. Like the *Fetha Negast* the minimum age for criminal responsibility of children is fixed at the age of seven. The relevant provision in this regard is Number 150 of Chapter 8 which declares:[206]

> There is no punishment for a child under seven years of age for any crime which he commits.(Fit.Neg)

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[202] Abba (Father) P. Tsadua (1968), transl., Fetha Negast,

[203] J. Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2, at 272.

[204] For an in depth discussion on this Penal Code, see A. Jembere (2000), Legal History of Ethiopia 1434-1974, at 195-198; Also see J. Graven (1964), 'The Penal Code of the Empire of Ethiopia', Journal of Ethiopian Law, Vol. I, No 2, at 272-276.

[205] Steven Lowenstein (1965), 'The Penal System of Ethiopia', Journal of Ethiopian Law, Vol. II, No 2 at 385.

[206] This provision as can be seen from its wording makes a direct reference to the *Fetha Negast.* In this regard it can be said that this provision is a direct replica of the *Fetah Negast*. This assertion is also expressed in the Code. *See* The Preamble No.16. Aside from the above provision there are also other provisions in the penal code that deal with the case of children and their limited responsibility for their criminal activities. Such provisions include Article 1, Chapter2, No 21; Chapter 8, No 150.

Under the 1957 Penal Code, the administration of juvenile justice is fairly well dealt with. The Code incorporated various provisions that particularly regulate the case of children in conflict with the law.[207] One among such provisions is Article 52 which deals with the minimum age for criminal responsibility of children. This article stipulates the start of the age of criminal responsibility at 9 years.[208] In other words the minimum age for criminal responsibility of children is 9. Thus, all "[i]nfants who have not attained the age of nine years shall not be deemed to be criminally responsible. The provisions of [the] Code Shall not apply to them."[209]

This Code increased the minimum age from that of seven in the 1930 Penal Code to nine. However, this was regarded as too law by many including the CRC Committee.[210] Though the Penal Code was promulgated long before the coming in to effect of the CRC and the country's accession to the same, the minimum age for

[207] For a discussion on the compatibility of this Code with the CRC as regards children in conflict with the law, see T. Teshome (1997), 'The Child and the Law in Ethiopia: The Case of the UN Convention on the Rights of the Child', Journal of Ethiopian Law, Vol. XVIII, at 56-59.

[208] For purposes of criminal liability the Code sets out three age categories. The first one is infancy which refers to children below the age of 9. Those children between the ages of 9 and 15 are regarded as young offenders and are subjected to special treatment, whereas those between 15 and 18 are treated and punished as adults.

[209] Penal Code of the Empire of Ethiopia (1957), Art 52, Para.1

[210] CRC/C/15/Add.67, 24 Jan, 1997, Para. 20; Also see CRC/C/15/Add.144 21 Feb. 2001 Paras.28-29; CRC/C/ETH/CO/3, 01 NOV 2006, Para 77; UNICEF and OMCT have also considered the age of nine as too low. See Roberta Cecchetti, Rights of the Child in Ethiopia: Report Concerning the Application of the Convention on the Rights of the Child by the Federal Democratic Republic of Ethiopia, OMCT country reports (2001) at 21, available at www.omct.org [Accessed on 12 February, 2009]; UNICEF (2001) "Situation of Ethiopian Children and Women: A Rights Based Analysis." Cited in the Children UK, Child Situation Analysis for Ethiopia, (2004) at 21, available at http://savethechildren.ch/ethiopia/publications/situationanalysis.doc ; [Accessed on 10 February, 2009]

criminal responsibility set out in the Code has been alleged to be way below the international standard minimum age for criminal responsibility of children.[211] Because of this, the country has been called up on to amend the law. In the next section we will see whether or not this was done under the FCC which replaced the PCE in 2005.

4.5.2. Age of Criminal Responsibility under the FCC

In 2004 the 1957 Penal Code was formally repealed and replaced by the new Federal Criminal Code.[212] Among the many reasons that necessitated this, the Preamble to the new Code asserts that:

> It is nearly half a century since the 1957 Penal Code entered into operation. During this period, radical political, economic and social changes have taken place in Ethiopia. Among the major changes are the recognition by the Constitution and international agreements ratified by Ethiopia of the equality between religions, nations, nationalities and peoples, the democratic rights and freedoms of citizens and residents, ***human rights, and most of all, the rights of social groups like women and children.*** After all these phenomena have taken place, it would be inappropriate to allow the continuance of the enforcement of the 1949 **[1957 GC]** Penal Code. (Emphasis mine)

[211] CRC/C/15/Add.67 24 Jan 1997, Para 20; CRC/C/15/Add.144 21 Feb. 2001, Para.29; Note that this two observations were made by the CRC Committee when the PCE was operational in the Country.

