



ADDIS ABABA UNIVERSITY
FACULTY OF LAW
SCHOOL OF GRADUATE STUDIES

The Ban on Intercountry Adoption in Ethiopia:
Implications on the Right to Alternative Care

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Declaration

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Acronyms

ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of Children
AAI	Adoption Advocates International
ANPPCAN	Association for National Planned Program for Vulnerable children and in need
UNCRC	UN Convention on the Rights of the Child
DA	Domestic Adoption
EPRDF	Ethiopian people’s Revolutionary Democratic Front
EU	European Union
FDRE	Federal Democratic Republic of Ethiopia
GDP	Gross Domestic Product
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HPR	House of People’s Representatives
ICA	Intercountry Adoption
ICCPR	International Covenant on Civil and Political Rights
IDC	Italian Development Cooperation
MoLSA	Ministry of Labor and Social Affairs
MoWCYA	Ministry of Women, Children and Youth Affairs
NGO	Non-governmental Organization
OVC	Orphan and Vulnerable Children
PAD	Positive Action for Development
UN	United Nations
UNICEF	United Nations International Children’s Emergency Fund
USD	United States Dollar
U.S.A	United States of America

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Abstract

The objective of the study is to assess the implications of the law banning intercountry adoption on the right to alternative care of orphans and vulnerable children. It examines those implications in relation to the best interest of the child. The nature of the study is both doctrinal and non-doctrinal legal research. The research design is qualitative legal research and exploratory and predictive research design approach is employed to conduct the study. The sources of data are literatures and a key informant interviews. Further, comparative study of the experiences of Russia, Romania, and Uganda was conducted to understand the practice of the world regarding the issue under study. On selection of the key informants, snowball sampling was adopted.

The study reached at a conclusion that banning ICA in Ethiopian context goes against the best interest of the orphan and vulnerable children (OVC) which has to be determined on case-by-case basis. The country lacks a conducive environment to support its OVCs by exclusive focus on domestic alternative care options which highly rely on the capacities of nationals of the country, i.e. awareness, willingness and economic capacities of the nationals. It takes a considerable time to attain the three elements of capacities of the nationals of the state simultaneously. Further, the alleged problems on intercountry adoption are found to be abuses on the process which could have been rectified through administrative measures and by filling the gaps on the legal and institutional framework for intercountry adoption. In addition, the country lacks adequate domestic alternatives to support OVC in general and those with cross-sectional problems and with special needs in particular.

The study finally recommends administrative measures for effective control and evaluation of adoption agencies and other institutions which facilitate the process be taken by the government. Further, it recommends the government to fill the gaps on the legal and institutional framework on intercountry adoption, to ratify the Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Convention) 1993, to improve compliance with quality-standard guideline for intercountry adoption by making it widely accessible, improving awareness and understanding through training and regular supervision and support of the adoption agencies and other institutions on the process and to adopt policies and procedures which favor information-sharing and networking between adoption agencies and all other institutions which are involved in the intercountry adoption process.

Chapter One: Introduction

1.1. Background

A family is the fundamental unit of society and the natural environment for the growth and well-being of all its members.¹ Family environment is a significant condition for the full and harmonious development of children.² Accordingly, children should be afforded the necessary protection, tutelage, and assistance from their families so that they can fully assume their responsibilities within the community.³ As a result, children are entitled to be cared for and live with parents and to not be separated from them.⁴ However, there are some serious questions to be answered, such as, whether a family environment is always attainable to a child and if not, what the fate of a child afterward will be? Could there be a responsible third party to be entrusted to fill in the parental void? If yes, what are the standards that should be adhered to by the party who assumed such responsibility? And what are alternative care mechanisms for the orphan and vulnerable Children (OVC)?

Natural calamities, war, extreme poverty, accidents, terminal diseases, epidemics, etc. are among the reasons that could deprive a child of natural family environment turning them into an orphan and/or vulnerable.⁵ Orphan problems are universal, but the magnitude varies from one geographical location to the other.⁶ In 2015, there were nearly 140 million orphans globally including 61 million in Asia, 52 million in Africa, 10 million in Latin America and the Caribbean, and 7.3 million in Eastern Europe and Central Asia.⁷ This figure includes orphans who had lost both parents and “half” or “single” orphans who had lost only one parent.⁸ Orphan and vulnerable children suffer profoundly and experience psychosocial distress, economic

¹ United Nations Child Rights Convention (CRC),1989, preamble, *Office of the United Nations High Commissioner for Human Rights, the Core International Human Rights Treaties*, 2006, pp 97; African Charter on Rights and Welfare of Children (ACRWC),1990, CAB/LEG/153/Rev.2, Article 18; General Assembly, Resolution A/RES/64/14223,2010, Guidelines for the Alternative Care of Children, para 3.

² CRC, Preamble; ACRWC, Preamble.

³ Supra note 1.

⁴ CRC, Article 7, Article 9; ACRWC, Article 19.

⁵ “Orphans”,(https://www.unicef.org/media/media_45279.html, accessed on Feb 24, 2018).

⁶ Bimal Kanta Nayak, “Orphan Problems and Community Concern in Ethiopia”, *International Journal of Management and Social Sciences Research*(2014) Volume 3, No. 1, pp8.

⁷ Supra note 5.

⁸ Ibid.

hardship, and withdrawal from school, malnutrition and illness, loss of inheritance, fear, and isolation, and increased abuse and risk of Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS).⁹

The fate of OVC depends on whether they have relatives who are willful and capable to take care of them as a family environment is not necessarily confined to availability and ability of parents.¹⁰ If they have, then they may get the required family environment from such relatives. Otherwise, their fate highly depends on the legal and institutional framework of their national state.¹¹ Therefore, if their national state establishes a properly functioning legal and institutional framework for the protection of the OVC, only then will they be properly catered for.

The main responsible party to take care of the OVC is the state.¹² The responsibility starts with establishing the legal and institutional framework for the protection of the OVC.¹³ The responsibilities of other actors are derived from the established legal and institutional framework. Thus, states need to adopt comprehensive legislative, administrative, and other measures so that the right of the OVC to alternative care is fully observed.

The state and other actors responsible for the observance of the right to alternative care of the OVC should fulfill their respective responsibilities in a manner conforming to the principles of the best interest of the child, non-discrimination, children's right to life survival and development, and children's right to participation.¹⁴ In addition, holistic approach that keeps in mind the interrelatedness and interdependence of human rights which results in the observance of the one right on the adherence of the other human rights and vice versa has to be adopted by every party responsible for the protection of the OVC.

⁹ "Orphans and other Children affected by HIV/AIDS", a UNICEF fact sheet, (2003), https://www.unicef.org/publications/index_21357.html accessed on March 02; Shilpa Khanna Arora (eds), Dheeraj Shah(eds), Sanjay Chaturvedi(eds), Piyush Gupta(eds), *Defining and Measuring Vulnerability in Young People*, *Indian J Community (Med.* 2015 Jul-Sep; vol 40(3).

¹⁰ CRC, Article 20; ACRWC, Article 25 (1,); UN Guideline, Para 18.

¹¹ CRC, Article 4; ACRWC, Article 4.

¹² Ibid.

¹³ Ibid.

¹⁴ CRC, Article 2, 3 (1), 6, 12; ACRWC, Article 3, 4, 5 and 7.

OVC are entitled to the right to alternative care.¹⁵ „Alternative care“ is an arrangement, formal or informal, temporary or permanent, for children who are living secluded from their natural parents.¹⁶ Adoption, foster care, institutional placement, Islamic Kafalah and kinship care are alternative care mechanisms recognized under international instruments.¹⁷ International instruments do not expressly recognize the „right to alternative care“ of the OVC; rather such right is impliedly recognized under their entitlement to special protection and assistance from the state and the stipulation on the obligation of states to provide alternative care support for children who are deprived of family environment.¹⁸ There are also guidelines on the basis of which such alternative cares have to be provided.¹⁹ Therefore, all actors responsible for the protection of the OVC should adhere to those principles so that the right to alternative care of children can be fully observed.

As discussed above the primarily responsible organ for the observance of the right to alternative care of the OVC is the state. States sometimes take legislative and administrative reforms which they deem are necessary to enhance the best interest of the child, and which have a possible effect to broaden or narrow the right of the OVC. Such reforms have to be critically scrutinized lest they turn out to be self-defeating in light of promoting the best interests of the OVC.

Ethiopia has ratified the United Nations Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (ACRWC) which are treated as integral part of the law of the land.²⁰ In addition, the need for a child to know and be cared for by parents or legal guardians is emphasized.²¹ In instances where such family care is unattainable, the state is obligated to provide special protection and facilitate the means by which such orphans get

¹⁵ Supra note 10.

¹⁶ UN Guideline, para 15; Guidelines for the Alternative Care of Children, A tool for reviewing the United Nations Framework with Children, Facilitators Guide (2010) pp 9, (<https://resourcecentre.savethechildren.net/sites/default/files/documents/5447.pdf>, accessed on March 14/2018).

¹⁷ Usang Maria Assim and AquinaldoMandlate, “The Right to Alternative Care for Children Deprived of a Family Environment: Overview of International Norms and the Legislative Framework of Mozambique”, *Int'l Surv. Fam. L.* (2014),pp339.

¹⁸ CRC, Article 20 (1) (2); ACRWC, Article 25 (1) (2).

¹⁹ UN Guideline.

²⁰ Constitution of Federal Democratic Republic of Ethiopia (FDRE Constitution), Proclamation No 1/1995, Article 9 (4).

²¹ FDRE Constitution, Article 36 (1) (c).

alternative care.²² A similar arrangement is provided under the Revised Federal Family law.²³ After exhausting all the recognized means where a child can get family care, the option of giving alternative care follows. The law deals with one of the alternative care mechanism, i.e. adoption in great detail.²⁴ It recognized domestic and intercountry adoption (ICA) and specifically set a stringent condition for the latter.²⁵

The Federal Democratic Republic of Ethiopia's (FDRE) House of People's Representatives (HPR) has recently reformed the federal adoption law putting an indefinite moratorium on intercountry adoption, i.e. Proclamation No 1070/2018 to „harmonize“ the revised Family Code with the National Children's Policy.²⁶ The likelihood of such reform to broaden or narrow the scope of protection that the OVC get prior to the reform needs to be studied. The implications of the reform have to be critically examined so as to see whether it, in fact, promotes the best interest of the child.

1.2. Statement of the Problem

Adoption is recognized as an alternative care option which may take domestic or intercountry form.²⁷ The latter is a last resort and will only be employed when domestic adoption or other alternative care mechanisms at domestic level are exhausted, i.e. principle of subsidiarity.²⁸ To this effect, while domestic adoptions are wholly governed by national laws, intercountry adoptions are governed by domestic laws and the Hague Convention for states who are parties to the convention.²⁹ Non-Hague countries, such as Ethiopia regulate ICA by domestic laws and bilateral agreements with the receiving countries.³⁰

The recognition of adoption, domestic or intercountry as one form of alternative care under international instruments does not compel member states to permit or endorse the practice, i.e. it

²² FDRE Constitution, Article 36 (5).

²³ The Revised Family Code, 2000, Article 210, 222, 227, Chapter 10, Proclamation No 213/2000, Neg. Gaz. 6th year, Extraordinary Issue No 1.

²⁴ The Revised Federal Family Code, Chapter 10.

²⁵ The Revised Federal Family Code, Article 193, and 194 (3) (d).

²⁶ *Infra* note 37.

²⁷ CRC, Article 20 (3); ACWRC, Article 24 (a).

²⁸ CRC, Article 21 (b); ACWRC, Article 24 (b).

²⁹ Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Convention), 1993, *The International Journal of Children's Rights* 3: 463-468, 1995.

³⁰ Cantwell Nigel, "The Sale of Children and Illegal Adoption" *Terre des Hommes in cooperation with Defence for Children-ECPAT The Netherlands*, (2017), pp 30.

only directs those who incorporate the system of adoption to conduct it with the paramount consideration of the best interest of the child.³¹ Accordingly, some states which are parties to the CRC and ACRWC have banned ICA allegedly to protect the best interest of the child.³² The very principle of „best interest of the child“ lacks conceptual clarity which makes a room for it being used to promote other latent motives.³³ International instruments do not provide a standard for determination of the „best interest of the child“, and there is no consensus as to the organ which should determine the same.³⁴

Ethiopia has recently banned intercountry adoption with the allegation that while it falls short of satisfactorily compensating for the parental love and care the child is deprived of in Ethiopia, it further caused an ensuing identity crisis as per the National Children’s Policy.³⁵ As a result, ICA is excluded from the means of alternative care options for the OVC under the policy.³⁶ Such exclusion resulted in the amendment of the revised Federal family Code, Proclamation No 213/2000 with the aim of „harmonizing“ the same with the National Children’s Policy.³⁷

Ethiopia is characterized by very young population with 48 percent of people under the age of 18years.³⁸ In addition, 26% of the population lived below the national poverty line (USD 1.25 per day in 2015), and the poverty headcount was higher for children (32.4%) than for the population as a whole.³⁹ As to the nutritional status of children, 38% of children under age 5 are stunted (short for their age), 10% are wasted (thin for their height), and 24% are underweight (thin for their age). In 2017, children in need of treatment for severe acute malnutrition reached 376,000, in need of access to safe drinking water and sanitation services, 10.5 million and

³¹ CRC, Article 21 (b); ACRWC, Article 24 (b).

³² Jean-François Mignot, “Why is intercountry adoption declining worldwide?”, *Population and Societies*, (2015), (http://www.ined.fr/fichier/s_rubrique/23160/population.and.societies.2015.519.adoption.world.en.pdf.halshs-01326717 accessed on April 13/2018).

³³ Cantwell Nigel, “The Best Interests of the Child in Intercountry Adoption”, *Innocenti Insight, Florence: UNICEF Office of Research*, (2014), pp 5.

³⁴ Ibid.

³⁵ Federal Democratic Republic of Ethiopia (FDRE) National Children’s Policy, (2017), Addis Ababa, pp 7.

³⁶ National Children’s Policy, para 3.6 (a), (j), (N), 2017, pp 19 and 20.

³⁷ The Revised Family Code, 2000, Article 210, 222, 227, Chapter 10, Proclamation No 213/2000, Neg. Gaz. 6th year, extraordinary issue no 1, as amended, Revised family Code (amendment) proclamation, 2018, Preamble, Proclamation No 1070/2018, Neg. Gaz. 24th year, No 26.

³⁸ United Nations Children’s Fund and the Ministry of Finance and Economic Cooperation, “Updated National Equity Situation Analysis on Children and Women in Ethiopia”, Addis Ababa, Ethiopia, 2015, pp 4.

³⁹ Ibid, pp 6; “Poverty and Equity Data Portal”, *The World Bank Group*, (<http://povertydata.worldbank.org/poverty/country/ETH> accessed on March 9/2018).

school-aged children in need of emergency school feeding and learning material assistance reached 1.9 million.⁴⁰ Further, one in 10 children under age 18 is not living with a biological parent and 7% of these children are orphans, with one or both parents dead.⁴¹ The percentage of children who are orphans rises rapidly with age, from 2% among children under age 5 to 6% among children age 5-9 and 17% among children age 15-17.⁴² These facts made Ethiopia one of the top sending countries for ICA.⁴³

Socioeconomic circumstances warrant the need to adopt comprehensive mechanism whereby these vulnerable children get the standard alternative care. Here, Ethiopia has ratified the CRC, ACRWC, and incorporates the notion of support for the OVC on the FDRE Constitution. However, at the national level, the National Alternative Childcare Guideline is the sole guideline for alternative care in Ethiopia.⁴⁴ Such guideline provides minimum standards to be adhered to for Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service.⁴⁵

ICA may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.⁴⁶ Therefore, the ban on ICA has to be closely scrutinized in light of the availability and adequacy of domestic alternatives to overcome the problems that OVC face and ensure the best interest of the child. In addition, the existence of other motives behind the ban, if any, is not yet studied. The impacts of the ban in relation to cross-sectional problems of the OVC, for instance, OVC with disabilities, developmental delays, and nutritional deficiencies needs to be specifically addressed. The causal relationship between the primarily alleged problem, i.e. identity crisis that causes psychological and social problems and the proposed solution, i.e. indefinite moratorium on ICA along with the examination of immunity of domestic alternatives from the alleged problems on ICA, is another point of concern. The

⁴⁰ "Ethiopian Humanitarian Situation report", *UNICEF*, 2017, (<https://reliefweb.int/report/ethiopia/unicf-ethiopia-humanitarian-situation-report-17-reporting-period-6-october-5>, accessed on March 6/2018).

⁴¹ "Ethiopia Demographic and Health Survey 2016", *Central Statistical Agency (CSA), Ethiopia and ICF*, 2016, pp 13.

⁴² *Ibid.*

⁴³ ACPF, "Intercountry Adoption: An African Perspective", Addis Ababa, *The African child Policy forum*, 2012, pp 10.

⁴⁴ Ministry of Women's Affairs, "Alternative Childcare Guideline on Community-based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service", 2009, Addis Ababa, Ethiopia.

