

**University of the Western Cape  
Faculty of Law**

**TOWARDS AN EFFECTIVE PROTECTION FOR  
INDEPENDENT ADOLESCENT MIGRANTS IN AFRICA**

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A thesis submitted in fulfillment of the requirement for the award of degree of Doctor of Laws in  
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## Declaration

I, Fasil Mulatu Gessesse, hereby declare that the work presented in this thesis, *Towards an Effective Protection for Independent Migrant Children in Africa*, is my original work. I further certify that this work has not been submitted, either in whole or in part, for a degree at any other university or academic institution. The works of other people used have been properly referenced and acknowledged.

**Name: Fasil Mulatu Gessesse**

**Signature:**



**Date: 1 November 2019**



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I am beholden to Almighty God – with the direction and guidance of the Holy Ghost, I know now that my life has purpose and meaning.

The logo of the University of the Western Cape, featuring a stylized building with columns and a pediment.

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## **Abstract**

Every year approximately 33 million children leave their home countries and cross international borders seeking refuge from war, instability, ethnic conflicts, natural and man-made disasters, and extreme poverty. Among the total child migrant population, adolescents account for 11 million. In terms of the ratio of child and adolescent migrants to the total migrant population, Africa has the highest proportion.

While the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of Child, the Convention Governing the Specific Aspects of Refugee Problems in Africa, and other international and regional legal regimes may be relevant, it does not seem that they are effective in protecting independent adolescents migrants. The central aim of this thesis is to examine the adequacy of the existing international and regional legal regime in protecting independent migrant adolescents and to propose ways to address comprehensively the rights and protection of these children.

Such a comprehensive legal instrument may, in fact, be justified to give effect to the principle of the best interests of the child and child participation in the context of the cross-border independent migration of children. Other serious problems include the issue of nationality and statelessness, child detention in the receiving country without any criminal act, age determination, freedom of movement, and the right to work. Although states have the sovereign power to regulate immigration matters, the special protection needs of independent migrant children call for a mechanism to foster the protection of these children within the sovereign power of states.

The study examines whether there is adequate policy and legal recognition of independent adolescent migrants in the international and regional human rights systems, with a particular focus on their right to move freely across borders and the right to work. It also investigates how the principles of non-discrimination, the best interests of the child, and child participation are interpreted in the context of adolescent independent migrants, and which mechanisms of protection are feasible to protect the rights of adolescent independent migrants within the principle of state sovereignty to regulate migration.

Finally, the study examines the normative frameworks of two countries with track-records of sending and receiving child migrants. South Africa (as a receiving country) and Ethiopia (as both a sending and receiving country) have been selected to examine state practices in recognising and protecting independent adolescent migrants. Moreover, the study considers the adequacy of the existing protection mechanisms and their harmonisation with international and regional child rights protection frameworks; good practices, if any, are identified in the case of each country.

The study employs doctrinal legal analysis of international, regional and sub-regional, national normative frameworks to identify relevant legal principles and state practices in Africa. Given

this three-tier – international, regional and national – normative analysis, the study stands set to contribute to the betterment and greater effectiveness of the international and regional legal regime on the rights and protection of migrant children.



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## Key Words and Phrases

Independent child migration, adolescent migration, adolescent's right to move, adolescent's right to work, best interest determination, migrant children's right to participation, child migration in Africa, immigration law in South Africa and Ethiopia, age determination, adolescent asylum seekers.



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## Abbreviations and Acronyms

ACERWC	African Committee of Experts on Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACP	African, Caribbean and Pacific
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
AHRS	African Human Rights System
ARRA	Administration of Refugee and Returnee Affairs
AUC	AU Commission
BIA	Best Interest Assessment
BID	Best Interest Determination
CAT	Convention against Torture
CEDAW	Convention on the Elimination of Discrimination against Women
CEN-SAD	Community of Sahel-Saharan States
COMESA	Treaty Establishing a Common Market for Eastern and Southern Africa
CRVS	Civil Registration and Vital Statistics
CYCC	Children and Youth Care Centre
DGD	Day of General Discussion
DHA	Department of Home Affairs
DHA	Department of Home Affairs
DHS	Demography and Health Survey
DRC	Democratic Republic of Congo
DSD	Department of Social Development
EAC	East African Community

ECOWAS	Economic Community of West African States
ESC	Economic, Social and Cultural
FDRE	Federal Democratic Republic of Ethiopia
GA	General Assembly
GDP	Gross Domestic Product
GoE	Government of Ethiopia
GoK	Government of Kenya
GTP	Growth and Transformation Plans
HRAP	National Human Rights Action Plan of Ethiopia
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers
IDPs	Internally Displaced Persons
IGAD	Intergovernmental Authority for Development
ILO	International Labour Organization
IOM	International Organization for Migration
MOLSA	Ministry of Labour and Social Affairs
MPFA	Migration Policy Framework for Africa
OAU	Organization of African Unity
OCP	Out-of-camp
OVCs	Orphans and Vulnerable Children
RECs	Regional Economic Communities
RMMS	Regional Mixed Migration Secretariat
ROVs	Refugee Outreach Volunteers



RSD	Refugee Status Determination
SADC	Southern African Development Community
SCCT	Scalabrini Centre of Cape Town
SNNPR	Southern Nations Nationalities and Peoples' Region
SOPs	Standard Operating Procedures
UDHR	Universal Declaration of Human Rights
CRC	United Nations Convention on the Rights of the Child
UNDESA	United Nations Department of Economic and Social Affairs
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
USMC	Unaccompanied and Separated Migrant Children
VCLT	Vienna Convention on the Law of Treaties
WWI	First World War
WWII	Second World War



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# CHAPTER ONE: INTRODUCTION

## 1.1 Background

Global migration has changed from being adult-driven to involving the movement of children, either accompanied by adults or moving by themselves. This shift in migration trends has led to researchers, policy-makers and international organisations paying more attention to the problem. However, the fact that these actors have regarded migrant children as subordinate to adults in the migration process has limited the undertaking of comprehensive research in the area of child migration.<sup>1</sup> The treatment of children as dependents slowly started to change in the 1990s due to the gravity of the problem, the increase in number of child migrants, and the perception of children as right-bearers following after the adoption of the United Nations Convention on the Rights of the Child (CRC).<sup>2</sup> Despite interest at the international level, there is a lack of adequate and disaggregated data on the number of children migrating alone or with adults. Likewise, the characteristics, causes and driving factors particular to children are neither well researched and nor well understood at the international, regional and local levels.<sup>3</sup>