[212] The 1957 penal Code was repealed as from the 9th of May 2005, and the new Code came in to force as from the same date. *See* the preamble to the new code.

It is true that it would be inappropriate to allow the continuance of the old code in the middle of all the changes that have taken place in the country and else where. Whether or not the new Code has achieved what the law maker has intended is subject to all kinds of discussions. However, in relation to the minimum age of criminal responsibility the new code falls way below all expectations.

As regards the different age groups and the treatments accorded to them, the new Code has not made any change to that in the old one. Exactly the same mode of division or categorisation of age groups is adopted.[213] The FCC categorizes children in to three groups. The first group of children (also known as infants) represents those children who have not attained the full age of nine years, and these children are presumed not to have the necessary capacity to be held responsible for their actions.[214] Thus, like the case under the PCE, the minimum age for criminal responsibility is set at nine years of age.[215] In 2001 while considering the country's second periodic report, the CRC Committee recommended that the country increase the minimum age of criminal responsibility and even recommended that the country use the ongoing

[213] Except for some minor word changes, Articles 52, 53 and 56 of the new Code are direct duplications of the previous Articles 52, 53 and 56 of the PCE. Also see ሐተታ ዘ ምክንያት ፣ ሰኔ 1996, at 30-32.

[214] FCC Article 52 - Infancy:, Exoneration from Criminal Provisions**.**

> Infants who have not attained the age of nine years shall not be deemed to be criminally responsible. The provisions of this Code Shall not apply to them.

Where a crime is committed by an infant, appropriate steps may be taken by the family, school or guardianship authority

[215] FCC, Article 52

review of the PCE to introduce relevant changes to the law.[216] However, when it came in to force in 2005 the FCC did not change that.[217] The second group of children refers to those children between the ages of nine and fifteen who are also known as "young offenders".[218] Children of this group, however, are presumed to have the necessary mental capacity/*mens rea* of understanding the nature and consequences of their actions. Thus, these children are regarded as having a limited responsibility for their criminal activities as opposed to the third group of children, who are above fifteen and have not attained the full age of eighteen years. This last group of children, like adults, are held fully responsible for their criminal acts.[219] Here it should be mentioned that both under the PCE and the FCC, the upper age of delinquency is set

[216] CRC/C/15/Add.144 21 Feb. 2001,Para.29

[217] Also see A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study ,African Child Policy Forum Available at http://www.africanchildforum.org/Documents/ [accessed on September17,2008]; During the revision of the Penal Code some Ngos(APAP and EWLA) approached the Expert revision Committee and aired their concern regarding the low minimum age of criminal responsibility in the PCE.. However their concern did not seem to have convinced the group of experts working on the revision especially the "Policy Wing". For members of the committee, compared to those children in the 1950s when the PCE was enacted, today's children in 2005 stand a better chance to develop both physically and mentally faster as they have a better access to different sources of information. In such a situation raising the minimum age of criminal responsibility would be denying the courts from making timely intervention (orders of a curative, educational or corrective nature) in the life of children. These reasons seem to have been accepted by the Parliament when the FCC was promulgated in 2005. Interview with Ato Tiumelisan Lemma, Chairman of the Drafting Committee of the FCE, and Ato Tsehai Wada, a member of the Drafting Committee.

[218] FCC, Art. 53.