⁴⁵ *Ibid.*

⁴⁶ Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, Preamble.

possible implications of the ban on the right to alternative care have to be studied and predictions as to whether or not the ban compromises or enhances the rights of the OVC needs to be made.

1.3. Research Questions

1. What are the advantages and disadvantages of ICA?
2. Have there been other mechanisms adopted and employed to overcome the disadvantages of ICA in Ethiopia? If so, were these other mechanisms exhaustively employed and proven ineffective (less effective) to overcome the problems?
3. Does the law banning ICA have implications on the right to alternative care of children? If so, what are the positive and adverse effects of this ban?
4. Are new alternatives, if any, introduced to fill the gaps that result from the ban?

1.4. Objectives of the study

1.4.1. General Objective

The overall objective of the research is to assess the implications of the law banning ICA in Ethiopia on the right to alternative care based on the international and regional instruments to which Ethiopia is a party and the FDRE Constitution.

1.4.2. Specific Objectives

- To assess the advantages and disadvantages of ICA in Ethiopia.
- To assess other mechanisms, if any, adopted to overcome the practical disadvantages of ICA.
- To assess the possible implications of the law banning ICA on the right to alternative care in Ethiopia.
- To assess the possible new alternatives, if any, to fill the gaps that result from the ban.

1.5. Significance of the Study

- The government of Ethiopia has given much emphasis for the recognition of children's rights. The issue of children is incorporated in the laws, national strategies, plans of actions and guidelines. Therefore, it will enable policymakers to reassess their decisions of banning ICA on the basis of the implications this study predicts.
- It will inform different institutions of child care services about the implications of banning ICA so that they adjust their services to the extent of filling the gaps caused by the ban.

- It will promote the expansion of domestic adoption, foster care, and community-based programs by clearly revealing the possible implications of the ban and the possible gaps as a result on the right to alternative care.

1.6. Limitation and Scope

1.6.1. Limitation

- The fact that the ban is a very recent phenomenon limited the study from reflecting the practical implications of the ban of on the right to alternative care. Therefore, the study only explored the problem and predicted the implications in light of the legal perspective on whether the ban broadens or narrows the level of protection the OVC used to get prior to the ban and whether it enhances the best interest of children.
- The other limitation was that no studies have yet been conducted on the issue under study that can serve as a base for the study.
- Time and resource was another limitation.

1.6.2. Scope

The scope of this study is limited to the areas of Addis Ababa and Dire Dawa where the revised Federal Family Code along with the new amendment that resulted in the ban on ICA is applicable.

The study is further confined to one of the alternative care mechanisms, i.e. ICA. It addressed the law banning ICA in relation to its implications on the right to alternative care and the best interest of the child.

The research did not address cases, if any, where Ethiopians adopt foreign children like an Ethiopian family adopting an Eritrean child or a foreigner adopting another foreign child in Ethiopia.

1.7. Operational Definitions

Child: every human being under the age of 18 years.⁴⁷

Adopted child: a child who is not the natural child of the parents but has become a true child by legal action.⁴⁸

⁴⁷ ACWRC, Article 2.

⁴⁸ The Law Dictionary, Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed, (<https://thelawdictionary.org/adopted-child/>, accessed on March 4/2018).

Adoptive parents: parents of whatever nationality who have lawfully adopted a child.⁴⁹

Adoption agencies: organizations that screen prospective adoptive parents and that place children with approved adoptive families.⁵⁰

Alternative childcare: an arrangement, formal or informal, temporary or permanent, for a child who is living away from his or her parents.⁵¹

Domestic adoption (DA): an adoption wherein the adoptive parents and the adopted child are of the same nationality and have the same country of residence, i.e. Ethiopia.⁵²

Intercountry adoption (ICA): an adoption that involves a change in the child's habitual country of residence, whatever the nationality of the adopting parents. It also includes an adoption that involves parents of a nationality other than that of the child, whether or not they reside and continue to reside in the child's habitual country of residence.⁵³

Orphans and Vulnerable Children (OVC): children whose survival and development are jeopardized by certain circumstances and are therefore in need of alternative child care services.⁵⁴

1.2. Methodology and Methods

The nature of the study is a mix of both doctrinal and non-doctrinal legal research. The researcher's interest is to assess the ban on ICA by the Federal government of Ethiopia and predict implications of the ban on the right to alternative care in Addis Ababa and Dire Dawa. Accordingly, the policy and law that excluded ICA along with its interpretation is addressed on doctrinal part of the research through document review. Further, methods from other disciplines to generate empirical data that answer the research questions have been employed in order to explore the problem and predict the implications of the ban on the right to alternative care.

⁴⁹ Christine Adamec and Laurie C. Miller, M.D., "The Encyclopedia of Adoption" (Third Edition), PP 25.

⁵⁰ Ibid, pp 14.

⁵¹ Supra note 16.

⁵² Supra note 44, Section 1, 6.15, pp 10.

⁵³ Ibid, Section 1, 6.22, pp 11.

⁵⁴ Ibid, Section 1, 6.25.

1.2.1. Research Design

Since the study aims at exploring the implications of the law banning ICA on the right to alternative care, qualitative research design is adopted in order to gather information about alternative care options in Addis Ababa and Dire Dawa and the implications of the ban on the right to alternative care.

The study employed exploratory and predictive qualitative research design approaches. Because the exclusion of ICA is a recent phenomenon its implications on the right to alternative care are not yet studied. Therefore, the study first explores the problem and provides a better understanding of the problem. Then, it predicts the possible implications of the reform on adoption law on the existing support from alternative care for the OVC.

1.2.2. Sources of Data

Much emphasis was given for analysis of a range of literature which includes both primary and secondary sources pertinent to the issue under study. On the former, the study addressed the issue under study in light of conventions and charters, principles, guidelines, national laws, policies, and other legal documents pertaining to children's right to alternative care. Further, research outputs of various international and national organizations had been analyzed. Considerable reliance on secondary sources including books and academic articles, research outputs and impact assessment reports had also been made. Various internet sites were further consulted for relevant data and information.

In addition, the study had generated data from an interview. Accordingly, the study made use of key informants from representatives of governmental institutions and NGOs which work on child rights issues.

Further, a comparative study had been conducted in order to understand the experiences of Russia and Romania which had banned ICA along with the reasons for and implications of their ban. Russia and Romania are selected because they had comparable experience and rank on sending children through ICA with Ethiopia. Further, the experience of Uganda is studied as an example of a good practice as it is one instance whereby solving problems in a given process should not necessarily follow banning that process.

1.2.3. Sampling Techniques

The nature of the study, i.e. qualitative research warrants employing non-probability sampling technique.⁵⁵ Therefore, snowball sampling which requires identifying people with relevant characteristics, gather data from these participants and asking the same people for names of other people who are of similar/different characteristics had been used to conduct the research.⁵⁶ Accordingly, the researcher identified people who work in child rights issues in general and on alternative care for children in particular and asked those people to lead to other people who relate to the issue under study. The researcher did not determine the sample size in advance, and the sample size was determined as the research proceeds.⁵⁷ Accordingly, two authorities from the MoWCYA, two officers from former adoption agency that facilitate ICA, i.e. Nuovi Orizzonti Per Vivere L'Adozione (NOVA) and one officer from ACPF were selected as key informants.

1.2.4. Methods of Data Collection/Instruments

Data was collected using key informant interview guides, recorder, and thorough review of documents that include primary and secondary data. The other source of primary data was key informant interviews with authorities who participated in the preparation of the National Children's Policy i.e. in MoWCYA, and other stakeholders like the African Child Policy Forum (ACPF) and non-governmental organizations (NGOs) that used to work on children's right to alternative care, particularly on ICA. These key informants were selected using snowball sampling.

Key informant interview with open-ended questions had been employed to get in-depth information regarding the issue under study. Further, the interview was a semi-structured interview, i.e. the researcher had a number of predetermined questions and had the freedom to probe far beyond the answers to the standardized questions. Therefore, as the nature of the research necessitated, key informant interview and document review had been employed as a tool to gather data.

1.2.5. Methods of Data Analysis

The researcher listened to all the recorded data of all the participant's responses and read all the notes taken during key informant interviews. For the purpose of accuracy, the researcher listened

⁵⁵ Yitayew Alemayehu and Wondemagegn Tadesse, "Human Rights Research: A practical guidebook on Methodology and Methods", *Center for Human Rights, Addis Ababa University*, (2013), pp 121.

⁵⁶ Ibid, pp 132.

⁵⁷ Ibid, pp 130.

to recorded information several times. Then, the researcher transcribed the data that had been collected from the interviews to get a general sense, i.e. reduced data. Then, the reduced data were displayed in the form of summaries or proportions of various statements, phrases, and terms. After a repeated reading, the data collected from all key informants were categorized into different themes based on the research questions of the study. The content of the data that had been collected from key informant interview are compared and analyzed with the content of the data from document review and vice versa. Then, verifiable conclusions are made as the analysis proceeds.⁵⁸

1.2.6. Trustworthiness and Data Quality Assurance

The researcher used different methods to secure trustworthiness of the research starting from data collection to data analysis stage. To eliminate missing out on important ideas while simultaneously taking notes during the interviews, a voice recorder had been employed.

To avoid personal bias, the researcher refrained from imposing one's ideas on all key informants during the interview by giving them the freedom to give the answers to the questions without any guidance. The purpose of the research was communicated clearly before the key informant interview was conducted. The researcher had repeatedly listened to the audio record to make sure that the informant's idea is put in place correctly. Again, during data analysis stage issues were only discussed on the basis of the data from key informants and document review. The content of the data that had been collected from key informant interview are compared and analyzed with the content of the data from document review and vice versa.

During the data collection process, necessary measures had been taken to ensure validity and reliability of the interview guides. The interview guides have explained what it intended to measure and the questions were adequate to be representative of the phenomenon. Emphasis had been given to ensure the content validity of the interview guide, documents for literature reviews and key informants.

1.2.7. Ethical Considerations

The research is conducted following the ethical requirements of research. The principle of informed consent, as well as participant well-being, was given a priority. The researcher prepared a consent form to be signed before the data collection. This helped to ensure that the

⁵⁸ Ibid, pp 146.

key informants understand and make their choice freely to participate in the study. The interviews had been conducted after the researcher clearly explained the purpose of the interview and assured the participants that their views would exclusively be used for academic purpose.

1.2.8. Organization of the study

The study is organized into four chapters. The first chapter deals with the general background of the study, statement of the problem, research questions, and objectives of the study, significance, scope, limitations and research methodologies. Chapter two deals with the review of related literature on concepts, emergence, classification, advantages and disadvantages, and convention, charter, and guideline on ICA. On the empirical part, the experience of Russia, Romania and, Uganda is included. Chapter three deals with data description and analysis which explains facts, advantages, and challenges on the ICA in the Ethiopian context. The final chapter presents conclusions and recommendations for proper intervention and policy to solve problems identified in the research.

Chapter Two

2.1. Literature Review

2.1.1. International Legal Framework for Intercountry Adoption

„Alternative care“, as defined already, is an arrangement, formal or informal, temporary or permanent, for a child who is living away from his or her parents.⁵⁹ Alternative care is intended to provide protection, well-being, and stability for the OVC.⁶⁰ The arrangement of alternative care has to ensure that the child can exercise all his/her rights, including access to education, health, and other services, the right to identity, freedom of religion or belief, language and protection of property and inheritance rights.⁶¹ Further, the arrangement should not separate children from their siblings unless there is a clear risk of abuse or other strong reason.⁶²

Different factors might necessitate the need to place children in an alternative care. Some of these are the absence of biological parents, their unwillingness and/or inability to take care their children due to illness, mental health issues, substance abuse or other difficulties.⁶³ The other factors are physical, sexual, or psychological abuse, neglect, socioeconomic challenges, and migration.⁶⁴

The United Nations Convention on the Rights of the Child (CRC) was adopted by the United Nations (UN) General Assembly in 1989 and entered in to force in 1990. It is the most universally accepted human rights instrument in history.⁶⁵ Its counterpart at a regional level is African Charter on the Rights and Welfare of Children (ACRWC). It was adopted in July 1990 and entered in to force in 1999. The CRC defines a child as „every human being below the age of eighteen years unless, under the law applicable to the child, a majority is attained earlier.“⁶⁶ ACRWC on its part defines a child as „every human being below the age of 18 years.“⁶⁷ The former makes room for exceptional cases where the child might attain a majority on the basis of

⁵⁹ Supra note 16, pp 9.

⁶⁰ Ibid, pp 10.

⁶¹ Ibid.

⁶² Ibid.

⁶³ DajaWenke, „Family Support and Alternative Care, the Baltic Sea States Regional Report“ *Council of the Baltic Sea States Secretariat Stockholm, Sweden* (2015), pp 15.

⁶⁴ Ibid.

⁶⁵ „A world of difference, 25 CRC achievements“, UNICEF, (https://www.unicef.org/crc/index_73549.html), accessed on April 12/2018).

⁶⁶ CRC, Article 1.

⁶⁷ ACRWC, Article 2.

national laws, and the later does not recognize any exception whatsoever for the child to attain majority while being below the age of eighteen years. Both instruments emphasized the importance of children growing up in the family environment for the full and harmonious development. Such emphasis is demonstrated by the stipulation of the same as one of the reasons for the adoption of those instruments.⁶⁸ Accordingly, children's right to be cared for and live with parents and to not be separated from them and the right to parental care and protection are provided.⁶⁹

In addition, the fact that such parental care may not always be available for the child for different reasons and the need to provide an alternative care when the best interest of the child dictates so is stipulated under the CRC and ACRWC.⁷⁰ These instruments do not expressly recognize the „right to alternative care“; rather such right is impliedly recognized under the OVC's entitlement to special protection and assistance from the state and the obligation of states to provide alternative care support for children deprived of family environment.⁷¹ The recognition of the right covers temporary or permanent deprivation and includes categories of children who have „lost“ or become „separated“ from parents for different reasons.⁷² Both instruments refer to the deprivation of „family environment“.⁷³ This implies that being cared for and live in a family environment is not necessarily confined to the availability and ability of parents to care for the children. Thus, it is possible for the child to live and be cared for by other members of the family in the absence or inability of his/her parents to assume such responsibility.

As to the differences between the CRC and the ACRWC, the later introduced trafficking as one of the forms of prohibitions that ICA should not be an instrument for.⁷⁴ It also introduced an obligation of states to establish a system to monitor the well-being of the adopted child.⁷⁵

The UN General Assembly provides the guidelines for the Alternative care of Children on the basis of which such care has to be provided.⁷⁶ These guidelines provide for the required quality

⁶⁸ CRC, Preamble; ACRWC, Preamble.

⁶⁹ CRC, Article 7, 9; ACRWC, Article 19.

⁷⁰ CRC, Article 20; ACRWC, Article 25 (1).

⁷¹ Supra note 18.

⁷² Supra note 17, pp 341.

⁷³ Ibid.

⁷⁴ ACRWC, Article 24 (d).

⁷⁵ Ibid (f).

of different alternative care without defining what „alternative care“ means. However, it defines „children deprived of parental care“ as „all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances“.⁷⁷ The guidelines aim at enhancing „the implementation of the CRC and other international instruments regarding the protection, and well-being of children who are deprived of parental care and are at the risk of being so“.⁷⁸ The guidelines refer „parents“ as primary families of a child, and the right to alternative care commences when such parental care is deprived. Such deprivation of „parental care“ in the Guideline and deprivation of „family care“ under the CRC and ACRWC has implications on when the right to alternative care is activated.⁷⁹

The guidelines for providing alternative care arise from two principles namely the „necessity principle“ and the „suitability principle“.⁸⁰ The former refers to an instance where the care is genuinely needed, and the latter is the availability of the most appropriate care for a child concerned once the necessity is ascertained.⁸¹ These principles imply the need to exhaust all means to keep the child with the original family without compromising the rights of the child while staying in that environment.⁸²

The above-discussed instruments recognize adoption, foster care, institutional placement, Islamic Kafalah and kinship care as alternative care mechanisms.⁸³ The UN Guidelines further recognize formal and informal care on the basis of the arrangement of the alternative care. The former is when the given alternative care is arranged at the initiative and by the power of competent

⁷⁶ General Assembly, Resolution A/RES/64/14223 Feb 2010, Guidelines for the Alternative Care of Children.

⁷⁷ See para 29 (a) of the UN Guidelines. This includes children without parental care who are outside their country of habitual residence or who are victims of emergency situations.

⁷⁸ See para 1 of the UN Guidelines: 'The family is the fundamental group of society, and the natural environment for the growth, well-being, and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members.' See also para 4 which provides that children with 'inadequate or no parental care' are at the risk of being denied 'a supportive, protective and caring environment that promotes their full potential'.

⁷⁹ See supra note 17, pp 345.

⁸⁰ Ibid, pp 347.

⁸¹ Supra note 17.

⁸² Ibid.