However, there is some data demonstrating the magnitude of the problem. International migration may be from one developing nation to another (south-south migration), or from developing nations to richer nations (south-north).<sup>4</sup> According to the 2019 United Nations Department of Economic and Social Affairs (UNDESA) data, since 2005 south-south migration has increased, accounting for 74 per cent of international migration.<sup>5</sup> According to UNDESA, in

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<sup>1</sup> ACP Observatory on Migration 'The migration of children in ACP countries: Of their own free will or involuntary?' ACPOBS/2012/BN10 (2013) 5 available at [www.acpmigration\\_obs.org/sites/default/files/EN-BN10-children.pdf](http://www.acpmigration_obs.org/sites/default/files/EN-BN10-children.pdf) (accessed 15 July 2013).

<sup>2</sup> Bhabha J *Child Migration and Human Rights in a Global Age* (2014) 3.

<sup>3</sup> McKenzie DJ 'A profile of the World's Young Developing Country Migrants' 2007 2-3 available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-4021> (accessed 15 July 2013); Crépeau F 'The right of all Children in the context of international migration' in IOM *Children on the Move* (2013) IOM 2 available at [http://publications.iom.int/bookstore/free/Children\\_on\\_the\\_Move\\_15May.pdf](http://publications.iom.int/bookstore/free/Children_on_the_Move_15May.pdf) (accessed 15 July 2013); ACP Observatory on Migration (2013) 5; UN Committee on the Rights of the Child (CRC Committee) 2012 Day of General Discussion Outline for Participants 'The Rights of All Children in the Context of International Migration' 2012 2 available at <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/DGD2012Outline.pdf> (accessed 8 April 2014); Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General 'Study of the Office of the United Nations High Commissioner for Human Rights on the challenges and best practices on the implementation of the international framework for the protection of the rights of the child in the context of migration' A/HRC/15/29 5 July 2010 4 para 5 available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29_en.pdf) (accessed 8 April 2014).

<sup>4</sup> UNICEF 'International Migration, Children and Adolescents, Population Dynamics' 2013 3 available at [http://www.unicef.org/socialpolicy/files/Population\\_Dynamics\\_and\\_Migration\\_per\\_cent281\\_per\\_cent29.pdf](http://www.unicef.org/socialpolicy/files/Population_Dynamics_and_Migration_per_cent281_per_cent29.pdf) (accessed 11 July 2013).

<sup>5</sup> UNDESA Population Facts' (September 2019) 3; CRC Committee 'Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' 2012 6 available at <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf> (accessed 8 April 2014).

2019 the number of international migrants reached 272 million, of whom 105 million were engaged in south-south migration.<sup>6</sup> In 2019, 20 per cent of all migrants crossing international borders in the south were under the age of 20 years.<sup>7</sup> In 2019, in terms of the ratio of child and adolescent migrants to the total international migrant population, Africa has the highest proportion, namely 27 per cent.<sup>8</sup>

UNDESA has estimated that of the 33.3 million international migrants under the age of 20, 20 million live in the less-developed regions.<sup>9</sup> Among the total migrant population under the age of 20, adolescents between the ages of 15-19 account for 11 million, adolescents between the ages of 10 and 14 for about 9 million, young children between the ages of 5 and 9 for 7 million, and very young children under the ages of 4, for 6 million.<sup>10</sup> Hence, emphasis should be given to the 'intra-regional adolescent migration' issues in Africa.<sup>11</sup>

The pattern of child migration in Africa, whether international or domestic, also differs according to gender. A study of Benin, Burkina Faso and Ghana shows that boys tend to migrate across borders while girls mostly migrate locally.<sup>12</sup> Other studies indicate that in some developing countries, more boys than girls migrate for employment and better schooling.<sup>13</sup> In West Africa, girls migrate to cities to get informal education such as apprenticeships. In Ethiopia, despite age and sex variations, the main reasons for adolescent migration are work, school and marriage. Nevertheless, boys tend more than girls to migrate for better schooling and employment.<sup>14</sup>

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<sup>6</sup> UNDESA 'Population Facts' September 2019 (No. 2019/4) 2-3 available at [https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationStock2019\\_PopFacts\\_2019-04.pdf](https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationStock2019_PopFacts_2019-04.pdf) (accessed 21 October 2019).

<sup>7</sup> UNDESA 'Population Facts' (September 2019) 4; see also United Nations General Assembly 'International migration and development Report of the Secretary-General' 1 August 2018 (A/73/286) 3-4 available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N18/246/56/PDF/N1824656.pdf?OpenElement> (accessed 21 October 2019).

<sup>8</sup> UNDESA 'The number of international migrants reaches 272 million, continuing an upward trend in all world regions, says UN' News 17 September 2019 available at <https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.html> (accessed 21 October 2019).

<sup>9</sup> UNDESA 'The Age and Sex of Migrants' 2011 available at [http://www.un.org/esa/population/publications/2011Migration\\_Chart/wallchart\\_2011.pdf](http://www.un.org/esa/population/publications/2011Migration_Chart/wallchart_2011.pdf) (accessed 22 July 2013).

<sup>10</sup> UNICEF 'International Migration, Children and Adolescents, Population Dynamics' 2013 1-2.

<sup>11</sup> CRC Committee 'Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (2012) 6.

<sup>12</sup> Glind H 'Working paper on migration and child labour exploring child migrant vulnerabilities and those of children left-behind' ILO (2010) 7-8 available at [www.ilo.org/ipeinfo/product/viewProduct.do?productId=14313](http://www.ilo.org/ipeinfo/product/viewProduct.do?productId=14313) (accessed 15 July 2013); Report of the Secretary-General 'New trends in migration: demographic aspects' Actions in follow-up to the recommendations of the International Conference on Population and Development E/CN.9/2013/3 19 February 2013 9 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/237/32/PDF/N1323732.pdf?OpenElement> (accessed 01 June 2014).