[219] FCC, Art 56. The special treatment measures and penalties provided for under articles 157-175 of the Code are available to young offenders up on conviction. See Article 53(1). For those in the third group the court may also apply the special penalties available for young persons (Arts. 166-168). See Art.56 (2). In terms of Article 117(1) of the FCC, the death penalty "shall be passed only on an criminal who, at the time of the commission of the crime, has attained the age of eighteen years."

at the age of fifteen which is way below the internationally recommended upper age for end of delinquency.[220]

4.6. Conclusion

The setting of a minimum age of criminal responsibility is not a new thing in the Ethiopian legal system. Both under the *Fetha Negast* and the 1930 Penal Code the age of seven was the prescribed age below which children were presumed not to have the capacity to infringe penal law. This age was moved upwards to nine by the 1957 Penal Code. The new Federal Criminal Code maintains this age. And the age of nine is too low by international law standards valid today. The next chapter will provide some more points on this and other related issues. It will also forward possible recommendations.

[220] The Committee recommended that "the Penal Code be amended to ensure that all children, including those aged 15 to 18, benefit from the protections afforded by international juvenile justice standards and to ensure that children under 18 years of age cannot be sentenced to the death penalty or to life imprisonment." CRC/C/15/Add.144 21 Feb. 2001,Para.77; Also see CRC/C/15/Add.67 24 Jan 1997,Para.20

Chapter Five: Conclusion and Recommendations

5.1. Conclusion

As it is usually said the protections accorded to children in conflict with the law both under the international instruments and other domestic laws would only start to be realized upon the setting of a clearly defined minimum age of criminal responsibility.[221] And that is the main reason behind the provisions under Articles 40(3) (a) and 17(4) of the CRC and ACRWC respectively when they provided that State Parties establish a minimum age below which children "shall be presumed not to have the capacity to infringe the penal law."

Though this is generally the case, these two major instruments in the areas of children do not say where this minimum age should be fixed. Finding a clear/authoritative guidance on how minimum the minimum age should be has for long been near impossible for state parties to both instruments.[222] However, the CRC Committee through General Comment No.10 has now made it clear that very low minimum ages are unacceptable, and 12 years of age is now the absolute minimum age below which State Parties cannot go to fix the minimum age of criminal responsibility in their domestic legislations. And this is in line with the general principle that protective minimum ages should be fixed as high as possible.

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[221] Also see K. Ramages (2008), Investigating the Minimum Age of Criminal Responsibility in African Legal Systems (Unpublished LLM thesis) at 33.

[222] In this regard mention should be made of the non-binding Beijing Rules that provide some guidance on this matter. See chapter three.

When seen in this light, the age of nine in the FCC is too low. Ever since the country became a subscriber to the treaty, the CRC Committee has been concerned about the juvenile justice system in the country in general and the minimum age of criminal responsibility in particular. For instance, in its concluding observations on the initial report of the country, the Committee stated that "[it] is deeply concerned at the present system of juvenile justice, which is not in conformity with articles 37, 39 and 40 of the Convention. It is particularly concerned about the setting of the age of criminal responsibility at 9 years and that as from the age of 15 years, children are treated as adults."[223] Further to that the Committee recommended that the country pursue legal reform taking in to full account the provisions of the Convention, in particular Articles 37, 39 and 40 and other relevant international standards.[224] But as we have seen earlier this was not done by the new Federal Criminal Code, at least with regards to the minimum age for criminal responsibility, which remained the same eight years after the Committee first expressed it concern and recommended its

[223] CRC/C/15/Add.67 24 Jan 1997, Para 20; Also see CRC/C/15/Add.144 21 Feb. 2001,Para.76 and 77 regarding the general concern on the juvenile justice ,and Para 28 and 29 specifically talking about the minimum age for criminal responsibility.; CRC/C/ETH/CO/3, 01 Nov. 2006, Paras 77,78,78(a);

[224] CRC/C/15/Add.67 24 Jan 1997, Para 34;The full text of this paragraph reads: With regard to the administration of juvenile justice, the Committee recommends that legal reform be pursued and that the State party take fully into account the provisions of the Convention, in particular articles 37, 39 and 40 as well as other relevant international standards in this area, such as the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. The Committee also recommends that the State party avails itself of the technical assistance programmes of the High Commissioner/Centre for Human Rights and the Crime Prevention and Criminal Justice Division of the Secretariat. Also see CRC/C/ETH/CO/3, 01 Nov. 2006, Para 78.

raising to an acceptable age. Thus, in this regard it can be concluded that the country has not lived up to its obligations and has not fully domesticated the available international law on the issue of the minimum age for criminal responsibility of children.