⁸³ Ibid, pp 348.

administrative body or judicial authority while the latter stands for the care arranged privately.⁸⁴ For ICA, nearly all adoptions are managed by adoption agencies, i.e. formal care.⁸⁵

ICA, as defined already, is an adoption that involves a change in the child's habitual country of residence, whatever the nationality of the adopting parents. It also includes an adoption that involves parents of a nationality other than that of the child, whether or not they reside and continue to reside in the child's habitual country of residence.⁸⁶

ICA began at the end of World War II when European children, particularly from Germany and Greece were adopted by American families.⁸⁷ The second wave of large-scale ICA arose in the 1950s following the Korean War.⁸⁸ Thus, large-scale ICA had resulted from the civil or international war as the humanitarian response. In addition, natural events are the other causes for large-scale ICA.⁸⁹ This assertion is best demonstrated in Haiti following the earthquake in 2010 which resulted in the surge of children sent abroad for adoption.⁹⁰

The other instrument that specifically addresses the issue of ICA is the Hague Convention.⁹¹ It states that „for the full and harmonious development of his or her personality, a child should grow up in a family environment, in an atmosphere of happiness, love, and understanding“.⁹² It also stipulates „ICA may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin“.⁹³

The Hague Convention, the CRC, and ACRWC take the same stand on prioritizing DA over ICA.⁹⁴ However, the CRC and ACRWC prefer in-country foster care and in-country institutional care over ICA by stipulating that ICA should only be employed if the child cannot in any suitable manner be cared for in his country of origin, i.e. as a measure of last resort.⁹⁵ In contrast, the Hague convention emphasizes permanency of the care and therefore prioritizes ICA over in-

⁸⁴ Supra note 19, (b) (i) and (ii).

⁸⁵ Supra note 49, pp 147.

⁸⁶ Supra note 44, Section 1, 6.22, pp 11.

⁸⁷ Hilferty, F, and Katz, I, "Literature review on factors influencing intercountry adoption rates", *Sydney: Social Policy Research Centre, UNSW Australia*, (2016)pp16.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993.

⁹² Hague Convention, Preamble.

⁹³ Ibid.

⁹⁴ ACRWC, Article 24 (b); CRC, Article 21 (b); Hague Convention, Preamble.

⁹⁵ CRC, Article 21 (b); ACRWC, Article 24 (b).

country foster care and in-country institutional care.⁹⁶ Such emphasis of the Hague convention sets out the following hierarchy of options:⁹⁷

- Family-based solutions are generally preferable to institutional placements;
- Permanent solutions are preferable to temporary placements;
- Domestic solutions are preferable to alternatives in other countries.⁹⁸

ICA fulfills the first two principles, and in-country institutional care fulfills only the third principle.⁹⁹ Further, ICA has to be critically weighted against in-country foster care which fulfills the first and the third principles. Therefore, the hierarchy of the above principles warrant priority be given to ICA over in-country foster care and in-country institutional care.¹⁰⁰

2.1.2. Factors that necessitate Intercountry Adoption

Factors that necessitate ICA are different depending on whether the state is a sending or receiving state. Accordingly, poverty, political factors including conflicts/wars, disease, social and cultural factors are the root causes of parents in developing countries making their children available for adoption.¹⁰¹ In the past, the prominent sending countries include Guatemala, China, central and eastern European countries like Romania, Ukraine along with Russia, Vietnam and South Korea.¹⁰² However, some of these countries have since suspended, shut down or limited intercountry adoption which has become one of the factors for Africa becoming the new frontier of intercountry adoption.¹⁰³

For instance, on political factors, Romania can be an example where the previous political order which incorporated the Ceausescu's reproductive policies that forced women at the age of 45 and younger to have at least 4 children coupled with the lowest standard of living in Europe forced many families to place one or more of their children in institutional care.¹⁰⁴ One of the instances

⁹⁶ Supra note 91, Preamble.

⁹⁷ UNICEF, Innocenti Digest, Intercountry Adoption, pp 5, (<https://www.unicef-irc.org/publications/pdf/digest4e.pdf>, accessed on April 21/2018).

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Supra note 87, pp 15.

¹⁰² ACPF, "Africa: The New Frontier for Intercountry Adoption", Addis Ababa: The African Child Policy Forum, 2012, pp 6.

¹⁰³ Ibid

¹⁰⁴ Supra note 87, pp 15.

after the fall of Ceausescu regime was children estimated to be about 10,000 left Romania through ICA.¹⁰⁵

On social and cultural factors, stigmas towards women who give birth without wedlock, towards couples who adopt and the greater value given to having sons increase the tendency of giving away girls through ICA.¹⁰⁶

One of the factors that cause ICA from the perspective of receiving countries is the reduction of children available for DA in those countries due to improved social and economic conditions.¹⁰⁷

The improvements include benefits and services for single parents and increased availability of contraception and abortion, and increased tendency of single mothers to keep their children.¹⁰⁸

Infertility, the desire of same-sex couples, and single persons to have children are the other factors that result in ICA in receiving countries.¹⁰⁹ Canada, Mexico United Kingdom and the United States are categorized under the receiving countries.¹¹⁰

2.1.3. Arguments for and against Intercountry Adoption

Supporters of ICA assert that it is the most viable solution for the disparity of the number of children without families and number of families without children.¹¹¹ As opposed to other alternative care mechanisms, adoption provides a child with "loving, permanent home that is necessary to meet that child's physical and emotional needs".¹¹² However, the possibility of children in sending countries being adopted at the domestic level is not a very feasible option.¹¹³ Here, international adoption saves lives metaphorically and figuratively speaking.¹¹⁴ Even if there is a concern on resettling a child from one country and culture to another in relation to the best interest of that child, the bottom line is that adoptive families are able to provide that child with love, support and the adequate standard of living.¹¹⁵

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, pp 16.

¹⁰⁷ Ibid, pp 19.

¹⁰⁸ Ibid.

¹⁰⁹ Bridget M. Hubing, "International Child Adoptions: Who Should Decide What Is in the Best Interests of the Family", *Notre Dame J.L. Ethics & Pub, Pol'y*, (2001) pp655.

¹¹⁰ Annual Report on Intercountry Adoptions Narrative, Bureau of Consular Affairs, U.S. Department of State, pp 6, (https://travel.state.gov/content/dam/aa/pdfs/2014_Annual_Report_on_Intercountry_Adoptions_Narrative.pdf, accessed on April 21/2018).

¹¹¹ Supra note 109, pp 660.

¹¹² Ibid, pp 663.

¹¹³ Ibid.

¹¹⁴ Ibid, pp 665.

¹¹⁵ Ibid.

Financial ground is the other base for argument against ICA.¹¹⁶ Here, ICA makes a room for “black market” of baby selling due to high demand for children and the process of ICA being a source of improper financial gain for those who facilitate the process.¹¹⁷ Further, at the national level, it relates to the new form of “colonialism” or “imperialism” that involves taking away of children from the poor developing nations to the rich, industrialized nations of the world.¹¹⁸ As per these arguments, international adoption highly compromises the best interest of the child and the family in sending countries. ICA is also criticized to not fully compensate for the love and care the children have missed in their natural homes which in turn exposes those children to identity crisis and other problems that will affect them psychologically and socially.¹¹⁹ It further exposes children to different cultural and racial environment than their country of origin.¹²⁰

2.1.4. Classification of Adoption

Adoption can be classified as domestic or intercountry on the basis of the nationality of the adoptive parents and the child or the country of residence the adoptive parents and the child.¹²¹ Accordingly, DA, as defined already is an adoption wherein the adoptive parents and the adopted child are of the same nationality and have the same country of residence.¹²² ICA is an adoption that involves a change in the child’s habitual country of residence, whatever the nationality of the adopting parents. It also includes an adoption that involves parents of a nationality other than that of the child, whether or not they reside and continue to reside in the child’s habitual country of residence, as defined already.¹²³

Adoption can also be classified as open and closed on the basis of the level of communication between the biological parents and adoptive parents.¹²⁴ Accordingly, open adoption refers to „adoptive placement in which the birth mother and sometimes the birth father as well exchange specific identifying information with the adopting parents“.¹²⁵ Information includes addresses,

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Supra note 44, pp 7.

¹²⁰ Supra note 17, pp 491.

¹²¹ Supra note 44, Section 1, 6.15, pp 10 and Section 1, 6.22, pp 11.

¹²² Supra note 44, Section 1, 6.15, pp 10.

¹²³ Ibid, Section 1, 6.22, pp 11.

¹²⁴ Supra note 49, pp 199.

¹²⁵ Ibid.

and other data may be exchanged so that ongoing contact between the adoptive and birth families is possible.¹²⁶ The frequency of the communications is to be determined by the parties involved.¹²⁷ Closed (confidential) adoption, on the other hand, refers to placement „in which identifying information is not shared between the adoptive parents and the birthparents“, i.e. there will be no communications between the parties.¹²⁸ There is a third category named semi-open which shows some level of openness such as meeting between the pregnant woman and the prospective parents, but without sharing of their last names.¹²⁹ ICAs are rarely open adoption.¹³⁰

Different groups of prospective parents prefer ICA to domestic adoption as they perceive it to be faster and more likely to succeed than DA.¹³¹ In addition, they negatively view the trend of „open adoption“ that is more likely to occur in DA.¹³²

2.1.5. Problems faced by Children adopted through Intercountry Adoption

Even though it is not specific to ICA, one of the problems is attachment disorder.¹³³ Attachment disorder refers to psychological disorder present in some infants and older children who have difficulty relating to or accepting a parental figure as the primary caregiver.¹³⁴ The problem is more common in children who experience difficult circumstances in early life; most children with attachment disorders have been previously neglected and/or abused, and many have had multiple caregivers and placements.¹³⁵ Some indicators of attachment disorders include self-destructive behavior, sleep disorders, stealing from parents, intense rages (particularly toward female caregivers), inappropriate emotional responses, such as laughing at another’s pain, above or below average tolerance to pain, and poor personal hygiene.¹³⁶ The issues of attachment are more problematic in adopting a child with special needs.¹³⁷ As adoptive parents attempt to attach to a child whose attachment ability is impaired by developmental delays, the attachment will

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid, pp 200.

¹³¹ Supra note 87, pp 20.

¹³² Ibid.

¹³³ Supra note 49, pp 42.

¹³⁴ Ibid, pp 42.

¹³⁵ Ibid.

¹³⁶ Ibid, pp 45.

¹³⁷ Ibid, pp 44.

either be non-existent, distorted or focused on negative behaviors.¹³⁸ The best preventive measure against attachment disorder is for children needing families to be placed with loving adoptive families at as young an age as is possible.¹³⁹ If that is not possible, children should be placed with foster families with whom it is likely they may stay.¹⁴⁰ If an institutional setting is needed, then it should be staffed with sufficient and consistent caregivers such that infants and small children can be given individual attention.¹⁴¹

The other problem is related to eating disorder.¹⁴² Some children adopted from other countries may be very resistant to trying new foods, possibly because they are used to the extremely bland tastes and textures of orphanage food.¹⁴³ The eating disorder may also relate to domestic adoption or foster care, especially in countries with a heterogeneous mixture. For instance, Ethiopia is a place of several ethno-linguistic groups endowed with different cultures.¹⁴⁴ Further, there are about 85 different ethnic groups living in different regions of the country.¹⁴⁵ Such diversity of ethnicity and culture can be manifested in the difference of the food from one ethnicity or culture to the other, in addition to the different taste of food the children are used to in orphanages. Therefore, it is possible for a child who is adopted through DA across ethnic group or transculturally to face eating disorder. In such cases, it is best to introduce new foods slowly and not press the child to try many different types of foods at once.¹⁴⁶

Growth delay, i.e. delay or deficiency in the growth of the child, referring to height, weight, and/or head circumference is another problem observed on orphans adopted through ICA.¹⁴⁷ Growth delays are most commonly due to orphanage living, and the causes include „insufficient food, improper feeding techniques such as bottle propping, lack of nurturing physical contact,

¹³⁸ Ibid.

¹³⁹ Ibid, pp 45.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Supra note 49, pp 91.

¹⁴³ Ibid.

¹⁴⁴ Kibrework Lemma, “Discourses of Ethno-linguistic Diversity; the case of Ethiopia”, *International Conference on Management, Economics and Social Sciences*, (2011).

¹⁴⁵ Ibid.

¹⁴⁶ Supra note 49, pp 91.

¹⁴⁷ Supra note 49, pp 123.

depression leading to poor appetite or poor absorption and use of calories, or almost any concurrent medical problem¹⁴⁸.

The other problem is language delay which refers to speaking words or phrases later than is expected for the child's chronological age which is related to the need to learn to speak a new language.¹⁴⁹ In addition, delays in the child's birth language are exceedingly common which hinder mastery of the new language.¹⁵⁰ Some children adopted in the United States also have language delays due to developmental disabilities, parental exposures, and other problems, such as child abuse or neglect.¹⁵¹ Children adopted through ICA also often experience environmental deprivation that may lead to generalized developmental delays and compound their problem of language delays.¹⁵² Language delay can also prevail on domestic adoption or in-country foster care in heterogeneous society. For instance, there are about eighty-five languages in Ethiopia.¹⁵³ Thus, a child who is adopted across a region or ethnicity can possibly face language delay. Here, adoptive parents should seek assistance from their pediatrician as well as from school authorities and may benefit from early intervention program for pre-school age adopted child.¹⁵⁴

The other problem is sleeping disorder which refers to difficulty in getting to sleep and/or staying asleep including difficulty with bad dreams.¹⁵⁵ Painful experiences of separation and loss often manifest as sleep disturbances.¹⁵⁶ Some adopted children might find it difficult to sleep alone.¹⁵⁷ Since this problem is caused by the previous experiences of the children, it can also be observed on children adopted through DA or in-country foster care. Such problem can be managed through adoptive parents co-sleeping for the first few weeks or months after adoption, repeated expressions of love and provision of needed attention and security.¹⁵⁸

Medical problems include short-term and long-range medical and developmental problems, including infectious diseases, developmental delays, nutritional deficiencies and psychiatric and

¹⁴⁸ Ibid.

¹⁴⁹ Ibid, pp 178.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Supra note 144.

¹⁵⁴ Supra note 49, pp 178.

¹⁵⁵ Supra note 49, pp 64.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

behavioral problems.¹⁵⁹ Medical problems include the growth delay of the children, as discussed already. These problems are attributable to the previous exposures of the children and are the reflections of the living condition they had in their home countries.¹⁶⁰ Some of the problems can be managed through pediatric interventions, and love and support from the adoptive family.¹⁶¹

2.1.6. Orphans with Cross-sectional Problems

Childhood is the most crucial and formative period of human life.¹⁶² A healthy childhood is essential for future growth and development. It is greatly influenced by parent, family, society, and environment which formulate attitude, behavior, manners and emotions.¹⁶³ Millions of orphans and abandoned children across the world are deprived of the necessary environment for the healthy childhood.¹⁶⁴ Such deprivation might also be accompanied by other problems, such as disability, developmental delay, nutritional deficiencies and severe medical problems of those children.¹⁶⁵

The number of children available for adoption in the country of origins is declining.¹⁶⁶ However, on the issue of children with special needs, many countries struggle to provide resource necessary to fulfill the needs of those children.¹⁶⁷ As a result, those children are prioritized for ICA.¹⁶⁸ Further, a number of sending countries such as Brazil, Latvia, Lithuania, and Poland only send older children or those with medical or behavioral needs for ICA.¹⁶⁹ The willingness of prospective adoptive parents to adopt those children help to sustain ICA as the number of healthy babies available for adoption declines globally.¹⁷⁰ This makes ICA the ideal solution to entitle the OVC with cross-sectional problems with a chance to get family-based alternative care. Further, they can be provided with special treatment specific to their needs which they might not

¹⁵⁹ Ibid, pp 189.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Dr. SourajitRoutray, Dr. Bijay Kumar Meher, Dr. RadhaTripathy, Dr.SailajaNandanParida, Dr. NijwmMahilary, Dr. DeeptiDamayantyPradhan, "Growth and Development among Children Living In Orphanages of Odisha, an Eastern Indian State", *IOSR Journal of Dental and Medical Sciences (IOSR-JDMS)*, Volume 14, Issue 4 Ver. I (Apr. 2015), PP 38.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Supra note 49, pp 189.

¹⁶⁶ Supra note 87, pp 20.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

get in their countries due to the social and economic realities in sending countries. The solutions to overcome the medical problems of the adopted child, as discussed already, can be applied to children with cross-sectional problems.

