THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW IN THE CHILD JUSTICE SYSTEM: EXAMINING THE DUE PROCESS RIGHTS AND DISPOSITIONS IN ETHIOPIA

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Declaration

I, the undersigned, declare that the dissertation entitled '**The Rights of Children in Conflict with the Law in the Child Justice System: Examining the Due Process Rights and Dispositions in Ethiopia'** is my original work. In compliance with the accepted rules, I have duly acknowledged and referenced all materials used in this dissertation.

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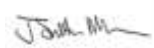
Signature:  _____ Date: 9 March 2023

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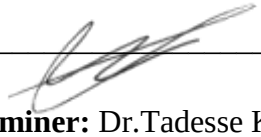
Signature:  _____ Date: 24 July 2023

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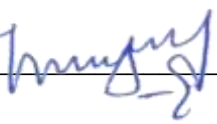
Signature:  _____ Date: 26.7.2023

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Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
ACPF	African Child Policy Forum
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ANRS	Amhara National Regional State
AU	African Union
CBCC	Community-Based Correction Center
CBCP	Community-Based Correction Program
CICWL	Children in Conflict with the Law
CJPO	Child Justice Project Office
CPU	Child Protection Unit
CRC	Convention on the Rights of the Child
CPC	Criminal Procedure Code
CSO	Charities and Societies
ECtHR	European Court of Human Rights
EHRC	Ethiopian Human Rights Commission
FAG	Federal Attorney General
FN	Footnote Number
FFIC	Federal First Instance Court

FSCE	Forum on Sustainable Child Empowerment
FDRE	Federal Democratic Republic of Ethiopia
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
MACR	Minimum Age of Criminal Responsibility
MoE	Ministry of Education
MoJ	Ministry of Justice
MoWSA	Ministry of Women and Social Affairs
NHRIs	National Human Rights Institutions
OHCHR	Office of the High Commissioner for Human Rights
PRI	Penal Reform International
RFC	Revised Family Code
SNNPR	Southern Nations, Nationalities and Peoples Region
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime

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Abstract

The general aim of this research was to examine the due process rights and dispositions in the Ethiopian child justice system in light of the accepted standards. It employed a doctrinal and qualitative research approach. The primary data were collected through interview, observation and analysis of court files.

The due process rights of CICWL in Ethiopia are contained in only ten Articles of a Code that existed for more than 50 years. As a result of its old age, the Code does not include contemporary rights of CICWL such as diversion and the right to participate in the proceeding with the requirements to effectively exercise it like the mandatory presence of parents (when appropriate), support by social workers and child-friendly court settings. The Code recognizes few rights and leaves some other rights unaddressed. Further, it does not have a provision that links the adult procedures to the child justice procedures. The constitutional principle of equality would warrant equal application of other due process rights recognized for adults to children. This research however argues that this approach is not effective in protecting the due process rights of CICWL. Some provisions of the Code are discriminatory when compared to adult counterparts. This is the case for arrest and the right to counsel. The majority of the rights duly recognized in the Code are known for their violation rather than their respect in the actual practice of the Ethiopian child justice system.

Deprivation of liberty of a child is a measure of last resort in the child justice system. The Ethiopian child justice system does not restate this principle. It incorporates admission to a curative institution, supervised education, reprimand, school or home arrest, admission to a corrective institution as measures of first resort. Restorative justice measures and community service orders are not recognized while a fine is a penalty of last resort which is regrettable. The Ethiopian child justice system does not comply with the rule that 'deprivation of liberty shall be a measure of last resort' for the reason of admission to corrective detention and home arrest. Further, home arrest applies for crimes of small gravity including petty offenses.

Another cardinal principle in the child justice system is that deprivation of liberty shall be for the shortest period. This principle is not explicitly provided in the Ethiopian child justice system. As a result, the system is not immune from violating the principle both in normative terms and in actual practice. Violation of this principle is clearer in practice. For instance, although the maximum duration of corrective detention is five years, some courts sentenced children to terms exceeding this term. This research also found disproportionate terms of home or school arrest.

Imprisonment is a penalty of last resort in the Ethiopian child justice system. In practice, this principle is not known by judges and some of them sentenced children who came in conflict with the law for the first time to prison. The maximum duration of imprisonment is ten years which can be considered as 'shortest' provided that courts use proportionate conversion of the actual penalty determined to the duration stated under Article 168 (2) of the Criminal Code. In practice, however, this research found cases where children are sentenced to a term of imprisonment of 20 years and ten years without first determining the actual penalty. A further

effort to comply with this principle is the recognition of conditional release. Regrettably, however, the same threshold of served sentence (two-thirds) is required as in adult cases.

Children aged over 15 years are subject to ordinary penalties except for death penalty and life imprisonment without parole. However, courts are empowered to mitigate the ordinary penalty. Further, measures and penalties applicable to the first group may be imposed on them. These discretions are not effectively utilized in practice.

Different challenges and gaps from within and outside the system contributed to the current status of enforcement of the due process rights and application of the dispositions. The child justice system is not given attention by the government including the child justice actors, law schools teaching and curricula, academia and NGOs. From the government side, this is reflected in the absence of an all-encompassing child/justice rights statute; the absence of sufficient specialized institutions and personnel; the failure to maintain long-existing institution (CBCC); little to no work done by the relevant government offices; insufficient budget allocated; insufficient training given to actors; and absence of data and research. The little place that child justice occupies in law schools curricula, teaching and exam, and academic writings results in a lack of knowledge among child justice actors which eventually affects the administration of the system. Further, there are administrative arrangements like fixed days of hearing, reliance on medical examination as a means of proof of age, the low status of birth certification, and shifting child justice judges that have repercussions on the right not to be detained pending trial and the right to speedy trial. Hence, this research recommends that all these stakeholders must give sufficient attention to child justice in Ethiopia and that administrative challenges be rectified for the realization of due process rights and proper application of the dispositions. More specifically, there should be a separate child rights/justice statute that incorporates the guiding principles and a wide variety of dispositions with precise grounds of application. Sufficient specialized institutions and personnel like child justice benches, police units, probation offices and rehabilitation centers must be established. Hence, sufficient budget must be allocated for the justice sector in general and the child justice system in particular.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Historically, there was no distinction between the criminal justice system for children and adults; both were treated under the same law by the same court and subject to the same punishment.[1] Domestically, it was in the late 19th and early 20th century that separate systems of laws and institutions emerged to deal with children in conflict with the law.[2] At the international level, the international community developed standards for children's rights in the late 20th century. This is because children, due to their physical and mental immaturity, need special safeguards and care, including legal protection.[3] With this spirit, the justice systems of the modern world have differentiated between the child justice system and the criminal justice applicable to adults. This is because 'young persons, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security'.[4]

This effort for specialized treatment of children in conflict with the law (hereinafter, CICWL) has begun in the 1966 International Covenant on Civil and Political Rights (ICCPR). This Covenant prohibits the imposition of death penalty on persons below the age of 18[5] and provides for segregation of accused children from adults and the speedy disposition of their cases.[6] It further opines that CICWL shall be accorded treatment appropriate to their age and legal status.[7] The Covenant also enjoins states to establish procedures suited for the needs of children and desirable for their rehabilitation[8] and mandates hearing of children's cases in camera when their

[1] Cliff Roberson, *Juvenile Justice: Theory and Practice* (CRC Press 2010) 21; Jeffrey Ferro, *Juvenile Crime* (Facts on File 2003) 6; Donald J Shoemaker, *Juvenile Delinquency* (Rowman and Littlefield Publishers 2009) 11.
[2] Peter C Kratcoski, *Juvenile Justice Administration* (CRC Press 2012) 7.
[3] Declaration on the Rights of the Child (adopted 20 November 1959 UNGA Res 1386 (XIV) preamble, para 3; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) preamble, para 9.
[4] United Nations Standard Minimum Rules for the Administration of Juveniles Justice (Beijing Rules) (adopted 29 November 1985) UNGA Res 40/33 preamble, para 5.
[5] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171(ICCPR) art 6 (5).
[6] ibid art 10 (2) (b).
[7] ibid art 10 (3).
[8] ibid art 14 (4).

interests require so.[9]

The core standard on the rights of the child in general and child justice in particular, the Convention on the Rights of the Child (hereinafter, CRC), was adopted in 1989. It proclaims the aim of the child justice system as 'the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and promotion of the child's reintegration and the child's assuming a constructive role in society'. [10] Hence, the aim of child justice is the rehabilitation of the child in a way that reinforces the child's respect for human rights and fundamental freedoms of others. Accordingly, the CRC tries to accommodate the treatment of children with the responsibilities they should assume for infringing the penal law.[11]

To achieve this aim, the CRC provides guiding principles, due process rights and dispositions that a child justice system should incorporate. The principles concerning deprivation of liberty of children including CICWL are provided in Article 37. Accordingly, arrest, detention or imprisonment of a child shall be a as a measure of last resort and for the shortest appropriate period. Further, a child deprived of his/her liberty shall be treated with humanity in a manner which takes into account his/her age and shall be separated from adults unless it is considered in the child's best interest not to do so.

Another guiding principle provided in the CRC is diversion of CICWL from the formal judicial process wherever it is appropriate and with due respect to the human rights of the child.[12] Diversion is a central feature of modern child justice systems in the world today.[13] It reemerged during the 1970s when there was a loss of confidence in the effectiveness of the traditional 'juvenile justice system' and it has continued its expansion due to national and international developments in 'juvenile crime policy' in the 1980s.[14]

Diversion options should be offered from the earliest point of contact, before a trial commences,

[9] ibid art 14 (1).
[10] CRC, art 40 (1).
[11] John Tobin and Cate Read, 'Article 40: The Rights of the Child in the Juvenile Justice System', in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 1600.
[12] ibid art 40 (3) (b).
[13] Ann Skelton and Boyane Tshehla 'Child Justice in South Africa, Monograph 150' (2008) 17.
[14] Frieder Dunkel, 'Diversion; A Meaningful and Successful Alternative to Punishment in the European Juvenile Justice System' in Josine Jungr-Tas and Frieder Dunkel (eds), Reforming Juvenile Justice (Springer 2009) 147.

and be available throughout the proceedings.[15] There are various diversion approaches though their applicability and features vary depending on the contextual factors as well as the nature of each specific case.[16] These include guidance and supervision, restitution and compensation to victims, [17]caution, mediation, conferencing, pretrial community service,[18] apology, restrictions on the CICWL, attendance at personal/behavioral development programs, home detention, community residential treatment and admission to rehabilitation centers.[19]

The minimum due process rights are provided under article 40 (2) of the CRC. Most of these guarantees are the ones applicable to every arrested or accused person. However, some of them are modified by taking into account the special circumstances of children and there are rights peculiar to CICWL.

Of the due process rights, the right to be heard or the so-called 'participation right' requires particular mention here. Article 12 of the CRC recognizes this right in that children have the right to be heard in administrative or judicial proceedings affecting them. Informed by their lesser maturity, effective participation of children in judicial proceedings requires the following:

- Child-friendly court environment and settings
- Informing the child about the child justice process and possible measures
- Showing genuine interest in the child's case
- Use of child-appropriate language and the need to avoid legal jargon
- Ensuring the child's understanding of the case.[20]

Concerning dispositions, the guiding principle is that detention or imprisonment must be a measure of last resort as provided in article 37(b) of the CRC. Accordingly, a variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care;

[15] Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (18 September 2019) CRC/C/GC/24 (CRC Committee, General Comment No.24) para 72.
[16] Tsegaye Deda and Alemtsehay Mulat, 'Police Training Manual on Child Protection' (Save the Children Sweden 2008) 314.
[17] Beijing Rules, Rule 11.4.
[18] Nikhil Roy and Mabel Wong, 'Juvenile Justice: Modern Concepts of Working with Children in Conflict with the Law' (Save the Children UK 2004) 55-56; Josine Junger-Tas and Frieder Dunkel, 'Reforming Juvenile Justice: European Perspectives' in Josine Junger-Tas and Fieder Dunkel (eds), *Reforming Juvenile Justice* (Springer 2009) 230.
[19] Deda and Mulat (n 16) 314.
[20] See Stephanie Rap, *The participation of Juvenile Defendants in the Youth Court: A Comparative Study of Juvenile Justice Procedures in Europe* (2013) 123 ff.

education and vocational training programs and other alternatives to institutional care shall be available to ensure that 'children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offen[s]e'.[21] These are some of the important reactions and sanctions that have been practiced and proved successful thus far in different legal systems.[22]Where it is necessary to deprive a child of his/her liberty, it must be for the shortest appropriate period and hence, life imprisonment without the possibility of release shall not be imposed on a person below the age of 18.[23] Further, by virtue of the rehabilitative ideal of a child justice system and the respect for well the being of the child, death penalty on a person below the age of 18 is also prohibited.[24]

The CRC mandates member states to seek for the establishment of laws, procedures, authorities and institutions specific to CICWL. This requirement of specialty in laws, procedures and institutions is essential to achieve the aims of the child justice system.

At a regional level, the African Charter on the Right and Welfare of the Child (ACRWC) has also similar provisions. It prohibits the imposition of death penalty on persons below the age of 18[25] and further stipulates rules on the administration of child justice.[26] In this regard, it: provides that children accused of or found guilty of having infringed penal law shall have special treatment consistent with the child's sense of dignity; enjoins states to ensure that CICWL should not be detained with adults; enshrines basic procedural safeguards; requires trial in-camera; opines that the aim of treatment of CICWL at all stages of the proceeding is for the reformation and reintegration into their family and society. The African Youth Charter, on its part, also provides for special treatment and measures for CICWL. It mandates states to: ensure segregation of accused minors[27] from convicted persons; build separate facilities for accused youth who are still minors and ensure that accused and convicted young people are entitled to a

[21] CRC, art 40 (4).
[22] United Nations Department of Public Information, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Commentary)' (1986) (Commentary to the Beijing Rules), Commentary to Rule 18.
[23] CRC, art 37 (a).
[24] ibid.
[25] African Charter on the Rights and Welfare of the Child (adopted 01 July 1990, entered into force 29 November 1999) CAB/LEG/153/REV.2 (ACRWC) art 5.
[26] ibid art17.
[27] Defined as young people aged 15 to 17 years subject to each country's laws. African Youth Charter (adopted 02 July 2006, entered into force 08 August 2009).

lawyer.[28]

In addition to binding international and regional instruments, a non-binding standard, the Beijing Rules for the Administration of Juvenile Justice, was adopted in 1985. It is an all-encompassing standard addressing due process rights, dispositions, and institutional setups. Further, monitoring bodies have developed General Comments that elaborate the rules contained in the standards.[29] Though not binding, the Beijing Rules and General Comments provide an authoritative source for designing an effective child justice system.

In conclusion, it is important to mention the provision of the Beijing Rules which provides that:

> [Child justice] shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all [CICWL], thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.[30]

Ethiopia has ratified the binding instruments (ICCPR, CRC, ACRWC and the African Youth Charter) and hence undertook to discharge the obligations concerning the administration of child justice. To discharge these obligations, Ethiopia has enacted a Constitution[31] containing different rights including the rights of children. These international and regional instruments are an integral part of the law of Ethiopia and should be used as a reference for the interpretation of the rights of children in general and the rights of CICWL in particular.[32]

The details are found in the 2004 Criminal Code and the 1961 Criminal Procedure Code (CPC). The Criminal Code divides CICWL into two groups based on their age; those aged between nine and fifteen and those over 15 and below 18.[33] It also provides special measures and penalties to be applied to them.[34] The special measures principally apply to the first group of children and include school or home arrest, supervised education, admission to curative institutions,

[28] ibid, art18 (2) (b), (c) and (e) respectively.
[29] CRC Committee, General Comment No.24; African Committee of Experts on the Rights and Welfare of the Child, General Comment No.5, State Party Obligation under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection (2018) (ACERWC, General Comment No.5).
[30] Beijing Rules, Rule 1.4.
[31] Constitution of the Federal Democratic Republic of Ethiopia 1995, Proclamation No.1, Federal Negarit Gazeta, 1st Year No.1 (FDRE Constitution).
[32] ibid arts 9 (4) and 13 (2).
[33] Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414, Federal Negarit Gazeta (Criminal Code) arts 52 and 56.
[34] ibid arts 157-177.

reprimand and admission to corrective centers. The Code provides an important principle concerning the imposition of penalties in that they should not be imposed unless the special measures are tried and failed to reform the child.[35] As regards the terms of imprisonment, great discretion is also given to judges i.e. for crimes punishable by imprisonment of ten or more years or with death, the Code provides for the imprisonment to start from one year and up to ten years.[36] The second group of children are subject to the ordinary penalties applicable to adults except death penalty. Further courts are allowed to mitigate the penalty[37] and they could be subjected to the measures and penalties where their physical or mental development is considered to be that of children below the age of 15 or if they did not commit a serious crime and, according to expert opinion, still seems amenable to curative, educational or corrective measure.[38]

Special child justice procedures/due process rights are incorporated in the CPC.[39] The rights are: - first and immediate appearance before the nearest Woreda Court; the right to the presence of parents or guardians; the right to be handed to parents or guardians where the case is adjourned; the right to court-appointed counsel where the crime is punishable with rigorous imprisonment exceeding ten years or with death or where no parent appears to represent them; and hearing of the case in an informal manner including hearing in chamber.

The criminal justice policy of Ethiopia adopted in 2011 has a section that deals with the issue of CICWL.[40] The policy in this section provides for the establishment of separate benches, police departments and prosecutions. In addition, it envisages the need to have an alternative to judicial proceedings (diversion) applicable for CICWL. Ethiopia also adopted the second National Human Rights Action Plan in 2016 and the National Child Policy in 2017. These documents, though not sufficient in detailing the rights of CICWL, have sections on the issue of child justice.

Apart from legislative and policy measures, the Ethiopian government has also established default special institutions in the capital city and some parts of the country. Such measures

[35] ibid art 166.
[36] ibid art 168 (2).
[37] ibid art 176.
[38] ibid art 177 (1).
[39] Criminal Procedure Code of Ethiopia 1961, Proclamation No.185, Negarit Gazeta Extra Ordinary, 21st Year No.7 (CPC), arts 171-180.
[40] Criminal Justice Policy of the Federal Democratic Republic of Ethiopia (translated from Amharic 2011) (Criminal Justice Policy) s 6.4.

include the establishment of child-friendly benches, special police units, community-based correction centers, and Child Justice Project Office (CJPO) of the Federal Supreme Court.[41] UNICEF reported that there are child-friendly courts in nine of the ten sub-cities in Addis Ababa, of which, only seven handled cases of CICWL.[42] A separate police division (Child Protection Unit, CPU) for CICWL is also operating in Addis Ababa, and in regional states in Adama, Bahirdar, Dessie, Diredawa, Shashemene, Awassa and Wolaita Sodo that serve CICWL together with other children in contact with the law.[43] There were three corrective centers in Ethiopia; Addis Ababa, Adama and Mekelle.[44] Similarly, community-based correction centers were available in all regional towns except in the Afar Region.[45] These centers are used to divert CICWL from the formal judicial system. The CJPO was established in the middle of 1999 within the Federal Supreme Court with financial and technical support from donor organizations with long-term objectives of proposing ideas towards reforming the child justice administration of the country to adequately protect the rights of children in line with the international child right standards; and enabling the child justice administration of the country to develop the necessary infrastructure and specialized capacity for the realization of the provisions of the CRC, the FDRE Constitution and the working laws of the country on children.[46]

1.2 Statement of the Problem

Although the CRC is a near-universally ratified document, the administration of child justice around the world is far from satisfactory. Child justice remains a neglected issue both in governments' reporting and the reality on the ground.[47] As a result, it is claimed that child justice is 'an unwanted child' in the UN system.[48] The recent report by the UN on children deprived of liberty is a good indication of the problem as the report found that around 410 000 children are

[41] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Fourth and Fifth Periodic Reports of States Parties due in 2011: Ethiopia (23 December 2013) CRC/C/ETH/4-5 s D (Combined Fourth and Fifth Periodic Reports of Ethiopia to the Committee on the Rights of the Child).
[42] UNICEF, 'Child Notice Ethiopia' (2018) 72.
[43] Frances Sheahan, 'Child Protection and Child-friendly Justice: Lessons Learned from Programmes in Ethiopia, Executive Summary' (Save the Children Sweden 2012) 4.
[44] UNICEF, Child Notice Ethiopia (n 42) 71.
[45] ibid.
[46] Available at <http://www.fsc.gov.et/Children/GetPdf/9> accessed 20 November 2020.
[47] Roy and Wong (n 18) 30; UNICEF, 'Justice for Children' <https://www.unicef.org/protection/justice-for-children> accessed 17 November 2020.
[48] Bruce Abramson, 'Child Justice: The 'Unwanted Child': Why the potential of the Convention on the Rights of the Child is not realized, and what we can do about it' in Eric L Jensen and Jorgen Jepsen (eds), *Juvenile law Violators, Human Rights and the Development of new Child Justice System* (Hart Publishing 2006).

deprived of their liberty every year around the world in pretrial detentions and prisons, excluding the estimated 1 million children detained in police stations.[49] UNICEF estimated the number as over a million.[50]

Though Ethiopia is a party to the international and regional instruments dealing with the issue, its child justice system is not up to these standards. For instance, the CRC Committee regrets the absence of child-friendly justice in Ethiopia.[51] Even though Ethiopia has ratified the CRC which envisions the establishment of separate institutions,[52] it has not yet formally done so. Though the 2011 criminal justice policy envisages the specialization of the institutions and the need for diversion, these aspirations have not yet been backed by law apart from rare default practices in this regard. Community-based correction centers (CBCCs) that were operating in the country are now phased-out.[53] There is only one corrective center in the country. Diversion, which is at the fore of the child justice system, is not formally recognized in the Criminal Code and Criminal Procedure Code. Hence, the absence of sufficient, formalized and specialized institutions and personnel, and diversion and corrective centers in the Ethiopian child justice system have a repercussion on the realization of the due process rights and proper application of the measures and penalties designed for CICWL.

Concerning the procedures/due process rights, the CPC provides that they apply to children between the age of nine and fifteen (art 3) and contains only ten Articles. Not only the terseness of the provisions, the Code was adopted before 60 years and hence, its provisions need to be tested in light of the current standards and principles of child justice. Further, this section of the Code does not have a provision that links it to adult procedures. As a result, there are procedural safeguards applicable to adults that are missed in child justice procedures. Although it is possible to argue that the due process rights provided under the Constitution are equally applicable to children by virtue of the constitutional provision that: provides for equal protection of the law (art 25) and makes the international treaties ratified by Ethiopia an integral part of the law of the

[49] Manfred Nowak, *The United Nations Global Study on Children Deprived of Liberty* (2019) 249.
[50] UNICEF, 'Justice for Children' (n 47).
[51] Committee on the Right of Child, Concluding Observations: Ethiopia (1 November 2006) CRC/C/ETH/CO/3 (CRC Committee, 'Concluding Observations (2006)) para77; Committee on the Rights of the Child, Concluding Observations on the Combined Fourth and Fifth Periodic Report of Ethiopia (3 June 2015) CRC/C/ETH/CO/4-5 (CRC Committee, 'Concluding Observations (2015)) para7.
[52] CRC, art 40 (3).
[53] Phone interview with Adugna Muleta, Manager, Addis Ababa Area Office, FSCE (24 November 2020).

land (art 9 (4)), I contend that analogous application of the adult due process rights will create a discrepant and discriminatory treatment of children vis-à-vis adults and among themselves, which is against one of the principles of international human rights standards in general and child justice instruments in particular.

The draft Criminal Procedure and Evidence Code has tried to address this concern by inserting a provision that provides for the applicability of adult due process rights to children's cases mutatis mutandis if they are not against the special due process rights provisions of the Code and interests of CICWL.[54] However, as argued above, this approach will not be free from the risk of discriminatory and diminished treatment of children compared with adults and even among children themselves as the practice of analogous application of the adult due process rights may vary from place to place.

Dispositions available in the Ethiopian child justice system are principally applicable to children between the age of nine and fifteen[55]and exceptionally to the other group of children.[56] The Criminal Code indirectly provides that imprisonment is a measure of last resort. In this regard Article 166 provides that where the special measures have been applied and failed, the court may sentence a child to imprisonment or a fine. However, it is not clear whether the commission of another crime or even a breach of conditions attached to the measures constitutes failure of the measure. The imprecision will lead to a breach of the principle of 'imprisonment as a measure of last resort' which is detrimental to the wellbeing of CICWL. Similarly, the conditions under which some measures could be applicable are not precise enough. For instance, a measure of school or home arrest applies to crimes of small gravity.[57] Nonetheless, what constitutes crimes of small gravity is not defined which will lead to discrepant practices.

Moreover, although the Criminal Code recognizes 'admission to corrective center' as one alternative to imprisonment for CICWL, there were only a few such centers in the country.[58] Now a day, such a center exists only in Addis Ababa. As a result, children from other areas are

[54] Draft Criminal Procedure and Evidence Code of Ethiopia (2021) art 372 (4).
[55] Criminal Code, art 157.
[56] ibid art 177 (1).
[57] ibid art 161.
[58] UNICEF, 'Child Notice Ethiopia' (n 42) 71.

sent to this center. However, as the capacity of the center is limited,[59] it cannot accommodate all children in the country. This creates discrimination/differential treatment among children based on the place where they live, which constitutes a violation of the Constitution and of international standards to which Ethiopia is a party. And, sentencing children in other areas to imprisonment for lack of a similar center is against the other principles of child rights, 'best interest and development'. Moreover, taking children far away from their place of residence and their families will not be in line with their best interest and hence, the Beijing Rules provide that CICWL should not be removed from parental supervision, unless the circumstances of her or his case make it necessary.[60]

Identifying the gaps in the laws and practices is not enough to improve the child justice system in Ethiopia. The challenges and gaps in the administration of child justice in Ethiopia with a particular focus on the due process rights and implementation of dispositions need to be investigated systematically, as knowing the challenges and gaps is one step ahead in addressing them.

Nonetheless, the due process rights, dispositions, and challenges and gaps in the Ethiopian child justice system are not comprehensively studied. Although there are attempts to study the administration of child justice including the due process rights and dispositions,[61] due process rights were not fully investigated. The major miss in all these researches is the examination of the right to participation of children during trial and investigation of the requirements for effective participation. Moreover, these researches did not engage in a critical legal analysis of the existing due process rights in light of the international and regional standards. They simply investigate the extent of the realization of the rights recognized in the CPC. The same is true for

[59] Addis Ababa University Office of Research Director, 'The System of Justice for Children in Ethiopia: An Assessment of Key Processes, Actors and Initiatives', Part I (Addis Ababa University 2017) 78.
[60] Rule 18.2.
[61] Addis Ababa University Office of Research Director (n 59); Mohammedberhan Kahsay, 'Juveniles Justice Administration: The Case of Tigray Regional State' (LL.M Thesis, Addis Ababa University 2015); Abdi Tesfa, 'The Juvenile Justice System in Oromia Region: The Law and the Practice' (LL.M Thesis, Oromia Justice Sector Professionals Training and Legal Research Institute 2013); Tesera Fenta, 'The Legal Framework on CICWL and Implementation Gaps in Amhara Region' (2015) 2(2), ANRS Justice Professionals Training and Legal Research Institute Journal 57 (translated from Amharic); Matewos Bashaye, 'Determination and Enforcement of Penalties and Measures on Young Offenders in Kafa Zone' (LLM Thesis, Jima University 2021); Elias Hizkeal, 'Legal Gaps, Good Practices, and Challenges in Juvenile Justice Administration in Ethiopia: A Case of Addis Ababa City' (LLM Thesis, Bahir Dar University 2012).

dispositions in that the Criminal Code provisions on measures and penalties have not been analyzed in themselves and in light of the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest appropriate time'. These researches simply identified that some measures are dominant in the respective study area without investigating the appropriateness of these stances and the reasons for not imposing other measures. These researches did not also systematically and comprehensively investigate the challenges and gaps in the Ethiopian child justice system. The commonly identified challenges are lack of finance, absence of child justice benches and corrective centers, and absence of data concerning the child justice system. However, the need to improve the child justice system requires a more boarder and holistic investigation of the potential challenges and gaps.

In addition to lack of comprehensiveness, some of the researches have methodological problems that cast doubt on the reliability and credibility of the findings. This is the case for researches conducted in Tigray, Oromia and Amhara regions. They do not have justified methodology (the first two only listed sources of data) including sampling technique. Further, those conducted in Oromia and Amhara did not properly triangulate the data and heavily relied on interviews while those in Tigray and the one conducted at the national level did not use dead court files as a source of data.

There are also doctrinal works (legal analysis of the due process rights and dispositions).[62] Nonetheless, dispositions receive little attention in these works. Regarding due process rights as well, the works have limitations in that the analyses are not informed by international and regional standards on the subject matter.

Therefore, this research is intended to fill gaps in previous researches by analyzing and investigating the due process rights of CICWL and dispositions robustly in light of the principles and safeguards of the international and regional standards together with the challenges and gaps in the realization of the rights and proper application of the dispositions by using proper methodological approach. It is an interdisciplinary research and is informed by the tenets of developmental psychology. Generally speaking, standards and discourses on child rights in

[62] Stanley Z Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (1970) 7(1) Journal of Ethiopian Law 115; Girmachew Alemu and Yonas Birmeta, *Handbook on the Right of Child in Ethiopia* (Addis Ababa University and Save the Children Norway 2013); Tadesse Kassa, 'Judicial Application of the "Best Interest of the Child" Principle in Ethiopia: A Comparative Study' in Kokebe Wolde (ed), *Judicial Application of the "Best Interest of the Child" Principle in Ethiopia* (Center for Human Rights 2016).

general and child justice in particular are informed by developmental psychology. That means the lesser maturity and vulnerability of children necessitates special protection. This has been recognized both in the CRC (preamble, para 9) and the Beijing Rules (preamble, para 5) and the CRC Committee. Thus, it can be argued that the very nature of child rights makes the study interdisciplinary. Specifically, the requirements for effective participation of the child in the judicial proceedings mentioned in the background of the study which are not clearly stated in the standards, but are developed by developmental psychologists and endorsed by the monitoring bodies, make this research interdisciplinary. This research assessed whether these age-appropriate communication and interaction approaches with a child are practically employed in the Ethiopian child justice system as part of the due process rights of the child to effective participate in the judicial proceedings. Moreover, the extra-legal aspects are covered in chapter seven of the dissertation which dealt with gaps and challenges in the realization of the due process rights and proper application of dispositions.

1.3 Objectives of the Study

1.3.1 General Objective

This research aims to examine the due process rights and dispositions in the Ethiopian child justice system in light of international and regional standards.

1.3.2 Specific Objectives

It specifically aims to:

- Examine the due process rights incorporated and enforced in the Ethiopian child justice system and whether they accommodate the special needs of CICWL in the light of the aims and principles of the internationally prescribed child justice system**;**
- Examine dispositions available in the Ethiopian child justice system in light of the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest appropriate period of time'; and investigate their practical application;
- Investigate the challenges and gaps in the realization of the due process rights and proper application of dispositions in the Ethiopian child justice system, and recommend workable solutions.

1.4 Research Questions

To accomplish the objectives of the research, the following research questions are formulated:

1.4.1 Main Research Question

What is the status of the Ethiopian child justice system as regards the due process rights of CICWL and the availability and application of dispositions when seen in light of the international and regional standards?

1.4.2 Specific Research Questions

- What due process rights are incorporated and enforced in the Ethiopian child justice system and do they accommodate the special needs and circumstances of CICWL?
- What dispositions are available in the Ethiopian child justice system; and do they comply with the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest period of time?' To what extent they are applied in practice?
- What are the challenges and gaps in the realization of the due process rights and application of dispositions in the Ethiopian child justice system?

1.5 Scope of the Study

This research is limited to analyses of the due process rights of CICWL and dispositions available in the Ethiopian child justice system where children commit *ordinary crimes*. Thus, procedural/due process rights in case of petty offenses, private proceedings, a variation of orders and reinstatement are not part of this research. The references concerning due process rights are Articles 40 (2) and 41 of the CRC and the corresponding provisions of other standards such as ACRWC, ICCPR, Beijing Rules, FDRE Constitution and the Criminal Procedure Code.

As mentioned above, the exclusive subjects of these due process rights in Ethiopia are children between the age of nine and fifteen. Thus, the subjects of the study concerning due process rights are children of this age group. On the other hand, the special measures principally apply to this group of children and in exceptional cases to children over 15 but below 18 years. Moreover, in sentencing children over 15 and below 18, courts are allowed to mitigate freely. Thus, this research also assessed the applicability of these measures and penalties to this second group of children. This aspect of the Ethiopian child justice system is a positive and important step designed to ensure that children of this group (15-18 years old) benefit from special treatments warranted by their conditions and needs. Hence, it is worth assessing their practicability in the Ethiopian child justice system.

1.6 Significance of the Study

This research will contribute to strengthening the legal and institutional framework of the child justice system of Ethiopia. Hence, it may become a reference point for the concerned government organ charged with the power to evaluate and improve the system. Moreover, the finding of this research can also provide inputs for NGOs working on the right of children in general and of CICWL in particular. The findings of this research will also help personnel engaged in the administration of child justice to appreciate the gaps between the law in books and the practice. Finally, this research may be used as a reference by potential researchers in the field.

1.7 Limitation of the Study

This research faced three challenges. The first relates to the unwillingness of some respondent institutions. These are the Federal Police Commission, Addis Ababa Rehabilitation and Remand Center, and Save the Children. The police commission was not willing to provide the information due to its internal rule that prohibits disclosure of information for non-police Universities. Hence, the researcher did not get information on the presence or otherwise of child justice statistics and its contents which was important for a well-informed analysis. The Rehabilitation Center prohibited the researcher to interview children for the alleged justification of protection of their rights and dignity. The researcher could get complete data from these children who passed all stages of the judicial process than those who were contacted on spot in courts whose cases have not been disposed of. Save the Children was one of the child rights NGOs that the researcher tried to contact. Due to the COVID protocol, physical entrance to its compound was not allowed and the researcher submitted the support letter through a messenger and was promised to be contacted via phone call. However, the researcher did not get it and in turn, called the NGO many times. The responses were that the letter has not been addressed to the concerned office. Therefore, the researcher did not get information on its planned activities in the area of the Ethiopian child justice system and the reasons for its termination of the financial support it was providing to a national NGO working in the area of child justice.

The second challenge concerns the absence of organized data concerning the Ethiopian child justice system. The regional state courts have no child justice database. The researcher got the court files from social workers, counsels, judges and prosecutors and used all of them as they are few. This hindered the researcher to employ purposive sampling to have a mix of cases involving

minor and serious crimes. In Addis Ababa, courts have a separate database on cases involving women and children. However, the database is not designed to have the necessary information. It only contains the name of the parties and the duration of the trial. As a result, the researcher was not able to apply purposive sampling based on the severity of the crime or the types of dispositions imposed.

Finally, the researcher faced shortage of financial resources and hence was not able to cover another area (region) to make a more compressive study. Including other study areas would require the researcher to incur two types of costs: accommodation costs and costs for language interpreters and translators (of court files). The research fund provided by the University was not enough to cover the costs even with coping mechanisms.

1.8 Literature Review

1.8.1 Theoretical Frameworks: Models of Child Justice

Although there is a consensus that CICWL should be treated separately from adults, there are competing models of child justice on the appropriate treatments for CICWLs adopted across jurisdictions, the predominant of which are welfare and justice models**.** These models determine the appropriate response that governments give to child offending and treatments accorded to them**.** Accordingly, there is a divergence of laws, policies, institutions and programs adopted by various jurisdictions in the administration of child justice.

Welfare Model (Medical Model) is informed by parens partiae philosophy**.** According to this principle, the court and the justice system, in general, are not directed toward punishing CICWL who are deviant but rather toward providing assistance and care, much like a caring parent.[63] This model emphasizes treatment and rehabilitation rather than punishment for those youth who violated the laws. Delinquent youths are considered to be victims of their environment and, just as a sick person is given a diagnosis and medical treatment, a delinquent child can also be diagnosed and treated. When this model is applied, the focus of the child justice system is more on correcting deviant children.[64] The requirement of due process is not given much attention as children brought before the court are handled using informal procedures.[65]

[63] Kratcoski, (n 2) 16.
[64] ibid.
[65] John A Winterdyk, 'Introduction: Juvenile Justice in International Arena' in John A Winterdyk (ed), *Juvenile Justice: International Perspectives, Models and Trends* (CRC Press 2015) 6.

Justice (Just Desert) Model on the other hand emphasizes a just punishment for the offender. CICWL should be held responsible for their actions.[66] It supports strict due process and proportionality of punishments. According to this model, crime is irrational and punishment must be used to deter people from violating the rights of others and to demonstrate the irrationality of law-breaking behavior; and punishment must be proportionate to the harm done not for reformation or retribution.[67] Under this model, lack of criminal capacity is not an excuse, but a ground of mitigation of punishment.[68]

This model has been developed in response to the weakness of the welfare approach i.e. under the welfare model, the informality of proceedings and lack of procedural protections in the child court proceedings have led to abuse of processes and systems. As a result, children accused of crimes have been unfairly and arbitrarily punished. This led to the transformation of the informal, non-adversarial and highly discretionary child justice system into a more adversarial and formalized system.[69]

Restorative Justice Model is a combination of the welfare model and justice model. It emphasizes the interests of victims of crime, community security and the needs of CICWL and their families.[70] Under this model, CICWL must assume responsibility for their behavior and they are given a just punishment, but the community has some responsibility for providing programs that will prevent delinquency and help CICWL to become functioning members of society. It can be taken as one aspect of diversion as discussed below.

Diversionary Approach is another model in the child justice system. Diversion refers to the process of removing CICWL from formal judicial procedures. It has its base in the CRC and the Beijing Rules. The use of the diversionary approach in handling CICWL is not a novel approach. The establishment of separate courts for children in the 19th century marked the first form of diversion in child justice as it was designed to redirect children away from adult courts into a more informal system. However, the new movement of diversion reform occurred during the

[66] ibid 17.
[67] Jane Pickford, 'Introduction: A New Youth Justice for a New Century?' in Jane Pickford (ed), *Youth Justice: Theory and Practice* (Cavendish Publishing Limited 2000) xxvii.
[68] ibid.
[69] Aminuddin Mustaffa, 'Rights of Children in Criminal Proceeding: A Comparative Analysis on the Compatibility of the Malaysian Juvenile Justice System with the Standards of the Convention on Rights of Children (DPhil Thesis, Lancaster University 2016) 23.
[70] Winterdyk (n 65) 17.

1970s when there was a crisis of confidence over the effectiveness of the traditional child justice system.[71] There are various diversionary measures, the most common of which include caution, mediation, conferencing and pretrial community service. [72]

Corporatism (Managerialism) is another approach in the child justice system akin to the management of corporations and requires a setting-up of a multidisciplinary justice team at a national and local level to standardize practices and the child justice profession.[73] This approach has features such as increased administrative decision-making, greater sentencing diversity, centralized authority, and coordination of policy and growing involvement of non-juridical agencies.[74]

Hybrid Approach: The models mentioned above are not mutually exclusive[75] and it is difficult to prioritize one model over the other. Therefore, diverse models could be used to achieve government policies concerning child justice.[76]

Child Rights-based Approach: It requires the child justice system to be built on the basic principles on child rights included in international standards such as the CRC and other relevant international and regional standards related to CICWL crime prevention, children deprived of their liberty and noncustodial alternative measures.[77] It furthers the realization of the rights of children set out in the CRC through developing the capacity of duty-bearers to meet their obligations to respect, protect and fulfill rights and the capacity of rights-holders to claim their rights, and which is guided 'at all times' by the principles of the right to life, survival and development; non-discrimination; the best interests of the child and the right to be heard of the child.[78]

This model subsumes the tenets of the above models except for the 'just punishment' aspect of the justice model and the aspect of the welfare model that disregards the due process rights of

[71] Mustaffa (n 69) 26.
[72] Roy and Wong (n 18) 55-56.
[73] Paul Dugmore and Jane Pickford, *Youth Justice and Social Work* (Learning Matters 2006) 32.
[74] John Pratt, 'Corporatism: The Third Model of Juvenile Justice' (1989) 29 (3) British Journal of Criminology 236, 245.
[75] Winterdyk (n 65) 6.
[76] John Muncie and Gordon Hughes, 'Modes of Governance: Political Realities, Criminalization and Resistance', cited in Dugmore and Pickford (n 73) 40.
[77] Segrado Chiara, 'Child Rights and Juvenile Justice: Best Practices and Lesson Learned from Save the Children Italy National and International Programs' (Save the Children Italy 2016) 12.
[78] UNICEF, 'Toolkit on Diversion and Alternative Detention' (2010) <https://www.unicef.org/tdad/glossary.doc,> accessed 9 June 2020.

CICWL. Hence, due to this feature of the child rights-based approach and the trend in using the human rights-based approach in all spheres after the advent of international human rights standards, this research is guided by the child rights-based approach.

1.8.2 Empirical Literature

Child justice has been studied by a team of researchers under the auspices of the research directorate of Addis Ababa University in 2017. It was about the assessment of processes, actors and initiatives for justice for children in Ethiopia. The study covered nine regions and the two city administrations and identified the following gaps in the Ethiopian child justice system: low minimum age of criminal responsibility; detention of children before trial and after conviction; the absence of guidelines on how police and judges handle and interact with children; the variation in practice as regards court-appointed counsel (in some cases, the provision of the CPC is followed and in the other case the Constitutional provision and in Addis Ababa court-appointed counsel is available for all children starting from arrest irrespective of the seriousness of the crime); and absence of institutions and alternative mechanisms including diversion.[79]

Thus, due process rights like arrest warrant; notification and content of charges/complaints are not addressed. Similarly, the procedures/rights during trial including the setting of the court and participation of children and/or their counsel are not addressed. As regards dispositions, this research found that children are detained after conviction for serious crimes but the reference to children here is those aged over 15 years which is not prohibited under the Criminal Code.[80] It also stated that the dominant measure is reprimand and that the only corrective center is found in Addis Ababa. But, it did not investigate the practicability of other dispositions provided under the Criminal Code. The research never analyzed a single court file for its findings. It is also possible to say that this research did not investigate the challenges and gaps in the Ethiopian child justice system apart from stating that 'the Ethiopian child justice system lacks the resources… to deal with children in a manner that respects their rights and furthers their best interests'.[81]

[79] Addis Ababa University Office of the Research Director (n 59) 166ff.
[80] ibid 76.
[81] ibid 171.

Moreover, many of their findings are without sources i.e. it is not clear whether the findings are based on one or more sources of data employed.[82] This led us to question the credibility of the findings. Further, the research did not use the most reliable source of data, court files, as a tool of data collection.

A study that investigated the law and practice of child justice in Oromia region was conducted in 2013.[83] The study found a breach of the provision that requires the immediate bringing of children to court and the consequent detention of CICWL in police stations; investigation and prosecution of children cases without court authorization; the involvement of different justice actors in the examination of the age of the child; the lengthy time that the examination took; the absence of child justice benches; the absence of parental participation during trial; the participation of prosecutors in lower courts; the breach of the unique rules of examination of witnesses; the absence of legal representation in lower courts (but, does not indicate the seriousness of the crimes or absence of parents); the absence of diversion centers; and the imposition of imprisonment on CICWL who did not commit serious crimes as a dominant sanction. However, this research lacks legal analysis of the due process rights and the disposition in light of the international rules and principles and failed to assess the application of the special protection accorded to children over the age of 15. Let alone this, it did not investigate the legality of the imposition of the measures on the first group of children in light of the grounds provided for the respective measure- it simply stated that most of the children were subjected to the measures and penalties provided under the Code. It did not also investigate the full range of the due process rights that are/should be available to CICWL. Moreover, it heavily relied on information from interviews and did not use court cases to triangulate the findings from the interview which affects the quality of the findings. Further, the findings on the measures and penalties are made solely on quantitative examination of 15 files which is not representative. Finally, this research did not investigate gaps and challenges in the administration of justice in the region-it did not have an objective on this.

A research on the legal frameworks of child justice and implementation gaps in the Amhara region was conducted in 2015.[84] This research tried to assess both the substantive and procedural

[82] See Addis Ababa University Office of the Research Director (n 59), Part II.
[83] Tesfa (n 61).
[84] Fenta (n 61).

aspects of the child justice system of the country and its implementation in the Amhara region. However, the researcher did not include a methodological section and never mentioned it in the abstract which affected the reliability of the findings. As inferred from the reading of the whole paper, the researcher used interviews and case analysis as tools for data collection. Nonetheless, the researcher interviewed only ten respondents from only two areas of the region viz.Bahir Dar and North Wollo. Similarly, he analyzed nine cases only. These facts added another layer of doubt to the reliability of the findings.

The substance of the research inclined to the legal analysis and empirical findings are few that did not cover all due process rights of CICWL recognized under the CPC and measures and penalties recognized in the Criminal Code. Regarding due process rights, it only addressed age determination issue, the existence of child justice benches, the absence of diversionary measures, and initiation of a case (complaint and charging). Regarding measures and penalties, the researcher indicated that courts imprisoned children who came in conflict with the law and stated that the prevalent measure is reprimand based on only one interview and analysis of two cases.[85]

The administration of child justice in Tigray region was studied through a mix of qualitative and quantitative approach.[86] The research found the absence of sufficient special units at the police level and child-friendly benches; the absence of legal provision on diversion of cases; the breach of immediate bringing of children to the court and detention of children in police station; the absence of legal representation during the pretrial stage; the observance of closed trial of cases; and reprimand as a dominant measure due to the absence of institutions to give effect to other measures envisaged in the Code. The research identified limited challenges in the administration of child justice in the study area viz. financial constraints; lack of intersectoral cooperation; absence of trained manpower and disaggregated data. As others, this study did not engage in a legal analysis of the due process rights and dispositions in light of the international rules and principles. The research is not also comprehensive enough and omits investigating some due process rights and the practicability of the special protection accorded to children over the age of 15.

[85] See ibid 132 -33.
[86] Kahsay (n 61).

A study on the determination and enforcement of penalties and measures in Kafa Zone, SNNPR, was conducted in 2021.[87] The research aimed to investigate the status of application of the measures and penalties and the associated challenges thereto through a mixed research approach. Accordingly, it found that none of the measures got practical application while imprisonment is the dominant penalty. It also identified that the prison center in the study area does not provide rehabilitative services to prisoners in general and CICWL in particular. As challenges in the proper determination and enforcement of the dispositions, the researcher identified the absence of training, child justice benches, separate place of accommodation of children and the little use of social workers. The research nonetheless did not indulge in a legal analysis to discern the content and essence of the dispositions and tested them in light of the two principles of the child justice system regarding response to child crimes. The challenges identified are also limited in their reach.

In 2012 another research was conducted entitled 'Legal gaps, good practices, and challenges in juvenile justice administration in Ethiopia: A case of Addis Ababa city'.[88] Although the research pretended to assess the legal gaps in the Ethiopian child justice system, it only identified these legal gaps: low minimum age; lack of legal recognition of pretrial diversion and child-friendly benches; restriction of court-appointed counsel to serious offenses; and the lack of precision of the CPC about the immediacy of bringing the child to the court. The research gave much devotion to the institutional setups viz. Child Protection Unit (CPU), CBCC, Child-friendly benches, Addis Ababa Remand Home and CJPO. Thus, there is as such no examination of the laws and practices concerning due process rights and dispositions of the Ethiopian child justice system. Further, concerning the challenges, the research identified only a lack of ownership of the institutions by the government including financial constraints to run them.

Another subject-specific research has been conducted on the working and operation of community-based correction centers in Addis Ababa at the time when they were functional. Although no law specifically authorizes and provides guidance to do so, diversion of children in conflict with the law to a community-based correction program was widely practiced.[89] The Community-Based Correction Programs (CBCPs) are arrangements where petty and first-time

[87] Bashaye (n 61).
[88] Hizkeal (n 61).
[89] Tsegaye Deda 'Introducing Child Protection and Child-friendly Justice in a Society with Complex Socioeconomic Challenges: Experiences and Lessons from Ethiopia' (Save the Children Sweden 2011) 61.

CICWL get diverted to the community instead of going through the formal child justice system.[90] The research described the advantages of the program, its origin in Ethiopia and the processes employed and services available to children in the centers. Similar research has been done by another author focusing on child rights-based approach diversion to CBCCs.[91] The research found that diverting children to CBCCs is congruent with the four principles of the CRC and reinforces them. It also identified the different stakeholders involved in the administration of the program, it positive impact on children (improving academic performance, helping to drop bad behavior and friends, and establishing good family relation) and challenges besieging the system (absence of sufficient centers, the location of the center, and absence of sufficient facilities).

1.8.3 Legal Analysis and Related Literature

Fisher made a thorough analysis of the special procedures incorporated in the Ethiopian child justice system.[92] However, this analysis was made a long time ago, in 1970, based on the provisions of the 1955 revised Constitution and the provisions of adult procedures of the CPC. However, many things have changed since then like the adoption of the FDRE Constitution and international and regional human rights standards, and the analysis should be made in light of these developments.

Girmachew and Yonas have prepared a handbook on the rights of the child in Ethiopia which contains sections that discuss due process rights; measures and penalties from the perspective of the CRC and domestic laws.[93] The handbook discusses the due process rights and dispositions as nearly as the words of the laws.

However, the handbook raised important points regarding the implementation of child rights. For the effective realization of children's rights in Ethiopia, the handbook recalled the concern of the CRC Committee concerning the absence of a comprehensive child code.[94] Further, the handbook emphasized the importance of a central coordinating body with adequate human and material

[90] ibid.
[91] Kumneger Girma, 'A Child Rights-Based Approach to Diversion in Ethiopia: An Analysis of the Community-Based Correction Program in Addis Ababa' (MA Thesis 2015).
[92] Fisher (n 62).
[93] Alemu and Birmeta (n 62) 162-74.
[94] ibid 29.

resources for the enforcement of child rights including the rights of CICWL.[95] It also recalled the absence of a disaggregated data collection system on the status of implementation of the rights of the child, which the Committee has recommended to do more in this regard in its consideration of Ethiopia's report.[96]

However, as it is a handbook, one cannot find critical legal analysis and practical dimensions in it, and hence, it does not engage in the critical analysis of the legal frameworks of Ethiopia in light of the CRC and a general feature of an ideal child justice system and assessment of the practical implementation of the rights and application of dispositions.

Another doctrinal work is done by explicating the provisions of the laws from the perspective of the best interest of the child and in comparative terms with the legal framework of other countries.[97] Regarding, due process rights, this work identified the various modalities of proving the age of the child provided under the Ethiopian legal regime; the special rules of investigation and charging; prohibition of pretrial detention; the inappropriateness of confining the right to counsel of CICWL to serious crimes; the absence of proper legal framework on the informal setting of court-rooms; the omission of some due process rights like the right to presumption of innocence, the right to remain silent, the right to be notified of the charge and the right to privacy of the child; and the absence of a clear provision on the expeditious disposition of child justice cases. Nonetheless, as the work is a comparative study, it does not indulge into a rigorous analysis of the provisions of the CPC in light of the international and regional standards on the matter.

Concerning measures and penalties, the author is optimistic about the measures provided in the Criminal Code that they could serve the best interest of CICWL if applied in good faith, and on the other hand, casted doubt on their applicability as the required institutions are not established and separate accommodation of children is not strongly enforced. It then mentioned the measures and penalties that the Code stipulates for both groups of children without further examining the content and essence of each measure and/or penalty and without testing them in light of the two principles of the child justice system concerning dispositions.

[95] ibid 31-32.
[96] ibid 34.
[97] Kassa (n 62).

1.9 Methodology of the Research

1.9.1 Research Methods

The selection of methods is based on research questions which in turn flow from the research problem and objectives. Hence, this research employed doctrinal and non-doctrinal methods. In the doctrinal method, the researcher made a critical legal analysis of the existing legal frameworks of Ethiopian child justice in light of the international and regional standards and the frameworks in themselves.

The empirical approach has employed a qualitative method. The qualitative method is used in this research because as Harwell noted, qualitative research method focuses on discovering and understanding the experience, perception and thought of participants and hence explores meaning, purpose or reality.[98] Likewise, Tewksbury, in describing the feature of this method said that qualitative method focuses on trait, meaning and characteristics of people or events.[99]

1.9.2 Population and Sampling

The population of this research is generally persons involved in the administration of child justice, those in contact with it and others who are expected to promote and ensure the observance of the rights of the child in general and CICWL in particular. Such include police officers, prosecutors, judges, defense counsels, social workers, children and their parents or guardians, coordinators of diversion centers, persons from the ministry of justice and regional counterparts, child justice project offices, the Ethiopian human rights commission, ministry of women and social affairs and the regional counterparts, law and justice institute, justice professional training centers, child rights NGOs and law school students.

Nonetheless, since it is impossible, owing to resource and time constraints, to conduct country-wide research, the research covered only selected areas in the country i.e. Addis Ababa, Hawassa, Bahir Dar, Debre Markos, Finote Selam and Arba Minch. However, respondents from other areas are also interviewed by phone as appropriate. Addis Ababa is selected because it has a better practice in the administration of child justice including the remand home and child-friendly bench. Areas in the Amhara region are selected because there are child-friendly courts in

[98] Michael R Harwell, *Handbook for Research in Education: Pursuing Ideas as a Keystone of Exemplary Inquiry*, (2nd edn, Sage Publications 2011) 148.

[99] Richard Tewksbury, 'Quantitative versus Quantitative Methods: Understanding Why Qualitative Methods are Superior for Criminology and Criminal Justice' (2009) 1(1) Journal of Theoretical and Philosophical Criminology 38, 38-39.

15 major cities of the Region.[100] The Region has also introduced CPU in all police stations.[101] Arba Minch and Hawasa are selected as research sites because the researcher was informed that the cities have diversion centers[102] and how diversion is ordered and implemented, and their current status need investigation. Besides, language accessibility was another consideration in selecting the research sites. The researcher only speaks Amharic language (from the national languages) and Amharic is the working language in these areas.

The respondents (child justice actors) were selected purposively i.e. respondents who are experienced in child justice cases are interviewed. In this case, judges and prosecutors from first instance and high courts were interviewed. Police officers interviewed were mostly those working in women and children cases investigation units (purposive). Concerning personnel from institutions, the researcher interviewed the respective person to whom the support letter was referred to. Professionals from NGOs were selected purposively based on their expertise in the area of children's rights in general and the rights of CICWL in particular. In interviewing children and/or their guardians, the researcher used convenience sampling in that interviews were made in the court when they come for the litigation. In the regions, the researcher tried to interview all such children and/or guardians while in Addis Ababa, random sampling was used. Interview with children detained in Addis Ababa rehabilitation center was not made as the center did not allow the researcher to do so for the reason that interviewing them will expose them to double victimization.

Three mechanisms were employed to get court cases. The first mechanism was consulting social workers' records to identify the file numbers involving CICWL. The second mechanism was using the court database. Thirdly, the researcher got case numbers from judges, prosecutors and defense counsels. In the regions, the researcher tried to analyze all available cases. On the other hand, in Addis Ababa, as the cases are many, sampling is used. Hence, except for the case of Lideta First Instance Court and Bahir Dar City Woreda Court where the researcher used purposive sampling to have a mix of cases involving minor and serious crimes as the disposition for the two is different (for this purpose, the researcher used the records of the social work offices), files from other benches were randomly selected as the databases were short of the

[100] UNICEF, 'Child Notice Ethiopia' (n 42) 72.
[101] Sheahan (n 43) 4.
[102] Addis Ababa University Office of the Research Director (n 59) 75; Phone interview with Mahlet Tibebu, Child Justice Coordinator, SNNPR Supreme Court (13 November 2020).

necessary information to employ purposive sampling. Cases from the lower to the highest court level were analyzed.

The researcher observed real court cases in the regions as available (as they are rare) while in Addis Ababa, the researcher went to the benches once on the hearing days and observed cases entertained on those days.

1.9.3 Sample Size

As the research employed a qualitative approach, the sample size is governed by the rule of data saturation. Hence, the researcher interviewed as many interviewees as possible, observe real court cases, and investigated as many court files as possible until the data saturates. Accordingly, 15 police officers, 20 prosecutors, 24 judges, 16 defense counsels, 16 social workers, 10 children and/or guardians, 19 law school students, 41 persons from the relevant government ministries and offices including the Ethiopian human rights commission, and 4 respondents from two child rights NGOs- Forum on Sustainable Child Empowerment (FSCE) and African Child Policy Forum (ACPF)- were interviewed.

The researcher observed 12 real court cases and analyzed 73 court files (including two appeal and one cassation file) involving children below the age of fifteen and 18 files involving those over fifteen years of age. The majority of the files were obtained from first instance courts due to the prevalence of minor crimes which are under the jurisdiction of lower courts and due to the rarity of serious crimes that are triable by high courts.

1.9.4 Data Collection Tools

This research used the following data collection tools described below.

1.9.4.1 Interview

Key informants interviews were held with police officers, prosecutors, judges, defense counsels, social workers, and persons from the ministry of justice and regional counterparts, ministry of women and social affairs and regional counterparts, Ethiopian human rights commission, child justice project office, diversion center coordinator, law and justice institute, justice professional training centers, and NGOs working on child rights. Children and their parents or guardians were also interviewed as a check against the information the researcher get from police, prosecutors and judges about the special procedures they have passed through.

Interviews were also held with law school students who took criminal law and procedure courses to know their assessment of the sufficiency of legal knowledge they acquire after taking the courses. Effectively acquainting prospective judges and prosecutors with the principles, aims and rights in the child justice system is essential for the effective administration of child justice and pressing for improvement of the system.

This research thus employed a semi-structured interview. A semi-structured interview enables the researcher to include new questions in the course of undertaking the interview when the circumstance presents itself and provides flexibility for the interviewees to elaborate on phenomena in the way they think desirable. Thus, it helps the researcher to gather sufficient data by adding questions at the later stage of conducting the interview.

1.9.4.2 Observation

Personal observation of real court cases was another tool for collecting data when the researcher was allowed to attend real court cases involving CICWL, as the trial involving CICWL who are between nine and 15 years of age is in-camera.[103] The issues observed include, among others, the whole procedural aspects of handling cases involving this group of children including the setting of the court; the involvement of social workers; the presence of parents and/or counsel and the manner judges communicate with children. Observation was also made to the Addis Ababa rehabilitation and remand center, the CBCC in Hawassa and police stations.

1.9.4.3 Court Cases

Court cases were analyzed to examine issues such as the procedures followed by courts in handling cases in which children have been involved particularly the presence of parents and/or counsel; the length of times the case took to be disposed of including the time for investigation and prosecution; pretrial detention issues; number of adjournments and their grounds; social inquiry report presented and used by the court; the nature and duration of measures applied on CICWL and so forth. The charges framed by prosecutors and complaints drawn by police against a child suspected of a crime (attached to court files) were also investigated to assess their contents and to see if any consideration of the child's maturity is taken in framing them.

[103] CPC, art 176(1). As such, the researcher was prohibited to attend cases in one of the Federal First Instance Court, Akaki Kaliti Division.

1.9.4.4 Legal Instruments

Child rights related laws such as the FDRE Constitution, Criminal Code, CPC, laws establishing and providing powers of the relevant ministries, bureaus and the Ethiopian human rights commission, CRC, ICCPR, ACRWC as well as other relevant instruments were consulted for setting the legal framework governing child justice on the basis of which the practice is gauged.

1.9.4.5 Secondary Sources

Secondary sources such as books, commentaries, journals, official reports and documents, general comments and concluding observations of the supervisory bodies on the rights of the child were also consulted. Journals of law schools, law schools' curricula and teaching materials, justice professionals' training materials and law school exit exam papers were investigated to assess the place they give to child justice.

1.9.5 Data Analysis and Interpretation Method

Thematic analysis was used to analyze and interpret data obtained through interviews and court files. The process of data analysis requires preparing the data for analysis, representing the data, and making an interpretation of the larger meaning of the data.[104] Therefore, the researcher followed the following steps in analyzing the data.[105] The first step involves organizing and preparing the data for analysis which includes transcribing interviews, writing up field notes, or sorting and arranging the data into different types depending on the sources of information. A second step is reading through all the data to obtain a general sense of the information. Thirdly, the researcher coded the data i.e. segmented sentences, paragraphs and contents of court files into categories and identified themes for analysis. These themes are the ones that appear as major findings in qualitative studies and are stated under separate headings in the findings sections of studies. The final step is analyzing the data and presenting the findings.

On the other hand, content analysis was used to analyze data obtained from secondary documentary sources in that they are assessed in terms of the place they give to child justice.

[104] John W Creswell, *Research Design, Qualitative, Quantitative and Mixed Methods Approaches (*2nd edn, Sage Publication 2009) 133.
[105] ibid 134-136.

1.9.6 Ethical Considerations

Ethical considerations are of utmost importance in qualitative research. This is because there is a face-to-face interaction between the researcher and participants, which does not occur in quantitative research. Therefore, the following safeguards were employed to protect the rights of informants[106]: 1) the research objectives were articulated verbally and in writing so that they were clearly understood by the informant (including a description of how data will be used); 2) consent of the participants was obtained freely, and concerning children, consent was first secured from guardians followed by consent of the children; 4) the final decision regarding informant anonymity rested with the informant and the researcher asked their choice at the end of each interview.

Apart from general ethical issues, human rights research in general and research in child rights in particular requires specific ethical considerations. The fact that human rights researchers conduct research in pursuit of a good cause will not exempt them from ethical scrutiny.[107] Ethics should be viewed as an integral part of the research methodology. An important source of guidance in this regard is the human rights instruments,[108] be they international, regional or national. The following are professional ethics that equally apply to research in human rights. These are the no harm issue, recognition and respect, beneficence and compliance with the professional standards.[109] The researcher should try to avoid any potential harm, direct or indirect; respect the right to participation of researchers; comply with the principle of non-discrimination; ensure their dignity; enhance the promotion and protection of human rights under consideration and comply with standards of good scientific conduct. Standards for good scientific conduct include anti-plagiarism norms, academic honesty and a general requirement for methodological stringency, accuracy in the recording of research data, caution about generalizing findings, and ensuring that empirical findings can be tested and verified. Thus, the researcher tried to comply with all these ethical issues.

Further, the researcher approached CICWL informally by taking their age and maturity into consideration. That means familiarizing conversations that are not related to the issues to be

[106] ibid 141.
[107] George Ulrich, 'Research Ethics for Human Rights Researchers' in Bard A. Andreassen, Hans-O. Sano and Siobhan Mclnerney-Lankford (eds), *Research Methods in Human Rights: A handbook* (Edward Elgar Publishing 2017) 192.
[108] ibid 193.
[109] ibid 194ff.

addressed by the interview were used to create a rapport with them. Further, serious taking of notes was avoided to make the conversation friendly.

1.10 Organization of the Study

This research is organized into eight chapters. The first chapter deals with the introduction of the research covering the background of the study, statement of the problem, research objectives, research questions, significance of the study and methodology. Chapter two provides a detailed discussion on the concept of child justice system, its history, aims, principles, and models of child justice. Due process rights of CICWL in the international and regional standards are analyzed in chapter three. Chapter four discusses principles concerning deprivation of liberty of children after conviction and the various dispositions available under the CRC and other related standards. Chapter five examines the legal and practical frameworks of due process rights in the Ethiopian child justice system. Chapter six critically examines dispositions available to judges in Ethiopia and the extent to which judges explore and use them. In addition, disposition in the Ethiopian child justice system are gauged in light of the guiding principles relating to deprivation of liberty of children. Investigation of the challenges and gaps in the administration of the Ethiopian child justice system is covered in chapter seven. The final chapter makes concluding remarks and suggests possible ways to improve the Ethiopian child justice system.

CHAPTER TWO

CHILDREN IN CONFLICT WITH THE LAW AND THE CHILD JUSTICE SYSTEM: GENERAL OVERVIEW

2.1 Introduction

The term child justice is not used explicitly in international and regional instruments dealing with child rights. These instruments rather prescribe the enactment of laws and the creation of institutions and procedures for CICWL.[110] The term is not used in literature either. The terms 'juvenile' and 'juvenile justice' are extensively used in literature. However, the recent General Comment of the CRC Committee employed the term child justice. The Committee defined child justice as legislations, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, children considered as offenders.[111] Therefore, child justice encompasses special laws and institutions that deal with children infringing or alleged as infringing the penal law.

Until the late 19th century, CICWL were not as such treated separately from adults; and the child justice system we know today is the result of years of development.[112] The first child justice court was established in Chicago in 1899. Before this time, CICWL were prosecuted and punished under the same law as adults.[113]

In according special treatment to CICWL, states adopt various models of child justice. These include the welfare model, justice model, restorative justice model, diversionary approach, corporatism, a mix of these models and child rights-based approach. Depending on the prevailing social, political, cultural and economic conditions, states adopt their own model of child justice. However, international and regional standards on the issue are used as a guide in adopting an appropriate child justice model that will best serve the rights of CICWL.

The aim the child justice system is to establish a system of justice which is based on child rights and puts the best interest of the child first.[114] Thus, the child justice system shall emphasize the wellbeing of children and ensure that reactions to child offending should be proportionate to the

[110] CRC, art 40 (3); Beijing Rules, Rule 2.3.
[111] CRC Committee, General Comment No.24, para 8.
[112] Roberson (n 1) 12.
[113] ibid 21.
[114] Roy and Wong (n 18) 12.

circumstances of the offender and the offense.[115] This is because children, due to their mental and physical immaturity, need special protection.[116] Apart from the four principles of the CRC, the child justice system has its principles. These include arrest and detention as a measure of last resort and deprivation of liberty for the shortest appropriate time.

This Chapter thus begins by defining 'children in conflict with the law' and 'child justice system' and proceeds with tracing the historical development of the child justice system. It then discusses the various models that are developed across different times followed by a discussion on the aim and principles that underpin an ideal child justice system as enshrined in the CRC, the Beijing Rules and the ACRWC.

2.2 Defining Children in Conflict with the Law and the Child Justice System

The term 'CICWL' is not used explicitly in the child rights instruments in general and in child justice laws in particular. Instead, this term is used in literature. The international and regional child rights standards use the term children with the qualification that they violate or are alleged to have violated criminal law. The CRC uses the term 'child alleged as, accused of, or recognized as having infringed the penal law', and the ACRWC employs the term 'child accused or found guilty of having infringed penal law'. The equivalent term to 'CICWL' is 'juvenile or 'juvenile offender'. The Beijing Rules define a juvenile as a child or young person who may be dealt with for an offense in a manner different from an adult.[117] However, who is a child is not defined in the Rules. Similarly, the Rules define a juvenile offender as a child or young person who is alleged to have committed or who has been found committed an offense.[118] The UN Rules for the protection of juveniles deprived of their liberty define juvenile as every person under the age of 18 years.[119] Unlike the CRC and the Beijing Rules, these Rules use the term 'person below the age of 18 years', instead of the qualified term 'child' (for the CRC) and the undefined term 'child or young person' (in the case of Beijing Rules). It is important to remember that these Guidelines were adopted one year after the adoption of the CRC.

[115] Beijing Rules, Rule 5.
[116] CRC, preamble, para 9.
[117] Beijing Rules, Rule 2.2 (a).
[118] ibid Rule 2.2(c).
[119] United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) (adopted 14 December 1990) UNGA Res 45/113 Rule 11 (a).

Thus, according to these standards and as inferred from the definition of a child,[120] CICWL are children below the age of 18 and who have been suspected, accused or found guilty of committing a crime. However, under the CRC, the age of majority may be attained earlier, and thus, the age of CICWL may be lower than 18. This exception is not acceptable in the African human rights system. The CRC Committee also requires the child justice system to apply to all children below the age of 18 years[121] and recommends states parties that limit the scope of their child justice system to children under the age of 18 or that treated certain children as adults for a certain crime, to change their laws to ensure a non-discriminatory application of their child justice system.[122] The Human Rights Committee on its part also thinks that Article 6 (5) of ICCPR suggests that all persons under the age of 18 should be treated as children, at least in matters relating to criminal justice.[123] Moreover, both the CRC and ACRWC require states to fix the age below which a child shall be presumed not to have the capacity to infringe the penal law.[124] Therefore, it is possible to say that CICWL that are the subject of these and other standards are children below 18 years of age, but above the minimum age of criminal responsibility (MACR) and who have been suspected, accused or convicted of committing a crime.

However, MACR is not fixed in the standards except that it should not be too low.[125] Lifaard attributed this lack of fixed MACR to the highly controversial nature of the issue and the wide variety of MACRs throughout the world. He supported this by mentioning the lack of consensus at the time of the drafting of both the CRC and the Beijing Rules.[126] The Commentary to Rule 4.1 of the Beijing Rules admitted this fact and provides that:

> The minimum age of criminal responsibility differs widely owing to history and culture' and hence [t]he modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility;

[120] See CRC, art1.
[121] CRC Committee, General Comment No.24, para 29.
[122] ibid para 30.
[123] Human Rights Committee, General Comment No. 21, Human Treatment of Persons Deprived of their Liberty (Article 10) (10 April 1992) para13.
[124] CRC, art 40(3) (a); ACRWC, art 17 (4).
[125] Beijing Rules, Rule 4.1
[126] Ton Liefaard,' Juvenile Justice from an International Children's Rights Perspective' in Wouter Vandenhole and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 243.

that is whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behavior.

Research in the fields of child development and neuroscience indicates that maturity and the capacity for reasoning of children aged 12 to 13 years are still evolving as their frontal cortex is still developing. Hence, they are unlikely to understand the consequence of their actions or to understand criminal proceedings.[127] And, 'adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses'.[128]

Informed by such findings, the CRC Committee, in its General Comment No.24, paragraph 22, encouraged states to raise their MACR to at least 14 years old by raising it by two years recommended in the repealed General Comment No.10. However, the Committee's position in this regard is not as strong as the one it held in General Comment No.10. This is because in the repealed General Comment, the Committee has considered MACR below 12 years as not internationally acceptable. Such a position is not taken in the repealing General Comment; it simply encourages states to raise it to at least 14 years of age.[129] In Africa, the MACR should not be set below 12 years old. This age has been set as Agenda 2040 for every state.[130] Paragraph 46 of the Guidelines on Action for Children in the Justice System in Africa reads, '[u]nless already set at above this level, the age of criminal responsibility should not be fixed below 12 years of age, and states must endeavor to progressively raise this age to at least 15 years of age'. As a result of the absence of legally fixed MACR and despite the recommendations of the monitoring bodies, MACR varies across states and the average MACR worldwide is 11.3 years

[127] CRC Committee, General Comment No.24, para 22.

[128] ibid; see also Ido Weijers and Thomas Grisso, 'Criminal Responsibility of Adolescents: Youth as Junior Citizenship in Josine Junger-Tas and Frieder Dunkel (eds), *Reforming Juvenile Justice* (Springer Science 2009) 61 ff.

[129] In its Concluding Observations to states' reports, the Committee is not consistent as well. In its Concluding Observations to Costa Rica (given 4 March 2020) (CRC/C/CRI/CO/5-6) and to Hungary (given 3 March 2020) (CRC/C/HUN/CO/6), the Committee simply recommends the states parties to raise the MACR to 14. However, in its Concluding Observations to state report of Palestine, the Committee hinted that 14 years of age is the internationally acceptable MACR; See Committee on the Rights of the Child, Concluding Observations on the Initial Report of the State of Palestine (6 March 2020) CRC/C/PSE/CO/1 para 59 (b). And, the fact that this Concluding Observation is given after the ones given to Costa Rica and Hungary may prompt one to expect that the Committee will continue hinting that 14 years of age as an internationally accepted MACR.

[130] African Committee of Experts on the Rights and Welfare of the Child, 'Africa's Agenda for Children 2040: Fostering an African fit for Children' (2016) Aspiration 8, 41.

old.[131] Some states do not set MACR and in those states that set MACR, it ranges from 7 years to 16 years.[132]

The term 'child justice system' is not clearly defined in the above-mentioned standards. Black's law dictionary[133] defined it as a collective of institutions through which any young offender passes until the final disposition of the case. This definition is narrow in scope as it is confined to institutions only. A broader definition is given by the CRC Committee which defines it as a collective of legislation, standards and procedures specifically applicable to, and institutions set up to deal with children considered as offenders.[134] This definition confines itself to the protection aspect of the child justice system as it talks about child offenders. It does not deal with the prevention aspect of the system. A more elaborate definition which includes the prevention and post-release aspects is given by UNICEF, according to which child justice is a criminal justice system developed for children. It covers a wide range of issues from prevention through the first contact with the police, judicial process, conditions of detention and social reintegration, and involves a wide range of actors.[135]

This dissertation uses the term 'CICWL' in place of 'juvenile' and 'child justice' in place of 'juvenile justice' to align the use of terms with the recent document on the matter, General Comment No.24, which provides children's rights in the child justice system. Therefore, the terms 'juvenile' and 'juvenile justice' used in the literature mentioned in this research are replaced with 'CICWL' and 'child justice', as the terms are similar in meaning. However, the terms are maintained in the title of the sources cited in this dissertation.

2.3 The History of Child Justice System

The way societies have treated children who have violated the law is a reflection of that society's conception of children and its views on how to socialize them.[136] Junger-Tas noted that western history was bad in this regard. For hundreds of years, flogging children with a lash, stick, or

[131] Nowak, 'Global Study on Children Deprived of Liberty' (n 49) 278.
[132] ibid 280; see also Winterdyk (n 65) 9-12.
[133] Bryan A Garner (ed), *Black's Law Dictionary* (8th edn, 2004).
[134] CRC Committee, General Comment No.24, para 8.
[135] UNICEF, 'Improving the Protection of Children in Conflict with the Law in South Asia: A Regional Parliamentary Guide on Juvenile Justice, Regional Parliamentary Guide No.1' (2007) 4.
[136] Josine Junger-Tas, 'The Juvenile Justice System: Past and Present Trends in Western Society', in Ido Weijers and Antony Duff (eds), *Punishing Juveniles: Principles and Critique* (Hart Publishing 2002) 23.

other instruments was normal.[137] Unlike the criminal justice system, whose development is traced back hundreds of years, the child justice system occurred over less than 100 years.[138] Before this time, children were referred to as 'little adults' and punished accordingly.[139] They were prosecuted and punished under the same law as adults.[140]

In contrast to the position of Kratcoski, who traced the origin of the child justice system back to hundred years, some scholars traced its origin to the middle age and Enlightenment period. Accordingly, during the late Middle Ages, children under the age of 7 years had absolute immunity from criminal liability because of the belief that they could not form the necessary intent to commit a crime. However, children between the ages of 7 and 14 years were generally believed to be incapable of committing a crime but would be held criminally liable if it is shown that they were sufficiently developed to form such intent. [141]

Similarly, throughout the age of Enlightenment (approximately 1500–1800 AD), the emergence of new philosophies concerning the causes of crimes affected the treatment of children and youths. The revision of national criminal codes in Europe, based on new ideas of rehabilitation and re-socialization, resulted in the limiting of corporal and capital punishments and the emergence of incarceration as a form of penal sanction.[142] More humane methods for dealing with children were also emerging during the age of Enlightenment based on the consideration that the environment rather than innate sin caused delinquency and that the best way to deal with it was through proper socialization.[143] This is the central theme of the positivist school of criminology that attributed crimes to factors beyond the control of criminals and hence, the offender should not be punished for what his/her environment made him/her. Instead, mechanisms should be devised to protect him from those factors that contributed to his delinquent behavior.[144] Real change in the treatment and rehabilitation of children did not come

[137] ibid.
[138] Kratcoski (n 2) 7.
[139] Kristin C Thompson and Richard J Morris, *Child Delinquency and Disability* (Springer International 2016) 56.
[140] Roberson (n 1) 21; Ferro (n 1) 6; Shoemaker (n 1) 11; Dean J Shampion (ed), *Juvenile Justice System: Delinquency, Processing and the Law* (6thedn, Printice Hall 2010) 49.
[141] Allan L Patenaude, 'History of the Treatment and Attitudes Towards Children' in Barbara Sims and Pamela Preston(eds), *Handbook of Juvenile Justice: Theory and Practice* (Taylor and Francis Group 2006) 9.
[142] ibid 10.
[143] ibid 11.
[144] Jean Trepanier, 'Roots and Development of Juvenile Justice: An International Overview', in Jean Trepanier and Xavier Rouseaux (eds), *Youth and Justice in Western States, 1815-1950: from Punishment to Welfare* (Palgrave Macmillan 2018) 30.

until the eighteenth century when the ideas of the enlightenment spread all over Europe and the US. One of its consequences, regarding how to respond to delinquency, was growing opposition to corporal punishment.[145]

Hence, the child justice system we know today is the result of years of development.[146] The late 19th century saw an important development in the history of a child justice system with the establishment of the first child justice court in 1899 in Chicago. It arose in response to the failure of the earlier interventions with CICWL and to address the issues of the era.[147] The precedent for the establishment of a separate child justice court in America came from the English courts particularly from the 1772 case of Erye v Shaftsbury. The principle of parens patriae emerged from this case and enabled courts to act in lieu of parents who were found unwilling or unable to care for their children.[148] Parens patriae, a Latin term, means the father of the nation. It refers to the power of the state to act as a parent of a child by intervening when parents or caregivers are unable or unwilling to give appropriate guidance.[149] It is oriented to civil rather than criminal law in that it is about welfare or equity rather than about punishment.[150] The doctrine was used to enable the child justice court to accept social inquiry reports and depart from the formal due process of law.[151] According to this principle, courts 'operated on the concept that the child ceased to be a criminal and had the status of a child in need of care, protection, and discipline directed toward rehabilitation'.[152]

The first three decades of the twentieth century were a period of intense development of the child justice system. Legislations establishing child justice courts or equivalent non-judicial bodies go back to that period in many western countries.[153] Canada enacted the first child justice act, Child Delinquents Act, in 1908 followed by Belgium, France and Switzerland which enacted their respective legislation in 1912. France established specialized child justice court magistrates after

[145] Junger-Tas (n 136) 25.
[146] ibid 12 and 22.
[147] John T Whitehead and Steven P Lab (eds), *Juvenile Justice: An Introduction* (9th edn, Routledge 2018) 46.
[148] Albert R Roberts, 'The Emergence of Child Justice Courts and Probation Services' in Albert R Roberts (ed), *Juvenile Justice Sourcebook: Past, Present and Future* (OUP 2004) 164.
[149] ibid.; Roberson (n 1) 23.
[150] Roberts (n 148) 164.
[151] ibid 165; Roberson (n 1) 28.
[152] Roberson (n 1) 32.
[153] Trepanier (n 144) 27-28.