<sup>13</sup> Temin M, Montgomery M R, Engebretsen S et al. 'Girls on the Move: Adolescent Girls and Migration in Developing World', The Population Council Inc (2013) 8 & 20 available at [http://www.popcouncil.org/uploads/pdfs/2013PGY\\_GirlsOnTheMove.pdf](http://www.popcouncil.org/uploads/pdfs/2013PGY_GirlsOnTheMove.pdf) (accessed 01 May 2014).

<sup>14</sup> Temin M, Montgomery M R, Engebretsen S et al. (2013) 21 & 23.

Although the list is not exhaustive, children affected by migration may be categorised as ‘children migrating with their parents, unaccompanied migrant children, separated migrant children, internally displaced children, children on the move/independent migrant children, asylum-seeking children, refugee children, left behind children, trafficked children, smuggled children, stateless children and children born to migrants in their country of destination’.<sup>15</sup> Some of the key terms used to categorise migrant children are defined below:

- **Child:** ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.<sup>16</sup>
- **Adolescence:** ‘the period in human growth and development that occurs after childhood and before adulthood, from ages 10 to 19’.<sup>17</sup> For this study, the term refers to the age group between 15-18 years.
- **Child on the move:** ‘a child taking an active part in the migration process’.<sup>18</sup>
- **Child refugee:** ‘a child who [...] owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’,<sup>19</sup> or ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.<sup>20</sup>
- **Asylum-seeker:** ‘someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated [on the basis of the 1951 Convention Relating to the Status of Refugees]’.<sup>21</sup>

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<sup>15</sup> Thatun S & Heissler K ‘Children’s migration: Towards a multidimensional child protection perspective’ in IOM *Children on the Move* (2013) 98 available at

[http://publications.iom.int/bookstore/free/Children\\_on\\_the\\_Move\\_15May.pdf](http://publications.iom.int/bookstore/free/Children_on_the_Move_15May.pdf) (accessed 15 July 2013); ACP Observatory on Migration (2013) 6.

<sup>16</sup> UN Convention on the Rights of the Child (CRC) adopted by General Assembly resolution 44/25 (20 November 1989) and entered into force 2 September 1990, art 1.

<sup>17</sup> The World Health Organization (WHO) available

at [http://www.who.int/maternal\\_child\\_adolescent/topics/adolescence/dev/en/](http://www.who.int/maternal_child_adolescent/topics/adolescence/dev/en/) (assessed 20 May 2014).

<sup>18</sup> Bustamante J ‘Report of the Special Rapporteur on the human rights of migrants Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development’ A/HRC/11/7 (14 May 2009) available at

<http://www.ohchr.org/en/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx> (accessed 27 May 2014).

<sup>19</sup> Convention relating to the Status of Refugees United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429(V) of 14 December 1950 and entered into force on 22 April 1954 (hereafter 1951 Refugee Convention), art 1(a).

<sup>20</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) by the Assembly of Heads of State and Government. CAB/LEG/24.3 entered into force on 20 June 1974, art 1(2).

<sup>21</sup> Asylum Seekers, available at <http://www.unhcr.org/pages/49c3646c137.html> (accessed 01 June 2014).



- **Internally displaced:** ‘someone who has been forced or obliged to flee or to leave his or her homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.<sup>22</sup>
- **Trafficking in persons:** ‘the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve his or her consent for the purpose of exploitation’.<sup>23</sup>
- **Smuggling of persons:** ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.<sup>24</sup>
- **Separated children:** ‘children who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives’.<sup>25</sup>
- **Unaccompanied children:** ‘children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so’.<sup>26</sup>
- **Stateless person:** ‘a person who is not considered as a national by any State under the operation of its law’.<sup>27</sup>
- **Migrant worker:** ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’.<sup>28</sup>

<sup>22</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted by the Special Summit of the Union held in Kampala-Uganda 23 October 2009, art 1(k).

<sup>23</sup> Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted by General Assembly resolution A/RES/55/25 (15 November 2000) and entered into force 25 December 2003 (hereafter Protocol against Trafficking), art 3(a).

<sup>24</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime adopted by General Assembly resolution A/RES/55/25 (15 November 2000) and entered into force 28 January 2004 (hereafter Protocol against Smuggling), art 3(a).

<sup>25</sup> Committee on the Rights of the Child (hereafter CRC Committee) General Comment No. 6 ‘Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (CRC/GC/2005/6) para 8.

<sup>26</sup> CRC Committee General Comment No. 6 para 7.

<sup>27</sup> Convention Relating to the Status of Stateless Persons adopted by General Assembly resolution 526A (XVII) (26 April 1954) of the UN Economic and Social Council and entered into force 6 June 1960, art 1 para 1.

<sup>28</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 (18 December 1990) and entered into force 1 July 2003, art 2 para 1.

- **Child left behind:** ‘a child raised in his or her home country or country of habitual residence who has been left behind by adult migrants responsible for him/her, such as one or both parents, extended family members, legal guardians or caregivers’.<sup>29</sup>

This research will deal in particular with adolescent independent migrants who move irregularly on their own initiative. This focus is in response to the limited attention given to issues related to them, as well as to gaps in the law for the protection of their human rights and interests.

The travels of independent migrant adolescents may be subdivided into regular and irregular migration. Regular migration takes place legally and involves using the proper travel documents required for leaving and entering a state. Irregular migration takes place illegally without fulfilling the immigration requirements ‘of the sending, transit and receiving countries’.<sup>30</sup> Even though both patterns of migration make children vulnerable, irregular migration is far more problematical. Children may be detained, abused, trafficked and exploited, and their education, health, family care and support, and other special rights and needs may not be fulfilled.<sup>31</sup> Moreover, there is a high probability that these migrant children will end up stateless.<sup>32</sup> Especially in developing countries, where civil registration systems are less sophisticated than elsewhere, migrant children may lack access to any sort of registration system.<sup>33</sup>

A number of factors compel adolescents to migrate independently and irregularly, thereby putting their lives and well-being at risk. These factors are often related to poverty and economic needs, including the search for better opportunities and livelihoods, the search for better education, or the need to support families. Other causes relate to adventure, the testimony of others,<sup>34</sup> escape from abuse, and technology and easy access to information.<sup>35</sup> Such factors differ from region to region and country to country. In Africa as well as other developing regions, the

<sup>29</sup> Bustamante J (A/HRC/11/7) (14 May 2009).