2.1.7. Issues on Transracial Adoption

Transracial adoption refers to any adoption across a racial or ethnic line.¹⁷¹ Here, it should be noted that transracial adoption might exist in DA, especially in countries with racial or ethnic diversities such as Ethiopia. For instance, it is possible for a black child in U.S.A to be adopted by white families and vice versa through DA. ICA may also result in transracial and/or intercultural adoption. Arguments in favor of such type of adoption assert that children who are adopted by families of different races function well in the society and most are emotionally healthy compared to their peers.¹⁷² They are also aware of their racial heritage, have positive self-esteem and the good outlook for the future.¹⁷³ The counter-argument is that the child will feel different and unaccepted and will find it difficult to relate to their racial community.¹⁷⁴ However, during adolescence and later as adults transracially adopted individuals were aware of and comfortable with their racial identity.¹⁷⁵ In addition, exposure to racial dynamism may, however, be good for those children, families and the community as a whole as they will learn to appreciate one another's racial and cultural heritage.¹⁷⁶ It may also promote common humanity.¹⁷⁷ Finally, due to heterogeneity among the interracial adoptive parents and particular way/ways of racial identification was not associated with better or worse psychological adjustment.¹⁷⁸ In addition, considering the racial difference between the adoptive family and the adopted child as a primary source of potentials problems ignores other relevant factors such as parenting, reasons for adopting, hardiness, ego strength, and trauma.¹⁷⁹

There will be undeniable curiosity about one's own birthplace, genealogical ancestors, and identities of biological parents by the foreign adopted child. The absence of knowledge to these

¹⁷¹ Supra note 49, pp 288.

¹⁷² Ibid, pp 290.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Supra note 17, pp 491.

¹⁷⁷ Ibid.

¹⁷⁸ Supra note 49, pp 290.

¹⁷⁹ Ibid, pp 291.

facts might cause feelings of insecurity, self-doubt and may result in psychological distress.¹⁸⁰ However, experts generally agree that stable and continuous relationship with parents is important to healthy child development.¹⁸¹ Therefore, when the issue goes down to a child being placed transracially either locally or through ICA and remaining in institutional care for an extended period of time or being shuttled from one foster family to the other, the best interest of the child warrants preference to ICA.¹⁸² In addition, studies indicate that transracially adopted children have a strong sense of racial identity and pride at least equal to children raised within their race, and have better inter-racial relationships and are more comfortable in racially integrated settings.¹⁸³ A study indicates that there may not be any real connection between positive self-esteem and being adopted in-racially.¹⁸⁴

2.2. Lessons from the World

2.2.1. Dima Yakovlev Law (Russian Federation)

On December 28, 2012, the Russian Federation, a member of the Hague convention on intercountry adoption¹⁸⁵, adopted a law “On Sanctions against Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation.”¹⁸⁶ The law among other things prohibits American citizens from adopting Russian children and any activity of organizations in relation to selection and placement of Russian children for adoption in the U.S.A.¹⁸⁷

In 2011, U.S.A and Russia had signed an agreement regarding the co-operation in the adoption of children, i.e. “Adoption Agreement.”¹⁸⁸ The agreement was intended to promote safe,

¹⁸⁰ Mark Eade, “Inter-Country Adoption: International, National and Cultural Concerns”, *Sask. L. Rev.*, (1993) pp 381.

¹⁸¹ *Ibid*, pp 385.

¹⁸² *Ibid*.

¹⁸³ *Ibid*, pp 386.

¹⁸⁴ *Ibid*.

¹⁸⁵ Hague Convention on ICA, <https://www.hcch.net/en/states/hcch-members>, accessed on May 7/2018.

¹⁸⁶ Measures against Persons involved in the Abuse of Fundamental Human Rights and Freedoms including those of Russian citizens, Dec 26, 2012.

¹⁸⁷ *Ibid*, Article 4.

¹⁸⁸ Bilateral Adoption Agreement between the United States and Russia, 2012.

transparent and ethical adoption process for all parties involved in ICA between Russia and U.S.A.¹⁸⁹ The ban on ICA resulted in the formal termination of the agreement.¹⁹⁰

In 2012, USA had enacted the “Magnitsky Act” which aimed to impose sanctions on persons responsible for the detention, abuse, or death of Sergei Magnitsky, for alleged conspiracy to defraud the Russian Federation of taxes on corporate profits through fraudulent transactions and lawsuits against Hermitage, for other gross violation of human rights in the Russian Federation, and for other purposes.¹⁹¹ Russian investigators closed the criminal case of the death of Hermitage Capital’s lawyer Sergei Magnitsky due to lack of criminal evidence.¹⁹² On July 11, 2013, Moscow’s Tverskoy Court posthumously convicted Sergei Magnitsky of tax evasion and closed the case due to his death.¹⁹³ Therefore, the U.S. adopted the Magnitsky Act which among other things denied visas and other privileges for Russian officials who violate human rights and involved in acts of significant corruption.¹⁹⁴

Then, Russia adopted the DimaYakovlev law which is named after the two-year-old Russian boy, who suffocated to death after his adoptive American father left him locked in a car in the sun and in memory of all Russian children who died or were injured at the hands of their adoptive parents in the United States.¹⁹⁵ As required by the law, 60 American citizens were banned from entering Russia. The list includes judges, agents and members of the security services, prosecutors involved in the trial of Russian citizens Viktor Bout and Konstantin Yaroshenko, members of the U.S.A Congress, who sponsored the Magnitsky Act, and Americans who abused the rights of adopted Russian children.¹⁹⁶

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, Article 4 (2).

¹⁹¹ Sergei Magnitsky Rule of Law Accountability Act of 2012, U.S.A, Preamble.

¹⁹² Sputnik International, 6/12/2014, “Two years of Magnitsky Act: Facts and Details”, <https://sputniknews.com/world/201412061015567488/>

¹⁹³ Ibid.

¹⁹⁴ Supra note 191, Section 5.

¹⁹⁵ Sputnik International, 21/12/2014, “DimaYakovlev Law in facts” <https://sputniknews.com/russia/201412211016090563/>

¹⁹⁶ Ibid.

The Dima Yakovlev law is alleged to have a political motive of responding to the “Magnitsky Act” of U.S.A.¹⁹⁷ It is criticized for preventing many of the close to 100,000 orphans, living in orphanages, from finding a real family.¹⁹⁸

In 2015, there were approximately 128,000 orphans eligible for adoption in Russia but only about 18,000 domestic prospective families were willing to adopt.¹⁹⁹ For those who are not adopted domestically, i.e. 110,000 orphans, ICA was the only way to have a family-based alternative care.²⁰⁰ This is attributable to the shortage of available and willing Russian adoptive families and, to the dire economic conditions of the people.²⁰¹ American citizens had adopted about sixty thousand Russia children in twenty years until the law banning ICA was enacted.²⁰² After 2005, the number of Russian children adopted by Americans has decreased with every year.²⁰³ The decline was not due to fewer orphans in the country nor waning demand from prospective parents, rather due to rising regulations and growing sentiment in Russia.²⁰⁴ Such decline on the number, however, did not change the fact that Russia ranked the third place for adoption by Americans, after China and Ethiopia.²⁰⁵

Proponents of the ban assert that it is necessary for Russia to protect its children from uncontrolled and unsupervised adoptions in the U.S.A that resulted in various incidents of deaths and neglect of Russian orphans by American parents.²⁰⁶ The death of nineteen children out of the sixty thousand adopted by the U.S. citizens for twenty years prior to the ban constitutes 0.03% of death rate. Statistically, in Russia over the same period, there have been about 1,220 deaths out

¹⁹⁷ Cynthia Hawkins DeBose and Ekaterina DeAngelo, “The New Cold War: Russia’s Ban on Adoptions by U.S. Citizens”, *Journal of the American Academy of Matrimonial Lawyers*, Vol. 28, (2015), pp 69.

¹⁹⁸ Supra note 195.

¹⁹⁹ Adoption Today, Richard Fischer(ed) and Kim Phagan-Hansel (ed), Louis & Company Publishing,2013, Vol 15, No 8, pp 12, (<https://www.hottell.com/Articles/Adoption-TODAY-April-2013.pdf>, accessed on April 29/2018)..

²⁰⁰ Supra note 197, pp 52.

²⁰¹ Supra note 199.

²⁰² Wm. Robert Johnston (compiled) “Historical International Adoption Statistics, United States and World”,(2017, <http://www.johnstonsarchive.net/policy/adoptionstatsintl.html> accessed on April 16, 2018).

²⁰³ Supra note 197, pp 58.

²⁰⁴ Kevin Voigt and Sophie Brown, “International Adoptions in Decline as number of Orphans Grows”, *CNN*, (2013), (<http://edition.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html>, accessed on April 15/2018).

²⁰⁵ Peter Selman, Key Tables for Intercountry Adoption: Receiving States 2003-2012; States of Origin 2003-2011, Newcastle University, UK, 2013, (<https://assets.hcch.net/upload/2013selmanstats33.pdf>, accessed on April15/2018).

²⁰⁶ Supra note 197, pp 66.

of more than 170,000 domestic adoptions, or a death rate of 0.7%.²⁰⁷ This would mean that Russia's overall child death rate from parents' abuse or neglect is more than two times higher its counterpart in the U.S.A.

Proponents of the ban claim that the ban would stimulate domestic adoption within Russia.²⁰⁸ The other justification is national pride which was verified by public opinion survey by the state-run Public Opinion Fund showing 56% of Russians supported the proposed adoption ban while 21% opposed the ban.²⁰⁹ Further, 75% of respondents said Russia should ban or place additional restrictions on other foreign adoptions.²¹⁰

Opponents of the ban claim that the ban would be most harmful to Russian orphans themselves, many of whom are disabled.²¹¹ Fewer Russian families are able to adopt due to an increasingly dire economic situation in Russia.²¹² This coupled with the ban would make children inevitably entombed in institutions.²¹³

Considering the economic positions of the Russians and the stigma attached to the orphans, especially the ones with special needs, ICA might be the last chance for the better lives of Russian orphans languishing in orphanages.²¹⁴ It is hard to claim that remaining in underfunded and underperforming Russian orphanage enhances the best interest of children better than being adopted in U.S.²¹⁵

The Dima Yakovlev law gives a lesson how the interest of children can be subject to a political bargain. It shows how the political relations of the receiving and sending countries can determine the fate of the OVC. Ultimately, the right of the OVC to family environment, especially those who cannot be placed at domestic alternatives, is conditional on whether their country has good relations with receiving states or not.

²⁰⁷ Michael Bahm, "10 Russian Myths about U.S. Adoptions", *The Moscow Times*, (2013).

²⁰⁸ Supra note 197, pp 66.

²⁰⁹ *CNN News*, Dec 29, 2012, "Russia's Putin signs anti-U.S. adoption bill", (<https://edition.cnn.com/2012/12/28/world/europe/russia-us-adoptions/index.html>, accessed on April 20/2018).

²¹⁰ Steve Gutterman and Alissa de Carbonnel, "Russian Parliament approves Ban on American Adoptions", *Reuters*, (2012).

²¹¹ Supra note 197, pp 67.

²¹² *Ibid.*

²¹³ *Ibid*, pp 69.

²¹⁴ *Ibid.*

²¹⁵ *Ibid*, pp 70.

A year later the adoption of the Dima Yakovlev law, on June 2013, the State Duma of Russian Federation passed an amendment that bans the adoption of Russian children by same-sex couples from abroad.²¹⁶ Additionally, the law prevents any unmarried individuals in countries that allow the marriage of same-sex couples from adopting children from Russia.²¹⁷ The law aimed at protecting Russian orphans from “dictated non-traditional sexual behavior” and rid them of “distresses of soul and stresses, which according to psychologists” research, are often experienced by children raised by same-sex parents.”²¹⁸ Such ban is criticized by the European Court of Human Rights to be discriminatory and to encourage homophobia.²¹⁹

This, however, is a good lesson to Ethiopia as a country of origin for children to be adopted through ICA should protect its orphans from placement within the family union/environment which is not legally recognized under its national laws. Pragmatic considerations to not recognize such types of unions locally should be extended to the laws of ICA so that those orphans will get equal protection with those who are adopted domestically or through ICA to families with similar arrangements with the country of origin.

2.2.2. Romania

Romania, a member of the Hague convention on ICA²²⁰, was one of the prominent sending countries of orphans through ICA.²²¹ This was attributable to a deliberate government policy: first, to boost the birth rate and, second, through strict laws against birth control during the Nicolae Ceausescu regime (prior to 1990), as discussed already. Ceausescu's campaign, thus, resulted in the unusual tradition of child abandonment in Romania.²²² The fall of Ceausescu in 1989 left an estimated 100,000 abandoned children living in appalling conditions throughout the

²¹⁶ Reuters, July 3, 2013, “Russia's Putin signs law banning gay adoptions”, (<https://www.reuters.com/article/us-russia-putin-gay-idUSBRE96210N20130703> accessed on May 18/2018).

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ BBC News, 20 June 2017, “European Court blasts Russia 'Gay Propaganda' Law”, (<http://www.bbc.com/news/world-europe-40338637> accessed on May 18/2018).

²²⁰ Hague Convention on Intercountry adoption, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>, accessed on May 7/2018.

²²¹ Elizabeth Willmott-Harrop, “Intercountry Adoption: the African context”, *Fifth International Policy Conference on the African Child Intercountry Adoption: Alternatives and Controversies*, (2012).

²²² Carrie A. Rankin, “Change In Intercountry Adoption Law results in a Human Rights violation”, *Syracuse Journal of International Law and Commerce*, Vol. 34, No. 1, Art. 7, (2006), pp 261.

country.²²³ Mentally or physically disabled and delinquent children were also significantly at risk.²²⁴

Then, Romania applied to join the European Union (EU).²²⁵ With its application, and more particularly with the decision to begin negotiations, Romania has entered a period of transition.²²⁶ During this time, the government had to implement legislation conforming to the requirements of the Union.²²⁷ The situation was so critical by 2000 that Romanian authorities received pressure from the EU, to apply a moratorium in 2001 to stop the extremely high numbers of ICA.²²⁸ Such pressure was sparked by a critical report from Baroness Emma Nicholson, the European Parliament's representative responsible for monitoring Romania's ascension to the EU.²²⁹ Baroness Nicholson termed ICA in Romania a "profitable trade in child trafficking" and charged institutions and officials with selling babies.²³⁰ Further, she concluded that ICA to have been hijacked by the child traffickers and to be a crime unwittingly supported by adoptive parents.²³¹ In addition, she claimed that children have been exported abroad often against their will and are often subjected to pedophilia, child prostitution or domestic servitude.²³²

However, she presented no evidence that Romanian children were ever sent abroad for adoption "against their will."²³³ Nor does it appear that adoptive children were "often subjected to pedophilia, child prostitution or domestic servitude."²³⁴ Reports indicate that the problems on ICA in Romania were mainly the result of lax regulation, which was later cured at least in part by legislative reforms which were in place before Baroness Nicholson's allegations of

²²³ Ibid.

²²⁴ "Inter-country adoption: The European Union, Romania and the International Community", A Report for the Center for Adoption Policy Studies, 2002, pp 39.

²²⁵ Ibid, pp 3.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Supra note 222, pp 263.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Richard Carlson, "Seeking the Better Interests of Children with a New International Law of Adoption", vol 55, (2010/2011), pp 741, (<http://www.nyislawreview.com/wp-content/uploads/sites/16/2013/11/55-3.Carlson.pdf>, accessed on April 26/2018).

²³² Ibid.

²³³ Ibid, pp 742.

²³⁴ Ibid.

criminality.²³⁵ Her assertions are criticized to be unfounded and to have distracted attention from real issues, problems, and solutions.²³⁶

Even though the official reports regarding Romania's admittance into the EU did not make a ban on ICA a pre-requisite for admission, the EU representative Baroness Nicholson repeatedly made adoption a high profile issue.²³⁷ Despite the EU's dominant push for the ban on ICAs, there is no EU law or regulation restricting ICAs to biological grandparents or requiring that restrictive laws on ICA be passed as a prerequisite for accession.²³⁸

Finally, Romania adopted the law that ultimately eliminated the possibility of ICA of Romanian children with the exception of the adopter or one of the spouses in the adopting family who have the domicile abroad is the grandparent of the child.²³⁹ However, on April 2012, an adoption law went into effect in Romania that extended the criteria for prospective adoptive parents to include relatives up to the fourth degree of kinship, the spouse of the child's natural parent, and Romanian citizens who are habitually resident abroad.²⁴⁰

Romania's ban on ICA is likely to be one of the eligibility requirements to join the EU. Here, the interest of the OVC is compromised in the process joining the union. The government should have given due regard to the need of its OVC to get a family and to the inadequacy of domestic alternatives to provide them such support. Accordingly, it should have excluded the issue of OVC from the points of bargain to join the EU.

Further, the ban is criticized to be, in retrospect, the wrong solution because it was aimed at a different and apparently non-existent problem.²⁴¹ Here, the nationals of the country are affected by the policy of the previous regime that their capacity to adopt or foster another child is highly unlikely. This exposed those OVC to live in institutions. The corruption and other illegal acts in the process of ICA warranted legal intervention to address those problems, not banning the process without providing adequate options at domestic level.

²³⁵ Ibid, pp 743.

²³⁶ Ibid, pp 745.

²³⁷ Supra note 222, pp 266.

²³⁸ Ibid, pp 268.

²³⁹ Ibid, pp 271.

²⁴⁰ Supra note 109.

²⁴¹ Supra note 231, pp 746.