World War II.[154]

Not all countries adopted the American child justice court model. However, the child justice systems that spread over the western world, whether they involve a separate child justice court, a child judge or a Scandinavian welfare board, share the same characteristics. These include wide discretionary power given to all actors in the system; rejection of the principle that punishment should be proportional to the offense; predominance of the child's interest which makes it possible to impose non-custodial measures; heavy emphasis on extra-judicial practices to avoid court proceedings; and reduction of the formal character of court procedures including public hearing.[155]

Its philosophy remained unchanged in most of the western world until the 1970s.[156] Thereafter, the social changes in western society since the 1950s, such as increasing prosperity, higher levels of education and technological change challenged the earliest version of the child justice system. Parents no longer accepted the absolute authority of a paternalistic judge over the lives of their children. The first country that made changes in this regard was the US through the famous ruling *in Re Gault* (1967) granting CICWL due process rights, such as notice of the charges, right to counsel, right to confrontation and cross-examination, and the privilege against self-incrimination.[157]

According to Junger-Tas, the following are the main characteristics of the changed child justice system in the last decades of the twentieth century:

- Viewing the child as a rational being with free will and attributing full responsibility with more severe penal measures over his/her protection and treatment
- Victims have occupied a central place in legal procedures which led to an emphasis on restitution and reparation for the harm done.
- More formalization of the proceedings than was the case before and the consequent reduction of the differences between the adult criminal justice system and the child justice system

[154] Junger-Tas (n 136) 29.
[155] ibid 30.
[156] ibid.
[157] ibid 31.

- Extra-judicial procedures and community-based sanctions were limited to non-serious offenders.[158]

This retributive child justice system was developed in the 1980s and the 1990s. This happened first in the US and Canada and then spread to Europe.[159] The UK Crime and Disorder Act 1998 abolished the common-law assumption that children under 14 were 'incapable of doing evil', the *doli incapax* principle and provided that children aged 10 can be held accountable for their actions.[160]Retribution, just deserts, and deterrence emerged as the watchwords for both the child and criminal justice systems. Rather than considering the external factors of criminality, there is a stronger belief that individuals of all ages choose to commit offenses and should be held responsible for their actions.[161] These negative developments were thought to be due to an increase in child crimes though, in most western countries, the bulk of them were property and petty crimes.[162]Another potential factor is that the general stability in child (and adult) crime rates is the consequence of more severe sanctioning policies i.e. the belief that deterrence and incapacitation do reduce crime.[163]

When we come to the international and concerted movements in this regard, elements of the child justice system have been incorporated in the ICCPR.[164] There were previous efforts to have child-specific instruments at the international level in 1924 and 1959 in the form of a declaration. However, the issues of child justice were not explicitly addressed in these Declarations. Child justice became a separate and distinct issue of the international community in 1985 with the adoption of the UN Standard Minimum Rules for the administration of juvenile justice, also known as the Beijing Rules. Five years later, two other instruments were adopted at the UN level on 14 December 1990; the UN Rules for the protection of juveniles deprived of their liberty (Havana Rules) and the UN Guidelines for the prevention of child delinquency (Riyadh Guidelines). All these instruments are soft laws and are not binding, but have an authoritative role.

[158] ibid 32.
[159] ibid.
[160] ibid 33.
[161] Whitehead and Lab (n 147) 54.
[162] ibid 55; Junger-Tas (n 136) 35.
[163] Junger-Tas (n 136) 36.
[164] ICCPR, arts 6 (5), 10(2), 14 (1) and 14 (3).

Almost a year before the adoption of the Havana Rules and Riyadh Guidelines, a legally binding instrument, the CRC, was adopted. It has specific provisions (Articles 37 and 40) on the administration of child justice. These provisions generally govern the due process rights of CICWL and the various dispositions that states should respect and/or adopt. At the African level, a binding standard, the African Charter on the Rights and Welfare of the Child, which was adopted a year after the CRC, regulates the issue of child justice in a single provision (art 17). It replicates some of the due process rights enshrined under Article 40 (2) (b) of the CRC but is silent on dispositions available to the sentencing authority and the issue of deprivation of liberty of children.

2.4 Models of Child Justice

There are significant differences between child justice systems adopted across jurisdictions. This is because the child justice system does not function in a vacuum. The place of children within the family, the community, and the society differed across society in question and the specific period.[165] The value society placed on children varied during different periods in history. The social, political, and economic conditions of a country at any given moment have an effect on the type of legislation and programs developed to either control children or provide assistance.[166]

The majority of English-speaking countries have adopted a justice model that focuses on holding a child accountable for their actions and imposing punitive measures while respecting the due process rights of the suspect child. Countries, in Europe generally, tend to employ a welfare-based model characterized by the informality of proceedings and interventions based on the best interests of the child. There is however a growing trend towards hybrid child justice systems incorporating elements of both justice and welfare models.[167] And, now, after the adoption of the CRC, the dominant model is/should be a child rights-based approach.

These models determine the appropriate response that governments give to child offending and the treatments accorded to them**.** Accordingly, there is a divergence of laws, policies, institutions and programs adopted by various jurisdictions**.** The discussion of models below is not meant to be exhaustive, but illustrative of common models. There are various other models of child

[165] Kratcoski (n 2) 15.
[166] ibid 16.
[167] Noetic Solutions Pty Limited, 'Review of Effective Practice in Juvenile Justice: Report for the Minister for Child Justice' (2010) III.

justice.[168]

2.4.1 Welfare Model (Medical Model)[169]

As indicated above, until the end of the 19th century, children were treated much like adults. However, the establishment of a child justice court in Illinois in 1899 marked the beginning of the child justice system. During that period, the child justice system was informed by the parens partiae philosophy**.** Under this doctrine, a state was regarded as the parent of the country and thus the parent for children. Accordingly, the purpose of the justice system is not punishing children who are deviant but rather 'providing assistance and care, much like a caring parent'.[170] Thus, the model emphasizes treatment and rehabilitation.[171] This is because CICWL are considered to be victims of their environment and are diagnosed and treated much like a sick person. The requirement of due process is not given as much attention[172] as the purpose of the model is not punishment.[173] This approach to child justice remained relatively intact with only moderate modifications for the first half of the 20th century.[174]

2.4.2 Justice (Just Desert) Model[175]

This model focuses on a just punishment for the offender.[176] It supports strict due process and proportionality of punishments. According to this model, crime is irrational and punishment must be used to deter people from violating the rights of others and to demonstrate the irrationality of law-breaking behavior; and punishment must be proportionate to the harm done and does not aim at reformation or retribution.[177] This model has three implications.[178] First, the legal rights of

[168] See for instance Winterdyk (n 65) 6; Jane Pickford, 'The Development of Youth Justice Philosophies, Laws and Policies' in Paul Dugmore and Jane Pickford (eds), *Youth Justice and Social Work* (Learning Matters Ltd 2006) 31 and ff.
[169] Countries that follow this model include Australia, Netherland, Belgium, South Korea, India and Scotland. See Winterdyk (n 65) 6.
[170] Kratcoski (n 2) 16.
[171] Eric L Jensen, 'An Historical Overview of the American Juvenile Justice System' in Eric L Jensen and Jorgen Jepsen (eds), *Juvenile Law Violators, Human Rights and the Development of New Child Justice Systems* (Hart Publishing 2006) 85.
[172] Winterdyk (n 65) 6; Pickford, 'Introduction: A New Youth Justice for a New Century?' (n 67) xxiv.
[173] Jensen (n 171) 85.
[174] Kratcoski (n 2) 13.
[175] German, China, Russia and Namibia follow this model. See Winterdyk (n 65) 6.
[176] Kratcoski (n 2) 17; Philip L Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (7thedn, Pearson Education Inc 2018) 265.
[177] Pickford (n 67) xxv; Reichel (n 176) 270.
[178] Barry Goldson, 'Juvenile Justice Social Work in England and Wales: Past, Present and Future?' in Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *The Role of Social Work in Juvenile Justice: International Experience (*2020) 12.

CICWL must be ensured through due process, by professional representation and the engagement of lawyers. Second, restrictions of liberty must be limited to the minimum necessary, in accordance with principles of proportionality. Third, custodial sentencing should be restricted to the most serious crimes for which no other sentence is deemed to be appropriate.

This model was developed in response to the weakness of the welfare approach under which many CICWL were being treated punitively in the child justice court without due process protections provided to adults in the criminal justice system. This realization and subsequent U.S. Supreme Court decisions led to major changes in the child justice system. The most notable of these decisions was the *Gault* case in 1967. In this decision, the U.S. Supreme Court held that CICWL had the constitutional right to certain due process protections when they are in jeopardy of being incarcerated. These were: the right to counsel, the right to a notice of the charges, the right to confront and cross-examine witnesses against them, and the privilege against self-incrimination. This decision initiated a due process revolution, as CICWL were given almost all the due process rights of adult suspects[179] in the American child justice court and it marked the beginnings of a more adversarial system.[180] This reform movement of the 1970s in the USA is believed to have influenced portions of the child justice sections of the CRC.[181] For example, the due process rights specified in Article 40 (2) (b) (i–iv))) of the CRC are derived from the U.S. Supreme Court decisions.[182]

2.4.3 Crime Control Model

The crime control model emphasizes the prevention of crime through deterrence and incapacitation. This model gives priority to the protection of the public and punishes offenders regardless of their age.[183] Another feature of this model is the stipulation in law for a determinate sentence for a crime.[184] This model emerged as the dominant approach in the late 1980s and early 1990s in the USA.[185] The increasing number of children involved in serious crimes and the

[179] Kratcoski (n 2) 17.
[180] Jensen (n 171) 86.
[181] ibid 87.
[182] ibid.
[183] Mustaffa (n 69) 23.
[184] Winterdyk (n 65) 6.
[185] Barry Krisberg and James F.Austin, *Reinventing Juvenile Justice* (Sage Publications 1993) 50.

lack of faith in the welfare system and judges contributed to the emergence of this model in the child justice system.[186]

In response to the public outcry about children's involvement in crimes, many jurisdictions have initiated reform measures that changed the child justice systems beginning in the late 1980s. This was the beginning of the 'get tough' approach in the child justice system. This approach has transformed child justice into a modified version of the adult criminal system.[187] Under this model, the child justice system has gradually incorporated more and more characteristics of the adult criminal justice system. The crime control trend has resulted in the promulgation of harsh punishments for CICWL. It has shifted the primary goal of child justice from rehabilitation towards deterrence, retribution and incapacitation.[188] The emergence of this model has eroded the protection and privileges that were given to CICWL under the welfare model.[189] The legal reform allowed for easier transfer of child cases to adult court; reduced the privacy of proceedings and the confidentiality of personal information; decreased the informality of proceedings and provided harsher punishment for children.[190]

The 'get tough' approach under the crime control model in tackling child delinquency has been subjected to criticism. One of the criticisms was that it caused an increase in the number of incarcerated children.[191] Further, research also indicated that punitive sanctions against children are ineffective in reducing recidivism and reformation of children and also require high cost.[192] Further, given the adoption of the CRC and the consequent child rights-based approach to child justice discussed below, the crime control model is not an acceptable approach.

[186] Mustaffa (n 69) 24.
[187] Jeffrey A Butts and Daniel P Mears, 'Reviving Juvenile Justice in a Get-Tough Era' (2001) 33 (2) Youth and Society 169, 175.
[188] Mustaffa (n 69) 24-25.
[189] ibid 25.
[190] Candace Zierdt, 'The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Track' (1999) 33 *University of San Francisco Law Review* 401, 415–426.
[191] Kareem Jordan and David L.Myers, 'Juvenile Transfer and Deterrence: Re-examining the Effectiveness of a 'Get-Tough' Policy (2011) 57(2) Crime and Delinquency 247, 250.
[192] Emily A Polachek, 'Juvenile Transfer: From: 'Get Better' to 'Get Tough' and Where We Go From Here' (2009) 35 (3) William Mitchell Law Review 1162, 1181.

2.4.4 Restorative Justice Model

The restorative justice model emerged with the drafting and signing of the CRC in the late 1980s.[193] In the US, during the 1990s, the political climate started to reverse because of the belief that the child justice system had over-emphasized punishment. As a result, there were some movements to go back to the welfare model. It emphasizes the interests of victims of crime, community security and the needs of CICWL.[194] Under this model, children must assume responsibility for their behavior and they are given a just punishment, but the community has some responsibility for providing programs that will prevent delinquency and help offenders to become productive members of society.[195]

Although the term 'restorative justice' is considered a new phenomenon, its practice is not. Various societies have resorted to this method in dealing with crime and deviant behavior for a long time.[196] For example, the Family Group Conferencing model which has been introduced under the New Zealand legal system originated from the Maori community practice known as 'Wanau *Conference'.*[197] Its modern development probably began in response to the first victim-offender mediation programs developed in the mid-1970s in Canada as an alternative to probation for young offenders and expanded into pre-sentence programs that allowed the victim and offender to develop a sentencing proposal for the judge's consideration[198] and it has become an influential movement in Australia, Canada, England and Wales, New Zealand and other countries.[199]

In contrast with a traditional criminal justice system approach which views crime as wrongful action that entails punishment, restorative justice views crime as a violation of people's relationships. As such, it reduces the role of the state and places the offender, victim and their family or friends together, to right the wrongs caused by the offender to the victim.[200] Therefore,

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[193] Nessa Lynch and Ton Liefaard, 'What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law' (2020) 28 International Journal of Children's Rights 89, 96.
[194] Kratcoski (n 2) 17; Ferro (n 1) 92.
[195] Gordon Bazemoore and Mark S Umbreit, 'Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Response to Youth Crime (1995) 41(3) Crime and Delinquency 296, 304.
[196] Griff Daniels, 'Restorative Justice: Changing the Paradigm (2013) 60(3) Probation Journal 302, 306.
[197] ibid.
[198] Daniel Van Ness, Allison Morris and Gabrielle Maxwell, 'Introducing Restorative Justice' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing 2001) 4.
[199] ibid.
[200] Junger-Tas and Dunkel (n 18) 231.

restorative justice is 'a process to involve those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations', to heal and put things as right as possible.[201] A more or less similar definition is given to restorative child justice which is defined as a way of treating CICWL to repair the individual, relational and social harm caused by the offense and which contributes to the child's rehabilitation and reintegration into society.[202] This requires a process in which the child offender, the victim, and where appropriate, other individuals and members of the community participate actively together in the resolution of matters arising from the offense.[203]

There are various restorative programs, the dominant ones are victim-offender mediation, family group conferences and circle sentencing.[204]

The Basic Principles on the use of Restorative Justice in criminal matters stipulate that restorative justice programs should be generally accessible at all stages of the criminal process; that they should be used voluntarily; that participants should receive all relevant information and explanation; and differences in power, age, and mental capacity need to be taken into account in devising processes.[205] Core due process requirements should also be observed.

Restorative justice programs offer effective alternatives to more formal and stigmatizing child justice measures. Because of their educational value, they are particularly useful for promoting diversionary measures and for providing alternatives to measures that would deprive a child of his/her liberty.

The four objectives of restorative justice are: repairing the harm done and restoring the damaged relationship; restitution for the victim; ensuring that the offender understands and takes responsibility for his/her actions; and helping the offender to improve future behavior.[206]

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[201] Howard Zehr, *The Little Book of Restorative Justice* (2002) 36.
[202] World Congress on Juvenile Justice Final Declaration (30 January 2015) para 11.
[203] Zehr (n 201) 36.
[204] ibid 44; Van Ness, Morris and Maxwell (n 198) 6.
[205] Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000) s II.
[206] Roy and Wong (n 18) 52; Susan Sharpe has identified five guiding principles of Restorative Justice: Full participation and consensus of the victim, offenders and the community; healing the broken relationship; reuniting what has been divided; full accountability for the offence and strengthening the community to prevent further crime; Susan Sharpe, *Restorative Justice: A Vision for Healing and Change* (Edmonton Victim Offender Mediation Society 1998) 7-12.

The restorative justice approach has gained popularity in modern child justice systems due to its advantages.[207] Its proponents claim that this approach is beneficial to offenders, victims and society as a whole.[208]

2.4.5 Diversionary Approach

This is another model in the child justice system. New trends in child justice policy have emerged in Europe and North America since the 1960s that were based on the notions of the 'subsidiarity' of state interventions against CICWL. Further, these developments specifically emphasize the expansion of procedural safeguards. One major element of this philosophy is the idea of diversion.[209] It refers to the process of removing children from the formal judicial process when the crime is minor and when the formal process seems inappropriate.[210] It has its base in the CRC and the Beijing Rules.[211] The Beijing Rules govern diversion in a far broader way than the CRC. According to the Beijing Rules (Rule 11), the power to divert child cases should also be given to police, prosecutor and other agencies dealing with child cases. However, it has to be done in accordance with the principles of the Rules (the CRC says human rights and basic safeguards should be respected) and based on the consent of the child or his/her parents or guardians. Further, a decision to refer the case shall be subject to review.

There are various diversion approaches though their applicability and detailed features vary depending on the contextual factors as well as the nature of each specific case.[212] These include community programs such as temporary supervision and guidance, restitution and compensation, [213]caution, mediation, conferencing, pretrial community service, [214]apology, restrictions on the

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[207] Mustaffa (n 69) 31.

[208] See Jung Jin Choi, Gorden Bazemore and Michael J.Gilbert, 'Review of Research on Victims Experiences in Restorative Justice: Implications for Youth Justice' (2012) 34(1) Children and Youth Services Review 35; Heather Strang and others, 'Victim Evaluations of Face-to- Face Restorative Justice Conferences- A Quasi-Experimental Analysis' (2006) 62(2) Journal of Social Issues 281, 302-303 ; Christa Pelikan and Thomas Trenczek, 'Victim Offender Mediation and Restorative Justice', in Dannis Sullivan and Lary Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006) 79; Mustaffa (n 69) 29-33; Adam Crawford and Todd Clear, 'Community Justice: Transforming Communities through Community Justice?' in Gordon Bazemore and Mara Schiff (eds), *Restorative Community Justice: Repairing Harm and Transforming Communities* (Routledge 2001) 130.

[209] Dunkel (n 14)147.

[210] ibid 148.

[211] CRC, art 40 (3)(b); Beijing Rules, Rule 11; United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) (adopted by General 14 December 1990) UNGA Res 45/112, No.57; United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) (adopted 14 December 1990) UNGA Res 45/110 Rule 5.

[212] Deda and Mulat (n 16) 314.

[213] Beijing Rules, Rule 11.4.

child, attendance to personal/behavioral development programs, home detention, community residential treatment and admission to rehabilitation centers.[215]

The use of the diversionary approach in handling CICWL is not a novel approach. The establishment of separate courts for children in the late 19th century marked the first form of diversion in child justice as it was designed primarily to redirect offending children away from adult courts into a more informal system. However, the new reform movement promoting diversion occurred during the 1970s due to the ineffectiveness of the traditional child justice system[216] and it has continued its expansion due to national and international developments in child crime policy in the 1980s.[217]

The six theoretical assumptions that can be seen as the bases for diversion are:[218]

a) Avoiding unnecessary stigmatization;
b) Prioritizing education instead of punishment;
c) Proportionality of responses as a limitation of state intervention;
d) Reducing or limiting the courts' caseload;
e) The petty nature of most child crimes; and
f) The effect of less severe punishment to produce future norm conformity.

2.4.6 Corporatism (Managerialism)

This approach in the child justice system is akin to the management of corporations. It requires the setting up of a multidisciplinary justice team at a national and local level to standardize practices and the child justice profession.[219] Countries that have adopted this model include England/Wales and Hong Kong.[220] This seems to imply the establishment of separate institutions as required in the CRC. This approach has features such as increased administrative decision-making, greater sentencing diversity, centralized authority and coordination of policy and

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[214] Roy and Wong (n 18) 55-56; Junger-Tas and Dunkel (n 18) 230.
[215] Deda and Mulat (n 16) 314.
[216] Sally T Hillsman, 'Pretrial Diversion of Youthful Adults: A Decade of Reform and Research' (1982) 27 (3) The Justice System Journal 361, 363.
[217] Dunkel (n 14) 147.
[218] See Thomas Raiser, *Basics of Legal Sociology: the Living Law* (translated from Germany); Mohr Siebeck and G Spittler, *Norm and Sanction (translated from Germany),* cited in Dunkel (n 14) 149; Dada and Mulat (n 16) 314.
[219] Dugmore and Pickford (n 73) 32.
[220] Winterdyk (n 65) 6.

growing involvement of non-juridical agencies.[221]

2.4.7 Hybrid Approach

The various models of child justice are not mutually exclusive[222] and it is difficult to prioritize one model over the other. Therefore, diverse models could be used to achieve government policies concerning child justice.[223]

2.4.8 Human (Child) Rights-based Approach

Although the concept is defined differently by different actors[224], the most common tenet is that 'human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'.[225] This is often referred to as mainstreaming human rights, a process described by UN Secretary-General Kofi Anan as 'the process of assessing the human rights implications of any planned action including legislation, policies or programs, in all areas and at all levels'.[226]

Hence, in the context of the child justice system, it requires the system to be founded on the basic principles of child rights included in international standards such as the CRC and other relevant international and regional standards related to child crime prevention, children deprived of their liberty and non-custodial alternative measures.[227] It furthers the realization of the rights of all children as set out in the CRC through developing the capacity of duty-bearers to meet their obligations and the capacity of rights-holders to claim their rights, and which is guided at all times by the principles of the right to life, survival and development, non-discrimination, the best interests of the child and respect for the views of the child.[228]

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[221] Pratt (n 74) 245.
[222] Winterdyk (n 65) 6.
[223] John Muncie and Gordon Hughes, 'Modes of Governance: Political Realities, Criminalisation and Resistance', in John Muncie, Gordon Hughes and Eugene McLaughlin (eds), *Youth Justice: Critical Readings*, cited in Dugmore and Pickford (n 82) 40.
[224] John Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate Publishing Company 2011) 66.
[225] OHCHR, 'Frequently Asked Questions about Human Rights Based Approach to Development Cooperation' (United Nations 2006) 15.
[226] Tobin (n 224) 66.
[227] Chiara (n 77) 12.
[228] Committee on the Rights of the Child, General Comment No. 13, The Right of the Child to Freedom from all Forms of Violence (18 April 2011) CRC/C/GC/13 para 59.

This model subsumes the tenets of the above models except the crime control model; an aspect of the justice model that rejects the reformatory aim of punishments; and an aspect of the welfare model that disregards the due process rights of CICWL. Hence, this research is guided by a child rights-based approach for the following reasons. First, almost all the other models were developed before the adoption of the CRC and some had tenets that are not consistent with the values and principles of the CRC. Second, the 'human rights-based approach' came as an agenda after the advent of the notion of human rights following the adoption of core international human rights standards, and hence, the child rights-based approach should be followed as the international community has adopted the CRC. Therefore, every measure taken by states concerning CICWL should be measured against the principles and provisions of the CRC in general and of Articles 37 and 40 in particular.

Some of these models particularly the child rights-based approach, the welfare model and the justice model are again informed by developmental psychology and behavioral science theory. Typical in this case is a cognitive theory that considers children as less capable of knowing and predicting the consequence of their actions and hence they should be treated accordingly and differently from adults. This entails different dispositions for children found violating the criminal law and punishing them less severely as a measure of last resort.[229] Moreover, developmental psychology is all about the stages of human development and maturity. Hence, apart from the less cognitive capacity to understand or predict the consequence of their acts, children are also less capable to understand things. In the context of child justice, this relates to the due processes in that children cannot fully understand the judicial processes and hence, shall be accorded special due process safeguards, some of which are new and some are modified adult due process rights.

2.5 The Aim of the Child Justice System

The general aim of the child justice system is the rehabilitation and reintegration of children as provided under Article 40(1) of the CRC,[230] which reads:

[229] See National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (The National Academic Press 2013) 89 ff.

[230] OHCHR, 'The Rights of the Child in the Administration of Justice', in OHCHR, *Human Rights in the Administration of Justice; A Manual for Judges, Prosecutors and Lawyers*, Professional Training Series No.9 (2003) 408.

> States parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and *the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*.[231]

According to Liefaard, this aim 'represents the pedagogical objective of child justice, placing the child's individual interests and his/her future role in society at its core, and which makes the child justice system fundamentally different from the adult criminal justice system'.[232] This, further, requires acknowledgment of the negative impact of the justice system on the child's development and uses it only as a last resort by recognizing diversion.[233]

The rehabilitation ideal of the child justice system is also enunciated in Article 17 (3) of the ACRWC, which states that 'the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her *reformation, re-integration into his or her family and social rehabilitation'.*[234]

Rule 5.1 of the Beijing Rules also sets the aim of the child justice system in that '… [child] justice system shall emphasize the well-being of the child and shall ensure that any reaction to child offenders shall always be in proportion to the circumstances of both the offenders and the offen[s]e'. According to the accompanying commentary, this rule has two objectives. The first objective is 'the promotion of the well-being of the child' which should be emphasized by each legal system. The second objective is the principle of proportionality in that 'the response to CICWL should be based on the consideration not only of the gravity of the offen[s]e but also of personal circumstances', such as 'social status, family situation, the harm caused by the offen[s]e or other factors affecting personal circumstances'. This principle of proportionality of reactions is also enunciated in Rule 17.1(a).

[231] Emphasis added.
[232] Liefaard, 'Juvenile Justice' (n 126) 241.
[233] ibid.
[234] Emphasis added.

The rehabilitation ideal of the child justice system resulted in the recognition of the principle 'arrest and detention of children as a measure of last resort';[235] giving preference to 'non-custodial measures over custodial ones';[236] 'establishment of special laws, procedures and institutions'[237] and 'segregation of children from adult prisoners'.[238] A separate system for children is informed by a lesser maturity and culpability of children, and the negative effect of subjecting them to the adult criminal justice system on their rehabilitation.[239]

2.6 Principles of the Child Justice System

CICWL are one category of children and hence, the four principles that underpin the CRC are applicable in the administration of the child justice system.[240] The CRC Committee consistently considered these principles while examining states' reports and requires states to ensure that the principles guide policy and decision-making and must incorporate them in legal revisions, judicial and administrative decisions as well as in programs that have an impact on children.[241] The CRC does not provide these as principles; instead, the CRC Committee designated them as pillars for the enjoyment of other rights. [242] The same holds true for ACRWC whose monitoring body designated these principles.[243] In addition, the child justice system has its principles which in fact could be derived from the four general principles of the CRC. Thus, this section elaborates on these principles.

2.6.1 General Principles

2.6.1.1 The Principle of non-discrimination

The principle of non-discrimination is enshrined in Article 2 (1) of the CRC and Article 3 of the ACRWC. It requires states parties to respect the rights of the child enshrined in the CRC, one of which is the rights of CICWL as provided in Articles 37 and 40, without any discrimination.

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[235] CRC, art 37(b); Beijing Rules, Rule 13.1.
[236] CRC, art 40 (4); Beijing Rules, Rule 18.1.
[237] ibid, art 40 (3).
[238] ibid, art 37 (c); ACRWC, art 17(2) (b).
[239] CRC Committee, General Comment No. 24, para 2.
[240] ibid, para 6; Committee on the Rights of the Child, General Comment No.5, General Measures of Implementation of the Convention on the Rights of the Child (27 November 2003) CRC/GC/2003/5 (CRC Committee, General Comment No.5); Guidelines for action on Children in the Criminal Justice System (Vienna Guidelines) (21 July 1997) ECOSOC Res 197/30 para 8(a).
[241] OHCHR, 'The Rights of the Child in the Administration of Justice' (n 230) 403.
[242] Committee on the Rights of the Child, General Guidelines on the Form and Content of Initial Reports (30 October 1991) CRC/C/5 para13; see also CRC Committee, General Comment No.5, para 12.
[243] ACERWC, General Comment No.5.

The principle of non-discrimination in the child justice system arises from unequal treatment of CICWL based on age and other factors.[244] In the context of children deprived of their liberty, discrimination may have two aspects: a) discrimination of children because of their status as being deprived of their liberty in relation to all other children by virtue of 'other status' group under Article 2 (1), as the deprivation may interfere with children's access to education, health care and so forth, and b) discrimination between children already deprived of their liberty.[245] Therefore, it is possible to say that these two aspects apply to CICWL (among themselves and vis-à-vis other children) throughout the whole process of the child justice system; not only in case of deprivation of liberty.

The principle of non-discrimination is also contained in Article 3 of the ACRWC and Rule 2 (1) of the Beijing Rules. The provisions on non-discrimination and equality in other general human rights instruments (e.g. arts 2 (1) and 26 of the ICCPR, art 2 of the African Charter on Human and Peoples' Rights (ACHPR)) are equally applicable to children.

Safeguards against discrimination should apply from the earliest contact with the child justice system and throughout the trial. Particular attention should be given to girls and children with disabilities.[246] According to the principle of non-discrimination, states are not only required to ensure rights enshrined in Articles 37, 39 and 40 of the CRC, but also other rights like health and education.[247] The Convention on the Rights of Persons with Disabilities on its part requires states 'to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations […] in all legal proceedings, including at investigative and other preliminary stages'.[248]

[244] Ton Liefaard, Stephanie Rap and Ido Weijers, 'Procedural Justice for Juveniles: A Human Rights and Developmental Psychology Perspective' (International Association of Youth and Family Judges and Magistrates 2011) 48; CRC Committee, General Comment No.24, para 30.
[245] William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and deprivation of Liberty' in Andre Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2006) 70.
[246] CRC Committee, General Comment No.24, para 40.
[247] Committee on the Rights of the Child, General Comment No. 9, Rights of Children with Disabilities (27 February 2007) CRC/C/GC/9 para 73.
[248] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 art 13 (1).

2.6.1.2 The Best Interest of the Child

Article 3 (1) of the CRC stipulates the principle of best interest of the child which reads; '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The same principle is contained in the African counterpart, except for the replacement of the term 'a primary consideration' with 'the primary consideration'. This principle is aimed at ensuring the full and effective enjoyment of all the rights recognized in the CRC;[249] and no conditions are attached to this principle that could diminish its scope or application.[250]

Taking the best interests of the child 'a *primary* consideration' in the decision affecting him/her is an indication that 'the best interests of the child may not be considered on the same level as all other considerations', but that it might conflict with other interests or rights.[251] However, the child's interest 'must be the subject of active consideration', and 'it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration'.[252]

Though judicial authorities make the final decision regarding the best interest of the child, an interdisciplinary approach should be used in the assessment of those interests.[253] Taking the best interest of the child as a primary consideration entails the adoption of a welfarist approach to child justice which focuses on the needs instead of deeds of CICWL and is based on the involvement of social workers to assist courts.[254] Hence, the emphasis should be on rehabilitation and restorative justice than retribution.[255] Given this principle, the CRC Committee recommends states to decriminalize the so-called status offenses, such as running away from home, vagrancy or truancy, all rather problem behavior than offenses.[256]

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[249] Committee on the Rights of the Child, General Comment No. 14, the Right of the Child to have his or her Best Interests taken as a Primary Consideration (29 May 2013) CRC/C/GC/14 (CRC Committee, General Comment No.14) para 4.
[250] ACERWC, General Comment No.5, 11.
[251] CRC Committee, General Comment No.14, paras 36 and 39.
[252] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, 2007) 38.
[253] African Child Policy Forum (ACPF), 'Spotlighting the Invisible: Justice for Children in Africa' (2018) 25; ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (2011) para 17; African Child Policy Forum and Defence for Child International, 'Achieving Child-friendly Justice in Africa' (2012) 18; CRC Committee, General Comment No.14, para 5.
[254] UNODC, 'Cross-Cutting Issues: Juvenile Justice, Criminal Justice Assessment Toolkit 2' (2006) 1.
[255] Junger-Tas and Dunkel (n 18) 220.
[256] CRC Committee, General Comment No.24, para 12.

Moreover, key concepts, such as diversion,[257] the principle of proportionality of the reaction to CICWL[258] and the principles of last resort to and for the shortest period of deprivation of liberty[259] of the CRC and Beijing Rules, could be regarded as expressions of the best interest clause.[260] The best interest principle is also important for the interpretation and assessment of the age of criminal responsibility and conditions of treatment during deprivation of liberty[261] and the establishment of a special child justice system.

2.6.1.3 The Child's Right to Life, Survival and Development

Article 6 (1) of the CRC provides that '[s]tates parties recognize that every child has the inherent right to life' and that they 'shall ensure to the maximum extent possible the survival and development of the child' (sub art 2). Similarly, Article 5 (1) of the ACRWC guarantees to every child 'an inherent right to life', which 'shall be protected by law'. States parties further undertake to 'ensure, to the maximum extent possible, the survival, protection and development of the child' (sub art 2).

The right to life, survival and development of CICWL may be at stake when proper consideration is not given to their needs and interests. The way arrest is effected, the investigation made, trial conducted and the type of measures and/or penalties imposed and enforced have repercussions on these rights of children. Therefore, this right must be taken into consideration in the administration of child justice, and it requires the adoption of diversionary and other alternative measures and sanctions.[262] The commentary on the Beijing Rules, Rule 17.1(a) dictates that proportionality of reaction to the offense and circumstances of CICWL helps in ensuring personal development and education. Moreover, the stipulation that 'deprivation of liberty as a measure of last resort and for the shortest appropriate period of time' is significant in ensuring the right to the healthy development of CICWL.[263] The prohibition of life imprisonment without parole and death penalty is also informed by this principle/right of the child.

[257] CRC, art 40 (3) (b); Beijing Rules, Rule 11.
[258] Beijing Rules, Rules 5 and 17.
[259] CRC, art 37 (b); Beijing Rules, Rules 13.1 and 17.1(c); Havana Rules, Rule 2.
[260] Schabas and Sax (n 245) 72.
[261] ibid.
[262] Liefaard, Rap and Weijers, (n 244) 48.
[263] Schabas and Sax (n 245) 73.

2.6.1.4 The Child's Right to be heard

Another important general principle is found in Article 12 (1) of the CRC, according to which a child who is capable of forming his/her views has the right to express those views freely in all matters affecting the child. Further, the views of the child shall be given 'due weight in accordance with the age and maturity of the child'. This does not, however, mean that the opinion expressed by an older child would deserve more attention than that of a younger child. Rather, it means that persons who are hearing the views of a child have to assess the capacity of children to form an autonomous view on the situation, irrespective of their age and level of development.[264] In other words, age alone cannot determine the significance of a child's views as children's levels of understanding are not uniformly linked to their biological age. Other factors such as information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacity to form a view. For this reason, the views of the child have to be assessed on a case-by-case basis.[265]

According to the CRC Committee, Article 12 of the CRC is a unique provision in a human rights treaty as it addresses the legal and social status of children, who lack the full autonomy of adults but are subjects of rights.[266] The right to be heard has an important implication on the treatment of CICWL in a court of law.[267] It is an entry point to the holistic and empowering approach promoted by the CRC i.e. the recognition of children as rights holders.[268] This right shall be fully respected during all stages of the judicial process including the adjudication and implementation of the imposed measures.[269]

A child's right to be heard does not mean, however, that the child has 'a right to self-determination', but only that it has a right 'to involvement in decision-making'.[270] This participation must be genuine and cannot be reduced to a mere formality. The Committee states that '[l]istening to children should not be seen as an end in itself, but rather as a means by which

[264] Defence for Children International (DCI), 'Children's Right to Participation and the Juvenile Justice System: Theory and Practice for Implementation' (2016) 16.
[265] Committee on the Rights of the Child, General Comment No.12, the Right of the Child to be Heard (20 July 2009) CRC/C/GC/12 (CRC Committee, General Comment No.12) para 29.
[266] ibid para 1.
[267] Stephanie Rap, 'The Voice of the Child in the Juvenile Justice Procedures' in Ton Liefaard and Julia Sloth-Nielsen (eds), The *United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 294, 296.
[268] DCI (n 264) 14.
[269] CRC Committee, General Comment No.12, para 58.
[270] UNICEF, 'Implementation Handbook for the CRC' (n 252) 150.

states make their interactions with children and their actions on behalf of children more sensitive to the implementation of children's rights'.[271] The right to participation of CICWL is based on the assumption that if s/he is considered as capable of committing a crime, s/he must be considered as capable of expressing views.[272]

Concerning the adjudication of children cases, Rule 14.2 of the Beijing Rules also provides that '[t]he proceedings shall be conducive to the best interests of the child and shall be conducted in an atmosphere of understanding, which shall allow the child to participate therein and to express her or himself freely'. This requires the proceeding to be adapted to the child's age, maturity and understanding.[273] Further, a child must be informed about the charges against her/him, and also about the child justice process and possible measures taken by the court. The proceedings should also be conducted in an atmosphere enabling the child to participate and to express her/himself freely.[274] One way of creating an enabling environment is conducting child trials in closed courtrooms and according to the CRC Committee, exceptions to this should be very limited, guided by the best interests of the child and specified in domestic law.[275]

2.6.2 Principles specific to Child Justice

In addition to the general principles, we can also derive various principles specific to child justice from the CRC and other international and regional instruments. Key principles enshrined are discussed below.

2.6.2.1 Deprivation of liberty in conformity with the law and prohibition of arbitrary deprivation

Article 37 (b) of the CRC provides that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily'. It further provides that '[t]he arrest, detention or imprisonment of a child shall be in conformity with the law […].' This provision is a replica of Article 9 (1) of ICCPR. Unlawful detention and arbitrary deprivation of liberty are two overlapping concepts.[276] According to the Human Rights Committee, unlawful deprivation of liberty is a deprivation that is not imposed on such grounds and in accordance with such procedures as are established by

[271] CRC Committee, General Comment No.5, para 12.
[272] Liefaard, Rap and Weijers (n 244) 48.
[273] Aoife Daly and Stephanie Rap, 'Children's Participation in Youth Justice and Civil Proceedings', in Ursula Kilkelly and Ton Liefaard(eds), *International Handbook of Children* (Springer Nature Singapore Pte Ltd. 2018) 7.
[274] CRC Committee, General Comment No.12, para 60; ACERWC, General Comment No.5, 13.
[275] CRC Committee, General Comment No.12, para 61.
[276] Human Rights Committee, General Comment No.35, Article 9 (Liberty and Security of a Person) (16 December 2014) CCPR/C/GC/35 (HRC, General Comment No.35) para 11.

law.[277] The reference to 'law' here seems domestic law, and one can wonder what if this law is not in compliance with international human rights standards. The same Committee addressed this issue in the later part of the comment by defining unlawful detention as detention that violates domestic law and detention that is incompatible with the requirements of Article 9 (1) or with any other relevant provision of the Covenant.[278] Thus, detention in conformity with the law requires not only that the domestic law permits detention (formal element) in the particular circumstances, but also conforms to the national and international human rights safeguards (substantive element).[279]

The standards prohibit not only unlawful detention but also arbitrary deprivation of liberty. Nonetheless, there is no clear definition of arbitrary detention in international law. Neither does the CRC Committee regularly refer explicitly to the different requirements under Article 37(b).[280]

However, the Working Group on Arbitrary Detention has defined it as detention that is contrary to the human rights provisions of the major international human rights instruments.[281] In this regard, the Human Rights Committee noted that detention may be authorized by domestic law and nonetheless be arbitrary. It added, '[…] arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[282]

2.6.2.2 Detention or Imprisonment as a measure of last resort

Article 37 (b) of the CRC provides that detention or imprisonment of children shall only be used as a measure of last resort. The Beijing Rules provide that restrictions on the personal liberty of a child shall be imposed 'only after careful consideration and shall be limited to the minimum'

[277] ibid.
[278] Ibid para 44; See also *James, Wells and Lee v United Kingdom* App nos 25119/09, 57715/09 and 57877/09 (ECtHR, 2 February 2013) paras 191 and 230.
[279] John Tobin and Harry Hobbs, 'Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 1471.
[280] Schabas and Sax (n 244) 78.
[281] Commission on Human Rights, Report of the Working Group on Arbitrary Detention (1996), U.N.Doc. E/CN.4/1997/4 para. 87, citing E/CN.4/1992/20 Annex 1.
[282] HRC, General Comment No.35, para12. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel 2005) para 30, 225; Schebas and Sax (n 244) 76.

(Rule 17.1 (b)).[283] It goes further and provides that children should not be deprived of their liberty unless they are guilty of committing a violent offense against a person or have been involved in persistent serious offending and that there is no other appropriate response (Rule 17.1 (c)). Thus, non-custodial measures should be the norm, with detention only being used where they are not considered appropriate or effective.[284] The phrase 'no other appropriate response' should not be interpreted as an absence of alternative measures, but to situations where other measures are not suitable or beneficial to the child.[285] In other words, a custodial sentence should not be imposed on a child just because there is no other suitable placement.[286] Courts must give due consideration to whether a custodial sentence is the last resort.[287] That means it must first consider all reasonable alternatives to detention.[288] This is one of the most fundamental principles underpinning a rights-compliant child justice system.[289]

This principle is informed by the negative effect that detention on children [290] and the removal of a child from the family may have on a child who is still at a very sensitive stage of development.[291] Its effects have been the subject of scholarly comments[292] and have led scholars such as Goldson and Kilkelly to call for the abolition of child imprisonment altogether for the reasons that imprisonment is: dangerous to the safety of children; ineffective in reducing recidivism; unnecessary (many in detention pose a minimal risk to the public); obsolete (there

[283] See also Rule 19 of the Beijing Rules. The Havana Rules (Rules 1 and2) and the Vienna Guidelines (para 18) also incorporate this principle.
[284] Ursula Kilkelly, 'Measures of Deprivation of Liberty for Young Offenders: how to enrich International Standards in Juvenile Justice and promote Alternatives to Detention in Europe?' IJJO Green Paper on Child-Friendly Justice (European Council for Juvenile Justice 2011) 21.
[285] Ton Liefaard, 'Deprivation of Liberty of Children' in Ursula Kilkelly and Ton Liefaard (eds*) International Human Rights of Children* (Springer 2019) 331.
[286] Carolyn Hamilton, 'Guidance for Legislative Reform on Juvenile Justice' (UNICEF 2011) 91-92; UNODC, 'Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary' (2013) (Model Law on Juvenile Justice), Commentary 109.
[287] Commentary to the Model Law on Juvenile Justice 109.
[288] Tobin and Hobbs (n 279) 1472.
[289] Ursula Kilkelly, Louise Forde and Deirdre Malone, 'Alternatives to Detention for Juvenile Offenders: Manual of Good Practices in Europe' (International Juvenile Justice Observatory 2016) 13.
[290] For detailed effects of deprivation of liberty on children's health, see Nowak, 'Global Study on Children Deprived of Liberty' (n 49), Chapter Six.
[291] ibid 250; Committee on the Rights of the Child, General Comment No.24, para 77; OHCHR, 'The Rights of the Child in the Administration of Justice' (n 230) 420; Kilkelly, Forde and Malone (n 289)13.
[292] See for instance Ian Lambie and Isabel Randell, 'The Impact of Incarceration on Juvenile Offenders' (2013) 33 Clinical Psychology Review 448; Julinda Cilingiri, 'Recidivism Rate in Juveniles in Conflict with the law in the Penitentiary System 2013-2014: Accompanying Causes and Factors of Recurring Criminal Behaviour' (Save the Children 2015); Jeffrey Fagan and Aaron Kupchik, 'Juvenile Incarceration and the Pains of Imprisonment' (2011) 3 Duke Forum for Law and Social Change 29; Barry Goldson, 'Child Imprisonment: A Case for Abolition' (2005) 5(2) Youth Justice 77.

are other effective treatment options); wasteful of state resources and inadequate (detention centers are ill-equipped to address the need of children).[293] Further, '[t]he removal of children from their family and community networks as well as from educational and vocational opportunities at critical and formative periods in their lives, can compound social and economic disadvantage and marginali[z]ation'.[294]

Therefore, this principle is intended to limit the harmful effects of custodial sentencing for children as much as possible. The use of detention only as a last resort is also strongly linked to the rehabilitative ideal of the child justice system as contained in the CRC. Studies show that detaining children makes them more, rather than less, likely to commit further offenses.

> [C]hildren detained in prisons are more likely to be damaged in the short term through the trauma of the experience, and in the long term will find it more difficult to return to school or obtain employment or vocational training, and are therefore more likely to be a burden on the economy and society at large, rather than being able to contribute to its advancement and healing in times of economic crisis.[295]

2.6.2.3 Detention or Imprisonment for the shortest appropriate period

When detention or imprisonment of CICWL is inevitable, it must be for the shortest appropriate period.[296] According to Tobin and Hobbs, the term 'appropriate period' replaced the term 'possible period' after a fierce debate during the drafting of the CRC, and noted that the term is used as some delegations argued that rehabilitation could/should take some time.[297] On the other hand, Liefaard, by citing Rule 13.1 of the Beijing Rules, Rule 17 of the Havana Rules and the ECtHR jurisprudence on the issue of pretrial detention, argues that 'states parties are compelled to limit the duration of deprivation of liberty as much as possible and that appropriateness should

[293] Barry Goldson and Ursula Kilkelly, 'International Human Rights Standards and Child Imprisonment' (2013) 21(2) International Journal of Children's Rights 345, 370-71.
[294] Penal Reform International and Interagency Panel on Juvenile Justice, 'Ten-Point Plan for Fair and Effective Criminal Justice for Children' (2012) 1.
[295] Marianne Moore, 'Save Money, Protect Society and Realise Youth Potential: Improving Youth Justice System During a Time of Economic Crises' (International Juvenile Justice Observatory 2013) 9.
[296] CRC, art 37 (b); Beijing Rules, Rule 17.1 (b) and (c) and 19; Havana Rules, Rules 1 and 2; Vienna Guidelines, para 18.
[297] Tobin and Hobbs (n 279) 1472.

also be understood in the light of the impact of deprivation of liberty on children, including the level of security'.[298]

What constitutes the 'shortest appropriate period' has to be directly linked with the length of time considered to be appropriate to reintegrate the child and help him/her assuming a constructive role in society.[299] Providing that a sentence for a child shall be less than that of an adult by some proportion will not make the duration shortest.[300] Cognizant of the harm caused to children by deprivation of liberty including on their reintegration, the CRC Committee recommends states parties to set a maximum penalty for CICWL that reflects the principle of the 'shortest appropriate period' as contained in Article 37 (b) of the CRC.[301] Concerning the minimum sentence, the Committee considers mandatory minimum sentences incompatible with the child justice principles of 'detention as a measure of last resort' and 'for the shortest appropriate period' and recommends that courts should start with 'a clean slate'. For the Committee, even discretionary minimum sentences impede the proper application of international standards.[302]

To ensure observance of this principle, conditional release of children or parole needs to be entrenched in the national child justice system. The Beijing Rules explicitly recognize early release of children from detention centers[303] upon evidence of satisfactory progress towards rehabilitation. This applies also to *offenders who had been deemed dangerous at the time of their institutionalization*.[304] As the italicized phrase indicates, the nature or seriousness of the offense is not the relevant consideration to release a child conditionally. The CRC does not mention conditional release in its Articles 37 and 40. The Committee incidentally touched on this issue and obliges states to permit early release from custody (para 88) without further delving into what should be the period to be served before release or the interval of time for review; the

[298] Liefaard, 'Deprivation of Liberty of Children' (n 286) 332.
[299] Hamilton (n 286) 93; Eva Manco, 'Detention of the Child in the Light of International Law- A Commentary on Article 37 of the United Nation Convention on the Rights of the Child' (2015) 7(1) Amsterdam Law Forum 55, 63; Liefaard, 'Deprivation of Liberty of Children' (n 285) 332.
[300] Hamilton (n 286) 93.
[301] CRC Committee, General Comment No.24, para 77.
[302] ibid para78.
[303] Rule 28.1. See also the Tokyo Rules, Rule 9.4.
[304] Commentary to Rule 28.1 of the Beijing Rules; emphasis added.

conditions that can be imposed while on probation; supervision and assistance to be provided for the child; and effects of breaches of the conditions.[305]

However, there is no clear guidance on what constitutes 'early time'. Concerning release from life imprisonment, the CRC Committee, in its General Comment No.24, provides that the period to be served before a child is released from life imprisonment should be *substantially* shorter than that of adults (para 81). Accordingly, a period of two or three years less would not satisfy this criterion. For an equal length of imprisonment, the qualification requires at least half less than the period that should be served by an adult prisoner before release.

However, it seems that the requirements of 'early release' and 'substantially shorter period' are two related but different requirements. In other words, requiring the period to be served before release to be 'substantially shorter' than that of the adults does not guarantee early release. The Committee uses the length of the period to be served by an adult as a benchmark to determine the period that should be served by a child. In other words, the Committee does not consider the period to be served by a child before release on its own by virtue of the principle that detention shall be for the shortest appropriate period. The law applicable to adults may set the period to be served too high, and in these scenarios, requiring the period to be served by a child shall be substantially shorter may not lead to early release. Hence, it is possible to argue that conditional release of children shall be granted at the earliest period and this period must be substantially shorter than the adult counterpart.

The principle that detention or imprisonment of children should be a measure of last resort and for the shortest appropriate period is the most significant concept in international law on deprivation of liberty of children[306] and may serve as one example of added value by the CRC towards child rights protection, as it does not simply repeat existing standards but develops them further.[307]

2.6.2.4 Proportionality

Article 40 (4) of the CRC and Rules 5 and 17.1 (a) of the Beijing Rules stipulate that in all cases, the final disposition of a case must be proportional both to the circumstances and the gravity of the offense and to the circumstances of the child. According to the CRC Committee, personal

[305] Commentaries to Rule 28 of the Beijing and Rule 9 of the Tokyo Rules are better in this regard.
[306] Schebas and Sax (n 244) 81.
[307] ibid 82.

circumstances include age, lesser culpability, needs, including the mental health needs of the child. Therefore, the child's characteristics and needs, as well as the type and seriousness of the offense need to be weighed in the balance when imposing a sanction on a child.

These elements are essential to curb excesses in sentencing in particular where courts tend to justify excessive interventions based on either disproportionate welfarism or disproportionate punitivism.[308] In this regard, the CRC Committee considers a strictly punitive approach incompatible with the principles of child justice as set out in Article 40 (1) of the CRC. It, however, noted that measures proportionate to the circumstances of the child and the gravity of the offense may be considered, including considerations of the need for public safety and sanctions where a serious offense is committed by children. In this scenario, weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.[309]

Determination of proportionality requires an assessment of the background and circumstances in which a child is living or an investigation of the nature and conditions under which the offense has been committed. In determining the seriousness of the offense and the degree of responsibility of the child, the court must consider the harm done and whether it was intentional or reasonably foreseeable; previous findings of guilt; and any other aggravating or mitigating circumstances related to the child or the offense that are relevant.[310] This principle is particularly relevant for non-custodial sanctions as indicated under Article 40 (4) of the CRC. For custodial sanctions, the relevant principle is 'detention or imprisonment for the shortest time'.

2.7 Conclusion

The development of a distinct child justice system is a recent phenomenon in the history of the national criminal justice system. Before that, children were prosecuted and punished under the same law as adults. In the history of child justice, different models emerged owing to the difference in culture and perception about children and ways of molding them. The earliest models include the welfare model, justice model, crime control model, restorative justice model, diversionary approach and corporatism. They were developed at different times and are not

[308] Commentary to Rule 5 of the Beijing Rules; Kilkelly, Forde and Malone (n 289) 14. See also CRC Committee, General Comment No.24, para 76.
[309] CRC Committee, General Comment No.24, para 76.
[310] Penal Reform International (PRI), 'Protecting Children's Rights in Criminal Justice Systems: A Training Manual and Reference Point for Professionals and Policymakers' (2013) 78.

mutually exclusive and a given system may have a mix of them. Following the adoption of the CRC, a child rights-based approach is adopted, which requires the child justice system to comply with the CRC's rights and principles. It thus subsumes the elements of the above-mentioned models except the crime control model; an aspect of the justice model that rejects the reformatory aim of punishments; and an aspect of the welfare model that disregards due process rights. At the normative level, elements of the child justice system have been incorporated in the ICCPR. This is followed by the adoption of the Beijing Rules in 1985. The international community then adopted a binding international instrument on the rights of the child (the CRC) in 1989, which among other rights governs the rights of CICWL in its Articles 37 and 40. At the African level also the ACRWC was adopted in 1990 with a single provision (art 17) addressing child justice.

The general aim of the child justice system is the rehabilitation and reintegration of CICWL. Accordingly, detention or imprisonment shall be a measure of last resort and for the shortest appropriate period; diversion of child cases shall be entrenched; preference shall be given to non-custodial measures; separate institutions and procedures must be established and CICWL deprived of their liberty shall be segregated from adults.

Therefore, the child justice system becomes popular with the adoption of international standards and shall be conceived as an integral part of the development process of each country.[311]

[311] Beijing Rules, Rule 1.4.

CHAPTER THREE

DUE PROCESS RIGHTS OF CICWL UNDER INTERNATIONAL AND REGIONAL STANDARDS

3.1 Introduction

The adoption of the CRC was a legal breakthrough in the human rights of children as it is a binding instrument containing a bulk of rights, amongst which are the rights of CICWL. Articles 37 and 40 are the core provisions in this regard. Article 37 of the CRC provides the guiding principle, 'arrest and detention as a measure of last resort and for the shortest appropriate period'. After setting the principle of the child justice system under Article 40 (1), the CRC goes on to list minimum due process rights that states parties must accord to CICWL. Furthermore, the CRC enjoins states parties to seek to promote the establishment of laws and procedures specifically applicable to CICWL (art 40 (3)).

Apart from the CRC, there are also other non-binding international and regional standards governing the administration of child justice, one of which is due process rights.[312] Although these Rules and Guidelines are non-binding, the CRC ameliorates this to some extent by drawing heavily on these instruments and importing their underlying principles into its provisions on child justice.[313] Further, as a result of the work of the Committee, rather than seeing them as mainly non-binding per se, states appear to have accepted the application of the rules to their child justice system.[314]

This chapter, therefore, discusses these due process rights of CICWL recognized under the international and regional human rights standards. For a better understanding, these rights are grouped based on the stages of proceeding i.e. pretrial, trial, sentencing and post-sentencing stage. This researcher tries to follow the most common grouping of some of the rights as used in the relevant literature and guidance.[315] However, it should be borne in mind that some rights like the right to legal counsel and the presence of parents and diversion can fall in more than one

[312] ACRWC, art17; ICCPR, arts 6 (5), 10 (2) (b), 10 (3), 14 (1), 14 (4) and other relevant provisions pursuant to Article 41 of the CRC; Beijing Rules; Havana Rules; and Vienna Guidelines.
[313] Deirdre Fottrell, 'Bringing Rights all the way Home: Some Issues of Law and Policy in International Law and Juvenile Justice', in Jane Pickford (ed), *Youth Justice: Theory and practice* (Cavendish Publishing 2000) 102.
[314] Geraldine Van Bueren, 'Article 40: Child Criminal Justice', in Andre Alen and others (eds), *A Commentary on United Nations Convention on the Rights of the Child* (Marinus Nijhoff Publisher 2006) 3.
[315] See Model Law on Juvenile Justice; Hamilton (n 286).

stage of the process and the grouping of the right in one of the stages does not mean that it solely applies for that stage of the child justice process.

3.2 Pretrial Rights

3.2.1 Arrest

An arrest is the first step in the criminal and child justice system that brings the suspect to the justice system. Although the aim of arrest is, principally, to protect public safety and security, it may also aim at the protection and treatment of CICWL. In any case, arrest interferes with the liberty of the suspect and thus it has to be regulated by law in light of the principle of the best interest of the child and the rehabilitation and reintegration goal of child justice.

Hence, the CRC and other standards have provisions governing arrest and the attendant guarantees. First, it is provided that '[n]o child [in conflict with the law] shall be deprived of his or her liberty unlawfully or arbitrarily'. This gives a child a right to challenge the legality of deprivation of liberty (arrest).[316] For that reason, every child arrested and deprived of his/her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation.[317]

Second, it is stressed that the arrest of CICWL shall be a measure of last resort[318] and for the shortest appropriate period.[319] Accordingly, for the arrest to be legal, it must pass the double test of 'a measure of last resort' and 'for the shortest appropriate period of time'. The law enforcement authorities should first prove whether the intended arrest is really a measure of last resort without other alternatives which interfere less with the child's rights. If the answer is in the affirmative, the next test is what would be an appropriate time frame, with the implicit duty to regularly assess the situation and consider its continued justification.[320] In other words, the requirement of this provision strongly emphasizes that law enforcement officers should avoid arresting children. When an arrest is necessary, extra caution should be taken to ensure that it is only for the shortest period. Concerning the necessity of arrest, the CRC Committee recommends that no child be deprived of liberty, unless there is a genuine public safety concern, and it

[316] CRC, art 37 (d).
[317] CRC Committee, General Comment No.24, para 90.
[318] CRC, art 37 (b); Havana Rules, Rule 2; Beijing Rules, Rule 19.1.
[319] CRC, art 37 (b).
[320] Schabas and Sax (n 244) 85.

encourages states parties to fix minimum age for deprivation of liberty.[321]

Third, the manner of arrest is also regulated in that law enforcement agencies shall respect the child's legal status, promote his/her wellbeing and avoid harm.[322] The term 'avoid harm' covers many features of interaction including the use of harsh language or physical violence. Involvement in child justice processes in itself can be harmful to children, and hence the term 'avoid harm' should be interpreted broadly. This is particularly 'important in the initial contact with law enforcement agencies, which might profoundly influence the [child's] attitude towards the state and society'.[323] The manner of contact at this stage has an effect on the success of any further intervention. Therefore, compassion is important.[324] Treating CICWL with fairness and respect fosters their rehabilitation and 'any treatment that leads to resentment and a sense of having been treated unfairly will make rehabilitation more difficult'.[325] Only minimum force may be used in arresting CICWL. Children should not be handcuffed unless it is necessary for the protection of others or the protection of the child against harming him or herself, and there should not be degrading treatment.[326]

Fourth, the involvement of parents or guardians is highly emphasized in the judicial proceeding involving CICWL starting from arrest. Hence, '[u]pon the apprehension of [the child], her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter';[327] and the police are also expected to communicate relevant information and details of the arrest to the parents or guardian.[328] Further, the police officer must inform the child of his/her right to talk to a parent and that this right is separate from the right to counsel. [329] In this regard, the CRC Committee recommends that CICWL should be supported by parents or guardians during interrogation;[330] and elucidates that this early notification allows

[321] CRC Committee, General Comment No.24, para 89.
[322] Beijing Rules, Rule 10.3.
[323] Commentary to Rule 10.3 of the Beijing Rules.
[324] ibid; PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 39.
[325] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (ibid) 39.
[326] ibid.
[327] Bejing Rules, Rule 10.1; ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para 48.
[328] Mustaffa (n 69) 107.
[329] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 40.
[330] CRC Committee, General Comment No.24, para 60.

them to contact a lawyer.[331]

This is an important recommendation since the standards are not clear in this regard. Article 40 (2) (b) (iii) provides for the 'matter to be determined… in the presence of legal assistance or parents or legal guardians'. The term 'matter' seems to imply trial of the case. Rule 10.1 of the Beijing Rules on the other hand provides for the need for immediate notification of the parents or legal guardians of the arrest of the child. It is not clear however that parents shall/can be present during police interrogation. Rule 15 of the Beijing Rules similarly provides for the presence of these persons during the proceeding or throughout the proceeding in case of legal counsel. The term 'proceeding' again seems to refer to the trial and this has been clearly indicated in the commentary as it uses the term 'hearing'. Article 37 (d) of the CRC that guarantees the rights of children deprived of their liberty (for this case, CICWL) to be assisted by legal counsel is not sufficient as it left out children who are not deprived of their liberty but released during the proceedings including police interrogation as per the rule that 'detention must be used as a measure of last resort'.

Fifth, a child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance after arrest.[332] This right applies to a child arrested for committing a crime, as arrest is one form of deprivation of liberty. Unlike Article 40 (2) (b) (iii) of the CRC which makes other forms of assistance alternative to the legal one, the presence of both legal and other forms of assistance like psycho-social support is required under Article 37 (d). The purpose of legal assistance during interrogation is to ensure that the evidence given is voluntary; that inappropriate questions are not asked and that the child is treated in a manner appropriate to his/her age and maturity.[333]

Nonetheless, one of the important issues missed in these legal standards (the CRC, Beijing Rules and ACRWC) is the right of the child to be informed of the reason for the arrest.[334] The only right akin to this is the right of the child to be notified of the charge, a right that arises during prosecution. In the absence of a specific provision in this regard, reference should be made to the

[331] Mustaffa (n 69) 107.
[332] CRC, art 37(d); CRC Committee, General Comment No. 24 para 60.
[333] Hamilton (n 286) 45.
[334] Schabas and Sax (n 244) 39–40. The Guidelines on Action for Children in the Justice System in Africa clearly stipulate that CICWL should be informed of the reason for arrest promptly and directly in the language s/he understands; para 54 (c).

ICCPR (art 9 (2)) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) (principles 10 and12) which guarantee this right to the arrested person. Directly informing the reason for arrest to the child may not be sufficient and the relevant authority must also inform the parents or legal guardians,[335] provided that this is not against the interest of the child as can be derived from Article 40 (2) (ii) and (iii). Informing the reason for the arrest enables the suspect to seek his/her release if the alleged reason is unfounded.[336] The reasons must include the facts that support the substance of the complaint including the identity of an alleged victim.[337] It may be given orally in the language that the arrested person understands.[338]

3.2.2 Age Determination

Age determination is the cornerstone of the child justice system. It determines who is a child and who is an adult, and the attending judicial processes. Therefore, age determination should be taken as the due process rights of the child and the manner and means of proving the age of the child suspect should be guided by the aim and principles of child justice as enshrined in the CRC and other instruments. The principal means of proving the age of the child is birth certificate.[339] Nonetheless, proving the age of a suspect child by a certificate of birth may not be possible. This is particularly the case in countries with no or poor birth registration systems.

Hence, in the absence of birth certificate, the competent authority should seek or accept all other documents such as notification of birth, extracts from birth registries (for lost or destroyed certificates), baptismal or equivalent documents or school certificates or reports. These documents should be considered genuine save where there is proof to the contrary.[340] If none exists,[341] authorities should accept testimony by parents or permit affirmations to be filed by teachers or religious or community leaders who know the age of the child.[342]

Interviews with parents and other persons who know the child as a means to prove the age of the child should be used with due care. Sometimes, these persons may intentionally tell the authority

[335] HRC, General Comment No.35, para 28.
[336] ibid para 25.
[337] ibid.
[338] ibid para 26.
[339] This can be inferred from paragraphs 33 and 34 of the CRC Committee's General Comment No.24.
[340] ibid para 33.
[341] See ibid para 34.
[342] ibid para 33.

a false lower age with the aim to get him/her out of the justice system, and in another case, they may tell a false higher age to get him/her punished particularly when the child is repeatedly engaged in antisocial behaviors. In the latter scenario, the child must be entitled to seek a review of the decision by a higher authority. Though the right to appeal is attached to final conviction both under the ICCPR (art 14 (5), the CRC (art 40 (2) (v) and ACRWC (art 17 (2) (c) (iv), it is difficult to argue that the right to appeal is confined to conviction or sentence.

Medical and physical examinations of the child are supposed to be the last option. That means they can be used only where the above-mentioned measures prove unsuccessful. In such a case, specialists may assess the child's physical and psychological development to evaluate different aspects of development.[343] The Committee warns states to refrain from using only medical methods such as bone and dental analysis which is often inaccurate due to wide margins of error. Further, the method of assessment should be the least invasive.[344] In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt[345] (if there is a doubt that a child is above the MACR) in that s/he should not be held criminally responsible. [346] A similar benefit of the doubt shall also apply in a case where there is a doubt as to whether a person is a child above the MACR or an adult. In other words, in the case where it is not clear as to whether the suspect is a child or an adult, s/he must be treated as a child.

3.2.3 The Right to prompt bringing before a Judge or another Authorized Officer

Article 9 (3) of the ICCPR requires that an arrested person shall be brought promptly before a judge or other authorized officer. There is no equivalent provision in the CRC, ACRWC and the Beijing Rules. However, indirect recognition of this right is found in Rule 10.2 of the Beijing Rules, which obliges judges or other competent officials to consider the issue of release of the child without delay. This implies that the police have the duty to bring children before these bodies. Nonetheless, the time limits within which the police should bring the child before a court should be prompt. The CRC Committee, on the other hand, recommends that every child arrested should be brought before a competent authority within 24 hours.[347]

[343] ibid para 34.
[344] ibid.
[345] ibid.
[346] ibid para 24.
[347] ibid para 90.

3.2.4 Diversion

As discussed in chapter two, diversion has been introduced into many systems around the world. Diversion is also recognized in the CRC and Beijing Rules.[348] The CRC enjoins states to seek to adopt diversionary measures 'whenever appropriate and desirable' (art 40 (3) (b)). A similar provision is contained in the Beijing Rules, which reads, '[c]onsideration shall be given, wherever appropriate, to dealing with [CICWL] without resorting to formal trial by the competent authority [… .] (Rule 11.1). It need not be limited to minor crimes[349] and the CRC Committee recommends states parties to extend the range of offenses for which diversion is possible, including serious offenses where appropriate.[350]

Diversion is a process that seeks to avoid first contact with the criminal justice system by directing children away from the formal justice system and prosecution towards community support or interventions. [351] Taking it one step further, the commentary to Rule 11 of the Beijing Rules provides that:

> In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offen[s]e is non-serious and where the family, the school or other informal social control institutions have already reacted, or are likely to react, appropriately and constructively.

This aspect of diversion reinforces the principle that arrest and detention of CICWL must be a measure of last resort. This is particularly the case where the justice system allows the arrest of CICWL by the police. Therefore, the 'non-intervention' approach prevents arrest and detention of children than an aspect of diversion that aims to prevent first contact with the justice system, that is, prosecution and trial. Hence, states must take a 'stepped' response in addressing children, which includes taking no further action, giving warning to children, pre-trial diversion, and as a last resort, trial.[352]

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[348] See also ACPF 'Guidelines on Actions for Children in the Justice System in Africa' (n 253), para 50; Vienna Guidelines, para 15.
[349] Commentary to Rule 11 of the Beijing Rules.
[350] CRC Committee, General Comment No.24, para16.
[351] Commentary to Rule 11 of the Beijing Rules.
[352] Hamilton (n 286) 52.

The power of diverting children can be exercised by police, prosecutors and other agencies dealing with CICWL including judicial bodies[353] if they consider that it is not necessary to proceed with the case for the protection of society and the rights of victims.[354] This power may be exercised by one or all of these authorities.[355] That means, in the latter case, the prosecutor and judicial personnel should consider diverting the case if it is brought to them for prosecution and trial respectively.

The various diversionary measures that these personnel and agencies could order include community programs such as temporary supervision and guidance, restitution, and compensation of victims;[356] non-intervention, cautions, support service, voluntary community service work, restorative justice measures, and a combination of these measures.[357]

There are various preconditions and rules pertaining to diversion of CICWL from the formal justice system. First, as provided under Article 40 (3) (b) of the CRC and Rule 11.1 of the Beijing Rules, diversion must be appropriate and desirable. From this requirement, we can understand that although diversion is a preferred measure in child justice cases, it may not be desirable and appropriate in certain circumstances. For instance, if the community is hostile to child crime, diverting him/her to such a community will not result in the desired result or worse, may subject the child to attack and intimidation. Second, it should be used only when there is sufficient evidence that the child committed the alleged crime.[358] The third precondition for diversion is the consent of the child concerned or his/her parents or guardians when it involves referral to community service as clearly provided in the Beijing Rule 11.3 and the child must admit the commission of the offense.[359] Referring a child to community service without such consent 'would contradict the Abolition of Forced Labor Convention'.[360]Fourth, diversionary measures should comply with all human rights guarantees[361] including due process like informing the child and guardian of their rights, the options available and the consequences of

[353] Beijing Rules, Rule 11.2; CRC Committee General Comment No. 24, para 16.
[354] Tokyo Rules, Rule 5.
[355] Commentary to the Beijing Rules, Rule 11.
[356] Beijing Rules, Rule 11.4.
[357] See PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 47- 54; CRC Committee, General Comment No. 24, para 17; Hamilton (n 286) 59.
[358] ibid; CRC Committee, General Comment No. 24, para 18 (a).
[359] ibid, para 18 (a) and (b); PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 47.
[360] Commentary to Rule 11.3 of the Beijing Rules.
[361] CRC, art 40 (3) (b). See also Beijing Rules, Rule 11.2.

his/her choice; adhering to the principle of proportionality; and having a system review.[362] Fifth, the child should be given the opportunity to seek legal or other appropriate assistance.[363] Sixth**,** diversion measures should not include the deprivation of liberty.[364] Seventh, the decision of the appropriate body to divert children to community measures should be subject to review.[365] This requirement helps to minimize the potential for coercion and intimidation in the diversion process. Thus, it is necessary to set objective criteria to gauge its appropriateness by a competent authority.[366] This right to review should also apply in a case where the concerned authority denied diversion. Eighth, records of diversionary measures should not be viewed as criminal convictions or result in criminal records. [367] Finally, in cases where the child does not comply with the diversion measures and the case is referred back to court, the child's statement or guilty plea made at the beginning of the diversion process cannot be taken as evidence.[368]

3.2.5 Bail and other Alternatives to Pretrial Detention

As discussed below, pretrial detention is an exception and release of CICWL is a rule. This is because pretrial detention of children is not desirable in terms of their rehabilitation, as it may contaminate them with criminals,[369] and for their emotional and physical wellbeing. Therefore, the child justice system shall incorporate other alternatives such as 'close supervision, intensive care or placement within the family or in an educational setting or home'. [370] The CRC Committee also recommends states to release the child into the care of parents or other appropriate adults; release with or without conditions, such as reporting to an authorized person or place.[371] That means even in a case where there is concern that the child may commit another crime while awaiting trial, courts should be empowered to impose certain conditions such as requiring the child not to go to certain places, not to mix with certain people, to attend school, or to be at home at a certain hour rather than ordering monetary bail or pre-trial detention.[372]

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[362] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 47.
[363] CRC Committee, General Comment No. 24, para18 (d); United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (adopted 20 December 2012) UNGA Res 67/187 Guideline 10, para 53 (f).
[364] CRC Committee, General Comment No.24, para 18 (e).
[365] Beijing Rules, Rule 11.3.
[366] Commentary to Rule 11.3 of the Beijing Rules; General Comment No.24, para 18 (c).
[367] CRC Committee, General Comment No.24, para18 (f).
[368] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 47.
[369] Commentary to Rule 13 of the Beijing Rules.
[370] Beijing Rules, Rule 13.3.
[371] CRC Committee, General Comment No.24, para 88.
[372] Hamilton (n 286) 62.

Bail could be another means to do away with pretrial detention of CICWL as in the case of adult suspects. However, the Committee notes that payment of monetary bail should not be a requirement,[373] as most children cannot pay and because it discriminates against poor families. Thus, the release of the child on his/her own or the parents' recognizance can be ordered.

3.2.6 Pretrial Detention

Pretrial detention refers to detaining the suspect from the moment of the arrest to the stage of the disposition or sentence, including detention throughout the trial.[374] The CRC sets the principle in this regard that detention of CICWL shall be used only as a measure of last resort. Similarly, Rule 17 of the Havana Rules provides that detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. The CRC Committee recommends that pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered.[375] It further requires the criteria to use pretrial detention to be specified in the law, which should be primarily for ensuring appearance at the court proceedings and to prevent an immediate danger that the child will pose to others.[376] Thus, all efforts shall be made to apply alternative measures[377] and judges shall consider releasing the child without delay.[378]

Once pretrial detention is unavoidable, it should be used for the shortest appropriate time[379] and its duration must be determined by law.[380] In consonance with this, the CRC Committee iterates that the child must be charged and brought to the competent authority as soon as possible but not later than 30 days after the detention and that a final decision on the charge shall be made within six months after the detention.[381] The decision to detain children pending other proceedings should be subject to review by a competent authority. Taking into account the harsh consequences of detention, the CRC Committee requires all actors in the child justice system to

[373] See also Article 34 (2) of the Model Law on Juvenile Justice.
[374] CRC Committee, General Comment No. 24, para 8.
[375] ibid para 86.
[376] ibid para 87.
[377] Havana Rules, Rule 17.
[378] Beijing Rules, Rule 10.2.
[379] CRC, art 37 (b); Article 10 (2) (b) of ICCPR provides that children should be brought for adjudication as speedily as possible. See also Rule 17 of the Havana Rules.
[380] CRC Committee, General Comment No. 24, para 87.
[381] ibid para 90.

give priority to cases of children in pretrial detention.[382] The requirement that pretrial detention of CICWL should be a measure of last resort and for the shortest appropriate period is also contained in the Beijing Rules (Rule 13.1), Rule 17 of Havana Rules, and paragraph 51 of Guidelines on Action for Children in the Justice system in Africa.

3.2.7 Interrogation and the Right against self-incrimination

Interrogation of the suspect is another important stage in the justice process after arrest or after the suspect submits to the police through summoning. The purpose of the interrogation is to gather evidence to determine whether the suspect has committed the crime. In the course of interrogation, however, the rights of the suspect have to be respected. The issue of contact of law enforcement officials with CICWL including the manner of interrogation is of paramount importance in the child justice system as children are vulnerable to abuses due to their immaturity and the long-term consequences of abuse and intimidation on their future life and the chance of rehabilitation and reintegration. That is why Rule 10.3 of the Beijing Rules sets the guiding principles that contact between the law enforcement agencies and CICWL shall respect the legal status of the child, promote his/her wellbeing and avoid harm.[383]

Article 40 (2) (b) (iv) of the CRC and Article 17 (2) (c) (v) 0f ACRWC explicitly provide that children shall not be compelled to testify against themselves or to confess to a crime. Compulsion should not be limited to the use of physical force.[384] Police officers and other investigating authorities should be well trained to avoid questioning techniques that result in coerced confessions.[385] The child may confess falsely due to his/her age and development; lack of understanding; fear of unknown consequences (the possibility of imprisonment), as well as due to the length and circumstances of the questioning.[386] Taking this into account, the child must have access to legal or other appropriate assistance and should be supported by a parent, legal guardian or another appropriate adult during questioning.[387] Hence, in considering the

[382] ibid para 87.
[383] See also ACPF, 'Guidelines on Actions for Children in the Justice System in Africa' (n 253) para 48.
[384] CRC Committee, General Comment No.24, para 59.
[385] ibid para 60.
[386] ibid para 59.
[387] ibid para 60; ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para 54 (e).

voluntariness and reliability of an admission or confession by a child, all these factors must be taken into account.[388]

Rule 7 of the Beijing Rules reinforces this procedural protection by reaffirming their right to remain silent during interrogation. The Rule, thus, is more protective than the CRC, ACRCW and ICCPR, as they only prohibit compulsion and do not explicitly recognize the right to remain silent. Thus, according to the CRC and ICCPR, it would appear that adverse inferences could be drawn from silence and refusal to answer questions whilst in custody.[389]

3.2.8 Notification of Charge[390]

Every child in conflict with the law has the right to be informed promptly of the charges brought against him/her. 'Promptly' means as soon as possible after the first contact of the child with the justice system[391] and this must be evaluated in light of the special vulnerability of children and should be stricter than when applied to adults.[392] Notification of the charge helps the child and his/her counsel to prepare their defense and to effectively participate during the trial.[393] The need to inform 'promptly' and 'directly' should also apply where the case is diverted from the formal judicial proceedings.[394] Under the CRC, a child could also be notified of the charge indirectly through his/her parents or guardians. The ACRWC on the other hand does not recognize notification of charges through parents or legal guardians. It requires the charge to be notified to the child in the language s/he understands and the charge should contain the details of the alleged offense, which mirrors Article 14 (3) (a) of the ICCPR. The CRC does not mention these requirements either. Another element of the requirement that the language must be understandable by the child is the avoidance of formal legal language and jargon.[395]

The CRC Committee requires authorities to ensure that the child understands the charges. Hence, providing the child with an official charge is not sufficient and an oral explanation is necessary,

[388] CRC Committee, General Comment No.24, para 60.
[389] Van Bueren (n 314), 21.
[390] CRC, Art 40 (2) (b) (ii); ACRWC, Art 17 (2) (c) (ii); ICCPR, Art 14 (3) (a); Beijing Rules, Rule 7; ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para 55 (b).
[391] CRC Committee, General Comment No. 24, para 47.
[392] Tobin and Read (n 11) 1625.
[393] CRC Committee, General Comment No.12, para 60.
[394] Hamilton (n 286) 41.
[395] ibid 42.

and the explanation should not be left to parents or other persons.[396] It seems also that the presence of legal counsel would not bar this obligation of the authorities. Therefore, it is the duty of the relevant authorities (e.g. police, prosecutor, judge) to ensure that the child, parent or legal guardian understands each charge brought against the child and the possible consequences.[397]

The right of a child to have his/her parents or legal guardians informed of the charges is qualified by the words 'if appropriate'. The qualification is introduced to protect the child's best interests. Where a child's best interest is not served by informing his/her parents, it can be withheld. In reaching such a decision, the view of the child must be taken.[398] Nonetheless, failure to notify parents cannot be justified on the grounds of convenience or shortage of resources.[399]

Neither of the instruments provides for the charge to be communicated to a counsel. It is difficult to justify this silence; even the autonomy of the child will not, as the law allows indirect notification through parents or legal guardians. This position would have a repercussion on the right to defense of the child, and at least, concurrent notification of the charge to the counsel is important.