<sup>30</sup> Albrecht B, Clerin N & Klepkova J et al. ‘Exchange of information and best practices on first reception, protection and treatment of unaccompanied minors, Manual of Best Practice and Recommendations’ IOM 2008 available at [http://lastradainternational.org/lsidocs/777\\_per\\_cent20EUAMMANUALFINAIA4Format.pdf](http://lastradainternational.org/lsidocs/777_per_cent20EUAMMANUALFINAIA4Format.pdf) (accessed 01 July 2013).

<sup>31</sup> Touzenis K ‘Human Rights of Migrant Children’ (2008) 15 *International Migration Law* 9-10 available at [http://www.globalmigrationgroup.org/uploads/gmgtopics/children/I.C\\_Int\\_Migration\\_Law\\_N\\_15\\_Human\\_Rights\\_IOM.pdf](http://www.globalmigrationgroup.org/uploads/gmgtopics/children/I.C_Int_Migration_Law_N_15_Human_Rights_IOM.pdf) (accessed 01 July 2013).

<sup>32</sup> Goris I, Harrington J & Köhn S ‘Statelessness: What it is and why it matters’ (2009) 32 *Migration Review* 4 available at <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf> (accessed 25 July 2013); Bhabha J ‘Ardent’s Children: Do Today’s Migrant Children Have Rights to Have Rights?’ (2009) 31 *Human Rights Quarterly* 410-51.

<sup>33</sup> Van Waas L ‘The Children of Irregular Migrants: A Stateless Generation?’ (2007) 25 *Neth. Q. Hum.Rts.* 449-50; Bhabha J (2014) 271.

<sup>34</sup> Testimony may include the testimony of smugglers, that of already migrated persons who may have returned, or that of friends and relatives.

<sup>35</sup> Touzenis K (2008) 9; ACP Observatory on Migration (2013) 7.

push factors and respective migration modalities may be located in a family model,<sup>36</sup> a community model<sup>37</sup> and an individual model.<sup>38</sup>

Until recently, the individual model was considered less than relevant to children, as child migration was viewed as a part of adult migration. However, children also make decisions to migrate by themselves.<sup>39</sup> Consequently, they may fall in the hands of smugglers and traffickers, resulting in the violation of their civil and political freedoms as well as the socio-economic rights provided under international and regional child-rights laws.<sup>40</sup> Apart from their being subjected to the risk of exploitation and abuse, children migrating on their own initiative raise other concerns. They may be unable to express their views in decision-making processes about their interests due to the failure of administrative authorities to acknowledge their presence in the receiving country. The ordinary interpretations of ‘the best interests of the child’, ‘child participation’,<sup>41</sup> ‘evolving capacity and family responsibility’ may not be applicable in their situation. In this regard, international human rights laws as well as specific principles and norms relating to child migration may fall short of protecting the migrant children’s rights and interests.<sup>42</sup>

As illustrated above, independent adolescent migration is a major problem around the globe and in Africa in particular. This study seeks to highlight the nature of the problem, the international and regional legal protections that exist in Africa, the lacunae within them, and ways of addressing these gaps and enhancing protections and safeguards for such children.

## 1.2 Statement of the Problem

One of the problems African children face is irregular migration. Although there is limited data on children’s migration within Africa,<sup>43</sup> the seriousness of the problem has been reported by civil

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<sup>36</sup> Mckenzie D J (2007) 5-6; Thatun S & Heissler K (2013) 102-03.

<sup>37</sup> Mckenzie D J (2007) 6; Hashim I & Thorsen D *Child Migration in Africa* (2011) 115; Temin M, Montgomery M R, Engebretsen S et al. (2013) 22.

<sup>38</sup> Mckenzie D J (2007) 4.

<sup>39</sup> Touzenis K (2008) 15.

<sup>40</sup> Gallinetti J & Kassan D ‘The Trafficking of Children in Africa: An Overview of Research, International Obligations and Existing Legal Provisions’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 240-42.

<sup>41</sup> Skeels A & Sandvik-Nylund M ‘Participation of Adolescents in Protection: Dividends for All’ in Couldrey M & Herson M (eds.) *Being Young and Out of Place* (2012) 40 *Forced Migration Review* 9 available at <http://www.fmreview.org/en/young-and-out-of-place.pdf> (accessed 01 May 2014).

<sup>42</sup> Bhabha J (2014) 6; International Organization for Migration, ‘Unaccompanied Children on the Move: The Work of International Organization for Migration’ (2011) 15 available at [http://publications.iom.int/bookstore/free/UAM\\_per\\_cent20Report\\_11812.pdf](http://publications.iom.int/bookstore/free/UAM_per_cent20Report_11812.pdf) (accessed 15 May 2014).

<sup>43</sup> Mckenzie (2007) 2-3; Crépeau F (2013) 2; ACP Observatory on Migration (2013) 5; CRC Committee 2012 Day of General Discussion Outline for Participants ‘The Rights of All Children in the Context of International Migration’ 2012 2; Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary -General (A/HRC/15/29) 5 July 2010 4 para 5; Flahaux M & De Haas H ‘African migration: trends, patterns, drivers’ (2016) 4 *Comparative Migration Studies* 6.

society organisations and the UN.<sup>44</sup> The focus of the present study is, as noted, independent adolescent migrants who take an active role in the migration process. Children migrating alone for better lives and opportunities are more often punished than rewarded, due to lacunae in international and regional human rights laws, norms and principles.

Particularly acute problems include contextualising the principles of the best interests of the individual child, especially during return, family reunification and determination of the protection of socio-economic rights (as opposed to the existing welfare-driven determination of best interests);<sup>45</sup> best interests assessment for the assignment of legal guardians while children are in the host country;<sup>46</sup> and child participation in decision-making regarding immigration status. Other serious problems include the issue of nationality and statelessness;<sup>47</sup> child detention in the receiving country without any criminal act;<sup>48</sup> age determination;<sup>49</sup> freedom of movement; and the right to work. States have the sovereign power to regulate immigration matters within their domestic legislative and policy frameworks. However, owing to the special protection needs of independent migrant children, there should be a mechanism to foster the protection of these children within the sovereign power of states. In its engagement with these problems and gaps, this research adopt a human rights and child-rights law perspective.