The experience of Romania could be a lesson that banning ICA better be taken as a measure of last resort after exhausting all the administrative measures to overcome the problems on ICA and failure to do so might harm the OVC. In addition, adequate research on what problems actually exist on ICA should have been conducted by the government rather than relying on the allegations from an international organization so that the government can choose what possible legal interventions are necessary to solve the problems and to promote the best interest of the child. Further, states of origins for children to be adopted through ICA should ensure availability of adequate domestic alternative care options before excluding ICA.

2.2.3. The Republic of Uganda

Uganda, a non-member state to the Hague Convention on ICA²⁴², can be an example to show that solving problems in the process of a given alternative care should not necessarily be banning the process.

The Children Act of Uganda recognized in-country adoption and ICA as the last forms of alternative care, the latter being reserved for 'exceptional circumstances'.²⁴³ The act among other things provided that both in-country adoption and ICA have to be preceded by three years (36 months) of foster care of the specific child to whom the adoption relates by prospective adoptive parents in Uganda.²⁴⁴ ICA, in addition to being the last resort, was not a stand-alone care option; rather, it is linked to foster care for three years.

In order to circumvent this stringent requirement, legal practitioners had devised certain mechanisms.²⁴⁵ The first had been to make applications for guardianship rather than ICA which is less restrictive than ICA and which entitled applicants to take the child abroad.²⁴⁶ The second had been to rely on the expressed provisions on adoption but to contend that those requirements are merely directory and not mandatory.²⁴⁷ Here, the circumventions results in neither the ban nor the suspensions of guardianship or ICA. Rather, the country tightened the legal requirements for guardianship of Ugandan children by foreigners and made the legal requirements for ICA less

²⁴² Supra note 220.

²⁴³ The Children Act, Chapter 59, 1997, the Republic of Uganda, Section 46 (1).

²⁴⁴ Ibid.

²⁴⁵ DM Chirwa 'Children's rights, domestic alternative care frameworks and judicial responses to restrictions on inter-country adoption: A case study of Malawi and Uganda' *African Human Rights Law Journal*, (2016)pp117-144.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

restrictive than it was.²⁴⁸ Accordingly, the law on guardianship includes requiring applicants to reside at least for three months in Uganda on a condition that the other requirements for guardianship including absence of a relative or next of kin of the child, unwillingness and/or inability of the relative or next of kin of the child to take parental responsibility and exhaustion of all alternative care options available to the child are fulfilled.²⁴⁹

Conversely, the law softens some of the requirements for ICA, i.e. it shortens the length of time that an applicant for adoption must reside in Uganda and foster the child from three years down to one year.²⁵⁰ Further, it authorizes the Court to waive certain requirements under section 46(1) of the Children Act, Chapter 59 in “exceptional circumstances” including having a recommendation concerning his or her suitability to adopt a child from his or her country’s probation and welfare office or other competent authority, having satisfied the court that his or her country of origin will respect and recognize the adoption order, and not having criminal record.²⁵¹ However, neither the Children Act 59 nor its amendments in 2015 and 2016 elaborated what constitute „exceptional circumstances“. Here, it makes the issue open for interpretation and expose the same for subjective determination by courts. The laws could have reduced subjectivity by stipulating illustrative list of the exceptional circumstances or through characterization of what constitute the existence of such circumstances.

Despite of that, the experience of Uganda constitutes a very good example to rectify the flaws on the law and practical problems on ICA through legislative reforms but not necessarily through banning the process. The law of Uganda assures that the interest of those orphans in need of families will not be compromised. Further, prospective adoptive parents will only go through a process that reasonably reveals their genuine interest to adopt the child.

²⁴⁸ The Children (Amendment) (No. 2) Bill, the Republic of Uganda, 2015.

²⁴⁹ Children (Amendment) Act, 2016, the Republic of Uganda, Section 43F (2) (a) and Section 43 (f) (1) (a) (b) (c).

²⁵⁰ Ibid, Section 14 (a); (b).

²⁵¹ Ibid, Section 14 (4); Supra note 241, Section 46 (1) (3) (4) (5).

Chapter Three: The Banning of Intercountry Adoption in Ethiopia and Its Assessment

3.1. Major causes of Orphan-hood and Vulnerability in Ethiopia

During the Haile Sellassie's era (1930-1974) and Ethiopia under the Dergue, the military junta that ruled the country between 1975 and 1991, ICA from Ethiopia was unthinkable due to cultural and ideological reasons.²⁵² Culturally, Ethiopians were averse to the idea of giving up their children to foreigners.²⁵³ There were safety-net (taking care of one's neighbors and villagers) practices.²⁵⁴ Such practice entitled the OVC to get alternative family care without the need to go abroad. The socialist ideology of the Dergue regime which was also unfriendly to the U.S.A and the western world was the ideological factor that hindered ICA from spreading.²⁵⁵

Between 1960 and 1991, Ethiopia was in a civil war which was fought between the Ethiopian government and the various opposition movements, especially the Eritrean liberation fronts, and various political groupings.²⁵⁶ The war left many children without a father as males were the direct combatants in the war.²⁵⁷ More than often, be it in rural or urban Ethiopia the father was the main breadwinner.²⁵⁸

During the Red Terror which roughly took place between 1977 and 1979, the government, and its allies killed tens of thousands of people and it was the major cause for children being orphans and vulnerable.²⁵⁹ The other cause was the Somali-Ethiopian conflict in 1977.²⁶⁰ Then, even if it did not involve the formal process of ICA, the major destination of Ethiopian orphans was Cuba.²⁶¹ This was the consequence of the regime being pro-soviet and anti-imperialist which meant the weakening of Ethio-American ties that had been established during the Haile

²⁵² Solomon Addis Getahun, "A History of Ethiopia's Newest Immigrants to the United States: Orphans", *Journal des africanistes*, (2011), pp 185-200, para 12.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, para 18.

²⁵⁶ *Supra* note 252, para 13.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Supra* note 252, para 15.

²⁶⁰ *Infra* note 262.

²⁶¹ *Infra* note 268.

Sellassie's era.²⁶² Furthermore, Moscow was involved in the Somali-Ethiopian conflict in 1977 and 1978 in support of Ethiopia.²⁶³ Cuba as well, not only sent as many as 15,000 troops to back Ethiopia's fight against Somalia but also financed around 4,000 orphans of the war to study in Cuba on a full scholarship.²⁶⁴

Since 1982, the major cause of orphan-hood and vulnerability in Ethiopia was HIV/AIDS pandemic.²⁶⁵ Ethiopia has been identified as one of the highest HIV/AIDS affected parts of the world.²⁶⁶ Moreover, in 1984 famine struck the country and left plenty of children without parents and/or family environment.²⁶⁷ Then, diplomats and other foreigners informally took orphans abroad as a humanitarian response.²⁶⁸

Therefore, due to the continuous wars, the periodic drought that trigger instant famine and the onslaught of HIV/AIDS and other diseases, the culturally enshrined practice of safety-net that had been in place and by which Ethiopians used to help each other faced extreme distress.²⁶⁹

The aforementioned causes of orphanhood of children coupled with the government change that took place in Ethiopia in 1991 (the military regime had been overthrown by a coalition of forces, the Ethiopian People's Revolutionary Democratic Front, EPRDF) paved the way for ICA in Ethiopia.²⁷⁰ Unlike the previous socialist regime, the EPRDF government was „friendly“ to U.S.A and open to the „Western world“. ²⁷¹ This made France, U.S.A, and Spain the major receiving countries of Ethiopian orphans since 1991.²⁷² The difference in the places of destinations of orphans during the Dergue and the EPRDF regime shows that the foreign relations of the ruling government determine the destinations of orphans.

²⁶² Kenneth G. Weiss, "The Soviet Involvement in the Ogaden War", *Professional paper 269, Center for naval analysis*, (1980), pp 3.

²⁶³ *Ibid*, pp 10.

²⁶⁴ *Ethiopia Observer*, Nov 26, 2017, "The Adventures of Ethiopians educated in Cuba", (<https://ethiopiaobserver.com/2017/11/26/the-adventures-of-ethiopians-educated-in-cuba/>, accessed on April 28/2018).

²⁶⁵ *Infra* note 268.

²⁶⁶ *Supra* note 252, para 16.

²⁶⁷ *Ibid*, para 13.

²⁶⁸ Interview with Mr. Tewodros G/ab, Director of Child Protection and Inspection, MoWCYA (MoWCYA, 10 April 2018).

²⁶⁹ *Supra* note 252, para 17.

²⁷⁰ *Ibid*, para 18.

²⁷¹ *Ibid*.

²⁷² Peter Selman, "The rise and fall of intercountry adoption in the 21st century", *Sage Publications, International Social Work*, 2009, pp 587.

In addition, until 2009, there was no comprehensive law that specifically regulated non-governmental agencies, including local as well as international that involved in adoption.²⁷³ This and the privatization policy adopted by the EPRDF encouraged the establishment of non-governmental and non-profit organizations, including adoption agencies.²⁷⁴ These advantages made, Ethiopia, a country more often associated by Americans with drought, famine, and conflict to become a hot spot for international adoption.²⁷⁵ Further, the adoption of an Ethiopian orphan by the Hollywood celebrity Angelina Jolie in 2005 put Ethiopia on the spotlight of ICA, the aftermath of which almost quadrupled the number of Ethiopian children adopted annually by American families.²⁷⁶

3.2. Legal and Institutional Framework for ICA in Ethiopia

International human rights instruments ratified by Ethiopia are part and parcel of the law of the land.²⁷⁷ Accordingly, provisions of the CRC and ACWRC are an integral part of the family law of Ethiopia. Further, the FDRE Constitution explicitly recognized the rights of a child under article 36 without defining what a „child“ is. It provides that children have the right to know and be cared for by parents.²⁷⁸ In the absence of such care, a state is under obligation to provide alternative means of care.²⁷⁹ In all cases that the interest of a child is at stake, the primary consideration has to be the best interest of the child.²⁸⁰

Further, the state is obligated, within available means, to allocate resources to provide rehabilitation and assistance to children who are left without parents or guardians.²⁸¹ The phrase „within available means“ makes the obligation of the state contingent upon the availability of resources, i.e. the observance of the right involves progressive realization.

The Revised Federal Family Code, Proclamation No 213/2000 defines a minor as „a person of either sex who has not attained the full age of eighteen years“.²⁸² It further provides the primary

²⁷³ Supra note 252, para 19.

²⁷⁴ Ibid.

²⁷⁵ Jane Gross and Will Cornnors, „Surge in Adoption Raises Concern in Ethiopia“, *The New York Times*, (2007).

²⁷⁶ Supra note 252, para 21.

²⁷⁷ FDRE Constitution, Article 9 (4).

²⁷⁸ FDRE Constitution, Article 36 (1) (c).

²⁷⁹ FDRE Constitution, Article 36 (5).

²⁸⁰ FDRE Constitution, Article 36 (2).

²⁸¹ Ibid, Article 41 (5).

²⁸² The Revised Family Code, Article 215.

caretakers of the child to be the mother and father of the child.²⁸³ In their absence, the law gives the responsibility of raising the child to testamentary guardians and tutors, and in their absence to guardian and tutor assigned by a court until the child reaches the age of 18 years.²⁸⁴ Adoption, one of the alternative care mechanisms is addressed under chapter 10 of the Proclamation. It recognized DA and ICA and set stringent requirements for the later.²⁸⁵

The first regulatory guideline (Alternative Childcare Guideline) was adopted in 2001 by a joint undertaking of the Ministry of Labor and Social Affairs (MoLSA) and the Italian Development Cooperation (IDC) which was later revised by the 2009 Alternative Childcare Guidelines.²⁸⁶ The 2009 National Alternative Care Guideline, hereinafter called the Guideline, was adopted as a regulatory mechanism to ensure the quality of care and service programs provided by governmental and NGOs to the OVC.²⁸⁷ It prescribes the provision of quality and effective care in a manner promoting the best interest of the child.²⁸⁸ Further, it provides for minimum conditions on the delivery of alternative childcare services in the country, to put in place rights-based operational structures in the community and institutional care, and promotes participation of children.²⁸⁹ It is the only national guideline that provides minimum standards for providing Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service.²⁹⁰ Section 2, D of the guideline regulated adoption, i.e. domestic and ICA. It sets standards for domestic and ICAs and provided more stringent requirements for the later. The part that regulated ICA has become inapplicable following the ban on ICA, i.e. the enactment of Proclamation No 1070/2018.

The other instrument is the National Children's Policy. One of its major policy issues is the children and family care.²⁹¹ One of the objectives of the policy is supporting orphans and vulnerable children to be raised in the Ethiopian culture, traditions, customs and social values of

²⁸³ Ibid, Article 219.

²⁸⁴ Ibid, Article 222; 227.

²⁸⁵ Ibid, Article 193; 194 (3) (d).

²⁸⁶ Supra note 44, Section 1, Background, pp 3.

²⁸⁷ Ibid, Section 4.1, pp 6.

²⁸⁸ Ibid, Section 1, 4.2.1.

²⁸⁹ Ibid, Section 1, 4.2.2, 4.2.3 and 4.2.4.

²⁹⁰ Supra note 44.

²⁹¹ The FDRE National Children's Policy, Section 3.2 (a).

their birth areas.²⁹² It aims to fulfill this objective through strengthening community-based care, local adoption, foster care, reunification, and reintegration alternative care programs.²⁹³

However, Ethiopia is a diverse country with diversified ethnicities with heterogeneous culture, traditions, customs and social values.²⁹⁴ Some of the implementation strategies of this objective of the policy, such as domestic adoption and foster care may not necessarily be immune from exposing children to a different environment. For example, a child who is adopted from Benshangul Gumuz region to Tigray would be exposed to a culture, traditions, customs and social values of Tigray which is decidedly different from those he/she had in Benshangul Gumuz. Strict compliance with this objective would thus equate with the ban on intercultural DA and intercultural in-country foster care.

The issue of ethnic and cultural background of the child is addressed on the CRC and ACRWC as one of the elements to be given due regard when considering alternative family care for a child.²⁹⁵ Here, the desirability of “continuity” of the care and placing the child in his/her own background²⁹⁶ should not be seen as one and the same, i.e. the provisions do not explicitly refer to the continuity of the care within the child’s background. For instance, if a child has a chance of getting continuous alternative family care within the culture of his/her own background and within his/her country with different culture, or abroad, priority shall be given to the former. However, the cultural background should not be an obstacle to grant children their right to grow up in a family environment, when that family can only be found in-country and transculturally or abroad as cultural identity does not override the children’s need to live in a family environment. Further, the issue of cultural identity is not claimed exclusively for the interest of the child, i.e. at least part of such claim has a latent motive of promoting that culture and the interest of those who belong to such cultural identity. Here, a child has to be adopted through in-country intercultural adoption or ICA, if it is his/her last option of having a family, and the sending and receiving states should respect, protect and fulfill his/her right to know one’s own background. Then, the child should ultimately choose which cultural identity he/she wants to pursue as

²⁹² The FDRE National Children’s Policy, Section 2.2.2 (a), pp 13.

²⁹³ Ibid.

²⁹⁴ Supra note 141.

²⁹⁵ CRC, Article 20 (3); ACRWC, Article 25 (3).

²⁹⁶ Ibid.

cultural identity should not be imposed on the child, especially at the expense of his/her chance of having a family-based care elsewhere than his/her birth place.

Further, studies show that transracially adopted children have strong sense of racial identity and pride at least equal to children within their race and have better inter-racial relationships and are more comfortable in racially integrated settings.²⁹⁷ In addition, there may not be a real connection between a positive self-esteem and being adopted in-racially.²⁹⁸ Here, particular ways of racial identification are not associated with better or worse psychological adjustment and extreme focus on racial identity neglects other important issues such as capabilities of adoptive parents, parenting styles and pre-adoption experiences of the adopted child and adoptive parents, as discussed already.²⁹⁹ Therefore, stable and continuous relationship with parents is more important for a healthy childhood than racial match between adoptive parents and the adopted child.

The National Children’s Policy explicitly addressed the issue of OVC as one form of „children in difficult circumstances“.³⁰⁰ It provides the expansion of DA, foster care, and community-based care for the OVC.³⁰¹ It excluded ICA³⁰² and its implementation resulted in the amendment of the Proclamation No 213/2000. Accordingly, the HPR voted on a bill that would ban adoption of Ethiopian children by ICA on the session it had on January 2, 2018, i.e. Proclamation No 1070/2018.³⁰³ The bill was approved by the house with a majority vote, with three against and three abstentions.³⁰⁴

Regarding the institutional framework for ICA, adoption agencies used to facilitate ICA in collaboration with orphanages where a would-be-adopted child stayed at until the process is completed.³⁰⁵ MoWCYA received all the required documents pertinent to every ICA from adoption agencies including case studies that show detailed information on the applicant and the would-be-adopted child, ensured the fulfillment of eligibility requirements of the child and

²⁹⁷ Supra note 179, pp 385.

²⁹⁸ Ibid.

²⁹⁹ Supra note 49, pp 290 and 291.