The form of communication of the charge is not indicated in the instruments. Therefore, one may be tempted to argue that the charge may be communicated either in written or oral form. The term 'notified' used in the instruments can include oral communication. Had the instruments intended to confine the means of communication to written form; they would have done so by saying, '…given notice of charges in writing'. The Human Rights Committee has also confirmed this line of argument as it provides that communication can be made either orally or in writing provided that the information provides the laws and facts on which the charge is based.[400] However, the following justifications may be invoked in favor of a written form of notification of the charge. The first reason is the lesser level of maturity and understanding of legal matters by children. Thus, giving the charge in written form will give children the chance to better understand the contents of the charge and prepare their defense accordingly. This sounds proper if children are literate. Even, in cases where they cannot read, the charge should as well be given

[396] CRC Committee, General Comment No.24, para 48.
[397] Hamilton (n 286) 42.
[398] Van Bueren (n 314) 15.
[399] CRC Committee, General Comment No.24, para 47.
[400] Human Rights Committee, General Comment No. 32, Article 14: The Right to Equality before the Courts and Tribunals and to a Fair Trial (23 August 2007) CCPR/C/GC/32 (HRC, General Comment No.32) para 31

in written form since the power relation between the child and the authority could hinder proper understanding of oral communication. This is the second justification. Thirdly, both the CRC and the ACRWC entitled CICWL with the right to be assisted by counsel in the preparation of their defense. Nonetheless, they do not recognize informing of the charge to the counsel. Thus, this requires written communication of the charge to children for the assistance of the counsel to be effective as children may not properly communicate information given to them orally to the counsel. Finally, the CRC Committee seems to favor a written form of communication of the charge by referring to the term 'official document'.[401]

3.3 Rights during Trial

3.3.1 Participation of CICWL during Trial and Requirements for Effective Participation

3.3.1.1 The Right to Examine Witnesses

Article 12 (2) of the CRC guarantees the right to participation of children in judicial proceedings. One way to exercise this right is the examination of witnesses.[402] This is an essential component of the equality of arms between the defense and prosecution.[403] The practical consequence of this right entitles the accused to compel the attendance of witnesses and to examine or cross-examine any prosecution witnesses as are available.[404] However, this does not entitle the accused or his counsel an unfettered right to compel the attendance of any witness, instead, it involves whether the court's failure to permit examination of a particular witness violates the equality of arms between the defense and prosecution.[405]

For the child to effectively participate in the judicial proceeding, certain requirements must be fulfilled as discussed below.

3.3.1.2 Child-friendly Court Environment

Effective participation of the child requires efforts to ensure that the environment is as non-intimidating and child-sensitive as possible[406] by for instance requiring judges not to wear their formal robes but to dress casually instead; having court staff sit at the same level as the child rather than on a raised bench or podium and allowing the child to sit next to a parent or other

[401] CRC Committee, General Comment No.24, para 48.
[402] CRC, art 40 (2) (b) (iv); ICCPR, art 14 (3) (e); ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para 55 (f).
[403] Tobin and Read (n 11) 1638.
[404] HRC, General Comment No.32, para 39.
[405] Tobin and Read (n 11) 1638.
[406] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 75.

adult.[407] Furthermore, court sessions involving CICWL should be adapted to the child's pace and attention span: regular breaks should be planned[408] and hearings should not last too long to ensure that the child is able to keep up with the proceedings at all stages. In addition, it is recommended that disruption and distractions during court sessions should be kept to a minimum.[409] Ensuring that the physical distance between parties should not be too wide and that children should be addressed in a positive manner are required to make the court setting child-friendly.[410] Regarding a child-friendly court environment, the European Court of Human Rights (ECtHR) ruled that a highly formal court setting is intimidating, and thus, is a violation of fair trial right as enshrined under Article 6 (1) of the Convention.[411]

As one means to empower CICWL to participate freely and reduce the intimidating nature of the court environment, the ACRWC prohibits the press and the public from the trial (art 17 (2) (d)) while ICCPR prohibits public trial when the interest of children so requires (art 14 (1)). Limiting the number of persons to be present during trial has a positive effect in ensuring the participation of the child, as a judge has great space to seek to hear the child's view and explain the judgment.

3.3.1.3 Preparing the Child and showing Genuine Interest

For the child to freely and effectively express his/her view, s/he must be well informed about the rights, the procedures and possible measures to be taken by the court.[412] This helps the child to direct the counsel and to make appropriate decisions about evidence and the measure to be imposed so that 'proceedings should be conducted in an atmosphere of understanding to allow children to fully participate'.[413] The CRC Committee imposes this obligation on the decision-makers. They must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be and inform the child of the right to express his/her opinion, and about the impact that his/her expressed views

[407] Hamilton (n 286) 77; See also United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System, para53 (h); CRC Committee, General Comment No.24, para 46.
[408] See Model Law on Juvenile Justice, art 45 (b).
[409] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 75.
[410] Karen Saywitz, Lorinda B. Camparo and Anna Romanof, 'Interviewing Children in Custody Cases: Implications of Research and Policy for Practice' (2010) 28 (4) Behavioral Sciences and the Law 542, 550 ff.
[411] *T v United Kingdom* App no 24724/94 (ECtHR, 16 December 1999) para 89 with 86.
[412] CRC Committee, General Comment No.12, para 60; see also Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (adopted 17 November 2010) IV para 48 (European Guidelines on Child-Friendly Justice).
[413] CRC Committee, General Comment No.24, para 46.

will have on the outcome.[414] It is possible to argue that this obligation of the decision-makers to prepare the child is in addition to the same obligation imposed on the counsel. That is, the decision-makers have to discharge this obligation irrespective of the fact that the counsel has done so previously, as the lesser maturity of the child may cause him to forget what the counsel has told him/her**.** Therefore, the decision-makers should not assume that the child will remember all the information or has an adequate recollection of these issues.[415]

Children's views have to be treated with respect[416] and is an important element of effective participation.[417] Showing a genuine interest means showing interest in the offense and everything the child would like to share about it, as well as showing interest in the personal background of the child, such as his/her leisure time activities and personal interests.[418]

3.3.1.4 Ensuring Children's Understanding: Before, during and after the Hearing

After reviewing studies about children's understanding of court proceedings, Rap concluded that '[children] are only capable of understanding what it means to appear before a judge when they are around 14 years of age' with a note that there are differences between the developmental maturity of individual children; some children are behind or ahead in their development, physically, cognitively, emotionally or morally.[419] Thus, explanation should be given to the child about the purpose of the hearing, the order of the proceedings and the persons who are present and their roles at the hearing are needed.

In other words, for the child to effectively participate in the child justice proceeding, it is not only essential for him/her to be given the opportunity to express views but also that s/he understands what happens in court, what is discussed during the hearing and what the consequences are of what is decided. Understanding what is happening or will happen is therefore an important component of effective participation.[420] Moreover, the ECtHR in the *T v the United Kingdom* prescribes that understanding what is happening in court and what implications certain decisions have are requirements of a fair trial (para 85).

[414] CRC Commitee, General Comment No. 12, para 41.
[415] Ursula Kilkelly, 'Listening to Children about Justice: Report of the Council of Europe Consultation with Children on Child-Friendly Justice' (2010) 64.
[416] HRC, General Comment No. 12, para 134 (c).
[417] Rap, 'The Participation of Juvenile Defendants' (n 20) 132.
[418] ibid.
[419] Stephanie Rap, 'A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court' (2016) 24 International Journal of Children's Rights 93, 100.
[420] Rap, 'The Participation of Juvenile Defendants' (n 20) 136.

However, for the child to properly understand and taking into account age and level of maturity, s/he needs to be assisted by legal professionals.[421] Nonetheless, it is not required for the child to understand every point of the law and evidence. This is because even adults, let alone, children are unable to fully comprehend all the intricacies and exchanges which take place in modern courtrooms. However, effective participation presupposes that the accused need to have a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty that may be imposed. It means that s/he, if necessary with the assistance of an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court.[422] And, unlike the adult case, where the burden is on the accused, the special circumstances of the child and the tenet of the best interest of the child place the burden of checking the child's ability on the authorities i.e. the authorities should make the necessary inquiry as to the child's degree of comprehension of the proceedings.[423]

The language used in court proceedings has also an implication on the child's capacity to understand, and hence, proceedings should be conducted in a language the child fully understands or free assistance of an interpreter should be provided. Moreover, legal jargon should be avoided to the largest extent possible.[424] However, when it is inevitable to use certain terms, explaining those terms is necessary.[425]

Further, the need to ensure that the child understands requires explanation of the judgment made against the child and his/her views expressed during the hearing. In this regard, the European Guidelines on Child-Friendly Justice provide that any judgment and court rulings affecting children should be duly reasoned and explained to them in a language they can understand, particularly those decisions in which the child's views and opinions have not been followed.[426] This is required by the stipulation under Article 12 of the CRC which enjoins states to give due weight to the view of the child.[427] This is a guarantee that 'the views of the child are not only

[421] Ibid; see also E Kay M Tisdall, 'Children and Young People's Participation, A Critical Consideration of Article 12', in Wouter Vandenhole and others (eds), *Routledge International Handbook of Children's Rights Studies (*Routledge 2015) 187.
[422] *SC v United Kingdom* App no 60958/00 (ECtHR, 15 June of 2004) para 29.
[423] Tobin and Read (n 11) 1641-42.
[424] Hamilton (n 286) 75; Rap, 'A Children's Rights Perspectives on Participation' (n 419) 107.
[425] Rap, 'The Participation of Juvenile Defendants' (n 20) 138.
[426] European Guidelines on Child-Friendly Justice, para 49; See also HRC, General Comment No. 12 para 45; Tisdall (n 421) 187.
[427] CRC Committee, General Comment No. 12, para 45.

heard as a formality, but are taken seriously'.[428]

3.3.1.5 The presence of Parents or Legal Guardians[429]

CICWL have the right for their case to be determined in the presence of parents or legal guardians.[430] Hence, parents may be required to attend proceedings.[431] The CRC Committee also recommends the mandatory presence of parents or legal guardians[432] during the child justice process and requires states parties to legislate for it as their presence provides psychological and emotional support to the child and contributes to effective outcomes.[433] In cases where parents are unavailable, children should be assisted by persons with whom they are informally living.[434] The issue again is 'what if the child is living alone?' In such a case, the choice should be given to the child to call any person whom s/he trusts or the court may call a representative of a welfare organization if it exists and after hearing the view of the child.[435]

However, parents or legal guardians or other persons[436] may be excluded from participation if the interest of children so requires. This ground of exclusion is clearly indicated in both the CRC and the Beijing Rule, which is 'the best interest of the child'. Further, they may be excluded at the request of the child or his/her counsel or any other person.[437] Thus, Van Bueren concludes that both participation and non-participation should be based on the child's consent.[438] Tobin and Read, however, argue that the view of the child or his representative should not be determinative in deciding to exclude parents, and judges must decide the matter after taking into account all relevant considerations including the age and maturity of the child, and views of the parents and other relevant persons such as social workers, prosecutors and/or police.[439]

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[428] ibid.
[429] The ACRWC does not recognize this right.
[430] CRC, art 40 (2) (b) (iii).
[431] Rule 15.2
[432] General Comment No. 24, para 56.
[433] ibid para 57.
[434] ibid.
[435] The Committee however incidentally provides for the presence of an appropriate adult during police questioning (para 60); and the Commentary to Rule 15 of the Beijing Rules mentions the importance of other personal assistant who the child trusts.
[436] In case where no parent or legal guardian is available, a child shall be assisted by relatives and these persons may also be excluded on the same conditions. The only consideration is the best interest of the child, not a difference in the nature of the relation that these persons have with the child.
[437] CRC Committee, General Comment No.24, para 56.
[438] Van Bueren (n 314) 20.
[439] Tobin and Read (n 11) 1635.

Parents cannot only provide psychological support to the child, but they can also direct and guide him/her in the exercise of the rights recognized under the CRC (art 5), one of which is the rights of CICWL as enshrined in Articles 37 and 40. Thus, it is possible to argue that parents have the right and/or the duty to guide the child in the exercise of their rights during trial if they (parents) are able to do so. Rap has rightly noted that 'parents can be seen as the first appropriate persons to support the child in the child justice court unless the participation of parents conflicts with the best interests of the child'.[440]

3.3.1.6 Legal[441] or other Appropriate Assistance[442]

The Right to Counsel: Appointment, Competence and Time for preparing the Defense

The right to counsel of an accused person is a duly recognized right under the international and regional human rights instruments. As one category of accused persons, CICWL have also the right to counsel. For instance, Article 40 (2) (b) (iii) of the CRC guarantees the presence of legal or other appropriate assistance during trial. The fact that this author has discussed the right to counsel as an important component of effective participation of CICWL does not imply that this right is less significant in the other stages of the judicial process. However, trial is usually a culminating event that could result in decisions affecting the liberty of the child, and hence, legal representation and participation of the child should be emphasized. This is because CICWL, due to their immaturity, may not understand court procedures. For instance, if children choose to plead guilty, there is a need to ensure that the guilty plea is not given under misconception or without entirely understanding their rights and the consequences of the plea.[443] Further, in the adversarial system, it is the accused who is to examine his/her witnesses and cross-examines the prosecution witnesses. This part of the process is essential as it is evidence that determines the guilt or innocence of the accused. Thus, legal assistance is highly demanded for CICWL during examination of witnesses. The same can be said for other aspects of the trial. Therefore, the limited understanding of children concerning the child justice process warrants special assistance in order to facilitate effective participation during trial.[444] In this regard, the CRC Committee

[440] Rap, 'The Participation of Juvenile Defendants' (n 20) 116.
[441] CRC, art 40 (2) (b) (iii); ACRWC, art 17 (2) (c) (iii); ICCPR, art 14 (3) (d); Beijing Rules, Rule 7 and 15; Havana Rules, Rule 18 (a); ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para 55 (c).
[442] CRC, art 40 (2) (b) (iii).
[443] Mustaffa (n 69) 140.
[444] Rap, 'The Participation of Juvenile Defendants' (n 20) 112.

provides that:

> [For the child] [t]o effectively participate, a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.[445]

The Human Rights Committee also stressed that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.[446] The requirement that a child should be assisted by a counsel to effectively participate in the proceeding should entail an obligation on the lawyer to prepare and inform the child about his/her rights, the procedures and actors.[447] The ECtHR has reaffirmed this task of lawyers.[448]

Both the CRC and the ACRWC are not explicit on the issue of free legal aid. They simply provide that the child has the right for the matter to be determined in the presence of legal assistance (art 40 (2) (b) (iii)) or afforded with legal assistance in the preparation and presentation of defense (art 17 (2) (c) (iii)). The Beijing Rules provide that free legal aid can be provided if available in the legal system of the country (Rule 15.1), and the Vienna Guidelines qualified it by the phrase 'if needed' (para 16). The UN Principles and Guidelines on Access to Legal Aid in the Criminal Justice Systems provide that '[c]hildren should have access to legal aid under the same conditions as or more lenient conditions than adults' (para 22) and legal aid to children should be prioritized and free from the 'means test'(para 35). The exemption of children from the 'means test' implies that children should get free legal aid. The CRC Committee also recommends states parties to provide free legal representation for all children

[445] CRC Committee, General Comment No.24, para 46.
[446] HRC, General Comment No. 32, para 10.
[447] See Rap, 'The Participation of Juvenile Defendants' (n 20) 112; Aoife Daly and Stephanie Rap, 'Children's Participation in the Justice System' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer 2019) 308; Ton Liefaard, 'Child-friendly Justice: Protection and Participation of Children in the Justice System' (2016) 28 Temple Law Review 905, 921; PRI, 'Protecting Children Rights in Criminal Justice Systems' (n 310) 77; UNICEF, 'Guidelines on Child-Friendly Legal Aid' (2018) 17 and 25; Kilkelly, Listening to Children about Justice' (n 415) 51.
[448] *SC v United Kingdom* (n 422) para 29.

accused of committing crime.[449] This seems the case irrespective of the seriousness and complexity of the offense (provided however that the trial will entail conviction or deprivation of liberty[450]) and irrespective of the available resource. Hence, the condition 'when justice requires' stated under Article 14 (3) (d) of the ICCPR does not apply.[451]

To do so, priority should be given to setting up agencies and programs to provide legal assistance to children[452] instead of funding the bar association or NGOs to provide legal advice and representation to children directly, or requiring a qualified lawyer to deliver free legal aid as a condition of their license.[453] The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems encourage states to establish specialized legal aid for children (par 58 (a)). Minimum quality standards for lawyers working in these agencies (representing children) should be set including the necessary minimum level of legal experience in the criminal justice system, the level of training to be completed before appointment and to continue delivering the service.[454] In this regard, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems enjoin states to devise mechanisms to ensure that legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offenses dealt with, and the rights and needs of children (para 37). The Principles further state that legal aid providers representing children should receive ongoing, interdisciplinary and in-depth training on child rights and be capable of communicating with children at their level of understanding (para 58 (d)).[455]

The right to counsel by itself may not suffice when the time given for the preparation of the defense is short. Neither the CRC nor the ACRWC and Beijing Rules require the defense counsel to be given sufficient time and facility for the preparation and presentation of the defense. This requirement is contained in Article 14 (3) (b) of ICCPR and the CRC Committee recalled this to

[449] CRC Committee, General Comment No.24, para 51; The Model law on Juvenile Justice also recognizes this right to free legal assistance (art 42).
[450] See CRC Committee, General Comment No. 24, para 52.
[451] Tobin and Read (n 11) 1629.
[452] Vienna Guidelines, para 16. This can also be inferred from the duty imposed on states to establish specialized institutions that are applicable for CICWL (CRC, art 40 (3)). Without indicating so, the CRC Committee requires a specialized defender (General Comment No.24, para 106). The Commentary to the Model Law on Juvenile Justice also requires that the body responsible for providing legal aid should be clearly specified in law.
[453] Hamilton (n 286) 70.
[454] ibid 69.
[455] See also UNICEF, 'Guidelines on Child-Friendly Legal Aid' (n 447) 14.

be applied to child justice cases[456] via Article 41 of the CRC. Further, the confidentiality of communications between the child and his/her counsel or another assistant should be guaranteed by virtue of Article 40 (2) (b) (vii) of the CRC.[457]

Other Appropriate Assistance

Article 40 (2) (b) (iii) of the CRC provides that a child shall be provided with other assistance. The provision uses a conjunction 'or' which implies that there may be cases where a child is provided with other appropriate assistance only. On the other hand, the ACRWC uses the conjunction 'and'.[458] The question here is 'where legal counsel is necessary?' and where, on the other hand, 'other appropriate assistance is permissible?' The CRC Committee has clarified that children who are facing criminal charges shall be provided with legal assistance,[459] while other appropriate assistance is acceptable 'where the case does not result in conviction including criminal record or deprivation of liberty, or where the child is diverted from the judicial proceedings'.[460] The Committee seems to draw the suggestion of the Federal Republic of Germany made during the deliberation leading to the adoption of the CRC that '[…] in cases of minor infringement of law, the defen[s]e of the child could be assured by non-lawyers'.[461]

Nonetheless, such a person giving this assistance is required to have 'sufficient knowledge of the legal aspects of the child justice process and receive appropriate training'.[462] Though the term 'process' seems to refer to child justice procedures, the person must have knowledge about the substantive issues of the child justice system.[463] S/he needs to have sufficient experience in defending cases involving CICWL.[464]

The person who can provide this assistance need not be a lawyer. However, it is not clear from the Committee's comment who this person is. In its repealed General Comment No.10, the Committee mentioned social workers as an example of persons that can provide this assistance

[456] CRC Committee, General Comment No.24, para 53.
[457] ibid.
[458] It used the conjunction 'and' (see art 17 (2) (c) (iii)).
[459] CRC Committee, General Comment No.24, para 51.
[460] ibid para 52.
[461] OHCHR, 'Legislative History of the Convention on the Rights of the Child', Vol.II para 577.
[462] CRC Committee, General Comment No.24, para 52.
[463] Tobin and Read (n 11) 1627.
[464] ibid.

though omitted in General Comment No.24. Hence, it can be said that professionals like social workers and psychologists who know the child justice process can provide this assistance.

3.3.2 Decision without delay[465]

The determination of cases involving CICWL should be made without delay. This is because the longer the time between the commission of the crime and the final disposition of the case, the more likely the response will lose its desired outcome.[466] Further, as time passes, CICWL will find it difficult to relate the procedure and measures to the offense, both 'intellectually' and 'psychologically'.[467] For these reasons, the CRC Committee recommends states to set time limits for the completion of the police investigation, the framing of the charges, and the final disposal of the case.[468] These time limits should be much shorter than those set for adults with due respect to the legal safeguards. Similar time limits should be set for diversionary measures.[469]

With regard to children, the question of the swiftness of the proceedings is particularly important and the child must therefore be tried 'without delay', the adjective 'undue' having been omitted from Article 40 of the CRC.[470] The ACRWC on the other hand uses the phrase 'as speedily as possible', which is different in effect from the term 'without delay'. Delay in proceedings involving children deprived of their liberty is especially egregious; these cases must hence be prioritized on a court's roll.[471] In this regard, the CRC Committee states that where the child is *not released pending pretrial*, s/he must be charged with the alleged offense and brought before the competent body for the determination of the case as soon as possible but not later than 30 days after the pretrial detention takes effect.[472] The Committee further urges states parties 'to adopt maximum limits for the number and length of postponements' and to legislate that a final decision should not take more than six months from the initial date of detention (not from the date of filing of the charge), failing which the child should be released.[473] Unlike cases where the

[465] CRC, art 40 (2) (b) (iii); ACRWC, art 17 (2) (c) (iv); Beijing Rules, Rule 15 and 20; ICCPR, art 10 (2) (b); ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), para55 (d) and (e**).** Note must be taken that the standards use different terminology which have different implication.
[466] CRC Committee, General Comment No.24, para 54.
[467] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 74.
[468] See also ACERWC, General Comment No.5, 25.
[469] CRC Committee, General Comment No.24, para 55.
[470] OHCHR, 'The Rights of the Child in the Administration of Justice' (n 230) 416.
[471] ACPF, 'Justice for Children in Africa' (n 253) 71.
[472] CRC Committee, General Comment No.24, para 90. Emphasis added.
[473] ibid. The date of filing the charge was the starting period to count the 6 months limit in the repealed General Comment No.10.

child is detained pending trial, the Committee does not set a specific time limit. It only states that 'the time between the commission of the offen[s]e and the conclusion of proceedings should be as short as possible'.[474]

3.3.3 By a Competent Authority

According to Article 40 (2) (b) (iii) of the CRC, CICWL have the right for their case to be determined by a competent authority or judicial body. Rule 14.1 of the Beijing Rules also provides that cases of CICWL should be tried by a competent authority such as a court, tribunal, board, council, and so forth. The ACRWC on the other hand does not mention the issue of competence, it simply provides for the case to be determined by an impartial tribunal (art17 (2) (c) (iv)). Nonetheless, what constitutes competence is not clearly elaborated by the monitoring bodies. However, from the obligation imposed on states parties by CRC to establish institutions and personnel specifically applicable to CICWL, we can infer that these institutions and personnel should be well acquainted with the substances of child justice with the need to be further upgraded by continuous training. In this regard, Rule 22.2 of the Beijing Rules provides that '[p]rofessional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized, to establish and maintain the necessary professional *competence* of all personnel dealing with [children] cases'. Therefore, for an adjudicating body to be considered competent, its personnel should receive professional education (in criminal justice in general and child justice in particular) and be supported by continuous training.

The CRC Committee also emphasized that such professionals should be able to work in interdisciplinary teams, and should be well-informed about the physical, psychological, mental and social development of children and adolescents.[475] It further noted that continuous and systematic training of professionals in the child justice system is crucial to uphold those guarantees,[476] and the training should not be limited to the relevant national and international legal provisions. The training should further include established and emerging information from a variety of fields on, inter alia, the causes of crime, the social and psychological development of

[474] ibid para 54.
[475] ibid para 39.
[476] ibid. See also Commentary to Rule 22.1 of the Beijing Rules.

children, including current neuroscience findings, and the available diversion measures and non-custodial sentences.[477]

In connection with the authority to adjudicate cases involving CICWL, one of the issues is whether states are duty-bound to establish special child justice courts. Reference can here be made to Article 40 (3) of the CRC and Rule 2.3 of the Beijing Rules which enjoin states to 'seek to promote the establishment' of institutions specifically applicable to CICWL. In the case at hand, this can be interpreted to require the setting up of special courts that can hear cases involving CICWL. Support for this line of interpretation is found in the Vienna Guidelines which obliged states to establish 'juvenile courts' with primary jurisdiction over CICWL (No.14 (d)). The American Convention on Human Rights (ACHR) also recognizes this right by entitling children to be tried before a specialized tribunal (art 5 (5)). However, the CRC Committee does not take this as a strict obligation of states and foresees the child justice courts as either a separate unit or as part of the existing court (adult courts) system.[478] It also gives leeway for states that cannot fulfill this obligation immediately. In such a case, it recommends the appointment of specialized judges.[479] This position of the Committee may not be compatible with the tenet of Article 40 (3) of the CRC.

3.3.4 Full respect of Privacy[480]

CICWL have the right for his/her privacy to be fully respected at all stages of the proceedings. This right is based on criminological research that revealing the identity of the child to the general public is detrimental to his/her rehabilitation by opening the door for labeling 'as criminal or 'delinquent' and stigmatization.[481]

At the trial stage, respect for the privacy of CICWL requires child justice hearings to be conducted behind closed doors with very limited exceptions clearly stated in the law.[482] Further, if the sentence is pronounced in public at a court session, the identity of the child should not be revealed.[483] Further, respect for privacy also entails that the court files and records of children

[477] ibid, para 112. See also Commentary to Rule 22.1 of the Beijing Rules.
[478] ibid, para 107.
[479] ibid.
[480] CRC, art 40 (2) (b) (Vii); Beijing Rules, Rules 8 and 21; ACPF, 'Guidelines on Action for Children in the Justice System in Africa' (n 253), paras 49 and 55 (i).
[481] Commentary to Rule 8 of the Beijing Rules.
[482] CRC Committee, General Comment No. 24, para 67.
[483] ibid.

should be kept strictly confidential and closed to third parties.[484] The prohibition should include the use of photographs or other images of the child and the parents, naming of the child and the parents, the school the child attends and the neighborhood in which the child lives.[485] Moreover, the right to privacy of CICWL requires case reporting involving the same to be anonymous including reports placed online.[486]

3.4 Sentencing stage: The use of Social Inquiry Report

A social inquiry report by social workers before the competent authority passes a decision on sentence is important in the child justice system. The Beijing Rules recognize the importance of a social inquiry report as a pre-sentence aid for judicious adjudication of child cases. Rule 16.1 stipulates that:

> In all cases except those involving minor offen[s]es, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the [child] is living or the conditions under which the offen[s]e has been committed shall be properly investigated to facilitate judicious adjudication of the case by the competent authority.[487]

The report should cover the family background of the child, the child's current circumstances, including where s/he is living and with whom, the child's educational background and health status, and previous antecedents, as well as the circumstances surrounding the commission of the offense and the likely impact of any sentence on the child.[488] It is also important for the report to contain a suggestion to the adjudicating body on the appropriate decision that should be taken concerning the child.[489]

3.5 Post-sentencing stage: Appeal

The right to appeal against decisions affecting one's rights is one of the internationally and regionally recognized human rights of convicted persons.[490] This right is also applicable in the child justice system.[491] The right to appeal is very essential in the child justice system because

[484] ibid para 67; see also Beijing Rules, Rule 21.1; Hamilton (n 286) 72.
[485] Hamilton (n 286) 72. See also commentary to Article 44 (3) of the Model Law 98.
[486] CRC Committee, General Comment No.24, para 68. See also the Model Law on Juvenile Justice, art 44 (3).
[487] On the other hand, the Model Law on Juvenile Justice makes it a rule for all cases, minor or not (art 52 (1).
[488] Model Law on Juvenile Justice, art 52 (2). See also commentary to Rule 16 of the Beijing Rules.
[489] Model Law on Juvenile Justice, art 52 (3).
[490] See ICCPR, art14 (5).
[491] CRC, art 40 (2) (b) (v); Beijing Rules, Rule 7.1.

child justice procedures are informal and great discretion is given to judges or other competent authorities. Hence, this informality and discretionary powers may subject the child to improper measures and treatments. This right to appeal is not limited to the most serious offenses and automatic review should be considered, particularly when the proceeding results in criminal records or deprivation of liberty.[492] For the proper exercise of this right, children must be informed of their right to appeal in a language that they can understand and have a right to free legal representation to prepare the appeal and defend it before the appellate body.[493]

3.6 Conclusion

The due process rights of arrested and accused persons are enshrined in international and regional standards. Hence, by virtue of the principle of non-discrimination and Article 41 of the CRC,[494] CICWL should benefit from the due process safeguards accorded to adult criminals if they are compatible with the aim and principles of the child justice system. In furtherance of this, the CRC and other child justice-related standards contain due process rights applicable to CICWL.

Some of these rights are identical to those guaranteed for adult criminals while others are modified by taking into account the special need and circumstances of children. In the first category fall the right not to be compelled to confess guilt, notification of charges; the right for the case to be determined by a competent body; the right to counsel and appeal while in the latter category we find the right for determination of the case 'without delay' (the qualification 'undue' is avoided) and the right to counsel free of charges as recommended by the CRC Committee.

Further, international and regional child rights standards contain due process safeguards that are unique to child justice, such as the principles of ‘arrest and detention as a measure of last resort’ and for the ‘shortest appropriate period of time’; the right to the presence of parents or legal guardians; the right to other appropriate assistance; and the right to privacy respected at all stages of the proceeding entailing closed trial and confidentiality of court files and records. From this principle of ‘detention as a measure of last resort’ follows diversion from the formal judicial process as enshrined in the CRC.

[492] CRC Committee, General Comment No.24, para 62.
[493] Hamilton (n 286) 79. See also Model Law on Juvenile Justice, art 48 (2).
[494] Which provides that provisions stipulated in the Convention shall not affect any other provisions which are more conducive to the realization of the rights of the child and which may be contained in international law to which a state is a party.

CHAPTER FOUR

DISPOSITIONS IN THE CHILD JUSTICE SYSTEM

4.1 Introduction

Legally speaking, the traditional justifications of punishment, including retribution, deterrence and incapacitation[495] do not have a place in the child justice system.[496] The child justice system relies on the rehabilitative justification of punishment as enshrined both in Article 40 (1), (4) and Article 37 of the CRC and Rules 5 and 17.1 (d) of the Beijing Rules. The prohibition of death penalty indicates the move away from the retributive ideal. Similarly, the principle that detention or imprisonment must be a measure of last resort and for the shortest appropriate period, and the prohibition of life imprisonment without parole, to some extent, militates against the relevance of incapacitation. In furtherance of this aim, the standards provide for a variety of non-custodial measures that national child justice systems should adopt and implement. The list of measures in these standards is not meant to be exhaustive. The measures include care and supervision, counseling, educational measures, probation, community service, financial penalties, and so forth.

This distinctiveness is justified for two reasons.[497] First, being a minor is taken as a ground of diminished guilt, since children are less capable of understanding the consequence of their actions, which leads to a lightening of punishments compared to those imposed on adults. Secondly, it is believed that CICWL can, more than adults, still be influenced positively. That means children are more malleable than adults and there is a great chance of molding them. Thus, punishments or other measures imposed should be educational. This again is justified by the reason that troublesome behavior among children is due to problems in the children's ongoing socialization, and as such, not considered worth punishing. This allows a state to take care of the further development and welfare of children, which will ultimately diminish their tendency to commit crimes.

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[495] For a discussion on these justifications, see Francis Pakes, *Comparative Criminal Justice* (2nd edn, Willian Publishing 2010), chapter 8; Lode Walgrave, 'Not Punishing Children, but Committing Them to Restore', in Antony Duff and Ido Weijers (eds), *Punishing Juveniles: Principle and Critique* (Hart Publishing 2002); Reichel (n 176) 220-221.

[496] In Western industrialized societies, child justice systems give prominence to the rehabilitative goal of punishments. Guided by this, great majority of states in the world have adopted a special types of punishment that aim at reeducating of children; see Walgrave (ibid) 99.

[497] ibid 98-99.

Thus, as these measures are part of the general punishment system, this chapter begins with a discussion on the place of punishments in the international and regional (human rights) standards. It then proceeds with a general introduction to non-custodial measures in the criminal justice system, including their place in the international and regional (human rights) standards. A comprehensive elaboration on dispositions in the child justice system occupies a central place in this chapter. This section deals with the underlying principles in the imposition of appropriate measures or penalties; the prohibited punishments; common types of dispositions as contained in the standards and implemented in various jurisdictions; and enforcement of the same.

4.2 International and Regional (Human Rights) Standards and Punishments

4.2.1 General

The oft-cited stipulation in the international human rights standards concerning punishments is the prohibition of cruel, inhuman or degrading punishment.[498] Specific provisions in the human rights standards pertaining to punishments include Article 6 of the ICCPR which restricts death penalty to more serious crimes and prohibits its imposition on persons below the age of 18 and its execution on pregnant women. The effort to regulate the nature of punishments in the human rights standards continued with the adoption of a specific instrument on the prohibition of death penalty in 1989.[499] The adoption of the Optional Protocol to ICCPR on the prohibition of death penalty is a reconsideration of Article 6 of the same Covenant which restricts death penalty to more serious offenses. At the European level, death penalty was first prohibited in peace time with the adoption of Optional Protocol 6 to the European Convention[500] and then prohibited at all times by Protocol 13 to the European Convention.[501] Regarding children, the CRC prohibits the imposition of death penalty and life imprisonment without the possibility of release (art 37(a)). The African counterpart, the ACRWC, in its Article 5 (3), and Rule 17.2 of the Beijing Rules similarly prohibit the imposition of death penalty on children.

[498] See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) UN Doc A/810 71 art 5; ICCPR, art 7; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) art 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 16.

[499] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at Abolition of Death Penalty (adopted 15 December 1989) 1642 UNTS 414.

[500] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) European Treaty Series No.114.

[501] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) European Treaty Series No.187.

These standards, combined with more general human rights principles, created a new dimension for debates about penal policies that were previously regarded as purely within the ambit of national criminal justice systems.[502] These interrelated principles[503] include, 'respect for human dignity', 'proportionality of punishments' and 'rehabilitative' aim of the penitentiary system.

Human Dignity

The first general human rights principle is the idea that all persons have dignity, which must be protected.[504] This principle applies to all persons subject to the criminal justice system irrespective of the seriousness of the offenses.[505] Thus, though punishment inevitably limits the human rights of those subjected to it, it cannot deny their fundamental dignity.[506] The principle of human dignity is closely connected with the prohibition of certain forms of punishment, defined as 'cruel and unusual' or 'inhuman and degrading'. Death penalty and corporal punishment are challenged by virtue of this principle as they are contrary to human dignity.[507] This relative importance of international human rights norms in the abolition of the death penalty and the introduction of life imprisonment came about after the end of the Cold War, in the early 1990s, both in the international and national criminal justice systems.[508] The influence of international human rights on national penal regimes was strongly felt particularly in countries that, in the early 1990s, debated reforms to their penal systems in the aftermath of the Cold War. In Europe, countries of the former Eastern bloc were required to abolish death penalty if they wished to join the Council of Europe.[509]

Opposition to the death penalty based on this principle has made life imprisonment an alternative to it, which in turn made the debate as to whether life imprisonment is contrary to human dignity problematic. Added to this debate was a call made by Pope Francis in 2014 for the abolition of

[502] Dirk Van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press 2019) 15.
[503] See *Murray v the Netherlands* App no 10511/10 (ECtHR, 26 April 2016) para 101, which for instance states that '[…] it would be incompatible with human dignity […] [to] forcefully to (sic) deprive a person of his freedom without striving towards his rehabilitation and providing him with the chance to regain that freedom at some future date'.
[504] UDHR, art 1; ICCPR, preamble, para 2.
[505] Van Zyl Smit and Appleton (n 502) 16.
[506] ibid.
[507] ibid.
[508] ibid 23.
[509] ibid 28-29.

all life imprisonment on the explicit grounds that it infringed on human dignity.[510]

Proportionality of Punishment

Proportionality of punishment to the offense goes back to the long-established penal theory of retribution.[511] However, the advent of human rights has led to the proportionality principle being questioned afresh.[512] The stipulation that punishments should be proportionate to the offense is informed by and complements the prohibition of 'cruel, inhuman or degrading punishment'.[513] The South African Constitutional Court provides in this regard that '[t]he concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading […]'.[514] The idea of human rights shapes the concept of proportionality: first, by stressing the fundamental cruelty of punishment such as the sentence of death, which, if it is to be used at all, should be applied only to the most serious offenses, second, by applying the same principle of proportionality to imprisonment in general and life imprisonment, as the most severe form of imprisonment, in particular.[515]

Rehabilitation aim of the Penitentiary System

Article 10 (3) of the ICCPR provides that the aim of the penitentiary system shall be the reformation and rehabilitation of offenders. This stipulation has a deep influence on the appropriateness of death penalty and life imprisonment without parole.[516] In this regard, the decision of the ECtHR that all prisoners, including those serving life sentences, had a right to social rehabilitation,[517] led the Grand Chamber of the ECtHR to provide that, for a life sentence not to be inhuman and degrading, a prisoner must have the opportunity in law and in fact to be considered for release.[518] The implication of this judgment is that life imprisonment without the possibility of release shall not be imposed. The Nelson Mandela Rules stipulate that the purposes of punishment are to protect society against crime and to reduce recidivism. For these purposes to be achieved, the period of imprisonment must be used to ensure the reintegration of such

[510] ibid 16.
[511] ibid.
[512] See Dirk van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 (4) Modern Law Review 541.
[513] ibid 543.
[514] *S v Dodo* (CCT 1/01) [2001] ZAAC 16 Constitutional Court of South Africa 5 April 2001 para 37.
[515] Van Zyl Smit and Appleton (n 502) 17.
[516] ibid 21.
[517] *Murray v the Netherlands (*n 503) para 104.
[518] Van Zyl Smit and Appleton (n 502) 22.

persons into society.[519] Thus, it is possible to argue that the use of life imprisonment without parole makes reintegration of the offender impossible as it keeps the offender in prison for the rest of his/her life.[520]

Taking the negative consequence of imprisonment in general, one can also question a life sentence with parole if it, in practice, leads to offenders being imprisoned for longer than is necessary to meet the purposes of punishment.[521] Many Latin American countries have gone even further and argued for the abolition of life imprisonment[522] as it undermines the human rights of offenders by denying them the opportunity to rehabilitate them.[523] They base their argument on Article 5 (6) of the American Convention on Human Rights which provides that '[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners'.

4.2.2 Non-custodial Penalties

Compared to general punishments, non-custodial penalties have occupied the centerpiece of many international and regional (human rights) standards. At the global level, three key instruments address the issue of alternatives to imprisonment. These are the Tokyo Rules, the Beijing Rules and The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).[524]

According to the Tokyo Rules, non-custodial measures available at the sentencing stage include verbal sanction such as admonition, reprimand and warning; conditional discharge; status penalties; fine and day fines; confiscation or expropriation order; restitution to the victim or compensation; suspended or deferred sentence; community service order; referral to attendance center; house arrest; any other modes of non-institutional treatments or a combination of measures listed above.[525] The Beijing Rules provide numerous alternative disposition measures that can be applied singly or in combination with others. These measures include care, guidance and supervision order; probation; community service order; financial penalties, compensation

[519] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) (adopted 17 December 2015) UNGA Res 70/175 Rule 4.
[520] Penal Reform International and University of Nottingham, 'Life Imprisonment: A Policy Briefing' 6.
[521] ibid.
[522] Van Zyl Smit and Appleton (n 502) 22.
[523] Dirk Van Zyl Smit, *Taking Life Imprisonment Seriously: in National and International Law* (2002) 174.
[524] Adopted 16 March 2011 UNGA Res 65/229.
[525] Rule 8.2.

and restitution; treatment; order to participate in group counseling; foster care and other relevant orders.[526] The Bangkok Rules apply to women in general and girls in conflict with the law and women with special conditions such as pregnant and breastfeeding women in particular. These rules, unlike the Tokyo Rules, do not provide a list of non-custodial measures; instead, they lay down the principle that the special condition of women offenders has prompted the need to implement alternatives at the pretrial and trial stage, where possible and appropriate.[527]

The need to adopt alternatives to imprisonment is also taken at a regional level in Europe and Africa. In Europe, it was felt shortly after the adoption of the Tokyo Rules. In 1992, the Committee of Ministers of the Council of Europe adopted a Recommendation on the use of Community Sanctions and Measures. The Recommendation defined community sanctions and measures as sanctions and measures which maintain the offender in the community and involve some restriction of liberty through the imposition of conditions and/or obligations.[528] However, the Recommendation, unlike the Tokyo Rules did not contain a list of community sanctions and measures. This Recommendation is replaced by another Recommendation, which provides examples of community sanction and measures on one rule without classification based on the stages of the criminal process. The measures are probation, suspension of enforcement of the sentence, community service, compensation, treatment order, electronic monitoring and conditional release. [529] There are also specific instruments on specific alternatives to imprisonment. Such include a Recommendation on Probation[530] and the European Convention on the supervision of conditionally sentenced or conditionally released offenders.[531]

Apart from these rules that apply to all criminals, the Council of Europe also adopted a specific rule designed for CICWL subject to sanctions or measures.[532] The Rules, however, do not provide a list of alternative measures; they simply provide guiding principles in the

[526] Rule 18.1.
[527] Rule 58.
[528] Recommendation No. R(92) 16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures (adopted 19 October 1992) Appendix- Glossary.
[529] Recommendation CM/Rec (2017) 3 of Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures, Adopted by the Committee of Ministers on 22 March 2017) Rule 2.
[530] Recommendation CM/Rec (2010)1 of the Committee of Ministers to Member States on the Council of Europe Probation Rules (adopted 20 January 2010).
[531] European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (adopted 30 November, entered into force 22 August 1975).
[532] Recommendation CM/Rec (2008)11 of the Committee of Ministers to Member States on the European Rules for Juvenile Offenders subject to Sanctions or Measures (adopted 5 November 2008) (European Rules for Juvenile Offenders subject to Sanctions or Measures).

implementation of the Rules. However, the general rules of the Council of Europe Rules on Community Sanction and Measures are equally applicable, to the extent they do not conflict with the rules for juveniles subject to sanction or measures.[533]

In Africa, alternatives to imprisonment got attention in the 1990s.[534] Cognizant of the prison overcrowding and deteriorated condition of treatment of prisoners in the continent, a conference was held in 1996 in Kampala and adopted the 'Kampala Declaration on Prison Conditions in Africa'. [535] Again taking note of the limited effectiveness of imprisonment for minor crimes and the cost of imprisonment, the participants recommended the use of different alternatives to incarceration such as civil reparation or financial penalties and community service orders. In the year following the adoption of the Kampala Declaration, another conference, held in Zimbabwe, adopted the Kadoma Declaration on Community Service Orders. [536] Participants of the conference, noting the limited effectiveness of imprisonment for minor offenses and cost implication of imprisonment and adverse consequences of overcrowding in general, made a declaration that imprisonment should be a measure of last resort, and that overcrowding requires positive actions, inter alia, the introduction of community service, which conforms to the African tradition of dealing with offenses. Five years later in 2002, another important conference was held in Burkina Faso and 'the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa' was adopted.[537] One of the recommendations made at the conference was the reduction of prison population. The Plan of Action sets three classes of strategies to reduce prison population. One such strategy was a reduction of the number of prisoners at the sentencing stage. Hence, alternative sentences such as community service order, suspended sentence, probation and correctional supervision are the recognized alternatives to imprisonment in this Declaration. Article 30 (a) of the ACRWC has also mentioned non-custodial measures as regards pregnant women and women with dependent children.

[533] ibid the appendix.
[534] Penal Reform International, 'Alternatives in East Africa: Trends and Challenges' (2012) 7.
[535] Kampala Declaration on Prison Conditions in Africa and Plan of Action, Adopted at the Kampala Seminar on Prison Conditions in Africa, 19-21 September 1996.
[536] Kadoma Declaration on Community Service Orders, adopted by International Conference on Community Service Orders in Africa, Held in Zimbabwe, 24-28 November 1997.
[537] Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa, Adopted by the Ouagadougou Conference on Penal and Prison Reform in Africa, held in Ouagadougou, 18-20 September 2002.

4.3 Dispositions in the Child Justice System

4.3.1 Prohibited Punishments

In addition to and informed by the principles discussed in chapter two, the CRC, the ICCPR, regional human rights instruments and other non-binding standards all contain limitations on the sentences that may be imposed.[538] The purpose of this section thus is to elaborate these prohibited punishments in the child justice system.

4.3.1.1 Cruel, Inhuman or Degrading Punishment

Article 37 (a) of the CRC, which is the special counterpart of Article 7 of the ICCPR, explicitly states that 'no child shall be subjected to […] cruel, inhuman or degrading […] punishment'. Article 7 of the ICCPR has been elaborated by the Human Rights Committee and accordingly, it aims 'to protect both the dignity and the physical and mental integrity of the individual'.[539] Further, Article 7 allows for no derogation even in situations of public emergency.[540] In this regard, the ECtHR held that the guarantees of Article 3 apply irrespective of the seriousness of the conduct of the person in question.[541] This prohibition is a broad-level prohibition that encompasses other specific prohibitions such as corporal punishment, death penalty and life imprisonment without the possibility of release as contained in the general human rights standards and child rights instruments.

However, there is little international jurisprudence as to what exactly constitutes cruel or inhuman punishment and also on distinguishing the terms.[542] Scholars also do not agree on the differences that these terms entail, some suggesting that they refer to the same concept and others arguing that they are different.[543] The term cruel punishment got greater attention in the national courts, particularly in the USA. As mentioned by Tobin and Hobbs, the Supreme Court stated that the term is dynamic and is more than physically barbarous punishments. It is guided by the principle of human dignity. They also list the four cumulative features of cruel punishment

[538] See section 4.2.1 above.
[539] Human Rights Committee, General Comment No. 20, 'Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) para 2.
[540] ibid para 3.
[541] *D v United Kingdom* App No. 30240/96 (ECtHR, 2 May 1997) para 47.
[542] Tobin and Hobbs (n 279) 1147.
[543] ibid.

identified by one judge; a punishment: which degrades human dignity; inflicted in a wholly arbitrary manner; rejected by society and is manifestly unnecessary.[544]

4.3.1.2 Corporal Punishment

Though it is not expressly prohibited in the CRC,[545] the Committee considers corporal punishment as degrading and defines it as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light'. Such includes inter alia, hitting children with the hand or with an implement, shaking or throwing, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning and forced ingestion. [546] In its latest general Comment, the Committee reiterates that corporal punishment is a violation of Article 37 (a) of the CRC.[547]

In its consideration of States' reports, the Committee also urged states to abolish corporal punishment of children in all settings, including in the administration of justice. As of March 2020, the Committee had made 486 recommendations on the issue to 194 states.[548] The same approach is taken by the Human Rights Committee in that it urges states to abolish corporal punishment first in the administration of justice and school setting and then in all settings.[549]

4.3.1.3 Life Imprisonment without Parole

The CRC prohibits the imposition of life imprisonment without parole on CICWL.[550] This prohibition is unique to the CRC.[551] This prohibition is fully logical given the rule that detention or imprisonment of a child shall be for the shortest appropriate period. According to the OHCHR, a life sentence would ipso facto be contrary to the rule of detention for the shortest appropriate period and also to the notion of the best interest of the child, which denies the child a chance of reintegration.[552]

Although life imprisonment with parole is not prohibited in the standards, it has been criticized

[544] ibid 1148.
[545] The Beijing Rules however expressly prohibited corporal punishments as a sentence to be imposed on a person below 18 year old (Rule 17.3).
[546] Committee on the Rights of the Child, General Comment No.8, The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia) (2 March 2007) CRC/C/GC/8 para 11.
[547] CRC Committee, General Comment No.24, para75.
[548] Available at <https://endcorporalpunishment.org/human-rights-law/crc/> accessed 12 July 2021.
[549] Available at <https://endcorporalpunishment.org/human-rights-law/iccpr/> accessed 12 July 2021.
[550] See art 37 (a).
[551] Tobin and Hobbs (n 279) 1463.
[552] OHCHR, 'The Rights of the Child in the Administration of Justice' (n 230) 429.

and considered incompatible with the very aim of the child justice system. The CRC believes that life imprisonment makes reintegration very difficult, and after recalling the 2015 report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that showed life imprisonment on a child is 'grossly disproportionate' and cruel, inhuman or degrading, it strongly recommends states parties to abolish all forms of life imprisonment for persons who were below the age of 18 at the time of the commission of the offense.[553] Liefaard also opined that Article 37 (a) of the CRC which only prohibits life imprisonment without parole led to inconsistency as detention including imprisonment shall be for the shortest appropriate period (art 37 (b)), and also with the overall objectives of the child justice as enshrined in Article 40 (1) of the CRC.[554]

4.3.1.4 Indeterminate Sentence

Although life imprisonment without parole and indeterminate sentences are sentences with no specific time set, they are not the same. Life imprisonment is imposed for the crime and is based on retribution, while indeterminate sentencing is informed by preventive rationale.[555] The ECtHR has entertained the issue of indeterminate sentences in some cases involving the UK. In the case between *James, Well and Lee and UK* in which the court has substantively examined the issue, it did not find indeterminate sentencing as a violation of the Convention per se. But, an indeterminate sentence violates Article 5(1) of the Convention which prohibits arbitrary detention[556] if steps are not taken to progress the offenders through the prison system with a view to providing them with access to appropriate rehabilitative courses.[557] In the case *T v UK*, which involves indeterminate detention of an 11 years old child at the queen's pleasure, the Court mentioned that the failure to fix the sentence and leaving the child in uncertainty over many years might give rise to an issue under Article 3 of the Convention, which prohibits inhuman or degrading punishment.[558]

[553] CRC Committee, General Comment No.24, para 81. See also Child Rights International Network (CRIN), 'Inhuman Sentencing: Life Imprisonment of Children around the World' (2015).
[554] Liefaard, 'Deprivation of Liberty of Children' (n 285) 332; Liefaard, 'Juvenile Justice' (n 126) 252.
[555] Tobin and Hobbs (n 279) 1465.
[556] *James, Wells and Lee v United Kingdom* (n 278), para 222.
[557] ibid para 221.
[558] *T v United Kingdom* (n 411) para 99.

Indeterminate detention of children also caught the attention of the Committee on the Rights of the Child in its consideration of states' reports;[559] and it has recommended states to eliminate it with strong language in the latest observation compared to the earlier one.[560] This culminated with the clear recommendation to abolish it for all offenses committed by a person below the age of 18 at the time of commission,[561] which was not included in the repealed General Comment No.10. Though the Committee has not made its observation based on specific provisions of the CRC, an argument against this sentence can be made based on the aim of the child justice system as stated under Article 40 (reintegration); the principle that detention shall be for the shortest period as enshrined under Article 37 (b) and the disproportionality of the sentence itself.[562]

4.3.1.5 Death Penalty

The prohibition of the imposition of death penalty on a person below the age of 18 is recognized under international and regional standards.[563] According to the CRC Committee, Article 37 (a) of the CRC reflects the customary international law prohibition of death penalty on a person under the age of 18.[564] The reference time for this prohibition is the age of the person at the time of the commission of the crime regardless of the age of the person at the time of the trial or sentencing or of the imposition of the sanction.[565] The prohibition of death penalty not only requires states not to execute it on children but also the total elimination of the punishment from the law. In this regard, Tobin and Hobbs state that it is insufficient for states to refrain from executing death penalty despite its incorporation in their national law. They, thus, argue that the very possibility of its imposition is against Article 37 (a) of the CRC.[566]

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[559] Committee on the Rights of the Child, Concluding Observations on the Report of Malawi (27 March 2009) CRC/C/MWI/CO/2 para 75 and 76(i); Committee on the Rights of the Child, Concluding Observations on the Report of Zambia (2 July 2003) CRC/C/15/Add.206 para 70 and 72(a).

[560] The Committee used soft language '[r]eview the procedure of detaining children "at the pleasure of the President" with the view to eliminating it […]' in its observation to Malawi while clearly recommended Zambia to prohibit detention at the president's pleasure.

[561] CRC Committee, General Comment No.24, para 81.

[562] Tobin and Hobbs (n 279) 1465-66.

[563] ICCPR, art 6 (5); CRC, art 37(a); ACRWC, art 5 (3), Beijing Rules, Rule 17.2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 4 (5).

[564] General Comment No. 24, para 79. See also Amnesty International, 'The Exclusion of Child Offenders from the Death Penalty under General International Law' (2003) 9.

[565] CRC Committee, General Comment No.24, para 79; Tobin and Hobbs (n 279) 1461; Hamilton (n 286) 94-95.

[566] Tobin and Hobbs (n 279) 1461.

Under Article 37 (a) of the CRC, the use of the death penalty is regarded as falling within the definition of cruel, inhuman or degrading treatment or punishment.[567] Amnesty International considers death penalty as the ultimate cruel, inhuman and degrading punishment.[568] Death penalty would also infringe on the right to life under Article 6 of the CRC, Article 2 of the European Convention on Human Rights, Article 6 (1) of the ICCPR, Article 4 (1) of the ACHR, Article 4 of the ACHPR and Article 3 of the UDHR.[569]

4.3.2 Segregation of Children from Adults

Imprisonment or institutionalization of CICWL is not prohibited at all times. A child may be sentenced to imprisonment for the offense if it is the only appropriate response for his/her case. And, the reach of the child justice system never stops at providing the rule that imprisonment should be a measure of last resort. It goes beyond and provides that children should be segregated from adults in detention centers.[570] This is because detaining children with adults is detrimental to their safety and rehabilitation,[571] as this will contaminate them with hard criminals. Further, detention of CICWL with adults constitutes cruel, inhuman or degrading punishment.[572] Thus, children may be detained in *a separate detention facility or a separate cell within the adult detention*[573]*facilities.*[574] From the italicized phrase it is clear that states have the discretion to establish a separate detention center for children or build a separate cell within the adult detention center. However, the CRC Committee seems to incline towards the first option as it prohibits placing children in adult detention centers, and requires states to establish separate facilities staffed by trained personnel and that operate in a child-friendly way.[575] The term 'separate facility' used in this statement is similar to the one used in the Beijing Rules, which refers to a center completely detached from the adult prison. The European Rules for Juvenile

[567] Commentary to the Model Law on Juvenile Justice 109; *State v Makwanyane and others* (CCT/3/94) [1995] ZAAC 3 Constitutional Court of South Africa 6 June 1995 para 26.
[568] Available at <https://www.amnesty.org/en/what-we-do/death-penalty/> accessed on 12 July 2021.
[569] Commentary to the Model Law on Juvenile Justice 109.
[570] CRC, art 37 (c); ACRWC, art 17 (2) (b); African Youth Charter, art 18 (2) (c); ICCPR, art 10 (3); Beijing Rules, Rule 26.3; Havana Rules, Rule 29; Mandela Rules, Rule 11(d).
[571] CRC Committee, General Comment No.24, para 92. For the various violence that children faced in adult prisons, see Andrea Wood, 'Cruel and Unusual Punishment: Confining Juveniles with Adults after Graham and Miller' (2012) 61(6) Emory Law Journal 1445, 1450 ff.
[572] Wood ibid.
[573] Emphasis added.
[574] Beijing Rules, Rule 26.3; The practice of states as well is diverse, see Rob Allen, 'Custodial Establishments for Juveniles in Europe' in Josine Junger-Tas and Frieder Dunkel *Reforming Juvenile Justice* (Springer 2009).
[575] CRC Committee, General Comment No.24, para 92.

Offenders subject to Sanctions or Measures too, make institutionalization of children in adult facilities an exception and require holding children in institutions specially designed for them (Rule 59.1).

Nonetheless, segregation may not be an 'all-time requirement' that there may be cases where the need arises to detain them with adults; and this is recognized in Article 37 (c) of the CRC and Rule 29 of the Havana Rules. Therefore, the best interest of the child may not warrant the segregation of children from adults.[576] For instance, they may be detained with members of the family; and may also be detained with carefully selected adults as part of a special program beneficial for the child concerned.[577] This exception should be interpreted narrowly and the convenience of States should not override the interest of a child.[578]

The principle of segregation of CICWL from adults may lead one to conclude that once a child reaches the age of 18, s/he shall be transferred to adult detention centers. However, this may not be the case at all times and the best interest of the child requires his/her continuation in children's detention centers.[579]

Another limitation put on national child justice systems that detain children in line with the principles set above is the need to prioritize semi-open institutions such as halfway houses, educational homes, day-time training centers and other such appropriate arrangements that foster the reintegration of CICWL.[580] They are also recognized in the Tokyo Rules as post-sentencing alternatives (Rule 9.2) in a more mandatory term than the Beijing Rules.[581]

4.3.3 The various types of Dispositions available in the Child Justice System

Article 40 (4) of the CRC requires states to make available a variety of alternative measures. It reads '[a] variety of dispositions […] shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offen[s]e'. Similarly, Rule 18.1 of the Beijing Rules provides that '[a] large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to

[576] CRC, art 37 (c).
[577] Havana Rules, Rule 29.
[578] CRC Committee, General Comment No. 24, para 92.
[579] ibid para 93.
[580] Beijing Rules, Rule 29.1.
[581] Rule 9.1 of the Tokyo Rules provides that '[t]he competent authority *shall have* at its disposal a wide range of post-sentencing alternatives…', while in the Beijing Rules provide that '[*e]fforts* shall be made […]'. Emphasis added.

avoid institutionalization to the greatest extent possible'. These stipulations complement and reinforce the principle contained in Article 37 of the CRC that detention should only be used as a last resort.[582]

The disposition measures provided under both standards are not exhaustive as expressed by the phrase 'other relevant orders',[583] and a conjunction 'such as' and the phrase 'other alternatives to institutional care'.[584] The lists provide some guidance to states on the variety and types of alternatives that should be available in their child justice system. Hence, states are left with great discretion to adopt measures that fit their circumstances.[585] However, adopting non-custodial measures is not at the discretion of the states as the term 'shall' used in Article 40 (4) of the CRC implies. What is discretionary is the choice of the types of non-custodial measures that are in line with the underlying principles and aim of the child justice system as well as the national circumstances of a state.

According to Sloth-Nielsen, institutional care referred to in Article 40 (4) of the CRC includes not only imprisonment but also other forms of institutional care, such as referrals to reform schools, industry schools, residential vocational or educational institutions, and so forth.[586] This is because Article 37 (b) of the CRC provides that any form of detention shall be a measure of last resort.

Compared to the due process rights, this aspect of the child justice system is not given sufficient attention in the works of the CRC Committee and scholarly works as well.[587] In its latest General Comment No.24, the Committee did not highlight the nature of each measure enshrined in the CRC. It simply enjoins states to implement a wide variety of non-custodial measures and to prioritize them in furtherance of the principle that deprivation of liberty (imprisonment) is a measure of last resort (para 73). The Travaux preparatoires does not also contain a discussion on the meaning and nature of the measures mentioned under Article 40 (4) of the CRC.[588] The

[582] Kilkelly, Forde and Malone (n 289) 16.
[583] Beijing Rules, Rule 18.1 (h).
[584] CRC, art 40 (4).
[585] CRC Committee, para 74; Tobin and Read (n 11) 1660.
[586] Julia Sloth-Nielsen, 'International Frameworks' in Julia Sloth-Nielsen and Jacqui Gallinette (eds) *Child Justice in Africa; A Guide to Good Practice* (Community Law Center 2004) 25.
[587] For instance in the commentary to Article 40 of the CRC by Van Bueren, only a single page is devoted to non-custodial measures (see Van Bueren (n 314)). Similarly, in the commentary by Tobin and Read (n 11), only two pages are dedicated for this issue.
[588] Tobin and Read (n 11) 1660.

purpose of this section is, therefore, to highlight the nature of these measures as adopted and implemented in the various national child justice systems and serve as alternatives to imprisonment and other forms of detentions.

The principle that detention or imprisonment shall be a measure of last resort should entail the prioritization of one measure over the other based on the extent to which it infringes on the liberty of a child. In other words, priority shall be given to educational and most appropriate sanctions.[589] Dunkel and Junger-Tas propose the following levels of sanctioning, ordered from the least to the most intrusive.

1. Warnings, reprimands, conviction without sentence

2. Fines, community service, reparation orders, mediation

3. Social training courses and other intensive educational sanctions

4. Mixed sentences, combination orders (which can be characterized as a more repressive way of dealing with CICWL)

5. Probation

6. Electronic monitoring

7. Educational residential care, youth imprisonment and similar forms of deprivation of liberty.[590]

Though not explicit, Rule 8.2 of the Tokyo Rules seems to put the measures in their order from the least intrusive (warning) to the most intrusive (referral to an attendance center and house arrest).

It is possible to say that some of the measures discussed below (as provided in the CRC and Beijing Rules)[591] are not unique to the child justice system. They are also found in the adult criminal justice system. For instance, Rule 8.2 of the Tokyo Rules provides a similar list of non-custodial measures. However, one distinction that must be emphasized is that non-custodial

[589] European Rules for Juvenile Offenders subject to Sanctions or Measures, Rule 23.2.
[590] Frieder Dünkel and Ineke Pruin, 'Community Sanctions and the Sanctioning Practice in Juvenile Justice Systems in Europe' in Josine Junger-Tas and Frieder Dunkel *Reforming Juvenile Justice* (Springer 2009) 188.
[591] Except care, guidance and supervision order (CRC, art 40 (4); Beijing Rules, Rule 18.1 (a); intermediate and other treatment orders (Beijing Rules, Rule 18.1 (e); group counseling (Beijing Rules, Rule 18.2 (f); see also CRC, art 40 (4)) and orders concerning foster care, living communities or other educational settings (Beijing Rules, Rule 18.1 (g); see also CRC, art 40 (4)).

measures in the child justice system are measures of first resort irrespective of the seriousness of the offense unlike the adult criminal justice system in which they are not measures of first resort for all offenses but aimed to avoid unnecessary use of imprisonment.[592]

More than one measure can be imposed in a given case as clearly provided under both the Beijing Rules and the Tokyo Rules.[593]

4.3.3.1 Conditional Discharge

This measure involves the child being discharged without being sentenced but under certain conditions.[594] It is recognized under Rule 8.2 (b) of the Tokyo Rules.

4.3.3.2 Verbal Sanctions[595]

Such includes admonitions, reprimands, warnings or unconditional discharges accompanied by a formal or informal verbal sanction. These are some of the mildest responses[596] that a court may impose upon a finding of guilt or legal culpability, and ensure that the child justice system is not further involved in the matter.

4.3.3.3 Guidance and Supervision Order[597]

Supervision orders place the child under the supervision of a community authority for a given period. This could be a youth probation worker or a social worker who acts as a case manager and is responsible for the child for the duration of their sentence and is a key point of contact for the police or the courts in any matters relating to the child's offenses.[598] Various conditions may be attached to this order. The conditions may be set by either the court or social worker or probation officer include requiring the child to meet with the supervisor at specified dates; that the child takes part in specified activities at specified places, including attendance at drug rehabilitation programs; requiring the child to attend school regularly; to refrain from meeting

[592] See Tokyo Rules, Rule 2.3.
[593] Beijing Rules, Rule 18.1; Tokyo Rules, Rule 8.2 (m).
[594] UNODC, 'Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment' (United Nations 2007) 29.
[595] ibid; Tokyo Rules, Rule 8.2 (a).
[596] Ineke Pruin, Frieder Dünkel and Joanna Grzywa, 'The Implementation of Alternative Sanctions and Measures into Juvenile Justice Systems' (2011) 1-2 Romania Journal of Sociology New Series 3, 6.
[597] CRC, art 40 (4); Beijing Rules, Rule 18.1 (a); Model Law on Juvenile Justice, art 53 (1) (l).
[598] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 82.

with certain people or going to certain places.[599]

If the child is a high-risk offender or has a very chaotic lifestyle, intensive supervision may be ordered. It is a more rigorous version of supervision that can be used, and the child is closely supervised to reduce opportunities for reoffending and to assist him/her in reintegrating into society.[600] It generally encompasses a wide variety of risk control strategies, including multiple weekly face-to-face meetings, evening visits, drug or alcohol testing, and electronic monitoring.[601]

4.3.3.4 Restorative Justice Measures

Restorative justice measures are not only avenues to divert a child from the formal proceeding or trial; they are also alternatives to custodial dispositions once a formal trial is unavoidable. However, restorative justice is not explicitly mentioned in the CRC, the Beijing Rules, and the Tokyo Rules as alternatives to imprisonment, the reason for which is difficult to speculate. It can, however, fall in 'any other order' or 'other alternatives to institutional care'. The CRC Committee added it to the list of measures through its interpretation of the Convention. In its General Comment No. 24, after noting that the effectiveness of restorative justice was one of the reasons for the revision of the earlier General Comment (No.10) (para 1), the Committee indicates that restorative justice is one of the alternative measures implemented in various jurisdictions and recommends states to take lessons from (para 74). The model law on juvenile justice has explicitly recognized restorative justice as one alternative to institutionalization (art 53 (1) (d)). Restorative justice is an effective way of addressing offending behavior and reducing recidivism.[602] It has become a central aspect of practice in many child justice systems.[603]

Restorative justice in the child justice system often takes the form of family group conferencing in which the child, his/her parents or guardian or another appropriate adult meet with the victim, and other members of the community and a plan is drawn up, with the input of the offender and his/her family.[604] In some jurisdictions, the plan drawn up at such a family conference can be approved by the court and become a court order. The child will make an apology to the victim

[599] Hamilton (n 285) 85; PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 82; Commentary to the Model Law on Juvenile Justice 106.
[600] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 83.
[601] ibid.
[602] Hamilton (n 286) 86.
[603] Kilkelly, Forde and Malone (n 289) 44.
[604] ibid.

and will undertake to make some sort of reparation or pay compensation to the victim.[605]

4.3.3.5 Community Service Order

Community service order is mentioned under Rule 18.1 (c) of the Beijing Rules and Rule 8.2 (i) of the Tokyo Rules, but not in the CRC. This order requires the child to undertake unpaid work for a certain number of hours for the benefit of the community.[606] It offers a way for the child to be held accountable and to repair some of the harm caused by his/her criminal conduct.[607] The work is unpaid and is usually undertaken outside school hours, so as not to interfere with the child's education.[608] It should also be based on the consent of the child[609] and, possibly, the parents as well.

Community service can be regarded as a restorative justice process outcome, a condition to probation or as an independent measure of its own.[610] In any case, it should consist of a constructive activity, preferably one that will enable the child to learn a skill, and allow him/her to feel that s/he has done something useful for the community.[611] To that effect, the court should collect reliable information that such work is available under appropriate supervision.[612] Community service should not involve hard labor[613] by virtue of the prohibition of the worst form of child labor.[614] Further, the court must make sure that the child is able to discharge the work. In other words, the child must be physically and mentally fit to perform the work.

Community service has proved to be more effective when children are able to learn new skills and feel that they have made a positive and useful contribution to their community.[615] It is likely to be more effective if it can incorporate an element of mentoring at the same time.[616] It works best where the type of community service offered relates to the offense the child has committed.

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[605] ibid.
[606] ibid 27; Hamilton (n 286) 87; Commentary to the Model Law on Juvenile Justice 105; PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 84; UNODC, 'Handbook on Alternatives to Imprisonment' (n 594) 35.
[607] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 84.
[608] ibid.
[609] ibid.
[610] Hamilton (n 286) 87; Kilkelly, Forde and Malone (n 289) 27; Commentary to the Model Law on Juvenile Justice 105.
[611] Hamilton (n 286) 87.
[612] UNODC, 'Handbook on Alternatives to Imprisonment' (n 594) 35.
[613] Commentary to the Model Law on Juvenile Justice 105.
[614] Worst form of Child Labor Convention (1999) (No.182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161.
[615] Commentary to the Model Law on Juvenile Justice 105.
[616] Hamilton (n 286) 87.

For example, if the child has committed an act of vandalism s/he may be required to work painting or rebuilding community structures.[617] This can help the child understand the harm s/he has caused and feel responsible for the offense. Community service can be an important means of trying to achieve a child's successful reintegration into his/her community if used together with other supports[618] as it involves the local community.[619]

4.3.3.6 Financial Penalties

Rule 18.1 (d) of the Beijing Rules and Rule 8.2 (d) of the Tokyo Rules require states to adopt financial or economic penalties in their child justice system. The CRC does not expressly mention it nor does the Committee in its latest General Comment (No.24). The prevalent type of financial penalty in the criminal justice system in general and child justice in particular, is a fine. [620] Payment can be made through various court-ordered methods including outright payment, installment payments, withholding of an offender's salary, or taking possession of the offender's property.[621]

Another financial penalty is restitution.[622] This particularly applies in cases of property crime, fraud, forgery, or theft. It may also be applied to compensate victims of violent crime for medical expenses incurred for their physical and mental health recovery.[623] In the rarest form, restitution involves direct service to the victims of the crime. It, thus, serves as a medium for reconciling the victim and the child by creating an opportunity for them to meet together.[624] It usually includes repairing property damaged by the offender and which alleviates the victim's fear emanating from the offense.[625]

4.3.3.7 Educational and Vocational Measures[626]

Educational measures require a child to attend classes as part of a reintegration process.[627] They are most useful when they are designed to meet the child's specific needs.[628] CICWL have often

[617] PRI 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 84.
[618] Kilkelly, Forde and Malone (n 289) 27.
[619] PRI, 'Protecting Children Children's Rights in Criminal Justice Systems' (n 310) 84.
[620] ibid; Commentary on the Tokyo Rules, Commentary to Rule 8.2.
[621] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 84.
[622] Beijing Rules, Rule 18.1 (d); Tokyo Rules, Rule 8.2 (f)
[623] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 85.
[624] ibid.
[625] ibid.
[626] See CRC, art 40 (4).

missed periods of schooling or have learning difficulties. Thus, emphasis should be placed on ensuring that children have basic literacy and then on bringing them up to the same level as their peers to enable them to re-enter school.[629] It, thus, seems that educational measures concern a child who already is/was in the educational setting, but is not able to attend or not properly attending it. However, these measures should also apply to children who have no access to education at all. Vocational training should also take into account the child's needs and assist the child to gain a skill that can help him/her obtain employment once education has finished.[630]

4.3.3.8 Probation[631]

Probation is a non-custodial measure that can be imposed either as an alternative to a custodial sentence or following partial completion of a custodial sentence.[632] It is a common type of alternative measure.[633] Probation consists of the conditional suspension of punishment while the offender is placed under personal supervision and is given individual guidance or treatment.[634] It gives the child an opportunity to rehabilitate in his/her home[635] and a second chance to demonstrate that s/he can function in the community and abide by its rules.[636] It often contains conditions, such as reporting to a probation officer regularly or the prohibition of visiting specific places or people,[637] a curfew; or a requirement to take part in education, training, or other types of program which is considered beneficial.[638]

The breach of one of the conditions will result in the child's referral back to the courts. Therefore, it is important to ensure that the conditions of probation for a child are realistic.[639] For instance, requiring a child to avail to a probation officer once a week may not be practical if the

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[627] Hamilton (n 286) 90; Commentary to the Model Law on Juvenile Justice 105; Kilkelly, Forde and Malone (n 289) 32.
[628] Hamilton (n 286) 90; Commentary to the Model Law on Juvenile Justice 105.
[629] Hamilton (n 286) 90.
[630] ibid; Commentary to the Model Law on Juvenile Justice 105.
[631] Beijing Rules, Rule 18.1 (b); Tokyo Rules, Rule 8.2 (h); Model Law on Juvenile Justice, art 53(1) (c).
[632] Hamilton (n 286) 87.
[633] Kilkelly, Forde and Malone (n 289) 24; Steven M Cox and others, *Juvenile Justice: A Guide to Theory, Policy, and Practice* (Sage 2018) 490.
[634] Hamilton (n 286) 87.
[635] Joan McCord, Cathy Spatz Widom and Nancy A Crowell (eds), *Juvenile Crime, Juvenile Justice* (National Academy of Science 2001) 182.
[636] Cox and others (n 631) 490.
[637] ibid 491; Hamilton (n 286) 88; Commentary to the Model Law on Juvenile Justice 105; UNODC, 'Handbook on Alternatives to Imprisonment' (n 594) 34; Roberson (n 1) 227; Kratcoski (n 2) 415.
[638] Kilkelly, Forde and Malone (n 289) 24.
[639] Cox and others (n 631) 491.

office is far away unless the child is helped with the costs of transport.[640] Nonetheless, this researcher contends that a child should not be required to travel a long distance to meet the officers even if the cost is covered by the office.

The order is supervised by a probation officer, who is responsible for helping the child comply with the order, and who will also report any violations of this order to the court,[641] mostly, working under a specialized division of probation service dedicated to CICWL.[642]

4.3.3.9 Intermediate Treatment[643]

Intermediate treatment is popular in western states. It does not involve custody or punishment but provides a child the opportunity to learn constructive patterns of behavior to replace potentially offending ones. The assumption is that children need to be encouraged to behave differently through activities and experiences of a rewarding, enriching and enjoyable nature, which help them take control of their lives, reintegrate into the community and contribute towards helping their peers.[644] Intermediate treatment focuses on the child's social skills and motivating him/her to perform well at school and to make better use of leisure time. It resembles counseling as recognized under the CRC.

4.3.3.10 Other Measures

The CRC, the Beijing Rules and the Tokyo Rules all empower states to adopt other non-institutional measures. This gives states the flexibility to develop new forms of non-institutional treatment or to reinvigorate customary alternatives that may have fallen into disuse.[645] However, such measures should be provided in the law and be compatible with human rights standards.[646] The following measures can be implemented to help the child assume a constructive role in society. These include mentoring and befriending, curfews, prohibited activity orders, exclusion orders, short-term fostering order, residence order and care order.

Mentoring and befriending program involves providing the child with an adult to support and

[640] Hamilton (n 286) 89; Commentary to the Model Law on Juvenile Justice 105.
[641] Hamilton (n 286) 88; Kilkelly, Forde and Malone (n 289) 24.
[642] Kilkelly, Forde and Malone (n 289) 24.
[643] Beijing Rules, Rule 18.1 (e).
[644] Hamilton (n 286) 90.
[645] UNODC, 'Handbook on Alternatives to Imprisonment' (n 594) 39.
[646] ibid.

befriend him/her.[647] A mentor may work with both the child and his/her family and meets with them regularly.[648] A mentor should act as a role model for the child and through the process of forming a friendship, can provide stability in the young person's life. [649] The role of the mentor is to provide support, advice and guidance to the child.[650]

Curfews, prohibited activity orders, and exclusion orders are another group of non-custodial measures. They focus on keeping a child away from people and situations which are likely to cause further offending. In other words, such orders are appropriate where a child's offending is linked to a particular activity or particular person.[651]

A curfew order **c**ould be considered by the sentencing authority where there is a clearly identified time-based pattern of offending behavior by the child and a curfew is likely to prevent further offending. It could cover either a specific time of day during which the child is known to engage in offending behavior or the evening and night. However, a curfew should not be so long to amount to house arrest, nor should it prevent children from attending school or taking part in other regular activities.