Though inadequate, international and regional legislative frameworks do have some provisions that could be used to protect the rights of independent adolescent migrants.<sup>50</sup> In particular, the

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<sup>44</sup> The data by UNDESA reported in 'The Age and Sex of Migrants' (2011) shows the gravity of the problem of child migration in Africa. Similarly, the UNICEF Children and Adolescents, Population Dynamics Report (2019/2013) further demonstrates that Africa experiences very high levels of child migration. Moreover, research by the Observatory of Migration (on African, Caribbean and Pacific ACP countries) also highlights the magnitude of the problem in Africa.

<sup>45</sup> Bhabha J (2014) 5, 6, 247 & 268; International Organization for Migration, 'Unaccompanied Children on the Move: The Work of International Organization for Migration' (2011) 15.

<sup>46</sup> Foneseca A, Hardy A & Adam C 'Unaccompanied migrant children and legal guardianship in the context of returns: The missing links between host countries and countries of origin' in *IOM Children on the Move* (2013).

<sup>47</sup> Goris I, Harrington J & Köhn S 'Statelessness: What it is and why it matters' (2009) 32 *Forced Migration Review* 4 available at <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf> (accessed 25 July 2013); Bhabha J 'Ardent's Children: Do Today's Migrant Children Have Rights to Have Rights?' (2009) 31 *Human Rights Quarterly* 410-51; Van Waas L (2007) 449-50.

<sup>48</sup> Report of the Secretary-General 'Protection and Assistance to Unaccompanied and Separated Refugee Children' A/60/300 (2005) para 68; Farmer A 'The Impact of Immigration Detention on Children' in Couldrey M and Herson M (eds.) *Detention, alternatives to detention, and deportation* (2013) 44 *Forced Migration Review* 14 available at <http://www.fmreview.org/en/detention.pdf> (accessed 01 May 2014); Bhabha J (2014) 248, 251 & 257.

<sup>49</sup> Bhabha J (2014) 260.

<sup>50</sup> Universal Declaration of Human Rights (UDHR) (1948); International Covenant on Civil and Political Rights (ICCPR) (1966); The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) and the other core international human rights conventions have provisions that could be used to protect the rights of independent migrant children, given that these treaties should apply to all universally and thus extend to migrant children; African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) entered into force 29 November 1999, art 3 & UN Convention on the Rights of the Child art 2; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, October 2009 arts 7 (e)(f), (9)(1)(d), 9(2)(c) & 13(4); Convention Governing the Specific Aspects of Refugee problem in Africa September 1969 arts 1(1) & (2); ILO Convention 138 Minimum Age Convention (1973); ILO Convention 182 Worst Forms of Child Labour Convention (1999); ILO Recommendation 190 Worst Forms of Child Labour Recommendation (1999);

CRC provides protection for unaccompanied and separated children who cross international borders. Its African regional counterpart, the African Charter on the Rights and Welfare of the Child (ACRWC), includes provisions that could also apply to independent migrant children. When states ratify the CRC and ACRWC, they are duty-bound to provide protection not only to their nationals but all children found in their territory.<sup>51</sup>

Apart from international human rights laws, there are soft laws developed by the United Nations (UN) and its specialised agencies, such as the UN High Commissioner for Refugees (UNHCR).<sup>52</sup> The UN has expressed its concern about this matter through the adoption of a series of notes and reports on migration, the protection of migrants, women migrant workers and human rights, and the paradigm-shift in migration demography.<sup>53</sup>

In addition, the Human Rights Council (HRC) has sought to address the issue of child migration in its special procedures mechanisms. The reports of the Special Rapporteurs on the human rights of migrants<sup>54</sup> on the subject of children in the context of migration<sup>55</sup> – taken in combination with a series of reports by the Secretary General of the UN<sup>56</sup> – show the gravity of

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International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Convention on the Reduction of Statelessness (1954); Protocol against Trafficking and the Protocol against Smuggling.

<sup>51</sup> African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) entered into force 29 November 1999, art 3 & UN Convention on the Rights of the Child art 2.

<sup>52</sup> Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live A/RES/40/144 13 December 1985; General Assembly Resolution A/RES/67/219 International Migration and Development; General Assembly Resolution A/RES/66/172 Protection of Migrants; General Assembly Resolution 61/146 Rights of the Child 2007; General Assembly Resolution S-27/2 A World Fit for Children 2002; UNHCR Guidelines on Determining the Best Interests of the Child (2008); Inter-Agency Guiding Principles on Unaccompanied and Separated Children (2004); Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997).

<sup>53</sup> United Nations General Assembly and Economic and Social Council Reports of the Secretary-General and resolutions available at <http://www.un.org/esa/population/migration/ga/index.html> (1 June 2014).

<sup>54</sup> The Human Rights Council, through resolution 8/10 of 18 June 2008, strengthened the mandate of the Special Rapporteur on the Human Rights of Migrants, an office established in 1999. This mandate was extended for a period of three years for each assignment period, and renewed by the Human Rights Council in resolution 17/12 of 10 June 2011 and resolution 26/19 of 26 June 2014. Since 1999, there have been three Special Rapporteurs on the Human Rights of Migrants: François Crépeau (Canada), August 2011 to the present; Jorge A. Bustamante (Mexico), August 2005-July 2011; and Gabriela Rodríguez Pizarro (Costa Rica), 1999-2005. Available at <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> (accessed 10 June 2014).

<sup>55</sup> Crépeau F 'Report of the Special Rapporteur on the human rights of migrants, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms' (A/68/283) 7 August 2013 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/421/15/PDF/N1342115.pdf?OpenElement> (accessed 01 June 2014); Bustamante J (A/HRC/11/7) (14 May 2009).

<sup>56</sup> Report of the Secretary-General Promotion and protection of human rights, including ways and means to promote the human rights of migrants A/68/292, 9 August 2013; Report of the Secretary-General 'International migration and development' A/68/190 25 July 2013; Report of the Secretary-General 'Violence against women migrant workers' A/68/178 23 July 2013; Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (A/HRC/15/29) 5 July 2010.

the problem and the concern it raises among UN Bodies.<sup>57</sup> Such efforts are commendable in addressing the plight of child migration.