³⁰⁰ The FDRE National Children’s Policy, Section 3.6.

³⁰¹ The FDRE National Children’s Policy, Section 3.6 (a).

³⁰² Ibid, Section 3.6 (a).

³⁰³ Yonas Abiye, “Parliament passes the Bill Banning Adoption by Foreigners” , *The Reporter*, 13 January 2018.

³⁰⁴ Ibid.

³⁰⁵ Supra note 44, Section 4; Section 5.

prospective adoptive parents and made recommendations for the court on whether such adoption enhances the best interest of the child.³⁰⁶ MoWCYA further involved in the post-placement follow-ups by receiving reports from adoption agencies and monitor and evaluate ICA services in line with the policy, guidelines, and procedures of the country.³⁰⁷ Ethiopian Embassies in receiving states and Ministry of Foreign Affairs of Ethiopia authenticated documents presented by the applicants and the former further prepared reports for adoption agencies on the status of the adopted child after the child reached the receiving states.³⁰⁸ Ethiopian courts whose approvals gave effect for the adoption received an application from prospective foreign adoptive parents and recommendations from MoWCYA to determine whether such adoption is in the best interest of the child or not.³⁰⁹ Further, courts could revoke an approved adoption agreement in exceptional circumstances, i.e. if in practice it is proven to be against the well-being of the child.³¹⁰

3.3. Why the Ban on Intercountry Adoption

ICA had been one of the most viable alternatives for Ethiopian orphans and Ethiopia ranked one of the top sending countries of orphans through the process.³¹¹ It had its own pros and cons just like other alternative care options. Regarding the advantage of the ICA, the MoWCYA claims that it enhanced the best interest of OVC who were left without option at domestic level.³¹² Here, ICA ensured the right to be raised in a family environment with appropriate love and care that further entails the observance of other rights including the right to education, health, name, and inheritance.

However, the enactment of the Proclamation No 1070/2018 which aimed at „harmonizing“ the Revised Family Code with the National Children’s Policy excludes ICA from alternative care mechanisms.³¹³ The Policy asserts that ICA fails to fully compensate for the love and care the

³⁰⁶ Ibid, Section 6.

³⁰⁷ Ibid.

³⁰⁸ Ibid, Section 9.2.2 (f) last para; Section 9.5.2 (c).

³⁰⁹ Ibid, Section 9.2.2 (g); Section 9.4; Section 6.3.

³¹⁰ Ibid, Section 10.1.3.

³¹¹ Dr. Peter Selman, “Global Trends in Intercountry Adoption: 2001-2010”, *Adoption Advocate*, (2012), pp 6.

³¹² Interview with Mr. Kibri Hailu Abay, Children’s Rights and Welfare Participation and Inclusion Directorate Director, MoWCYA (MoWCYA, 6 April 2018).

³¹³ Revised Family Code (Amendment) Proclamation No 1070/2018, Preamble.

children have missed in their natural homes and for exposing them to the identity crisis and other problems that will affect them psychologically and socially.³¹⁴

The other disadvantages of ICA according to the Ministry include:

- Identity crisis which resulted from curiosity as to one's own background and being different from adoptive parents;
- Distorting the national image of the country by giving false impressions to people that the state is „selling children“ through ICA;
- Even though it's not supported by concrete evidence, a rumor on the exposure of adopted children to physical abuse and exploitation;
- Blocking sights for domestic alternatives;
- Encouraging parents to abandon their children for economic gains in collaboration with brokers and agencies that facilitated the process;³¹⁵

The researcher's visit to the MoWCYA and the Ethiopian Charities and Societies Agency finds no research/empirical evidence to support these assertions of the government as the research on ICA is kept unpublished and confidential. Further, the minute on the deliberation of the draft bill to amend the revised family code stated that neither the standing committees of the parliament nor the HPR is aware of any research on the basis of which the exclusion under the policy was made.³¹⁶ In addition, the process of adoption of the policy is not well documented.³¹⁷ As a result, the impact assessment on the draft of the policy highly relied on the memories of the staff members of the different governmental organizations and NGOs involved in the process of development of the policy and very little documentation for reference.³¹⁸

In spite of the stated problems, there is no immediate cause/direct problem that warranted banning the ICA.³¹⁹ The case of Hanna Williams who had been adopted by an American couple

³¹⁴ Supra note 44, pp 7.

³¹⁵ Supra note 312; Supra note 268.

³¹⁶ Minute of the discussion organized by the standing committees of the Law and Justice and Women and Children's Affairs on the draft bill to amend the revised family code, (Unpublished, the FDRE parliament's library), Nov 1/2017, pp 8.

³¹⁷ Fasil Mulatu Gessesse and Rakeb Messele Aberra, "Impact assessment report on the Draft National Child Policy of Ethiopia" *Center For Human Rights, Addis Ababa University* (2014), pp 58.

³¹⁸ Ibid.

³¹⁹ Supra note 268.

and who was later abused and who died of hyperthermia in 2011 is the other contributory factor to the ban on ICA.³²⁰

Therefore, the policy and the law are partly based on an incident. In contrast with Dima Yakovlev of Russia whose death was considered an accident and his American adoptive father walked free³²¹, Hanna's adoptive mother and father were sentenced to 37 and 28 years of imprisonment respectively in 2014.³²² Further, the agency that facilitated her adoption, i.e. Adoption Advocates International (AAI) was shut down by its own initiation on the same year.³²³ Here, even if the death of Hanna is atrocious, justice has been served that her death should only serve as an alarm to give due care to the adoption process, especially on post-placement follow-up, than ground for its ban.

The other possible reason behind the ban is that receiving states started to suspend adoption from Ethiopia alleging severe ethical problems and corruption involving ICA. Australia had closed the program³²⁴ while France, Denmark, Germany, French-speaking Belgium, Spain, Ireland, Sweden and Switzerland suspended it.³²⁵ The allegations of these countries are likely to compromise the national image of the country and attract Ethiopian government's reaction in a similar way that the Magnitsky act of the U.S.A appealed a reaction from Russia (i.e. Russia banning ICA to the U.S.A).

Further, the closure and/or suspensions of the receiving states explicitly encouraged the government to focus on domestic alternatives and indicated their support in that regard.³²⁶ Thus, it is likely that one of the reasons behind the ban is an attempt at controlling the damage to the image of the country possibly caused by the suspensions of ICA by the receiving states. Here, the

³²⁰ Ibid.

³²¹ Ellen Barry, "Russian Furor Over U.S. Adoptions Follows American's Acquittal in Boy's Death", *The New York Times*, (2009).

³²² Doyle Murphy, "Washington couple guilty in death of adopted daughter Hana Williams", *The New York Daily News*, (2013).

³²³ Jeremy Schwartz and Diane Urbani de la Paz, "Adoption Advocates International in Port Angeles shuts down", *Peninsula Daily News*, 3/11/2014.

³²⁴ Attorney General and Minister for Emergency Management: *Closure Strategy for Ethiopia-Australia Adoption Program*, 2012, File no 11/27771.

³²⁵ France Diplomatie, Communiqué on the Suspension of International adoption in Ethiopia, 2016, (<https://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/actualites-de-l-adoption-internationale/les-communiqués-de-la-mission-de-l-adoption-internationale/2016/article/communique-relatif-a-la-suspension-des-adoptions-internationales-en-ethiopie-4>, accessed on April 22/2018)

³²⁶ Ibid.

allegations of the receiving states could be an evidence for the existence problems on the process of ICA and an alarm to give due regard for the process than a point for its ban. Here, the government should have examined the stated problems on ICA and take a measure to suppress the problems and to keep the best interest of the child simultaneously. The measure should not necessarily be banning ICA.

Some manifestations for the ban to be likely a response for the allegations from the receiving states are that the reasons stated on the minute of deliberation on the draft bill to amend the revised family code. Those are:

1. ICA has to be banned because allowing it to continue would amount to admitting that foreigners are better at raising children than Ethiopians,³²⁷ and
2. African countries that are less developed than Ethiopia have banned the process that Ethiopia with the current development level should follow their lead and ban ICA.³²⁸

However, these arguments do not seem to hold water to justify the ban. To start with, poverty is not a sole ground to place a child in an alternative care arrangement.³²⁹ Further, economic development is not a guarantee for the availability and adequacy of domestic alternatives to support the OVC. For instance, Russia which is one of the developed countries had comparable experience and rank of sending orphans through ICA with Ethiopia.³³⁰ The above assertions of the government imply that the ban has a latent motive of expressing national pride of the country.

There were no prior measures adopted to overcome the problems related to ICA, i.e. the ban is not the last resort.³³¹ Other measures to overcome the alleged problems could have been taken by the government. However, ICA was suspended for few months in 2017 for the purpose of solving some problems in the process.³³² Further, the government has already tried to discourage ICA through lengthy processes and procedures as a result of which the number of OVC that

³²⁷ Supra note 316, pp 10.

³²⁸ Ibid, pp 9.

³²⁹ Supra note 51, pp 13.

³³⁰ Peter Selman, Key Tables for Intercountry Adoption: Receiving States 2003-2012; States of Origin 2003-2011, Newcastle University, UK, 2013, (<https://assets.hcch.net/upload/2013selmanstats33.pdf>, accessed on May 1/2018).

³³¹ Supra note 312.

³³² Ibid.

leave the country through the process declined from 4000/ year in 2009/10 to 300-400 since mid-2011.³³³ Such decline in the number of ICAs, however, does not mean that the orphans are getting support from domestic alternatives.³³⁴

3.4. The Scope of the Ban

The ban on ICA will not have a retrospective application. Therefore, it will not affect the processes that started before the effective date of the Proclamation No 1070/2018, i.e. prior to 14th February 2018.³³⁵ If there was a real threat as claimed by the government for the identity and physical integrity of children, and if the ban could enhance the interest of the children by protecting them from such threat, the ban should have taken retroactive effect, in which case, the children whose processes have started before the effective date of the ban could have been protected from all the threats, if any, the ban intended to prevent.

The ban also includes ICAs by foreign citizens of Ethiopian origin.³³⁶ The ban makes no distinction between them and foreigners to that effect. Those foreigners of Ethiopian origin may raise a child promoting Ethiopian culture and identity which goes in line with the objective of the Policy. The reason behind making no distinction is to maintain diplomatic relations with foreign countries which is likely to be affected if the distinction was made.³³⁷ Here, in any decision that the interest of children is at stake, the principle is the best interest of the child, sustaining diplomatic relations is not an exception in this regard.

Further, the government claims that it will go against international instruments signed by Ethiopia to favor foreigners of Ethiopian origin to adopt Ethiopian OVC.³³⁸ The CRC Committee's comment on "General Measures of Implementation" provides that the principle of non-discrimination demands states to take steps to recognize children at individual and group level that require special measures for realization of their rights.³³⁹ The right to the alternative care of the OVC results from their special recognition and treatment in order for them exercise

³³³ Supra note 268; Supra note 317, pp 38.

³³⁴ Interview with Mrs. Selamawit Awlache, the former worker on Mother Teresa Missionaries of Charity, and the former facilitator of ICA, Nuovi Orizzonti Per Vivere L'Adozione (NOVA), Addis Ababa, (Addis Ababa, April 21, 2018).

³³⁵ Supra note 313, Article 3.

³³⁶ Supra note 316, pp 10.

³³⁷ Ibid; Supra note 312.

³³⁸ Ibid.

³³⁹ UN Committee on the Rights of a Child, General Comment No. 5, Nov 27/2003, para 12.

their right to family environment. ICA used to be an instrument for the observance of such right of the OVC. If it's banned for the purpose of protecting the OVC from the identity crisis that might result from exposure to different culture and language and if ICA by foreign nationals of Ethiopian origin is not likely to expose them to those problems, allowing them to adopt would not result in infringement of the principle of non-discrimination under the CRC and ACRWC. The notion of the principle of non-discrimination under the CRC and the ACRWC refers to the specifics of the child or his/her parents or guardians that should not be the base of discrimination against the child. The ultimate protection against discrimination is for the child. Thus, the status of prospective adoptive parents can be considered on entitling or prohibiting them from adopting Ethiopian child on the basis of the best interest of the child which has to be determined on case-by-case basis. The distinction between the foreigners and foreign nationals of Ethiopian origin may amount to discrimination; but it is against the foreign adoptive parents who are out of the scope of the protection of the principle of non-discrimination on the CRC and ACRWC. For example, if there is a law that prohibits homosexuals from adopting a child, the issue would have been discrimination on prospective adoptive parents on the basis of their sexual orientation, not the issue of discrimination against the child.

Further, neither the ICCPR nor other international conventions to which Ethiopia is a party recognize the „right to adopt“. Therefore, the principle of non-discrimination under international conventions is not extended to cover distinctions between foreigners and foreign nationals of Ethiopian origin on adoption of Ethiopian OVC. Consequently, had the ban made distinction, it would not contravene the principle of non-discrimination under international conventions to which Ethiopia is a party.

3.5. Gaps in the Legal and Institutional Framework of ICA in Ethiopia

There are some gaps in the legal and institutional framework for ICA that might expose children to the alleged problems by the government. To begin, the national alternative care guideline provided the manner in to which ICA should be conducted under section D. It regulated issues from eligibility requirement to post-placement follow-ups.³⁴⁰ Accordingly, a foreign prospective adoptive parent should bring a document certifying his/her state law is consistent with the legal

³⁴⁰ Supra note 44, Section 2, D, pp 38.

requirements of Ethiopia on adoption.³⁴¹ The guideline permitted ICA by married couples.³⁴² It, however, did not require prospective adoptive parents to assure their state law matches with Ethiopian law on marriage. For instance, U.S.A is the main receiving state for Ethiopian children³⁴³ and it recognizes same-sex marriage.³⁴⁴ Here, provided that the adoption law of U.S.A matches with its counterpart in Ethiopia, same-sex couples are entitled to adopt Ethiopian children. The match between the marriage laws protects the children from ending up in a family environment which is considered unlawful under the revised Federal Family Code.³⁴⁵ Further, Marriage celebrated abroad in accordance with the law of the place of celebration shall be valid in Ethiopia so long as it does not contravene public moral.³⁴⁶ Therefore, same-sex marriage celebrated abroad is not valid in Ethiopia. Homosexual act is also punishable under the Federal Criminal Code under crimes against morals and the family.³⁴⁷

Such problem might be prevented through the recommendation of the MoWCYA to the court on whether such adoption is in the best interest of the child. The court can also reject a given adoption application if such fact is neglected by the Ministry. However, such issue is vital that needs a clear substantial guarantee than a procedural safeguard.

The other gap is the fact that the Guideline permits single adoptive parents to adopt.³⁴⁸ First, such adoption cannot fully entitle a child to live in a family environment the absence of which necessitated the need to place him/her in an alternative care arrangement in the first place. Further, it makes a room for single homosexuals, i.e. around an act punishable under the Federal Criminal Code to adopt Ethiopian children, and such problem cannot easily be identified by the MoWCYA and/or the court.

The above loopholes in the guideline may expose children to harm. Ethiopia does not recognize same-sex marriage and had made the act punishable under the criminal law, as stated already.

³⁴¹ Supra note 44, Section 2, 8.2.1.

³⁴² Ibid, Section 2, 8.2.6.

³⁴³ Supra note 205; Supra note 312.

³⁴⁴ *Obergefell v. Hodges*, No. 14–556, (Certiorari to the United States Court of Appeals for the Sixth Circuit), (6/26/2015), https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf, accessed on April 18/2018.

³⁴⁵ Supra note 282, Article 7;

³⁴⁶ Supra note 282, Article 5.

³⁴⁷ The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Article 629, Proclamation No 414/2004.

³⁴⁸ Supra note 44, Section 2, 9.2.2 (f) (Vii).

Therefore, entitling some orphans to be adopted by homosexuals (because of the loopholes) in effect might expose those children to harm. All the pragmatic considerations for prohibiting same-sex marriage in Ethiopia and for criminalizing the act have to be extended to the guideline so that OVC could be protected from that prohibited family environment along with the consequences of being raised in that family environment, if any. Further, even if the vulnerability of the OVC necessitates the need to place them in an alternative care, such placement should not reluctantly send children to family unions that are not lawful under the domestic laws of Ethiopia.

Thus, the guideline should have been formulated in a manner clearly excluding same-sex union recognized as a marriage and registered in accordance with the law of states in which such marriage is allowed, and also citizens of such states who are not married. Then, heterosexual couples in countries that recognize same-sex marriage would still be entitled to adopt.

The other gap is that the guideline obliges MoWCYA to respect the right of an adopted child to information about his/her parents.³⁴⁹ This obligation seems to imply mere prohibition of interference from the ministry on the exercise of the right to information of the child. In practice, there is a serious failure to inform adopted children as to their backgrounds.³⁵⁰ Duty to respect, protect (ensuring that no other person interferes on the stated right of the child) and fulfill (facilitating the ways by which such right of the child can be fully observed) could have protected the adopted children better from identity crisis that results from lack of information about one's own background. Such stipulation with appropriate implementation mechanism could have contributed to solving the alleged identity crisis caused by the absence of information as to one's own background.