An exclusion order requires a child to stay away from a particular place and is useful where there is an identifiable geographic or physical pattern to the offending.

Prohibited activity order can include a prohibition on contacting certain people with whom the child has committed offenses or who are generally regarded as contributing to the child's offending behavior. This is particularly useful when a child is a member of a gang.

The third category of non-custodial measures includes short-term fostering order, residence order and care order which involve the removal of a child from the home and the care of the parents. Removal of the child from his/her parents or family should only be ordered where it is absolutely needed to rehabilitate and reintegrate the child and to address offending behavior. Therefore, the failure of the parents to prevent the child from committing the offense and the seriousness of the offense will not meet the threshold for the removal of a child.[652]

[647] Hamilton (286) 91; Kilkelly, Forde and Malone (n 289) 32.
[648] Kilkelly, Forde and Malone ibid.
[649] ibid.
[650] ibid; Hamilton (n 286) 91.
[651] Commentary to the Model Law on Juvenile Justice 105-106.
[652] ibid 106.

Short-term fostering order has been used successfully in several states, but requires well-trained and experienced foster parents who can focus on the child's offending behavior. Foster care is appropriate where the parents are experiencing difficulty in managing the child or the parents have problems of their own that they need to address in order to parent effectively, such as drug or alcohol misuse. Short-term fostering can be particularly effective if it also involves working with the family to address the underlying causes of the offending.

A residence order can be used to ensure that the child stays in a particular place for a specified period. The order should be short-term and should not exceed a period of about six months, as anything longer than this may hinder the child's reintegration into the family or community. It will be appropriate where the child's living arrangements are thought to have contributed to his/her offending. For instance, a residence order is effective when the child is separated from the parents and is living without parental care.

Care orders allow a court to order a child who has committed an offense to be removed from his/her parents into the care of another individual. Usually, this will be another family member or a foster parent, or an institution such as a residential children's home.

4.4 Enforcement of Dispositions

For court-sanctioned non-custodial measures to attain their aim of rehabilitating and helping the child to become a law-abiding citizen, effective enforcement mechanisms must be put in place. Here follows the discussion on elements of effective enforcement.

4.4.1 Staffing: Competence, Training, and Conditions of Work

Rule 15.2 of the Tokyo Rules requires states to recruit suitable staff with appropriate professional training and practical experience.[653] The Beijing Rules provide that the staff should be competent and equipped with professional education (Rule 22.1) as it is essential in ensuring the impartial and effective administration of child justice.[654] According to the commentary to this Rule, training in law, sociology, psychology, criminology and behavioral sciences would be required to ensure specialization and independence of the competent authority. The CRC Committee also emphasized that all the professionals involved in the administration of child justice, in this case, enforcement of the measures, shall receive appropriate multidisciplinary

[653] See also the Model Law on Juvenile Justice, art 54 (10).
[654] Commentary to Rule 22 of the Beijing Rules. See also Rule 6.3 of the same Rules.

training on the content of the CRC. It further noted that the training should be systematic and continuous and should not be limited to information on the relevant legal framework. It should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, and the social and psychological development of children.[655]

The Tokyo Rules on their part provide that states should provide refresher courses, in-service training or any other appropriate modes of instruction to maintain and upgrade the competence of the authorities. The objective of the training shall relate to the responsibilities of rehabilitating the offender, ensuring the children's rights and protecting society.[656] Hence, before entering duty, staff shall be given training that includes instruction on the nature of non-custodial measures, the purposes of supervision and the various modalities of the application of non-custodial measures;[657] and after entering duty, they shall maintain and improve their knowledge and professional capacity by attending in-service training.[658]

Further, conditions of work and payment to staff are other important considerations regarding staffing. Rule 133 of the European Rules for Juvenile Offenders subject to Sanctions or Measures provide that staff working in the child justice system, including those enforcing or supervising the measures, shall have appropriate conditions of work and pay that is commensurate with the nature of their work and comparable to the conditions of others employed in similar professional activities. A similar provision is incorporated in Rule 15.3 of the Tokyo Rules, with an additional requirement that staff should be provided the opportunity for professional growth and career development. These are essential in retaining qualified staff.[659]

4.4.2 Supervision

Most of the non-custodial measures often involve supervision of the child subjected to it by a responsible agency and person, the purpose of which is to reduce reoffending and to assist the offender's integration into society.[660] The supervision shall be carried out by a competent authority under the specific conditions prescribed by law.[661] Usually, this would be a youth

[655] CRC Committee, General Comment No.24, para 112. See also European Rules for Juvenile Offenders subject to Sanctions or Measures, Rules 129.1 and 129.3.
[656] Tokyo Rules, Rule 16.1.
[657] ibid Rule 16.2.
[658] ibid Rule 16.3.
[659] ibid Rule 15.3.
[660] ibid Rule 10.1.
[661] ibid Rule 10.2; Model Law on Juvenile Justice, art 54 (8).

probation worker or a social worker,[662] but it is also possible for the decision-makers to monitor the measures as stipulated under Rule 23.1 of the Beijing Rules. Thus, the competent authority (that adjudicates the case) or an independent body (parole board, probation office, youth welfare institution) with appropriate qualifications should monitor the implementation of the disposition.[663] However, the CRC Committee seems to assign this duty to probation offices as it enjoins the establishment of specialized probation service.[664] This is a stronger position taken by the Committee compared to the soft and discretionary duty imposed on states '*to seek to promote the establishment'* of institutions under Article 40 (3) of the CRC.[665]

Supervision and treatment should be periodically reviewed and adjusted[666] particularly where a child has shown strong effort to comply with the non-custodial sentence.[667] For the supervision to achieve its goal, children should be provided with needed assistance, including psychological, social and material assistance, and provided with opportunities to strengthen links with the community and facilitate his/her reintegration into society.[668]

4.4.3 Conditions, Breach of Conditions and its Effect

As indicated above, some non-custodial measures are attached with certain conditions that the child should comply with. Thus, conditions should take into account the needs of society and the needs and rights of the offender (child) and the victim,[669] and shall be practicable, precise and as few as possible, and be aimed at reducing the likelihood of reoffending.[670] A provision must be made in the law for the review of the conditions in accordance with the progress made by the offender.[671]

Breach of conditions attached to a non-custodial measure may result in a modification or revocation of the measure,[672] but should not automatically lead to the imposition of a custodial

[662] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 294) 80.
[663] Commentary to Rule 23 of the Beijing Rules.
[664] CRC Committee, General Comment No.24, para 107.
[665] Emphasis added.
[666] Tokyo Rules, Rule 10.3.
[667] Model Law on Juvenile Justice, art 54 (7).
[668] Tokyo Rules, Rule 10.4: Beijing Rules, Rule 24: Model Law on Juvenile Justice, art 54(5).
[669] Tokyo Rules, Rule 12.1.
[670] ibid Rule 12.2.
[671] ibid Rule 12.4.
[672] ibid Rule 14.1; Model Law on Juvenile Justice, art 54(11).

measure.[673] According to the European Rules for Juvenile Offenders subject to Sanctions or Measures, the breach should be significant and those minor transgressions need not be reported to the authority in charge of deciding the breach.[674] Further, breach of conditions shall not constitute an offense.[675] The modification or revocation of the non-custodial measure shall be made by the competent authority, and only after a careful examination of the facts.[676] In modifying or revoking the non-custodial measure, the competent authority shall try to establish a suitable alternative non-custodial measure.[677] Hence, imprisonment may be imposed only in the absence of other suitable alternatives.[678] Further, where the measure is modified or revoked, due account shall be taken of the extent to which the child has already fulfilled the requirements of the initial measure in order to ensure that a new or modified measure is still proportionate to the offense.[679]

4.4.4 Variation of the Measures and/or Conditions

Variation of measures in the course of enforcement by the competent authority is also essential in responding to the real needs of CICWL and for their effective rehabilitation and reintegration. Hence, provisions must be there in national laws that allow for variation of orders as the competent authority may deem necessary from time to time.[680] This is because disposition in child justice cases tends to influence the child's life for a longer period than in adult cases. Thus, the competent authority must monitor the implementation of the disposition[681] with the power to modify as it deems necessary. In contrast to the Beijing Rules which allow variation of the dispositions, the Tokyo Rules seem to confine the variation to the attendant conditions, not to the measure itself. Rules 12.4 reads, *'[t]he conditions* may be modified by the competent authority […] in accordance with the progress made by the offender'.[682] A similar approach is taken in

[673] Tokyo Rules, Rule 14.3; European Rules for Juvenile Offenders subject to Sanctions or Measures, Rule 30.1. Model Law on Juvenile Justice, art 54 (13).
[674] Rules 47.2 and 47.3.
[675] European Rules for Juveniles subject to Sanctions or Measures, Rule 30.2.
[676] Tokyo Rules, Rule14.2; European Rules for Juvenile Offenders subject to Sanctions or Measures, Rule 48.1; Model Law on Juvenile Justice, art 54 (14).
[677] Tokyo Rules, Rule 14.4; Model Law on Juvenile Justice, art 54 (12).
[678] Tokyo Rules, Rule 14.4.
[679] European Rules for Juvenile Offenders subject to Sanctions or Measures, Rule 48.4.
[680] Beijing Rules, Rule 23.2.
[681] Commentary to Rule 23 of the Beijing Rules.
[682] Emphasis added.

European Rules for Juvenile subject to Sanctions or Measures as it grants a child a right to apply for a variation of *conditions of implementation* (Rule 33.2).[683]

In any case, the issue that consequently arises is 'who should initiate the variation?' It is not clear in the Rules whether the variation can be made by the authority's own initiation or on the application of the child or his/her parents. The phrase 'as the competent authority may deem necessary from time to time' used in the Beijing Rules suggests that the variation can be initiated by the authorities. This can also be supported by the rehabilitative aim of the child justice system that requires actions from the government side to that effect. On the other hand, Rule 33.2 of the European Rules for Juvenile Offenders subject to Sanctions or Measures grants CICWL the right to apply for alteration of conditions of implementation. Therefore, child justice legislations need to allow the initiation for variation of the measures or conditions to come from either side.

Regarding the grounds for variation, the Beijing Rules simply give the power to authorities to vary the measures as it deems necessary. However, it is important to note that the power and conditions under which it is exercised should be specified in the law. The Tokyo Rules are clear in this regard. They require the conditions to be specified in the law, and variation to depend on the progress made by the offender (Rule 12.4).

4.4.5 National and International Cooperation

Enforcement of non-custodial measures requires inter-agency linkage and international cooperation. In this regard, the Tokyo Rules provide that:

> Suitable mechanisms should be evolved at various levels to facilitate the establishment of linkages between services responsible for non-custodial measures, other branches of the criminal justice system, social development and welfare agencies, both governmental and non-governmental, in such fields as health, housing, education and labor, and the mass media.[684]

International cooperation between countries in the field of non-custodial measures should also be promoted. Thus, research, training, technical assistance and the exchange of information among member states on non-custodial measures should be strengthened through the United Nations

[683] Emphasis added.
[684] Tokyo Rules, Rule 21.1; See also CRC Committee, General Comment No.24, paras 108 and 110.

institutes for the prevention of crime and the treatment of offenders.[685] Moreover, comparative studies and the harmonization of legislation should be furthered to expand the range of non-institutional measures and facilitate their application across national frontiers.[686]

4.5 Conclusion

The aim of the child justice system is the rehabilitation of CICWL and helping them assume a constructive role in society. In line with this aim, detention or imprisonment of children shall be a measure of last resort and for the shortest appropriate period. Hence, life imprisonment without parole and death penalty shall not be imposed on a person below the age of 18 at the time of the commission of the offense. Corporal punishment is not also in line with this aim and is inhuman or degrading.

In furtherance of the principle that detention or imprisonment as a measure of last resort and the aim of rehabilitation, the national child justice systems shall adopt a wide variety of non-custodial measures. Accordingly, there are different non-custodial measures across jurisdictions. The overall purpose of the measures is to give opportunities to children who commit offenses to learn constructive patterns of behavior instead of depriving them of their liberty. Hence, the measures should be tailored to the child's needs and should allow the child to participate in activities which allow them to take control of their lives and reintegrate into the community.[687] To that end, conditions attached with a specific measure shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behavior and of increasing the offender's chances of social integration.

Some dispositions require supervision (as they are subject to certain conditions) or require regular contact with the child. This in turn requires the setting up of a specialized body to discharge these responsibilities for the measures to achieve their intended purpose of rehabilitating the child. Continuous training should be given to the enforcement body on the contents of the child justice standards; the purpose and nature of non-custodial measures; the physical and psychological development of children and the causes of children's offending behavior. This body should work in cooperation with governmental and non-governmental bodies whose mandate relates to children's affairs and working on child justice respectively.

[685] Tokyo Rules, Rule 23.1.
[686] ibid Rule 23.2.
[687] ibid.

CHAPTER FIVE

DUE PROCESS RIGHTS AND SPECIAL PROCEDURES IN THE ETHIOPIAN CHILD JUSTICE SYSTEM

5.1 Introduction

One aspect of the special treatment accorded to CICWL in international and regional child rights and child justice standards is due process rights. These rights range from initial contact with law enforcement officials through pretrial detention, trial and post-sentencing stages of the child justice proceedings. Ethiopia is a pioneer in setting special procedures for handling child justice cases a couple of decades before the Beijing Rules and the CRC. The CPC of Ethiopia was adopted in the Imperial period in 1961 and is still functional without amendment. This more than half a century years old code has a section that contains ten Articles governing the due process rights of children.[688]

Therefore, this chapter analyzes these due process rights and special procedures applicable to children aged nine to fifteen as these provisions apply only to this group of children.[689] The analysis is made based on the stipulations of the FDRE Constitution and the adult procedures. These stipulations again are pitted against the principles and provisions of the child justice system as provided in the CRC and other related standards. In addition to the legal analysis, this chapter also investigates the practicability of these due process guarantees. For the sake of ease in figuring out the due process rights and special treatments and giving a comprehensive analysis, the analyses in this chapter are arranged in a consecutive manner starting from first contact with the criminal law (arrest) to the post-sentencing stages of the process.

5.2 Pretrial Rights and Procedures

5.2.1 Arrest

5.2.1.1 Arrest as a rule and without warrant in warrantable cases?

Article 172 (1) of the CPC simply provides that the 'young persons' must be taken immediately before the nearest Woreda Court by the police, public prosecutor, the parent or guardian or the complainant. This act of taking the child to the nearest court amounts to arrest.[690] Arrest is 'any

[688] CPC, arts 171-180.
[689] ibid art 3.
[690] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 132.

apprehension of a person that commences a deprivation of liberty'.[691] Moreover, the provision seems to exclude summoning the child as it gives the power of arresting the child to a complainant[692] and prosecutor though this has not practically happened (there are no cases where complainants or prosecutors take the child to the court).[693] Therefore, this provision of the Code is not in line with the rule that the arrest of a child shall be a measure of last resort as enshrined under Article 37 (b) of the CRC and Rule 17 of the Beijing Rules. Police should use summons to avoid the stigmatizing effect of arrest, and arrest must be used as a measure of last resort.[694] Not only this, but summon could also avoid the potential physical and psychological harm that may ensue from effecting the arrest.[695] This however is rarely practiced as admitted by police officers and the interview with all children and parents revealed that their cases were initiated with arrest by the police or other security forces like militias.

This Article of the Code seems to exclude an arrest warrant as it allows private persons[696] to take the child to court in which case it is unlikely for these persons to ask court warrant as they may not have legal knowledge. The absence of cross-reference to the adult provision also seems to exonerate police from securing authorization from the court (arrest warrant). Nonetheless, if the arrest is necessary, it shall be with an arrest warrant in warrantable cases. Otherwise, there will be few limitations on the power of anyone to interfere in the liberty of children.[697] It is also difficult to envision any advantage that these deviations from similar adult procedures could bring to the child. In practice, however, there were no instances where police asked and courts issued it. This is a violation of the rights of the child and discriminatory treatment of children based on their age. Police officers attributed this fact to the lesser dangerousness of children and less possibility of hiding themselves.[698] These are not the considerations provided in the law. An arrest warrant is a rule while arrest without a warrant is an exception (art 49). All these make

[691] HRC, General Comment No.35, para 13.
[692] It seems for this reason that the draft Criminal Procedure and Evidence Code has omitted complainants from the list of authorized persons.
[693] The researcher found no case where children are brought to the court by the complainant or prosecutor. It is the police who take the child to the court after arresting him/her or after brought to the police station by complainants.
[694] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 132.
[695] Stanley Z Fisher, 'Some Aspects of Ethiopian Arrest Law: The Eclectic Approach to Codification' (1966) 3 (2) Journal of Ethiopian Law 463, 471.
[696] The draft Criminal Procedure and Evidence Code has omitted this (art 373 (1)).
[697] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 132.
[698] Interview with Sergeant Woinshet Habtam, Investigating Officer, Women and Children Unit, Arba Minch City Police Department (Arba Minch, 11 January 2022); Anonymous, Investigating Officer, Lideta Sub-City Police Department (Addis Ababa, 20 April 2022).

arrest in the Ethiopian child justice system arbitrary as it violated the accepted international standards and the principle of appropriateness and reasonableness.[699]

5.2.1.2 Manner of arrest

Rule 10.3 of the Beijing Rules provides that contact between law enforcement agencies and a child shall be made in a way that promotes the wellbeing of the child and avoid harm including the use of harsh language.[700] Further, children should not be handcuffed unless it is necessary for the protection of others or the protection of the child against harming him or herself, and there should not be degrading treatment.[701]

The Ethiopian child justice system is silent in this regard except for the constitutional provision of 'respect for the best interest of the child' (art 36 (2)) and prohibition of inhuman or degrading treatment (art 36 (1) (e)). However, Article 56 of the CPC which governs arrest procedures in adult cases is of help in this regard. It provides that the arresting police shall first establish the identity of the arrestee; read the arrest warrant if issued and show him/her when requested; try to confine the arrestee if s/he did not submit to the words of mouth; and use appropriate force to arrest in case where the person resists the arrest. In practice, there are instances where police beat children during arrest[702] or investigation[703] and handcuffed children while taking them to the court[704] and the rehabilitation center.[705] Moreover, the rules of Article 56 of the CPC are unlikely to be complied with by complainants while arresting a child.

5.2.1.3 Informing Parents of the arrest of the Child

Notification of parents or guardians about the arrest of the child is recognized in the Beijing Rules (Rule 10.1). Accordingly, parents or guardians shall be informed of the apprehension of a child immediately, and if this is not possible, within a short period.

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[699] HRC, General Comment No.35, para12.
[700] See the accompanying commentary.
[701] ibid.
[702] In two court files, the fact of beating during arrest is indicated (*A v Bahir Dar City Police*, Bahir Dar City Woreda Court, File No.33153; *Y v Prosecutor*, Federal First Instance Court (FFIC), Lideta Division, File No.282686). See also Addis Ababa University Office of Research Director (n 59) 70.
[703] Interview with BG, a child accused in the West Gojjam Zone High Court (Finote Selam, 11 March 2022).
[704] ibid. The researcher also observed two cases where children are handcuffed one with adults and in the other they were both children that have been brought to the child justice bench at Lideta.
[705] Interview with Moges Demeke, Social Worker, Addis Ababa Rehabilitation and Remand Center (Addis Ababa, 20 April 2022).

In the Ethiopian child justice system, this issue is not addressed expressly. However, indirect notification can be made in two ways. First, if no parent or guardian or other relative is present at the time when the child was taken to the nearest court, the court shall immediately summon such person to appear without delay.[706] Though the purpose of this summons is to ensure the attendance of parents during the trial, it is also a means to inform the arrest of the child if parents are not aware of that and ensure that they are present with the child in court. In practice, judges said that in the majority of cases, parents appear together with the child, either because they are aware of the arrest on their own or have been notified by the police. Second, parents can be notified of the arrest of their child by the police. This is a prevalent practice in Addis Ababa. This is done through a phone call to them after getting their number from the children. Normally, this is done not for the purpose of notification of the arrest, but for the parents to bring documentary evidence as proof of the age and take the child through an ID card guarantee (if s/he is below 15 years) pending trial. Hence, it will not necessarily be done immediately or within a short period.

5.2.1.4 The Right to prompt bringing before a Court

Unlike Article 9 (3) of the ICCPR, the CRC, ACRWC and the Beijing Rules do not provide this right. Promptness in the child justice system is defined as 'within 24 hours'. The CRC Committee provides that every child arrested and deprived of his/her liberty should be brought before a competent authority within 24 hours.[707]

Coming to the Ethiopian child justice system, Article 172 (1) of the CPC requires that the child shall be immediately brought to the nearest Woreda Court. Unlike the ICCPR stipulation of prompt bringing and the Committee's recommendation of 24 hours, the Ethiopian child justice system offers higher protection in this regard and also higher protection to children compared to adults.[708] Most police officers interviewed claimed that they comply with the rule except for cases where children are arrested over the weekend, on holidays or in the evening.[709] However, most judges and children and/or parents interviewed said that police do not bring children to the

[706] CPC, art 173.
[707] CRC Committee, General Comment No.24, para 90.
[708] In adult cases, the time to bring the suspect to the court is 48 hours; see FDRE Constitution, art 19 (3); CPC, art 29 (1).
[709] Of these Police Officers, some do not know the provision and mentioned the adult timeframe for bringing to the court (48 hours).

court *on the same day of the arrest*[710] and were detained in the stations for about a month.[711] In this regard, one judge said that 'when we ask children, they told us that they were detained in a police station for days despite the allegation of the police that they arrested them on the same day of appearance to the court'.[712] Analysis of court files also shows that only in two cases that police brought children to court on the same day of the crime or arrest.[713] In the rest of the cases, children were detained in the police station for one day to a couple of months before they appear in court.[714]

5.2.2 Age Determination

5.2.2.1 Means of proof

The age of the suspect and the manner of its verification are crucial in the administration of child justice. Setting MACR or any other age category is of no value unless there is a genuine method of proving the age of the suspect. The principal means of proving the age is/should be/ birth certificate. In the absence of a birth certificate, other documentation such as notification of birth, extracts from birth registries, baptismal or school certificates should be sought and accepted. If none exists again, authorities should allow testimony from relevant persons regarding the age of the child.[715] Physical examination should only be used if these measures prove unsuccessful. However, states should refrain from using only medical examination. In other words, the least invasive method of assessment should be applied.[716]

Coming to the Ethiopian case, a birth certificate is the primary means of proving the age of a person under the Ethiopian Revised Family Code (RFC).[717] However, since the Civil Code provisions regarding birth registration were not practicable and considering the recent beginning of birth registration in 2017 (five years after the promulgation of the law) and the low

[710] Emphasis added and the practice is gauged against this parameter instead of the literal meaning of the term could imply.
[711] Interview with AG, a child suspected of theft, Federal First Instance Court, Yeka Division (Addis Ababa, 17 May 2022); Interview with Tamir Mengistu, Parent, Federal First Instance Court, Lideta Division (Addis Ababa, 7 July 2022).
[712] Interview with Bayeh Embiale, Judge, Bahir Dar and its Surrounding High Court (Bahir Dar, Amhara Region, 11 Febrary 2022).
[713] *B v Yeka Sub City Police*, FFIC, Yeka Division, File No.176877 (2022); *R v Police*, FFIC, Arada Division, File No.196604 (2021).
[714] The cases analyzed arose in the cities and, hence, remoteness of the area cannot be a justification.
[715] CRC Committee, General Comment No.24, para 33.
[716] ibid para 34.
[717] Revised Family Code 2000, Proclamation No.213, Federal Negarit Gazeta , Extraordinary Issue No.1 (Revised Family Code) art 217 (1).

performance of the Ethiopian vital events registration system,[718] a birth certificate is not of much help in the current child justice system in Ethiopia. In the absence of this, the same Family Code (art 217 (2)) provides for the age to be proved by reliable documents or by the testimony of not less than two witnesses. These documents may include vaccination cards, baptismal certificates and school cards. A medical examination is not mentioned as an alternative means of proof.

Regarding the means of proof, the practice is mixed. Court files show that in places other than Addis Ababa, medical examination is exclusively used to verify the age of the child[719] though it has not found its place in the law and is contrary to the recommendation that medical means shall be the last resort. More tellingly, in one case, a judge gave preference to the medical result over the birth certificate produced by the child.[720] Further, police officers usually contested documentary evidence, and in such a case, courts order police to bring medical examination results.[721] All judges interviewed from these areas also affirmed this and some judges justified this on three grounds. The first relates to the presumed absence of birth certificates.[722] However, they never asked children or parents whether they have it or other documentary evidence like school cards, vaccination cards or baptismal certificates. They left it to be produced by a child or his/her parents or counsel.[723] Secondly, medical examination is considered more reliable[724] and simple[725] than some documentary evidence. Third, one judge said that 'as police asks (medical examination of the age of the child), we cannot use other means. We order only what is asked'.[726]

On the contrary, the practice in Addis Ababa is the opposite of what is happening in the regional states. The examination of court files shows that the predominant means of proof are

[718] Only 3 percent of children are registered at birth (Central Statistics Agency and DHS Program, 'Ethiopian Demographic and Health Survey' (2016)) 14.
[719] There are of course cases where medical examination and documentary evidence are used, but the age is determined based on the medical result despite the divergence of the results (*Y and others v Prosecutor*, Bahir Dar City Woreda Court, File No.29661 (2016); *K v Prosecutor*, Hawassa City High Court, File No.31809 (2022).
[720] *F v Prosecutor*, Arba Minch City First Instance Court, File No.31304 (2021).
[721] Interview with Bayeh Embiale (n 712).
[722] Inteview with Abreham Abate, Judge, Gamo Zone High Court (Arba Minch, 14 January 2022).
[723] Ibid; Interview with Debebe Gezahagn, Former Women and Children Bench Judge, Arba Minch City First Instance Court (Arba Minch, 11 January 2022); Gizachew Adamasu, Judge, Gamo Zone High Court (Arba Minch, 15 January 2022); Bayeh Embiale (n 712); Wondale Eniemayehu, Judge, Jabi Tehnan Woreda Court (Finote Selam, 9 March 2022).
[724] Interview with Tsegaye Zeleke, Judge, Women and Children Bench, Arba Minch City First Instance Court (Arba Minch, 11 January 2022).
[725] Interview with Gizachew Admasu (n 723).
[726] Interview with Sielu Shiferaw, Judge, Arab Minch Zuria Woreda Court (Arba Minch, 12 January 2022).

documentary evidence, in their order: vaccination cards, birth certificates and baptismal certificates. In this connection, courts ask children or their parents to produce the available documentary evidence,[727] and if there is none, medical examination is ordered.[728]

The result of the medical examination often gives the age in ranges except in a few cases where the age is fixed one[729] and all judges said that the lowest age is taken to the benefit of the accused. However, examination of the court files shows that such a course is rare.[730] Further, few judges believe that taking the minimum or the maximum age has no difference if the age range falls between nine and fifteen.[731] In one case, the average age was taken.[732] In other cases, the following three trends are identified: not fixing the age which is the prevalent trend;[733] taking what the child said during the identity verification (whether it is equal to, higher or lower than the minimum);[734] and taking the age as provided in the medical result.[735]

As mentioned above, the majority of cases did not fix the age. However, it is important to note that fixing the age is relevant not only for procedural issues. It is also relevant to the measures that could be imposed on the child. This is because a measure of curative detention, supervised education and admission to corrective institutions shall not extend beyond the coming of age of the child.[736] Furthermore, a child admitted to a corrective institution shall be transferred to prison

[727] *A v Addis Ketema Sub City Police*, FFIC, Lideta Division, File No.290056 (2021); *B v Police*, FFIC, Akaki Kaliti Division, File No.100346 (2021); *J v Akaki Surrounding Police*, FFIC, Akaki Kaliti Division, File No.100904 (2022).
[728] All judges in Addis Ababa affirmed that medical examination is a last resort.
[729] *A v Prosecutor*, Arba Minch City First Instance Court, File No.30419 (2020); *K v Prosecutor* (n 719); *R v Police* (n 713).
[730] The researcher found only one case where the minimum is taken (*S v Prosecutor*, Bahir Dar City Woreda Court, File No.30965 (2017)).
[731] Interview with, Debebe Gezahagn (n 723); Bayeh Embiale (n 712). In one case, the judge stated this (*YN and others v Prosecutor*, Jabi Tehnan Woreda Court, File No.0202889 (2019).
[732] *AA v Prosecutor*, Debre Markos City Woreda Court, File No.0504828 (2022).
[733] *AL v Prosecutor*, Gamo Zone High Court, File No.40547 (2021); *Y and others v Prosecutor* (n 719); *KY v Prosecutor*, Jabi Tehnan Woreda Court, File No.0202795 (2019); *G v Prosecutor*, Hawassa City High Court, File No.28727 (2020); *M v Prosecutor*, FFIC, Lideta Division, File No.288247 (2020); *Y v Prosecutor* (n 702); *BG v Police*, FFIC, Akaki Kaliti Division, File No.101227 (2022); *T and others v Lemi Kura Sub City Police*, FFIC, Bole Division, File No.136832 (2022); *AM v Prosecutor*, FFIC, Bole Division, File No.134712 (2022); *M v Bole Police*, FFIC, Bole Division, File No.137069 (2022).
[734] *AZ v Prosecutor*, Arba Minch City First Instance Court, File No.31906 (2021); *A v Bahir Dar City Police* (n 702); *MD v Prosecutor*, Bahir Dar City Woreda Court, File No.30641 (2016); *YB v Prosecutor*, Jabi Tehnan Woreda Court, File No.0202527 (2018); *H v Prosecutor*, Jabi Tehnan Woreda Court, File No.0202778 (2019); *K v Prosecutor*, Hawassa City High Court (n 719); *Z v Prosecutor*, Gofa Zone High Court, File No.04359 (2021).
[735] *Y and others v Prosecutor* (n 719).
[736] Criminal Code, art 163 (1).

if s/he attains the age of majority.[737] To give effect to these provisions, it is necessary to fix the age of the child.

5.2.2.2 Initiation of age verification: Whose power is it?

According to the RFC, it is the court that should decide the age of the child by the means provided when there is no certificate of birth. This means that once a child is brought to it, the court shall prove the age. The court should, therefore, not proceed with the case before proving that the age of the suspect is within the range provided in the law. Therefore, other steps like instructing the police investigation or prosecution should follow after ascertaining that the child is the subject of the law (aged 9-15). However, this is not always the case in the actual practice and the trial continues before the determination of the age. In one case, the judge proceeded with reading of the charge and took the plea of the child[738] while in another case witnesses for the prosecution were heard.[739] The bad thing in these cases was that the age examination result showed that the accused were over the age of 15 and transferred to the adult court where they could face a retrial.

A seemingly different line of argument and interpretation can be inferred from Article 39 (1) (b) of the CPC, which allows the public prosecutor to close police investigation files when the accused is under nine years of age. A literal reading of this provision seems to imply, at least, that the power to order proof of the age of the child is not that of the court. However, the provision of Article 172 of the CPC counters this argument as the investigation and prosecution are led by the court. Accordingly, a case that is not ripe for child justice procedures (a case involving a child below the age of nine) will not go to the prosecutor so that the prosecutor closes according to Article 39 (1) (b). Therefore, the power to initiate and prove the age of a child is given to the court and the police have no such power unless instructed by the court as implied from the requirement of immediate bringing of a child to the court. This requirement does not allow the police to prove the age particularly when the crime is flagrant.

In practice, however, police initiated proof of age including medical examination without first

[737] ibid art 168 (2), para 2.
[738] *R v Police* (n 713).
[739] *E v Police*, FFIC, Arada Division, File No.198666 (2021).

taking the child to the court and being instructed to do so. Interviews with police officers[740] and judges[741] and a review of court files[742] confirmed this. This affects the right to liberty of children as they will be detained in police stations until their age is proven.

5.2.3 Diversion

Diversion of cases from the formal judicial proceeding is one of the cornerstones of the child justice system. Nonetheless, it is not legally recognized in the Ethiopian criminal (child) justice system (in the Codes). The only legal provision that can be invoked in support of 'diversion' of criminal cases is Article 151 of the CPC, which mandates courts to attempt to mediate between the parties in case of private prosecution. In other cases, there is no legal room for diversion of criminal cases at different stages of the justice process in the Ethiopian criminal justice system.[743] The 2011 criminal justice policy (hereinafter, the policy) provides for diversion of cases [744] and says this should be sought first unless otherwise warranted by the seriousness of the crime and its inappropriateness for the case concerned.[745] As a result of this policy aspiration, the Federal Attorney General Office adopted a directive on reconciliation in 2015 and revised it in 2020. These diversionary measures and their enforcement shall be in line with the rights of CICWL incorporated or recognized in the Constitution.[746] The policy, the directive and the draft Criminal Procedure and Evidence Code provide detailed rules in this regard as discussed below.

5.2.3.1 Initiation and the Justice Actor in charge of diverting Cases

The policy provides that a case at any stage of the justice process can be diverted by the court on the application of the prosecutor or by the accused person or on the court's initiation (s 4.6.1).

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[740] Deputy Inspector Agerie Tadesse, Women and Children Unit Officer, Debre Markos City Administration Police Office (Debre Markos, 17 Feb 2022); Sergeant Getachew Atalel, Investigating Officer, Finote Selam City Police Department (Finote Selam, 10 March 2022); Deputy Inspector Mebres Ejeta, Women and Children (cases) Investigation Officer, Kirkos Sub City Police Department (Addia Ababa, 21 April 2022); Deputy Inspector Ermias, Gacheno, Women and Children (cases) Investigation Officer, Bole Sub City Police Department (Addis Ababa, 29 April 2022).

[741] Few judges also confirmed that police can cause the examination ;(Interview with, Lewoyehu Andualem, Former Women and Children Judge, Debre Markos City Woreda Court (Debre Markos, 17 February 2022); Antenanie Tiru, Judge, East Gojjam Zone High Court (Debre Markos, 18 February 2022); Abreham Abate (n 722); Shibru Jote, Judge, Women and Children Bench, FFIC, Akaki Kaliti Divisison (Addis Ababa, 27 April 2022).

[742] *F v Prosecutor* (n 720); *MD v Prosecutor* (n 734); *H v Prosecutor* (n 734); *BG v Police* (n 733).

[743] See Julie Macfarlane, 'Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems within the Formal Legal System' (2007) 8 Cardozo Journal of Conflict Resolution 487; Endalew Lijalem, 'The Space for Restorative Justice in the Ethiopian Criminal Justice System' (2014) 2 (2) Bergen Journal of Criminal Law and Criminal Justice 215.

[744] Criminal Justice Policy, ss 4.6.2.1 (b); 4.6.2.3 (a).

[745] ibid s 6.4.3.

[746] ibid s 6.4.4.

Further, the public prosecutor is empowered not to frame a charge even if there is sufficient evidence to convict the accused person if s/he believes that the case will be disposed of by out-of-court mechanisms (s 4.6.1 para 2). In the policy, the police are not mentioned as one justice actor empowered to divert cases.

Similarly, regarding the initiation of diversion and the stages at which it could arise, the draft Code provides self-contradictory provisions. In the general section that governs out-of-court mechanisms, the Code inserts a phrase '*crimes on which a charge is framed.*[747] This phrase seems to confine the mechanisms to the trial stage. On the other hand, it provides that reconciliation can be initiated by the police and public prosecutor (art 165 (4)) and empowers the public prosecutor to close the file, i.e. before framing the charge, if there is an application for reconciliation (art168 (1) (a)). This indicates that this mechanism can also arise at the stage of investigation. This has been clearly provided in the Code when it comes to the resolution of criminal cases by customary mechanisms (art 181 (1)). The same is true for the disposal of cases by other mechanisms (art 191 (2)). However, police do not seem to have the power to dispose cases by themselves apart from initiating the mechanisms. This is given to the public prosecutor (art 168 (1) (a) and court (art192).

In the reconciliation directive, however, the reconciliation is party-led and justice actors are not given clear power to initiate the reconciliation. The only way the justice actors can become involved in the reconciliation process is when the parties asked for their involvement in the so-called assisted reconciliation. In other cases, parties can settle the issue and submit a reconciliation application to the concerned justice actor depending on the stage at which the case is. The directive allows reconciliation of crimes punishable upon complaint[748] at any stage of the process.[749]

Coming to the practice of diversion in child justice cases, legally speaking, diversion by police or prosecutor is not allowed as the CPC requires immediate bringing of the child to the court. This, however, can be challenged by the very tenet of the child justice system i.e. avoiding contact of children with the justice system. The police is one of the organs in charge of doing so in the Beijing Rules. Though not prevalent, there are practices of disposing child justice cases at the

[747] Draft Criminal Procedure and Evidence Code, art 163.
[748] Reconciliation Directive No.1 (2020) art 4 (1).
[749] ibid art 2 (4).

police level. This is when the crime is of minor nature which is punishable upon complaint.[750] Moreover, when diversion centers were operational in Ethiopia, police referred cases to the centers for minor crimes committed by a child who came in conflict with the law for the first time.[751]

Apart from taking a child to the court, the public prosecutor is not involved in child justice cases unless it is a serious crime punishable by more than ten years of rigorous imprisonment. This, in other words, means that the public prosecutor could not divert a case as s/he participated in only serious crimes which are not eligible for diversion according to the policy (s 6.4.3) and as s/he cannot participate in less serious crimes. Practically, however, the public prosecutor participated in the child justice processes both at the charging and trial stages for less serious crimes. This is the prevalent practice in places outside of Addis Ababa.[752] Nonetheless, almost all lower level prosecutors never diverted child justice cases to out-of-court mechanisms. Only one prosecutor has claimed the possibility of diverting cases at the prosecution stage.[753]

Therefore, diversion, if it happens, could be ordered by a court after these persons take the child before it. However, all judges interviewed have never referred child justice cases on their initiation to be settled by the parties themselves. However, the researcher found only one case closed by the court on the initiation of the parties.[754] The child was accused of three counts of willful injury and while the two counts were closed by the court as the parties have reconciled, the court did not try to settle the remaining case by the same mechanism.

CBCCs were vibrant institutions in the Ethiopian child justice system after being launched by FSCE in Addis Ababa and supported by UNICEF in the regional states.[755] In Addis Ababa, they were piloted in 2004 and spread to regional cities like Adama, Bahir Dar, Dessie, Dire Dawa,[756] Hawassa and Arba Minch. In addition to police, parents, members of the community and schools

[750] Interview with Sergeant Gizealew Minwag, Homicide and Robbery Investigation Sub Office Coordinator, Debre Markos City Administration Police Office, 1st Station (Debre Markos, 17 February 2022); Sergeant Haile Gizaw, Women and Children (cases) Investigator, Bahir Dar City Police Department, 6th Station (Bahir Dar, 11 February 2022; Inspector Metaket Ferede, Women and Children Unit Officer, Bahir Dar City Police Department, 4th Station (Bahir Dar, 11 February 2022).
[751] Forum on Street Children, 'Juvenile Diversion Program: A Practitioners Manual' (2008) 6; See also Deda (n 89).
[752] See section 5.3.2 below.
[753] Interview with Mebrat Ermias, Former Women and Children (cases) Prosecutor, Arba Minch City Justice Office (Arba Minch, 18 January 2022).
[754] *SM & SZ v Prosecutor*, Bahr Dar City Woreda Court, File No.31756 (2017).
[755] Addis Ababa University Office of Research Director (n 59) 139.
[756] Deda (n 89) 62.

used to refer children to these centers.[757] Children were also referred to these centers for acts not criminal in nature.[758] The services they were providing to children include counseling, play, computer training and library service.[759] Nowadays these centers are not functional.[760]

5.2.3.2 Preconditions

The policy stated the preconditions for the application of out-of-court mechanisms and they relate to the nature of the crime and the manner of its commission; the character of the suspected/accused person and whether the measure will serve the public interest. Thus, diversionary measures are applicable for children, non-repeat offenders[761] and for offenders who committed crimes punishable with simple imprisonment (s 4.6.2.1 (b)).

The draft Code prohibits customary dispute resolution of crimes entailing human rights violations, crimes against the honor of a person, and crimes against the security of the state (art 171 (2)). The Federal Attorney General (FAG), the now Ministry of Justice (MoJ), is tasked to adopt a system for the determination of the eligibility of cases and offenders for diversion (s 4.6.2.4). In addition to these general conditions, the following specific conditions must be fulfilled: the presence of sufficient evidence to ensure conviction of the person;[762] admission of the crime by the person (after being assisted by legal counsel) and expressing his/her repentance in writing; the person is informed about the right not to consent to these mechanisms;[763] and the suspected or accused person must be provided with the charge and evidence against him (s 4.6.2.2)).

The same preconditions shall apply to child justice cases. However, in those rare cases of diversion by the police and public prosecutor found in this research, there is no consideration of these preconditions. The police and public prosecutor simply initiated the reconciliation without first ensuring the fulfillment of the preconditions except that the crime is minor or punishable

[757] A Report prepared by Bahir Dar City Woreda Court for the Year 2014/15.
[758] ibid.
[759] ibid; Forum on Street Children (n 751) 33; Deda (n 89) 62; *A v Bahir Dar City Police* (n 702); *S v Prosecutor* (n 730).
[760] See chapter seven, section 7.3.5.
[761] The draft Criminal Procedure and Evidence Code seems not to prohibit diversion of cases for repeat offender as it gives the discretion to the decision makers (art 183 (3)). This is clearly stated in the Reconciliation Directive (art 4 (3) and (4)).
[762] The draft Code mentions this as a condition for disposition of cases by customary way (art 185 (1)).
[763] Consent is one of the preconditions for disposition of a case in a customary way under the draft Code (art 185 (1)).

upon complaint. In the only case mentioned above where the case is closed by reconciliation, the judgment did not indicate that the court ensured that the reconciliation is voluntary according to the duty imposed by the directive.[764]

5.2.3.3 Types of Diversionary Measures

The policy mentions only reconciliation and payment of compensation to the victim in the section that deals with the principles underlying out-of-court mechanisms (s 4.6.2.1 (a)). The draft Code on its part provides four types of out-of-court mechanisms viz. reconciliation, plea bargaining, customary resolution mechanisms (arts160 ff) and other alternatives (arts189 ff). In the section governing the power of the public prosecutor, the policy adds other alternatives like medical treatment; admission to institutions that deliver educational, vocational or moral education; community service and ordering the child to remain in a specific place for a specified period (s 4.6.2.5). It is, however, difficult to say that courts cannot use these alternatives. The draft Code settled this dilemma as it provides these lists of measures as 'other resolution mechanisms' without assigning them to specific justice actors (art 191). Moreover, the power of courts to decide the use of these measures is explicitly indicated in the subsequent provisions of the Code (arts 191 (3); 192 (1) & 194 (1). The Code adds reprimand to the lists mentioned in the policy. In those rare cases mentioned above, the diversionary measure used was reconciliation.

5.2.4 Pretrial Detention and the Right to Bail

The issue of pretrial detention and the right to bail in Ethiopia is clear in the ordinary procedure for adults. Once arrested, a suspect may be released on bond by the police if the guilt is suspicious or if the crime is not serious.[765] If not released on bond by the police, the suspected person has the right to be brought before the court within 48 hours.[766] The court will then release the suspect on bail;[767] order his remand to custody for trial[768] or give the police 14 additional days to complete the investigation.[769]

Turning to child justice cases, Article 172 (4) of the CPC provides that:

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[764] The Reconciliation Directive obliges the public prosecutor to ensure that it is made voluntarily (art 7 (6)). In the child justice cases, this power shall be exercised by the judge as the public prosecutor is not allowed to be present participate.
[765] CPC, art 28 (1).
[766] FDRE Constitution, art 19 (3); CPC, art 29 (1).
[767] FDRE Constitution, art 19 (6); CPC, arts 59(1) and 63 ff.
[768] CPC, arts 59 (1) and 60.
[769] ibid art 59 (3).

> Where the case requires to be adjourned or to be transferred to a superior court for trial, the young person shall be handed over to the care of his parents, guardian or relative and in default of any such person to an [institution[770]] or a reliable person who shall be responsible for ensuring his attendance at the trial.

The literal reading of this provision entails that pretrial detention is not allowed in the Ethiopian child justice system,[771] which is far better than the international principle that 'detention' shall be a measure of last resort. This provision does not provide an exception to pretrial detention even based on the nature of the crime[772] or the possibility of tampering with evidence. Moreover, the provision does not envisage the grounds where handing children to these persons will not be the desired course. For instance, the child may be the target of revenge by the victims or their families, and releasing the child may be risky. The draft Code incorporates this exception including the case of psychological attack. It also adds other exceptions relating to the seriousness of the crime and the possibility of hindering the process and the potential for joining with other criminals (arts 373 (6) and 376 (2)). These exceptions however are negative developments and will make the system fail to comply with the principle that detention shall be a measure of last resort. The practice also recognizes the risk of revenge as a ground for pretrial detention[773] in addition to other grounds like the safety of the victim,[774] absence of parents,[775]and character of the child or parents,[776] whereby all except the first ground are not compliant with the principle of detention as a last resort.

According to Article 172 (4) of the CPC, the power to release a child pending trial seems to be given to courts only. In practice, however, the police have done so before they bring children to court. The majority of police interviewed in Addis Ababa and some in the regions said that they released a child to their parents. Despite this, however, the researcher found only one court file

[770] Included in the Amharic version.
[771] The draft Code is explicit in this regard and in principle prohibits pretrial detention of children (art 377 (1)).
[772] cf Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia (n 62) FN 146.
[773] Interview with Selamit Anesa, Defense Counsel, Hawassa City High Court (Hawassa, 16 March 2022).
[774] Phone interview with Leuleselassie Liben, Judge, Child Justice Bench, FFIC, Lideta Division (Addis Ababa, 20 July 2022).
[775] Interview with Degitu Asfaw, Judge, Children Bench, Bahir Dar Ciry Woreda Court (Bahir Dar, 2 Febraury 2022); Birkie Tilahun, Judge, Bahir Dar Zurai Woreda Court (Bahir Dar, 4 February 2022). This is also confirmed by a number of court files analyzed.
[776] Phone interview with Leuleselassie Liben (n 774). He mentioned one particular case that the child does not consider the act as a crime and the parents were using and still want to use the child as a source of income through his begging.

that indicates so.[777] Release by the police is important to avoid detention of children arrested particularly on weekends, holidays, in the evening or at times when it is not convenient for the police to take the child to the court immediately.

Despite this stipulation (art 172 (4)) and the allegation of police and judges mentioned above, the research found children with parents who ended up in pretrial detention by the police[778] or the court including remand to prison with no other justifications. According to police officers, detention in a police station occurs when a child with no parent is arrested over the weekend, on holidays or in the evening. Another ground of detention is when the case arises on a day other than the trial date. This is a case in Addis Ababa where courts have fixed days assigned for child justice cases. Although police claimed that they even brought a child to the court on a day other than the trial date,[779] the analysis of court cases shows that the days of the first appearance of children in courts are mostly the date of the trial. The police is not blameworthy for this as there is no guideline or agreement between courts and police to bring children to court at any time.

The main place of pretrial detention is the Addis Ababa Rehabilitation and Remand Center. This is mostly the case where a child has no parent or relatives to hand over to pending the case. The researcher observed from the records of the Center that the majority of children are on remand including those who have parents/relatives in Addis Ababa. This fact is also observed from court files in that courts ordered remand to the Center although children have relatives and failed to provide any justification to that effect.[780] In some cases, this order is made by revoking the previous order of handing the child to parents or relatives for their failure to bring children on the date adjourned,[781] which can be ensured by giving a warning to parents or guardians or as a last resort by making them criminally liable.[782]

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[777] *H v Police*, FFIC, Akaki Kaliti Division, File No.102111 (2022).
[778] Pretrial detention by the police has to do with the right of a child to be brought to the court immediately. Thus, in cases where this right is not observed, a child is in pretrial detention and regarding the evidence, reference can be made to those mentioned in the section dealing with this right above.
[779] Interview with Deputy Inspector Zebenay Adane, Women and Children (cases) Investigation Team leader, Gulele Sub City Police Department (Addis Ababa, 29 April 2022); Interview with Ermias Gacheno (n 740).
[780] *R v Police* (n 713); *N v Prosecutor*, FFIC, Lideta Division, File No.282849 (2020) ; *EC v Poli*ce, FFIC, Bole Division, File No.137714 (2022); *AA v Police*, FFIC, Nifas Silk Lafto Division, File No.179422 (2022).
[781] *M v Prosecutor* (n 733); *A v Addis Ketema Sub City Police* (n 727); *SH v Prosecutor*, FFIC, Lideta Division, File No.257967 (2018). In the latter two cases, the reason is not mentioned.
[782] Failure to produce an accused person, in this case the child that the parents took under the obligation to bring him during trial, is a criminal act under Article 448 of the Criminal Code.

The research also found that children were remanded to prison by courts pending their case though they have parents or guardians. No other justification like protection of the children from revenge was stated and they were later on released by courts pending the trial. These were mostly in homicide cases[783] where the pretrial issues are within the jurisdiction of first instance courts. By taking into account the seriousness of the crime and ignoring provision of Article 172 (4) of the CPC, children were remanded to prison where segregation of children from adults is not practicable. What is despicable was that these children were in detention for a long period, four and nine months respectively.

Though not envisaged in the CPC, own monetary bond by the child if s/he has a means, requiring bail, is far better than detention for the reason that s/he has no guardians, relatives, institutions or reliable person to take him/her. In reality, some children do not have these persons but have a means of living. Therefore, like adults, children with means should be allowed to be released on bail than detained in the absence of guardians or institutions. A personal bail bond by a child is not utilized by courts in such scenarios except in one case. Nonetheless, in this case, the child did not have the means and it was collected from police and court staff.[784]

The provision does not mention bail as a condition for handing a child to parents or other persons. It simply provides that they are responsible to ensure the attendance of the child at the trial. Accordingly, the release can be effected by oral recognizance of the person to ensure the child's attendance at trial. The intention of the law, one may assume, is to give better protection for the child compared to an adult by not requiring a bail bond and releasing him/her to these persons. In practice, however, some courts require monetary bail from the parents that should be forfeited when they fail to bring the child during the trial;[785] and in some cases, the money was paid at first.[786]

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[783] Interview with, KY, a child accused in East Gojjam Zone High Court (Debre Markos, 28 February 2022); BG (n 703); *M & Z v Prosecutor*, East Gojjam Zone High Court, File No.0223322 (2020). In one case that involved theft, the child was in prison until the final judgment despite the fact that he had a sister (*YN and others v Prosecutor* (n 731)).

[784] Personal Observation.

[785] *A v Prosecutor* (n 729); *S v Prosecutor* (n 730); Personal observation made in the case between *KY (2) v Prosecutor*, East Gojjam Zone High Court (22 Febraury 2022); *Y v Kotebe Surrounding Police*, FFIC, Yeka Division, File No.176402 (2022) ; *D v Yeka Sub City Police*, FFIC, Yeka Division, File No.177024 (2022); *B v Yeka Sub City Police*, FFIC, Yeka Division, File No.176877 (2022); *N v Gulele Sub City Police*, FFIC, Arada Division, File No.202232 (2021).

[786] *B v Prosecutor*, West Gojjam Zone High Court, File No.02-56500 (2019); *YZ v Prosecutor*, FFIC, Lideta Division, File No.279395 (2021).

5.2.5 Police Investigation

5.2.5.1 Court-authorized Investigation

After the child is brought to the court by the authorized persons including the police and after recording the complaints or particulars of the case, the court *shall*[787] instruct the police on the manner of investigation. The English version uses the term 'may' which is not mandatory for the court to instruct the manner of investigation. However, according to the Amharic version, the overriding version, the court must do so.[788] In this sense, investigation in the child justice case is court-authorized. In other words, police cannot investigate the crime without being instructed to do so and cannot use methods not allowed by the court. Nonetheless, analysis of court files shows that in the majority of cases, courts do not give investigation instructions. This is even the case where police requested an order in written form while filing the complaint.

Although police officers claimed that they comply with this rule and that an investigation (including interrogation of the child) is not conducted without court authorization, interviews with judges[789] and analysis of court files indicate that police interrogate a child before bringing him/her to court.[790] Further, some police officers unwittingly indicated that the child is interrogated or that they have completed the investigation in their request for instruction to the court.[791] Judges did not seem serious about the violation of this right as they never reprimand or remind police about the illegality of the interrogation.

The Code simply provides for the court to give the police instructions as to the manner in which investigations should be made, and apart from recalling that the investigation shall comply with

[787] Emphasis added and included in the Amharic version.

[788] Federal Negarit Gazeta Establishment Proclamation 1995, Proclamation No.3, Federal Negarit Gazeta 1st Year No.3 art 2 (4) (Federal Negait Gazeta Establishment Proclamation). Although the Code is promulgated during the imperial era and nor published in federal gazeta, the same rule can work for any contradiction between the two versions of this Code. In practice however, it is the police who requests an instruction while bringing the child to the court and stating that the child is below 15 years old.

[789] Tegaye Zeleke (n 724); Sielu Shiferaw (n 726); Abreham Abate (n 722); Sera Chalachew, Judge, Bahir Dar Zuria Woreda Court (Bahir Dar, 4 February 2022); Leuleselassie Liben, Judge, Child Justice Bench, FFIC, Lideta Division (Addis Ababa, 13 April 2022).

[790] *A v Bahir Dar City Police* (n 702); *MD v Prosecutor* (n 734); *AA v Prosecutor* (n 732); *HD v Prosecutor*, East Gojjam Zone Prosecutor Department, Prosecution File No.69/14 (2021); *KY (2) v Prosecutor*, East Gojjam Zone Prosecutor Department Prosecution File No.481/14 (2022); *SF v Prosecutor*, West Gojjam Zone High Court, File No.02-56882 (2019); *BG v Prosecutor*, West Gojjam Zone Prosecutor Department, Prosecution File No.33762 (2021); *KY (3) v Prosecutor*, West Gojjam Zone Prosecutor Department, Prosecution File No.34340 (2021); *H v Police* (n 777); *T and others v Lemi Kura Sub City Police* (n 733).

[791] *YB v Prosecutor* (n 734); BG v Police (n 733); *J v Akaki Surrounding Police* (n 727); *F v Akaki Police*, FFIC, Akaki Kaliti Division, File No.102046 (2022);*YK v Yeka Sub City Police*, FFIC, Yeka Division, File No.178226 (2022).

the rules and procedures of the adult cases, there is no clear guidance regarding other sorts of instructions can/should the court give to the investigating police. However, reference to the international and regional standards on child justice sheds some light. For instance, the court can order the police to interrogate the child in the presence of the parent and counsel or another appropriate person; conduct the interrogation in a child-friendly way (wearing civil attire, using child-friendly language, and so forth); fix the place of interrogation and that the investigation should not take long time, so and so forth.

Analysis of court files and interviews with judges reveal the following instructions. The first (the leading instruction) relates to handing children to parents or remanding them to the Remand Center. The second most given instruction is allowing interrogation and ordering police to interrogate the child in the presence of parents or social workers in case where the child has no parents; with civil attire or investigation with the prosecutor (one file each for the last three instructions). The third is ordering the police to cause a medical examination of the age of the child. The least and general instruction given is to investigate the case or continue investigating the case.

Nonetheless, despite the legal stipulation that the police cannot investigate the case without court authorization, the same code fails to provide the effect of non-observance of this rule and the power of the court in this regard. Whether the interrogation shall be inadmissible or the court can order re-interrogation is not specified. As a result, the practice is mixed in that although the majority of judges agreed that the result shall be inadmissible, there is an instance where re-interrogation is ordered which subjected the child to undue double encounter.[792]

5.2.5.2 Interrogation in the presence of Parents or Legal Guardians and/or Counsel

As discussed in chapter three, the international standards are not sufficiently clear in this regard. The CRC Committee, however, recommends states to ensure that a child gets legal or other assistance and is supported by parents or guardians.[793] As it is clear from this, the presence of parents is in addition to the legal or other assistance.

The Ethiopian child justice system does not provide for this right. The relevant provision is Article 173 of the CPC, which requires the court before which the child is brought to summon

[792] Interview with Sielu Shiferaw (n 726).
[793] CRC Committee, General Comment No.24, para 60.

parents, guardians or other persons in loco parentis. This provision seems to ensure the presence of these persons during the trial and possibly during the recording of the accusation or complaint by the court. It is not clear whether their presence is required during police interrogation. It is also important to note that legal representation at the pretrial stage is not constitutionally guaranteed in Ethiopia. It is available for accused persons.[794]

In the CPC on the other hand, a person detained on arrest has a right to call and talk with his/her advocate (art 61). Nonetheless, the phrase 'call and interview' does not seem to include the presence of a counsel during interrogation. Further, the term 'his advocate' refers to retained counsel instead of appointed one. These together make the relevance of this provision to child justice minimal. However, as mentioned above, the court may exercise its power and instruct the police to interrogate the child in the presence of these persons, and have done so regarding parents. However, there is no practice of ordering the police to interrogate the child in the presence of a counsel and the role of a counsel starts at the trial stage.

5.2.5.3 Timeframe for completing the Investigation

Setting a time limit for the completion of the investigation is essential to ensure the speedy disposition of child justice cases as enshrined in international and regional standards. In the absence of special provisions in the CPC, reference can be made to the Constitution and the adult procedures. The Constitution provides that the court may remand an arrested person upon request for a time strictly required to carry out the *necessary investigation.*[795] The additional time necessary for investigations shall be determined in light of the arrested person's right to a speedy trial.[796] Hence, the Constitution sets two requirements; that the time shall be necessary to complete the investigation and it must not violate the right to a speedy trial.

The CPC on its part provides that '[w]here the police investigation is not completed [,] the investigating police officer may apply for a remand for a *sufficient time* to enable the investigation to be completed'.[797] However, no remand shall be granted for more than 14 days on each occasion.[798] This provision of the Code is problematic in two respects. First, unlike the Constitutional provision that the additional time shall be necessary to complete the investigation,

[794] FDRE Constitution, art 20 (5).
[795] Emphasis added.
[796] FDRE Constitution, art 19 (4).
[797] CPC, art 59 (2). Emphasis added.
[798] ibid art 59 (3).

it qualifies the additional time by the phrase 'sufficient to complete the investigation'. Sufficient time may not always be necessary in light of the right to a speedy trial. Second, it only provides the maximum period to be 14 days on each occasion leaving open the number of remands.

In addition to these provisions of the laws that deal with additional time for investigation of cases involving a person who is in remand or custody, Article 37 (1) of the CPC provides the general rule that investigation shall be completed without unnecessary delay. The CPC dealing with child justice procedures is not explicit in this regard.[799] Nonetheless, by virtue of the rule that child cases shall be disposed of without delay and the special circumstances of children, it is possible to argue that the timeframe for completion of investigation in child justice cases shall, in normal circumstances, be much shorter than the adult counterpart. Inference for this can be made from the Code's provision that presupposes disposal of the case in one day (art 172 (4)). Furthermore, a child must be taken to the court immediately and it is the court to instruct the investigation (art 172 (1)). These together suggest that the investigation shall be completed shortly including within a day. If it is not possible to complete it in one day, the court shall, as part of 'investigation instruction', order the police to complete the investigation within a short time/*without delay*[800] which they failed to do so. Of the cases reviewed in which courts provide investigation instruction, there is no instruction on the time of completion of the investigation. Similarly, such instruction is not mentioned by all judges interviewed. Hence, the practice does not pay special attention to the timely completion of child justice cases and some cases took months to complete the investigation including those cases where children were in detention[801] and involving minor crimes.[802]

[799] This is explicitly stated in the draft code and that child justice cases including investigation shall be disposed expeditiously and in informal procedure but in keeping with the best interest of the child and assisted with social workers and psychologists (art 472).

[800] Emphasis added. The qualification 'unnecessary' is unnecessary in the child justice cases.

[801] In the case between *N and Prosecutor* (n 780), the investigation took three months. The case *AS v Police*, FFIC, Akaki Kaliti Division, File No.101224 (2022) took eight months.

[802] The case between *BG and Police* (n 733) involving theft, the investigation took three months and 20 days. The case between *F and Akaki Police* (n 791) involving theft, the investigation took seven months. For this, the research uses only cases that are initiated by police complaint and cases disposed by charges only are excluded as they did not show the time of completion of the investigation. The starting point is the date of the crime and the ending time is the filing of the complaint. Of course, the investigation may not start in the first day of the crime if it is not flagrant. But, it is possible to presume that the filing of accusation or complaint by the victims may not take that long time. Further, one of these cases, *F v Akaki Police* (n 791) was flagrant.

5.2.6 Prosecution and the decision to prosecute

Under the adult procedure, police investigation culminates with a report to the prosecutor, who then decides whether to prosecute or not based on the grounds provided under Articles 39 and 42 of the CPC. The procedure in child justice cases is not clear. Article 40 of CPC provides that the prosecutor shall not institute proceeding against a child unless instructed to do so by the Court under Article 172. Article 172 (3) on its part provides that where the accusation relates to a crime punishable with rigorous imprisonment exceeding ten years or with death, the court shall direct the public prosecutor to frame a charge i.e. to institute proceeding.[803] This means that in non-serious cases, the child is tried without a charge.

However, this provision of the Code leaves two questions unanswered.[804] First, in serious cases, by what criteria, if any, does the court instructs the prosecutor to frame charges? Second, in non-serious cases, by what criteria, if any, will the court decide to try or not the child for the crime complained of? In adult cases, the public prosecutor has this screening power.

This is not an issue for cases entertained by regional courts as almost all cases are proceeded with a charge framed by a public prosecutor for even minor crimes without court authorization.[805] This issue is pertinent for cases in Addis Ababa where minor crimes are proceeded with a police complaint and serious crimes with court-authorized charges. Legally and logically speaking, it can be argued that the court shall exercise the power of the prosecutor in deciding whether a case is chargeable and whether a trial will be held based on a complaint filed by the police. Ordering the framing of the charge or conducting trial following the filing of a complaint against a child by the police though the investigation may reveal no convincing evidence in support thereof leads to discriminatory treatment of children for no valid reason.[806] Therefore, since it is the exclusive power of the Woreda Court to order and supervise police investigation, it should also have the duty to ensure that there is sufficient evidence to cause the framing of the charge or decide whether or not a trial should be held on the allegation made. In

[803] The draft Code seems to oust this power of the court as it only provides that prosecutor shall frame the charge in writing (art 479 (1)). Hence, investigation report seems to be handed to prosecutor (art 473 (2)) which gives the public prosecutor the ordinary filtering power when the case is brought to him/her.
[804] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 140.
[805] All judges and prosecutors interviewed said that charging is not court authorized.
[806] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 140.

so doing, the court should follow the provisions of Articles 39 and 42 of the CPC set down for public prosecutor in adult cases.[807]

Nonetheless, examination of court files shows that courts instructed the police to complete the investigation of the crime and bring the charge after getting it framed by the public prosecutor. By this, courts relinquish their filtering function and, the investigation file is submitted to the prosecutor instead of the courts. Hence, it is the public prosecutor who can and shall perform the ordinary filtering function while ordered to frame the charge. Interview with prosecutors also reveals that the police brought the investigation report together with the order, and that prosecutor can order police to bring additional evidence[808] or may close the case if there is no sufficient evidence.[809]

In minor cases that are triable only by police complaint too, courts do not examine police investigation reports to ascertain whether there is probable cause against the child and to proceed with the trial. These cases directly go to trial without being checked for their eligibility and the filtering function performed by the prosecutor is missing. Although some judges in Addis Ababa alleged that they have done so, the researcher could not find mention of this in the judgments and could not get police reports attached to court cases that are decided even before one or two days.[810]

5.2.7 Charging

5.2.7.1 Timeframe for framing the Charge

Another point of concern in child justice cases is the time within which the charge should be framed after the arrest (first contact of the child with the justice system) or after being instructed to frame it by the court. The CRC Committee recommends states parties to provide time limit for the framing of the charge which should be shorter than the limit set in adult cases (GC No.24, para 55) and in case where the child is in pretrial detention, the charge shall be framed as soon as possible but not later than 30 days (para 90). In ordinary cases in Ethiopia, the public prosecutor is required to frame the charge within 15 days after the receipt of the police investigation report.

[807] ibid 141.
[808] Phone interview with Kalkidan Abiyou, Prosecutor, Federal Attorney General Office, Lideta Division (Addis Ababa, 9 August 2022).
[809] Phone interview with Tirualem Mekuriaw, Prosecutor, Federal Attorney General Office, Addis Ketema Division (Addis Ababa, 4 May 2022).
[810] The timeframe is mentioned because the researcher is informed that there is a practice of returning police investigation files within a specified period after the completion of the case.

[811] This has to do with the right to speedy trial of accused persons. This right has special relevance when the accused is a child as a lengthy proceeding is counterproductive in child justice processes. However, the CPC does not contain a special timeframe for framing the charge in child justice cases. In the absence of a specific provision, the relevant time to refer is 15 days after being instructed by the court, which may not be satisfactory for child justice cases.[812] In this regard, most prosecutors interviewed said that they are not guided by the period provided in the adult code and reiterated that framing will not take more than three days. However, examination of police reports and court files refutes this claim of prosecutors and the framing of the charges took long time after the completion of the investigation. In one of the cases, the charge was framed after six months of the completion of the investigation.[813] Apart from failure on the part of prosecutors in the regions to frame it within the time provided in the Code, in Addis Ababa, judges give extended time for framing the charge.[814]

5.2.7.2 Content of the Charge or Police Complaint

Article 111 of the CPC provides the contents of a criminal charge in adult cases. These include the name of the accused; the offense with which the accused is charged and its (moral and material[815]) ingredients; the time and place of the offense and, where appropriate, the person against whom or the property in respect of which the offense was committed; and the law and Article of the law against which the offense is said to have been committed.

The child justice procedure does not provide the contents of the charge. Article 108 (3) of the CPC provides that the provisions of the chapter dealing with the charge shall not apply in cases concerning CICWL unless an order to the contrary is made under Article 172. The pertinent provision in Article 172 to which Article 108 (3) refers is 172 (3) which states that '[w]here the accusation relates to an offense punishable with rigorous imprisonment exceeding ten years or with death […] the court shall direct the public prosecutor to frame a charge'. In such a case, the public prosecutor is required to comply with the contents and form of charge for adult cases and

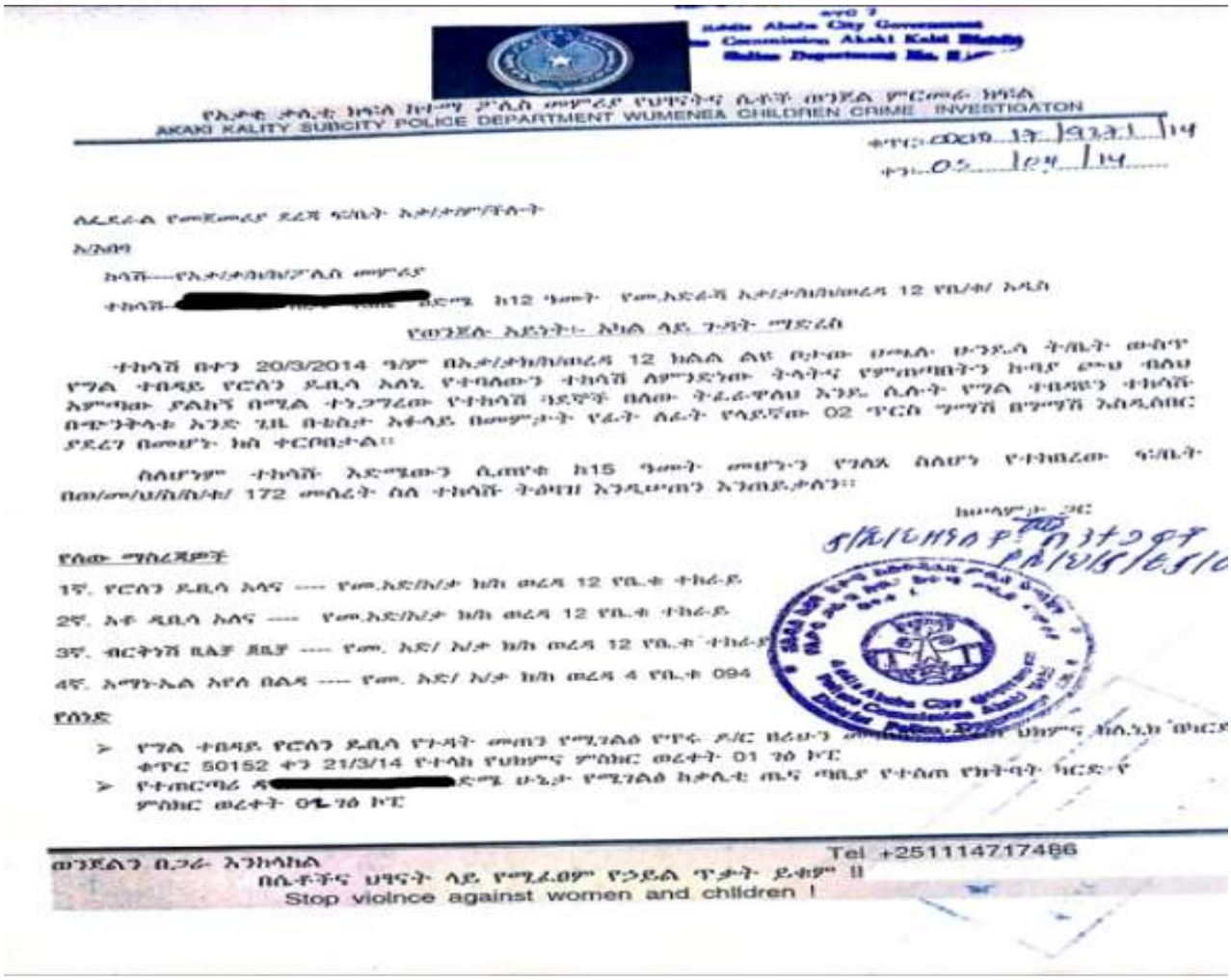
[811] CPC, art 109 (1).
[812] The draft Code also failed to provide the time limit.
[813] *BG v Prosecutor* (n 790). Although it is understandable that the police may not send the file on the same day, it is unlikely for the police to keep the file on the shelf for this long time given the fact that the investigation is completed within three days of the crime.
[814] *M v Prosecutor* (n 733); *YS v Prosecutor*, FFIC, Lideta Division, File No.290308 (2021); *YZ v Prosecutor* (n 786).
[815] Implied from the Amharic version and clearly indicated in the second schedule of the Code.

that a child shall be given every safeguard accorded to adults.[816] This requirement is necessitated by the right of the child to a fair hearing and the right to defense. In other words, unless the charge contains the precise facts, laws and circumstances under which the alleged crime is committed, the child will have difficulty of properly defending his/her case, which again compromises the fairness of the trial. The practice conforms to this argument and a charge framed in the child justice system is similar in content and form to those in adult cases.

A contrary reading of Article 172 (3) reveals that framing of charge is not required for non-serious child justice cases. In such a case, the complaint or accusation recorded by the court after asking the person who brings the child substitutes the charge. As mentioned in the preceding sections, the practice in this regard is framing a complaint by the police, not by the court. In this regard, it is important to highlight its implication for the rights of a child accused of such a crime. The question thus, is what should the complaint contain? Shall it contain the same elements of the charge framed for serious crimes?

The answer shall be in the affirmative.[817] This is because a child may be compromised in the defense if, for instance, the complaint does not contain the date of the crime and the provision of the law violated. In practice, the complaints filed by the police contain every detail of the crime including the name of the suspect, the date and place of the crime, and in many cases, the list of witnesses. The missing elements are the provision of the law violated; except in few cases, the name of the crime and the mental element of the crime.[818] This has an impact on the right to defense of the child for crimes the elements of which are not ordinarily known.

[816] Fisher, 'Criminal Procedure for Juvenile Offender in Ethiopia' (n 62) 143.
[817] ibid 144.
[818] All complaints have not mentioned the provisions violated and only few complaints (this is typical to one bench, Akaki Kaliti) included the name of the crime. Of course failing to mention the name of the crime is not unique to complaints but also the charges including in the adult cases despite its inclusion in the second schedule.



Picture 1: Police Complaint

5.2.7.3 Notification (handing) of the Charge or Complaint

Notification of the charge to the child is provided under Article 40 (2) (b) (ii) of the CRC; Article 17 (2) (c) (ii) of the ACRWC; Article 14 (3) (a) of the ICCPR and Rule 7 of the Beijing Rules. This right is equally recognized in the Ethiopian criminal justice system. Article 20 (2) of the FDRE Constitution states that '[a]ccused persons have the right to be informed with sufficient particulars of the charge brought against them and to be given the charge in writing'. The adult procedure on its part provides that a copy of the charge must be given to the accused free of charge[819] and indirectly to be served with a copy of the charge in sufficient time before trial to enable him/her to prepare for defense.[820]

[819] CPC, art 109 (4).
[820] ibid art 94 (2) (g).

The requirement that the charge must be notified in the language that the accused understands provided under the ICCPR and ACRWC is not mentioned in the Ethiopian criminal/child justice system. Since the Ethiopian system provides for written notification (copy) of the charge, this requirement entails the translation of the charge into the language that the accused can understand. This is not, however, the case in practice as charges are normally framed in the working language of the courts and the accused or the child will be provided with this charge irrespective of his ability to understand the language. It is through the assistance of another person that the accused person reads and understands the charge.[821]

These provisions of the laws entitled an accused person the right to receive a copy of the charge before the trial date. This is essential for the accused person and his/her counsel to prepare their defense based on the facts and evidence mentioned in the charge. Nonetheless, the constitutional provision and Article 109 (4) of the CPC do not mention the sufficiency of the time for preparation of the defense nor specify it. It is Article 94 (2) (g) of the CPC that incidentally mentions this qualification in that adjournment can be ordered where the accused person has been served a copy too short a time before the trial to enable him/her properly prepare his/her defense.

Coming to the Ethiopian child justice system, no mention is made of this right. In applying these provisions to the child justice system, two issues would arise. The first relates to the person to whom the charge shall be given; to the child, his/her parents or counsel. Giving it to the child only may not be sufficient as the child may not be literate to read, understand and prepare the defense. Therefore, the charge should be given to the child and his/her parent if appropriate or to the child and the counsel concurrently to ensure, on the one hand, that the child is considered as the subject of the right and on the other, to ensure that the child, through the assistance of his/her parents or counsel, prepares the defense properly.

However, in practice, in cases where it happens, the child and counsel get it during the hearing of the charge. Almost all defense counsels interviewed said that it is during the date fixed for hearing of the charge that the charge is given to them[822] and judges give counsels and the child some time to discuss the charge and notify the court whether they can proceed with the case or

[821] Interview with Tenahun Cherkos, Prosecutor, Gamo Zone Justice Department (Arba Minch, 13 January 2022).
[822] Only one defense counsel has claimed that he gets the charge before the trial from the child. Interview with Hailu Solomon, Defense Counsel and Assistant Judge, Hawassa City First Instance Court (Hawassa, 16 March 2022).

seek adjournment. This is supported by the practice among courts that counsels are not notified of the case in advance and only know the case during the hearing of the charge.[823] Some court files also indicate that the charge is given to them in court.[824] One counsel tries to justify this practice by the less complicated nature of crimes committed by children and the consequent charges.[825] However, this is not envisaged in the law and for every crime, accused persons must be provided with a copy of the charge in advance of the trial. Adjourning the case for the fact that the charge is not served in advance and the preparation of defense needs time counts against the right to a speedy trial.

There are only a handful of court files that ordered the police to hand the charge to the accused (child).[826] Moreover, interviews with parents or guardians and/or children refuted these orders as none of them said that the charge is served on them before the trial. More tellingly, one guardian said that the charge was not given to them despite their repeated request for it.[827]

The second issue relates to the content of the charge, not in terms of what the adult procedure prescribes, but in terms of how the contents should be written in a way that is easily understandable by the child. This includes, for instance, avoidance of legal jargon and using simple and short sentences. This is not addressed in the existing Code, but in the draft Code (art 380 (1)). This issue is not considered in framing charges in child justice cases. The charges use the terms as they appear in the provision of the law violated.