The UN's Committee on the Rights of the Child has also been involved in activities to realise the rights of children in the context of migration. These measures include General Comments on variety of subjects pertinent to child migration.<sup>58</sup> Moreover, the Committee bi-annually dedicates a Day of General Discussion (DGD) to a provision of the CRC or child-rights issue to enhance understanding of the Convention as well as child rights in general.<sup>59</sup> The 2012 DGD was devoted to discussing 'The Rights of All Children in the Context of International Migration'.<sup>60</sup>

Instead of attempting to examine every aspect of independent child migration in Africa, this study selects two countries with track records of sending and receiving child migrants: South Africa (as a receiving country) and Ethiopia (as a sending country and receiving).<sup>61</sup> The rationale for this selection lies in these countries' reported concerns as receiving and sending countries. Ethiopia has a track record of being one of the major sending countries of migrants of a general nature as well as economic migrants, as well as receiving a large number of migrants especially from neighbouring countries.<sup>62</sup> South Africa has one the strongest economies and is therefore a

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<sup>57</sup> Bustamante J (A/HRC/11/7) (14 May 2009).

<sup>58</sup> CRC Committee, General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin; No. 4 on Adolescent Health and Development; No. 12 on the Right of Children to be Heard; No. 10 on Children in Juvenile Justice & No. 1 on the Aim of Education.

<sup>59</sup> Rules of Procedure, Committee on the Rights of the Child, CRC/C/4/Rev.3 Rule 79 available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/4/Rev.3 & Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/4/Rev.3 & Lang=en) (accessed 8 April 2014).

<sup>60</sup> CRC Committee 2012 Day of General Discussion Outline for Participants 'The Rights of All Children in the Context of International Migration' 2012 2; CRC Committee 'Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (2012) 15-22.

<sup>61</sup> International Organization for Migration World Migration-Inward and Outward available at <http://www.iom.int/cms/en/sites/iom/home/about-migration/world-migration.html> (accessed 01 July 2014).

<sup>62</sup> Regional Mixed Migration Secretariat: East Africa and Yemen (RMMS) 'Ethiopia Country Profile' (2016) available at <http://www.regionalmms.org/index.php/country-profiles/ethiopia> (accessed 09 October 2017); Marchand K, Roosen I, Reinold J & Siegel M 'Irregular Migration from and in the East and Horn of Africa' (May 2016) Maastricht Graduate School of Governance 17 available at <https://www.merit.unu.edu/publications/uploads/1496241719.pdf> (accessed 09 October 2017); Department of State, United States of America 'Trafficking in Persons Report' (June 2016) 167 available at <https://www.state.gov/documents/organization/258876.pdf> (accessed 13 October 2017); UNHCR, UNICEF & IOM 'Refugee and Migrant Children Including Unaccompanied and Separated Children in the EU: Overview of Trends in 2016' available at <https://data2.unhcr.org/ar/documents/download/55971> (accessed 12 October 2017); Regional Mixed Migration Secretariat (RMMS) and Danish Refugee Council (DRC): East Africa and Yemen 'Ethiopia Country Profile' (May 2016) available at <http://www.regionalmms.org/images/CountryProfile/Ethiopia/EthiopiaCountryProfile.pdf> (accessed 09 October 2017); IOM 'Profiling of Ethiopian Unaccompanied and Separated Migrant Children along the Horn of Africa-Gulf of Aden Migration Route' (2016); Save the Children & Regional Mixed Migration Secretariat (RMMS) 'Young and on the Move: Children and youth in mixed migration flows within and from the Horn of Africa' (2016) Mixed Migration Research Series 10, 21, available at [https://resourcecentre.savethechildren.net/node/10080/pdf/young\\_and\\_on\\_the\\_move\\_sep\\_2016.pdf](https://resourcecentre.savethechildren.net/node/10080/pdf/young_and_on_the_move_sep_2016.pdf) accessed 14 August 2017).

migrant attracting country with entrants coming from the entire sub-African region.<sup>63</sup> The research deals with their migration profiles of adolescent children, their immigration laws and policies and the harmonization thereof with international and regional human rights and child-rights standards as well as their implementation.

### 1.3 Research Questions

The research questions of this study are as follows:

- Is there adequate policy and legal recognition of adolescent independent migrants in the international and regional human rights systems – with a focus on the freedom to move across borders and the right to work?
- How are the principles of non-discrimination, the best interests of the child, child participation and the right to life, survival and development interpreted in the context of adolescent independent migrants?
- Which mechanisms of protection are feasible to protect the rights of adolescent independent migrant children in view of the principle of state sovereignty in regard to regulating migration?
- Are the laws and policies of African countries, particularly South Africa and Ethiopia, compatible with international and regional human rights norms and principles pertinent to adolescent independent migrants?

### 1.4 Research Methodology

The research employs a desktop-research method utilising literature review as well as analysis of international, regional and domestic law and policy. The theoretical foundation for the research is built by drawing on various secondary data, research findings, and international and regional norms and principles discussed in books, journal articles and reports. To understand trends and causes of child migration, reports are considered from selected African states, particularly South Africa and Ethiopia, along with data from credible organisations working in the area and that

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<sup>63</sup> Statistics South Africa ‘Community Survey 2016’ 24-5, Central Intelligence Agency (CIA), The World Factbook: South Africa; UNDESA ‘International Migration Report 2017: Highlights’ (2017) New York 26 available at [https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017\\_Highlights.pdf](https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf) (accessed 29 April 2019); Food and Agriculture Organization of the United Nations (FAO) ‘Evidence on internal and international migration patterns in selected African countries’ 2-4 available at <http://www.fao.org/3/a-i7468e.pdf> (accessed 29 April 2019); Crush J ‘Southern hub: the globalization of migration to South Africa’ in Lucas R E.B (ed) *International Handbook on Migration and Economic Development* (2014) 214; UNICEF ‘South Africa: Migration Profile’ (2013) available at <https://esa.un.org/migmgprofiles/indicators/files/SouthAfrica.pdf> (accessed 29 April 2019); Chiumia S ‘Factsheet: How many international migrants are there in SA?’ (website last updated on 31 July 2017) available at <https://africacheck.org/factsheets/data-migrants-numbers/> (accessed 10 November 2017).

from other secondary sources. Based on the theoretical foundations, and causes and trends of child migration, a specific analytical approach to understating independent adolescent migration will be constructed. However, such approach will not employ grounded theory methodology because the study will not generate data through empirical research methodology that is prerequisite for grounded theory – and such empirical research is beyond the scope of this study. The gaps in the international and regional laws pertinent to independent adolescent migrants are investigated in the light of international and regional legislative frameworks, including general comments from UN treaty bodies. Additionally, the domestic immigration laws and policies of South Africa and Ethiopia are assessed to determine whether they are in line with international and regional human rights laws, norms and principles. Lessons are drawn from other regional human rights systems to find alternative methods and best practices for the protection of independent migrant children. In doing so, the study considers the laws, cases and jurisprudence of other regional human rights systems.