As per the Guideline, the primarily responsible organs for conducting post placement follow-ups are adoption agencies.³⁵¹ Post-placement follow-up is a very vital stage where the well-being of the child is to be assured and is a serious concern that may result in revocation of the approved adoption.³⁵² It also requires an adequate resource to conduct periodic and incidental visits to the residences of those children. A mere report from the adoptive parents and Ethiopian Embassy in

³⁴⁹ Supra note 44, Section 2, 6.8.

³⁵⁰ Supra note 268.

³⁵¹ Supra note 44, Section 2, 9.5.2 (a).

³⁵² Supra note 44, Section 2, 10.1.3.

receiving states is not sufficient to conclude on the well-being of the child, and the content of the former as to genuinely and impartially reflecting the well-being of the child is questionable. Yet, Ethiopian Embassies in receiving states are not active in following the status of children and sending reports to the agencies.³⁵³ MoWCYA is in the process of collaborating with Ministry of Foreign Affairs of Ethiopia and Ethiopian Embassies in receiving states to that effect.³⁵⁴ In addition, the agency that facilitated the adoption might be closed for various reasons which further complicates the process of reports from adoptive parents. The reluctance of adoptive parents to send reports is the other problem.³⁵⁵ This oversight limitation leaves the fate of adopted children to the will of adoptive parents and the legal system of the receiving states. Thus, the government should have given appropriate emphasis to the issue and oblige MoWCYA to be the primary organ to conduct post-placement follow-ups with collaborations with adoption agencies, Ministry of Foreign Affairs of Ethiopia and Ethiopian Embassies in receiving states. Here, the issue of allocating sufficient resource for the task should not be neglected.

3.6. Issues on the preparation of the National Children's Policy

The government of Ethiopia has found it necessary to formulate a comprehensive national children's policy to meet its commitment to respect, protect and fulfill children's rights and enhance the family and community's role in a healthy growth and personality development of children.³⁵⁶ The Policy addressed the issue of OVC as one category of children in difficult circumstances.³⁵⁷ The preparation of the Policy involved all government organs which work in child rights issues and only the United Nations International Children's Emergency Fund (UNICEF), African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), and African Child Policy Forum (ACPF) to represent the views of non-governmental stakeholders whose participation was irregular and with no constant representatives.³⁵⁸ It excluded the views of religious, customary and community leaders.³⁵⁹ A public consultation was not conducted and participation of children was confined only to Addis Ababa, i.e. 10 children from the 10 sub-cities whose representation of the OVC can highly be

³⁵³ Supra note 312.

³⁵⁴ Ibid.

³⁵⁵ Supra note 268.

³⁵⁶ The FDRE National Children's Policy, 2017, Introduction, pp 1.

³⁵⁷ Ibid, Section 3.6 (a).

³⁵⁸ Supra note 317, pp 58.

³⁵⁹ Ibid.

questioned as the issue of OVC was one of the many agendas to be dealt with by the policy.³⁶⁰ Further, the participation of the private sector and the media was neglected.³⁶¹

Such drawbacks in the preparation and adoption of the policy which resulted in the ban of ICA raise a question on whether the appropriate emphasis is given to the issues of the OVC. To start with, the issue of OVC as one category of children in difficult circumstances is one of the many policy issues. Exclusion of community and religious leaders compromises their role on reflecting the magnitude of the vulnerability of children in their locality and on implementing the domestic alternative care mechanisms provided under the policy. Exclusion of important stakeholders can possibly limit people's sense of ownership of the policy and in turn their participation on implementing the domestic alternatives provided under the policy. Finally, the preparation of the policy infringes on one of the major principles in the international and national legal framework pertaining to the rights of children, i.e. participation of children in decisions that have impacts on their interest.³⁶²

3.7. Issues on Amendment of the Revised Family Code

The FDRE HPRs has referred the draft bill to amend the revised federal family code, i.e. draft bill no 11/2010 primarily to the standing committee for Law and Justice and for assistance to the standing committees of Women and Children's Affairs and Social Affairs.³⁶³ The standing committees organized a discussion and deliberation forum to raise questions for the officials from the MoWCYA, Federal Attorney General and the Prime Minister's Office regarding the draft bill.³⁶⁴ The committees further organized and conducted two public hearings that involved different ministries of the federal government, appropriate stakeholders, and the media.³⁶⁵ Some of the issues framed in the discussions were on the point of banning the ICA at a time where the awareness of domestic adoption is not satisfactory to support the OVC, on whether the ban

³⁶⁰ Ibid, pp 60.

³⁶¹ Ibid.

³⁶² CRC, Article 12; Supra note 44 Section 2, 5.2.4.

³⁶³ The Federal Democratic Republic of Ethiopia, the 5th House of People's representatives, the 3rd year tenure, 2nd regular meeting, (Unpublished, the FDRE parliament's library), Oct 12/2017, Agenda no 2.

³⁶⁴ Supra note 316.

³⁶⁵ Ibid.

resulted from solving the factors that necessitated ICA in the first place, and on the concrete causes of the ban.³⁶⁶

The explanation given to the first issue is that adoption has a domestic origin and base in Ethiopia, i.e. started in Oromia and is now spreading.³⁶⁷ In addition an option where children stay with a family/relatives and get community-based support is prioritized than adoption.³⁶⁸ Then, foster care and reunification and reintegration follow.³⁶⁹ Thus, domestic adoption is not a sole alternative option for the OVC.³⁷⁰ The fact that adoption has a domestic base does not guarantee the current status of the people on adoption, i.e. awareness, willingness and economic capability to adopt children. However, the fact that adoption is not the sole domestic alternative is a good stand.

On the second issue, the responses stated that the problems that necessitated ICA in Ethiopia still exist and visits to orphanages and reports did not show problems on ICAs, however, the development level of the country warrants better protection for the OVC by the exclusive focus on domestic alternatives.³⁷¹ The number of OVC that leave the country through ICA was declining to 300-400 children/year since the mid of 2011 as the government discouraged ICA with process and procedures.³⁷² This decline in the number does not necessarily mean that those children are getting support from domestic alternatives the same way the ban on ICA is not an evidence for the adequacy of domestic alternatives. ICA was also suspended in April 2017 for the purpose of solving problems in the process of ICA.³⁷³ The double-digit economic growth of Ethiopia may reflect the country's capacity to raise 300-400 OVC/year by domestic alternatives.³⁷⁴

However, economic growth manifested by the gross domestic product (GDP) of a country may not necessarily reflect the economic capabilities of nationals of that country which is confirmed

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Supra note 312.

³⁷³ Ibid.

³⁷⁴ The World Bank: Ethiopia Overview, April 2018, (<http://www.worldbank.org/en/country/ethiopia/overview>, accessed on April 22/2018).

by the World Bank report marking the country to be the fastest growing in Africa but also one of the poorest, with a per capita income of \$783.³⁷⁵ Russia demonstrates such assertion by being one of the developed countries and having comparable experience and rank with Ethiopia on sending children through ICA.³⁷⁶ Alternatives provided by the policy, i.e. domestic adoption, foster care and community-based care require the economic capacities of the nationals more than that of the state's. Further, poverty shall not be the sole ground to place a child in an alternative care arrangement.³⁷⁷ Consequently, economic development of the country should not be the only justification to ban ICA.

The discussion on the draft bill organized by the standing committees of HPR did not involve the participation of children.³⁷⁸ The opinions of the OVC should have been incorporated into the decision that can possibly determine their fate. This coupled with the very limited participation of children in the preparation of the policy makes the ban to clearly infringe the right of children to participate and be heard on matters affecting their interest.³⁷⁹

Further, the discussion did not address the existence of other causes, if any, that might contribute to the primarily alleged identity crisis and abuse of the OVC. The minute on the draft bill to amend the revised family code implies the prevalence of ICA solely caused the alleged problems including an identity crisis without concrete evidence for taking that stand.³⁸⁰ Equating ICA with an immoral alternative that is an instrument of different illegal acts without any benefit for the children displays a high level of misconception and lack of close attention on the subject. If the fact that Ethiopia permitted ICA solely exposed the children to the stated problems, it then implies that more than 20,000 children who went abroad through that process³⁸¹ are victims of the mistake or negligence of the government to not excluding the process until now. In addition, it distracted attention from the real issues, problems, and solutions on ICA. ICA has served a noble goal of connecting a child with a family as opposed to institutional or street upbringing. It

³⁷⁵ Diane Coyle, "Rethinking GDP", *Finance and Development, International Monetary Fund*, Vol 54, No 1, (2017);
Supra note 373.

³⁷⁶ Supra note 205.

³⁷⁷ Supra note 16.

³⁷⁸ Supra note 312.

³⁷⁹ Supra note 317.

³⁸⁰ Supra note 316, pp 10.

³⁸¹ Supra note 268.

has its own disadvantages just like the other alternatives; however, it does not mean that nothing good came out of ICA.

The discussion mentioned Uganda and Kenya as examples for banning ICA.³⁸² However, a brief overview of the experience of Uganda shows the contrary. The country tightened the requirements for guardianship of Ugandan children by foreigners and softened its counterpart for ICA³⁸³, as discussed already. This reveals that adequate comparative study has not been conducted by the federal government of Ethiopia.

3.8. Initiatives to promote Domestic Alternatives

Since ICA used to be one option by which Ethiopian OVC get alternative family care, the ban would likely result in gaps that used to be filled by the process. Accordingly, the MoWCYA intends to fill the gap from the ban through strengthening the already recognized domestic alternatives, i.e. no new alternatives are going to be introduced.³⁸⁴ Accordingly, there is an initiative of creating awareness and promoting domestic alternatives by the government.³⁸⁵ For instance, community-based care is highly promoted which encourages every family to donate 24 birr/year or in kind during harvesting season of the year for the support of children who live with parents or relatives.³⁸⁶ There are Community Care Coalitions to facilitate community-based care at *woreda* level which have so far supported about 5.5 million OVC in Ethiopia as per the MoWCYA.³⁸⁷

However, the service program officer at ACPF questions the accuracy of such number as to showing the actual figure.³⁸⁸ Similarly, an officer at Mary Joy Ethiopia, i.e. the major facilitator of community-based care in Addis Ababa, described such data to be far from reflecting the reality. Such contentions are further demonstrated by the different figures stated in the discussion on the draft bill of the law banning ICA, i.e. 4.6 million children.³⁸⁹

³⁸² Supra note 316.

³⁸³ The Children (Amendment) (No. 2) Bill, 2015, the Republic of Uganda; Children (Amendment) Act, 2016, the Republic of Uganda, Section 43F (2) (a).

³⁸⁴ Supra note 312.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Supra note 312.

³⁸⁸ Interview with Mrs. Saba Lishan, Service Program Officer, African Child Policy Forum (ACPF, 10 April 2018).

³⁸⁹ Supra note 316, pp 4.

In addition, there is a mechanism of facilitating support from different institutions encouraging the employees to give some amount, usually 1% of their monthly salary for support of the OVC.³⁹⁰ There is also a reunification and reintegration program facilitated by the MoWCYA for children living on the street.³⁹¹ Further, the ministry is planning to negotiate with different investment institutions such as Industrial Parks on the issue of support for the OVC.³⁹²

There is an Ethiopian resident's charity organization named Positive Action for Development (PAD) in Dire Dawa that specifically works on the alternatives of foster care and DA.³⁹³ It is well organized and is supporting a number of OVC by the stated alternatives.³⁹⁴ It reveals a good practice on a small-scale level.

3.9. Gaps in Initiations of Domestic Alternatives

One of the gaps on the government's initiatives of domestic alternatives is a knowledge gap; a qualitative review conducted by the MoWCYA shows that people working in institutions that work on OVC have no or limited knowledge as to the content of the national guideline for alternative care including the principles of necessity and suitability.³⁹⁵ The other limitation is a structural limitation, MoWCYA is organized at federal, regional, zonal and *Woreda* level.³⁹⁶ Such institution does not exist at *Kebele* level which is the closest institution to the people. At *Woreda* level, there are some experts from the Ministry who are supposed to inspect on the status of OVC and work with institutions that facilitate domestic alternatives.

Here, there is a serious limitation of a resource as those officials share the limited resource such as cars with other officials of different ministerial offices at *Woreda* level.³⁹⁷ There is also lack of coordination between different sectors like the health sector, the social welfare, and the law enforcement.³⁹⁸ The researcher's visits to Mary Joy Development Association, the office of MoWCYA in *Woreda 06* and *Bole* sub-city reveals a serious lack of coordination on keeping data and sharing information on facilitating community-based care.

³⁹⁰ Supra note 312.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Supra note 388.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

The reintegration and reunification program for the OVC on the streets of Addis Ababa does not seem to be effective as most of the children that were reintegrated and reunified with families came back and continued to live on the streets.³⁹⁹ The claim that there are adequate and efficient domestic alternative to the existence of these gaps does not hold water.

The initiative to raise funds from public and private sector employees (through the withholding of 1% of their salaries by employers) is not very effective due to lack of awareness, people's lack of awareness as to the severity of the problems of the OVC which compromises their willingness to engage in the support programs.⁴⁰⁰ The researcher's visit to the Mary Joy Developmental Association, the major facilitator of community-based care in Addis Ababa, observed the prevalence of the same problem in organizing community-based care. The unwillingness of the relatives to let the children stay in their homes is the other serious problem on community-based care.⁴⁰¹

Regarding community-based alternative childcare, on the capacity of staffs involved in providing services, there is a significant shortfall in the availability of staff with specialized qualifications.⁴⁰² Institutions that facilitate such alternative care have no child-protection policy to guide the conduct of their staff and the provision of services.⁴⁰³ Further, the qualitative investigation revealed complaints by community members about screening procedures not being appropriate or not being applied appropriately, which constrains access to those who are genuinely in need.⁴⁰⁴

Further, institutions providing community-based child-care services indicated that they are overwhelmed by the huge demand for various types of family-preservation services in the community, while family-based alternative child-care service providers (for DA and in-country foster care) are reportedly daunted by the wide misconception, i.e. higher sense of resentment

³⁹⁹ Supra note 312.

⁴⁰⁰ Ibid.

⁴⁰¹ Supra note 334.

⁴⁰² Getnet Tadele (PhD) and Desta Ayode and Wolde kidan Kifle, Alternative Care Assessment Report Ethiopia, 2013, pp 2,

(<https://www.fhi360.org/sites/default/files/media/documents/Assessment%20of%20Community%20and%20Family-Based%20Alternative%20Child-Care%20Services%20in%20Ethiopia.pdf>, accessed on April 26/2018).

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

and negative attitude towards them in the community.⁴⁰⁵ Further, both domestic alternative care options, i.e. community-based and family-based care facilitators have challenges of financial and material resource constraints, shortage of qualified human resource, bureaucratic procedure, and lack of follow-up reports.⁴⁰⁶ As a result, the assistance from community-based care is insufficient to cover food, educational materials and other expenses of children.⁴⁰⁷

3.10. Points of Concern

In spite of the government's initiatives to support the OVC by domestic alternative care options and the above identified gaps on those initiations, there are some points of concern that should be discussed. One of these points is that the magnitude of the vulnerability of OVC is not clearly identified in Ethiopia.⁴⁰⁸ Neither the number of OVC nor the severity of their problems is known⁴⁰⁹ which makes interventions for their problems difficult and sometimes ineffective. The government lacks comprehensive data that reveals the real and exact magnitude of the vulnerability of OVC.⁴¹⁰ The national children's policy depended on situational analysis conducted and served as a base for the policy.⁴¹¹ However, such situational analysis among other things is criticized for being unable to estimate the number of children in difficult situations, one among which is OVC.⁴¹² Here, whether domestic alternatives provided under the policy are adequate enough for the existing OVC cannot be determined. With such limitation, the government's claim to have adequate domestic alternative care options does not stand a critical scrutiny. Thus, if domestic alternatives do not fit the existing OVC along with the magnitude of their problems, the ban would likely leave a number of OVC in orphanages or on the streets.

The other critical point is problems in the process of ICA. The process is labeled by receiving states as unethical and corrupted that does not prioritize the interest of the children.⁴¹³ Such assertions are demonstrated on different occasions. For instance, in Angelina Jolie's case, the adoption papers stated the death of the birth mother of the adopted child, Zehara, and Angelina

⁴⁰⁵ Ibid, pp 3.

⁴⁰⁶ Ibid, pp 70.

⁴⁰⁷ Ibid, pp 74.

⁴⁰⁸ Supra note 388.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Supra note 317, pp 57.

⁴¹² Ibid.