The same issue of handing a copy of the record or police complaint to the child before the trial arises in regard to minor cases. In terms of the Code, it does not seem that the child shall be provided with it. This can be inferred from Article 172 (4) which requires handing over of the child to his/her parents or another person where the case needs to be *adjourned*.[828] This seems to imply that the child's case may be disposed of on the same day when it was brought to court. In such a scenario, one can argue that it is more likely for the child not to be given a copy of the

[823] The counsel was notified of the hearing date in advance only in two cases (*A v Prosecutor* (n 729) and *AZ v Prosecutor* (n 734)). Even in these cases, the notification was made after the date of first hearing.
[824] *AB v Prosecutor*, Gamo Zone High Court, File No.39726 (2021); *M & A v Prosecutor*, Bahir Dar City Woreda Court, File No.30600 (2016); *S v Prosecutor* (n 730); *YN and others v Prosecutor* (n 731); *SF v Prosecutor* (n 790); KY (3) v Prosecutor (n 790); *BW v Prosecutor*, Hawassa City First Instance Court, File No.36996 (2021).
[825] Interview with Shimelis Abebe, Defense Counsel, FFIC, Lideta Division (Addis Ababa, 12 May 2022).
[826] From the total 40 cases on which charge is framed, only on 11 of them that an order to serve the charge in advance is made by courts or indicated that the charge is served before the trial date.
[827] A Guardian Interviewed in West Gojjam Zone High Court (Finote Selam, 11 March 2022).
[828] Emphasis added.

complaint. If there is a possibility to give the accusation, the time is not sufficient to prepare the defense. Both scenarios compromise the right to a fair trial of the child. The same can be said when a complaint is filed by the police. The practice supports this argument that children or their counsel are not provided with a copy of the complaint. Unlike cases where a charge is framed, the researcher did not find a single file where an order to serve the complaint on the child is made. It is only read in court during the first hearing.[829] This is not only for cases disposed of on the same day of filing the complaint but also for those adjourned for another time. Further, in some cases, the first hearing (plea) is conducted on the same day as the filing of the complaint[830] and in some cases; the case is disposed of on the same day.[831] This indicates that complaints are not given to children or their parents in advance of the trial. Therefore, the child justice procedure must guarantee the right of the child to be provided with a copy of the charge or accusation before the trial so that s/he or his counsel gets sufficient time to prepare the defense.

5.3 Rights at the Trial Stage

5.3.1 The Right not to be tried with Adults

Article 5 (1) of the CPC provides that no 'young person' shall be tried together with adults. This has to do with the right to a closed trial and of defense of the child. If s/he is tried together with adults, the proceeding becomes semi-public as new parties from the side of the adult are added to the trial that are not listed under Article 176 (1) of the CPC. This has also an effect on the extent and quality of participation and defense of the child as the environment becomes intimidating as a result of the involvement of many parties. Despite its plain language, this provision was violated in two cases[832] out of four cases that involve co-offending.

5.3.2 Examination of Witnesses

Another step during the trial of cases is the examination of prosecution and defense witnesses. Examination of witnesses is one of the human rights of accused persons as recognized in international human rights standards and the FDRE Constitution. The Constitution under Article

[829] Interview with, Leuleselasie Liben (n 789); Ergoye Kasa, Judge, Women and Children Bench, FFIC, Yeka Division (Addis Ababa, 27 April 2022); Shimelis Abebe (n 825).
[830] *YD v Addis Ketema Sub City Police*, FFIC, Lideta Division, File No.291545 (2021); *KT v Gulele Sub City Police*, FFIC, Arada Division, File No.196490 (2021); *N v Gulele Sub City Police* (n 785); *R v Police* (n 713).
[831] *SM & SZ v Prosecutor* (n 754); *M & A v Prosecutor* (n 824); *A v Bahir Dar City Police* (n 702); *MD v Prosecutor* (n 734) 3; *D v Debre Markos City Police*, Debre Markos City Woreda Court File No. 0500654 (2017); *BT v Debre Markos City Police*, Debre Markos City Woreda Court, File No.0209883 (2018).
[832] *KY v Prosecutor* (n 733); G v Prosecutor (n 733).

20 (4) provides that accused persons have the right to examine witnesses testifying against them. The CPC, the implementing law, robustly regulates the presentation of evidence, manner of examination of witnesses and judgment (arts136-149).

Concerning child justice cases, Article 176 (5)-(7) regulates the examination of witnesses. Accordingly, following the child's plea of not guilty, the court inquires as to what witnesses should be called to support such accusation or charge and the child, his/her representative or advocate may cause any witnesses to be summoned. As incorporated in the Constitution, one of the rights of accused persons is the cross-examination of prosecution witnesses. This has been reaffirmed respectively for adults and children in Articles 136 and 176 (6) of the CPC. In child justice cases, all witnesses (prosecution and defense witnesses) are examined in chief by the court and may thereupon be cross-examined by the defense. There seems no cross-examination of defense witnesses as the purpose of cross-examination is to discredit the statement given in the examination in chief (art 137 (3) of the CPC) and as there will not be such statements by defense witnesses.[833] In practice, however, they are cross-examined, probably, by the court as they are examined in chief by the child or his/her counsel.[834]

In most cases, the examination of witnesses is not in line with the provisions of the Code. The public prosecutor participated in the examination or cross-examination of witnesses not only in cases tried at the high court but also in cases tried at the lower courts that do not require framing of charge. According to Article 176 (1) of the CPC, the public prosecutor is required to appear in the high court without a role in the examination of witnesses as this power is given principally to the court.[835] However, in courts (lower and high courts) outside of Addis Ababa covered in this research, the public prosecutor participated in the trial and examined his/her witnesses and cross-examined defense witnesses.[836] In other words, the public prosecutor retained the usual function that s/he has in adult cases. This can make the trial adversarial and exposes the child to a hostile environment as a result of harsh words that could be used by the prosecutor in cross-

[833] cf Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 150.
[834] *Y v Prosecutor* (n 702); *SH v Prosecutor* (n 781); *YZ v Prosecutor* (n 786); *AM v Prosecutor* (n 733); AA v Police (n 780).
[835] In cases entertained by federal courts and proceeded with charges, the public prosecutor is not present. His/her role is limited to framing of the child and handing it to the police for the later to submit to the court.
[836] Court files collected from the regional states show this fact. The researcher finds only five files (out of 37 files collected from regional courts) where the proceeding is conducted by police complaint. Further, all judges interviewed from the same said that the public prosecutor maintained his/her role in the adult cases.

examining defense witnesses. In these courts, the defense counsel as well has the same role as a counsel in adult cases during the examination of witnesses in that s/he examines his/her witnesses in chief. These happened mostly due to a lack of knowledge of the special provision[837] and sometimes with knowledge.[838]

In court in Addis Ababa, the public prosecutor has no involvement in the trial and his/her role is confined to framing a charge and handing it to court through the police. Further, in cases that do not require framing of a charge and proceeded with a police complaint, the police are not present during the trial, and if present, do not have the power to examine witnesses.[839] Hence, the court exercises the role of the prosecutor including cross-examination of the defense witness. However, it is the counsel or the child who examines defense witnesses in chief.[840] This is not in line with the stipulation of Article 176 (6) of the CPC.

5.3.3 Participation of the Child and Requirements for effective Participation

5.3.3.1 The Right to be present during trial and the Right to Examine Witnesses

The right of an accused person to be tried in his/her presence is explicitly provided under Article 14 (3) (d)) of the ICCPR. This is essential in ensuring the fairness of the hearing. There are no equivalent provisions in the child rights standards, apart from the right of the child to be tried in a fair hearing[841] and examine witnesses.[842] The same is true under Article 20 of the FDRE Constitution. The model law on juvenile justice however clearly provides that no child shall be tried in absentia (art 46 (1)).

The right of the accused to be present during trial shall not be interpreted as a prohibition of trial in absentia in all cases. According to the Human Rights Committee, trial in absentia is permissible for the interest of justice, i.e. when the accused person intentionally fails to appear although s/he is informed of the proceeding in advance.[843] For such a trial to be compatible with Article 14 (3) (d) of the ICCPR, necessary steps shall be taken to summon the accused person in

[837] The researcher asked judges as to why this has happened and came to know that judges in these courts did not know this special provision. Further, the researcher has observed in one actual trial in the high court where role of the prosecutor to examine witnesses is challenged by a defense counsel and the judges decide after reading the provision. This indicates that judges are not aware of this special provision a priori.
[838] Interview with Mintamir Alamirew, Judge, Finote Selam City Woreda Court (Finote Selam, 10 March 2022).
[839] Interview with all judges and police in the city and examination of court files show this.
[840] *Y v Prosecutor* (n 702); *SH v Prosecutor* (n 781); *AM v Prosecutor* (n 733).
[841] CRC, art 40 (2) (b) (iii).
[842] ibid art 40 (2) (b) (iv) and Beijing Rules, Rule 7.
[843] HRC, General Comment No.32, para 36.

a timely manner and to inform him/her beforehand about the date and place of trial and to request his/her attendance.[844]

In line with this interpretation, the adult procedure in Ethiopia allows trial in absentia in exceptional cases. It applies only for specified crimes and where the accused person fails without good cause to appear on the day fixed for the hearing.[845] This provision, however, does not apply to CICWL and a child cannot be tried in his/her absence, which is an important safeguard that the Ethiopian child justice system accords children in the absence of similar provisions in the child rights standards.

The right to cross-examine witnesses testifying against oneself and call and cause to be examined own witnesses is a constitutional right that can be exercised by the child him/herself or by his counsel in consultation with the child. Nonetheless, children have no role in the examination of witnesses in the actual practice of the Ethiopian child justice system. The only say that children could have is during the hearing of the charge where they are asked whether they have an objection to the charge and admit the crime or not. In the subsequent stages of the proceeding, the case turned out to be the case between the public prosecutor in the regional courts and counsel or between the court and the counsel in Addis Ababa. In this regard, counsels go to the extent of saying that 'we are the mouth of the child'.[846] In tandem with this, in some cases observed by the researcher, children stood/sat far away from the counsel which forecloses their right to participation by examining the witnesses in consultation with the counsel. This perception and practice foreclose the other requirement for effective participation which is the preparation of the child by informing him/her of the parties and their roles, the procedure to be followed, his/her rights in each stage of the process, and so forth.[847]

5.3.3.2 Closed Hearing and Child-friendly Court Environment

Conducting the trial in a closed chamber is one aspect of a child-friendly environment in the administration of child justice. In normal adult cases, the trial shall be public to ensure the fairness of the proceeding by making it subject to the scrutiny of the general public. However, a trial may be conducted in camera in certain exceptional cases. In other words, a public trial is a

[844] ibid.
[845] CPC, art 161.
[846] Interview with Hailu Solomon (n 822).
[847] Neither judges nor counsels have prepared the child in these respects.

rule and closed trial or trial in camera is an exception. This issue is regulated in Article 20 (1) of the FDRE Constitution. One of the exceptional grounds that warrant a closed trial is the protection of the privacy of the accused. The same stipulations are incorporated in the ICCPR (art 14 (1)). The exceptional circumstance for conducting a closed trial for the sake of protecting the privacy of the accused is pertinent to child justice. This is because one of the aims of the child justice system is shielding children from undue publicity of the case to prevent the consequence of stigmatization that may result from it. The ICCPR is explicit in this regard that the interest of CICWL may prevent the publicity of the judgment.[848]

The CRC on its part provides that the privacy of CICWL shall be respected at all stages of the proceeding (art 40 (2) (b) (vii)). This provision is further elaborated by the Committee and that respect for the privacy of CICWL requires for the child justice hearing to be conducted in closed sessions and exceptions should be very limited and clearly provided in the law.[849] Article 17 (2) (d)) of the ACRWC makes trial in camera of child justice cases a rule without any exception.

Coming to the CPC, Article 176 (1) provides that trial involving CICWL shall be in a chamber and nobody except witnesses, experts, the parent or guardian or representatives of welfare organizations, and public prosecutor for crimes tried in the high court shall present at the hearing. This provision missed counsel from the list of persons allowed to present during the hearing, which is a slip of the pen. This provision of the Code, though preceded all the above-mentioned international and regional standards, recognizes the privacy of children by making the hearing closed except for persons relevant for the determination of the case and persons whose presence is essential for the benefit of the accused child.

In practice, this requirement is mostly respected. In some cases (regional first instance courts), the court rooms themselves do not allow public trial. They are so narrow that they cannot accommodate other persons than the judge and parties to the case including parents. In few cases, however, this rule is violated by allowing police to be present during the trial[850] and conducting the hearing in the same room where adult cases are tried.[851]

[848] Last prong of the second sentence of art 14 (1).
[849] CRC Committee, General Comment No.24, para 67.
[850] For instance, in the case *D v Debre Markos City Police* (n 831), the police examined witnesses.
[851] This is a case in Bahir Dar City Woreda Court where three judges are assigned in one bench trying their case simultaneously (the researcher personally observed that three judges are using one bench) which is designated as

There are other requirements the court and its actors must fulfill to make the court environment child-friendly for children's participation.[852] Though the CRC enjoins states to seek to establish separate institutions (one of which is the child justice court), it does not clearly specify the special court decorum that is child-friendly. This has been elaborated by the CRC Committee and includes support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings.[853]

As mentioned above, though not legally backed, there are 'child justice benches' across the country, which is one of the components of a child-friendly environment. The other element of a child-friendly court environment is provided under Article 176 (5) and (6) of the CPC in that examination of witnesses shall be conducted in a way different from the adult counterpart, though not complied with in most cases. It is the court that is supposed to examine all witnesses in chief and there is no cross-examination of defense witnesses. Apart from these, some courts tried to make the environment friendly in different ways. These include avoidance of legal attire; allowing the child, his/her guardians, counsel and other parties to sit during the majority of the trial session;[854] conducting the trial in the office of the judge except where the witness is a minor that requires CCTV;[855] round-table setting and avoidance of raised podiums.[856]

In some other courts, the environment is not child-friendly. The manifestations include raised podium;[857] confining the child in a wooden cage,[858] wearing gowns,[859] lengthy trial while the

'children bench' and a children bench judge said that there are times where these judges conduct parallel trials, interview with Degitu Asfaw (n 775)).

[852] Rap, 'A Children's Rights Perspectives on Participation' (n 419) 104.

[853] CRC Committee, General Comment No.24, para 46.

[854] However, the parties shall stand while making the issue that witnesses could testify; while presenting an objection and in the final address to the court. The child similarly is required to stand during reading of the charge and the judgment.

[855] This is particularly the case in most of the federal first instance courts (interview with, Ergoye Kasa (n 829); Saba Keneni, Judge, Child Justice Bench, FFIC, Bole Division (Addis Ababa, 13 May 2022) and observation made in Bole Division on 13 May 2022).

[856] This is a case in Lideta, Arba Minch and Hawassa (personal observation).

[857] This is mostly the case in high courts (personal observation). A first instance bench designed for CICWL has also raised podium (Bole Division).

[858] This is the case in Hawassa City High Court (personal observation and interview with Selamawit Anesa (n 773) Bilen Getamesay, Women and Children (cases) Prosecutor, Hawassa City Public Prosecution Department (Hawassa, 22 March 2022); Arba Minch Zuria Woreda Court (personal observation and interview with Sielu Shiferaw (n 726)); Bahir Dar and its Surrounding High Court (interview with Temesgen Melese, Defense Counsel, Bahir Dar and its Surrounding High Court (Bahir Dar, 7 February 2022)).

[859] This is the case in Bahir Dar and its Surrounding High Court (interview with Temesgen Melese (n 858)); Hawassa City High Court (interview with Bilen Getamesay (n 858)) and former East Gojjam Zone High Court (interview with Kefyalew Getie, Judge, East Gojjam Zone High Court (Debre Markos, 5 March 2022)).

child is standing,[860] wide rooms that make the sound inaudible for the child;[861] the presence of speaking mikes and sound recording devices (which make the setting highly formal and intimidating),[862] fast pace and use of confronting tone by the judges while examining witnesses; and separate sitting of children and parents.[863]


Picture 2: Court settings that are not child-friendly (a wooden cage and raised podium)

5.3.3.3 Presence of Parents or Guardians

The right of CICWL for their case to be determined in the presence of their parents or legal guardians, where appropriate, is recognized under Article 40 (2) (b) (iii)) of the CRC and Rule 15.2 of the Beijing Rules. This is because parents can provide psychological and emotional assistance to the child and contribute to effective outcomes.[864] Hence, parents or guardians are mandated to appear throughout the proceeding. In this regard, the CRC Committee requires states parties to legislate so. Where no parent or legal guardian is available, relatives with whom the child is living should be allowed to assist the child.[865]

[860] Observation made in West Gojjam Zone High Court (Finote Selam, 11 March 2022).
[861] In this connection the researcher observed in the FFIC, Bole Division where the defense counsel and the judge were frequently asking the witnesses to speak loudly.
[862] This is a case in all high courts and most first instance courts in Addis Ababa (personal observation).
[863] The researcher observed that in the federal first instance courts, children are seated by the side of the counsel located left side of the judge while parents are seated in front. In the regional high courts (West Gojjam Zone), the child was standing at the back while the guardian and witnesses in front.
[864] CRC Committee, General Comment No.24, para 57.
[865] ibid.

In the Ethiopian child justice system, the presence of parents or guardians during trial seems mandatory. Article 173 of the CPC mandated the court to call them where the child is not accompanied by them. This provision, however, does not indicate the appropriateness of the presence of these persons. As provided in the CRC and the Beijing Rules, the presence of parents or legal guardians is required if it is appropriate taking into account the best interest of the child. The constitutionally enshrined principle of the best interest of the child shall inform this provision and the parent or legal guardian shall not be present during the hearing if, the court, after hearing the view of the child or his/her counsel, believes that it is not in the best interest of the child and the fairness of the proceeding. The practice however does not take this into account while calling parents. All judges interviewed said that they did not consider the appropriateness or otherwise of the presence of the parents and inquired only whether the child has a parent. The presence of parents may be detrimental to the participation of the child in case they show signs of anger in the court for the reason that they are in the court because of him/her.

The CPC is not clear whether the parents shall be present throughout the whole process. It only mandates the court to call parents if they did not accompany the child during the first appearance (art 173) and does not provide for them to appear in the subsequent proceedings. Another relevant provision to refer to is Article 174 (a) of the same code. According to this provision, a child shall be assisted by a court-appointed counsel if no parent or relative appears. Accordingly, the presence of parents seems not mandatory. However, reading Article 172 (4) together with Article 173, one can infer that the presence of parents in the first appearance which is also a day for the disposition of the case (art 172 (4)) is mandatory. If this is the case, there is no reason to say that the presence of parents during trial adjourned for another day or transferred to the high court is not mandatory. The obvious rationale for ensuring the presence of parents is to provide psychological support to the child and this should continue until the final disposition of the case.

The practice in the Ethiopian child justice system is not in line with this interpretation and that parents should be present in each hearing only when they took the child pending the disposition of the case.[866] A case would not be adjourned if parents did not appear.[867] Proceeding with the

[866] Interview with, Mekides Kebede, Judge, Hawassa City First Insance Court (Hawassa, 16 March 20022); Leuleselassie Liben (n 789); Anonymous 1, Judge, FFIC, (Addis Ababa, 16 April 2022); Shibru Jote (n 741); Anonmous 2, Judge, FFIC (Addia Ababa, 19 May 2022).
[867] Interview with, Wondale Eniemayehu (n 723); Leuleselalssie Liben (n 789); Anonymous 1 (n 866).

case in absence of parents is detrimental to the child as s/he may feel lonely and suffer psychological stress.

The other issue that remains unanswered in Article 173 of the CPC is who shall be present in support of the child where there is no parent or legal guardian. As recommended by the CRC Committee, other relatives with whom the child is living shall be allowed to be present if their presence is appropriate. A further question is what if the child is living alone? A hint is found in Article 176 of the CPC that allows the representative of a welfare organization to be present during the hearing. Though not explicit, the conjunction 'or' indicates that the presence of representatives of welfare organizations is required when the child has no parent or guardian.

However, this should not be interpreted to prohibit the presence of an ordinary person during the hearing in case where such welfare organizations do not exist, and sometimes, although they exist if the child does not choose their presence. What should be taken into account in this regard is not only 'who should be present?' but also 'why should they be present?' In other words, it is important to note that the purpose of requiring the presence of parents/guardians or other relatives is to give the child emotional and psychological support and create favorable conditions for his/her effective participation in the proceeding. Hence, in this situation, the court should inquire whether there are other persons whom the child has close contact with and invite the child to call these persons, if s/he wishes and if the court believes that their presence is appropriate.

In Addis Ababa, when the child has no parents or relatives, s/he is sent to the remand home[868] and a person from this center appears before the court together with the child.[869] On the other hand, in the regions where there are no remand homes, children often appear before the court unaccompanied by parents or guardians. And, there is no effort made by courts to find other persons that the child knows. In the absence of persons whom the child knows, social workers could substitute them. In practice, however, social workers of courts come to know about a case after the child is convicted when courts ordered them to prepare a social inquiry report.[870]

[868] Interview with, Leuleselassie Liben (n 789); Anonymous 1 (n 866); Interview with Anonymous 2 (n 866).
[869] Personal observation made to Lideta Bench and the Remand Center.
[870] Interview with social workers.

5.3.3.4 Legal Assistance

The right to counsel of an accused person[871] in general and CICWL[872] in particular is an internationally recognized human right. This right is also recognized in Article 20 (5) of the FDRE Constitution. Accordingly, accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense. This provision does not limit the right to state counsel to certain types of crimes. This right is granted only if the accused has no sufficient means to hire one and a miscarriage of justice would result if s/he is not represented.

Article 174 of the CPC on its part provides for court-appointed counsel for CICWL where:

(a) No parent, guardian or other persons in loco parentis appears to represent the child, or

(b) The child is charged with a crime punishable with rigorous imprisonment exceeding ten years or with death.

According to this provision, a child could have court-appointed counsel during trial in two scenarios: in case where s/he is not represented by parents (for even minor cases) and in case of serious offenses punishable by imprisonment exceeding ten years (even though a child is accompanied by parents). The qualifications of 'inability to hire'[873] and 'miscarriage of justice' incorporated in Article 20 (5) of the FDRE Constitution are not provided in Article 174 of the CPC.[874] The grounds provided under the CPC are not congruent with Article 20 (5) of the Constitution. According to the Code, a child cannot be provided with court-appointed counsel for

[871] ICCPR, art 14 (3) (d).
[872] CRC, arts 37 (d) and 40 (2) (b) (ii) and (iii).
[873] With regard to the inapplicability of 'ability to hire', Fisher argued that appointing counsel for a child who can afford to hire is a waste of valuable resources; see Fisher, "Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 146. The draft code also adopts the means test (art 376). However, taking into account current developments in the child justice system, it is difficult to concur with this position for three reasons. First, the Committee on the Rights of the Child recommends states to provide legal assistance free of charge. Second, retaining the means test will be detrimental to the defense of the child in that the child may not hire a counsel for want of the money. Third, the role of the states in the child justice system is different and more protective of the interest of the child than the adult criminal justice system. Hence, the avoidance of the means test is the reflection of this difference.
[874] One must take note that the CPC is adopted decades before the adoption of the FDRE Constitution. The then Constitution (the 1955 revised Constitution) provided that the accused person has the right to counsel and, if s/he is unable to hire one, shall be appointed by the Court. Unlike the current Constitution, it did not include the requirement of 'miscarriage of justice'. Even, when seen in the light of the 1955 revised Constitution, the CPC adds a qualification of seriousness of the offence and absence of parents or guardians accompanying the child which were not present in the Constitution.

minor crimes if s/he is accompanied by his/her parent or guardian. This seems the case even if the child or his/her parent or guardian is incapable to hire counsel, which is contrary to the stipulation of Article 20 (5) of the Constitution. Thus, the Constitutional condition that 'miscarriage of justice' will happen if tried without counsel is omitted[875] in the Code and replaced with 'seriousness of the crime' and 'absence of parents or guardians' to represent the child. The condition of 'miscarriage of justice' has a great deal in the child justice system and should not be limited to cases where the child committed serious crimes. In other words, miscarriage of justice will happen in child justice cases and warrants the appointment of counsel even in non-serious cases even if the child is accompanied by parents.[876]

Coming to the practice in this regard, neither this difference in the two laws is appreciated by judges nor did court files mention the provision on which the appointment is made. Interview with judges and examination of court files reveal three scenarios. The first is appointing counsel for all cases including where the child is accused of minor crimes and irrespective of the presence of parents.[877] This practice is more protective than envisaged in the Code as children charged with minor crimes and with parents have had counsel assigned. The second is relying on the constitutional requirement of 'means' and appointing counsel after asking the child or his/her parents whether they can hire their own,[878] and sometimes after the child or the parent requires it for their inability to hire a private counsel.[879] This is mostly the case for crimes tried in high courts (homicide) and sometimes for serious crimes (sexual offenses) tried in first-instance courts. The third scenario is no representation of the child by a counsel. This is particularly the case in rural surrounding Woreda Courts in which there are no counsels.[880] Court files examined also reveal a few cases tried in the city courts where children were not represented by counsel irrespective of the absence of parents during the trial.[881] There is no attempt to refer these cases to the nearby law school legal aid centers or private advocates. In Addis Ababa, the research

[875] But, one needs to bear in mind that the Code is adopted long before the FDRE Constitution.
[876] See also Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 147-48; Kassa (n 62) 31.
[877] This is the case in benches in Addis Ababa except one bench (file analysis)
[878] Interview with, Bayeh Embiale (n 712); Kefyalew Getie (n 859). Case files also show this (A v Prosecutor (n 729); *AZ v Prosecutor* (n 734); *Y and others v Prosecutor* (n 719); *M & Z v Prosecutor* (n 783) ; *AY v Prosecutor*, East Gojjam Zone High Court, File No.0224558 (2020); *SF v Prosecutor* (n 790)).
[879] *B v Prosecutor* (n 786); *G v Prosecutor* (n 733); *YK v Yeka Sub City Police* (n 791); *AZ v Prosecutor* (n 734).
[880] Interview with, Admasu Zegeye, Judge, Arba Minch Zurai Woreda Court (Arba Minch, 12 January 2022); Sera Chalachew (n 789); Kefyalew Getie (n 859).
[881] *D v Debre Markos City Police* (n 831); *BT v Debre Markos City Police* (n 831); *MD v Prosecutor* (n 734).

came across a case where a child was not represented by counsel even where parents were not present, though the court has a defense counsel.[882]

5.3.3.5 Other Appropriate Assistance

This is another requirement for the effective participation of children.[883] The right to other appropriate assistance is provided under Article 40 (2) (b) (iii) of the CRC. This could be provided in conjunction with legal assistance or as sole assistance. Other appropriate assistance may be a sole form of assistance where the child is diverted from the judicial proceeding or where the outcome of the proceeding does not entail conviction or deprivation of liberty. On the other hand, where the system would lead to conviction or deprivation of liberty, states should provide this 'other assistance' in addition to legal counsel.[884] This includes assistance and counseling by social workers and/or psychologists.

Sole 'other appropriate assistance' is not recognized in the Ethiopian child justice system. Concerning concurrent assistance with legal one, inference can be drawn from Article 176 (1) of the CPC which includes representatives of welfare organizations in the lists of persons allowed to be present during the trial. There is, however, no practical case where these persons have assisted the child in the course of the proceeding. According to the English version, experts can also be present during the hearing. The literal meaning of this term may seem to include experts like social workers that can provide the needed assistance to the child. However, the Amharic version qualifies them as 'expert witnesses', which may assist the court in determining the appropriate sentence as per Article 54 of the Criminal Code.

Regarding the role of social workers or psychologists in the Ethiopian child justice system, some points need to be mentioned. The laws and the policy are silent about the assistance of a child by the social worker. Taking this into consideration, the draft Criminal Procedure and Evidence Code mandates for the child to be assisted by social workers and psychologists during the investigation of the crime; hearing of the charge, and trial (art 371 (2) (c)). In practice, social work services are mostly available at first instance courts and their service is principally

[882] *S v Gulele Sub City Police*, FFIC, Arada Division, File No.199035 (2021).
[883] Rap, 'A Children's Rights Perspectives on Participation' (n 419) 105.
[884] CRC Committee, General Comment No.24, para 52.

concerned with victims of crimes (women and children).[885] In the realm of child justice, mostly their service begins at the end of the judicial process through preparation of the social inquiry report after the child is convicted of the crime. In a few cases, social workers were present during police interrogation in the court[886] or the police station[887] in the place of parents or guardians and prepared the child for the interrogation. It should be noted that the service should be available at the early stage of the process, particularly during trial.[888] However, it is not practiced in the Ethiopian child justice system even in serious cases where this assistance should be available in addition to legal assistance.

5.3.3.6 Preparing the Child and ensuring his/her Understanding

As discussed in chapter three, preparing the child and ensuring his/her understanding are components of effective participation. For the child to freely and effectively express his/her view, s/he must be well informed about the rights and the processes[889] including the charges, possible consequences and options.[890] Hence, decision-makers must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be and inform the child of the right to express her/his opinion, and about the impact that his/her expressed views will have on the outcome.[891] This is not envisaged in the laws and is not done in the practice of the Ethiopian child justice system.[892] This is because, as mentioned above, the real parties in the debate are judges and counsels, and children are not participants.

Effective participation of CICWL also requires ensuring the understanding of a child of the proceedings and the decision reached. Hence, to the extent possible, legal jargon shall be avoided and an explanation shall be given to a child about what is going on in the court and judgments.[893]

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[885] Interview with, Hiwot Fanta, Social Worker, Debre Markos City Woreda Court (Debre Markos, 16 Februuary 2022); Meseret Haile, Social Worker, Hawassa City First Instance Court (Hawassa, 16 March 2022); Mintwab Mufato, Psychologist, Hawassa City High Court (Hawassa, 17 March 2022); Sitota Kifle, Social Worker, Hawassa City Justice Bureau (Hawassa, 21 March 2022); Eyerusalem Mulaw and Emebet Asefa, Social Workers, FFIC, Yeka Division (Addis Ababa, 18 April 2022).
[886] Interview with Meseret Haile (ibid).
[887] Interview with Hiwot Fanta (n 885).
[888] CRC, art 40 (2) (b) (iii).
[889] CRC Committee, General Comment No.12, para 60.
[890] CRC Committee, General Comment No.24, para 46.
[891] ibid para 41.
[892] None of judges and counsels interviewed has told children these issues before the trial.
[893] Rap, 'A Children's Rights Perspectives on Participation' (n 419) 108.

Regarding explanation of judgments (as one means of ensuring understanding), the CPC enjoins court to explain its decision to the child (art 177 (4). This stipulation is not sufficient as it confines the duty only to explanation of the judgment reached and does not seem to include how the decision is reached. Though not mentioned in the judgments, most judges said that the decisions are explained to the child. Regarding avoidance of legal jargon, judges, counsels and prosecutors are not concerned about it as children are not participants from the outset. In the cases observed, the researcher noted this as judges used jargon like 'order' and 'cross-examination' the Amharic equivalent of which are new for laypersons.

5.3.4 Decision without delay and Adjournment

The speedy disposition of child justice cases is important because the longer the time between the commission of the crime and the final disposition of the case, the more likely the response to lose its desired outcome.[894] Hence, time limits, which should be much shorter than those set for adults, must be set for the completion of the police investigation, the charging, and the final decision.[895]

Coming to the Ethiopian criminal/child justice system, the FDRE Constitution provides that accused persons have the right to trial within a reasonable time after having been charged (art 20(1)). Unlike the international instruments which use terms 'without delay' 'without undue delay' or 'without unnecessary delay', the Constitution employs the term 'within a reasonable time'. This seems a more elastic and longer period than the other terms imply.

The implementing law, the CPC, on its part regulates an aspect of speedy trial in adult cases. It does not, however, explicitly provide for the trial to be conducted without delay. It rather regulates the number of investigation days; the time within which a charge should be filed; and the grounds and length of adjournment of cases. Article 94 of the Code governs conditions under which adjournment of the hearing may be granted. The Code further enjoins the court to fix forthwith the date of trial and cause the accused and the public prosecutor to be summoned to appear on the date and at the time fixed by the court (art 123 (1)). However, it does not indicate for the trial date to be as short as possible to ensure respect for the right to a speedy trial of the

[894] CRC Committee, General Comment No.24, para 54.
[895] See also ACERWC, General Comment No.5, 25.

accused person. Administratively, however, courts tried to address this gap in their 'citizens' charter'[896] by fixing the length of disposition of the criminal case to be two months.

As far as CICWL is concerned, no mention of speedy trial of child cases is made in the CPC. However, the requirement that a child should be brought to the nearest Woreda Court immediately after apprehension (art 172 (1)) is one manifestation of a speedy trial. More importantly, it can be inferred from the cumulative reading of sub-articles 2 and 4 of the same article. After the child is brought to the court, sub-Article 2 requires the court to record the accusation or complaints and the name of witnesses. Sub Article 4 provides that *where the case requires to be adjourned*, a child shall be handed to the parents or guardians. The italicized phrase indicates that the trial of a child accused of crimes that fall within the jurisdiction of the Woreda Court is, as far as possible, on the same day of bringing the child to the court. For this reason, the court shall ask the person who takes the child to the court to state the list of witnesses and call them. All these indicate that the adult provisions concerning the issue do not apply to child justice. The non-applicability of preliminary inquiry[897] can also be taken as an indication of the intention of the drafters of the Code that child justice cases shall be disposed of as speedily as possible.

If this interpretation is correct, the approach taken by the Code is commendable from the perspective of a speedy trial. However, this too speedy trial could have a repercussion on other rights of the child such as the right to get a copy of the charge or accusation with sufficient time in advance of the trial to prepare the defense. Hence, the Code needs to strike a balance and regulate it clearly. In this regard, providing that 'child cases shall be tried without delay' will not suffice. The Code should try to fix the duration in terms of days that are short enough to avoid delay and long enough to ensure the right to defense of a child and proper determination of his/her case by the competent court.

In practice, completing a case on the same day of appearance is rare.[898] In all other cases, child justice cases are treated like adult cases and some cases even took a longer time than adult cases. In one case involving a child and an adult co-offender, the child's case was disposed of much

[896] This is a poster found in the walls of first instance courts. It contains time limits for the completion of tasks by the court including trial (civil and criminal).
[897] CPC, art 80 (3).
[898] Of the court files examined, only few cases involving theft and willful bodily injury are disposed on the same day.

later than the adult's case.[899] Moreover, despite the intention of the Code for the expeditious disposition of child justice cases, in practice, however, some cases took over a year. These cases were entertained in Addis Ababa.[900] Some other cases took over six months[901] for even children who were in detention pending trial and who were students.[902] Even though the crime with which these children were charged were serious crimes, the time the trial took is not reasonable.

As far as a speedy trial is concerned, one issue that should not be left without mention is adjournment. This issue has not been addressed in the child justice procedures. In the absence of this, our recourse is to Article 94 of the CPC that governs it for adult cases, and sparingly child justice cases. It provides that adjournment shall be ordered when the interest of justice so requires. It further provides a list of exhaustive grounds for adjournment and the maximum days of adjournment for certain grounds. The grounds of adjournment can equally apply to child justice. However, the special situation of children and the more serious effect of delay of cases on children require regulation of the matter in the child justice procedure. For instance, it may not be fair to give the same period of adjournment for adult and child justice cases. The grounds for adjournment also need to be approached from this perspective.

Coming to the practice of courts in the child justice system, they usually adjourn cases if the child, counsel or the prosecutor fails to appear (art 94 (2) (a)); when witnesses are not present (sub (c); where the charge needs to be amended; a trial cannot be conducted unless another proceeding is completed (age examination) (sub i); if it cannot be completed in one day (sub (l); and for reason personal to the judge (which is not allowed in light of the exhaustive list of grounds of adjournment). The days of adjournment shall be sufficient to enable the purpose for which the adjournment was granted to be carried out (art 95 (1)). However, the date shall not exceed one week for certain grounds including where the parties failed to appear (art 94 (3)). This is not practically respected by courts. In the majority of court files examined, the date of adjournment due to the absence of the child or prosecutor or for the examination of the age of the

[899] Interview BG (n 703).
[900] In the case *Y v Prosecutor* (n 702), it took one year and ten days while in the case *YZ v Prosecutor* (n 786), it took around one year and five months.
[901] *H v Prosecutor* (n 734) took seven months and 18 days; *B v Prosecutor* (n 786) took eight months and 16 days; *BG v Prosecutor* (n 790) which was pending at the time of the data collection took eight months and 19 days; *HD v Prosecutor* (n 790), a pending case, took six months and 14 days; *M v Prosecutor* (n 733) took seven months and seven days.
[902] *M & Z v Prosecutor* (n 783) took six months and 23 days while *SH v Prosecutor* (n 781) took eight months and 23 days.

child (production of documentary proof) is more than seven days. In some cases, the day extends up to over a month[903] and close to two months.[904]

5.4 Post-trial Right: Privacy of the Child, access to Judgment Register and Publication of the Judgment

Protection of the privacy of CICWL is one of the key due process rights in the child justice system. The privacy of children may be at stake at various stages of the proceeding, and the manner of publicizing and keeping the records of judgments should adhere to this safeguard. This requires confidentiality of court files and records of children and non-disclosure to third parties except for those directly involved in the investigation and adjudication of the case[905] The same is provided under Article 174 of the Criminal Code that 'entry in the judgment register of the measures and penalties affecting them to be made merely for the information of the official, administrative or judicial authorities concerned, and in no case shall excerpts from their record be communicated to third parties'.

Regarding publication of judgment, Article 174 of the Criminal Code provides that the publication of the judgment (art 155) with respect to children shall never be effected through the mass media. The definition of mass media can be found in the section of the code regulating crimes committed through mass media and includes newspapers, books leaflets, journals, posters, pictures, cinemas, radio or television broadcasting or any other means of mass media (art 42(2)).

Nonetheless, one should bear in mind that the medium of publication is of no concern as far as the privacy of children is concerned. This is because even other means of publication like case law reporting including online reporting should be anonymous.[906] This is typically relevant in the Ethiopian justice system where the Federal Supreme Court has the power to publicize selected cassation decisions. The model law further prohibits oral recital of the offense (art 44 (3)). Therefore, what matters is whether the medium used is capable of being accessed by other people other than state officials. It is also possible to argue that research works should not reveal the identity of the child. There is a gap in these two latter means of revelation of the identity of

[903] *YB (2) v Prosecutor*, Gamo Zone High Court, File No.41943 (2021); *Y v Prosecutor* (n 702); *SH v Prosecutor* (n 781).
[904] In *YZ v Prosecutor* (n 786), it was adjourned for 53 days.
[905] CRC Committee, General Comment No.24, para 67.
[906] ibid para 68.

the child in the Ethiopian child justice system in that a cassation decision and researchers use the actual name of the child as well as the nature of the crime committed.[907]

5.5 Conclusion

The due process rights and special procedures of the Ethiopian child justice system are contained in the 1961 CPC. The Code contains only ten Articles that cover the issue of arrest, the right to prompt bringing to the court, investigation, charging, pretrial detention, the right to counsel, and trial procedures. These are too few procedural safeguards. There are other due process rights that a child justice system should recognize and enforce as provided under the CRC, ACRWC and other relevant standards. These include the regulation of the manner of arrest, informing parents of the arrest of the child, the means and procedures of proving the age of the child, diversion, content and handing of a copy of charge or complaint, and requirements that ensure effective participation of the child such as child-friendly court setting, mandatory presence of parents during trial, provision of assistance by social workers and psychologists, preparing the child and ensuring his/her understanding. The right to privacy of CICWL throughout the proceeding is not recognized in the Ethiopian child justice system either.

Despite the terseness of these provisions, the Code failed to include a provision that links the adult procedures to the child justice procedures. In fact, by virtue of the principle of equality and non-discrimination, the adult procedures shall apply to children as well if they can serve their best interests. However, analogous application of adult procedures to children is not an effective way to ensure the due process rights of children as warranted by their personal circumstances.

The lacuna is reflected in the practice in that children are arrested without warrant in warrantable cases; there is no trend of informing parents of the arrest of the child; discrepant means of proving age; insufficiency of the content of the complaints and failure to hand a copy of the same and the charge to the child in advance of the trial; and little effort made to make the court environment child-friendly (and variation among courts in this regard).

Furthermore, two problems are identified concerning the due process rights of children incorporated in the CPC. First, some due process rights are to some extent discriminatory. This is the case for arrest as complainants are allowed to bring the child to the court (arrest) which is not

[907] The researcher refrained from citing the case and research works to comply with the respect for the privacy of the child.

the case for adults. The same is true regarding the right to court-appointed counsel of children as the CPC conditioned it on the seriousness of the crime (punishable with rigorous imprisonment exceeding ten years) and on the absence of parents when the crime committed is minor (below the above threshold). This deviates from the 'miscarriage of justice' requirement of the constitution.

The second relates to the practical enforcement of the rights in that some rights are commonly violated and some others are not strictly observed. The right of children to be immediately brought to the nearest Woreda Court is not respected in practice as this research only found two cases where children were brought on the day of their arrest or crime. Although pretrial detention is prohibited, the research found that children were detained pending their cases in police stations and remanded to the remand home and prisons by courts. More tellingly, this scenario includes children who have parents. There is a practice of interrogating children before bringing them to the court although the CPC provides that investigation is court-led. Prosecution is not court-authorized in the regions and is framed for every crime (minor and serious). Regarding examination of witnesses in the regional courts, the practice seriously deviates from the legal prescriptions (art 176 of the CPC) and parties and judges maintained the roles they have in adult cases where the judge umpires the adversarial debates between the prosecutor and the counsel. There were cases where children with no parents or legal guardians are tried without getting a counsel appointed even in courts with their own defense counsel. Although adjudication of child justice cases intended to be without delay, trial of cases took up to a year and some cases took over six months involving children who are in detention. This is partly attributable to the adjournment of cases for grounds and longer duration not allowed under the CPC. The right to privacy of the child is not fully respected either as case reports are not anonymous.

Therefore, the due process rights recognized in the CPC and enforced in practice do not effectively recognize the special circumstances of children.

CHAPTER SIX

DISPOSITIONS IN THE ETHIOPIAN CHILD JUSTICE SYSTEM: LEGAL AND PRACTICAL ANALYSES

6.1 Introduction

The other special treatment accorded to CICWL under the international standards concerns dispositions that can be or shall be imposed when found guilty. Considering that the treatment of CICWL aims at the rehabilitation of the child and enabling him/her assume a constructive role in society, the standards prescribe custodial responses as measures of last resort and non-custodial measures as measures of first resort. Further, certain forms of penalties are prohibited from being imposed on children.

As a party to these standards, Ethiopia tries to adhere to the rules contained therein. The Constitution makes these standards an integral part of the law of Ethiopia. It further contains the rights of the child including CICWL. The implementing law, the Criminal Code, contains detailed rules regarding dispositions applicable to children aged from nine to fifteen years old. That means the special measures and penalties provided in the Criminal Code (arts 158-169) and probation (art 171) are principally applicable to this group of children. The applicability of the measures to those aged over fifteen and below eighteen is exceptional where their mental development is like that of the first group and when amenable to such measure as per the expert opinion, and for penalties, the court is given the discretion to impose those special penalties to the latter group by taking into account the age, disposition and the possibility of reform.[908]

Accordingly, the discussion under this chapter is principally on the measures and penalties applicable to children aged from nine to fifteen years.[909] Hence, the term 'child', 'children' or 'CICWL' used in this chapter in the context of the Ethiopian child justice system refers to this group unless expressly provided otherwise. This chapter, thus, examines these measures and penalties in light of the international standards that govern child justice and their practical implementation. Before this, however, it highlights some issues on the purpose of the Ethiopian child justice system and the determination of the actual disposition.

[908] See Criminal Code, arts 56, 176 and 177.

[909] The legal analysis part of this chapter is published as an article (Belayneh Berhanu, 'Ethiopia's Criminal Justice System relating to Children in Conflict with the Law: Interrogating the Legal Framework on Measures and Penalties' (2022) 16 (1) Mizan Law Review 59.

6.2 Purpose of the FDRE Criminal Code and sentencing in the Child Justice System

The purpose of the Criminal Code is to preserve the peace and security of society by preventing the commission of crimes principally through punishment;[910] to deter criminals from committing another crime and make them a lesson to others; or by providing for their reform and measures to prevent the commission of further crimes.[911] The measures for reforming criminals include probation, parole[912] and provision of education and vocational training to prisoners.[913] Whereas, measures to prevent the commission of a crime refer to those measures provided under Articles 134 and the following of the Code that can be imposed in addition to the principal punishments or after the convict has undergone the punishment. Therefore, the principal aim of the Criminal Code is the protection of society from crime through crime prevention via punishment and reform of criminals.

Courts are required to take this purpose of criminal law into account while determining the appropriate punishment and *measures provided under the Code*. Nonetheless, the measures and penalties must not violate human dignity.[914] The italicized phrase includes also measures and penalties in the child justice system as the latter are contained in the same code.

However, this purpose clause of the Code is not applicable/should not apply/ to the child justice system the principal aim of which is the rehabilitation of the child, not the prevention of crime by punishment.[915] Though the protection of society from crime is also one of the aims of the child justice system, it is not the principal aim. In other words, the principal aim of the child justice system is the rehabilitation and reintegration of children into their families and society. This is clearly provided under the 2011 criminal justice policy of Ethiopia (s 6.4.1). In the child justice laws (the Constitution, the Criminal Code and Criminal Procedure Code), this aim of the child justice system is not reiterated. The rehabilitative ideal of Ethiopian child justice can, however, be inferred from the substantive provisions of the Criminal Code that prescribe measures as principal responses and imprisonment as a measure of last resort and for a shorter period than applicable for adults;[916] and prohibition of death penalty for children.[917] Nonetheless, it is of the

[910] Criminal Code, preamble para 7.
[911] ibid art 1.
[912] ibid preamble, para 8.
[913] ibid para 9.
[914] ibid art 87.
[915] See CRC, art 40 (1).
[916] See Criminal Code, arts 157 with 166.

utmost importance for the Ethiopian child justice laws to explicitly provide the rehabilitative aim at least for the first group of children.

6.3 Assessment and Determination of Sentence

6.3.1 Social Inquiry Report and the use of Expert Evidence

The rehabilitative ideal of the child justice system requires courts to inquire into the personal, family and social circumstances of a child to decide on an appropriate response and foster the aim of rehabilitation. Thus, courts can call and examine ordinary persons or experts. This is what Article 54 (1) of the Criminal Code stipulates. It states that:

> For the purpose of assessing sentence [,] the Court may require information about the conduct, education, position and circumstances of the [child]. It may examine his parents as well as the representatives of the school, guardianship authorities and the institutions concerned.

The CPC reaffirmed this provision and empowered courts to call any person or representative of any institution to obtain information concerning the character and antecedents of the child to arrive at a decision that is in the best interest of the child (art 177 (2)).

In addition to examining these persons, the court may require them to produce any files, medical and social reports in their possession concerning the child and his/her family.[918] The Codes do not recognize an organized pre-sentence social inquiry report prepared by a professional person or an entity. They simply empower courts to call any person or institution and examine them or require them to produce relevant documents *in their possession* as regards the character of the child.[919] As the italicized phrase indicates, what is required is the production of documents in their hands and not a report prepared by court order after the verdict of guilt and before the sentence.

In practice, however, there are social workers in each city court established at the first instance/woreda level tasked with the preparation of a social inquiry report containing the personal and family background of the child to aid the courts with the imposition of the appropriate measure. They are generally constituted to deal with issues involving women and

[917] ibid art 176.
[918] ibid art 54 (1) para 2.
[919] Emphasis added.

children. In all places covered in this research, this initiative was begun by NGOs and now the ownership is transferred to the government.[920] The offices are constituted by at least two persons except in the case of Debre Markos[921] city and Nifas Silk division in the Federal First Instance Court.[922]

As the term 'may' used in both Codes indicates, the court is not required to demand such inquiry. However, leaving it to the discretion of the court is regrettable in case the crime is serious.[923] This is because to pass a tailor-made sentence that will ensure the objective of child justice, a pre-sentence assessment of the background of a child must be required unless it causes unnecessary delay in the disposal of the case to the detriment of the interest of the child.[924] In the majority of cases, in the courts with social workers, the practice is also the reflection of the law in that social inquiry reports are not prepared in all cases except the case of Lideta Bench where a decision on measures for every crime and child is reached after production of the social inquiry report.

Although not uniform, the reports generally have two parts. The first part covers information about the personal and family background of the child collected from the child, his/her parents, victims or their families, and sometimes from schools. This part also contains information about the causes of the crime, the statement of the child and his/her parents about the crime, their plan and the measure they desired for the court to impose. The second part contains recommendations to the court on the measure they deemed appropriate.

Regarding the use of expert evidence, the Criminal Code provides that the court may require the production of expert evidence regarding the physical and mental condition of the child and shall put such questions as may be necessary to any expert to inform itself as to the physical and mental state of the child and inquire what treatment and measures of an educational, corrective or protective kind would be most suitable (art 54 (2), para 2).

[920] Interview with Mahlet Tibebu, Coordinator, Child Justice Project Office, SNNPR Supreme Court (Hawassa, 17 March 2022); Mesfin Chanie, former Focal Person, ANRS Supreme Court Child Justice Project Office (Bahir Dar, 24 February 2022).
[921] Interview with Hiwot Fanta (n 885)
[922] Interview with Ruth Getie, Social Worker, FFIC, Nifas Silk Lafto Division (Addis Ababa, 18 May 2022).
[923] Beijing Rules, Rule 16.1.
[924] Child Justice Act of South Africa 2008, No.75 s 71(1) (a) and (b).

6.3.2 Considering Aggravating and Mitigating Circumstances

The Criminal Code provides grounds of mitigation or aggravation under Articles 82 to 86, and the procedure and rules of mitigation or aggravation in Articles 179 and the following. For effective implementation of these provisions, the Federal Supreme Court has issued a sentencing manual pursuant to the power given to it under Article 88 (4) of the Criminal Code.[925]

The question here is whether these rules can work in child justice cases. One may tend to say that aggravation and mitigation do not apply to child justice cases. This is because the Criminal Code provides special measures and penalties that take into account children's circumstances. In other words, the argument is that for instance, 'what measure could you impose after mitigating or aggravating a given measure?'[926] The Code provides measures with their specific circumstances of imposition. These arguments can be strengthened by the absence of a provision akin to Article 149 (3) under Article 177 of the CPC. Two judges impliedly raised this as a justification for not using these provisions saying that the procedure in child cases is different.[927]

This, however, is a misunderstanding of the purpose of mitigation and aggravation and this researcher argues that aggravating and mitigating circumstances should be considered in child justice cases (for both measures and imprisonment). For measures, aggravating and mitigating circumstances can be used to determine the gravity of the crime i.e. whether serious or minor. This is because the Criminal Code uses the gravity of the crime as a parameter for the imposition of measures i.e. reprimand and home or school arrest are for minor crimes or crimes of small gravity while corrective detention is for serious crimes. Thus, we cannot know whether the crime is minor or serious without considering these circumstances. This is because one of the determining factors is the circumstance of the commission of the crime. In addition, there are lots of provisions in the special part of the Code that provide for imprisonment with a wide margin by using phrases like 'rigorous imprisonment not exceeding or not less than a specified year' or 'rigorous imprisonment from this to that years', and so forth. For instance, if it says 'rigorous imprisonment not exceeding or less than 10 years', we do not know the exact punishment that

[925] The Revised Sentencing Manual No.2 (2006).
[926] Interview with Debebe Gezahegn (n 723); Lewoyehu Andualem (n 741).
[927] Anonymous 1 (n 866); Saba Keneni (n 855).

the crime deserves and its gravity to choose the appropriate measure.[928]

In practice, however, courts, in most cases, never considered aggravating and mitigating circumstances. Courts that took them never used them to determine the gravity of the crime as required by the respective provision providing the measure. These courts, after considering the aggravating and mitigation circumstances and fixing the penalty, resorted to the measures by reasoning that 'the responses are measures and penalties from Article 157-168 in case where the criminal is a child'.

The same is true for imprisonment in that aggravating and mitigating circumstances should be considered. Under Article 168 of the Criminal Code, imprisonment shall be imposed if the crime is punishable with rigorous imprisonment of ten or more years or with death. Furthermore, the duration of imprisonment in child justice cases is from one to ten years, not the one stated in the special part provision violated. In other words, the maximum penalty to be imposed on a child who committed a crime punishable by death is ten years. Again, to know whether the crime is punishable by imprisonment of ten or more years, we need to take into account aggravating and mitigating circumstances and make sure that it is punishable as such to resort to Article 168.[929] In other words, courts need to fix the duration before resorting to Article 168, say 10 years, and use proportional conversion to fix the duration under Article 168 (2). That is, if the duration fixed is ten years, courts may convert it to one year and increase the duration proportionately as it increases the maximum duration of ten years shall be imposed if the court decides that the crime is punishable by death. This interpretation cannot be substantiated with the practice as courts do not appreciate the unique feature of imprisonment in the child justice system. Of the cases that sentenced a child to imprisonment, only one relied on Article 168. This case simply refers to the duration of imprisonment stated in the provision violated (13-25 years) and decided that it falls under Article 168 as 13 years is over ten years. The judge then fixed the duration randomly to ten years of rigorous imprisonment.[930]

[928] Few judges also claimed they used them even for measures if raised by prosecutor (Interview with Anonymous, Former Children Bench Judge, Bahir Dar City Woreda Court (Bahir Dar, 8 Febraury 2022); Bayeh Embiale (n 712)) or as a norm (Interview with Birkie Tilahun (n 775)).

[929] This was also the position of some judges; Debebe Gezahegn (n 723); Gizachew Admasu (n 723); Abreham Abate (n 722).

[930] *F v Prosecutor (A)*, Gamo Zone High Court, Appellate File No.40765 (2021); *F v Prosecutor (AA)*, SNNPR Supreme Court, Appellate File No.36008 (2021).

6.4 Dispositions under the 2004 Criminal Code

6.4.1 Measures

6.4.1.1 Measures as first resort

After finding a child aged nine to fifteen years guilty of the offense, the court shall order one of the measures incorporated in the Criminal Code depending on the circumstances of the child concerned. Article 157 of the Criminal Code provides that:

> In all cases where a crime provided by the criminal law or the Law of Petty Offences has been committed by a [child] between the ages of nine and fifteen years (Art. 53), the Court shall order one of the following measures having regard to the general provisions defining the special purpose to be achieved (Art. 55) and after having ordered all necessary inquiries for its information and guidance (Art. 54).

The word 'shall' used in this provision indicates that it is mandatory to impose *one of the measures*[931] provided in the Code. This provision, when read together with Article 166 of the same Code, indicates that imposition of one of the measures shall be a measure of first resort irrespective of the gravity of the offense. Article 166 provides that courts may impose penalties if the measures have been applied and failed.

Unlike in the repealed Penal Code (art 161), the term 'law of petty offenses' is omitted in the Amharic version which may send an impression that the measures only apply to ordinary crimes. This is not, however, the case as the Code of Petty Offences recognizes school or home arrest (art 750 (2)).[932] In addition, the nature of some measures justifies their applicability to a child who committed petty offenses. In this regard, it is possible to argue that reprimand and admission to a curative institution can apply to a child convicted of petty offenses. This is because it is proper to reprimand or censure a child who transgressed the Code of Petty Offenses. And, admission to a curative institution is required when the condition of a child requires treatment due to his/her mental development, health, or addiction to drugs or other substances.[933] Therefore, there is no reason to exclude this measure in case where a child commits petty

[931] Nonetheless, a combination of reprimand and other measures except admission to curative institution can be ordered; see art 160 (2).
[932] However, as argued below in this research, in light of the principle that detention shall be a measure of last resort, home arrest shall not be a measure of first resort for ordinary crimes, let alone for petty offences.
[933] See Criminal Code, art 158.

offenses. This research argues that the rest of the measures (corrective detention and supervised education) do not/shall not apply to petty offenses as corrective detention is applicable for serious crimes,[934] and supervised education results in removal of the child from his/her family, which should be a measure of last resort,[935] and handed to a relative.[936]

6.4.1.2 Admission to Curative Institution[937]

This measure applies to a child whose condition requires treatment and where s/he is 'feeble minded, abnormally arrested in his development, suffering from a mental disease, epileptic or addicted to drink, abuse of narcotic and psychotropic substances or other plants with similar effect'. The court shall order his/her admission to a suitable institution where s/he shall receive the medical care required by his/her condition. This provision must be read together with Articles 48, 49 and Articles 129 and that follow it. That means, for a child to be subject to this measure, s/he must be responsible for his/her act. In other words, the underlying conditions mentioned in Article 158 must not be fully deprived of his faculty. The child must at least be partially responsible. This is because according to Article 53 (2) of the Criminal Code, the measures including this cannot be ordered unless the child is convicted.

6.4.1.3 Supervised Education[938]

If the child is 'morally abandoned or is in need of care and protection or is exposed to the danger of corruption or is corrupted, measures for his education under supervision' of his/her relatives, or any reliable person or organization shall be ordered. The conditions are not precise enough and amenable to easy implementation. Hence, it is proper to characterize or list acts or situations for each ground.

As the term 'shall' indicates, ordering such measures is mandatory. This indicates the protective and rehabilitative approach taken by the Ethiopian child justice system. It is the condition of the child that matters here. Thus, it is possible to argue that this measure is applicable irrespective of the nature of the crime. The practice also supports this interpretation as children who committed

[934] ibid art 162, Amharic version.
[935] Beijing Rules, Rule 18.2.
[936] Criminal Code, art 159 (1), para 2.
[937] ibid art 158.
[938] ibid art 159.

serious crimes like homicide[939] and grave bodily injury[940] are subjected to it.[941] This measure (decisions that mention Article 159 and/or ordered parents to supervise the child) is the most prevalent in the Ethiopian child justice system although the decisions are not based on the existence of one of the conditions necessary for the imposition of the measure. Most cases of supervised education are from the regional state courts and the research has found the measure in only one bench at the federal level out of the seven benches.

The measure does not necessarily entail requiring the child to attend regular education. This is because requiring the child to regularly attend school is one of the conditions that may be attendant to the original measure as provided under sub-article 2 of the same provision. If that is the case, the question is what kind of education or measure can be taken against a child found in the situations mentioned in the provision. The education may be a kind of moral and ethical education under the supervision and care of the above-mentioned persons or institution. This can be inferred from the situation of the child under which s/he is found i.e. morally abandoned or not properly reared or exposed to moral corruption (corrupted). That means if a child is in such situations, the proper response is to place him/her under the care and supervision of the supervisors and receive moral education and be properly reared to address the causes of criminality. To that effect, as a condition, a child may be required to regularly attend a school or undergo apprenticeship pursuant to sub-article 2. This can be inferred from the Amharic version of sub-article 1 which includes 'proper upbringing' as an element of the measure and paragraph 3 of the same sub-article which provides that the supervisors should ensure the good behavior of the child. In the cases mentioned above, however, the order that the courts made is confined to requiring parents to supervise the child or follow his/her education properly.

Another issue is who should cover the cost of upbringing of the child under supervision as well as the cost of education or apprenticeship. In other words, the issue is whether parents, if present and capable, are required to cover the cost or is it fully the duty of the supervisor. This researcher argues that if the parents or other persons responsible for the care of the child failed to exercise proper care and the child is sentenced to supervised education and handed to another person, they

[939] *YB (2) v Prosecutor* (n 903); *AY v Prosecutor* (n 878); *B v Prosecutor* (n 786); *SF v Prosecutor* (n 790).
[940] These are cases from Federal First Instance Court, Akakki Kaliti Division such as *B v Police* (n 727); *D v Akaki Kaliti Sub City Police*, FFIC Akaki Kaliti Division, File No.100685 (2022); *J v Akaki Surrounding Police* (n 727).
[941] However, all these decisions have failed to ascertain whether children were under one of the conditions stated under the Article 159, and some even failed to mentions the provision itself.

shall cover the cost as can be inferred from Article 179 of the CPC provided however, they are capable to do so.

A further normative issue here is why the provision deprives the child of his/her family care without indicating the absence of parents or legal guardians of the child or their incapability or unworthiness to discharge the obligation of guardianship and care of the child.[942] This is because the fact that the child is morally abandoned does not necessarily mean that the child has no parents or guardians. The term 'morally abandoned' or 'not properly reared' to the contrary seems to indicate that the child has parents, but that they are not properly guiding him/her to be a good person. This is because proper upbringing of a child is the primary duty of parents. In line with this interpretation, the provision needs to indicate whether the child has parents and their incapability or unworthiness to continue in their guardianship and that it is necessary to deprive the child of his/her family environment after hearing his/her view. A step must be taken to entrust this obligation to parents under a court order and when it is in the best interest of the child, instead of placing the child under the supervision of outsiders. Entrusting the child without these safeguards is against the principles and aims of the child rights/justice standards. That is a child should not be deprived of a family environment unless it is necessary in the interest of the child.

Furthermore, it is not clear whether these persons (relatives and reliable persons) are duty-bound to take the responsibility of caring for and supervising the child. Presumably, other reliable persons may not be obliged to do so as it is unlikely for the court to require him/her to take the responsibility of supervising the good behavior of the child whom s/he does not know. Relatives may, on the other hand, be obliged to take responsibility. Nonetheless, entrusting a child to unwilling relatives will, in the end, result in failure of the measure unless backed by a stringent liability for failing to do so.[943]

6.4.1.4 Reprimand; Censure[944]

This measure will be imposed when 'it is appropriate and designed to produce good results having regard to the capacity of understanding' of a child and the 'not serious nature of the crime or the circumstances of its commission'. It entails directing the attention of the child to the

[942] Fortunately, however, the practice is not as per the word of this provision.
[943] A recall or admonishment is the only measure that can be taken against the supervisors; see art 159 (3).
[944] ibid, art 160.

consequences of his/her act and appeal to his/her sense of duty not to engage in similar acts in the future. This measure may be coupled with any other penalty or measure when the court considers it expedient to do so. Hence, the Ethiopian child justice system recognizes a combination of measures and a measure and penalty. Therefore, if the court considers it expedient, a reprimand may be ordered together with a measure of supervised education, school or home arrest or with a measure of admission to corrective institutions, or with penalties; fine or imprisonment.

The measure applies to crimes that are not serious in gravity. In other words, it applies to minor crimes.[945] Nonetheless, it is not clear what crimes would warrant this measure. In the face of such silence, reference may be made to Article 89 of the Criminal Code which defines minor crimes as those that entail simple imprisonment not exceeding three months or a fine not exceeding one thousand birr. This Article falls in Book II of the Code which deals with the determination of punishments and measures, and in the section that deals with general provisions applicable to both adult and child justice cases. The fact that the Code then deals with punishments for each group of offenders (adults and children) in separate sections may support this interpretation.

Nonetheless, based on the fact that child justice is premised on the favorable treatment of children compared to adults in similar situations, one can challenge this interpretation and recommend for courts to apply the measure to crimes of a nature of higher gravity than the ones mentioned in Article 89. For this reason, courts can use crimes that entail simple imprisonment as a benchmark. Support for this line of interpretation can be inferred from section 4.6.2.1 of the criminal justice policy which allows diversion for crimes punishable with simple imprisonment. This interpretation will not help if the crime is punishable with a fine. The question is which amount of a fine makes the crime minor?

In practice, courts are not seized with this issue and imposed the measure for even serious crimes that are punishable with rigorous imprisonment like Articles 627 (1)[946] and 631 (1) (b).[947] When asked about the legality of reprimand for serious crimes, some judges replied that the absence of corrective centers forced them to do so. However, none of the decisions that imposed it has

[945] Explicit in the Amharic version.
[946] *S v Prosecutor* (n 730).
[947] *E v Prosecutor*, Bahirdar Zuria Woreda Court, File No.11944 (2021).

mentioned this as a reason. Others never know the existence of such condition. This makes sole reprimand the most prevalent in the Ethiopian child justice system next to supervised education in contrast to the finding from interviews with judges that make it a number-one measure.[948]

6.4.1.5 Home or School Arrest[949]

In cases of crimes of 'small gravity' *and*[950] when the child 'seems likely to reform', the court *shall*[951] order that s/he be kept at school or in his/her home during his/her 'free hours' or holidays and perform a specific task adapted to his/her age and circumstances. In light of the strict interpretation of criminal law, the conjunction 'or' excludes concurrent imposition of both school and home arrest. Further, imposing both at a time unduly intrudes on the liberty of the child. In practice, however, courts imposed both at once.[952]

According to this provision, a child sentenced to school arrest shall be kept at a school during his/her free time. The term 'kept at a school' seems to confine itself to requiring the child not to leave the compound of the school, not requiring him/her to stay in the class during breaks.

The measure applies to crimes of small gravity. However, it is not clear as to what type of crimes or crimes committed under which circumstances would qualify as crimes of 'small gravity'. The Amharic version uses the term 'not serious' which does not necessarily mean minor crimes and seems to exclude Article 89 crimes. This interpretation is supported by the principle of equality and favorable treatment of children. This is because the penalty for minor crimes to be imposed on adults under Article 89 is reprimand, while it would be home or school arrest for children. Home or school arrest results in interference with the liberty of the child while reprimand does not, which is discriminatory. Therefore, crimes of small gravity for home or school arrest shall include crimes higher in gravity than the ones mentioned under Article 89 of the Criminal Code. As such, as indicated in the case of reprimand, the court can use the definition of crimes that would entail simple imprisonment as a parameter. According to Article 106, simple imprisonment may extend from 10 days to three years, and in exceptional cases, to five years. Hence, courts should use these Articles (89 and 106) together in that the minimum term of

[948] Addis Ababa University Office of Research Director (n 59) 76; Fenta (n 61) 126.
[949] Criminal Code, art 161.
[950] Emphasis added. The conjunction 'and' is used in the Amharic version, according to the rule of interpretation mentioned somewhere above, it prevails over the English version.
[951] Indicated in the Amharic version.
[952] *K v Prosecutor* (n 719); *AM v Prosecutor* (n 733).

simple imprisonment for school or home arrest should not be lower than three months. For crimes punishable below this, the court may order reprimand, which is less intrusive than school or home arrest. This does not mean that reprimand should only be ordered for this degree of crime. Contrary to this stipulation and interpretation, the Code of Petty Offences provides school or home arrest as a penalty which is not a proportionate response.

Similar to the case of reprimand, courts did not engage in this issue and imposed this measure for even serious crimes punishable with rigorous imprisonment of up to ten years.[953] Nonetheless, this measure is the least utilized in practice. Out of the 71 cases involving children below the age of 15 reviewed, in only two of them was this measure imposed. Some judges attribute this to the difficulty of implementing it or its presumed ineffectiveness[954] and this makes the practice far better than the law in terms of deprivation of liberty though unwittingly.

The other parameter that can be used to order either school or home arrest, or reprimand is the personal circumstances of the child. A measure of school or home arrest can be imposed for students or children who have homes. However, there may be children who committed crimes of the nature defined above but who are not students or have no home. In such a case, the court may reprimand the child if it thinks it would produce a good result. The fact that the child is out of school does not necessarily mean that s/he is corrupted or abandoned; s/he may be doing life-supporting activities like shoe shining or selling chewing gum, biscuit, mobile cards and so forth in the streets. It is unproductive to order these children to home arrest as this is against their survival, and hence reprimanding them would suffice. Considering measures and penalties from the lightest to the most severe ones is the duty of courts as provided under Article 88 (3) of the Criminal Code. Thus, having a home or not should not be the only consideration in determining either of the two measures. These situations in which children can be found would lead to suggestions for provision to include the appropriateness of home arrest, instead of considering only its rehabilitative capacity.

6.4.1.6 Admission to Corrective Institution[955]

A child *may be* admitted into a special institution for correction and rehabilitation by taking into account his/her bad character, antecedents or disposition and the gravity of the crime and the

[953] *AM v Prosecutor* (n 733).
[954] Interview with, Leuleselassie Liben (n 789); Sera Chalachew (n 789); Anonymous 1 (n 866).
[955] Criminal Code, art 162.

circumstances under which it was committed.[956] The child shall there receive the general moral and vocational education, *and other skills* needed to adapt him/her to social life and the exercise of an honest activity.[957]

The imposition of this measure is not mandatory as the discretionary term 'may' indicates. The question then is what measure can a court exercising this discretion impose on a child under these conditions? This provision is distinct from the previous provisions in that unlike the provisions of Articles 160 and 161 which apply for 'minor crimes' or 'crimes of small gravity', it deals with 'serious crimes'. Similarly, unlike Article 159 which deals with a child in need of protection or morally abandoned, Article 162 applies to a child with a bad character or antecedent. Hence, in the face of an exhaustive list of measures, it is not clear what measure the court would impose if it wants to exercise the discretion envisaged by the term 'may'.

This vagueness may be ameliorated by examining the status of the suspension of penalty under the Criminal Code. Suspension of penalty is provided under the subsection of the Code that deals with 'common provisions' i.e. provisions common to measures and penalties. This can be interpreted as making suspension of penalty both a measure of first and last resort depending on the case. The question again is when it should be a measure of first resort when pitted against this measure (corrective detention).

Its first resort nature can be justified by taking the rule of the child justice system when it comes to dispositions. In the international child justice system, detention or imprisonment shall be a measure of last resort. Therefore, suspension of imprisonment shall be ordered as a first measure instead of sentencing a child to corrective detention. In other words, as the provision of the Criminal Code stands, deprivation of liberty of the child in the form of corrective detention shall be confined to serious cases (Amharic version),[958] and in other cases, suspension can be ordered. It can be argued that the fact that the law sets a limit on the nature of a crime the sentence of which can be suspended (art171) while not doing the same for a measure of corrective detention (art162) is informed by the difference in the effect of the measures on the liberty of the child.

[956] Emphasis added.
[957] Emphasis added and included in the Amharic version.
[958] By this interpretation, the researcher is not justifying the provision of the Code that makes detention in corrective centers a measure of first resort.

That means, if a measure would deprive a child of his/her liberty, no limit on the seriousness of the crime may be made while in contrary a limitation may be imposed.

Then, the corollary issue is how serious the crime should be to entail admission to a corrective institution and what crimes would entail suspension of a sentence. The provision does not make any qualification as to the measurement of the seriousness of the crime for corrective detention. Hence, our recourse is Article 108 of the Criminal Code which deals with rigorous imprisonment and what sorts of crimes deserve it. According to this Article, rigorous imprisonment applies only to crimes of a very grave nature committed by criminals who are particularly dangerous to society. It extends from one to twenty five years, and in exceptional cases, to life imprisonment. Therefore, this research argues that the court shall use this as a benchmark to sentence a child to corrective detention. In this regard, Rule 17.1 (c) of the Beijing Rules further provides that children should not be deprived of their liberty unless they are guilty of committing a violent crime against a person. In this regard, inference can be made from Article 168 (1) (a) of the Criminal Code which provides for admission to corrective detention under stringent conditions when the crime is punishable with rigorous imprisonment for ten or more years. Further, Article 171 puts a limitation in that crimes punishable with rigorous imprisonment for ten years or more or with death are not eligible for suspension. Hence, it can be argued that corrective detention shall apply to crimes of this nature while suspension (probation) to those punishable below ten years (art 171) provided that other conditions are fulfilled.

In practice, corrective detention is mostly imposed on children who committed serious crimes punishable with rigorous imprisonment. In these cases, courts do not consider the character or antecedent of children. In other words, this measure is ordered even though the social inquiry reports showed that children have good character or antecedents. Further, in few cases, this measure is imposed for crimes punishable with simple imprisonment (art 555 (c))[959] and for theft.[960] In the first case, it was justified by the denial of the crime by the child and taking this as an indication that the child would commit another crime. In the latter case, the status of the child as a street child was one of the grounds that the court relied on. Respondents also confirmed this

[959] *AA v Police* (n 780).
[960] *EC v Police* (n 780). The researcher also observed similar cases from the record of the Addis Ababa Rehabilitation Center.

reasoning in that street children are mostly sent to the corrective center after conviction.[961] In its worst form, corrective detention for theft cases was imposed by a regional court that caused the child to be sent to the capital city as observed from the records of the Addis Ababa rehabilitation center.

6.4.1.7 Referral to Community-based Correction Centers

This measure was found in the practice of courts and has no legal backup under the Ethiopian child justice system. This measure required a child to go to a center during his/her free time for a specified period to get guidance and counseling from the center's social workers and use various services like library and play.[962] This measure was not in the form of pretrial diversion. It rather was ordered after the child is tried and found guilty of the crime. The research found few cases where children were diverted to such centers in Bahir Dar[963]and this was also a case in Addis Ababa a few years ago when there were CBCCs in some selected sub-cities.[964] In terms of hierarchy, it was above a measure of reprimand and below corrective detention.[965] In other words, the crimes that entail this measure were those more serious than crimes that can entail reprimand but less serious than the ones that can entail corrective detention. In the cases mentioned above, however, a child who committed a crime punishable with 13-25 years was referred to the center.[966]

6.4.1.8 Measures and the principle of 'detention as a last resort'

According to Article 37 (b) of the CRC, detention or imprisonment of children shall be a measure of last resort. The Ethiopian child justice system does not explicitly restate these principles. Further, gauging the measures envisaged in the Ethiopian child justice system discussed above, they are not in compliance with this principle. This is particularly the case for home arrest. According to the HRC, deprivation of liberty involves a severe restriction of motion within a narrower space than mere interference with the liberty of movement and includes, inter

[961] Interview with, Anonymous 1 (n 866): Saba Keneni (n 855).
[962] For the detailed rehabilitation schemes that the program was using, see Deda (n 89) 63-64.
[963]*A v Bahir Dar City Police* (n 702); *S v Prosecutor* (n 730). In the latter case, the referral was additional to suspension of the pronouncement of the sentence.
[964] These centers now are phased out. Interview with, Leuleselasie Liben (n 789), Adugna Muleta, Area Program Officer, FSCE (Addis Ababa, 26 April 2022); Banchiwosen Wondimeneh, Team Leader, Women and Children Rights and Welfare Protection Unit, Arba Minch City Women and Children's Affairs Office (Arba Minch, 30 May 2022).
[965] Interview with Leuleselassie Liben (n 789).
[966]*S v Prosecutor* (n 730).

alia, house arrest.[967] Worse, the Code allows a home arrest for minor crimes including petty offenses, which is not proportional.

The measure of admission to a corrective institution is also a measure of first resort. Confining the measure to serious crimes committed by a child with bad character or antecedent will not make it a measure of last resort. The lack of precision on what constitutes bad character or antecedent would make the measure fail the test. It may not necessarily mean the presence of prior conviction. In that sense, a child with a history of bad character may face this measure even though s/he comes in conflict with the law for the first time by committing a serious crime. Moreover, courts that sentenced children to corrective detention have never mentioned that the child has a bad character or antecedent which makes the first resort nature of corrective detention more clear. Furthermore, courts-imposed corrective detention is a measure of first resort for crimes punishable with simple imprisonment.

Similarly, the discretionary nature of the measure may not also make it a measure of last resort. This is because it is not clear in the Code what measure the court wishing to exercise this discretion would impose on a child. The only measure that relates to corrective detention is supervised education as it can be imposed for even serious crimes, and the character of the child is a determining factor. However, the condition of the child differs in the two cases. In the case of Article 159, the child is exposed to corruption or corrupted i.e. developing a bad character while in the case of Article 162; the child has already developed that character. The other measures cannot apply as they apply for minor crimes or to a child in need of medical treatment. As indicated above, courts in the exercise of their discretion may wonder to suspend a sentence as a measure of first resort instead of sending the child to a corrective institution. However, probation cannot substitute corrective detention when a child who is not under one of the conditions mentioned under Article 159 committed a crime punishable with ten or more years in which suspension is not allowed as provided under Article 171.

6.4.1.9 Duration of the measures and the principle of 'detention for the shortest appropriate period of time'

A measure for treatment (admission to a curative institution) shall apply for such time as is deemed necessary by the medical authority and may continue until the child attains 18 years of

[967] HRC, General Comment No.35, para 5.

age. It shall cease to be applied when, in the opinion of the medical authority, it has achieved its purpose.[968] In other words, this measure is enforceable until it achieved its goal but not after the child attains majority age. The justification for such undefined period can be the inability of the court to fix the duration as the measure is dependent on the personal circumstances of the child such as mental state and addictions. The court cannot reasonably forecast when the measure will have addressed the root causes of criminality.

However, the liberty of the child subjected to this measure can be at risk as the detention may be prolonged. This is because the law does not entrust the court to supervise or review the measures in general and the measure under discussion in particular except that it is authorized to vary the orders *up on the recommendation of the management of the institutions*.[969] Thus, the duration of the measure shall continue until the authority deems it achieved its purpose and apply to the court for variation[970] or until the child attains 18 years of age. This will subject children to unsupervised prolonged detention. The researcher was unable to validate this assertion as there are no cases where children have been subjected to curative detention and courts that sentenced children to supervised education have never fixed the duration.

This risk can be eased to some extent by Article 180 of the CPC which allows the court to vary the order on its initiation. However, this provision is not a guarantee unless the law specifically mandated the court to supervise the enforcement of these measures by, for instance, requiring the supervising authorities to report regularly the status of the child under their mandate or entrusted to supervise.

The duration of admission to a corrective institution, as a general rule, is from one to five years.[971] The phrase 'as a general rule' signifies the possibility of releasing the child before serving the full length (conditional release) and review of the duration by the court under the guise of variation so that the duration may be reduced. This period shall in no case extend beyond the coming to age of the child. The question, here, is what does this imply? A) Does it imply that the detention ends after the child attains majority age irrespective of its result on the reformation of the child?, or B) To mean that if the period extends beyond the coming to age of

[968] Criminal Code, art 163(1).
[969] ibid art 164.
[970] This is more explicit in the Amharic version of art 164 (1), para 2.
[971] Criminal Code, art 163 (2).

the child, the child will be transferred to penitentiary detention or fined if s/he is not completely reformed?