### **1.5 Significance of the Study**

This research has multifaceted significance for the field of adolescent migration. Seeing as most of the extant research focuses on the general aspects of unaccompanied and separated migrants, insufficient attention has been paid to independent adolescent migrants who actively engage in the migration process in Africa. This research attempts to fill the knowledge and information gap on child migration in Africa and bring a new perspective to the academic discourse on adolescent migrants. Apart from its academic significance, the study encourages international, regional and national law- and policy-makers to approach issues based on global, continental, sub-regional and country-specific needs and problems. The research also highlights alternative methods and approaches that need to be adopted regionally to address effectively the problems associated with independent child migrants.

The research is distinctive in that it focuses on the international human rights law aspect of the problem from an African perspective, thereby complementing the existing social science research on independent child migration. In this regard, it proposes new models of international and regional law safeguards to protect the rights and interests of independent migrant children.

### **1.6 Structure of the Research**

This first chapter introduces the dissertation by providing background information, a statement of the problem, research questions, methodology, and the significance of the study.

The second chapter lays the foundation by discussing general theories regarding migration and the causes, trends, characteristics and factors associated with child and adolescent migration in Africa. Emphasis is given to the trends and patterns of adolescent migration in Ethiopia and



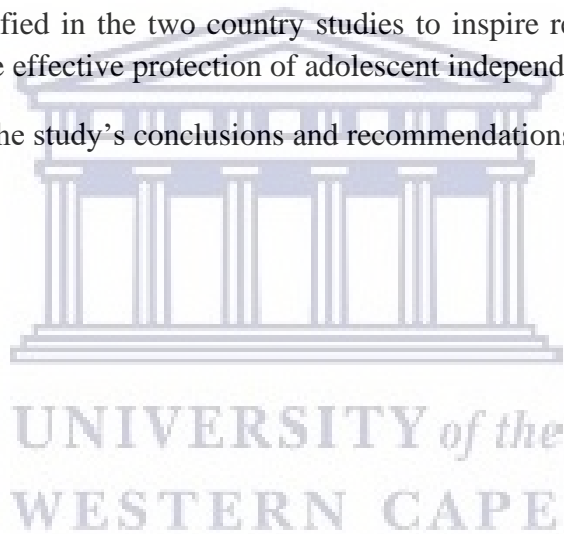
South Africa. Childhood and child-rights theoretical perspectives are also examined. The chapter sets out a functional definition of the term ‘independent adolescent migrants’.

The third chapter discusses the concepts of freedom of movement and the right to work and freely choose a means of livelihood. As part of this, it examines international and African regional norms and principles in the context of independent adolescent migration, and highlights distinctive attributes of the African regional system in regard to these two substantive rights.

The fourth chapter discusses the international and regional interpretation and application of the founding principles of children’s rights in the context of independent adolescent migrants. Soft laws and guiding principles are also examined, as is the issue of age determination.

The fifth chapter, which is based on the theoretical foundations above as well as the two-tier discussion of international and regional frameworks, investigates the normative adequacy and feasibility of the law and practice in Ethiopia and South Africa. This chapter considers if any best practices can be identified in the two country studies to inspire regional, sub-regional and national mechanisms for the effective protection of adolescent independent migrants.

The sixth chapter presents the study’s conclusions and recommendations.



# CHAPTER TWO: GENERAL OVERVIEW OF THEORIES OF MIGRATION AND THE CAUSES OF CHILD MIGRATION IN AFRICA

## Introduction

This chapter is dedicated to elucidating general theories of migration, theories of child rights, and related concepts such as the construction of childhood-adulthood, the notion of child agency, and the characteristics and trends of child migration. It provides a working definition of the ‘independent adolescent migrants’ who are the focus of this thesis. As child migration is part of the general adult migratory pattern, there are shared common features, and hence general theories of migration are discussed with reference to specific child migration causes, trends and characteristics. Similarly, it discusses trends in the migration of independent adolescent migration in and from Ethiopia and into South Africa. As the focus of the thesis is on the independent migration of adolescents, the chapter discusses the notions of child rights, the construction of childhood and various perspectives of agency with the view to see if the peculiar needs, characteristics, capabilities, and demonstrations of agency are taken into account in the general child-rights regime that is discussed in the subsequent sections.

The purpose of this chapter is to establish a foundation for the subsequent chapters dealing with international and regional children rights and principles as well as specific rights such as the right to movement. The chapter is divided into three parts: theories of migration; patterns, characteristics and trends of child migration in Africa; and theories of child rights.

## 2.1 General Overview of Migration Theories

### Introduction

Migration and the history of humankind are two sides of a coin.<sup>1</sup> Theories explaining why people move, however, are only a recent development.<sup>2</sup> Due to the complex nature of international migration, it has been difficult to design a single comprehensive theory.<sup>3</sup> Various kinds of theories have been proposed to explain migration. In all these theories, four different questions are raised and entertained: the causes and background of migration; the path and perpetuation of migration movements; and the employment of migrant labor and the socio-cultural adaptations.<sup>4</sup>

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<sup>1</sup> Gaston N & Nelson D R ‘Bridging Trade Theory and Labor Economics: The Effects of International Migration’ (2013) 25 *Journal of Economic Surveys* 98.

<sup>2</sup> De Haas H ‘Migration and Development: A Theoretical Perspective’ (2007) *Working Papers – Center on Migration, Citizenship and Development* 29.