⁴¹³ Supra note 324; Supra note 325.

reportedly believed the mother to have died from HIV/AIDS.⁴¹⁴ However, Mentaweb Dawit, who claimed she was the little girl’s mother, was later found to be alive.⁴¹⁵

The annulled adoption of Betty Demoze who was adopted to Holland and exposed to abuse is the other example. The VOA article states “the documents in Betty’s adoption file were falsified and were full of errors. They gave the wrong age and wrongly stated that Betty’s parents had died.”⁴¹⁶ All the documents pertinent to a given ICA go to the MoWCYA for a recommendation on whether it is in the best interest of the child or not.⁴¹⁷ However, the ministry lacks a financial and human resource to crosscheck whether the stated facts on the paper matches with the reality.⁴¹⁸

The absence of vital events registration in Ethiopia until very recently is the other major hindrance that results in false information about the death of birth parents and the age of the children.⁴¹⁹ The process of ICA is abused not only by adoption agencies but also by authorities in the MoWCYA and other governmental institutions such as in the *Woreda* i.e. to facilitate child trafficking and send their own relatives (non-orphans) through the process.⁴²⁰

In addition, a study shows that there is a serious gap on applying ICA as subsidiary to other domestic alternative care options which are prioritized over ICA under the National Children’s Guideline.⁴²¹ This is because ICA adoption served as a main source for financial gain of child care institutions and the amount of donation they obtain depended on the number of children

⁴¹⁴ Stephen Bevan, “Why did an adoption agency tell Angelina Jolie I had died of AIDS when they gave her my baby?”, *Daily Mail*, (2007).

⁴¹⁵ Ibid.

⁴¹⁶ VOA, Feb 11, 2013, “Ethiopian Adoptee Wins Legal Case to Revoke Adoption”, (https://www.voanews.com/a/ethiopian_adoptee_wins_legal_case_to_revoke_adoption/1601306.html, accessed April 27/2018).

⁴¹⁷ Supra note 44, Section 2, 6.

⁴¹⁸ Supra note 268.

⁴¹⁹ Ibid.

⁴²⁰ Interview with Mr. Hailu Asmir, the former facilitator of ICA, Nuovi Orizzonti Per Vivere L’Adozione (NOVA), Addis Ababa, (Addis Ababa, April 19, 2018).

⁴²¹ Eyerusalem Jima, “Ensuring a better Protection for Children: the application of Subsidiarity Principle in Ethiopia”, Addis Ababa University, 2016, pp 47.

they offer for ICA.⁴²² Child trafficking and falsification of documents are the other problems on the process of ICA.⁴²³

The other issue is that domestic alternatives are not all immune from the identity crisis, labor exploitation, and abuse problems.⁴²⁴ To start with, there is a gap in awareness of the people as to the concept of those alternatives in a strict sense of the term.⁴²⁵ On domestic adoption, the equal rights of the adopted child and biological child, including inheritance discourages people from adopting.⁴²⁶ Further, adoptive parents tend to not disclose the manner in which child became part of the family⁴²⁷, misunderstand the process as charity for the child excluding their legal obligations and accountability for meeting the basic needs and rights of the child.⁴²⁸ This results from misconceptions about adoption, i.e. gap in accepting it as one form of family formation in the society.⁴²⁹ Such situation is worsened by the fact that there is no effective controlling mechanism as to the quality of care the children get in domestic alternative care mechanisms.⁴³⁰

The other issue is on OVC with cross-sectional problems such as OVC with disabilities, developmental delay, and nutritional deficiencies. For those children, the likelihood of being supported through domestic alternatives is highly unlikely.⁴³¹ MoWCYA asserts that we should critically scrutinize foreigner's inclination to adopt those children, i.e. they may have a latent motive behind raising those children.⁴³² Mere suspicion of the ministry with no concrete evidence to support the same is neither conclusive for the existence of a latent motive nor to label the motive if any, negative. The ministry further asserts that the government will take responsibility for those OVC with cross-sectional problems.⁴³³ The implementation of this responsibility, however, lacks a guarantee. With the poor economic position of Ethiopians to address those special needs and the stigma attached to the orphans, especially the ones with

⁴²² Ibid.

⁴²³ Ibid, pp 46.

⁴²⁴ Supra note 388; Supra note 312.

⁴²⁵ Supra note 388.

⁴²⁶ Supra note 316.

⁴²⁷ Supra note 388; Supra note 312.

⁴²⁸ Supra note 334; Supra note 420.

⁴²⁹ Ibid.

⁴³⁰ Supra note 388.

⁴³¹ Supra note 334; Supra note 420.

⁴³² Supra note 312.

⁴³³ Ibid.

special needs⁴³⁴, ICA was the last chance for better lives for those Ethiopian orphans remaining in orphanages or on the streets.

The other neglected point is the issue of support for the orphanages (institutions where the OVC stay at) to provide the standard quality of care for the children which is neither included in the national children's policy nor addressed by the deliberation on the draft bill to amend the revised family code. Here, even if institutions are not considered an alternative under the policy, it is where the OVC stay at until they find a domestic alternative care option. Orphanages in Ethiopia are understaffed and lack the very basic need of food and most of them provide one bed for four children.⁴³⁵ The ban would likely cause children to stay longer in orphanages (at least for those who couldn't find an adoptive or foster parent and/or who cannot find a relative to stay with and get community-based care). It might cause children to stay in orphanages until they age out (reach the age of 18). The negligence, coupled with the Charities and Societies Proclamation No 621/2009 which highly limits the fund orphanages obtain from abroad cripples the orphanages to give the required quality care for the OVC.

3.11. Implications of the Ban on the Right to Alternative Care

On the positive implications of the ban the MoWCYA claims that it enables OVC to be raised on the basis of Ethiopian culture and within Ethiopian community which prevents a possible onset of identity crisis.⁴³⁶ This advantage is however for the limited number of OVC who are lucky to get support from domestic alternatives. The above identified gaps make domestic alternatives inadequate, if not non-existent to address some of the OVC along with their needs. Further, the fact that children might get support from domestic alternatives does not necessarily mean protection from identity crisis and abuse as domestic alternatives are not all immune from such threats. On negative impacts of the ban, if domestic alternatives are unsuccessful, the ban could result in children to end up in orphanages or on the streets, even in the death of children.⁴³⁷ Such impacts are almost definite to happen on OVC (especially on those with cross-sectional problems) who cannot benefit from domestic alternatives for different reasons. Such implication, in relation to the interdependent and interrelated nature of human rights results in the

⁴³⁴ Supra note 334; Supra note 420.

⁴³⁵ Ibid.

⁴³⁶ Supra note 312.

⁴³⁷ Ibid.

infringement of other rights that could have been protected had the ban not been made. This compromises the best interest of those children whose interest should have been determined on case-by-case basis.

As per the Service Program Officer at ACPF, the numerical scope of the ban is limited as the number of orphans who go abroad through ICA was already declining.⁴³⁸ This, however, does not mean that children will not be left in orphanages or on the streets if the domestic alternatives are not successful and adequate to raise those children.⁴³⁹ The interdependent and interrelated nature of human rights warrant due emphasis be given to the issue as the alleged abuse on the right to alternative care could entail the compromise of other rights of the child.⁴⁴⁰ On the positive side, to the extent domestic alternatives provide support, it entitles the OVC to be raised in Ethiopian culture, tradition and identity.⁴⁴¹ However, the extent of support from domestic sources, whether it addresses the available OVC and as to the quality of care it can offer is a serious concern.⁴⁴²

The responses of the interviewees from the MoWCYA and ACPF show that the success and adequacy of domestic alternatives are yet to be determined as those alternatives are in their early stages of implementations. Accordingly, the implications of the ban are “if” statements that are contingent on whether the domestic alternatives are successful or not. It is naive to conclude as to the adequacy of domestic alternatives with the identified gaps on domestic alternatives and while the implementation and effectiveness of such alternatives is not yet known.

NGOs that facilitated ICA criticized the ban to compromise the most viable option of the OVC without providing an adequate alternative care option at domestic level.⁴⁴³ The positive implications of the ban cannot be determined now in the absence of adequate domestic alternatives.⁴⁴⁴

⁴³⁸ Supra note 388.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Ibid.

⁴⁴³ Supra note 334; Supra note 420.

⁴⁴⁴ Ibid.

Chapter Four: Conclusion and Recommendations

4.1. Conclusion

Intercountry adoption is not an option that Ethiopia has to pursue indefinitely. At some point creating conducive and comprehensive environment to raise Ethiopian orphans by domestic alternative care options and excluding ICA is necessary. Even then, the exclusion should not follow banning ICA by the law, rather, repealing the laws that permit ICA by misuse. Here, we can protect the OVC from unnecessarily going abroad through ICA and still help those who absolutely need it to go through the process. This further foresees the possibilities of the augmentation of new/previous causes that necessitate ICA in Ethiopia.

However, it is not yet the time for Ethiopia to do so let alone banning ICA by law. To start with, the adequacy of domestic alternatives and its immunity from problems including identity crisis on the OVC is a serious concern. Those alternatives which are in their early stages of implementations require cumulative fulfillment of the awareness, willingness and economic capabilities of nationals of Ethiopia. It takes a considerable time to fulfill these three conditions simultaneously. Until then, the fate of the OVC would be staying in orphanages or on the streets for as long as it takes to get support from domestic sources or until they reach the age of 18 years. The uncertainty of the adequacy of domestic options (including the quality of care it offers), the compromised quality of care in orphanages and the risk of living on the streets warrant ICA to continue as a valid option.

In any decision that the interest of children is at stake, the guiding principle is the best interest of the child. Such principle has to be determined on case-by-case basis, i.e. the decline in the number of children who left Ethiopia for ICA shows the lesser numerical scope of the negative impacts of the ban but not definite for not compromising the best interest of the child on a subjective standard. It is further inconclusive to claim the OVC are getting support from domestic sources. For instance, orphans with cross-sectional problems would suffer most as ICA was their only viable chance of having a family-based alternative care.

The ban did not involve the opinions of OVC who are old enough to express the same. For instance, children above the age of 10 could be old enough to express the problems they are facing along with their needs. However, the ban doesn't involve the participation of children

which is one of the guiding principles on the national and international instruments pertaining to children's rights. Thus, even if the ban does not show Ethiopia's infringement of its obligations under the CRC and ACRWC, the legality of the ban can be questioned as it violates the best interest of the child and the right to participation principles.

Amendment of the revised family code was unnecessary as those provisions (article 193, 194 (3) (d) and 194 (4)) did not contribute anything for the alleged identity crisis and abuse that the ban intends to avoid. Rather, the identified gaps in the legal and institutional framework of the ICA and lack of effective supervision and control on the adoption agencies and other institutions that facilitate the process did. Here, the legal intervention was necessary to address the problems on ICA but the government took a shortcut and banned the process than facing the challenge of solving the problems in it. Failure to take other measures to protect the children from the alleged identity crisis, abuse and other stated problems prior to the ban demonstrates such assertion.

Further, the ban on ICA can possibly result in placing children in domestic alternative care options without due regard to the suitability principle on the international and national guidelines. Here, on promoting domestic alternatives and on the fact that such alternatives are the last chance for the child to get alternative care, children could reluctantly be placed in a family environment that does not promote their well-being and safety. The ban might result in a desire to place the children in any possible arrangement so that the government will not be responsible for the gaps that result from the ban.

The positive implication of the ban is that it could discourage parents who might abandon their children, if any, hoping they and/or their children could benefit from ICA. Further, for those OVC who can be supported by domestic alternatives, it gives them a chance to be raised within Ethiopian culture, norms, and values. However, the gaps in domestic alternatives including awareness of people towards formal domestic alternative care mechanism is still a serious concern.

Therefore, ICA should continue to be one option but the government should take administrative measures to identify and overcome all problems on ICA, to adhere to the principles of necessity and suitability principles and to assure that it would be applied as a measure of last resort, i.e. adhere to the principle of subsidiarity.

4.2. Recommendations

- The government should devise administrative measures to overcome the identified challenges on the process of ICA and then lift the ban. An effective implementation mechanism for the adopted administrative measures should also be adopted. Once the ban is lifted, measures to assure the observance of necessity and suitability principles and to strictly apply ICA as a measure of last resort after exhausting all the domestic alternative care options for the child needs to be adopted.
- The government should ratify the Hague Convention on ICA and require receiving states to be members of the same. The convention obliges member states to establish central authorities which if properly organized and sufficiently funded can be a safeguard against corrupt practices.⁴⁴⁵ With proper implementation mechanisms, it can also facilitate legitimate adoptions and suppress illegal activities. Until then, the government should sign bilateral adoption agreements with countries that receive most OVC from Ethiopia.
- The government should fill the gaps identified in the legal and institutional framework for ICA, including those claimed by the former receiving countries that closed/suspended ICA from Ethiopia.
- The government should improve the capacity of MoWCYA and its sub-structures to provide adequate control and evaluation on agencies that facilitate ICA.
- The government should improve compliance with quality-standard guideline for ICA by making it widely accessible, improving awareness and understanding through training and regular supervision and support of the adoption agencies and other institutions on ICA.
- The government should adopt policies and procedures which favor information-sharing and networking between adoption agencies and all other institutions that involve in ICA process.
- The government should devise a mechanism whereby children who are adopted abroad have access to a known, effective and impartial mechanism whereby they can notify complaints or concerns regarding their treatment or conditions of placement. Such mechanisms should include initial consultation, feedback, implementation and further

⁴⁴⁵ Hague Convention on Intercountry Adoption, 1993, Article 4, 6-11, 16, 22.

consultation. This process should be conducted by competent persons trained to work with children.

- The government should ensure that all adoption agencies and other institutions on the process of ICA develop a staff code of conduct, consistent with the present National Alternative Care Guideline that defines the role of each professional including clear reporting procedure on allegations of misconduct by any team member.

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- Interview with Mrs. Saba Lishan, Service Program Officer, African Child Policy Forum (ACPF, 10 April 2018).

- Interview with Mrs. Hailu Asmir, the former facilitator of ICA, Nuovi Orizzonti Per Vivere L'Adozione (NOVA), Addis Ababa, (Addis Ababa, April 19, 2018).
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Annexes

- **Annex One**

Interview Guide prepared for the Authorities in Ministry of Women, Children and Youth Affairs (MoWCYA) on assessment of the Implication of the law Banning Intercountry Adoption (ICA) on the Right to alternative Care.

The objective of this interview among other things intends to assess the views of authorities in MoWCYA (who participated on the preparation of the National Children's Policy which is the basis for the law banning ICA) on the implications of the law banning ICA on the right to alternative care of the orphans and vulnerable children.

So, you are kindly requested to respond to the questions as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views on the consent form.

Guiding Questions

1. What were the factors that necessitated intercountry adoption in Ethiopia?
2. What are the advantages and disadvantages on intercountry adoption?
3. What measures were taken to overcome those disadvantages?
4. What are the direct reasons (immediate and concrete problems) that necessitated banning intercountry adoption? Are domestic alternative care options all immune from such problems?
5. What is the causal relationship between those reasons and the solution, i.e. the ban?
6. What are the possible positive and negative impacts of the ban?
7. Are domestic alternatives adequate to address the problems of OVC? How about introducing new alternatives?
8. How would you examine the adequacy of domestic alternative care options in relation to the OVC with cross-sectional problems?
9. Did Ethiopian Embassies in receiving states and Ethiopian Ministry of Foreign Affairs have active role on intercountry adoption process?

- **Annex Two**

Interview Guide prepared for the non-governmental organizations (NGOs) on the assessment of the Implications of the Law Banning Intercountry adoption (ICA) on the Right to Alternative Care in Ethiopia.

The objective of this interview among other things intends to assess the views of officers in NGOs that used to facilitate ICA on the impacts of the ban on the process on the right to alternative care of the orphans and vulnerable children. It further intends to explore the challenges observed on the process ICA that might expose the children to different problems.

So, you are kindly requested to respond to the questions as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views on the consent form.

Guiding Questions

1. How was the process of intercountry adoption conducted?
2. How were post placement follow ups made?
3. What were the challenges manifested on intercountry adoption?
4. What was the trend on adoptability of children in terms of the age, sex, health status of the children?
5. Does the ban have implications on the right to alternative care? If so, what are the possible implications (positive and negative) of the ban?

- **Annex Three**

Interview Guide prepared for the officers at African Child Policy Forum (ACPF) on the assessment of the Law Banning Intercountry Adoption on the Right to Alternative care in Ethiopia.

This interview among other things intends to assess the views of officers at ACPF on the implications of the law banning ICA on the right to alternative care of the orphans and vulnerable children (OVC). It further intends to explore the magnitude of vulnerability in relation to the adequacy of domestic alternatives to address the problems of the OVC.

So, you are kindly requested to respond to the questions as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views on the consent form.

Guiding Questions

1. What is the magnitude OVC in Ethiopia in general and in Addis Abeba and Dire Dawa in particular? How about the magnitude of their vulnerability, i.e. severity of their problems?
2. Are domestic alternative care mechanisms including domestic adoption available and adequate enough to overcome the problems of the OVC?
3. How would you examine the adequacy of domestic alternative care options in relation to OVC with cross-sectional problems?
4. Does the ban have implications on the right to alternative care? If so, what are the possible implications (positive and negative) of the ban?
5. How do you evaluate the ban in relation to principle of the best interest of the child?
6. What would be the magnitude of the implications of the ban in relation to the interdependent and interrelated nature of human rights?