The same stipulation that the duration shall not extend beyond the coming to age of the child is provided for curative detention and supervised education. However, the meaning and effect of this phrase is not clear. For example in the case of admission to a curative institution, does it mean that a child who is mentally ill shall not get any treatment and get released? Or does it mean that the costs of treatment are not for the state but for the parents unless ordered by the court to be covered by them pursuant to Article 179? What if this child has no relatives? Similarly, for supervised education, does it mean that s/he should be free from the supervision irrespective of the effect of the supervision on the behavior of the child or should s/he be punished as a criminal?

The maximum period to be served in corrective detention is five years unless the child is released conditionally[972] or varied and reduced by the court under Article 163 of the Criminal Code and/or Article 180 of the CPC. Given the interpretation of 'serious crimes' that this researcher gives for the purpose of corrective detention, the period of corrective detention can be considered as the 'shortest' period' and complies with the principle as enshrined under the CRC. In practice, however, children are sentenced to corrective detention for up to 17 years. This indicates that the courts that did so have relied on the penalty provided under the violated provision instead of on Article 168. These are cases that came from regional states.[973]

The duration of school or home arrest is not addressed in Article 164 of the Criminal Code; rather it is provided in Article 161. Accordingly, the Code requires the court to determine the duration of the restraint in a manner appropriate to the circumstances of the case and the degree of gravity of the crime committed. However, one may ask why the Code makes it open for the court to determine while it fixes the duration of a corrective measure. Nonetheless, home arrest deprives a child of his/her liberty and thus, it should be for the shortest appropriate period. Hence, since this measure is applicable for crimes of small gravity, and the maximum duration of corrective detention (for serious crimes) is five years, it is safe to argue that the maximum duration of home arrest shall be lower than five years. It is not specified whether the duration

[972] ibid para 3.
[973] The researcher observed this from the records of the Addis Ababa Rehabilitation Center and confirmed by the Center's Counselor (Moges Demeke (n 705)).

should be fixed in days, months or hours. It is left to the discretion of the court to choose one. However, it must be noted that fixing the duration of home arrest in days is not appropriate for the reason that a child should not be required to stay the whole day at home.[974]In the practice of courts, the duration of home and school arrest is fixed in years up to four years (almost equivalent to the term of imprisonment provided in the provision violated)[975] which is too long and fails to meet the principle of 'shortest period'. This researcher contends that this is attributable to the law that makes the duration open and leaves it to the discretion of the court.

6.4.2 Penalties

6.4.2.1 The Principle: Penalties as measures of last resort?

Article 166 of the Criminal Code provides that the court may sentence a child to one of the penalties (fine or imprisonment) where measures have been applied and have failed and after having ordered such inquiries to be made as may seem necessary. This means that a child aged nine to fifteen years will not be subject to one of these penalties, irrespective of the seriousness of the crime,[976] before s/he first be subjected to one of the measures and failed to reform.[977] The plural term 'measures' and the phrase 'have been applied and failed' indicate that penalties are measures of last resort. That means, the court shall try the available measures (one after the other in the same case or a different case, as the case may be) before imposing a penalty on a child.[978]

The practice is contrary to this principle and courts have imposed a penalty, imprisonment, on children who came in conflict with the law for the first time without first trying the measures.[979] This is due to the lack of awareness of this principle among judges. When asked whether they have imposed imprisonment, most judges responded that they have not imposed it due to the absence of separate prisons and the prohibition that children should not be imprisoned with adults. None of the respondents mentioned the last resort nature of imprisonment as a

[974] UNODC, 'Handbook on Alternatives to Imprisonment' (n 594) 38.
[975] *K v Prosecutor* (n 719). In another case where the child is found guilty of a crime punishable with rigorous imprisonment up to ten years, the duration was one year (*AM v Prosecutor* (n 733)). This shows how the position of the Code paves the way for discrepant practices.
[976] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 122.
[977] See also Dejene Girma, *A Handbook on the Criminal Code of Ethiopia* (2013) 78.
[978] ibid.
[979] *F v Prosecutor (A)* (n 930); *A v Hawassa City Prosecutor*, Hawassa City High Court, File No.28731 (2020); *G v Prosecutor* (n 733); Interview with, Gizachew Admassu (n 723); Bayeh Embiale (n 712); Personal communication with Mekonen Balew, Judge, East Gojjam High Court (Debre Markos, 14 February 2022); Personal communication with Limenih Mihretie, Defense Counsel, East Gojjam High Court (Debre Markos, 22 February 2022); Phone communication with Yeshiwas Abrere, Prosecutor, South Gondar Zone (23 July 2022) (He told the researcher that he knew three cases in this regard).

justification. The same understanding is held by judges at the apex of the judicial ladder, at the cassation division of the Federal Supreme Court.[980]

The imposition of penalties is conditioned upon the failure of the measures. However, what constitutes failure is imprecise. Does it include a breach of conditions for instance attached to supervised education? Does it only refer to the commission of a further crime while undergoing or after having undergone the measure? The Amharic version seems to include a breach of conditions or any other faults as it stipulates for the court to determine the degree of fault.[981] Had the Code intended to confine 'failure of the measures' to the commission of a new crime, it would have explicitly done so. Punishing a child who is undergoing a measure, for instance, for breach of conditions or even for breach of the measure itself (e.g. school or home arrest), or has undergone one of the measures may invite the issue of double jeopardy. However, the stipulation that children sentenced to one of the measures are not considered as punished under the criminal law (Criminal Code, art165) may be used in defense of this position.

Whether the failure is due to a breach of conditions or commission of a new crime, one thing that must be clear from the principle of 'detention or imprisonment as a measure of last resort' and the provision of Article 166 is that the first failure of the measure should not necessarily result in the automatic imposition of a custodial sentence.[982] If a single failure to comply with the condition of the measures or the commission of another crime leads to an automatic imposition of custodial measures, detention is taken as a 'second resort', not as a last resort. It is for this reason that Article 166 of the Criminal Code (Amharic version) gives the court the power to assess the gravity of the fault. Further, the fact that a child has committed a new crime while undergoing or after having undergone a measure or committed any other fault may not be an indication of the failure of the measure. This is because the circumstances under which each measure is imposed are different.

For instance, a child who committed a crime with a mental problem and is admitted to a curative institution may commit a crime after s/he recovered from the trauma and is released and may be an addict, for instance, of drink or other substances (art158). Therefore, s/he should be given another chance of being subjected to the same measure. Similarly, a child who served corrective

[980] For the sake of privacy of the child, the researcher refrained from mentioning the file number.
[981] cf Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia (n 62) 121.
[982] See Model Law on Juvenile Justice, art 54 (13); Tokyo Rules, Rule 14.3.

detention or who served a measure of supervised education may later commit a crime and is in need of treatment due to addiction to alcohol or other substances. In such cases, s/he shall be admitted to a curative institution instead of being fined or imprisoned. In short, the circumstances under which s/he committed the first and the later crime shall be the same or at least similar. Even the seriousness of the crime should not be a sole consideration to rule that the measure has failed. This is clearly indicated under Article 168 (1), the chapeau and (b) in that for the child to be imprisoned for the commission of such a serious crime, s/he must be incorrigible and a cause of insecurity to others.

Furthermore, when a child who has been admitted to a corrective institution commits another crime of minor nature, it is difficult to conceive that the measure has failed to reform the child. In this regard, Fisher argued that commission of a new crime is not decisive to say that the measure has failed, and it needs assessment of failure by the judge.[983] This is because reformation may not necessarily mean that the child will never commit a crime in the future. The fact that the subsequent crime is a minor may, on the contrary, be taken as a success of the first measure in reforming the child to some extent. In such a case, the court may try another measure instead of sending him to penitentiary detention.

The most extreme effort to comply with the principle of 'detention as a last resort' may also require the court to give a second chance to a child by subjecting him/her to similar measures for the new crime. In such a case, a child may be subjected to similar measures with stringent conditions. This is typically the case for supervised education in that if the child was subject to lenient conditions, more stringent conditions may be attached if the court believes that the first measure with lenient conditions failed to reform the child. In exercising the discretion given under Article 166 (as the term ‘may’ indicates), courts must take into account all these caveats/considerations to make imprisonment or detention a measure of last resort in the Ethiopian criminal justice system.

[983] Fisher, ‘Criminal Procedure for Juvenile Offenders in Ethiopia’ (n 62) FN 57.

6.4.2.2 Fine[984]

When to impose it?

A fine is one of the penalties that can be imposed on CICWL of the first group based on the principle set under Article 166. That means, a fine is a measure of last resort which is difficult to justify. Given the fact that some of the measures that deprive a child of his/her liberty are measures of first resort, such as corrective detention and home arrest, there is no legitimate reason to make a fine, which does not have such effect, a measure of last resort. For instance, is there any justification to sentence a child to corrective detention for five years even though s/he is capable to pay the fine and understands its imposition? Under international child rights/justice standards including the Tokyo Rules, a fine is included as a non-custodial measure that states are required to make available in their child justice laws. Although not knowingly, the practice in Ethiopia is in line with this skepticism as courts imposed it on children who came in conflict with the law for the first time and without first applying other measures.[985]

It may be imposed in cases where the child is capable of paying a fine[986] and of realizing the reason for its imposition (art 167 (1)). This researcher argues that a fine can be imposed on a child for a crime even though the special part of the Code does not provide fine as a penalty. If it shall be imposed on a child when the special part provides fine as a penalty, there is no special treatment accorded to a child according to the general tenet of the child justice system. Note must be taken that special treatment is accorded to children in case of imprisonment as the minimum duration is one year though the crime is punishable with ten years at a minimum. Hence, similar special treatment concerning fine is expected. Further, given its last resort nature, interpreting that a fine can be imposed when the special part provides so works against the child and it is discriminatory since a fine is a penalty of first resort for adults. Hence, the researcher contends that Article 167 (1) is not intended to provide only the requirement that 'the child should be capable of realizing why s/he is paying the fine' and keeping the rule that a fine shall be paid when the special part provides so.

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[984] Criminal Code, art 167.

[985] *EB v Prosecutor*, Debay Tilat Gin Woreda Court, East Gojjam Zone, File No.0201585 (2020); *Y v Kotebe Surrounding Police* (n 785); *SM v Prosecutor*, Burji Special Woreda High Court, SNNPR, File No.050105 (2021).

[986] In practice however, the fine is paid by parents or guardians. Phone interview with Negalign Alemu, prosecutor of the case between SM and Prosecutor (10 July 2022); Phone Communication with Walle Tadesse, Justice Department Officer, Debay Tilat Gin Woreda, East Gojjam Zone (7 September 2022).

Though not explicitly stated in the judgments, the practice also finds itself in line with the argument in that fine is imposed for crimes where the special part does not provide for it as a penalty like Articles 627 (1)[987] and 665 (1).[988]

One may tend to counter argue by invoking the principle of legality[989] in that courts shall not impose a penalty not provided by law (special part). However, the provisions of the Code from Articles 157-177 are special parts for children's cases. This is because, despite the violation of the special part provision that provides a specified penalty, we cannot impose it on a child; rather what we can impose is one of the measures. Even for imprisonment, the duration is lower than what the crime could entail. The same can be said about a fine in that Article 167 is a special provision and can be imposed even though a fine is not provided as a penalty in the provision violated.

Further support for this line of interpretation can be derived from the reading of paragraph 2 of Article 167 (1) which provides that fine may be imposed in addition to other penalties. This sub-provision does not cross-refer to the adult counterpart provisions of Articles 91 and 92 (2) that govern the situations where fine can be imposed in addition to imprisonment. This absence of cross-reference indicates that the rule is special to the child justice system. Had the intention been to confine a fine to where the special part provides so, there is no need to provide that a fine may be imposed in addition to other penalties as there are many provisions in the special part of the Code that provide fine as an additional penalty to imprisonment.[990]

Given the above argument, the other issue is for which crimes a fine can be imposed. Article 167 does not indicate the nature of the crime for which a child may be fined. Thus, it may be argued that a fine can be imposed even for serious crimes. However, the Amharic version of Article 168 which makes the imposition of corrective detention or imprisonment mandatory entails a qualified interpretation. Therefore, according to this version, a fine may not be imposed for a crime punishable with ten or more years. Further support to this line of argument can be inferred from the reading of the same Article that does not provide a fine as an alternative in case the conduct of the child in corrective detention warrants or s/he attains a majority before the

[987] *EB v Prosecutor* (n 985).
[988] *Y v Kotebe Surrounding Police* (n 785).
[989] Criminal Code, art 2.
[990] See for instance, arts 350, 351, 353 (1), 366 (1), 371 (1(, 384 (1), 385 (2), 391, 393, 447, 448 (2), 466 (1), 478 (1) and (2), 481(1), 488 (2).

completion of the period of detention. It rather provides for transfer to penitentiary detention. This leads to an interpretation that this position of the provision is informed by the seriousness of the crime. The practice, however, is not in line with this interpretation as in one case where a fine was imposed, the punishment was over ten years.[991]

A fine may be imposed in addition to a penalty. This means that a fine may be imposed in addition to imprisonment. However, cumulative imposition of fine and imprisonment can be criticized from the perspective of the principle of 'minimum' intervention. This research did not find it in practice though. Combining non-custodial measures, however, is allowed under the Beijing Rules (Rule 18.1). Given the above argument, the issue of when to impose a fine with another penalty is worth mentioning. Unlike the adult counterpart which envisages that it is the special part that can provide for a fine as an alternative to imprisonment (arts 91) and 92 (2)), Article 167 (1) makes the possibility open and leaves it to the discretion of the court which can create differential treatment of children. The provision does not provide guidance as to when the court would impose fine in addition to imprisonment except that the child is capable of paying and understands the reason for its imposition. In other words, unlike Articles 91and 92 (2) of the Criminal Code that governs the situation where fine may be imposed in addition to imprisonment, Article 167 (1) neither specifies the circumstances under which it can be imposed with other penalties nor does it cross-refer to Articles 91 and 92 (2).

Time of Payment

Article 167 only excludes the consequence of failure to pay and its substitution with labor or forced labor. It does not exclude Article 93 of the Code which governs time and manner of payment in adult cases nor does it provide special rules. Hence, it seems apparent that Article 93 applies to children in that the fine shall be paid forthwith, and if a child cannot do so, the court may allow extra time of up to six months. However, a different position can be inferred from paragraph 2 of Article 167 (2) which provides that when the fine is not paid 'within a reasonable time' fixed by the court, it may be converted into home or school arrest. Hence, this phrase indicates that 'forthwith' payment is not the manner of payment in a child's case. Instead, the court shall fix a reasonable time for the payment by the child. This interpretation is supported by the ideal of child justice that gives preferential treatment to children. In the cases mentioned

[991] *EB v Prosecutor* (n 985).

above, courts did not fix a period of payment, and this seems to imply the adoption of the principle of 'forth with' payment provided in adult cases.

Failure to pay and its Effect

If the child deliberately fails to pay the fine within a reasonable time fixed by the judgment, the fine may be converted into school or home arrest for such time fixed by the court. And, the provisions regarding the substitution of other penalties for fines and the consequences of non-payment (arts 94-95) do not apply to children**.**[992] The excluded consequences are conversion of fine to labor and sale of property of the child. Though this provision omitted Article 96 which provides for conversion of the fine to forced labor (the severest form of labor), for strong reasons, it should not apply to children. The exclusion also applies to requiring the child to produce security or surety to pay the fine within the time fixed. In other words, children should not be required to produce security or surety to pay the fine within the time fixed. This is another preferential treatment accorded to children compared to adults.

Regarding substitution of fine with home or school arrest, keeping in mind the principle set out under Article 166 of the Criminal Code, it is important to note that the child must not first be subjected to school or home arrest and the measure failed to achieve its purpose. In other words, for a fine to be converted to school or home arrest, s/he must not previously have been subjected to it. This is because fine is imposed after the failure of the measure to achieve its goal and it will be futile to resentence the child to the same measure. The question, however, is what recourse the court could take if the child was previously subjected to it and at the same time deliberately failed to pay the fine. The other issue is whether the substitution of a fine to school or home arrest applies even in case where a fine is imposed in addition to, for instance, imprisonment.

6.4.2.3 Admission to Corrective Institution as a penalty?

Article 168 (1) (a) of the Criminal Code states that when the child has committed a serious crime which is normally punishable with rigorous imprisonment of ten years or more or with death, the court [shall][993] order him to be sent to a corrective institution (art 162) where 'special measure for safety, segregation or discipline can be applied to him in the general interest'. However, it is not clear in the Code whether it is a penalty or a measure. This is because on the one hand, it

[992] Criminal Code, art 167 (2), para 2.
[993] Provided in the Amharic version.

falls in the section dealing with penalties[994] and on the other hand, it is provided under Article 168 which talks about imprisonment which may entail a contrary interpretation that corrective detention is not a penalty. Reading this provision with Article 166 and the reference made to Article 162 seems to imply that the child must not be subject to this measure earlier as there is no point to send the child back to the same institution which failed to reform him/her. However, although the institution under this Article and the one under Article 162 is the same, the manner of enforcement of the detention is different since under this Article a child can be subject to special measures for safety, discipline and segregation.

Another issue here is what should be the length of this detention. Should it be from one to five years as per Article 163 (2) or is it from one to ten years as provided under Article 168 (2)? The later Article says 'the court shall determine the period of detention […]' in which case the same term 'detention' is used to refer to penitentiary detention in its sub-article 1 (b). This is more explicit in the Amharic version. Therefore, the duration mentioned in sub-article 2 does not apply to corrective detention, and the duration stated under Article 163 (2) applies to it which militates in favor of its nature as a measure. If corrective detention here is considered as a penalty, a corollary issue is whether it could entail a criminal record for the child by virtue of the acontrary reading of Article 165 or does it have the effect provided under this Article. This latter provision provides that a child subjected to one of the measures stated in Articles 158-162 is not considered as punished under the Criminal Code.

6.4.2.4 Imprisonment

Imprisonment as a last resort

Under the Ethiopian child justice system, in addition to the principle set under Article 166 of the Criminal Code, imprisonment of a child can happen in two cases. First, when the crime is punishable with rigorous imprisonment of ten years or more or with death and if s/he is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others (art 168 (1) (b).[995] This condition is an illumination of what constitutes 'failure of a measure' provided under Article 166. Thus, this provision, when read together with the principle set under 166, indicates

[994] Fisher considered this form of detention as one type of imprisonment (Fisher, 'Criminal Procedure for Juvenile Offender in Ethiopia' (n 62)) 122.

[995] Fisher criticized for tagging a child aged, for instance, ten or twelve years as 'incorrigible' and sending them to prison than corrective centers; Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62) 123.

that imprisonment is a measure of last resort. Article 168 (1) (b) pushes the principle one step further by requiring that the crime shall be serious. In other words, a child will not be imprisoned after the failure of the measures unless the crime is the one provided in this Article. The practice, however, is not fully compliant with the principle. As mentioned above (s 6.4.2.1), courts imposed imprisonment on children who came in conflict with the law for the first time and who were not subjected to measures. In other words, the last resort nature of imprisonment is not known by judges. More tellingly, a judge said that 'sentencing a child to imprisonment or not for serious crimes is personal to judges as there is no corrective center' and noted that there are children below the age of 15 in prisons.[996] One judge was explicit in this regard and said that she sent children to prison in exceptional (serious) cases.[997] Another judge reinforced this and said that 'since the other measures like supervised education and home arrest are not effective, we send children to adult prisons'.[998] Unlike the former judge, he did not qualify the gravity of the crime and it seems that imprisonment is imposed for less serious crimes.

Other children must be sent to corrective detention, and will be transferred to penitentiary detention if their conduct or the danger he constitutes renders such a measure necessary (art168 (2), para 2)). This is the second scenario to imprison a child. This provision makes clear the effort made by the Ethiopian criminal justice system to make imprisonment a measure of last resort. Accordingly, a child who has been subjected to one of the measures which failed to reform him/her will not face imprisonment before being sentenced to a corrective institution as per Article 168 (1) (a). This effort is more visible when a child who is not under one of the circumstances mentioned in Articles 158 or 159 commits a crime defined under Article 168 and is sentenced to corrective detention as a first resort. If this measure failed to reform the child, we have no other measures to try as the seriousness of the crime excluded them. However, s/he must not also be transferred to prison immediately before being subjected to the measure of discipline or segregation in the same center (art 168 (1) (a)).

The transfer is mandatory as the word 'shall' indicates. This may be justified by the fact that the child is not reformed at least for the second time. However, this may/diminish(es) the last resort nature of imprisonment for two reasons. First, the transfer is possible even before the child has

[996] Interview with Bayeh Embiale (n 712).
[997] Interview with Birkie Tilahun (n 775).
[998] Interview with Sera Chalachew (n 789).

served the detention period fixed by the court and without trying extension of the duration or imposing stringent conditions. Second, the criterion is too general and vague and is susceptible to misinterpretation.

The transfer is mandatory even for the reason that the child attains majority and the period of detention extends beyond that period irrespective of the fact that the time left is less than one year or less than a month for that matter. According to this provision, taking the result achieved is for the determination of the time to be served in prison, not to decide whether the transfer is necessary. However, it is plausible to consider the result achieved in deciding whether transfer is necessary, and hence, if the child has shown a good progress during his/her stay in the corrective center and if the time left is too short, s/he should not be transferred. Furthermore, if the time left is less than ten days, there is no need to transfer the child to prison as the minimum term of simple imprisonment is ten days according to Article 106 of the Criminal Code.

Crimes that can result in Imprisonment and Determination of the Duration or Nature of the Punishment

For a child to be subjected to imprisonment, the crime committed must be punishable with rigorous imprisonment for ten or more years or with death (art 168). Let us raise some questions in this regard. First, the provision talks about a single crime - what if a child committed concurrent crimes and one or all of them are punishable with a prison term below the threshold stated under this Article? Second, are the duration of the imprisonment and the nature of the crime stated under this Article the ones specified in the violated provision or the ones determined by the court after hearing witnesses and considering aggravating and mitigation circumstances? Let us try to answer these by starting with the second question. If it is the first scenario, a further question is, does this include 'crimes punishable by rigorous imprisonment not less than five, seven, ten or 15 years?' 'Crimes punishable with rigorous imprisonment not exceeding 15 years?' Or crimes that are punishable specifically by ten or more years?[999]

In this regard, this researcher contends that the duration of imprisonment or the nature of the crime stated under Article 168 should be the ones determined by the court after hearing of evidence and considering aggravating and mitigating circumstances. This is because many

[999] Like arts 240 (1) (b), 241, 247, 249 (2), 251, 252 (2), 269, 270, 275, 506 (5), 512 (1), 539 (1) and (2), 573 (3), 596 (3), 620 (3), 627 and 631 (1) (b).

provisions in the Code provide the penalty in ranges that can fall below and above the threshold stated under Article 168. This is a case where the provision uses terms like 'not less than' and 'not exceeding'. Hence, we can only avoid these uncertainties by fixing the exact penalty and its duration before resorting to Article 168. In other words, the court must determine the nature of the penalty and its duration to know whether the penalty falls within the threshold of Article 168. Hence, if the final penalty is ten or more years or death, the court can impose imprisonment on the child provided that the condition of incorrigibility is fulfilled. This interpretation also answers the first question in that this rule shall work when the child committed concurrent crimes. The court shall use the sentencing manual to determine the penalty for both or all crimes, and if the final penalty falls within the threshold stated under Article 168, the court can impose imprisonment.

The practice, however, is to the contrary in that it relies on the threshold of the penalty stated under the special part (the face value) without determining the actual penalty and its duration. In a case that used Article 168 to impose imprisonment on a child who committed a crime punishable with rigorous imprisonment from 13-25 years, the court simply referred to the duration stated there and did not fix the actual duration.[1000] In addition to the above justification relating to wide margins and the resulting uncertainties about the duration, the actual penalty may be below the threshold stated under the violated provision. For instance, in the case at hand, although the minimum duration of imprisonment is 13 years, it may be below this after taking mitigating circumstances into account. Hence, it is imperative to fix the nature of the penalty or the duration instead of referring to the face value of the nature or duration of the penalty provided in the provision violated.

Imprisonment for the shortest period

The period of detention to be undergone under Article 168 shall be determined according to the gravity of the act committed and having regard to the age of the child at the time of the crime. However, it shall not be for less than one year or more than ten years (art168 (2)). The crime is normally punishable by rigorous imprisonment of ten years or more or with death, and the Code, by fixing the minimum imprisonment of one year and a maximum of ten years, gives wide discretionary power to the court regarding the period of imprisonment. This helps in complying

[1000] *F v Prosecutor (A)* (n 930).

with the principle of 'detention for the shortest appropriate period'. Nonetheless, full compliance with the principle requires courts to proportionately convert the actual penalty stated under Article 168 (1) and determined as such to the one provided under Article 168 (2). That is, one year imprisonment shall be imposed for crimes punishable with ten years of rigorous imprisonment and the duration shall increase when the penalty increases and the maximum period of ten years shall be for crimes punishable by death.

The practice in this regard is different. As mentioned under the section dealing with the principle of imposition of penalty, courts imposed penalties including imprisonment on children who came in conflict with the law for the first time without first trying the measures. They were unaware of the last resort nature of imprisonment. The consequence is that the duration of imprisonment is determined by the special part provision concerned and hence, is not the shortest period (from one to ten years). As a result, in one case, a child aged 14 years old was sentenced to 20 years of rigorous imprisonment.[1001] In another case that relied on Article 168, a child was sentenced to ten years of rigorous imprisonment to be served under the regime of simple imprisonment (art 168 (3)). The court fixed the duration from 13-25 years. It did not first fix the actual duration and convert it to the duration provided under Article 168. Hence, it is not possible to assess this punishment in light of the principle.

Conditional release of a child is recognized under the Criminal Code (art168 (3)) and is a means to comply with the principle that imprisonment shall be for the shortest period. This provision simply cross-refers to Article 113, which again cross-refers to Article 202. This in other words means that there is no special privilege accorded to children and that the ordinary rules applicable to adults apply to children. For instance, a child has to serve two-thirds of the imprisonment before being conditionally released even if his/her behavior significantly improved and warrants the assumption that s/he will be of good conduct when released. However, this position can be challenged by virtue of the principle of 'detention for the shortest period of time', and the negative effect of detention on children. For this reason, it is recommendable for the law to provide a different and lesser threshold of a served sentence than Article 202.

In case of transfer from corrective detention, the period to be served in prison shall be determined by taking into account the time spent in the corrective institution and the results

[1001] *G v Prosecutor* (n 733).

thereby obtained (art 168 (2), para 2). This is the case for both grounds of transfer viz. conduct of the child in question and attainment of majority age. The cumulative nature of these considerations indicates that the period to be served in prison may not always be equal to the time left at the time of the transfer. Thus, the period of imprisonment may be less or more than one year depending on the result achieved during the corrective detention. That means, if the child is fast reforming during the corrective detention, the court may not order him/her to serve the same period as left at the time of transfer due to attainment of majority age. On the other hand, if the child was not reforming as expected during his/her stay in the corrective detention or s/he is acting in a way that warrants transfer to prison, the court may order the child to serve a period of imprisonment greater than what is left at the time of transfer. In such a case, the length of period that the court can add is not clear.[1002]

The difference in the regime under which corrective detention and imprisonment are undertaken is not provided as one consideration in determining the period to be served in prison after the transfer. Corrective centers are places where children are detained and re-educated to make them law-abiding citizens in the future. As such, they are not serving a punishment. On the other hand, prisons are places to enforce a sentence of imprisonment and it works in a way to achieve the purpose of criminal law by incapacitating the criminal or making him/her a lesson for others. This difference in the condition of enforcement of the two detentions is particularly worth raising in case of transfer when a child attains majority. Therefore, consideration should have been paid to this difference to determine the duration of the prison term.

The Regime of Imprisonment

Another important provision of the Code is that imprisonment shall take place under the regime of simple imprisonment.[1003] That means, irrespective of the length of imprisonment ordered, be it one year or ten years, detention of a child should take place under the regime of simple imprisonment, and the provision of Article 108 of the Criminal Code does not apply. The effect of this stipulation is that a child shall be sent to such prison or in such section thereof as is

[1002] Nonetheless, increment of the period over the one left at the time of transfer is problematic when pitted against the principle of prohibition of double jeopardy, and given the difference in the regime of detention in corrective institution and prison.
[1003] Criminal Code, art 168 (3).

appointed for that purpose,[1004] and the condition of enforcement is lighter.[1005] By this, the Code provides special treatment for CICWL.

6.4.3 Suspended Sentence (Probation)

6.4.3.1 When to apply?

Article 171 of the Criminal Code governs the suspension of sentences in child justice cases. It provides that:

> The general rules regarding the suspension of the sentence or of its enforcement with submission for a specific time to a period of probation under supervision (Arts. 190-200) shall, as a general rule, remain applicable to [children] if the conditions for the success of such a measure seem to exist and subject to the rules concerning serious crimes as defined in Article 168.

The exception clause implies that crimes the sentence of which could not be suspended are those specified under Article 168 and the nature of crime indicated under Article 191 or 194 is not a parameter in this regard. This interpretation can be supported with two justifications. First, unless interpreted this way, the seriousness exception indicated under Article 171 would be redundant to the stipulation of Article 191 which provides that suspension is applicable for non-serious crimes. Second, the general rule that children should be treated more favorably than adult's supports this interpretation and that a sentence of imprisonment for crimes not punishable with rigorous imprisonment for ten or more years or with death can be suspended provided that the other conditions are fulfilled.

By this, the Code makes a differential treatment for children by confining the exception to this rule to crimes of serious nature than applicable to adults, which are less serious. There are two types of probation in the Ethiopian criminal justice system viz. suspension of pronouncement of a sentence (art 191) and suspension of the enforcement (art 194). However, unlike adult cases (arts 191 and 194), it is difficult to delineate which crime can entail suspension of the pronouncement of a sentence and which crime can entail suspension of the execution of the sentence. A possible suggestion may be assigning suspension of pronouncement to crimes punishable with the term of simple imprisonment up to three years or rigorous imprisonment up

[1004] ibid art 106 (2).
[1005] Inferred from acontrario reading of Article 108 (2), paragraph 2 of the Criminal Code.

to five years (art 194 (1)), and suspension of enforcement to crimes punishable exceeding these terms but below ten years (art 171).

Probation is provided in the sub-section of the Code governing common provisions. This means that probation cannot purely be a measure or a penalty in the Ethiopian child justice system. It is not purely a measure because suspension of enforcement of the sentence has the effect of creating a criminal record while measures do not. Similarly, it is not purely a penalty in that it shall not be imposed after the failure of the measures. In other words, it can be imposed as a first resort or after the failure of measures.

Its first resort nature can be supported by the principle that detention shall be a measure of last resort which implies that suspending a sentence is more appropriate than ordering admission to a corrective center or home arrest. In other words, deprivation of liberty of the child in either way (home arrest, or corrective detention) should have been limited to serious cases,[1006] and in other cases, suspension can be ordered. Regrettably, however, home arrest applies for crimes of small gravity in the Ethiopian child justice system including petty offenses. Further, its first resort nature can be inferred from Article 171 which excludes its applicability for serious crimes as defined under Article 168. This, when read together with the absence of such limitation for the imposition of a measure of admission to a corrective institution (detention), implies that the limitation is informed by this deference in effect on the liberty of the child (which again is informed by the principle of child justice), and not to indicate the last resort nature of the suspension. That means, if a measure would deprive a child of his/her liberty, no limit on the seriousness of the crime may be made whereas if the measure does not deprive the liberty of a child, a limit may be provided.

This research has tried to demarcate the scenarios that could warrant a measure of corrective detention and suspension of penalty as a measure of first resort in its part dealing with the measure of corrective detention. Now it turns to demarcate suspension and a measure of school or home arrest and reprimand.[1007] It is stated that measures of school or home arrest and reprimand are applicable for minor crimes or crimes of small gravity, which as has been argued,

[1006] By this interpretation, the researcher is not justifying the provision of the Code that makes detention in corrective institution as a measure of first resort.
[1007] On the other hand suspension of sentence has no point of conflating with supervised education as the latter is a personalized measure in that is applied for abandoned children or for children in need of care and protection.

include crimes punishable with simple imprisonment. On the other hand, suspension of sentence shall apply to all crimes that fall below the threshold stated under Article 168 via Article 171. Hence, it seems that probation works for both crimes punishable with simple and rigorous imprisonment. In this sense, it meets with the measures of school or home arrest and reprimand when the crime is punishable with simple imprisonment. Then, the question is which measure to choose (provided that the conditions of probation are fulfilled), probation or the other measures? In such a case, courts need to be reminded of the duty imposed on them to consider sentences from the lightest to the most severe ones. In this context again, what the parameter should be to say that this measure is lighter and that is severe needs examination. Thus, in choosing probation or school or home arrest, is it the deprivation of (interference) with liberty or the effect of resulting criminal conviction (for suspension of enforcement)? This researcher contends that the consideration should be the effect of the measure on the liberty of the child and hence, such a measure should be reserved for relatively serious crimes.

Probation can be ordered where the measures of reprimand, school or home arrest or supervised education failed to reform the child (art 166).[1008] As indicated under Article 168, the crime must be serious for the court to order admission to a corrective institution or imprisonment. What measure or penalty would be taken against a child for less serious cases is not specified under the section of the Code that deals with penalties (arts 166-68). As discussed above, a fine can be the option provided that the child has the means and is capable of understanding the reason for its imposition. The question again is what if one of the conditions is missing? Therefore, suspension of imprisonment can be an answer to this question. This helps the Ethiopian criminal system to conform to the principle of detention as a measure of last resort.

The other exception to the general rules of suspension is the duration of probation i.e. in child cases it is between one to three years[1009] while in adult cases it extends from two to five years.[1010]

Article 171 of the Criminal Code is the most unknown provision among judges next to Article 166. When asked whether they have suspended a penalty, most judges refer to the adult

[1008] Admission to a corrective center is omitted because as argued, it is/should apply for more serious crimes as defined under Article 168, and a child not reformed while in detention (while receiving education and instruction) will not likely be reformed by placing him/her under probation in which the supervision and control is loose.
[1009] Criminal Code, art 171, para 2.
[1010] ibid art 196 (2), para 2.

provisions (arts 190-200) while a few others believe that probation should not apply to children. Examination of court cases also reveals that probation is the least used measure/penalty next to a home or school arrest.

6.4.3.2 Conditions and the Effect of Failure of Probation

As a general rule, Article 171 of the Code makes the provisions of Article 190-200 that govern probation (conditions, rules of conduct and failure of probation) applicable to child justice cases. As the term 'as a general rule' indicates, all the provisions of these Articles will not wholly apply to child justice as are provided. The provisions of the latter Articles shall apply by taking into account the special nature of child justice cases. Therefore, the following stipulations may not be applied to children.

- Requiring a child to enter into an undertaking to pay the indemnity to the injured person (art 101) as well as to pay the judicial costs (art 197 (1)). This is because the child may not have the means to do so, and payment of judicial costs is not tenable.
- Requiring a child to produce security, particularly, the material one for the same reason mentioned above (art 197 (2)).
- Revocation of probation for the reason that the child persisted in his/her behavior despite the first warning (art 200 (2)). This is because other measures like admission to a corrective center or home or school arrest may fit the child's case (particularly, if probation is a measure of first resort) instead of resuming the suspended penalty that deprives the child of his liberty under a stringent regime and results in criminal conviction (a record).
- Revocation of probation for fresh intentional crime (art 200 (2)). This is because, as discussed above, it is not the mere commission of the crime that results in deprivation of liberty or imprisonment. The personal circumstances of the child highly informed the responses in the child justice system. Hence, depending on the personal circumstances of the child and the nature of the crime, s/he may be sent to a corrective institution.

The practice is of no help in explicating these exceptions as judges did not indicate whether or not the suspension is made up on the fulfillment of the preconditions provided

under the adult provision (art 197). Further, none of the judgments imposed conditions (art 198 (1)) on a child on probation.

6.4.4 Community Service

The term community service as a punishment is not explicitly mentioned in the Ethiopian criminal justice system. Rather, the Criminal Code uses the term 'compulsory labor' as one form of punishment for adult offenders (art 103). The term 'compulsory' implies that the consent of the criminal is not a prerequisite for imposing community service punishment. However, in the modern criminal justice system, community service cannot be imposed without the consent of the convict.[1011] The same is true in the child justice system.[1012] Except for this difference and difference in naming, the services that the convict should perform are the same. The activities and services that the convict shall deliver should be beneficial to the community.

In the Ethiopian criminal justice system, community service or compulsory labor may be a principal punishment or alternative to fine for adults only, i.e. when the convict fails to pay the fine, compulsory labor may be imposed instead.[1013]

Coming to the child justice system, community service is not recognized. However, it may be a penalty for the second group of children as they are subject to the ordinary penalties applicable to adults, including compulsory labor. In child justice cases, the Criminal Code explicitly ousted community service as a punishment in Article 167 (2). It says, '[t]he provisions regarding the substitution of other penalties for fine and the consequences of non-payment (Art. 94-95) are not applicable to young criminals'. One of the alternative punishments in the Articles mentioned is compulsory labor or community service.

This is a missed opportunity had it been based on the consent of the convict. This is because community service punishment is one means of avoiding the deprivation of liberty of a child. For this reason, community service is highly demanded in the Ethiopian child justice system to allay deprivation of liberty both in law and practice.

Part of the potential justification for excluding compulsory labor punishment for this group of children may be their age and the provision of the then labor proclamation. The 2003 labor

[1011] Jurisdictions that adopt community service make the consent of the criminal a requirement.
[1012] PRI, 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 84.
[1013] See Criminal Code, arts 96 and 167 (2), para 2.

proclamation no.377/2003 prohibited employing persons below the age of 14 (art 89 (1)). This again refers to international child rights instruments which prohibit child labor[1014] for the reason that working at such age will be hazardous to their health and physical development. The difficult thing in the Ethiopian child justice system, which cannot be justified by the labor law, is the case of children who are 14th years old. They are allowed to work for private employers, but not required to do it as a punishment. This exclusion can be justified by the fact that community service punishment in Ethiopia is compulsory in nature, and it seems the intention of the lawmakers that compelling children of this age is not appropriate.

6.5 Exoneration

The fact that a child has committed a crime may not necessarily subject him/her to measures or penalties specified under the Criminal Code. Article 169 of the Criminal Code provides that the court may order no measure or penalty if it appears to be no longer necessary or expedient in case of a less serious crime when at least six months have elapsed since the crime was committed. Such shall be the case in particular when educational or corrective measures or suitable punishment have already been imposed by the parental or family authority, or when the child is of good behavior and seems to be reformed and no longer at risk of relapse. What crimes are less serious is not defined.

This is an important development in the Ethiopian child justice system to avoid the negative effects of detention or imprisonment or any other interference in the liberty of a child. However, the Ethiopian child justice system should devise a mechanism to divert such kind of cases away from the judicial system instead of trying and imposing no measure or penalty. This provision has not found expression in the practice of courts.

6.6 Prohibited Punishments

6.6.1 Life Imprisonment without parole

Though not explicitly stipulated, legally speaking, life imprisonment cannot be imposed on a child ages nine to fifteen. This is because Article 168 of the Criminal Code which provides a sentence of imprisonment provides that the terms of imprisonment shall not exceed ten years irrespective of the fact that the crime committed is heinous and punishable with death. That means the maximum punishment is imprisonment for ten years. This is an indication of indirect

[1014] CRC, art 32; Minimum Age Convention (No.138) (adopted 26 June 1973, entered into force 19 June 1976); Worst Forms of Child Labor Convention (No.182).

prohibition of life imprisonment. This is in line with the CRC, which prohibits life imprisonment without parole. As there is no life imprisonment without parole in the Ethiopian criminal justice system, [1015] the Ethiopian child justice system also complies with the prohibition of life imprisonment without parole for the second group of CICWL that will be subjected to life imprisonment.

6.6.2 Death Penalty

Article 176 of the Criminal Code prohibits death penalty for criminals below the age of 18 at the time of the commission of the crime. This is in line with international and regional standards which prohibit capital punishment for offenses committed by persons below 18 years of age.[1016]

6.6.3 Corporal Punishment

Corporal punishment of children as a penalty is not clearly prohibited in the Ethiopian child justice system. The Criminal Code is silent in this regard. The Constitution on the other hand only prohibits corporal punishment of children in schools and institutions, not as a penalty for crimes. However, such prohibition can be inferred from the prohibition of inhuman punishment under Article 18 (1) of the Constitution.

6.7 Penalties applicable for Children over 15 and below 18 years of age

In principle, children of this group are subject to ordinary penalties applicable to adults with few exceptions.[1017] First, the death penalty shall not be imposed upon a criminal who has not attained eighteen years of age at the time of the commission of the crime (art 117). Second, in the implementation of penalties entailing loss of liberty, the rule of segregation (art 110 (2)) applies. Third, the court may reduce the penalty (art 179) or apply penalties specified for the first group of children (arts 166-168) as a case may be (art 56 (2)).

Mitigation of the ordinary penalty for this group of children is mostly utilized by courts though there are variations in its implementation. There are two approaches in this regard. The first and most prevalent is using the age of children as one ground of mitigation together with other mitigating circumstances. The second approach determines punishment by taking other mitigating circumstances first, and then the resulting punishment is mitigated based on the rules of Article 179. The two scenarios have a different effect on the resulting magnitude of the

[1015] See Criminal Code, art 202.
[1016] CRC, art 37 (a); ACRWC, art 5 (3); ICCPR, art 6 (5).
[1017] Criminal Code, arts 56 and 176.

penalty. For instance, in one case where the punishment was mitigated using the second way, the punishment was changed from rigorous imprisonment (level 11, one year and eight months to two years) to simple imprisonment as per Article 179 (d).[1018] On the other hand, if the court used age as one ground of mitigation (the first approach), the 'level' of the crime will be decreased by one (level 10) and the punishment in this 'level' is rigorous imprisonment from one year and six months to two years.[1019]

On the other hand, the application of special penalties available for the first group of children (arts 167 and 168) to the second group is seldom used. All judges interviewed said that they have never used this modality and the researcher found only one case that imposed imprisonment for the duration specified under Article 168 on a child over the age of 15 years.[1020]

The fourth preferential treatment of children of this group is subjecting them to curative, corrective or educational measures applicable to the first group of children if the child's physical or mental development is considered to be that of a child below the age of fifteen or if the child did not commit a serious crime and is, according to expert opinion, amenable to such measures (art 177). Accordingly, the measures may apply in one of the two scenarios i.e. where the mental or physical development of a child is considered to be that of a child aged below fifteen or when the crime committed is not serious provided that the child concerned is amenable to the measures according to expert opinion. However, what makes the crime not serious is not clear so that the applicability of the measures may be limited. In this regard, the researcher found only one case where a child over fifteen was reprimanded. However, the court did use expert opinion as regards the amenability of the child to the measure. It only considered the minor nature of the crime.[1021]

In the beginning, the Code mentions only the three types of measures, and school or home arrest and reprimand are not mentioned. At the end of the provision, it uses the term 'in particular', according to which school or home arrest and reprimand may also be imposed. The court in the case mentioned above imposed reprimand without reasoning in this way.

[1018] *YM v Prosecutor*, Bahir Dar and its Surrounding High Court, File No.0412134 (2021).
[1019] The Revised Sentencing Manual 112.
[1020] *W v Prosecutor*, Arba Minch Zuria Woreda Court, File No.28269 (2022).
[1021] *HA v Prosecutor*, Jabi Tenan Woreda Court, West Gojjam, File No.0202477 (2018).

What effect does this analogous application have on the duration, variation and effects of the measures is not indicated in the provision. Presumably, it will have the same effect. This can be inferred from Article 177 (2) which limits the duration of the measures to extend up to the age of majority.

Therefore, the second group of children can be subjected to the measures and penalties provided for the first group. The question that remains here is whether the special rule concerning probation (art 171) can also apply to this group of children. Article 56 mentions the term penalties provided under Articles 166-168. The use of this term is the reflection of the arrangement of the Code that does not include probation as a penalty. Hence, it can be argued that this is not meant to exclude probation and that it can apply to them too.

6.8 Enforcement of Measures and Penalties

6.8.1 Enforcement of measures, Authorities in charge of the supervision and the role of Courts

The court which passed a sentence in a criminal case shall issue the necessary warrants or orders requiring the appropriate authorities to carry out or supervise the carrying out of the sentence.[1022] Accordingly, the court that sentenced a child to one of the measures shall issue the same order to the respective authorities, as there is no centralized organ mandated to supervise the enforcement of measures. Hence, the presiding judge shall sign and send an order to the responsible official in charge, in case of measures under Articles 158, 161(school director) and 162 and, in case of Article 159 to one of the persons mentioned therein with the same order to the local supervisory authority. Such order shall be sufficient authority to deal with a child on the conditions laid down in the order.[1023]

Each measure is entrusted to different supervising authorities and enforcement mechanisms. In case of curative measures, it is enforced by the curative institution by giving appropriate treatment (medical care) to cure the underlying causes of criminality. When the measure is supervised education, the child is entrusted to his/her relatives or reliable person or organization for education and protection of children. At last, the local supervisory authority (art 208) is responsible for the control of the measure.[1024] In case of a measure of reprimand or censure, it is

[1022] CPC, art 203 (1).
[1023] ibid art 213.
[1024] Criminal Code, art 159 (1).

the court to direct his/her attention to the consequences of the act and appeal to his/her sense of duty and to be of good behavior in the future.[1025] When the measure is school or home arrest, the court shall order the necessary steps for ensuring its enforcement under supervision.[1026] However, it is not clear as to who is to undertake such supervision; are they parents or any other relative in whose home a child is required to stay during his/her free time? Or is it the school authority or any other independent authority? In this regard, the practice reveals that the supervision can be entrusted to the police, the family of the victim, and other members of the community in addition to the family of the child.[1027] Finally, in case of admission to a corrective institution, it is the management of the institution which shall supervise the child under its custody.

Not only the absence of a centralized enforcement institution, but also that the court is not given a clear power to follow up the proper enforcement of the measures, except for the indirect mention of its power in case of supervised education[1028] and power to vary measures upon the recommendation of management of the institution as per Article 164, or on its initiation pursuant to Article 180 of the CPC. Therefore, it is necessary to establish a centralized and qualified institution that can enforce the measures to effectively achieve the intended goal of rehabilitating CICWL and turning them into productive people. It is also important for the court to follow up on the enforcement of measures and work together with the supervising authority. To that effect, a specific provision must be there that mandates the court to supervise the enforcement of measures. In practice, however, courts have no follow-up role. All judges interviewed said that once the case is disposed of, they have no chance to follow up on the enforcement of the measures.

6.8.2 Variation of Measure or 'Penalty'

Variation of measures in the course of enforcement by a competent authority is essential in responding to the real needs of CICWL and for their effective rehabilitation and reintegration. Hence, provisions must be there in national laws that allow for variation of orders.[1029] Accordingly, in the Ethiopian child justice system, the court sentencing a child to a given

[1025] ibid art 160 (1).
[1026] ibid, art 161, last paragraph.
[1027] *AM v Prosecutor* (n 733).
[1028] See Criminal Code, art 159 (3).
[1029] Beijing Rules, Rule 23.2.

measure has the power to vary it under both the Criminal Code and CPC. However, the Codes are not clear on whether variation of a penalty is possible. Article 55 of the Criminal Code which talks about assessment of *sentence* (measures or penalties),[1030] cross-refers Article 164 and provides that the court may vary its *order* whenever it is of the opinion that this will help to achieve better results (para 2). Article 164 of the Criminal Code titled 'variation of the measures' provides that the court may vary an *orde*r made under the preceding Articles when such variation will benefit the child.[1031] On its part, Article 180 of the CPC under the title 'variation or modification of *order* empowers the court which sentences a child to *a measure* to vary or modify such *order* on its motion or on the application of the child, his legal representative or the person or institution to which s/he was entrusted if the interest of the child requires.[1032] The Amharic version seems to use 'order' in both places.

The use of different terms 'order' and 'measure' and the cross-reference to a provision that governs variation of measure by a provision that governs the assessment of both measures and penalties provoke the issue of what could be varied. Is it the measure? Is it only the order (conditions attached to a given measure) or can a penalty also be varied? One may argue that the use of the term 'order' under article 55 (2) of the Criminal Code instead of 'sentence' and cross-reference to the provision that governs variation of measures with no equivalent provision for variation of sentence may seem to confine variation to 'measures' or 'modification' of order only.[1033] Fisher on the other hand recommended a broader interpretation and including variation of penalties (shortening or extending).[1034] Nonetheless, this researcher contends that variation of imprisonment by way of increment is not appropriate for children and is discriminatory as there is no equivalent provision in adult cases.

Variation of measures is justified by the rehabilitative ideal of the child justice system and analogizing a child justice judge to a doctor. This analogy is described by Graven in this way:

> There is a certain amount of experimentation involved in the dealing with young persons and it always is somewhat unpredictable whether attempts made to promote their reformation will succeed. Therefore, the court's duties do not end after it has begun

[1030] Explicit in the Amharic version.
[1031] Emphasis added.
[1032] Emphasis added.
[1033] See also Philippe Graven, *An Introduction to Ethiopian Penal Law* (Haile Selassie I University, 1965) 148.
[1034] Fisher, 'Criminal Procedure for Juvenile Offender in Ethiopia' (n 62) FN 61.

> judgment, as a doctor's duties do not end after he has prescribed a drug. In both cases, he who has ordered the treatment should ensure that it has its desired effect. As a physician does not blindly continue the treatment originally prescribed but often tries a new drug in the cause thereof when he sees that the patient's condition does not improve as expected, so the court may order a new measure if it appears that the one which is being enforced does not serve the purpose for which it was ordered.[1035]

He further explained that measures are imposed to educate and correct a child, and as such, they may be varied as soon as it is shown to the court that the measure originally ordered is inappropriate as regards its duration or its nature. He mentioned the following examples: a court that ordered a supervised education may either entrust him/her to a person or institution other than the one designated in the original order, or order school or home arrest or decide that s/he must be sent to a corrective institution. Similarly, if it appears that a child does not benefit from his/her stay in a corrective institution and that supervised education would be better suited, the court may alter its judgment accordingly.[1036]

In practice, the researcher is informed that variation of measures is seldom made and only one judge has this experience in one/two cases. The variation was a reduction of the duration of corrective detention following the progress of the child and on the application of a social worker of the institution.[1037]

As described by Graven above, variation of measures is typical to the child justice system which aims to rehabilitate the child instead of punishment. There is no equivalent provision in the adult procedure that allows the court to vary the unconditional original sentence. In adult cases, variation is confined to conditional sentences (probation), orders made in respect of offenders not fully responsible, and to variation of orders or conditions attached to probation or parole.[1038]

The other discrepant use of terms is reflected in the underlying reason for variation of the measures. Article 55 empowers the court to vary its order whenever it believes that this will help to achieve better results, and cross-refers Article 164. The latter Article on the other hand conditioned the variation on 'benefit to the child'. Article 180 of the CPC adopts the 'benefit'

[1035] Graven (n 1033) 149.
[1036] ibid; See also Glory Nirmal and Amha Mekonnen, 'Teaching Material on Criminal Law II' (2009) 34.
[1037] Interview with Leuleselasie Liben (n 774).
[1038] CPC, art 216.

approach which literally means a reduction of the duration or lightening of the conditions. On the other hand, believing the variation will produce better results may not necessarily benefit the child in the literal meaning of the term. For example, increasing the duration of the measure or imposing stringent conditions may produce a better result, but may not benefit the child. Increasing the duration of detention may produce good results by protecting the security of society, but may not benefit the child as lengthy detention will be detrimental to the overall interest of the child.

6.8.3 Segregation of Children from Adults

Once it is inevitable to detain a child, s/he must not be detained with adults. Segregation of children from adults in prison and detention centers is one of the legal safeguards provided under the international and regional child rights/justice standards. This rule is clearly incorporated in the Ethiopian child justice system under Article 36 (3) of the FDRE Constitution and Article 176 of the Criminal Code. The latter provision cross-refers to Article 110 of the same Code, which provides for segregation of prisoners who are sentenced to rigorous imprisonment or special confinement from prisoners under the age of 18 years. According to this provision, it is not from all adults that children shall be segregated. Instead, it is from adults serving rigorous imprisonment or special confinement. This is against the Constitution and the child rights/justice standards that do not qualify the rule. Hence, by virtue of the supremacy clause of the Constitution (art 9 (1)), this provision of the Code has no effect.

In line with the constitutional provision, the new Federal Prison Proclamation No.1174/2019 includes an important development regarding the segregation of children from adults in that unlike the previous laws,[1039] the new proclamation does not make segregation depend on the financial capacity of the government.[1040] Though not explicit, this proclamation indicates the need to establish a separate facility for children aged from nine to fifteen. This is because children who are the subject of this proclamation are those aged between 15 and 18 (art 2 (11)).

[1039] Federal Prison Commission Establishment Proclamation 2003, Proclamation No 365, Federal Negarit Gazeta 9th Year No.90 art 25 (2) and Treatment of Federal Prisoners Regulation 2007, Proclamation No.138 Federal Negarit Gazeta 13th Year No.47 art 5 (3) (a).
[1040] Federal Prison Proclamation 2019, Proclamation No.1174 Federal Negarit Gazeta 26th Year No.14 art 33 (4).

Nonetheless, segregation of both categories of children from adults is almost inexistent as children across different prisons are detained with adults.[1041]

6.8.4 Conditional Release (Parole)

Conditional release of children is recognized under the Criminal Code. Hence, children in detention centers either serving a measure of admission to a corrective institution (art 163 (2)) or imprisonment (art 168 (3)) can be released conditionally if the requirements of the law are fulfilled. Article 163 of the Code which governs the duration of measures provides under its sub-article 2 that:

> Conditional release by way of .probation after detention for one year may be ordered under such general conditions as are provided by law (Art. 205(sic)) and *subject to the application of rules of conduct* and submission of the released criminal to the control of a protector (Art.208) during the fixed probation period.[1042]

This provision puts two cumulative preconditions for a child to be released conditionally. First, at least one year must be served in detention. Second, the conditions provided under Article 202 must be fulfilled. Once the preconditions are fulfilled, the court may, on the recommendation of the management of the institution or on the petition of the criminal, order conditional release.[1043] However, it is this researcher's firm position that emphasis should be made on institutional application as a child may not be aware of this right, as his/her relationship with the court-appointed counsel ends after s/he is admitted to the corrective center. Application by a child him/herself may be unlikely even though notification of this right is made to him/her while entering the center.[1044] Thus, it would have been better for the application to be made by their lawyer or parents or legal

[1041] African Child Policy Forum, 'Children in Prisons and Detention Center in Ethiopia: The Way Forward' (2007); ARC Foundation, 'Prison Condition in Ethiopia' (2021) <https://www.ecoi.net/en/file/local/2044634/Ethiopia_prison_conditions_02.02.2021.PDF> accessed 25 July 2022; Ethiopian Human Rights Commission, 'Investigation Report on Eight Prison Center in the SNNPR' (2021); Mulugeta Belay, 'Reality or Myth: Rehabilitation of Prisoners in Federal Prison of Kality' (MA, Center for Human Rights, Addis Ababa University 2020) 58. See also CRC Committee, 'Concluding Observations (2015)', para 71.The researcher also came to know this fact from the interview with the respondents (Judges and Prosecutors) as most of them mentioned this as a child in the administration of the child justice system.

[1042] Emphasis added.

[1043] Criminal Code, art 202 (1).

[1044] Treatment of Federal Prisoners Regulation, art 4 (4).

guardians. And, 'petition by the criminal' should not be interpreted as excluding application by counsel or parents, as a child is not in a position to exercise his/her rights by him/herself. One must note that the Code makes application by the representative of a child for reinstatement possible.[1045]

In practice, however, conditional release from the Addis Ababa Rehabilitation Center has never happened.[1046] This is mainly attributed to the absence of a legal officer in the center.

The precondition of serving one year of detention is favorable to children in some respect compared to adult cases where two-thirds of the prison term must be served (art 202). However, fixing the minimum period to be served at one year may also have negative repercussions. For instance, a child sentenced to one year detention may not be released conditionally although the requirements set down under Article 202 are fulfilled. This may be regrettable given the principle of 'detention for the shortest appropriate period of time' recognized under international standards governing child justice.

Regarding conditional release from prison, Article 168 (3) of the Criminal Code simply cross refers to Article 113 which again cross refers to Article 202. This in other words means that there is no any special privilege accorded to children and that the ordinary rules applicable for adults apply to children. For instance, a child has to serve two-thirds of the imprisonment before being conditionally released although his/her behavior significantly improved and warrants the assumption that he will be of good conduct when released.[1047] However, this position may be challenged by virtue of the principle of 'detention for the shortest period of time', and the negative effect of imprisonment of children. For this reason, the law must provide a different and lesser threshold of served sentence than Article 202.

6.9 Conclusion

The Ethiopian child justice system recognizes few measures that could be imposed on a child found guilty of a crime. The major misses here are restorative justice measures[1048] and community service order. The available measures are admission to a curative institution;

[1045] Criminal Code, art 175.
[1046] Interview with Moges Demeke (n 705). All judges interviewed in Addis Ababa attested this as they have never experienced it.
[1047] See also Nirmala and Mekonnen (n 1036) 38.
[1048] These have been recognized in the criminal justice policy and included in the draft criminal procedure and evidence Code.

supervised education; reprimand or censure; home or school arrest and admission to a corrective institution. These measures are conditioned on either the personal circumstance of the child or the gravity of the crime or both. Regarding gravity of a crime as a ground for the selection of a given measure, reprimand or censure and home or school arrest apply for crimes of minor nature and crimes of small gravity respectively while corrective detention applies to serious crimes. However, which crimes are minor and which are serious for this purpose is not specified. Nonetheless, courts are not seized with these issues when deciding measures and for instance, reprimanded children who committed serious crimes. In this regard, one respondent rightly noted that judges do not know the provisions of the Ethiopian child justice system.[1049]

When gauged against the principle that detention shall be a measure of last resort, the Ethiopian child justice system failed the test as home arrest and corrective detention are measures of first resort under the Criminal Code. Moreover, home arrest applies to minor crimes including petty offenses. Although the Code confines corrective detention to serious crimes, in practice, however, children are sentenced to this measure for minor crimes like theft. Worse, such children also came from the regions to Addis Ababa (the place where the only corrective center is found) which exacerbated the effect of deprivation of liberty of the child.

The duration of curative detention applies for such time as deemed necessary by the medical authority and supervisor authority. This exposes children to the risk of prolonged detention as it does not clearly mandate courts to supervise the enforcement of the measures and since the medical authorities are not required to present a periodic report on the progress of the child. The duration of corrective detention is from one to five years and this is 'shortest period' given that the measure applies to serious crimes as interpreted in this research. In practice, however, children are sentenced to a period over the maximum fixed in the law. The duration of home or school arrest is not fixed in the law and is left to the court to determine in a manner appropriate to the circumstance of the case and the gravity of the crime. This researcher contends that failing to fix the duration by the law is unjustifiable and will result in discrepant practices and open the door for prolonged detention. This is what happened in reality where a lengthy period of four years was fixed for a crime punishable with simple imprisonment (art 543 (2)) while one year was set for the most serious crime punishable with rigorous imprisonment from 13-25 years.

[1049] Interview with Kefyalew Getie (n 859).

Though not explicitly stated, penalties are measures of last resort in the Ethiopian child justice system that could be imposed once the measures have been applied and failed. Therefore, courts need to try one measure after the other before imposing a penalty. In the practice of courts, however, this nature of penalties is not known and courts sentenced children who came in conflict with the law for the first time to imprisonment. The penalties recognized in the Code are fine and imprisonment. Corporal punishment as a penalty that was recognized in the repealed Penal Code is now discarded. Death penalty and life imprisonment without parole are not allowed.

This research argues that it is inappropriate and unjustifiable to make fine as a penalty of last resort in the face of measures that deprive a child of his liberty as a first resort and even for minor crimes. This research also argues that fine can be imposed although the special part of the Code does not provide it as a penalty. Otherwise, making fine applicable under the normal rules for adults will not offer preferential treatment to children and is discriminatory by making it a measure of last resort while it is a measure of first resort for adults. It can be imposed in addition to other penalties. This is however a violation of the principle of minimum intervention.

Imprisonment is the second penalty in the Ethiopian child justice system which should be a measure of last resort. In addition, the Ethiopian child justice system pushes this principle ahead in two respects. First, imprisonment is reserved for the most serious crimes. Secondly, even the seriousness of the crime alone shall not subject the child to it. S/he must be incorrigible. In practice, the last resort nature of imprisonment is not know and is imposed on children who came in conflict with the law for the first time. This research argues that the reference point to say the crime falls in the threshold should not be the face value of the imprisonment stated in the provision violated and must be determined in the ordinary case by taking aggravating and mitigating circumstances. Therefore, if the imprisonment determined is ten or more years, the actual imprisonment to be imposed on a child shall be from one to ten years. This is not, however, done in practice and the face value of imprisonment is used. Further, to ensure that imprisonment is for the shortest period, judges must use proportional conversion of the imprisonment determined to the one stated under Article 168 (2). The practice is not in line with this caveat.

Common to the measures and penalties, probation is also recognized in the Ethiopian child justice system under Article 171 of the Criminal Code. Compared to its adult counterpart, this provision provides preferential treatment by extending it to serious crimes that are not eligible for suspension for adults. The duration of the probation is also lower than that of adult cases. It does not seem also the same conditions are required and rules of conduct can be imposed on children as adults. The special circumstances of children should allow modifications. In practice, it is seldom used by courts.

Children over the age of 15 are subject to the ordinary penalties applicable to adults except for few exceptions. First, death penalty shall not be imposed on a child below the age of 18 at the time of the commission of the crime. Second, the ordinary penalty may be mitigated as per Article 179, a preferential treatment that is mostly utilized by courts. Third, courts are also allowed to impose penalties applicable for those below 15 (arts 167 and 168) to those over fifteen, which is seldom used in practice. Lastly, they may be subject to measures provided under Articles 158-162 if their mental development is much like that of a child below the age of 15 or where the crime is not serious and when they are amenable to such measures as per the expert opinion. This last scenario is also seldom used by courts.

Enforcement of the measures is not given to a centralized organ. Instead, it is given to the respective institutions and authorities specified in each provision. Moreover, courts are not mandated to supervise the enforcement of measures except for their power to vary measures. Normatively speaking, imprisonment of children shall be enforced in separate cells or prisons while the practice is to the contrary. Another issue as regards enforcement is the conditional release of children from detention centers and prisons which the Ethiopian criminal justice system clearly recognizes though it is not practiced. The critique, however, is that the law provides a minimum of one year of served sentence to be released conditionally from a corrective institution and the same period of served sentence as adults (two-thirds) to be released from prison. Another issue that comes during the enforcement of measures and penalties is variation or modification. Modification of measures or the attendant conditions is recognized in the Criminal Code. Variation or modification of the measures for the benefit of the child is a reflection of the rehabilitative ideal of the child justice system though seldom used in practice.

CHAPTER SEVEN

CHALLENGES AND GAPS IN THE REALIZATION OF THE DUE PROCESS RIGHTS AND APPLICATION OF DISPOSITIONS IN THE ETHIOPIAN CHILD JUSTICE SYSTEM

7.1 Introduction

As the preceding two chapters reveal, there is a problem in the realization of the due process rights and application of dispositions in the Ethiopian child justice system. Examining the status of enforcement of the due process rights and application of dispositions alone without equal assessment of the challenges and gaps hindering the operation of the child justice system is not sufficient. This chapter, thus, assesses the challenges and gaps that contributed to this weak enforcement of the rights of CICWL in the Ethiopian child justice system. It tries to examine the challenges and/or gaps starting from the legal framework; institutional setups; gaps and challenges relating to the competence of child justice actors including the place of child justice in law schools' curricula and teaching and in the academic writings and the sufficiency of training given to the actors. The place given to child justice by the relevant stakeholders including the former FAG; Ministry of Women, Children and Youth; Ethiopian Human Rights Commission; CJPO of the Federal Supreme Court; the Federal Justice and Legal Research and Training Institute and their regional counterparts is also addressed. Finally, this chapter assesses other challenges and gaps in the Ethiopian child justice system viz. the legacy of the old CSO proclamation in the works of child rights NGOs; the status of children as a challenge; and the gap in the judicial application of child rights standards in general and child justice provision in particular.

7.2 Normative Challenges and Gaps

7.2.1 Lack of Constitutional entrenchment of the basic principles, absence of a separate Code and the duty to take legislative measure

Ratifying a given human rights standard may not suffice for the implementation of those rights. This is because states have different approaches to giving place to international law in their domestic legal system. Moreover, international human rights standards set norms concerning substantive rights, and the means of implementation are left to the signatory states. This is why human rights standards mandate states parties to take legislative measures. Such national legislations shall give effect to the rights incorporated in the human rights standards to which

they are a party. They may not, however, diminish these rights as the Vienna Convention on the Law of Treaties excludes a defense of national law to depart from international obligations.[1050]

Adoption of legislative measures requires enactment of new laws as well as amendment of existing laws to make them compatible with international human rights standards.[1051] This approach may be called domestication of international standards to national affairs. The incorporation of child rights in national constitutions, though a welcomed approach, is not sufficient for the realization of the rights; additional legislative measures are necessary.[1052] It is desirable to have a consolidated child rights law and this law shall reflect the underpinning principles of the CRC.[1053] These laws are more convenient; in the best interest of the child and contribute to greater awareness on the part of the actors.[1054]

This obligation of states is clearly provided under Article 40 (3) of the CRC. States are required to promote the establishment of laws and procedures specifically applicable to CICWL. It is not clear from this provision whether these laws and procedures should be contained in a comprehensive child justice code or constitute a section of the child welfare laws or general criminal code. In the repealed General Comment No.10, the CRC Committee gave states the discretion to either adopt a special law or contain them in special chapters of the general criminal and procedural law.[1055] The Committee is silent on the issue in General Comment No.24.

However, having a separate code is a preferred approach and is supported by state practices as the majority of states in the world have adopted separate children's rights acts or child justice acts.[1056] This is because the child justice system is different from the criminal justice system both in aim and requires specialized institutions and personnel. Therefore, the need to harmonize the child justice system requires having a separate law governing the substantive measures and sanctions and procedures to be followed as well as the institutional setups. In this regard, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is of the view

[1050] Adopted 23 May1969, entered into force 27 January 1980) 1155 UNTS 331 art 27.
[1051] CRC Committee, General Comment No.5, para.18; ACERWC, General Comment No. 5, 19.
[1052] CRC Committee, General Comment No.5, para 21.
[1053] ibid para 22.
[1054] UNICEF, 'Global Perspectives on Consolidated Children's Rights Statutes' (2008) 23-24.
[1055] Committee on the Rights of the Child, General Comment No.10, Children's Rights in Juvenile Justice (25 April 2007) CRC/C/GC/10 para 91.
[1056] For instance, according to ACPF Report (2013), 39 African states in Africa have consolidated children Act/Code. See also UNICEF, 'Global Perspectives on Consolidated Children's Rights Statutes' (n 1054), executive summary,19, 97 ff; Center for Human Rights, 'Baseline Study for a Comprehensive Child Law in Ethiopia' (2013) 48 ff.

that isolated provisions relating to children contained in a general penal code do not meet the requirements of 'special treatment' envisaged under Article 17 (1) of the Charter. It added that a detailed statute governing the justice system for CICWL 'which could also be *part (and often is) of a more comprehensive child welfare and protection statute*, is needed'.[1057]

As a party to CRC and ACRWC and in the discharge of this obligation, the Ethiopian government tried to incorporate the rights of CICWL in the Constitution, the 2004 Criminal Code and CPC (This law in fact predates the CRC and ACRWC). The Constitution incorporates the principle of the best interest of the child; prohibits corporal punishment and requires for children detained in corrective centers and prisons to be segregated from adults. Constitutional entrenchment of a right gives more force to being respected, protected and promoted by the government and other actors. This is because a constitution is a supreme law of the land and incorporating a right in this law gives more force to implementation.[1058] Moreover, constitutional entrenchment of rights serves as a reference for the adoption of policies, laws and strategies on the rights of children.[1059] It is also important to counter negative developments in child rights.[1060] Hence, states should include the guiding principles of the CRC as it would not be possible to incorporate whole scale the CRC rights.[1061]

In this regard, the FDRE Constitution failed to contain principles that are relevant in the child justice system. These principles are the principle of 'deprivation of liberty of the child as a measure of last resort' and 'for the shortest appropriate period of time'. These principles are the cornerstones of the child justice system as deprivation of liberty of a child for a short period of time has an impact on his/her overall affairs.[1062] Given this, and that millions of CICWL around the world are deprived of their liberty,[1063] it is highly necessary to give these principles a constitutional status in Ethiopia.

[1057] ACERWC, General Comment No. 5, 26. Emphasis added.
[1058] UNICEF, *Handbook on Legislative Reform: Realizing Children's Rights*, vol 1 (UNICEF 2008) 111; Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19 (3) Human Rights Law Review 401, 401; Trude Haugli and Anna Nylund, 'Children's Constitutional Rights in the Nordic Countries: Do Constitutional Rights Matter?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, vol 5 (Brill 2019) 418.
[1059] UNICEF, *Handbook on Legislative Reform* (n 1058) 112, 113.
[1060] ibid 12.
[1061] ibid 126.
[1062] In Africa, these principles are clearly recognized in the Constitution of Republic of South Africa (1996), s 28 (1) (g); Constitution of Kenya (2010), s 53 (1) (f); and Constitution of Zimbabwe (2013), s 81 (1) (i).
[1063] See Nowak, 'Global Study on Children Deprived of Liberty' (n 49).

The implementing laws in the realm of child justice, the Criminal Code and CPC, address the substantive issues (MACR, measures and penalties) and the due process rights of children respectively. In other words, child justice matters in Ethiopia are contained in the general laws. These laws simply contain a separate section that addresses child justice procedures, and measures and penalties. This, as noted by the ACEWRC, does not meet the standard of 'special treatment' for CICWL that is in line with the aims and principles of the child justice system.

This is truly the case in Ethiopia as the special procedures governing child justice are few with no provision that calls for the mutatis mutandis application of the adult procedures. Even having a linking provision will not make the provisions sufficient. This is because equally applying adult procedures by virtue of the principle of equality can create inequality if the adult procedures are not modified to fit the special circumstances of children. Further, providing that 'the adult procedures shall apply by taking the special circumstances of children into account will not solve the problem as different judges with insufficient knowledge and training will conceive specialty differently. Hence, a separate code on child rights and/or child justice that contains the specificities of child justice is necessary so that children can benefit from specialized treatments envisaged in the international and regional child rights/justice standards in a holistic manner.[1064] The CRC Committee has pointed out the lack of a comprehensive children's code and recommended to the Ethiopian government to adopt a comprehensive children's code that contains the provisions of CRC and ACRWC.[1065] In response to this recommendation, the Ethiopian government has developed a plan to assess the possibility of consolidating child laws and entrusted this to the Ministry of Women, Children and Youth and FAG.[1066] To date, however, there is no concrete effort by the Ethiopian government towards having a comprehensive children's code.

7.2.2 Lack of clarity in the Law

This challenge is typical to the substantive law governing measures and penalties. The Criminal Code provides a list of measures and penalties the application of which is dependent on the personal circumstance of the child and/or the nature and gravity of the crime. As discussed in

[1064] Center for Human Rights (n 1056) 39.
[1065] CRC Committee, 'Concluding Observations (2006)', para 9; CRC Committee, 'Concluding Observations (2015)', paras 8 and 9.
[1066] Federal Democratic Republic of Ethiopia National Human Rights Action Plan 2016-2020 (Second National Human Rights Action Plan) 152.

chapter six, a measure of supervised education applies to a child who is morally abandoned or in need of care and protection or exposed to the danger of corruption or corrupted. These conditions, however, are general and vague for judges to implement. The measure of reprimand and home or school arrest are dependent on the gravity of the crime and apply to minor crimes or crimes small gravity respectively. However, which crimes are minor or non-serious for this purpose is not specified and makes the term susceptible to different interpretations. The same is true for the measure of admission to a corrective institution. It applies to a child who committed a serious crime, and which crimes are serious is not clear.

Although this lack of clarity is not noted by courts in practice (due to their lack of knowledge and attention), its potential effect on the proper enforcement of the measures is visible.

7.3 Gaps relating to Specialized Institutions and Personnel and Challenges relating to their Functioning

Article 40 (3) of the CRC enjoins states 'to seek to promote' the establishment of authorities and institutions specifically applicable to CICWL. This, at least, requires the establishment of specialized police units, benches, and the prosecutor's office, as well as a specialized defender's office.[1067] As the phrase 'specialized units' indicates, the obligation of the state is not to establish separate institutional setups that exclusively administer child justice. This is reaffirmed by the CRC Committee as regards the court when it gives the discretion to states to establish child justice courts either as separate units or as part of existing courts, and where that is not feasible for practical reasons, appoint specialized judges.[1068] The ACERWC on its part also supports the development of courts devoted to children's cases. These should have an appropriate legislative basis, including those related to the required specialized personnel and services that they must offer.[1069] However, unlike the Committee on the Rights of the Child, ACERWC is not clear on the nature of the court; whether it should be a separate unit or part of the general court system.

In addition to special police, prosecution, defense and court or judge, a comprehensive child justice system also requires specialized services such as probation, counseling or supervision,

[1067] CRC Committee, General Comment No.24, para 106.
[1068] ibid para 107.
[1069] ACERWC, General Comment No. 5, 26.

and establishment of day treatment centers and, where necessary, facilities for residential care and treatment of children referred by the child justice system.[1070]

Coming to the Ethiopian child justice system, there is no clear law or provision that mandates the establishment of/establishes/ specialized police, prosecution, defense, court and other institutions. This is the case in the face of a policy aspiration to have special benches, police and prosecution officers.[1071] Nonetheless, these specialized institutions and personnel are available in different parts of the country including in the study areas. There are special women and children police and prosecution units and child justice benches in the study areas of this research. Formalizing them is highly important to make them sustainable and their function effective.

7.3.1 Police Units

Special police units for children were started in 1998 in ten woreda police stations in Addis Ababa in the form of CPUs by the joint effort of FSCE, Addis Ababa Police Commission and Save the Children Sweden. [1072] The city police commission assigns and pays for police officers and monitors the CPU activities while FSCE hires non-police staff (volunteers and social workers) and covers the administrative costs of the units.[1073] Separate police divisions for CICWL are also operating in regional states in Adama, Bahirdar, Dessie, Diredawa, Shashemene, Awassa and Wolaita Sodo[1074] through collaboration between the respective regional police commissions and the FSCE as well as many other NGOs.[1075] Now it has become a national practice institutionalized into the police systems almost in all of the regional states[1076] and since 2004, the government has owned the project.[1077]

The functioning of the CPUs has immensely impacted the Ethiopian child justice system by fostering advocacy for increased involvement of duty bearers and improving the treatment of

[1070] CRC Committee, General Comment No.24, para108.
[1071] Criminal Justice Policy, s 6.4.5
[1072] Save the Children Sweden, 'Case Study: Diversion of Children in Conflict with the Law in the Community-Based Program Centers, Ethiopia' (2005) 5.
[1073] Deda (n 89) 54.
[1074] Save the Children Sweden, 'Child Protection and Child-friendly Justice: Lessons Learned from Programmes in Ethiopia: Executive Summary' (2012) 4.
[1075] Deda (n 89) 51.
[1076] ibid.
[1077] Save the Children Sweden, 'Diversion of Children in Conflict with the Law' (n 1072) 5.