Generally, international human rights treaties have acquired an important position in the Ethiopian legal system. By virtue of Articles 9(4) and 13(2) of the Constitution, together with the ACRWC and other human rights treaties, the CRC has been made part and parcel of the domestic laws of the country. By this the country has showed its commitment to the rights of children. However, many of the measures taken in the country to protect the rights of children were unable to generate the desired results.[225] There are still numerous gaps in legislation that still wait to be filled.[226] Absence of trained personnel is also a bottleneck in the country hindering the effective implementation of the rights of children.[227] Thus, to fully achieve the realization of the rights of the child enshrined both in the CRC and the ACRWC, the country shall have to take "all appropriate legislative, administrative, and other measures."[228]

5.2. Recommendations

First and foremost the existing minimum age of criminal responsibility under the Federal Criminal Code is way below the internationally accepted minimum age. In

[225] CRC/C/129/Add.8 28 Oct. 2005 Para 133

[226] CRC/C/129/Add.8 28 Oct. 2005 Para133

[227] CRC/C/129/Add.8 28 Oct. 2005 Para133

[228] CRC, Article 4; ACRWC, Article 1(1)

keeping with its obligations under Article 4 of the CRC and 1(1) of the ACRWC the country has to ensure that this law is compatible with the spirits of the Conventions and standards emerging in international law. Thus, amendment of the law is mandatory so as to raise the existing minimum age of criminal responsibility to an internationally acceptable age. Further to that it is important that the aim of the decision to raise the minimum age be understood. If the aim is to prevent further offending, to promote rehabilitation and the reintegration of children into playing a constructive role in society then it should be clear that dealing with children through the ordinary criminal justice system does not offer the best chance of success.[229] Instead the focus should be on assessing the problems and needs of children and attempting to meet those needs.[230] This is more so in countries like Ethiopia where children find themselves in difficult situations that are hard to imagine. In this regard mention should be made of the Community Based Correction Programme Centres introduced in Addis Ababa that have the objective of preventing children from getting in to anti-social activities and rehabilitating young offenders while they remain with their families.[231] Such programmes should be strengthened and made available to all children in the country.[232]

[229] Also see Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed 12 Nov,2008]

[230] Also see Include Youth: The Age Of Criminal Responsibility, (February 2002) available at www.peermediation.org/policy/age_criminal_resp.doc [Accessed 12 Nov,2008]

[231] A. Assefa and S. Yohannes (2006), Harmonisation of National and International Laws to Protect Children's Rights: the Ethiopia Case Study, African Child Policy Forum. Available at http://www.africanchildforum.org/Documents/ [accessed on September17,2008]; Also see Save the Children Sweden, Regional Juvenile Justice Network, 4th Annual Meeting (Kampala, November 2006), Record of Proceedings, Country Juvenile Justice Updates, Ethiopia (presentation by Teamet Mispanaw) at 4-6.

When one talks about setting a certain [minimum] age regarding children, it is important that one also talks about birth registration. As things stand today birth registration is almost non-existent in the country.[233] Because of this there is an obvious risk that very young children even those below the current minimum age might be subjected to the rigours of the criminal justice system. Thus, hand in hand with revising the relevant law, it is important that the country also put in place an effective birth registration scheme.

Finally, on a general note, it would be advisable for the country to enact a separate Proclamation on children (Children's Act) that will bring together all the laws affecting children in to one whole body. This will make the laws more accessible and enhance the enforcement of the rights of children. It will also make revision and amendment easier and faster when ever the need arises. It would also be highly valued if the full text of the CRC, ACRWC and other international human rights instruments is published in the official law gazette of the country.

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[232] In this regard the works of the Federal Supreme Court Juvenile Justice Project Office (JJPO) are notable and they should be further strengthened. See CRC/C/129/Add.8 28 Oct. 2005 Paras 214-217

[233] The Federal Supreme Court Juvenile Justice Project Office (JJPO), Protection of Children under the new Ethiopian Family Law, JJPO Papers, Vol. 1, at 2. The CRC Committee also expressed its concern on this matter. *See* CRC/C/15/Add.67 24 Jan 1997, Para 15and 29; CRC/C/15/Add.144 21 Feb. 2001, Para.34; CRC/C/ETH/CO/3, 01 NOV 2006, Para.31; The Revised Family Code also provides for birth registration. See the Revised Family Code (2000), Art. 321.

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