CICWL with regard to bringing them to the court as soon as possible and handing them to their parents or guardians pending the disposition of the case.[1078]

Now, there is no such kind of structure (unit) in the police stations. Instead, there are only women and children units[1079] which can be taken as a negative development from being a separate unit to a unit that deals with women's rights as well. Furthermore, such units are not sufficient and/or are not supplied with the necessary manpower. For instance, in Addis Ababa, such units are available at the department level (sub-city level)[1080] and hence, they are absent in police stations. As a result, violations of child rights like detention occurred in the stations.[1081] Moreover, there are police departments in the regions covered in this research where the office is not available.[1082]

7.3.2 Insufficient Child Justice Courts/Benches presided by ordinary Judges

Although it does not have a legal base, the child justice court/bench in Ethiopia traces its origin to the Imperial period. In 1961, a special tribunal of three high court judges was constituted to try children's cases. This tribunal functioned until December 1962 when the special court was established under the order of the Emperor in Addis Ababa that sat twice a week, Tuesday and Thursday. [1083] The Director of Social Defense in the Ministry of National Community Development had been appointed as a woreda (district) court judge to see child justice cases, while CICWL in the provinces were tried before adult courts.[1084]

Currently, child justice benches are established in the capital city and regional and zonal capitals.[1085] In the capital city, there are seven benches in seven sub-cities viz.Lideta, Arada, Kolfe, Bole, Kaliti, Nifas Silk and Yeka. Out of these, only two, those in Lideta and Bole, are

[1078] ibid.
[1079] These units perform the function of the CPUs after the reorganization of police offices in 2015/16; see Addis Ababa University Office of Research Director (n 59) 117.
[1080] Interview with Atsede Wordofa, Women and Children (cases) Investigation and Inspection Officer, Addis Ababa Police Commission (Addis Ababa, 20 April 2022).
[1081] Interview with, Zebanay Adane (n 779); Woinshet Habtam (n 698).
[1082] This is the case in Finote Selam and Hawassa Cities. In the former, the office is constituted but not functional due to shortage of manpower (interview with Getachew Atalel (n 740)) while in the latter, the researcher was unable to see the office designated as such despite the allegation of an officer (Tiglu Birhanu, Investigator, Menaheria Surrounding Police Station, Hawassa City Administration Police Department (Hawassa, 23 March 2022)) that the police station has such unit.
[1083] Steven Lowenstein, 'The Penal System of Ethiopia' (1965) 2 (2) Journal of Ethiopian Law 383, 397-398; T.Clark Dove and Gebre Medhin Gebre Christos, 'The Law and Practice of Handling Juveniles in the Courts of Addis Ababa' (1973) 5 (8) Journal of Legal Pluralism and Unofficial Law 29, 32.
[1084] Lowenstein (ibid) 398.
[1085] Combined Fourth and Fifth Periodic Reports of Ethiopia to the Committee on the Rights of the Child, para 298.

specifically designed for CICWL. The others are benches for women and children cases. In the regional states, similar structures are established in the respective capitals and zonal cities.[1086] A common thread in both Addis Ababa and the regions is that the structure is not available at the higher courts and in the 'rural surrounding' Woreda Courts. They are confined to first-instance courts. Therefore, children who are in areas where there are no special benches are tried in the adult courts which are not convenient for them. Establishing special benches for CICWL in the higher courts and in all first-instance courts in the country requires only a political commitment. Resource constraints cannot be a justification as the judges are ordinary judges and shortage of courtrooms is not convincing given the low standard of courts in woredas that do not require much cost. This lack of commitment is clear from the absence of child justice benches in the high courts where new buildings are constructed which have idle offices.[1087]

Apart from the court structure that ensues from such arrangement, specialized benches have also an implication for the competence of judges in that the bench shall be presided by judges who are experts on child rights in general and rights of CICWL in particular. However, this is not the case in Ethiopia. Judges presiding over these benches are ordinary judges without any expertise in the area.

The absence of specialized benches in Addis Ababa has an implication for the right to immediate bringing of children to court. This is because it is customary that police bring children for the first time only to courts where child justice benches are established.[1088] In other words, police who arrested a child in the sub-cities with no child justice benches (Gulele, Kirkos, and Addis Ketema) did not bring children to the first instance courts of these sub-cities as per Article 172 (1) of the CPC. This practice particularly affects the rights of children that may be arrested or brought to the police station late in the day as traveling and arriving before the closure of the benches will not be possible. Hence, children, particularly, street children, will thus spend a night in the police station which is against the law.

The challenge is not only the absence of sufficient benches. The manner of administering the existing benches has an effect on the rights of CICWL. In all the child justice benches, the judges

[1086] Interview with, Mahlet Tibebu (n 920); Mesfin Chanie (n 920).
[1087] This is the case in East and West Gojjam and Hawassa City High Court (personal observation).
[1088] Cases arose in sub-cities with no child justice benches are entertained by child justice benches in other sub-cities; Interview with Leuleselassie Liben (n 789). The researcher also ascertained this from the court files.

are not exclusively assigned to entertain child justice cases. They also entertain adult cases. This causes delay of cases as the judges hear child justice cases based on their schedules (including adult cases) and there is also no practice of prioritizing child justice cases. This problem is typical for regional child justice benches as they do not have fixed day(s) of hearing of child justice cases.[1089] In one particular case[1090] where the child was accused with an adult, his case was pending while the adult's case is completed. His case took over a year.

7.3.3 The absence of a specialized Defense Office and Challenges relating to the Service

As part of the actors in the administration of child justice, state counsels need to be qualified in the areas of child rights in general and rights of CICWL in particular and upgrade it with continuous training. This can be achieved easily if the state established a specialized legal aid scheme for children, instead of funding the bar associations or NGOs to provide legal services to children directly, or requiring a qualified lawyer to deliver free legal aid as a condition of their license.[1091]

Coming to the Ethiopian child justice system, such kind of stipulation is not provided in the laws. Let alone a specialization in the defense service, the public defender's office in Ethiopia is weak.[1092] One of the manifestations of this weakness is the absence of a public defender's office in general in the regional states let alone a special defense office on child rights.

In practice, there are four categories of legal assistance provided by counsels with no specialized knowledge of child justice. The first category which is present in the federal first instance courts is legal assistance by 'specialized' counsels. There is one counsel in five of the child justice benches in the federal first instance courts except for Lideta.[1093] In Lideta, there are two counsels since the hearing days in this court are two, Monday and Thursday afternoons. The term 'specialized' is under quotation because the counsels were not specialists on child rights in general and on the rights of CICWL in particular from the outset. They are licensed private

[1089] Arba Minch City First Instance Court is an exception in this regard.
[1090] *BG v Prosecutor (2)*, West Gojjam High Court, File No.59253 (2022).
[1091] Hamilton (n 286) 70.
[1092] See Tsehai Wada, 'The Right to Defense Counsel In Ethiopia: A Quest for Perfection' (2017) 19 Journal of Ethiopian Law 85; Ethiopian Lawyers Association and Ethiopian Young Lawyers Association, 'Public Defender's Services in Ethiopia' (2015).
[1093] Interview with Leuleselassie Liben (n 789).

advocates representing other clients.[1094] They are specialized because they represent only CICWL in their assigned benches. Therefore, they can be considered as 'specialized in-service' and get the expertise through practice.

The second category is legal assistance by counsels that represent all indigent parties. This is the practice in the regional courts covered in the study, be it in the first instance or high courts.[1095] They are court employees assigned to represent both adults and children, including CICWL. Their number ranges from one in all the first instance courts and Gamo Zone High Court to five in Bahir Dar and its surrounding high court.[1096]

The third type is the one provided by the federal public defenders' office. This office is established by the Federal Supreme Court as per the power given to it by the federal courts' proclamation no.25/96.[1097] However, there is no formal parent law establishing the office and governing its operation[1098] though the 2011 criminal justice policy envisages its establishment (s 4.7.2). The qualification of the counsels varies depending on the level of the court on which they are working, the minimum being a degree and four years of relevant experience for first instance court counsels and six and eight years of experience for the high court and supreme court counsel respectively.[1099] The office has now over 70 counsels and is expanding its reach by recruiting counsels for the regional divisions. Principally, this office provides legal services for adults over the age of 15.[1100] Nonetheless, in the federal first instance court, Arada division, the child justice bench is assisted by counsel from this office for the reason that the CJPO has not managed to get a free legal service provider.[1101]

The final category is a legal service provided by assistant judges. This is the case in Arba Minch and Hawassa cities' first instance courts.[1102]

[1094] ibid.
[1095] This is the case in Gamo Zone High Court, Bahir Dar and its surrounding High Court, West and East Gojjam High Courts; Hawassa City High Court; Debre Markos City Woreda Court, Bahir Dar City Woreda Wourt, and Jabi Tehnan Woreda Court (Finote Selam).
[1096] Interview with respective counsels in the courts mentioned in the above footnote.
[1097] Interview with Desalegn Kebede, Director, Federal Public Defenders Office (Addis Ababa, 7 April 2022).
[1098] There is however, an effort to legislate this legal framework; Interview with Desalegn Kebede (ibid).
[1099] ibid.
[1100] ibid.
[1101] Interview with Leuleselassie Liben (n 789).
[1102] Interview with, Tsegaye Zeleke (n 724); Mekonnen Belay, Defense Counsel and Assistant Judge, Arba Minch City First Instance Court (Arba Minch, 11 January 20220; Mekides Kebede (n 866); Hailu Solomon (n 822).

Apart from the lack of expertise, the legal service by state counsels faces other problems. The first relates to the workload of the counsels and the quality of service they thus provide. As discussed above, there are benches where counsels are assistant judges. They are providing this defense service in addition to their primary function (assistant judgeship) and for both civil and criminal cases.[1103] More tellingly, the counsel in Hawassa first instance court is a registrar as well.[1104] Similarly, the counsel in Gamo Zone High Court is also doing registrar work and provides the defense service to parties in civil disputes. This makes the counsel over-burdened and diminishes the quality of service provided to CICWL. The second challenge is the absence of the necessary facilities for the counsels. Counsels in many of the benches/courts covered in this research including benches in Addis Ababa do not have their own office.[1105] This makes counsels meet children either in the courtroom[1106] or somewhere in the compound of the court[1107] which ultimately affects the quality of the service. Furthermore, the existing offices are not equipped with the necessary materials like paper, printers and support staff which affected their service.[1108] The third challenge affecting the delivery of qualified service to indigents in general and CICWL in particular is low salary and allowances. Some counsels said that their salary is lower than that of the prosecutor.[1109] House allowance and other benefits for counsels are also lower than that of the registrars.[1110] The final challenge is the marginalization of the counsels and their services by prosecutors[1111]and other justice actors. In the latter case, a counsel mentioned the instances where judges rejected the counsels' request to join their association and the rejection of their colleague to attend training.[1112] As a result of all these challenges, one counsel

[1103] Hailu Solomon (n 822) and Selamawit Anesa (n 773) told the researcher that they are providing the service in both civil and criminal cases.
[1104] Interview with Hailu Solomon (n 822).
[1105] Interview with Tewodros Zeleke, Defense Counsel, Gamo Zone High Court (Arba Minch, 13 January 2022). The researcher observed the existence of counsels' offices only in Bahir Dar and its surrounding High Court; East Gojjam High Court; West Gojjam High Court; Jabi Tehnan Woreda Court; Hawassa City High Court and Federal First Instance Court Arada Division.
[1106] Interview with Shimelish Abebe (n 825).
[1107] Interview with Tewodros Zeleke (n 1105).
[1108] Interview with, Temesgen Melese (n 858); Kelemie Wondimu, Defense Counsel, East Gojjam High Court (Debre Markos, 17 February 2022).
[1109] Interview with, Behaylu Alemu, Defense Counsel, Bahir Dar City Woreda Court (Bahir Dar 2 February 2022); Kelemie Wondimu (ibid); Yenatfanta Mosie, Defense Counsel, Jabi Tehnan Woreda Court, West Gojjam (Finote Selam, 3 March 2022).
[1110] Interview with, Kelemie Wondimu (n 1108); Tewodros Zeleke (n 1105)
[1111] Interview with Yenatfanta Mosie (n 1109).
[1112] Interview with Kelemie Wondimu (n 1108).

characterized the defense counsel office as 'an office with no owner' and indicated that counsels are forced to foresee quitting the job.[1113]

7.3.4 A Single 'ineffective' Rehabilitation and 'Remand Center' with a questionable power

Admission to a corrective institution as a measure against CICWL was recognized in the Ethiopian legal framework since the 1957 Penal Code. Practically, however, there is only one such institution in Addis Ababa which was established in 1942.[1114] It operated under the prison administration until 1964 and was then transferred to the Division of Social Welfare in the Ministry of National Community Development.[1115] It was staffed by a prison superintendent, two probation officers and teachers.[1116] Now, it is administered by Addis Ababa Women, Children and Social Affairs Bureau[1117] and now, the bureau is claiming the transfer of the ownership to another body.[1118]

The Center's intake capacity which currently stands at 150 children[1119] is being expanded through the construction of new buildings[1120] with a potential intake capacity of around 600/700 children.[1121] Despite its limited capacity, however, the center also accommodates children who come from some regions (Oromia, SNNR and Diredawa).[1122] In other regions, the absence of a similar center coupled with the failure of judges to comprehend the last resort nature of imprisonment is the cause for sending children to prisons. As a result, most judges interviewed mentioned this absence as a challenge and recommended its establishment. Of course, similar centers in the regions were intended to accommodate children convicted of serious crimes as provided under Article 162 of the Criminal Code. This was the case in Amhara and SNNPR region. However, these centers are now being used as justice professional training and research

[1113] ibid.
[1114] Addis Ababa University Office of the Research Director (n 59) 172. There was also a similar center in Adama, Oromia region but now not functional (phone interview with deputy inspector Seble Temtim, Head, Prisoner Vocational Training Center (14 December 2022).
[1115] Lowenstein (n 1083) 398.
[1116] ibid.
[1117] Interview with, Moges Demeke (n 705); Andualem Tefesse, Director, Children Support and Supervision Directorate, Addis Ababa City Women, Children and Social Affairs Bureau (Addis Ababa, 4 May 2022).
[1118] Interview with Emebet Getachew, Prosecutor, Women, Children and Cross-Cutting Issues Directorate, Ministry of Justice (Addis Ababa, 4 May 2022).
[1119] Interview with Moges Demeke (n 705).
[1120] Interview with Yohannes Taye, Social Workers, Addis Ababa Rehabilitation and Remand Center (Addis Ababa, 20 April 2022) and personal observation.
[1121] Interview with Yohannes Taye (ibid).
[1122] Interview with Moges Demeke (n 705). The researcher also observed in the register of the center.

institutes/centers.[1123] The one in the SNNPR was not used for its intended purpose due to an alleged lack of budget and facilities.[1124] Whereas, the center in ANRS did not start its function due to implementation gaps such as the absence of an implementation directive, failure to inform the justice actors about the center, and the little attention given to the center by the then bureau of labor and social affairs.[1125]

Children who are admitted to the Center attend a primary school located in the premises of the center and a secondary school in nearby schools.[1126] In addition to education, children were receiving vocational training and skills. Now, this latter scheme stopped six years ago as a result of the reconstruction of the center and the absence of places to sustain the training.[1127]

The center has nine social workers who provide counseling to children on shift due to shortage of offices. It does not have a legal officer and this highly affects the rights of children. For instance, as discussed in chapter six, there is no instance of conditional release of children from the center despite the legal stipulation. This is attributable to the absence of a legal officer. Moreover, the presence of a legal officer well versed in the child justice provisions can prevent detention of children who have parents in Addis Ababa in the center. It is discussed in chapter five that children with parents or relatives in the city are in the center pending their cases. Hence, a legal officer, in consultation, with judges can avert this problem by calling parents and handing children to them pending the trial.

The center's effectiveness is questioned by justice actors including judges.[1128] Although it requires rigorous statistical analysis, part of the explanation for its ineffectiveness is the readmission of children to the center three to five times after serving their terms.[1129] It seems for this reason that some children requested transfer from the center to prison.[1130] Furthermore, the center has no disaggregated data which is essential to measure its impact on the life of children and design its strategy based on the needs and circumstances of children. Studies also indicated

[1123] Interview with, Anteneh Zemedie, Director, Legal Research Directorate, SNNPR Justice Organs Professional Training and Legal Research Center (Hawassa, 22 March 2022); Sera Chalachew (n 789); Bayeh Embiale (n 712).
[1124] Interview with Anteneh Zemedie (ibid).
[1125] ANRS Bureau of Labor and Social Affairs, 'Region wide Study to begin the Function of Bahir Dar Rehabilitation Center' (2003) cited in Fanta (n 61) 89.
[1126] Interview with Moges Demeke (n 705).
[1127] Interview with Yohannes Taye (n 1120).
[1128] Interview with, Leuleselassie Liben (n 789); Desealgn Kebede (n 1097).
[1129] Interview with, Moges Demeke (n 705); Addisu Gedefaw, Social Worker, Addis Ababa Rehabilitation and Remand Center (Addis Ababa, 29 April 2022).
[1130] Interview with Moges Demeke (n 705).

that the center is not performing well in many respects.[1131]

As its name indicates the center also serves as a remand center for children pending their cases. However, the legal base of this power of the center is questionable. As discussed in chapter five, pretrial detention of a child is not allowed.[1132] Handing to an institution is mentioned in the Amharic version and this institution shall not be a prison. It does not seem the intention of the lawmakers that this center has the power to receive children on remand. Had this been the intention, the Code which was adopted after the Penal Code, would explicitly refer to the provision of the then Penal Code that formalized a similar institution (corrective institution). Moreover, the center is almost similar to a prison as children are not allowed to leave the center. The only missing thing in the center is the armed security that keeps prisons. Therefore, this author contends that the institution mentioned in the CPC is another institution of a private or government nature with no restriction of liberty of the child like orphanages and child care centers.

7.3.5 Extinct Institutions: Community-based Correction Centers

The other de facto measure taken was the institutionalization of diversion. Although no law specifically authorizes and provides guidance to do so, diversion of CICWL to a community-based correction program was practiced.[1133] CBCP is an arrangement where petty and first-time CICWL get diverted to the community instead of going through the formal child justice system.[1134]

CBCCs were first introduced as a pilot project by Forum on Street Children Ethiopia (now Forum on Sustainable Child Empowerment) in conjunction with the Addis Ababa City Police Commission in 2004 in the most affected area of the city. Later on, it was replicated in ten more centers at different locations in Addis Ababa and many other cities where CPUs were operational

[1131] See Dejen Woldearegay, 'Causes and Treatments for Juvenile Sex Offenders in Addis Ababa Rehabilitation Center and Remand Home' (MA Thesis, Addis Ababa University 2017); Dejen Woldearegay, 'Provisioning Social Rights to Juvenile Offenders: The Case of Addis Ababa Remand Home' (LLM Thesis, Addis Ababa University 2021); Tesfamariam Mebratu, 'Experiences of Female Juvenile Delinquents and Available Rehabilitation Programs in Remand Home, Addis Ababa' (MA Thesis, Addis Ababa University 2017); Tigabu Haregewoin, 'Children in conflict with the Law and their Rights to Education in Addis Ababa Rehabilitation Centre (with special emphasis on Primary Education)' (MA Thesis, Addis Ababa University 2016).
[1132] CPC, art 172 (4).
[1133] Deda (n 89) 61.
[1134] ibid.

including Adama, Bahir Dar, Dessie and Dire Dawa.[1135] In Addis Ababa, they were located in the woreda administration office compounds.[1136] The center in Hawassa is also located in the same compound where there are government offices including police stations and political party offices.[1137]

On average, children stayed in the centers for three hours per day on weekdays[1138] or school days before or after class.[1139] The activities that children were engaged in and the services they received include studying in the center's library, tutorial classes, watching recreational films, playing indoor games,[1140] and counseling.[1141] The program was one of the most successful and taken as a model for other countries. As a result, some African countries took a lesson from the program.[1142]

Despite its tremendous impact on diverting children from the judicial process and assisting them to be responsible citizens, CPCP has now phased out due to the cessation of NGOs' funding and support[1143] and in Addis Ababa, with the retaking of the offices by the government.[1144] Due to lack of interest on the matter, the city government retook the offices that were used as CBCCs in the woreda offices claiming that the Centers are not needed. In some cases, the government has also expropriated the properties of the center.[1145] Another respondent speculated that the retaking was made due to the prevalence of youth centers across the sub-cities that are alleged to perform similar function as CBCCs. Nonetheless, there is no practice of referring children to these centers. Further, the youth centers now are used as meeting halls- they are not used for their

[1135] ibid 62.
[1136] Interview with Adugna Muleta (n 964).
[1137] Personal observation.
[1138] Save the Children Sweden, 'Child Protection' (n 1074) 11.
[1139] *A v Bahir Dar City Police* (n 702); S v Prosecutor (n 730).
[1140] Save the Children Sweden, 'Diversion of Children in Conflict with the Law' (n 1072) 10-11; Forum on Street Children (n 751) 33; Interview with, Seble Feleke, Social Worker, Bahir Dar City First Instance Court (Bahir Dar, 2 February 2022); Adugna Muleta (n 964); Debritu Wondimu, Psychologist, Hawassa Community-Based Diversion Center (Hawassa, 23 March 2022).
[1141] *A v Bahir Dar City Police* (n 702); *S v Prosecutor* (n 730).
[1142] Interview with Zewuditu Gebrehiwot, Social Workers, Forum for Sustainable Child Empowerment (Addis Ababa, 26 April 2022).
[1143] ibid; Interview with, Seble Feleke (n 1140); Mewded Zeleke, Social Worker, Arba Minch City First Instance Court (Arba Minch, 11 January 2022). This is partly attributable to the old CSO Law (phone interview with Adugna Muleta (n 969, 27 December 2022)) and loss of interest on the matter (interview with Zewuditu Gebrehiwot (n 1142).
[1144] Interview with, Adugna Muleta (n 964); Zewuditu Gebrehiwot (n 1142).
[1145] Interview with Zewuditu Gebrehiwot (n 1142)

intended purpose.[1146] The only center that is still not closed is the one located in Hawassa. There are psychologists there and those services are alleged to be available. Nonetheless, observation of the center shows that it is not functioning. The rooms dedicated for play, computer learning and play are all covered by dust and some are out of use (broken). The officer of the center also admitted that there have been no CICWL in the center for a long time and justice actors are not aware of it.[1147] This is one of the huge negative developments in the Ethiopian child justice system.

7.3.6 The absence of Probation Office or Supervisory Authority and limited use of Social Workers and Challenges relating to the Service of Social Workers

The CRC Committee recommends the establishment of specialized probation service, counseling or supervision as components of a comprehensive child justice system.[1148] Usually, these offices are run by social workers. The importance of social work is informed by the fact that the causes for the involvement of children in crimes are social in nature in that children who offend often live in families facing difficulties such as poverty, substance abuse or separation; children may be excluded from school; they may be involved in risky behaviors such as drug use or prostitution.[1149] The main purpose of the child justice system, as mentioned under Article 40 (1) of the CRC, is to enable children not to re-offend. This is the ideological base for the involvement of social work in the child justice system.[1150]

Child justice systems may not be equipped to fulfill this role alone and need to work with the social sector. In the absence of such intersectoral cooperation, child justice interventions would not bring 'a sustainable change in the child's behavior, circumstances and environment'.[1151] Hence, within the child justice system, a wide range of services can be delivered by social workers starting from the initial contact with the justice system through trial and disposition and to post-disposition stages.[1152] According to UNICEF, the following are the roles of social workers in the administration of child justice:

[1146] Interview with Adugna Muleta (n 964).
[1147] Interview with Debritu Wondimu (n 1140)
[1148] CRC Committee, General Comment No.24, para 108.
[1149] UNICEF, 'The Role of Social Work in Juvenile Justice' (2013) 1.
[1150] Xiaohua XI, ' The Role of Social Work in Juvenile Justice In Maninland China' in *The Role of Social Work In Juvenile Justice: International experiences* (Raoul Wallenberg Institute 2020) 197.
[1151] ibid.
[1152] UNICEF, 'The Role of Social Work' (n 1149) 4

- Assisting the child after arrest and providing emotional support by being present during police questioning
- Preparing social inquiry reports to help the court determine the most appropriate course of action concerning the child including 'diversion' at the pretrial stage
- **S**electing the most appropriate program and assisting the child to complete the diversionary measure successfully
- Supervising children released to the community
- Supporting children during custodial sentences
- Preparing children for release by providing continued education and vocational training and working with the family to make the home setting suitable for the child's return; and
- Post-release support (aftercare).

Probation or conditional suspension of a penalty and parole (conditional release of a prisoners) are recognized under the Ethiopian Criminal Code (arts190-200 and 201-207 respectively) and in the child justice system (arts171, and 163 (2), para 2 and 168 (3) of the same code). The supervision of the persons sentenced or released conditionally may be entrusted to a probation officer,[1153] and hence, the Code envisages the establishment of a probation commission.[1154] There is no probation office in the Ethiopian criminal justice system,[1155] let alone a specialized probation office for children. Given the tremendous roles of probation officers (social workers) discussed above in supervising the enforcement of community-based measures and in supporting a child who is released from custody, this absence of a probation office in Ethiopia has a great repercussion on the rehabilitation and reintegration of children which the child justice system has principally aimed at.

The Ethiopian criminal/child justice system empowered charitable organizations to supervise and assist offenders.[1156] These are associations or groups of a public or private nature, which perform their activity with the assistance and under the control of the state.[1157] This system aims at obtaining good results from the enforcement of penalties and measures, and shall be ordered

[1153] See Criminal Code, arts 199 and 205 (2).
[1154] ibid art 199 (2).
[1155] The Probation office was, however, in operation in previous times and it was started in 1967 (see Dove and G.Christos (n 1083) 76.
[1156] See Criminal Code, arts 199, 205 (2), 159.
[1157] ibid art 210 (1).

when the law provides; in other cases, a criminal either conditionally or finally released from prison or detention may voluntarily have recourse to the help of such an organization.[1158] The duties of the charitable organizations consist of providing offenders counseling, guidance and moral and material assistance to achieve the purpose of reinstatement and prevention of reoffending.[1159] The organization may, in particular, place the protected persons in employment or find for them or assist them in finding work and guide them on how to use their savings or earnings.[1160] Despite these immense and essential powers of rehabilitation and reintegration, there is no such institution established in the Ethiopian criminal justice system.[1161]

Regarding the service of social workers, the Ethiopian criminal/child justice system does not explicitly recognize their roles in the administration of the respective system. The only implied recognition of their roles can be inferred from the discretion given to the court to 'call and examine any person or representative of institutions' regarding the character of the child and the situation of his/her family before passing a sentence as provided under Article 54 (1) of the Criminal Code and 177 (2) of the CPC.

In practice, however, the Ethiopian child justice system utilizes the services of social workers. Social work offices are established in the federal first instance courts covered in this research and city-level first instance courts in the regions. They are available in courts where there are child justice benches.[1162] On the other hand, they are rarely available in higher courts which is regrettable as crimes triable in high courts are more serious and need an inquiry into the background of the child. Furthermore, in one high court where the office is constituted, its power is limited to victims of crime.[1163] They are also absent in rural surrounding Woreda Courts. In courts where the office is not available, there are no efforts to work with the sociology and/or anthropology departments of the nearby universities.

The service of social workers is limited in the practice of the Ethiopian child justice system in two respects. First, in some courts, social workers are rarely engaged in issues involving CICWL

[1158] ibid art 208.
[1159] ibid art 209 (1).
[1160] ibid.
[1161] Belayneh Admasu and Alemu Dagnew, 'Suspension of Penalty: The Legal Framework in Ethiopia and its Practice in the Amhara National Regional State Courts' (2017) 8 (1) Bahir Dar University Journal of Law 107; Shewit Kahsay, 'Community-Based Rehabilitation of Offenders: An Overview of Probation and Parole in Ethiopia' (2017) 1 Hawassa University Journal of Law 23.
[1162] Interview with, Mahlet Tibebeu (n 920); Mesfin Chanie (920).
[1163] Interview with Sitota Kifle (n 885)

and they work more on the issue of victims of crime and child custody.[1164] This is partly attributable to the lack of knowledge on the part of judges about the role of social work in the child justice system[1165] and partly evaded by judges intentionally with the need to get cases disposed of speedily as an indicator of their efficiency.[1166] Second, in courts where social workers engage in the child justice system, their role is mostly confined to the post-conviction stage and they rarely engage in the early stages of the child justice process.[1167] At this stage, social workers involve themselves in two ways. The first is in the preparation of a social inquiry report when ordered by judges after the conviction of the child. This is performed by court social workers. Secondly, social workers provide support and counseling to children in the rehabilitation center.

In those courts where the social workers' office is engaged in the child justice system, the service is besieged with different problems. The problems originate from the lack of attention given to the office[1168] in terms of salary and other benefits and logistics. It is important to recall that the Tokyo Rules provide that staff administering non-custodial measures shall be entitled to pay commensurate to the nature of the work and provide them with the opportunity for professional growth (Rule 15.3). Some social workers interviewed said that the salary they are being paid is too little, which forced their colleagues to leave the office and they are also anticipating to leave in search of a better salary.[1169] Making things worse, there is no logistics support provided by the court to facilitate the work of social workers. In other words, in regional courts where social workers compile information by going to the place of the child, his/her guardians and the place of the victim, the cost of travel is covered by the social workers.[1170] In addition to the low salary, the same social workers mentioned the absence of professional growth and promotion opportunities as a challenge to their service. One of the respondents said that service without

[1164] Interview with, Hiwot Fanta (n 885); Meseret Haile (n 885); Eyerusalem Mulaw and Emebet Asefa (n 885). The researcher did not also find court file where a social inquiry report is prepared in these courts and in Bahir Dar City Woreda Court and Jabi Tehnan Woreda Court.
[1165] Interview with, Hiwot Fanta (n 885), Biniam H. Selassie, Social Worker, FFIC, Arada Division (Addia Ababa, 19 April 2022); Shimelis Leulseged, Social Worker, FFIC, Akaki Kaliti Division (Addia Ababa, 26 April 2022).
[1166] Interview with Biniam H.Selassie (ibid).
[1167] The researcher found only three benches where social workers engaged in the early stages of the process, by being present during police interrogation (Interview with, Hiwot Fanta (n 885); Meseret Haile (n 885)).
[1168] Interview with Shimelis Leulseged (n 1165).
[1169] Ibid; Mewded Zeleke (n 1143); Anonymous, Social Worker, FFIC Bole Division (Addia Ababa, 28 April 2022); Ruth Getie (n 922).
[1170] Interview with, Mewded Zeleke (n 1143); Seble Feleke (n 1140); Meseret Haile (n 885); Hiwot Fanta (n 885); Tirualem Lingerew, Social Worker, Jabi Tehnan Woreda Court (Finote Selam, 1 March 2022).

professional growth is 'exploitation'.[1171]

7.4 Insufficient budget allocation

Adopting a policy on child rights and enacting child rights laws is not sufficient. Implementation of the laws, policies and programs requires 'sufficient financial resources being mobilized, allocated and spent in an accountable, effective, efficient, equitable, participatory, transparent and sustainable manner'.[1172] Hence, it is required to take legislative (enacting legislation that aims to ensure that budgets are sufficiently large for the realization of children's rights at the national and sub-national levels); administrative measures (development of programs that meet the aim of the law); and other measures (data collection and policy development on children's rights).[1173] Budgeting for children does not, in fact, require a separate budget for children; instead, it deals with the portion of the national budget that goes to programs and sectors that mainly target children.[1174]

Nevertheless, the Ethiopian government has failed to allocate the necessary budget for the realization of the rights of children, including the rights in the realm of child justice. In its latest concluding observation delivered in 2015, the CRC Committee regretted that the Ethiopian government did not comply with its previous recommendations as regards budgetary allocation (paras 6 & 12) despite the increased resource allocated to the Ethiopian Human Rights Commission[1175] and for health (para 56).[1176] Generally, budget for the justice sector takes the least share compared to other sectors in the budgetary allocation in Ethiopia.[1177]

7.5 Absence of Strategy, Evaluation, Data and Research

The CRC Committee enjoins states to develop a comprehensive national strategy or action plan to implement the rights of children contained in the CRC. This strategy has to include the rights

[1171] Interview with Shimelis Leulseged (n 1165).
[1172] Committee on the Rights of the Child, General Comment No.19, Public Budgeting on the Realization of Children's Rights (art.4) (20 July 2016) CRC/C/GC/19 para11 (CRC Committee, General Comment No.19).
[1173] ibid para 23.
[1174] Shimelis Tsegaye and Yehualashet Mekonen, 'Budgeting for Children in Africa: Concept and Framework for Analysis' (ACPF 2010) 60.
[1175] Combined Fourth and Fifth Periodic Reports of Ethiopia to the Committee on the Rights of the Child, para 48
[1176] Committee on the Rights of the Child, 'Concluding Observation on the combined Fourth and Fifth Periodic Reports of Ethiopia', para 56.
[1177] See for instance, UNICEF, 'Highlights of the 2021/22 Federal Government Budget Proclamation' 6 <https://www.unicef.org/ethiopia/media/5006/file/screenshot%20of%20the%20Highlights%20federal%20budget%20proclamation%20document.pdf>accessed 27 September 2022.

of all children and all rights of the CRC.[1178] The strategy must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of children across the state. It must go beyond statements of policy and principle and set real and achievable targets in relation to all rights of children.[1179]

Ethiopia adopted the National Children's Policy in 2017. The policy tries to address all rights of children with a wide variety of implementing mechanisms. It also addresses the issue of CICWL under the sections dealing with 'children in difficult situations'.[1180] It envisages prevention of crime by children and rehabilitation and reintegration into society.

Nonetheless, the policy is not backed by a strategy or action plan on child rights. There is only a national human rights action plan. So far, Ethiopia has adopted two national human rights action plans and is now in the process of adopting the third action plan. In the two action plans, child justice issues were addressed. The first action plan incorporated the following plans regarding CICWL: expansion of child-friendly systems; introduction of a standardized system of segregation of children from adults; and strengthening of the national CRC committees.[1181] The second action plan paid more attention to child justice and added the following action points to the plan: promote the participation of social workers, establish new corrective institutions at both federal and regional levels, provide training to justice actors, and conduct a study on consolidating child rights laws.[1182] This action plan provided performance indicators for the plans that were in the first action plan and those included in it. It also provided a list of responsible government actors for the achievement of the targets. Nonetheless, as this research has found, some of the plans are not realized. This is the case for the establishment of new corrective centers; segregation of children from adults and strengthening of the national CRC Committees. Furthermore, the achievements with regard to the rest of the action points are not satisfactory.

Ensuring that all the provisions of the CRC are respected requires a continuous child impact assessment (predicting the impact of any draft law or policy which affects children's rights) and

[1178] CRC Committee, General Comment No.5, para 29.
[1179] ibid para 32; ACERWC, General Comment No.5, 33.
[1180] S 1.1.6, para 3 and s 3.6 (l).
[1181] Federal Democratic Republic of Ethiopia National Human Rights Action Plan 2013-2015 s 4.2.5, paras 4, 7 and 2 respectively.
[1182] See the Second National Human Rights Action Plan 143-52.

child impact evaluation (evaluating the actual impact of implementation).[1183] Though this is the primary obligation of states, the involvement of NGOs, academic institutions, professional associations, and independent human rights institutions is essential.[1184] In the context of the child justice system, the evaluation shall include the effectiveness of the measures taken, the issue of reintegration and patterns of offending. The Committee recommends this be done by independent academic institutions.[1185]

There are no such endeavors concerning the Ethiopian child justice laws and policy except one impact assessment of the 2017 national children's policy.[1186] The policy takes research by government organs, and academic and research institutions as one tool of implementation. It is, however, a soft tool that only requires encouragement of the institutions to do so.[1187]

The collection of sufficient, reliable and disaggregated data on children is essential to assess the extent of realization of children's rights. This shall be done by the government in collaboration with research institutes and aim to generate a complete picture of progress towards the realization of the rights.[1188] The data collected shall be used to assess progress in implementation, identify problems and inform all policy development for better realization of rights. This requires the development of indicators for all rights of children guaranteed by the CRC.[1189] In the realm of child justice, the data shall be disaggregated on the number and nature of crimes committed by children, the use and the average duration of pretrial detention, and the number of children diverted, the number of convicted children, the nature of the sanctions imposed on them and the number of children deprived of their liberty.[1190]

The Beijing Rules provide research and data collection as a basis for policy formulation and evaluation of the child justice system (Rule 30).[1191] The mutualism between research and policy is especially important in the child justice system.[1192] The use of research as a basis for an

[1183] CRC Committee, General Comment No.5, para 45.
[1184] ibid para 46.
[1185] CRC Committee, General Comment No.24, para114.
[1186] Fasil Mulatu and Rakeb Messele, 'Impact Assessment Report on the Draft National Child Policy of Ethiopia (2011)' (Center for Human Rights, Addis Ababa University 2014).
[1187] Federal Democratic Republic of Ethiopia National Children's Policy (2017) s 4.7 (National Children's Policy).
[1188] CRC Committee, General Comment No.5, para 48; ACERWC, General Comment No.5, 42.
[1189] CRC Committee, ibid.
[1190] CRC Committee, General Comment No.24, para113.
[1191] See also Tobin and Read (n 11) 1697-98; Roy and Wong (n 18) 32.
[1192] Commentary to Rule 30 of the Beijing Rules.

informed child justice policy is an important mechanism for keeping practices in tandem with advances in knowledge and the continuing development of the child justice system. This is because the lifestyle of children rapidly changes in the forms and dimensions of crimes by children, and hence, the child justice systems' responses to these crimes shall take the changes into account.[1193] However, interviews with the officers of relevant government offices reveal that none of the concerned government organs has conducted research on the status of implementation of the child justice provisions or sponsored an academic institution to do so.

One of the primary concerns of the criminal justice policy of Ethiopia was the collection, analysis, dissemination and interpretation of criminal justice data.[1194] At the national level, data regarding child justice can be collected by three government organs: FAG (the now MoJ) as per the policy objective and its establishment proclamation;[1195] Federal Police Commission;[1196] and the Ministry of Women, Children and Youth (the now Ministry of Women and Social Affairs).[1197] However, there are no criminal justice statistics in general and comprehensive child justice statistics in particular.[1198]

The third periodic report of Ethiopia to the CRC Committee contained some data on the sex of children, the types of crimes committed and the number and sex of children detained in the correctional center located in Addis Ababa.[1199] The figure did not show the actual state of child justice in Ethiopia and did not cover all regions as criminal justice statistics in Ethiopia are very poor.[1200] Furthermore, the data lacked disaggregation in other respects like the socio-economic background of children and the geographic representation of children and the crimes they are

[1193] ibid.
[1194] See s 2.6.
[1195] A Proclamation to Provide for the Establishment of the Attorney General of the Federal Democratic Government of Ethiopia 2016, Proclamation No.943 Federal Negarit Gazeta 22nd Year No.62 art 6 (9) (b) (FAG Establishment Proclamation).
[1196] Duties related to criminal justice statistics was mentioned in the Federal Prison Commission Establishment Proclamation No.720/2011. The proclamation mandated the Commission to keep criminal records of offenders (art 6 (14)). In the new proclamation however, the commission is mandated to collect and analyze statistics on prisoners which is a narrow power; see Federal Prison Proclamation , art 7 (14).
[1197] National Children's Policy, s 4.9 a.
[1198] Interview with, Emebet Getachew (n 1118); Belete Dagne, Director, Children Rights Awareness Creation and Inclusion Directorate, Ministry of Women and Social Affairs (Addis Ababa, 19 April 2022).
[1199] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Third Period Report of States Parties due in 2003: Ethiopia (28 October 2005) CRC/C/129/Add.8 (Third Periodic Report of Ethiopia to the Committee on the Rights of the Child) paras 218-220.
[1200] Simenon Kilos, 'Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Actions' (2018) 12 (2) Mizzen Law Review 371.

alleged to have committed. In addition, the figure did not contain the number of children detained pretrial; the number of convicted children; the nature of sanctions imposed on them and the number of children deprived of their liberty as a sentence. These make the data incomplete and of almost no help in the effort to improve the child justice system and to make it comply with the international standards and serve the best interest of CICWL.

7.6 Challenges and Gaps relating to Competence and Training of the Child Justice Actors

7.6.1 Little to no place given to Child Justice in the Law School Curricula and Teaching

For the child justice system to have competent actors, its rules and principles must be included, at least, in law school's curricula, and well taught and researched. These are the two most important roles of law schools in the national human rights system, in this case, the child justice system- offering legal education and training and producing competent actors in the system and producing independent knowledge of human rights through research and scientific works.[1201]

The CRC Committee believes that the CRC shall be reflected in educational curricula at all levels. Not only this, children should know about human rights through the school curriculum and in other ways.[1202] This entails an obligation on the states to include teaching about human rights in general and children's rights in particular in their education curricula from the primary to the tertiary level including in graduate programs. This is because human rights education contributes to 'the long-term prevention of human rights abuses and represents an important investment in the endeavor to achieve a just society in which all human rights of all persons are valued and respected'. [1203] It does so 'by providing persons with knowledge, skills and understanding and developing their attitudes and behaviors, to empower them to contribute to the building and promotion of a universal culture of human rights'.[1204]

The Committee recommended the Ethiopian government to include human rights education in the education curriculum at all levels.[1205] So far, except for the provision of civic and ethical

[1201] Stephanie Langouste and Danielle Siskin, 'The Role of Academia in the Protection and Promotion of Human Rights (2018) 2 Matters of Concern Human Rights Research Papers 23.
[1202] CRC Committee, General Comment No.5, Para 53; see also ACERWC, General Comment No.5, 43-44
[1203] Available at <https://www.ohchr.org/en/resources/educators/human-rights-education-training> accessed 27 September 2022; See also Vienna Declaration and Program of Action (25 June 993) pares 33, 78-82.
[1204] United Nations Declaration on Human Rights Education and Training (adopted 19 December 2011) *UNGA Res 66/137, A/RES/66/137*art 2 (1).
[1205] CRC Committee, 'Concluding Observations (2006)', para 21.

education at the primary and secondary level,[1206] and legal education in higher education, this did not materialize[1207] despite the initiation undertaken by the Ethiopian human rights commission and its recommendation to the Ministry of Education (MoE) for the incorporation of human rights education at the primary and secondary level.[1208] The second national human rights action plan, however, envisaged human rights education as one means of implementing the action plan and required education institutions to give emphasis to it.[1209] The draft third national human rights action plan for the period 2020/2021 to 2024/2025 is more explicit in this regard. After noting the inadequacy of the existing efforts of educating about human rights, it envisaged the incorporation of human rights education at all levels[1210] presumably based on the research report that the second action plan mandated the MoE to evaluate and offer solutions on how human rights education could be included in the curricula at all educational levels.[1211]

In the context of child justice, the principles and rules of the child justice system must be included in the law school curricula at the undergraduate and graduate levels. This is the first and most important avenue to producing competent child justice actors. The undergraduate law school curriculum has included the special procedures of the child justice system and dispositions and this is given as part of the general criminal procedure and criminal law courses.

To that end and in tandem with the laws, nationwide teaching materials on both aspects of the child justice system have been prepared and serve as principal guides to teachers and students. Measures and penalties are included in the criminal law module (one sub-section). Measures are only illustrated in tabular form which is a summary while penalties are discussed using the words of the Criminal Code.[1212] The provisions are not assessed critically on their own and in line with the international and regional standards on the subject matter. On the child justice procedures

[1206] In its report to the monitoring bodies, the government of Ethiopia invoked this as a means to promote human rights education. See Combined Fourth and Fifth Periodic Reports of Ethiopia to the Committee on the Rights of the Child, para 266; Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights Combined Initial, Second and Third Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Ethiopia (28 July 2009) para 337; Human Rights Council, National Report Submitted in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Ethiopia, 6–17 (May 2019) para 18.

[1207] Ethiopian Human Rights Commission (EHRC), 'Human Rights Education in Ethiopian Primary and Secondary Schools: Progress, Gaps, Challenges and Way Forward' (2020) 3 (EHRC, 'Human Rights Education').

[1208] Ghetinet Metiku, 'Briefing Notes on Human Rights Education', <https://www.abyssinialaw.com/blog-posts/item/1458-briefing-notes-on-human-rights-education> accessed 18 October 2021.

[1209] Second National Human Rights Action Plan 189.

[1210] EHRC, 'Human Rights Education' (n 1207) 1.

[1211] Second National Human Rights Action Plan 189.

[1212] Nirmala and Mekonnen (n 1036) 37.

and due process rights, the criminal procedure module mentions the general special procedures only in half a page and suggested the readers to read the special procedures in the CPC, CRC and ACRWC.[1213]

The other relevant teaching material in the undergraduate program is 'sentencing and execution' module that deals with the theories of punishment, sentencing regimes, types of punishments and their determination, and execution. Nonetheless, this module has not addressed the justifications for imposing measures and penalties on a child, their types, determination and execution. Apart from these special courses, human rights course is being offered at an undergraduate (LLB) level mandatorily and African human rights law as an elective course. The human rights module does not mention the rights of CICWL in the section that discusses the rights of children.[1214] Similarly, the African human rights law module has only two pages on the African child rights protection system with no mention of the rights of CICWL.[1215]

Despite its inclusion in the undergraduate criminal law and criminal procedure courses, child justice procedures and dispositions are not well taught. Almost all students (both recent graduates and current students) interviewed said that the issue is marginalized in their learning-teaching and child justice issues never form part of the assignments and exams.[1216] Further, child justice questions are almost not featured in the national law school exit exams introduced in 2011. A review of these exams[1217] in the field of criminal law and procedural law found only questions that indirectly relate to child justice and many of the questions are about infancy as a ground of exoneration from criminal responsibility. The only substantive question that deals with the issue of child justice (justice system that involves children above the MACR) concerns the situation where death penalty cannot be imposed which includes persons below the age of 18 years.

Regarding the place of child justice in the postgraduate curricula, the researcher examined the curriculum of Addis Ababa University (college of law and governance studies[1218] and Center for

[1213] Aderajew Teklu and Kedir Mohammed, 'Ethiopian Criminal Procedure: Teaching Material' (2009) 280.
[1214] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law: Teaching Material' (2009) 70-74.
[1215] Nega Ewunetie and Admasu Alemayehu, 'Africa Human Rights Law: Teaching Material' (2209).
[1216] The researcher interviewed 19 students (in person and on phone) from Addis Ababa, Arba Minch, Bahir Dar, Debre Markos, Gondar, Hawassa, Jimma, Wolaita Sodo and Wollo University.
[1217] The researcher consulted exit exam papers for the year up to 2020.
[1218] Curriculum for the Degree of Masters of Law (LLM) in Criminal Justice (2021) and Masters of Law (LLM) in Human Rights.

Human Rights[1219]), Arba Minch University,[1220] Bahir Dar University,[1221] Hawassa[1222] and Wolaita Sodo University[1223] and found that child justice is included as an independent elective course in only two universities that offer masters program in criminal justice i.e. Addis Ababa University (college of law and governance studies) and Hawassa University. This shows the little attention given to the issue. In the other curricula, it is included as one issue in the 'comparative criminal justice policy' course in the Arba Minch University LLM curriculum; in 'seminar on contemporary issues in criminal justice and human rights course in the revised 2017 LLM curriculum of Bahir Dar University; and in the 'children and the law' course of the Center for Human Rights MA curriculum on child rights. Child justice issue is not incorporated in any of the courses in the Wolaita Sodo University LLM curriculum. A course on the rights of children in general is also offered as an elective course in Addis Ababa University, college of law human rights stream.

7.6.2 Insufficient place given to Child Justice in the Justice Professionals Training Institutes' Training Manuals

There are professional training institutes at both federal and regional levels that provide initial (pre-service) training to law graduates for about a year, and in-service training to judges and prosecutors.[1224] The pre-service training focuses on national laws and is more of practical nature.[1225] These are the second places where prospective practitioners can acquire and develop the legal knowledge they obtained in law schools in their undergraduate studies. This avenue, if used properly and meticulously, can produce competent child justice actors. There are four pre-job training modules prepared by the federal justice organs professionals training center (and used by regional counterparts)[1226] that are expected to include the issue of child justice viz. the criminal law, criminal procedure, sentencing, and court decorum modules. However, none of the modules has a single sentence on the issue of child justice. However, the 2004 on-job training

[1219] Curriculum for Masters of Arts (MA) in Children's Rights Studies (2021).
[1220] Curriculum on Masters of Law Degree in Human Rights and Justice Studies (LLM) (2018)
[1221] Revised Curriculum for the Degree of Masters of Laws (LLM) in Criminal Justice and Human Rights (2017).
[1222] Curriculum for the Degree of Masters of Laws (LLM) in Criminal Justice (nd).
[1223] Curriculum on Master[s] of Law in Criminal Justice and Human Rights (2015).
[1224] See Milkii Makuriya, 'Oromia Justice Sector Professionals Training and Legal Research Institute: Major Activities and Achievements' (2012) 1 (1) Oromia Journal of Law 167, 172; See also Amhara Justice Professionals Training and Legal Research Institute, <https://amharajusticetraining.gov.et/index.php?option=com_contentandview=articleandid=16andItemid=17andlang=en,> accessed 14 October 2021
[1225] Makuriya (n 1224).
[1226] The Amhara and SNNPR training and research institutes have no their own training manuals.

module on criminal procedure prepared by the same center briefs the special child justice procedure as contained in the CPC as they appear in the Code without further elaboration and without pitting them against the adult procedure and internationally accepted procedures as contained in the CRC, the Beijing Rules and the ACRWC.

7.6.3 Inadequate Training given to Child Justice Actors

Professional education, training, and refresher courses are all essential to build and sustain the necessary professional competence of personnel working in the child justice system.[1227] Countries having a child justice system with limited resources in terms of special institutions and personnel could provide good services for children if the child justice actors are well trained.[1228] This is because professional competence is essential for the effective and impartial administration of child justice.[1229]

The training should be multidisciplinary, *systematic, and continuous*[1230] and should not be limited to information on national and international standards. On the contents of the training, the Committee provides that the training:

> should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities and the available diversion measures and non-custodial sentences, in particular measures that avoid resorting to judicial proceedings.[1231]

The criminal justice policy emphasizes capacity building of justice actors[1232] to ensure observance of human rights, among others.[1233] The National Children's Policy also provides

[1227] Beijing Rules, Rule 22.1; See also Rule 12.1 of the same Rules.
[1228] ACPF, 'Justice for Children in Africa' (n 253) 44
[1229] Accompanying Commentary to Rule 22.1 of Beijing Rules.
[1230] Emphasis added. CRC Committee, General Comment No. 24, para 112. See also General Comment No. 5, para 53.
[1231] CRC Committee, General Comment No.24, para 112. See also Havana Rules, Rule 85; Vienna Guidelines, para 24.
[1232] Criminal Justice Policy, part III.
[1233] ibid s 3.3.

capacity building of the relevant actors as a mechanism of implementation.[1234] Continuous training is the yolk of capacity building. The task of providing training to child justice actors is given to different government organs viz. the CJPO,[1235] Ministry of Women, Children and Youth, Federal Supreme Courts, the FAG and the respective city and regional offices.[1236] The CJPO has trained justice actors on the contents of the CRC along with the national legal frameworks regarding child justice.[1237] However, interviews with officers of the Ministry/Bureau of Women and Children/Social Affairs and Federal Attorney General and regional justice bureaus show that this duty is not discharged. None of the respondents claimed that they provided training to child justice actors.[1238] Despite the activity of the CJPO and as a result of the failure to discharge their responsibility on the part of the above-mentioned government organs, interviews with judges, prosecutors, police and social workers indicate that there is no training or when provided, it is not adequate.[1239]

7.6.4 In search of the Unicorn: Child Justice in the Academic Writings in Ethiopia

Reading scholarly writings is the third avenue (the first and second being respectively law school teaching and pre and on-job training) that child justice actors use to acquaint themselves with the precept and rules of the child justice system. However, child justice issues are almost non-existent in academic writings in Ethiopia. This researcher consulted major journals publishing legal matters viz. Mizan Law Review (15 volumes with two issues each); Journal of Ethiopian Law (24 volumes, 13 vols. with two issues); Jimma University Journal of Law (13 Volumes); Oromia Law Journal (10 Volumes); Haramaya Law Review (8 Volumes); Ethiopian Journal of Human Rights (6 volumes) and Bahir Dar University Journal of Law (11 Volumes, each with two issues) and found only two Articles on the subject, one in the Journal of Ethiopian Law which is a commentary on the child justice procedures and slightly on the measures and penalties,[1240] and the other in Oromia Law Journal dealing with a case study of the right to

[1234] ibid s 4.10.
[1235] Brochure prepared by the CJPO (file with the researcher).
[1236] Second National Human Rights Action Plan 148.
[1237] Third Periodic Report of Ethiopian to the Committee on the Rights of the Child, paras 48, 215. See also the Second National Human Rights Action Plan 149.
[1238] The researcher interviewed two officers from the Ministry of Women and Social Affairs, one from the regional counter parts and cities covered in the research.
[1239] The only exceptions are one judge and prosecutor who claimed that the trainings are sufficient (Interview with, Tenahun Cherkos (n 821) and Mintamir Alamirew (n 838)).
[1240] Fisher, 'Criminal Procedure for Juvenile Offenders in Ethiopia' (n 62).

counsel of CICWL in Adama.[1241] This shows how the issue of child justice is neglected in the academic discourse in Ethiopia.

7.6.5 Lack of Knowledge among Child Justice Actors, particularly Judges

Considering the absence of sufficient place given to child justice in law school teaching, in the justice professional training institutes, the absence of adequate training for child justice actors, and the marginal place it occupies in the academic writings in Ethiopia, one cannot expect the existence of child justice actors particularly judges versed with the child justice principles and rules. Accordingly, this research has found a serious lack of knowledge on the part of judges. Based on the findings in the previous two chapters, the following are some of the indicators of lack of knowledge of judges;

- Not using other documents or witnesses as means of age proof when there is no birth certificate
- Entertaining every crime by charge, allowing the public prosecutor to examine witnesses and following the ordinary rules of witness examination used in adult cases
- In cases tried without charge, allowing police to be present during trial and examine witnesses
- Trying children together with adults
- Conducting preliminary inquiry in the face of a clear prohibition[1242]
- Lack of awareness of the special rule on the right to counsel of children and trying them without counsel when children are not accompanied by parents. Asking children or their parents about their capacity to hire a counsel (employing a means test), which is not provided in the CPC
- Being unaware of the specific conditions provided for each measure (relating to the gravity of the crime or personal circumstances of the child) and penalties (their last resort nature) and imposing imprisonment on first offenders; fine as a first measure; and rarely knowing the applicability/specialty of probation in the child justice cases
- Sentencing children to a corrective detention for the duration below[1243] and above the duration specified in the Criminal Code.

[1241] Makuriya (n 1224).
[1242] CPC, art 80 (3).

7.7 Little to no place given to Child Justice in the works of the concerned Government Organs and other relevant Entities

7.7.1 Federal Attorney General: A fictitious conflict of jurisdiction

The Attorney General Office was established in 2016 and before that, the power and duties of this office were given to the Ministry of Justice. Again, the office has been reorganized as the Ministry of Justice in October 2021 by the Executive Organs establishment Proclamation without any change in its powers and responsibilities.[1244] The office has the powers and duties, inter alia, to:

- Ensure the establishment of systems for the proper execution of criminal punishments
- Undertake legal reform studies
- Ensure the implementation of federal laws
- Design a strategy for the provision of free legal aid
- Prepare a national human rights action plan and follow up the same
- Visit persons under police custody and correctional facilities
- Provide human rights education and legal awareness training
- Follow up on international and regional human rights treaties ratified by Ethiopia and prepare a national report on their implementation
- Establish a system for the collection, organization, analysis and dissemination of criminal justice information.[1245]

In addition to these general powers and duties in the criminal justice system, the office was responsible for the realization of the action plans set out in the second national human rights action plan viz. establishment of child-friendly systems; corrective centers; segregation of children from adults and training of child justice actors.[1246]

In the context of the child justice system, the office has not discharged any of these powers and responsibilities except the preparation of a national human rights action plan that elucidates plans

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[1243] In the case between *AA and Police* (n 780), the court sentenced the child to one month corrective detention while the minimum duration in the law is one year.

[1244] See Definition of Powers and Duties of the Executive Organs Proclamation 2021, Proclamation No. 1263 Federal Negarit Gazeta, 28th Year No.4 (Federal Executive Organs Proclamation 2021) art 40 (1).

[1245] FAG Establishment Proclamation, art 6; Amhara Regional State Executive Organs Re-establishment and Determination of their Powers and Duties Proclamation 2010, Proclamation No.176 Zikre Hig 16th Year No.1 (ANRS, Executive Organs Re-establishment Proclamation) art 22.

[1246] Second National Human Rights Action Plan 145-52.

to enforce the rights of CICWL. In other words, there is no work done specifically for CICWL. This is because of a fallacious understanding that child justice is not within the power of the office unless the crime is serious or a child is over 15 years in case of which the office participates with charge framing and witness hearing respectively.[1247] This again is due to the aim of the child justice system i.e. rehabilitation which does not go in line with the power and function of the office.[1248] Hence, other cases are the power of the ministry and bureaus of women and children affairs.[1249]

Regional justice bureaus were bestowed with similar powers such as raising legal awareness; conducting a study to improve the regional justice system; ensuring that persons detained are properly handled; representing indigents; facilitating the delivery of the same by advocates;[1250] coordinating, supervising and ensuring the implementation of the criminal justice policy; compiling, analyzing and disseminating criminal justice statistics; ensuring observance of human rights and freedoms; visiting persons in prison and detention centers and ensure that their treatment is according to the law; creating conditions for disposition of cases with reconciliation; establishing a system for proper enforcement of criminal punishments; providing training to prosecutors; awareness creation; preparing regional human rights action plan and follow up its implementation; leading the activities of the region's prison commission.[1251] Like the federal counterpart, regional bureaus were mandated to accomplish the action plans in the child justice system mentioned there. In practice, the same absence of specific activities regarding child justice by these bureaus/departments is revealed through interviews with the respective officers at the regional and zonal levels.[1252]

[1247] Interview with Emebet Getachew (n 1118).
[1248] ibid.
[1249] ibid.
[1250] ANRS Executive Organs Re-establishment Proclamation, art 22.
[1251] See the Proclamation for the Establishment of the Attorney General of the Southern Nations, Nationalities and People's Region State (SNNPR) 2018, Proclamation No.179 art 6; Amended SNNPR Executive Organs Determination of Powers and Duties Proclamation 2019, Proclamation No.180 (Amended SNNPR Executive Organs Proclamation) art 13.
[1252] Interview with, Shimelis Chora, Head, Gamo Zone Justice Department (Arba Minch, 14 January 2022); Abebech Adane, Director, Human Rights Directorate, ANRS Justice Bureau (Bahir Dar, 9 February 2022); Abebe Awoke, Head, East Gojjam Zone Justice Department (Debre Markos, 3 March 2022); Yinager Taye, Criminal Cases Administration Officer, West Gojjam Zone Justice Department (Finote Selam, 9 March 2022); Eyerusalem Terefe, Prosecutor, Women and Children (cases) Investigation and Supervision Unit, SNNPR Justice Bureau (Hawassa, 17 March 2022).

7.7.2 Federal Justice and Legal Research and Training Institute and Regional Justice Professionals Training and Research Institute

This Institute, now renamed as the Federal Justice and Law Institute, is another government organ established with the aim to undertake studies and research on justice and law, to harmonize laws with the country's current level of growth and future development needs and make the justice system modern, accessible, efficient and effective.[1253] The establishing law also aims to enhance the implementation capacity of the justice sector by providing training that will produce qualified leaders and professionals equipped with the necessary knowledge, skills, attitude and ethics.[1254]

The Institute has the powers and duties, inter alia, to:

1. Design law revision research programs and conduct studies and research in order to:
    a) Consolidate and harmonize existing laws with the country's current level of development and make them suitable to use
    b) Initiate the legislation of new laws necessary for the development of the country's legal system
    c) Strengthen legal education and training; and
    d) Enhance the human resource capacities, organization and performance of justice organs.

2. Conduct justice information analysis and present reliable and comprehensive information regarding the success of the justice sector in achieving its mission and identify gaps and propose solutions.

3. Prepare national training curriculum.

4. Provide pre-job and on-job training to justice professionals.[1255]

In the context of the child justice system, the Institute should undertake research on: the sufficiency and impact of the existing child justice laws by collecting and analyzing child justice data; the place given to child justice in legal education; the challenges in the justice system that hinder proper enforcement of the existing laws; and provide recommendations for improvement.

[1253] Federal Justice and Legal Systems Research and Training Institute Establishment Proclamation 2018, Proclamation No.1071 Federal Negarit Gazeta 24th Year No.24 preamble para 1.
[1254] ibid para 3.
[1255] ibid art 6.

It should also prepare a child rights training manual; provide continuous capacity-building training to child justice actors. This is not however the case in the actual practice.[1256]

The regional counterparts to this institute assessed for this research are the justice professionals training and research institutes in Amhara and SNNPR. As their name indicates, these institutes have two directorates/departments, legal research and training. Regarding training, the institutes provide pre-job training to new graduates and on-job training to judges and prosecutors. As discussed under the section dealing with the place of child justice in justice professional training manuals, the institutes use the same manual prepared by the federal institute.[1257] As pointed out above, the pre-job manuals do not include the issue of child justice and hence, it is possible to say that professionals in these institutes are not trained in child justice rules. Neither is there on-job training for child justice actors focusing on the rights of CICWL except for a short training for prison officials on the treatment of prisoners including children over 15 years of age.[1258] Regarding research, there is no research conducted on the issue of child justice by the SNNPR legal research center,[1259] but one research is conducted by the Amhara region's legal research institute.[1260]

7.7.3 Ministry of Women, Children and Youth and its City and Regional counterparts

This long-existing Ministry has the duty to protect and ensure the rights of women, children and youth. In the ministerial establishment proclamation adopted in October 2021, this Ministry does not appear in its usual name. The new law reestablishes the Ministry as 'Ministry of Women and Social Affairs' (MoWSA) by leaving child rights invisible and falling under 'social affairs' which is a regressive development.[1261] In the repealed law, the Ministry of Women, Children and Youth was given the following powers and duties related to children's rights:

- Coordinate all stakeholders to protect the rights of children

[1256] Interview with, Zekarias Erkola, Deputy Director, Justice Professionals Training Directorate, Federal Justice and Law Institute (Addis Ababa, 21 April 2022); Hailemichael Melaku, Director, Public Laws Research and Training Directorate (Addis Ababa, 3 May 2022).
[1257] Interview with Yonas Tadesse, Head, Training Department, ANRS Justice Professionals Training and Legal Research Institute (Bahir Dar, 24 February 2022); Anteneh Zemedie (n 1123).
[1258] Interview with, Yonas Tadesse (ibid); Anteneh Zemedie (n 1128).
[1259] This lack of attention by the center is the reflection of the national attention given to the issue. Interview with Anteneh Zemedie (n 1123).
[1260] Interview Abebe Kassie, Head Research Department, ANRS Justice Professionals Training and Legal Research Institute (Bahir Dar, 9 May 2022).
[1261] Interview with, Belete Dagne (n 1198); Dereje Tegyibelu, Director, Legal Service Directorate, MoWSA (Addis Ababa, 19 April 2022).

- Design a strategy to follow up that the federal policies and laws pay attention to children
- Conclude international treaties relating to children's rights, follow their implementation and submit a report to the concerned bodies; and
- Collect, compile and disseminate information on the realities of children.[1262]

The new proclamation gives more powers to the Ministry in respect of the right of women and children. These are the duties and powers to: initiate policies, strategies and laws for children; devise strategies and standards for mainstreaming children's rights and lead and support awareness creation activities on the rights of children.[1263]

The regional counterparts have limited powers and duties regarding children. For instance, the ANRS Women, Children and Youth Affairs Bureau was given only the power and duty to initiate proposals to enforce the rights of children, and implement the policy issued for the protection of the wellbeing of children.[1264] The SNNPR Women, Children and Youth Affairs Bureau was given the powers and duties to raise awareness on the rights of children; collect and organize data on children; undertake a study for the realization of children's rights and work for its implementation; and supervise the implementation of the international conventions ratified by Ethiopia in the region and report to the concerned body.[1265]

More specifically, in the realm of child justice, the Ministry and Bureaus were responsible for the realization of the action plans set out in the second national human rights action plan including establishing and strengthening national CRC Committees.

Nonetheless, except for the Addis Ababa Women and Children Affairs Bureau (which administers the Addis Ababa Remand and Rehabilitation Center)[1266] and Gamo Zone and Arba Minch City Women and Children Affairs Departments (which are working to reinstitute the diversion center[1267]), the Federal Ministry, Regional Bureaus and city departments have done nothing with regard to the rights of CICWL and do not have tangible plans for the future

[1262] Definition of the Powers and Duties of Executive Organ of the Federal Democratic Republic of Ethiopia 2018, Proclamation No.1097 Federal Negarit Gazeta 25th Year No.8 (Federal Executive Organs Proclamation 2018) art 28.
[1263] Federal Executive Organs Proclamation 2021, art 36.
[1264] ANRS Executive Organs Re-establishment Proclamation, art 26.
[1265] Amended SNNPR Executive Organs Proclamation, art 23.
[1266] Interview with, Moges Demeke (n 705); Andualem Tafesse (n 1117).
[1267] Interview with, Tigabua Sultan, Team Leader, Women and Children Rights and Welfare Protection Unit, Gamo Zone Women and Children Affairs Department (Arba Minch, 30 May 2022); Banhciwosen Wondimeneh (n 964).

either.[1268] One of the potential factors for this reticence among these bureaus and departments may be the absence of legal officers in these organs. This is the case in Amhara region. According to the interview with the respective officers, the regional Women and Children Affairs Bureau and the zonal and city departments have no legal officers. Hence, it is difficult for these bureaus and departments to, for instance, raise awareness and assess the implementation of the rights contained in the CPC and measures and penalties provided in the Criminal Code as these are legal issues.

One point that should not be left without mention concerning the power and duty of the Ministry to coordinate all stakeholders is its power to coordinate the inter-ministerial CRC Committee. The Committee was established in the early 1990s by the then Ministry of Labor and Social Affairs and mandated to follow up the implementation of the CRC by each member Ministry.[1269] This power is then transferred to the Ministry of Women Affairs in 2005 with the transfer of children's rights issues to this Ministry.[1270] The structure goes down to the regional level up to the kebele level.[1271] Now, the power to coordinate the Committees is given to the respective Ministry and the regional counterpart Bureaus and Departments. However, interview with officers from the respective institutions shows that these committees are inactive except for the recent effort to reinvigorate them in the SNNPR.[1272]

7.3.4 Ethiopian Human Rights Commission

In its General Comment No. 2 (2002) on the role of independent national human rights institutions in the protection and promotion of the rights of the child, the CRC Committee noted that the establishment of NHRIs falls within the commitment made by states parties upon

[1268] Interview with, Belete Dagne (n 1198); Dereje Tegyibelu (n 1261); Dereje Mekonen, Children's Rights and Welfare Protection Officer, East Gojjam Zone Women, Children and Social Affairs Department (Debre Markos, 3 March 2022); Melsew Ayalew, Debre Markos City Women, Children and Social Affairs Department (Debre Markos, 3 March 2022); Melsachew Setegn, Children Rights Protection Officer, West Gojjam Zone Women, Children and Social Affairs Department (Finote Selam, 10 March 2022); Abreham Ayalew, Child Rights Protection Officer, Bahir Dar City Women, Children and Social Affairs Department (Bahir Dar, 10 May 2022); Pawlos Koira, Legal Officer, SNNPR Women and Children Affairs Bureau (Hawassa, 22 March 2022); Woinshet Biru, Legal Officer, Hawassa City Administration Women and Children's Affairs Department (Hawassa, 23 March 2022).
[1269] Center for Human Rights (n 1056) 26-27.
[1270] ibid 28
[1271] ibid 27; Third Periodic Report of Ethiopia to the Committee on the Rights of the Child, paras 44 and 45.
[1272] https://www.facebook.com/100064714717786/posts/pfbid0c8DHvHS9QXuQgxUdJECTpyJ47SZubgQHfWLZqiWo3ngsWQDsg2RH7dvc9XjQiziol/?app=fbl> accessed 1 September 2022.

ratification or accession to ensure the implementation of the Convention.[1273] This is because, children, compared to adults, are particularly vulnerable to human rights violations due to their developmental state; they encounter significant problems in using the judicial system to protect their rights; and they have limited access to organizations that may protect their rights.[1274]

These institutions can be established as specialized institutions on the rights of the child (children's rights ombudsperson) or as a broad-based institution with a commissioner on child rights or a specific division responsible for children's rights.[1275] In this regard, the Riyadh Guidelines provide for a consideration to be given to the establishment of an office of ombudsman or similar independent organ, which would ensure the rights and interests of children.[1276] According to this General Comment, the following are basic features of effective NHRIs to ensure the realization of children's rights:

- Furnished with adequate resources for an effective exercise of its powers and discharge of its responsibilities[1277]
- Pluralistic representation including child rights NGOs, universities or experts on child rights and professional associations[1278]
- Having the power to consider individual complaints and petitions and carry out investigations[1279]
- With the power to support children taking cases to court including the power to take children's case in the name of the Institution[1280] and
- The right to report independently on the state of children's rights to the public and parliamentary bodies.[1281]

Accordingly, NHRIs can undertake the following activities: investigations into any situation of violation of children's rights; prepare and publicize opinions, recommendations and reports;

[1273] Committee on the Rights of the Child, General Comment No. 2, The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child (15 November 2002) CRC/GC/2002/2 para 1 (CRC Committee, General Comment No.2). See also ACERWC, General Comment No.5, 48-50.
[1274] CRC Committee, General Comment No.2, para 5.
[1275] ibid para 6. See also ACERWC, General Comment No. 5, 49.
[1276] CRC Committee, General Comment No.2, para 57.
[1277] ibid para 11; CRC Committee, General Comment No.5, 49
[1278] CRC Committee, General Comment No.2, para 12.
[1279] ibid para13.
[1280] ibid para14.
[1281] ibid para18.

review the adequacy and effectiveness of laws and practices relating to children's rights; promote harmonization of national legislation, regulations and practices with the CRC and other standards; encourage ratification of or accession to any relevant international human rights instruments; create awareness about the provisions of the CRC; undertake human rights education; and provide legal assistance to children.[1282]

Therefore, NHRIs are useful for both monitoring and implementation of child rights by submitting reports to the CRC Committee and preparing national reports on the status of the implementation of the Convention in line with the Concluding Observations.[1283] More importantly, the complaint mechanism of the NHRIs is important to ensure the implementation of children's rights by investigating alleged violations and sometimes by representing children in litigations. In this connection, UNICEF described NHRIs as:

> [..] oil in the machine, bringing an explicit children's focus to traditional adult-oriented systems, filling gaps in checks and balances as direct accountability mechanisms, making sure that the impact of policy and practice on children's rights is understood and recognized, and supporting processes of remedy and reform when things have gone wrong or procedures or policies are inadequate.[1284]

The Ethiopian Human Rights Commission is a constitutionally entrenched human rights institution established in 2000 with the power to monitor and supervise the protection of human rights. The commission has a chief commissioner, deputy chief commissioner, women and children's affairs commissioner, and not less than four thematic commissioners.[1285] The Commission has the powers and duties, among others, to:

- Ensure observance of human rights
- Ensure that laws, regulations and directives as well as government decisions and orders do not contravene human rights

[1282] ibid para 19. These activities of NHRIs are derived from the Nairobi Declaration (2008), which was adopted by National Institutions for the Promotion and Protection of Human Rights.
[1283] Julia Sloth-Nielsen, 'Monitoring and Implementation of Children's Rights' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer 2019) 60.
[1284] UNICEF, 'Championing Children's Rights: A Global Study of Independent Human Rights Institutions for Children, Summary Report' (2012) 5.
[1285] Ethiopian Human Rights Commission Establishment (Amendment) Proclamation 2020, Proclamation No.1224 Federal Negarit Gazeta 26th Year No.75 (Ethiopian Human Rights Commission Establishment (Amendment) Proclamation) art 2 (3).

- Create awareness among the public using the mass media and other means, to enhance its tradition of respect for, and demand for enforcement of rights
- Undertake investigation, upon complaint or its initiation, of human rights violations
- Make recommendations for the revision of existing laws, enactment of new laws and formulation of policies
- Translate into local vernaculars, international human rights instruments adopted by Ethiopia and disperse the same[1286]
- Visit and monitor, without prior notice, any correction centers, prisons or police detention centers or any places where people are held in custody.[1287]

These powers and duties are equally applicable to children's rights in general and the rights of CICWL in particular. More specifically, the Commission is tasked to work towards the implementation of the action plan on the segregation of children.[1288] As such, the Commission has a children and women affairs commissioner. However, this research found limited activities undertaken by the Commission. The works done relate to translation of the CRC into national languages[1289] and monitoring of prison where the rights of children detained form part of[1290] and detention centers.[1291]

[1286] Ethiopian Human Rights Commission Establishment Proclamation 2000 (as amended by Proclamation No.1224/2020), Proclamation No.210 Federal Negarit Gazeta 6th Year No.40 art 6.
[1287] Ethiopian Human Rights Commission Establishment (Amendment) Proclamation, art 2 (2).
[1288] Second National Human Rights Action Plan 151.
[1289] Article 42 of the CRC enjoins states to make the principles and provisions of the Convention widely known, by appropriate and active means (one of which is translation of the text of the Convention into national languages), to adults and children alike. In this regard, the government of Ethiopia alleged that it has translated the CRC in 11 local languages and disseminated it to various institutions and professionals. The EHRC distributed about 50,000 copies of International Human Rights Conventions including the CRC (Combined Fourth and Fifth Periodic Reports of Ethiopia to the Committee on the Rights of the Child 59).
[1290] Interview with Dagim Gadisa, Investigation and Supervision Officer, EHRC, Hawassa Branch (Hawassa, 17 March 2022); Asefa Sentayehu, Investigation and Follow up Department Officer, EHRC, Bahir Dar Branch (Bahir Dar, 8 Feb 2022). See also EHRC Annual Report on Human Rights Conditions in Ethiopia (2022) 56; Ethiopian Human Rights Commission's Submission for the UPR <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=881andfile=EnglishTranslation> accessed 31 August 2022.
[1291] The commission has visited the Addis Ababa remand and rehabilitation center the report of which not yet released. Interview with Selamawit Girmay, Women and Children Rights Coordinator, EHRC (Addis Ababa,12 April 2022)

7.7.5 The CJPO: A relatively active but non-formalized Office

The office has been established in 1999 within the Federal Supreme Court as Juvenile Justice Project Office (later renamed as CJPO[1292]) with financial and technical support from NGOs.[1293] However, it lacks a legal base[1294] and it is a project that relied on funds from donors; not an office fully owned by the government. Moreover, it is established within the structure of the Federal Supreme Court; not a national office although its works have reached regional states. It has long-term objectives of proposing ideas for reforming the child justice system of the country to adequately protect the rights of children; and enabling the child justice system to have the necessary infrastructure and build specialized capacity for the realization of the CRC, the FDRE Constitution and other laws of Ethiopia pertaining to children.[1295] In the short term, it aims to:

- Improve the existing mode of operation of the judiciary, the police and reformatory organizations in dealing with cases of children
- Improve the institutional linkage among the judiciary, the police, reformatory organizations and other concerned bodies for the effective enforcement of national laws; and
- Enable the judiciary, the police and staffs of reformatory organizations to acquire adequate professional knowledge and skills on child rights and influence their attitude and practice towards children.[1296]

To achieve these objectives, the office is required to undertake, inter alia, the following activities:

- Organize national workshops on the legal and practical problems related to the protection of the rights of children
- Cause an assessment on Ethiopian legal provisions pertaining to children and compare them with the international child right standards; and based on the outcome of the assessment, identify the articles that need reform

[1292] Addis Ababa University Office of Research Director (n 59) 127.
[1293] Brochure prepared by the CJPO (file with the researcher).
[1294] The then Federal Courts Proclamation No.25/96 did not provide this power of the court. This power is not also provided in the new Federal Courts Proclamation No.1234/2021.
[1295] Brochure prepared by the CJPO.
[1296] ibid.

- Assess the structural framework of the judiciary and the police dealing with children and come up with a proposal on how to improve their mode of operation, including suggestions for new structures, if necessary
- Examine the institutional linkages among the courts, the prosecutors' offices, the police and reformatory organizations and propose ideas on how to strengthen and improve their working relations for the effective administration of the child justice system
- Cause an in-depth assessment of problems related with the Addis Ababa Remand Home and develop a proposal for improving its operation and for the establishment of additional homes in other places, if necessary
- Organize training programs for the judiciary, the police and staff members of reformatory organizations on child right issues and child protection programs
- Introduce child-friendly settings and informal court proceedings both for child victims and children in conflict with the law
- Establish Children's Legal Protection Center to provide legal aid and facilitate the referral system.[1297]

The office performed most of these functions.[1298] Prominent among them is supporting and setting up of child justice benches and police units in Addis Ababa and the regions. According to the focal person of the office, there are around 100 child justice benches that serve both child victims and CICWL.[1299] Trainings are also provided for police officers.[1300] The office, together with UNODC and the Addis Ababa City Women, Children and Youth Affairs Bureau conducted a study on the problems of the rehabilitation and remand center.[1301] An important task that the office has not performed is an assessment of the compatibility of the national laws with the international standards which is regrettable.

[1297] ibid.
[1298] See Addis Ababa University Office of Research Director (n 59) 130-37.
[1299] Interview with Leuleselassie Liben (2), Focal Person, Federal Supreme Court Child Justice Project Office (Addis Ababa, 12 April 2022).
[1300] ibid.
[1301] Available at <https://www.unodc.org/easternafrica/en/Stories/unodc-and-don-bosco-unite-to-brighten-the-future-of-vulnerable-children-in-ethiopia.html> accessed 7 September 2022.

7.8 Administrative Actions and Measures as Challenges

7.8.1 Fixed Days of hearing and its Implication on Pretrial Detention and Speedy Trial

The hearing of child justice cases is not conducted five days a week. This is particularly the case in Addis Ababa where the hearing day is one day a week in all the benches except Lideta where the hearing days are two days a week. This will entail detention of children until the next hearing date as there is no formal agreement between the court and the police to bring children on non-hearing days. This is particularly the case for children with no parents or relatives to whom the police can hand them over. Although there are a significant number of cases where the police brought children to the court on non-hearing days of the court, the majority of cases are brought to the court on the hearing days including cases in which children are arrested days before the first appearance.

The effect of this arrangement on the right to a speedy trial is clear. A case that is not completed on the same day is adjourned for the next week except for Lideta. This is against the right of the child and the aim of the child justice system. This effect is clearly seen in the cases entertained in Addis Ababa where they took long period when compared to the same cases entertained in the regional courts.[1302]

7.8.2 Non-permanent Judges as a Challenge

As discussed above, child justice judges in Ethiopia are not appointed based on their expertise. It rather is a random assignment. Moving from bad to worse, child justice judges often change on a yearly or less basis with an administrative decision to make all judges of a court versed with both aspects of the legal system (civil and criminal). Therefore, child justice issues are presided over by different judges in both adult benches and in child justice benches except Lideta where the judge is a permanent one. This shows the lack of attention given to the issue by the Ethiopian government. The government has not considered compensating the absence of specialized judges by making them acquire expertise through experience. Each year, the benches are presided by a new judge who even comes from the civil benches, which has a great implication on the rights of CICWL. It is a waste of a resource; experienced human resource and leads to a dearth of experienced human resources.

[1302] See chapter five, section 5.3.4. The researcher however is not saying that this is the only factor for the delay of the cases.

7.8.3 The absence of an effective Birth Registration System, reliance on Medical Examination as a means of age proof and fixed days of examination

Birth registration system in Ethiopia has begun in 2017 while the law that mandates so was promulgated in 2012[1303] which repealed previous law (Civil Code) provisions[1304] on the same matter. Registration of birth can be made in two ways. First, a child born after the entry into force of the law should be registered within 90 days.[1305] The second is retrospective registration in that a person who is born before the coming of the law shall be registered and a certificate shall be issued, if it is accompanied by supporting evidence.[1306] Birth certificate is the primary means of proving the age of a person under the Ethiopian family code.[1307] Nonetheless, considering the recent beginning of birth registration in 2017, and the weak performance of the Ethiopian vital events registration system,[1308] birth registration or a certificate is of not much help in the current child justice system in Ethiopia.

This is one of the reasons for the use of medical examination as a sole means of proof of the age of children in the regions. This has an implication on the right to speedy trial of children as the examination of age requires adjournment and takes more time than the production of documentary proofs. One of the factors that work towards this fact is the fixed days of examination provided by hospitals.[1309] That means hospitals will not examine the age of the child on days outside of the fixed days, even if the child is in detention. This shows the lack of cooperation between the concerned stakeholders. Moreover, some medical examinations involve physical examination that intrudes on the physical integrity of children.[1310] In addition, medical result is not always accurate and this will subject an infant to the child justice system or a child to the adult criminal justice system.

[1303] Registration of Vital Events and National Identity Card Proclamation 2012 (as amended), Proclamation No.760, Federal Negarit Gazeta 18th Year No.58 (Vital Events Registration Proclamation).
[1304] Civil Code of the Empire of Ethiopia 1960, Proclamation No.165 Negarit Gazeta 19th Year No.2 arts 74 ff.
[1305] Vital Events Registration Proclamation, art 18 (2).
[1306] ibid art 67 (4).
[1307] Revised Family Code, art 217 (1).
[1308] Only 3 percent of children are registered at birth; (Central Statistics Agency and DHS Program (n 718) 14.
[1309] A police officer in the case between *YB (2) v Prosecutor* (n 903) mentioned that the examination is only on two days and this was one of the reasons for the delay in the production of the medical result to prove the age of the child. The same is true in Addis Ababa that age examination is done only on two days a week; Tuesday and Thursday; Interview with Ermias Gacheno (n 740).
[1310] *BT v Police*, Hawassa City First Instance Court, File No.37752 (2021); *Y v Prosecutor* (n 702); *BG v Police* (n 733); *D v Yeka Sub City Police* (n 785).

7.9 Miscellaneous Challenges and Gaps

7.9.1 The status of the Child as a Challenge: The case of Street Children

Street children are re-victimized by the justice system. They are victims of life in the streets and of the failure of the government to take measures for their reintegration**.** The Ethiopian government does not offer any type of public funding for street children; instead, it has used police forces to minimize their presence by arresting and sending them back to their hometowns.[1311] It seems that this duty is left to NGOs despite the clear duty imposed on the Ministry of Women, Children and Youth (Ministry of Women and Social Affairs). [1312] Accordingly, a new project has been launched by an NGO, SOS Children's Village, to rehabilitate street children in three cities viz. Addis Ababa, Adama and Dire Dawa.[1313]

Street children are vulnerable to criminal acts. Although it needs scientific studies, some judges interviewed said that the majority of CICWL are street children. When they come in conflict with the law, they normally face detention pending trial and after conviction. According to judges interviewed, when a child is a street child, they end up in detention in police stations pending disposition of their case. In this regard, judges never passionately inquire about the presence of relatives or other reliable persons responsible to take the child. This is evidenced by the fact that children are sent to the remand center while they do have relatives in the city.[1314] Moreover, children are sentenced to admission to the corrective center for minor crimes on the ground that they are street children, a precondition not stipulated under Article 162 of the Criminal Code.[1315]

7.9.2 Child Justice in the Works of Human Rights NGOs and the Legacy of the Old CSO Law

The importance of NGOs in the promotion and protection of human rights has been recognized at the 1993 World conference on human rights.[1316] The same recognition has been given to CSOs in Africa at the first AU Ministerial meeting held in Kigali, which has called upon member states

[1311] Grace May, '7 Facts about Homeless Children in Ethiopia' (23 June, 2020) <https://borgenproject.org/homeless-children-in-ethiopia/> accessed 1 September 2022.
[1312] Federal Executive Organs Proclamation 2018, art 28 (1) (o); Federal Executive Organs Proclamation 2021, art 36 (1) (o).
[1313] Available at <https://www.capitalethiopia.com/2022/05/15/sos-childrens-village-launches-project-to-help-ethiopias-street-children/> accessed 1 August 2022.
[1314] The researcher observed this from the register of the Addis Ababa Remand and Rehabilitation Center.
[1315] *EC v Police* (n 780).
[1316] Vienna Declaration, para 38.

to protect them.[1317] It can be said that the realization and enforcement of human rights cannot be a reality without the active engagement of NGOs.[1318] In this regard, Korey has put it rightly that 'without NGOs, the entire human rights implementation system at the UN would come to a halt'.[1319] Though the primary duty bearers for the protection of human rights are signatory states, NGOs supplement and complement the activities of states in this regard.[1320] Some of the key roles that human rights NGOs could play in the promotion and protection of human rights at the national level include Monitoring, investigation and documentation of human rights; [1321] advocacy and lobbying;[1322]legal assistance and human rights education.[1323]

Coming to the works of NGOs on the rights of CICW in Ethiopia, some of them have engaged in one or more of the above-mentioned roles. The first such NGO is FSCE. It is the only national NGO, which has been relatively active in promoting and protecting the rights of CICWL by incorporating this issue as part of its mission.[1324] It uses various strategies such as advocacy, awareness raising, implementing pilot projects, and research and training.[1325] The establishment of child protection units in police stations, and community-based correction centers are/were some of the outcomes of the advocacy and awareness-raising works.[1326] These programs of FSCE highly impacted the Ethiopian child justice system as the children police units were overtaken by the government and are active now and the CBCC was the most successful program.[1327]

The other child rights NGO is Save the Children Sweden. It has contributed to the realization of the rights of CICWL in two ways. The first is through technical and financial support to NGOs working on the same issue. The financial and technical supports for the programs run by FSCE

[1317] Kigali Declaration (2003) para 28.
[1318]Vaibhav Goel and Manoj Tripathi, 'The Role of NGOs in the Enforcement of Human Rights: An Overview' (2010) 71 (3) Indian Journal of Political Science 769, 778.
[1319] William Korey, *NGOs and the Universal Declaration of Human Rights: A Cursory Grapevine* (Palgrave 1989) 9.
[1320] Goel andTripathi (n 1318) 781.
[1321] See Lina Marcinkute, 'The Role of Human Rights NGOs: Human Rights Defenders or State Sovereignty Destroyers' (2011) 4 (2) Baltic Journal of Law and Politics 52, 56; Goel and Tripathi (n 1318) 782.
[1322] Goel and Tripathi (n 1318) 786.
[1323] Marcinkute (n 1321) 57-58; Goel and Tripathi (n 1318) 781-82.
[1324] FSCE, '20 Years of Promoting and Implementing Child Protection (1989-2009)' 10.
[1325] ibid 11.
[1326] ibid 12-13.
[1327] Interview with Zewuditu Gebrehiwot (n 1142).

were obtained from Save the Children Sweden.[1328] Secondly, it by itself performed some activities like awareness creation and provision of training. It also worked with the Federal first instance court and CJPO in capacity building and advocacy for the establishment of child-friendly benches.[1329] Now, Save the Children Sweden formed a coalition with other save the children member organizations and formed Save the Children Ethiopia in 2012.[1330]

The work of human rights NGOs in general and child rights NGOs in particular has been impacted by the repressive charities proclamation enacted in 2009 and enforced for ten years until the enactment of the new charities proclamation in 2019. It prohibited Ethiopian resident charities and foreign charities from engaging in the promotion and protection of human rights; women's rights; children and disabled persons' rights.[1331] Ethiopian charities wanting to engage in human rights works could not raise more than 10% of their income from foreign sources. This starved Ethiopian CSOs due to the difficulty to raise funds domestically.[1332] There was also an undefined limitation on the expenses of civil societies in that they were not allowed to spend more than 30% of their budget on administrative costs. This undefined term (administrative cost) could be interpreted to include, inter alia, the costs of investigating and documenting human rights abuses, the provision of free legal aid, advocacy[1333] and research.[1334]

As a result, the proclamation affected many CSOs in the country. Many CSOs have been closed while those which survived have changed their mandate of working on human rights.[1335] Those organizations that continued to work on human rights have significantly reduced their operations. For instance, since the law was passed the Ethiopian Human Rights Council has closed nine of its offices and has cut at least 75 percent (more than 40 people) of its staff. Similarly, the

[1328] Yosef Endeshaw and Hirut Tefferi, 'Evaluation of Juvenile Justice Projects Supported by Save the Children Sweden' (Save the Children Sweden 2005) 39.
[1329] ibid.
[1330] Available at <https://ethiopia.savethechildren.net/about-us/our-history> accessed 30 August 2022.
[1331] Charities and Societies Proclamation 2009, Proclamation No.621 Federal Negarit Gazeta 15th Year No.25 art 14 (5).
[1332] Nicky Broeckhoven and others, 'CSOs in Sustainable Development in Ethiopia: Past Practices and New Trajectories (2020) 13 (1) African Journal of Legal Studies 43, 55.
[1333] Amnesty International, 'Ethiopia: The 2009 Charities and Societies Proclamation as a Serious Obstacle to the Promotion and Protection of Human Rights in Ethiopia: Amnesty International's Written Statement to the 20th Session of the UN Human Rights Council' (2012).
[1334] Broeckhoven and others (n 1332) 56.
[1335] Kendra E Dupuy, James Ron and Aseem Prakash, 'Who Survived? Ethiopia's Regulatory Crackdown on Foreign-Funded NGOs' (2014) 2 (2) Review of International Political Economy 419, 431 ff.

Ethiopian Women Lawyers Association has cut 70% of its staff and in 2010-2011 it has ceased to function, except for volunteers providing a small amount of free legal aid to women.[1336]

Therefore, it is easy to imagine how this law has affected human rights works in Ethiopia in general and child rights including the rights of children in the child justice system in particular. Ethiopian resident and foreign CSOs including Save the Children Sweden were prohibited to engage in the promotion and advocacy of child rights. The impact of this law was not limited to these NGOs. It also affected Ethiopian NGOs like FSCE. As a result of this law, FSCE changed its name to 'forum on sustainable child empowerment' and rebranded its work from the rights of street children to child protection and well-being.[1337] This law was also one of the reasons for the closure of the diversion centers that were operational since 1991 under the auspices of FSCE.[1338] This was because, FSCE, an Ethiopian national NGO, was not allowed to raise funds more than 10% from foreign sources. This coupled with the little source of funds from domestic sources made FSCE run short of funds and unable to cover the associated costs.[1339]

Despite the lifting of the restriction on NGOs to engage in human rights protection and advocacy in the new law, there is no positive move on the part of child rights NGOs to compensate the impact of the old law. More importantly, the rights of CICWL do not form part of the strategic plans of two child rights NGOs-FSCE[1340] and ACPF.[1341]

7.9.3 Limited Judicial Application of International and Regional Human Rights Standards

In many democratic states, courts are the most important institutions in the protection of human rights, and they are at the fore for discharging the protective responsibility of a state party to a given human rights standard.[1342] They often are considered as 'bulwarks' against abusive governments and have the protection of fundamental freedoms as their objective.[1343] This is why human rights standards provide for the independence of the judiciary.[1344] The same is true for

[1336] Amnesty International (n 1333).
[1337] Dupuy, Ron and Prakash (n 1335) 439.
[1338] Interview with Leuleselassie Liben (n 789).
[1339] Interview with Adugna Muleta (n 964).
[1340] ibid.
[1341] Phone interview with Girma Gadisa, Law and Children Technical Officer, African Child Policy Forum (Addis Ababa, 18 April 2022).
[1342] Tsegaye Regassa, 'Making Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (2009) 3 (2) Mizan Law Review 288, 289.
[1343] Laurence Freidman, 'Turning to the Courts: Human Rights before the Bench' (Book Review 2000) 13 Harvard Human Rights Journal 315, 316.
[1344] See, for instance, CRC, art 40 (2) (b) (iii).

national constitutions. Hence, courts need to apply human rights provisions of the international, regional and national laws.

The FDRE Constitution makes international human rights standards ratified by Ethiopia an integral part of the law of the land,[1345] which need to be implemented by courts at least in so far as they do not conflict with the Constitution without any enabling legislation.[1346] Nonetheless, courts in Ethiopia seldom backed their decisions with the provisions of human rights standards. The same can be said when it comes to decisions in the child justice sphere.[1347] Further, in decisions that mention provisions from the international standards, there is a problem of not relying on the pertinent provisions. In one child justice case entertained by the cassation bench of the Federal Supreme Court involving the appropriateness of imprisonment of a child aged 11 years old, the bench mentioned the best interest principle of the CRC and ACRWC which is commendable.[1348] However, the CRC has its own guiding principles when it comes to child justice. These are the principle of 'detention or imprisonment as a measure of last resort' and 'for the shortest appropriate period of time'. The bench failed to mention these principles. This is regrettable given the fact that the decision of the cassation bench is considered as law and binding on the lower courts.[1349]

This gap in relying on provisions of human rights standards is partly attributable to the absence of concrete steps taken by the Ethiopian government in domesticating human rights standards[1350] and to the absence of official translation of basic human rights standards in courts.[1351] The other potential reason is the unsettled position of international conventions and standards including human rights standards in the hierarchy of laws in Ethiopia both in the Constitution[1352] and

[1345] FDRE Constitution, art 9 (4).
[1346] Center for Human Rights (n 1056) 24.
[1347] Out of the 24 volumes of Federal Supreme Court Cassation Decisions, there are only three decisions that mention ICCPR and four decisions that mention the CRC and ACRWC. See Wasihum Hailemariam and Yehualashet Tamiru, 'The Federal Supreme Court Cassation Decision Table of Contents from Volume 1-24' <https://www.abyssinialaw.com/decisions/federal-supreme-court-cassation-decisions> accessed 31 August 2022. See also Deda (n 89) 130; Alemu and Birmeta (n 62) 25.
[1348] For the privacy of the child, the researcher refrained from citing the file number.
[1349] Federal Courts Proclamation 1996, Proclamation No.25 Federal Negarit Gazeta 2nd Year No.13 art 10 (4) as amended by Federal Courts Proclamation Reamendment Proclamation 2005, Proclamation No.454 Federal Negarit Gazeta 11th Year No.42 art 2 (1).
[1350] Alemu and Birmeta (n 62) 25; Center for Human Rights (n 1056) 25.
[1351] Center for Human Rights (n 1056) 25 and 132.
[1352] See FDRE Constitution, art 9 (4) and art 13 (2).

among scholars.[1353] This comes to the fore where there is a contradiction between the national laws and ratified treaties. Regarding domestication, the legislative trend in Ethiopia is publication of the 'fact of ratification' of a given human rights instrument and the text of the instrument remains unpublished. [1354] The CRC Committee recommended the Ethiopian government to publish the Convention in the official gazeta as it would aid awareness creation and make the Convention accessible to the justice actors.[1355] Translation of the Convention is another duty of states parties (art 42 of the CRC). In this regard, the government of Ethiopia alleged that it has translated the CRC in 11 local languages and disseminated it to various institutions and professionals. The EHRC distributed about 50,000 copies of International Human Rights Conventions including the CRC.[1356] Nonetheless, the research found that the official translation of the CRC is not available in the courts.

7.10 Conclusion

This chapter assesses the challenges that hinder the proper realization of the due process rights of CICWL and the application of the dispositions in the Ethiopian child justice system. The Ethiopian child justice system faces multi-dimensional challenges and gaps relating to the government's commitment, the competence of child justice actors, administrative challenges and other challenges relating to the status of a child as a street child, the limited role of NGOs and lack of judicial application of international and regional standards governing child justice.

The lack of government commitment takes different forms including the absence of constitutional entrenchment of the basic principles of child justice and separate child rights/justice law; insufficiency and non-formalization of specialized police and court structures; the absence of specialized and effective defense system; the absence of sufficient and effective rehabilitation institutions; failure to sustain the CBCCs; little place and attention given to social work; limited resource allocation; the absence of policy, evaluation, data and research on the

[1353] See Ibrahim Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 Journal of Ethiopian Law 113; Gebreamlak Gebregiorgis, 'The incorporation and Status of International Human Rights under the FDRE Constitution' in Girmachew Alemu and Sisay Alemahu (eds), 'The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects' (2008) 2 Ethiopian Human Law Series 37; Getachew Asefa, 'The Place of International Law in the Ethiopian Legal System' in Zeray Yihdego, Melaku Geboye and Fikremarkos Merso (eds), 'Ethiopian Yearbook of International Law' (2016); and Takel Seboka, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' (2009) 23 (1) Journal of Ethiopian Law 132.

[1354] Center for Human Rights (n 1056) 132.

[1355] Third Periodic Report of Ethiopia to the Committee on the Rights of the Child, para 9.

[1356] Combined Fourth and Fifth Periodic Report of Ethiopia to the Committee on the Rights of the Child, para 59.

status of compliance of the child justice system with the CRC; and little to no place given to child justice in the works of the relevant government organs.

Lack of competence of justice actors is another challenge in the administration of the Ethiopian child justice system particularly in the realization of the due process rights and enforcement of the available dispositions. This is attributable to the little place it occupies in the law school curricula (particularly LLM curricula); the neglect of the issue in the teaching and exams; the absence of training; the absence of child justice issues in the professional training manuals; and the reticence of the academic discourse to enlighten child justice issues.

Apart from the challenges and gaps in the legal and institutional frameworks and lack of competence of child justice actors, administrative actions not backed by legal provisions are also affecting the rights of CICWL. These include the arrangement of fixed days of trial, reliance on medical examination as a means of proof and non-permanent presiding judges. The first two have an implication on the right to a speedy trial and the liberty of children while the latter affects the whole spectrum of the due process rights and proper application of the measures and penalties as judges who preside over the benches rotate frequently. Each year, there are new judges with no specialized knowledge and training on the child justice system.

The status of children is also posing a problem in the Ethiopian child justice system. Street children are affected by the child justice system mostly due to their status. They are overrepresented in the remand home and are also sentenced to the corrective center for even minor crimes for the mere reason that they are street children with no parental care.

Little work of NGOs in the promotion and protection of the rights of children in general and the rights of CICWL in particular, and the dearth of judicial application of the international child justice provisions are also gaps in the effective administration of child justice relating to the realization of the due process rights and implementation dispositions. The works of NGOs were limited due to the repressive charities law that the Ethiopian government adopted and enforced for ten years (2009-2019). Although the new law lifted the limitations and barriers on the human rights works of NGOs, child justice issues are still not a priority agenda for child rights NGOs like FSCE and ACPF.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.1 Conclusion

Children are entitled to rights that are peculiar to their status as vulnerable and immature members of society. One group of these rights is the rights accorded to them when they come in conflict with the law. Although it gained binding status in 1990 with the coming into effect of the CRC, at the international level, the idea of child justice was conceived in 1985 with the adoption of the Beijing Rules. With this, the child justice system adopted the child rights-based approach that subsumed the features of individualized models of child justice that were prevalent at different times across different jurisdictions. Accordingly, the child justice system shall be guided by the four principles and other provisions of the CRC and should strive for the enhancement of the capacity of both the right holders and the duty bearers.

The rights of CICWL, which are the subject of this study, relate to the due process rights and special disposition that can/should be imposed once found guilty of the crime. These are contained under Articles 37 and 40 of the CRC, ACRWC, the Beijing Rules and other related standards. By virtue of the principle of equality which underlines the concept of human rights, CICWL are entitled to the same due process safeguards as adults, albeit with more favorable treatment. They are also entitled to unique due process rights owing to their special status as children. An effective child justice system also requires a wide variety of non-custodial measures to enforce the core principle that the system should rely on, 'detention or imprisonment as a measure of last resort', and to realize its aim of rehabilitation of children. When detention or imprisonment is inevitable, it must be for the shortest period and hence, life imprisonment without parole is prohibited. Similarly, death penalty is prohibited. Proper enforcement of these due process rights and non-custodial measures requires specialized institutions and personnel like child justice courts/benches, police officers, defense counsel, and probation office. The general objective of this study was, thus, the examination of the due process rights recognized and enforced in the Ethiopian child justice system and the dispositions in light of the principles of the child justice system as entrenched in the CRC.

Ethiopia has taken and is taking measures to ensure the rehabilitative ideal of the child justice system. The due process rights and special procedures, and the dispositions are contained in the

general laws, the Criminal Procedure and Criminal Code respectively. There were/are default measures concerning the establishment of specialized institutions and personnel, and the diversion of children from the formal justice system. These are the two measures that the CRC requires states to 'seek to promote'.

The due process rights of CICWL are contained in a half a century year old law, the Criminal Procedure Code, in only ten Articles. This section of the Code applies only to children aged nine to fifteen. These Articles are not sufficient and not in line with the current conception of the child justice system. The section of the CPC that governs the due process rights of children has to borrow from the adult section to address the rights not covered. Ironically, however, the Code failed to state this possibility explicitly. Moreover, applying the adult procedures to children will not solve the problem as the same rights need contextual application when it comes to children. Moreover, some rights are peculiar to the child justice system that cannot be found in the adult criminal justice system. These include informing parents of the reason for the arrest of the child; the means and procedures of proving the age of the child; handing children to their parents pending trial; and requirements that ensure effective participation of the child such as a child-friendly court setting, mandatory presence of parents during trial, provision of assistance by social workers and psychologists, preparing the child and ensuring his/her understanding. These necessitate the adoption of a children's act or child justice statute that contains the full list of due process rights as recognized in the international and regional child rights standards.

Unlike the provision of child justice standards, the arrest of a child in the Ethiopian child justice system is not a measure of last resort. This is because the CPC allows parents, prosecutors and complainants to take the child to the court (art 172 (1)). This act of taking the child amounts to arrest. By this, the Code seems to exclude summon as a means of securing the presence of the child and the need to have an arrest warrant in warrantable cases. Summoning a person to appear before police, and issuance of a warrant for warrantable cases are recognized in the adult procedure under Articles 25 and 50 of the CPC. This is not, however, indicated in the section that deals with the procedures of the child justice system. These are not also there in the practice of the child justice system. These together make the arrest of children in the Ethiopian child justice system arbitrary, in violation of international law, the CRC.

The manner of arrest of children is another sensitive issue in the child justice system. It should be made with due care and in a way that fosters the rehabilitative ideal of the child justice system. That is why the CRC requires specialized personnel (police) versed with the ideals, aims and principles of the child justice system. Any wrong done at this stage, the first contact of the child with the justice system, affects the outcome (rehabilitation of children).[1357] Therefore, any contact of the arresting officer with the child shall respect the dignity and wellbeing of the child and must avoid harm including verbal abuse. Handcuffing of children shall also be a measure of last resort. In the Ethiopian child justice system, this issue is not regulated in the law, and in practice, children often experience violence including beating by the arresting and investigating officers. Handcuffing of a child with adults and with another child is not absent in Ethiopia.

The other safeguards available during this stage of the child justice system are informing parents of the arrest of the child. This is recognized in the Beijing Rules (Rule 7.1). This notification is essential to optimize the participation of parents starting from the early stages of the child justice process. Again, this right is not explicitly recognized in the Ethiopian child justice system (CPC) except that it is the duty of the court before which the child is brought to call the parents or other relatives (art 173). In practice, it is rare for police officers to inform parents of the arrest of the child.

A child arrested must promptly be taken to the court or other competent authority. This is recognized under Article 9 (3) of the ICCPR, but not in the child rights standards. The CRC Committee recommends the child be brought to court within 24 hours. The Ethiopian child justice system (the legal framework) offers better protection by requiring the bringing of the child to be immediate (CPC, art 172 (1)). In practice, this rule is not respected and children may spend a day to a couple of months before appearing in court.

The starting point of a child justice system is dependent on the age of a child. Hence, it requires an effective system to prove the age of the suspect. The primary means of proving the age of the child is a birth certificate. This is not, however, a reality for all systems as a birth registration system is not developed in all jurisdictions. In the absence of birth registration and certification system, other documentary proofs like vaccination cards, baptismal certificates and schools cards shall be used; and medical examination as a means to prove the age of the child shall be used as a

[1357] Commentary to Rule 10.1 of the Beijing Rules; PRI 'Protecting Children's Rights in Criminal Justice Systems' (n 310) 39.

last resort. This issue is not clearly regulated in the Ethiopian child justice system. The means of proof of age is found in the general family law and the child justice procedure does not cross-refer this law. Given that birth registration and certification in Ethiopia are recent phenomena and are not fully operational, a birth certificate as a means of proof of age has minimal significance. It is used as a primary means of proof in Addis Ababa while it does not have a place in the practice of child justice in the regional states. In the regions, medical examination is the sole means of proving the age of the child. In this regard, judges never asked children or their parents to produce birth certificates or other documents, and in cases where the same is produced on the parties' initiation, the proof has solely relied on the medical result. In the absence of any documentary proof, the same Family Code requires courts to hear two reliable witnesses, a means almost unknown to judges and hence never utilized in the actual practice.

Age and the proper means of proof are the bedrocks of the child justice system. An ineffective system of age proof will bring infants to the net of child justice and will take children to the adult criminal justice system. Hence, reliance on medical examination as a means of proof is not immune from this risk. This is because the results are not accurate and this again is expressed by the results given by hospitals which are provided in ranges. It is from this range that judges need to fix the age which is normally the minimum age in the best interest of the child.

In line with the rehabilitative aim of the child justice system, the CRC mandates states parties to 'seek to promote' diversion of child justice cases outside of the formal system. Diversion of child justice cases has a multitude of advantages to the child, the justice system and society in general. Hence, a child justice system needs to adopt different diversionary measures that can be utilized at each stage of the justice process by different child justice actors. Despite its lack of legal base, diversion was practiced in the Ethiopian child justice system since the early 2000s with the initiation and support of child rights NGOs. This system-wide diversionary measure has now been phased out due to the cessation of funding and support from NGOs and the lack of enthusiasm on the part of the government to sustain them. The program was used to divert children who committed minor crimes for the first time. Currently, diversion of cases by child justice actors is almost non-existent.

Detention of children including pretrial detention shall be a measure of last resort and for the shortest period. In the current operating law in the Ethiopian child justice system, pretrial

detention is prohibited and a child shall be handed to the care of his/her parents or relatives, or in default of these, to a reliable person or institution responsible to ensure his/her attendance at trial. There is no exception to this rule based on the seriousness of the crime or personal characteristics of the child. In reality, however, detention of children is inevitable when they do not have parents or relatives. This is particularly the case for street children. This, coupled with the absence of an institution envisaged in the Code, has led to street children ending up in detention in the Addis Ababa Rehabilitation and Remand Home. In this regard, the research has found a lack of courage on the part of judges to inquire whether the child has parents or relatives before sending him/her to the remand home. This is evidenced by the presence of children in the remand home who have parents or relatives in Addis Ababa. Moreover, children are also detained in police stations. Although police officers attributed this to factors beyond their control like arrest in the evening or over the weekends, interviews with judges, children and/or parents and examination of court files show that police have detained children before their first appearance in court. This is even the case for children who have parents or guardians. In some cases as well, courts ordered detention of children in police stations. The other place of detention for children pending trial is prison. This is the case in the regions where children are suspected of serious crimes like homicide irrespective of the presence of parents to take them. Judges are not concerned about the violation of this right of children as they did not want to tell the police openly about the illegality of the pretrial detention.[1358]

Investigation of crimes committed by children is court authorized in the Ethiopian child justice system. This is because police are required to bring the child immediately to court. This together with the stipulation that the court shall instruct the manner of investigation after receiving the recording of the complaint about the crime from the person who brought the child to the court is an indication of the prohibition of investigation without court permission. In practice, however, police investigated the crime including interrogation without the permission of the court. Further, judges do not consider this violation as a serious one and never reprimanded police not to do the same. The law is not specific on the type of instruction that the court can give. Nonetheless, it may relate to the manner of interrogation (with whom, where, and in a child-friendly way) and the time for the completion of the investigation. In the practice of the Ethiopian child justice system, it is the police, in a written complaint stating the particular of the crime that requests

[1358] Personal observation.

instruction on how to proceed with the case. And, in the majority of these cases, judges never give instructions. In those cases where instruction is given, the dominant instruction is ordering the police to hand the child to the parents or the remand home.

One of the safeguards during investigation of the crime (interrogation) is the presence of parents and legal counsel or other appropriate assistance. This is not specified in the Ethiopian child justice system. Moreover, the Constitution limits the right to legal assistance to an accused person and seems to exclude the availability of the right before charging. The practice is the reflection of the legal regime and children are not assisted by counsel or other persons during police questioning. Interrogation in the presence of parents or legal guardians is, however, one of the instructions that courts gave to police officers though not a leading instruction.

The law and the practice (instructions) are silent on the time limit for the completion of the investigation. In the absence of a special time limit, our recourse is the provisions of the Constitution and the CPC that generally and indirectly govern the timeframe for the completion of the investigation. They indirectly address the issue by qualifying the additional time the court can give to the police upon request. The time shall be sufficient or necessary for the completion of the investigation and it shall be gauged by the right to speedy trial of a person. In practice, however, there are cases where the completion of police investigation took months.

Charging in the Ethiopian child justice system is an exception when the crime is punishable with rigorous imprisonment exceeding ten years or more. This in other words means that in less serious cases, the trial shall be conducted based on the record of the complaint or the accusation by the person who brought the child to the court. In the former case, it is the court that shall instruct the public prosecutor to frame the charge, and the prosecutor exercises its filtering power s/he has in adult cases under Articles 38-42 of the CPC. In practice, courts instructed the prosecutor to do so through the police. In the less serious cases, the filtering function of the prosecutor is not there as s/he is not involved in the case, and the court as well does not perform this filtering function by examining the sufficiency of the evidence to proceed to the trial. This will subject children to unfounded claims. Like investigation, there is no special timeframe for the framing of charges in child justice cases. Hence, our recourse is the 15 days limit provided by the adult code which may not be protective of the interest of children given the need for the

speedy disposition of cases. In practice as well there are cases that took more than this time limit and judges even gave an extended period for the framing of the charge.

Another issue regarding charges and complaints relates to the content of the charges or complaints. In this regard, though not expressly restated, the charge framed in child justice cases shall contain the elements mentioned under Article 111 of the CPC. The practice conforms to this. On the other hand, regarding complaints that are drawn by the police or the court, the Code does not seem to require it to fulfill the elements mentioned above. The practice is in line with this skeptic as the complaints drawn by police do not contain a provision of the law violated and the mental element of the crime. This compromises the right to defense of the child. Moreover, the Code is silent on the manner as to how the charge or complaint shall be drawn. Given the diminished capacity of children to understand things, charges and complaints should be framed in a way easily understandable by children and as much as possible legal jargon should be avoided. This is not the case in practice and, for instance, charges use words as they appear in the laws.

Finally, charges and complaints shall be given to children in advance of the trial. This is one of the due process rights accorded to accused persons. This is a constitutionally entrenched right in Ethiopia as well. In practice, however, children or their counsels get the charge at the first hearing in court. On the other hand, complaints drawn by police are not given to children or their counsels. Both affect the right to defense and hence the fairness of the trial. Of course, counsels said that they can get the case adjourned if they need time to prepare their defense. This however is at the cost of another right of the child; the right to a speedy trial.

Coming to the rights of CICWL at the trial stage, the CPC prohibits trial of children with adults, a plain stipulation, which is not respected in practice. In furtherance of the right to participation of children in matters affecting them, children have the right to examine witnesses. This right is also clearly recognized in the CPC. For the child to effectively participate during the trial including in the examination of witnesses, certain requirements must be fulfilled. They pertain to requirements relating to children; the court decorum and the presence of specified persons. These requirements are not clearly stated in the child rights standards and national legislation. They are the results of social science researchers in general and developmental psychologists in particular.

The starting point and the first of such requirements is the right to be present during trial and the prohibition of trials in absentia. The child rights standards are not explicit in this regard. The Ethiopian child justice system, on the other hand, prohibits trials in absentia. The second requirement is trial in camera and child-friendly environments. Trial in camera also requires limitation of the parties and persons to be present during trial. In this regard, Article 176 (1) of the CPC provides lists of persons who are allowed to be present. This is one of the rights mostly respected in the Ethiopian child justice system although there are few derogations from the rule. Child-friendly court environment pertains to the setting of the court, the appearance of judges, their interaction with children and the relationship that the child shall have with parents during the trial. Hence, the setting of the court shall be informal; judges shall not wear gowns; ask children simple and open short questions and a child shall sit close to his/her parents. In the practice of the Ethiopian child justice system, there are few attempts to make the court environment non-intimidating and child-friendly. These include hearing cases in the office of judges; allowing the parties to sit for the majority of the hearing; and not wearing gowns. In significant other cases, the environment is not child-friendly. The manifestations include raised podiums; requiring children to stand in wooden cages; elongated trial while children are standing; disconnection between the child and his/her parents; the presence of other formal structures like mikes and sound recording materials.

The other essential requirements for the effective participation of children are the presence of parents and assistance by legal counsel or other appropriate assistance. The presence of parents or guardians during trial is essential to give the child emotional and psychological support so that s/he feels conformable and expresses his/her views. In this regard, the CRC Committee recommends states to legislate for the mandatory involvement of parents in the judicial process. Nonetheless, the presence of parents may not be appropriate at all times and there may be times when the presence of parents is not in the interest of the child. This is clearly provided in the Beijing Rules. Such a qualification on the presence of parents is not provided in the legal frameworks of the Ethiopian child justice system and the practice as well did not pay attention to it. The presence of parents seems mandatory until the final disposition of cases and hence parents shall appear in each hearing. However, judges in the Ethiopian child justice system do not concur with this and said that the presence of parents is not mandatory and a case will not be postponed for the mere fact that parents are not present.

The right to state counsel is a right of everyone including children. This right is recognized in the FDRE Constitution and the CPC. However, this right is compromised both in law and practice in the Ethiopian child justice system. In terms of the legal framework on state counsel, the CPC includes requirements that are not compatible with the Constitution. The Constitution conditioned the right to state counsel on the 'inability of the person to hire counsel' and the possibility of 'miscarriage of justice if tried without counsel'. The CPC on the other hand conditioned the right on the presence or absence of parents during trial or the seriousness of the crime in that a child shall have the right to state counsel if there is no any parent accompanying him/her or where the crime is punishable with rigorous imprisonment exceeding ten years or with more. This right also faced challenges in actual practice. This is because first, state counsels are not available in all courts. They are confined to city first instance and high courts. Rural surrounding Woreda Courts do not have state counsel. Second, the counsels available are not specialized. On the contrary, in few courts, state counsels are assistant judges or registrars who perform other tasks which affect the quality of their service. Moreover, in some courts, these counsels are representing both adults and children in all proceedings (civil and criminal). This is the case in the regional states. In the federal courts as well counsels are not specialized from the outset. Unlike those in the regional courts, however, counsels in most federal courts are representing children only. Nonetheless, they are private pro bono lawyers. This kind of representation is not recommended in the child justice system. Third, although the 'means test' is not recognized in the CPC, some judges rely on this test to appoint state counsel in that a child would only have state counsel if his/her parents are not able to hire a private counsel. This is contrary to the stipulation of the Code. Trial without the counsel of a child not accompanied by parents also occurs in the practice of the Ethiopian child justice system.

The right to be assisted by other appropriate persons like social workers and psychologists is recognized in the CRC. In the Ethiopian child justice system, the role of social workers during trial is not recognized. Their role is confined to the post-trial stage by preparing social inquiry reports that help judges to decide an appropriate measure that fits the personal circumstance of the child.

Preparing the child, hearing his/her view and ensuring his/her understanding are also important requirements to ensure the participation of the child. As the children have limited say in the course of the trial (as counsels oust children), the issue of preparing a child in advance of the trial

by informing them of the identity of the parties and their roles; the procedures to be followed; the rights that s/he may have and the possible outcomes is not the concern of counsels and judges alike. One of the means to ensure that the child understood everything said in the court is avoiding legal jargon. Nonetheless, judges and parties in the Ethiopian child justice system are not concerned about this issue.

Child justice cases shall be disposed of without delay. The importance of speedy disposition of child justice cases is reflected by the elimination of the qualifying term 'undue' which is used in the general human rights standards. This is because the longer a case takes, the more likely the response will lose the desired outcome. Hence, it is important to provide the maximum time a trial in child justice could take. This is not the case in Ethiopia both in the criminal and child justice systems. The Constitution only provides that an accused person has the right to be tried 'within a reasonable time'. In furtherance of this principle, the CPC limits the grounds of adjournment and the time limit for certain adjournments under Article 94 of the CPC. In the practice, however, adjournments are given for grounds not mentioned under the said Article for a period exceeding the one permitted under Article 94 (3) of the CPC and in consequence, the trial of child justice cases took a long time, even up to a year- as the research has revealed.

Regarding rights in the post-sentencing stage, one point needs mentioning viz. privacy of a child and publication of judgments. Article 174 of the Criminal Code provides that the registers of judgment are only accessible to justice actors and shall not be publicized through mass media. This is an important safeguard in the child justice system as publicity of child justice cases is detrimental to the rehabilitation and future life of children. In addition to the prohibition of publication in mass media, the CRC Committee is of the view that other means of publicity like case reports shall not contain the real name of a child and other identifiers. In practice, however, in one cassation volume, the real name and address of the child were used which is a breach of privacy.

In conclusion, the due process rights recognized and enforced in the Ethiopian child justice system do not take the special interest of children seriously.

The right of CICWL in the child justice system is not confined to due process rights. The most innovative aspect of the child justice system pertains to the designation of the guiding principles in the determination of the responses when children are found violating criminal law.

Accordingly, detention or imprisonment shall be a measure of last resort. This principle is unique to the child rights standards and is informed by the special circumstances of children and the grave effect detention could have on children who are at their sensitive stage of development. Hence, a child justice system shall strive to have a wide variety of non-custodial measures. The child rights standards go further and state that detention or imprisonment (when imposed as a last resort) shall be for the shortest appropriate time. This principle pushes the principle of proportionality one step ahead in that the period of detention or imprisonment of children shall be much shorter than the duration when imposed on adult offenders. Moreover, going one step ahead of the principle of proportionality, the child justice system prohibits death penalty and life imprisonment without parole.

In tandem with this precept of the child justice system, Ethiopia has adopted a separate system of response to crime by children. The Criminal Code has a section that specifically applies to CICWL. The Ethiopian child justice system bifurcates children into two groups with different treatment concerning measures and penalties. Hence, the special measures and penalties principally apply to the first group of children aged nine to fifteen while the second group of children aged over the age of fifteen years are in principle subject to the ordinary penalties applicable for adults save few exceptions.

The first of such measures is admission to a curative institution. This applies to children with mental problems (relating to health or development) or those who are addicted to alcohol or other substances. This measure requires courts to send the child to institutions that provide medical care.

The second measure is supervised education which requires the child to be handed over to the care of his/her relatives or in default of this, to a reliable person or institution under which the child shall get education under supervision. A condition of attending education regularly or undertaking an apprenticeship may be imposed. This measure applies when the child is morally abandoned or not properly brought up or is exposed to the danger of corruption or is corrupted. The conditions under which this measure could be imposed are not clear enough which may hinder its proper application. Moreover, the measure requires the child to be handed over to the care of another person, and hence, the child is deprived of a family environment, a measure that should be used as a last resort. The fact that the child is in one of the conditions does not

necessarily mean that s/he has no parents. Thus, handing over the child to other persons in the presence of parents is not always in the best interest of the child. In practice, however, this provision is not comprehended by judges and there is no single judgment that hands a child to the care of other persons or institutions. Judges simply order parents to supervise the child in general and to attend to his/her education in particular.

Reprimand or censure is the third measure recognized in the Ethiopian child justice system. It applies when the court deems it appropriate and designed to produce a good result, and when the crime is minor, and by taking the capacity of understanding of the child into account. It may also be imposed in addition to another measure or penalty. Which crimes are minor crimes for this purpose is not defined in the said provision which will result in discrepant practices. This research argues that minor crimes for this purpose shall not be those mentioned under Article 89 of the Criminal Code and must generally include crimes punishable by simple imprisonment. This requirement for the imposition of the measure is not known by judges. As a result, judges reprimanded children who committed serious crimes which are punishable with rigorous imprisonment exceeding ten years.

The fourth measure is home or school arrest. In case of crimes of small gravity and when the child seems to be reformed, the court shall order the child to be kept in his/her home or school during his/her free time or holidays and required to perform a specific task adapted to his/her age. As the two measures are joined by a conjunction 'or' and in light of the principle of minimum intervention, it seems that concurrent imposition of school and home arrest is not allowed. In practice, however, judges have imposed both measures concurrently. Again, the problem with this provision is the failure to define what crimes qualify as crimes of small gravity. This lack of clarity however is not apprehended by judges. This research argues that the definition of minor crimes provided under Article 89 of the Criminal Code shall not work for this measure. This is because the application of this parameter results in discriminatory treatment of children as in adult cases the measure is reprimand while in child justice cases, the measure (school or home arrest) entails deprivation of liberty. Therefore, this research recommends that courts to use the threshold of simple imprisonment as a benchmark. Courts then use this effect of home arrest (deprivation of liberty) to choose either reprimand or home arrest and that home arrest should be for relatively serious crimes.

Children may be admitted to a corrective institution established for education and rehabilitation by taking into account their antecedent or character and the gravity of the crime. A similar issue of lack of specificity regarding the nature of the crime also arises here; what types of crimes would subject children to this measure? Given its effect on the liberty of children, this research argues that the measure shall apply to crimes defined under Article 168 of the Criminal Code. In most cases, corrective detention is imposed on children who committed serious crimes punishable with rigorous imprisonment. In few cases, however, this measure is imposed for crimes punishable with simple imprisonment. In its worst form, admission to corrective detention for crimes that entail simple imprisonment (theft) has been ordered by regional courts and children were sent to the Addis Ababa Rehabilitation Center, the only corrective institution in the country.

Probation is another measure in the Ethiopian child justice system. The Criminal Code does not provide this measure in the section that deals with measures, but in the section that talks about common issues i.e. measures and penalties. Hence, from the arrangement, it is possible to discern that probation can be a measure of first resort in the Ethiopian child justice system. However, it does not apply to crimes that are punishable with rigorous imprisonment of ten or more years. This provision of the Code is hardly known by judges and some judges even do not believe that probation is an appropriate measure for children. Only few judges know this provision. This Article of the Code, by cross-referring to the provisions in the adult code that govern the same issue, makes the conditions of probation, their breach and effect equally applicable to children which is not appropriate. Certain conditions and effects of the breach do not go in line with the precepts of the child justice system.

The final measure, which is not recognized in the law but was present in the practice, was a referral to community-based correction centers. This was a practice in Addis Ababa and major cities of the regional states where a court, after establishing the guilt, sent a child to the centers where s/he received various services including counseling. Now a days, such measure is not available as the centers are closed.

This researcher contends that the measures provided in the Ethiopian child justice system are not sufficient to allow the system to comply with the principle ‘detention or imprisonment as a

measure of last resort'. Importantly, missing here are community service orders and restorative measures.

Gauging the measures in line with the rule that detention shall be a measure of last resort, the Ethiopian child justice system does not comply with this. This is because home arrest and admission to a corrective institution are measures of first resort. Furthermore, home arrest applies to minor crimes (crimes of small gravity) including petty offenses. Regarding corrective detention, the Code tries to limit it by confining it to serious crimes and for children with bad character or antecedents and by leaving it to the discretion of the court to impose it or not even in the presence of the conditions. Nonetheless, this does not make the measure a last resort. This is because a child with a bad character but who comes in conflict with the law for the first time may be sent to corrective detention if s/he commits serious crimes. Moreover, in practice, courts do not take the antecedent aspect seriously and sentence a child with no bad character to corrective detention based merely on the seriousness of the crime.

Regarding the compliance of the Ethiopian child justice system with the rule that detention shall be for the shortest period, this research found that the system is not immune from non-compliance. This is the case regarding the duration of curative detention. The duration is left to the institution to determine and the court is not mandated to supervise the enforcement. The duration will end if the management of the institution believes that it has attained its purpose or when the child attains majority age. Therefore, the absence of a clear power of the court to supervise this measure will subject children to prolonged detention. Unlike the case of corrective detention, the duration of school or home arrest is not fixed in the law. It is left to the court to determine the duration considering the circumstance of the case and the gravity of the crime. This open-ended duration will expose children to prolonged detention. This is what has happened in practice as in one case the duration of the measure was four years, which is too long compared to the maximum duration of corrective detention (five years) and the difference in gravity of the crimes for the two measures. The crime was punishable with simple imprisonment from one to five years. The maximum duration of corrective detention is five years. Given its application to the most serious crimes (as argued in this research) including to crimes of a nature provided under Article 168 of the Criminal Code, the duration is considered as 'shortest'. Further, a child under corrective detention may be released after serving one year. This works towards making

the duration ‘shortest period’. In practice, however, courts have sentenced children for a period beyond the maximum and up to 17 years.

Penalties in the Ethiopian child justice system come into picture if the above-mentioned measures have been applied and failed to achieve the intended goal of rehabilitating the child. Though the term is not used, this provision seems to make penalties including imprisonment a measure of last resort. However, what constitutes failure is not precise. Regarding imprisonment, this principle is reinforced by confining imprisonment to the most serious crimes and when the child is incorrigible and a cause for the insecurity of others. The principle set out under Article 166 of the Criminal Code is not known by judges and as a result, children who committed serious crimes for the first time are sentenced to imprisonment. Regarding the duration of imprisonment, subject to conditional release, it extends from one to ten years. This gives a wide margin of appreciation to courts. For the duration to comply with the rule that imprisonment shall be for the shortest period, proportional conversion of the penalty determined after taking all aggravating and mitigating circumstances should be employed. This means that if the actual penalty that crime would entail had the criminal been an adult is ten years, this should be converted to one year imprisonment and the imprisonment shall increase accordingly and the maximum period of ten years shall be reserved for crimes punishable with death. Compliance with the rule in practice cannot be discerned as the court did not follow this procedure. They simply rely on the extent of the penalty provided in the provision violated. Conditional release of children from prison is subject to the same rules as the ones that apply to adults including the length of served sentence. This researcher contends that this is not appropriate given the special circumstances of children and the precept of the child justice system.

A fine is another penalty (of last resort) in the Ethiopian child justice system. It may be imposed if the child has a means and is capable of understanding the reason for its imposition. This research argues that a fine can be imposed even if the special part provision of the Code does not recognize it as a penalty. However, it is difficult to envision any justification to make a fine a measure of last resort in the face of home arrest and corrective detention as measures of first resort. In practice, a fine is imposed as a measure of first resort and paid by parents or relatives, not by children. It can be imposed in addition to other penalties including imprisonment which violates the principle of minimum intervention. When the child intentionally failed to pay the

fine within the time specified, it shall be converted to school or home arrest. This deviates from the adult counterpart that substitutes a fine with compulsory labor.

Children above the age of 15 are, in principle, subject to the same penalties as adults. However, there are certain exceptions to this rule. First, death penalty cannot be imposed on a person below the age of 18. Second, children shall be segregated from adults which is almost absent in practice. Third, they may be subjected to penalties applicable to the first group of children (arts 167 & 168). Finally, courts may also impose measures on them if the crime they committed is not serious and if, according to expert opinion, they are amenable to such measures. These two special treatments are rare in practice; the researcher found only one case for each.

The proper administration of child justice in Ethiopia is affected by various internal and external challenges and gaps. The first of such gaps is a normative gap. States parties are duty-bound to take legislative measures to realize the rights of CICWL. This law shall contain the guiding principles and rights contained in the child standards to which a state is a party. The legislative measure starts from the constitutional recognition of the rights and incorporation of the guiding principles. This has to be followed by a subordinate law that comprehensively addresses the rights and aids the implementation of constitutional rights. This is not the reality in the realm of child justice in Ethiopia. The guiding principles of the child justice system are not constitutionally entrenched. Neither are they clearly stated in the subordinate laws. Incorporating the principles into the constitution is important in giving the system more attention among stakeholders including child justice actors. This research also argues that the absence of a separate code on child justice is a gap that hinders the proper enforcement of the due process rights of CICWL. As discussed in chapter five, the due process rights contained in the CPC are too few and dispersed in different parts of the code which makes the rules insufficient and problematic to enforce.

The other normative gap is the lack of clarity in the Criminal Code that governs measures. The measures are conditioned on the personal circumstances and/or the nature of the crime. However, these conditions are not precise enough for enforcement. Although judges do not often consider these parameters due to their lack of knowledge, this imprecision is likely to affect the proper enforcement of the measures.

The absence of specialized institutions and personnel is another challenge hindering the realization of due process rights and the proper application of the measures. Establishing institutions specifically working in the child justice system is one of the duties the CRC imposed on its signatories. In this regard, the first problem in the Ethiopian child justice system is the absence of a legal provision for the establishment of specialized institutions and personnel. Some of the institutions and personnel are available without a legal base. This is the case for police units and prosecutors for children (and women); child justice benches; and CBCC. The second challenge concerns the insufficiency of the institutions or personnel and the failure to sustain the existing ones. In this regard, it is important to recall that child justice benches are not available in all tiers of courts in all parts of the country. The same limited number of police units working on children is found. Worst of all, there is only one rehabilitation center in the country with a limited capacity and it is not effective in rehabilitating children. Further, an important institution that was successful in the rehabilitation of children (CBCC) that was taken as a model for other African countries ceased to function mostly due to the lack of interest on the part of the government. Finally, two important institutions for the effectiveness of the child justice system are missing in Ethiopia. These are specialized defense offices and probation or other supervisory organizations. The state counsel system in the Ethiopian child justice system is weak and lacks uniformity. State counsels are not available in the rural surrounding Woreda Courts and in courts where they are available, the counsels differ in terms of expertise and workloads. In some courts, state counsels are assistant judges and/or registrars and, in some others, they are representing every indigent in both civil and criminal cases. In Addis Ababa, the service is delivered by pro-bono lawyers which is not a recommended approach. The counsels who are government employees are also facing different challenges that compromised the quality and sustainability of the service. These include such challenges as absence of offices, of necessary equipment, of support staff, low salary and benefits, and marginalization of their service by other justice actors. There is no probation office in the Ethiopian criminal justice system in general and in the child justice system in particular. Probation officers are highly important in the child justice system, a system that gives prominence to non-custodial measures the proper enforcement of which requires a probation offices staffed by persons with a social science background.

Failure to allocate sufficient budget is another challenge in the justice system in general in Ethiopia. The budget allocated for the justice sector in Ethiopia takes the least rank. The child

justice system, as one aspect of the justice system, is also affected by the lack of sufficient budget.

The Ethiopian child justice system is not supported by a child justice strategy, evaluation, data and research. Although there is a children's policy, it is not supported by a strategy. Moreover, there are no comprehensive justice statistics in Ethiopia in general and child justice statistics in particular which, would be a basis for research and evaluation of the status of compliance of the national child justice system with the international and regional standards. Disaggregated child justice data and research are important to evaluate the extent to which the national child justice system realizes the rights enshrined in the CRC.

The Ethiopian child justice system is also challenged by the absence of competent justice actors with the required knowledge updated through continuous training. The challenge begins from the place given to child justice in the law school curricula and teaching. Although child justice forms one section in criminal procedure and criminal law courses at the undergraduate level, sufficient attention is not given to it in the teaching, exams and teaching materials. Child justice has little place in postgraduate programs as well. The attention given to the issue diminishes after students leave law schools and join the practice world. In this regard, mention shall be made regarding the absence of the issue in the pre-job justice professional training manuals followed by inadequate training given to the child justice actors. Justice professionals' training institutes are second places, next to law schools, where prospective child justice actors acquire knowledge about child justice. The third means through which child justice actors can acquire knowledge on the same issue are academic writings. However, child justice issues are almost absent in academic writing.

In addition to the specialized institutions, general justice institutions and institutions working on human rights and children rights are charged with powers and duties the discharge of which is essential for the effective administration of the child justice system. These government organs include FAG and regional justice bureaus; justice professional institutes; ministry, bureau and department working on child rights; the Ethiopian Human Rights Commission and the CJPO. However, except the Addis Ababa women and children and social affairs bureau which administers the Addis Ababa rehabilitation and remand center (which, through current expansion works, aims to increase its intake capacity) and the CJPO under whose auspices the existing

child justice benches and police units have been established, the remaining government organs have not done and are not doing sufficient works on child justice issues.

The child justice system also faces administrative challenges. The first of such is an arrangement to entertain child justice cases only on fixed days of the week. This is the case in Addis Ababa. This arrangement has its effect on the due process rights of children like the prohibition of pretrial detention and speedy trial as police are not duty bound to bring children to the court on the day other than the hearing day, and as hearings cannot be conducted all days of the week respectively. The second administrative challenge is the non-permanent nature of the child justice judges. Except in the case of Lideta bench where the judge is permanent, in other benches, judges are changed within a fixed period. This is a loss of the 'hard-won' expertise gained on-job which requires the system to begin afresh. Finally, the absence of an effective birth registration and certification system and reliance on medical examination as a means of age proof together with fixed days of age examination in hospitals are affecting the effective administration of child justice. Birth registration and certification in Ethiopia are still at a low level and this prompts judges to heavily rely on medical examination to prove the age of the child, which again affects the right to a speedy trial as examination takes time as the service is available only on fixed days.

Other challenges identified by this research are the status of children, the limited role played by NGOs, and the limited judicial application of human rights standards as challenges. Street children are double victimized by the absence of the necessary support system to relieve them from street life and non-custodial institutions to take them pending disposition of their cases as per Article 172 (2) of the CPC. As a result, street children ended up in pretrial detention in police stations and the remand home as well as detention as a measure after conviction. This is a violation of the rights of children recognized in the CRC and the CPC. NGOs can play a pivotal role in the realization of child rights. This of course requires a conducive national legal framework. This has not been the case in Ethiopia as the human rights works of NGOs have been curtailed by the 2009 Charities proclamation that was in force for a decade. The effect of this law on the works of NGOs on child rights in general and on the rights of CICWL in particular is visible. Nonetheless, after the repeal of the law and liberalization of human rights work and advocacy, no change could be observed in the willingness of NGOs to work on child justice issues and their focus is still on developmental and welfare issues. The FDRE Constitution

makes international and regional standards (for this purpose child rights standards) part of Ethiopian law. Hence, they need to be implemented by judges at least in so far as they do not conflict with the constitution. There is however little judicial practice of substantiating the arguments and decisions by provisions from the human rights standards. This is the case even in the highest judicial authority, the cassation division of the Federal Supreme Court.

8.2 Recommendations

This section provides practical recommendations to improve the Ethiopian child justice system specifically concerning the due process rights of CICWL and dispositions. Improving the child justice system is not a task solely reserved for the government; other stakeholders should also contribute. Hence, this research recommends the following actions to be taken by the pertinent stakeholders.

1. The federal government should take concrete legislative measures to realize the rights of children in the child justice system. This requires a comprehensive Children Act with a section on the rights of CICWL or a separate Child Justice Act. This researcher firmly believes that incorporating the child justice provisions in the general laws applicable to adults is not appropriate and partly hinders the effective realization of the rights. The recommended Act shall incorporate the principles and rights as recognized in the CRC, ACRWC and other related standards. Hence, it shall address the problems of the existing legal framework of the Ethiopian child justice system by:
    - Explicitly stating that arrest, detention or imprisonment shall be a measure of last resort and for the shortest period
    - Recognizing diversion
    - Adopting additional non-custodial measures that can help the system to comply with the rule that detention or imprisonment shall be a measure of last resort; and
    - Remedying the ambiguities and vagueness in the Criminal Code relating to the conditions under which measures can/shall be imposed.
2. Governments at all level shall seek to expand specialized institutions and personnel. The Act that will govern the child justice system shall stipulate for the establishment of these institutions and personnel and the government shall establish them at least in hotspot areas. These include special police units, benches, defense counsel offices, diversion

centers, and probation offices that follow up enforcement of the measures. The law must recognize the role of social workers and psychologists in the child justice system and a social work offices must be constituted in the respective child justice institutions. The government must furnish the institutions with the necessary facilities and must create conducive working conditions. In connection with the establishment of institutions specifically working on child justice, it is important to underline the need to make the CJPO a formalized and permanent government body instead of a project-based office that highly relies on donors' funds.

3. The Ethiopian child justice system must reinforce the rehabilitative ideal by establishing sufficient rehabilitative institutions envisaged under Article 162 of the Criminal Code. Therefore, keeping the rule that detention is a measure of last resort, rehabilitation centers must be established in the regions at least in the regional capitals including Dire Dawa and the practice of sending children to the center in Addis Ababa from the regions must be stopped. The only rehabilitation center for CICWL, the Addis Ababa Rehabilitation and Remand Center, must be equipped with the necessary facilities and personnel to deliver the necessary rehabilitation services. More specifically, the center must have a legal officer. Furthermore, at a minimum, separate prison cells shall be established for children below the age of 18 years to segregate them from adults.
4. The system must be administered by competent personnel. Carving attractive legal and institutional frameworks is not sufficient. The effective administration of the child justice system requires competent actors. The journey to achieve this must start from teaching child justice in law schools adequately and from an interdisciplinary perspective through the inclusion of the same in the justice professional institutes' pre-job training manuals to continuous on-job training. This involves different stakeholders including law schools, concerned government institutions and NGOs. Hence, sufficient attention must be given to child justice issues in law schools' curricula and teaching in both under and postgraduate programs. Undergraduate lecturers should give child justice equal attention to other criminal justice issues. Child justice issues shall also adequately feature in the national exit exams. There is a good beginning in including child justice issues in the postgraduate programs as an elective course. Nonetheless, efforts must be made to offer the course as a mandatory course. Law schools, justice professional institutes and other

concerned government institutions and NGOs should provide training to the child justice actors to help them maintain and further enhance their knowledge.

5. Child justice actors shall pay attention to the essence and aim of child justice system in general and the Ethiopian child justice system in particular. This research has found that the cause of violation of the rights of CICWL in Ethiopia is not confined to lack of knowledge. Lack of attention and focus by these actors is also a contributing factor manifested by the violation of clearly stipulated rights. Hence, child justice actors shall adhere to the aims and stipulations contained in the existing laws. Further, judges shall strive to base their decisions on the provisions of the international and regional child rights standards to fill the gaps in the national laws and to give the nationally recognized rights a broader perspective.
6. MoJ, MoWSA and the regional and Addis Ababa city counterparts, EHRC, federal justice and law institute, and regional justice professional training and research centers shall give sufficient attention to child justice and work toward the realization of the rights of CICWL by performing the tasks provided in their establishment laws. The relatively active entity, CJPO, shall also increase its vigor in improving the child justice system.
7. Effective administration of child justice requires allocation of sufficient budget and hence, governments at all levels shall allocate sufficient budget to the justice sector of which the child justice system forms part. To this end, governments can seek aid from donor agencies to complement limited domestic resources. For effective utilization of the allocated budget in the administration of child justice, priority should be given to the establishment of specialized institutions and personnel followed by training of justice actors and the enactment of consolidated child/child justice law. Within the institutional setups, priority shall be given to the establishment of corrective centers to eliminate imprisonment of children who come in conflict with the law for the first time. Establishment of a well-organized supervisory authority/probation office/ should follow this.
8. The child justice system shall rectify the administrative challenges. In this regard, the arrangement that makes child justice cases hearing only on fixed days should be eliminated as it affects the right to liberty of children (by causing pretrial detention) and the right to a speedy trial. Moreover, hospitals should work in cooperation with the child

justice actors while examining the age of the child by making their service available on all days. The child justice system shall also address the arrangement of changing judges in rounds not to lose the knowledge and experience gained in-service. Therefore, it is recommended for the child justice benches to be presided by permanent judges.

9. Governments at all levels should design a strategy to relieve street children from a street life and not to be re-victimized in the child justice system for their status by being detained pending their cases in police stations and remand centers and by ending up in detention after conviction. Therefore, institutions that should not deprive children of their liberty shall be established as envisaged under Article 172 (4) of the CPC.
10. The child justice system must be evaluated for its compliance with the accepted standards and for its status of enforcement in itself and its impact on the life of CICWL. This requires research and disaggregated data. Hence, disaggregated data on the basic aspects of the child justice system must be collected which serves as a basis for research and recommendation for further improvement of the system. Governments can discharge this function by doing it through their officers or by commissioning Universities and research institutions.
11. Human rights NGOs in general and child rights NGOs in particular should vigorously work for the realization of the rights of children in the Ethiopian child justice system. They can do so by funding initiatives and activities designed by the government to improve the child justice system or by designing and running their own projects. As such, NGOs can play an instrumental role to realize the rights of CICWL by helping the government materialize some of the recommendations above.

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Annex

Addis Ababa University

Center for Human Rights

Semi-Structured Interview Questions and Observation Checklist

Informed consent

My name is Belayneh Berhanu, from the Center for Human Rights, Addis Ababa University. I am here to collect data on the issue of due process rights and dispositions in the Ethiopian child justice system. The research specifically aims to:

- Examine the due process rights incorporated and enforced in the Ethiopian child justice system and how they accommodate the special needs of CICWL in the light of the aims and principles of the internationally prescribed child justice system**;**
- Examine dispositions available in the Ethiopian child justice system in the light of the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest appropriate period of time' and investigate the extent to which judges are applying the available dispositions;
- Investigate the challenges and gaps in the realization of due process rights and enforcement of dispositions in the Ethiopian child justice system.

You will be asked questions concerning the due process rights and/or special procedures and judicial dispositions in the Ethiopian child justice system together with the existing challenges and gaps in ensuring due process rights and implementing the judicial dispositions. The answers, opinions and information you provide will be kept strictly confidential and will be used for research purposes only. Your name will not be cited anywhere if you want anonymity. Your participation in this research is voluntary; you can decide whether to answer any question, and whether to continue with the interview. Your participation is essential for this research and I hope you will participate in it.

A. Semi-structured Interview Questions for:

I. Police Officers

1. Have you ever received accusation or complaint against a child? What did you do then?
2. Have you tried summoning a child?
3. Have you requested an arrest warrant from the court?
4. Could you tell me how you effected an arrest and how it differs from an arrest of adults? Have you ever used force and handcuffs?
5. How do you know the age of the child?
6. Have you ever detained children aged nine to fifteen in the police station?
7. Have you released a child to his/her parents before the trial?
8. Are there cases of disposing cases at the police level (e.g. by reconciliation)?
9. How fast you brought a child to the court? Have you arrested a child on the weekend?
10. Have you ever diverted children to out of court mechanisms? If so, on what basis and what sort of mechanisms?
11. How do you conduct an investigation of the crime? Do you receive court authorization and instruction? What sort of instructions did you receive? Have you interrogated a child? Do parents or counsel present during the interrogation of the child?
12. Within which time the investigation shall be completed? To whom you handed the investigation report?
13. Have you received training concerning the child justice system? What were the contents of the training and how sufficient it was?
14. What challenges you faced so far and what recommendations do you have?

II. Prosecutors

1. Tell me about yourself: Educational background, including your exposure to human rights and child rights in general and child justice in particular; your experience. Is there a specialized prosecutor?
2. Have you ever diverted children from the formal court proceeding? If so, on what basis and to which mechanism?
3. Have you ever checked whether the police investigation is made with court authorization?

4. In case where a crime requires framing of charge, what are the contents of the charge and what modifications are made compared to the adult case?
5. How long it should take to frame the charge?
6. Have you handed it to the child and to the parents or counsel? Have you tried to explain the charge to the child and/or parents? If so, how much time is given to them for the preparation of the defense? In which language the copy of the charge is handed to the child and/or parents?
7. What is your role when you present in cases tried in the High Court? Do you examine witnesses? Is there a special setting during trial like speaking while seated?
8. Have you appealed against the decision of the court? If so, for which cases? Who was present in the court room?
9. DO you conduct prison visit? If yes, in what interval? What things are the subjects of the visit?
10. Have you received training concerning the child justice system? What were the contents of the training and how sufficient it was?
11. According to your view, what are the challenges and gaps in the Ethiopian child justice system?
12. Any recommendations you have?

III. Judges

Pretrial rights and procedures

1. Tell me about yourself: Educational background, including your exposure to human rights and child rights in general and child justice in particular; your experience.
2. What is your role in determining the age of the child and which age range do you take from the medically identified age ranges? Were there cases where the age range suggested by the medical professionals falls below the MACR and above it? Were there also cases where the ranges fall below 15 years and above it? Which age did you choose in such scenarios? Did you engage in the determination of the age of the child for the crime committed that falls under the jurisdiction of the high court?
3. Have you been requested for an arrest warrant for child cases and issued it?
4. How immediate bringing the child to you is? To what extent this rule is observed and what is the effect of its violation?

5. Have you encountered cases where parents are not willing to appear before the court? What remedies you have taken in this regard?
6. What is the content of the complaint that you framed after asking the person who brought the child to you? Have you handed this complaint to the child or parents or counsel before the trial?
7. What sort of instruction do you give to the police and in what form? Have you checked that the police have complied with the instructions? What is the effect of an investigation by the police without such authorization? Within which time the investigation should be completed?
8. Are there cases where you diverted a child to out of court mechanisms? If so, what crimes are eligible for diversion and what mechanisms are used? On what basis (own initiation or application by a child or parents) do you divert a case? What are the safeguards, procedures and outcomes of this mechanism and who are parties involved?
9. Have you considered the views of the child and the suitability (and on what basis) of the presence of the parent(s) during trial and handing the child to his/her parents? Who should appear in case where a child has no parent or any other relative or welfare institution?
10. What is the place of bail in the Ethiopian child justice system? What to do if there is no any person or institution to hand the child over?
11. On what basis do you decide to try the child or instruct the prosecutor to frame a charge?
12. Do children, parents or counsel present a preliminary objection concerning the age of the child? Or do you yourself raise it?

The right to counsel

13. Have you appointed counsel for a child at the stage of investigation/interrogation?
14. Based on which law do you assign counsel to the child, the Constitution or the Criminal Procedure Code (CPC)?
15. Do you experience cases where a child or his parents refuse court-appointed counsel and appoint their own?
16. Were there cases where a child is not represented by a counsel as guaranteed by the law? Have ever you referred cases to private advocates?

17. Who are court-appointed counsels in the child justice system? Do they have special expertise on it? What other requirements should be fulfilled to be appointed or continue representation?

Trial procedures

18. What are the special settings of the child justice benches? Do prosecutors appear before lower courts? What roles they have? How the examination of witnesses is conducted?
19. DO parents appear in all hearings and what roles do they play during trial?
20. When and from whom do you request a social inquiry report if any? And within which time should it be completed?
21. Have you explained to the child the purpose of the hearing, the procedures, the participants and their roles?
22. Within which time should the trial be completed?
23. Do you have experience in adjourning a case? On what grounds and for how long?

Measures and penalties

24. What measures have you imposed on a child?

    If you sentenced a child to school or home arrest or warned him/her, what are minor crimes for these measures?

    How do you decide whether to impose home or school arrest or reprimand?

    If you have ever sentenced a child to corrective detention, how do you determine the seriousness of the crimes for this purpose? Have you sentenced a child who comes in conflict with the law for the first time to corrective detention?

    If you have ever sentenced a child to supervised education, what was the content of the measure?
25. If you did not sentence to a particular measure (warning, school or home arrest, admission to curative or corrective institution or to supervised education), why is that?
26. Corrective measure is discretionary, and have you exercised that and haven't sentenced a child to corrective detention in the face of the fulfillment of the conditions? If so, which measure did you substitute?
27. For which crimes you imposed fine? For crimes punishable by fine under the Code or for any crime so long as the child has a means and understands the reason for its imposition? What manner of payment you ordered and how much time you gave the child if it is by

installment? Have you experienced failure to pay the fine? what procedures you followed and what measures you imposed on a child?

28. Have you ever sentenced a child to imprisonment?
    If so, under what scenario?
29. If you suspended a penalty, did you do that as a first or last measure? If as a first resort, how you distinguished the circumstances under which it is applicable vis-a-vis other measures? For which crimes did you suspend a penalty?
30. Do you consider mitigating and aggravating circumstances and how?
31. Have you ever clarified the judgment to the child?
32. Have you ever mitigated an ordinary punishment for children aged above fifteen? Have you considered imposing or imposed measures and penalties provided under Articles 158-171 on children aged above fifteen and below eighteen? If so, what crime is of not a serious nature?
    If yes, in what situations and for what duration, and what effect does it has on the criminal record of children concerned (for measures), and with regard to variation?
    If not, why?

Enforcement of measures and penalties

33. When and on what basis you varied measures? Have you ever tried varying penalties? What was the effect of the variation; reduction or increment of duration or imposing additional conditions? Does it include substituting one measure for the other? What procedures did you follow?
34. Have you entertained the issue of breach of conditions attached to a measure or penalty? If so, what procedures were followed?
35. Have you ever ordered transfer of a child from corrective detention to prison? If so, on what grounds and what procedures were followed? How is the period of imprisonment then determined?
36. To whom do you entrust a child under probation or conditionally released and what is your role in ensuring that the measure achieves its aim?
37. Have you had a role to supervise the progress of the child subjected to one of the measures?

Common questions

38. Have you received training concerning the child justice system? What were the contents of the training and how sufficient it was?
39. Do you have the CRC and ACRWC translated into one of the national languages?
40. According to your view, what are the challenges and gaps in the Ethiopian child justice system?
41. Any recommendations you have?

IV. Children aged 9-15 years and/or parents who passed through the formal court system

1. Who brought you to the court? If it is police, how you come in contact with (summon or arrest? (for children)
2. Could you tell me how the police arrested you? Was there a use of force? If so, what sort of? What words do you remember the police has used in arresting or thereafter? Were you handcuffed? (for children)
3. Have you been in the police station and interrogated there? Who was with you during the interrogation? (for children)
4. When have you been informed of the arrest of your child? Were you with your child during the interrogation? (for parents)
5. How and who proves your age/the age of your child? If it was a medical examination, what sort of examinations was undertaken and how were they respectful of your right and dignity? (for children)
6. Have you been asked for your view as to the appropriateness of calling your parents?
7. Did you get a copy of the complaint or the charge before trial? If so, how many days before the trial?
8. Do you think that the charge or complaint was easy to understand?
9. Have you been familiarized with the court environment? Has anyone explained to you the purpose for which you were/are in the court, the parties, the procedures and the potential outcomes? Has a judge explained to you the decision? Who were in the court room during the trial? Has a judge worn a gown? How short was the trial? Have you got a break? Have your parents sat or stood next to you?
10. What was your role during the trial?

11. Are you satisfied with the representation service delivered by the court-appointed counsel? If not, why?
12. Have you ever refused court-appointed counsel? If yes, why?
13. How long the final determination of the case took and from where you were following the proceeding?
14. Have you had a prior conviction?
15. Are there adults in the prison cell or detention center where you are in?

V. Defense Counsel

1. Tell me about yourself: Educational background, including your exposure to human rights and child rights in general and child justice in particular; your experience. Are you a specialized counsel? How many defense counsels are there in this court?
2. On which kind of cases you represent CICWL?
3. How long and where you met with the child before the trial? How far you are familiarized with the case before the trial date?
4. When does your service begin and up to what stage it continues? Have you appealed against the decision of the trial court? Have you applied for a variation of the measure imposed on the child including conditional release?
5. Do you get a copy of the charge/complaint before trial and sufficient the time was for the preparation of the defense?
6. What is/was your role during trial or appellate proceedings? What is the role of the child as well?
7. How would you describe the relationship you have had with children? Have you explained to the child his/her rights during the proceeding? The procedures and parties? Consulted him/her on statements that you made on behalf of the child?
8. Have you received training and how many times and how adequate it is? What were the contents of the training?
9. What challenges do you face while delivering your service?
10. According to your view, what are the challenges and gaps in the Ethiopian child justice system?
11. Any recommendations you have?

VI. Law school Students

1. Have you learned the special procedures, measures and penalties of the Ethiopian child justice system sufficiently? If yes, how sufficient, according to your view, it is and to what extent do the exams incorporate child justice issues?
2. What do think are the challenges facing the Ethiopian child justice system concerning the observance of due process rights and enforcement of measures?
3. Any recommendations you have?

VII. Social Workers

1. When and how do you come in contact with children?
2. What are your roles?
3. What challenges did you face?

VIII. Child Justice Project Office

1. What activities you have done and what you planned to do concerning the rights of CICWL?
2. What challenges did you face?
3. What do you think are the challenges and gaps in the realization of the due process rights and enforcement of due process rights?
4. Any recommendations you have?

IX. Ministry of Justice (MoJ), Ethiopian Human Rights Commission (EHRC), Ministry/Bureau of Women and Social Affairs', and Justice and Legal Research and Training Institute

1. What activities you have done and what you planned to do concerning the rights of CICWL? Do you have an awareness creation department/program in your office, and how far have child justice issues featured?
2. The establishment law empowers/tasks you with_____, _____, and _____. What activities have you done in these regards?
3. Is there any research work or impact assessment done by the government or under your auspices? Are there any efforts to adopt the experience and best practices of other countries regarding non-custodial measures? (for MoJ and the Training Institute)
4. Are the child justice standards particularly the CRC translated into the national languages of the country and disseminated? (For EHCR and MoJ)

5. What specialized institutions and/or personnel are there in the child justice system? (for MoJ)
6. Where do corrective centers established apart from the capital city, and which institutions are serving as curative centers? (for MoJ)
7. Are there charitable organizations to supervise measures and penalties as envisaged under Article 208 of the criminal code? (for MoJ)
8. Do the National Child Rights Committee still exist and what are their roles concerning child justice? (for MoJ and Ministry/Bureau of Women/Children and Social Affair)
9. Are there criminal justice statistics in general and child justice statistics in particular ? (for MoJ)
10. Do you have a legal affairs department? (for MoWSA and regional and city counterparts)
11. What challenges did you face? How budgetary issues does affect the child justice system? What is your role in this regard?
12. What do you think are the challenges and gaps in the realization of the due process rights and enforcement of due process rights?
13. Any recommendations you have?

X. Remand Home/Corrective Center

1. What are your staff members, what services you deliver to children and to whom you are accountable?
2. How do you admit children to the center? What are the procedure and preconditions?
3. Have you applied for a variation of the corrective detention? If not, why?
4. Do children have the right to do so in the center and do they know that?
5. What are the procedures to conditionally release children from the center?
6. Were there experiences of transferring children from this center to prison? If so, what were the procedures and your roles?
7. What are the challenges of the center, if any?
8. Any recommendations you have?

XI. Diversion Centers

1. What is your legal base?
2. Who are your staff and with whom you are working?
3. From whom do you receive children?

4. What are the services you deliver?
5. Who are the parties involved? What are the procedures and what are the outcomes?
6. To whom you are accountable and what is your relation to the justice actors?
7. What challenges did you face?
8. Any recommendations you have?

XII. NGOs working on child rights

1. What activities you have done, are you doing and planning to do concerning the administration of child justice in Ethiopia?
2. What do you think are the challenges and gaps in the realization of the due process rights of children and enforcement of measures in the Ethiopian child justice system?
3. Any recommendation?

B. Observation Checklist

- Courts and trials
  - ✓ Decorum: setting of the court, parties present, and legal attire
  - ✓ Due process rights: Presence of parents and their role; other trial procedures like examination of witnesses; right to counsel; use of legal jargon; whether a copy of the charge is given
  - ✓ Elements of ensuring understanding of the child: Explaining the purpose of the hearing, the procedures, parties present and their roles and clarification of the judgment and sentence
- Police stations:
  - ✓ The existence of special unit for CICWL
- Diversion centers: To see the procedures and working of the centers