<sup>3</sup> King R ‘Theories and Typologies of Migration: an Overview and a Premier’ (2012) *Willy Brandt Series of Working Papers in International Migration and Ethnic Relations 3/12* (Malmö Institute for Studies of Migration, Diversity and Welfare (MIM) Sweden 11.

<sup>4</sup> Korekova L ‘Theories of Migration: Conceptual Review and Empirical Testing in the Context of the EU East-West Flows’ (2011) *Paper prepared for Interdisciplinary Conference on Migration. Economic Change, Social Challenge*. April 6-9, 2011, University College London 3.

Though all the theories are geared towards explaining migration, they rely on different notions, rules, and orientations.<sup>5</sup> These theories arose from empirical observation, which led to their being fragmented from one another, falling within certain disciplinary boundaries and eventually growing apart from each other in isolation.<sup>6</sup> Modern migration literature contends, however, that all these theories complement each other.<sup>7</sup>

Theories of migration can be classified as macro, meso and micro, based on the dimension they adopt to provide rationales for migration.<sup>8</sup> Macro theories of migration seek to explain the causes of migration from the economics of trade, incomes and employment drawn from different sectors, whereas micro level theories address the decision to migrate from the individual's perspectives based on personal desires, goals and ambitions.<sup>9</sup> Meso-level theories are a mix of both macro- and micro-level.<sup>10</sup>

Theories of migration can also be classified based on the motives of international migration and those that preserve it.<sup>11</sup> Theorists such as Hagen-Zanker and Kurekova have categorised migration theories into two subdivisions: 'initiation of migration' theories, which address the drivers of migration, and 'perpetuation of migration' theories, which address factors that contribute to the continuity or universality of migration.<sup>12</sup>

One of the reasons for such a multiplicity of theories is that migration has never been the exclusive domain of a single scholarly discipline.<sup>13</sup> Moreover, the diversity and complexity of migration has contributed to the elusiveness of a single workable theory.<sup>14</sup> Understanding the complexity of migration requires a combination of disciplines and levels of investigation.<sup>15</sup> King notes, too, that earlier theories of migration were rigid and disconnected from each other; modern

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<sup>5</sup> Massey D S, Arango J, Hugo G, et al. 'Theories of International Migration' in Messina A M & Lahav G (ed) *The Migration Reader: Exploring Politics and Policies* (2006) 33.

<sup>6</sup> Korekova L (2011) 3-4; see also de Haas (2007) 9.

<sup>7</sup> Korekova L (2011) 9.

<sup>8</sup> These macro-level migration theories are neoclassical macro migration theory, migration as a system, dual labour market theory, world systems theory and mobility transition theory. Micro-level theories encompass Lee's push/pull factors, neoclassical micro migration theory, behavioural models, and the theory of social systems. Among the meso-level theories of migration are social capital theory, institutional theory, network theory, cumulative causation, and new economics of labour migration. Hagen-Zanker J 'Why Do People Migrate? A Review of the Theoretical Literature' (January 2008) *Working Paper MGSOG/2008/WP002 Maastricht Graduate School of Governance* 5.

<sup>9</sup> Hagen-Zanker J 'Why Do People Migrate? A Review of the Theoretical Literature' (January 2008) *Working Paper MGSOG/2008/WP002 Maastricht Graduate School of Governance* 5.

<sup>10</sup> Hagen-Zanker J (2008) 5.

<sup>11</sup> Hagen-Zanker J (2008) 5.

<sup>12</sup> Hagen-Zanker J (2008) 6; Wimalaratana W 'International Migration and Migration Theories' (2016) 1 *Social Affairs Journal* 18.

<sup>13</sup> King R (2012) 11.

<sup>14</sup> King R (2012) 11.

<sup>15</sup> Hagen-Zanker J (2008) 5.

theories of migration, on the other hand, try to bridge this gap by taking up a middle ground and employing both inductive and deductive reasoning.<sup>16</sup>

Various disciplines have posited theories to explain migration. These different perspectives treat and discuss causes, outcomes and perpetuation of international migration based on diverse aspects and views. This section discusses the theories in two major parts that examine, respectively, the causes and perpetuation of migration.

## **2.1.1 Theories on the Causes of Migration**

### **2.1.1.1 Neoclassical Economics: Macro Theory**

The neoclassical macro-economic theory is the one of the oldest theories of international migration.<sup>17</sup> According to this theory, high human capital and wages are never present simultaneously in a country.<sup>18</sup> Consequently, income variances resulting from geographic differences of supply and demand for labour are the main causes of international migration.<sup>19</sup> In other words, resource-driven movement of individuals from wealth-poor to wealth-rich countries results in a flow of labour from high- to low-labour countries.<sup>20</sup>

From this early economic perspective, income provides the basic reason for migration. It has the power to influence the supply and demand of migration. In this regard, Hicks, one of the founders of this theory in the 1930s, asserted that economic benefits – primarily income – are the driving forces of international migration.<sup>21</sup> Hence, people move from low-income destinations to high-income ones and from densely populated areas to sparsely populated ones, making distance and population densities influencing factors in migration patterns under this theory.<sup>22</sup>

This notion has been key to the thinking of demographers, economists and geographers over the centuries.<sup>23</sup> In addition, assuming the existence of full employment, the theory posits a direct relationship between wage differentials and migration flows.<sup>24</sup> Extended versions of this theory state that international migration is influenced by anticipated wages instead of tangible income and that the essential variable is income evaluated by the likelihood of employment.<sup>25</sup>

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<sup>16</sup> King R (2012) 11.

<sup>17</sup> Massey D S, Arango J, Hugo G, et al. (2006) 36; Korekova L (2011) 5.

<sup>18</sup> Hagen-Zanker J (2008) 6.

<sup>19</sup> Massey D S, Arango J, Hugo G, et al. (2006) 36; Jennissen R P W 'Macro-economic determinants of international migration in Europe' (2004) University of Groningen 33

<sup>20</sup> Massey D S, Arango J, Hugo G, et al. (2006) 36-7.

<sup>21</sup> Molho I 'Theories of Migration: A Review' (2013) 60 *Scottish Journal of Political Economy* 528

<sup>22</sup> de Haas H (2007) 12.

<sup>23</sup> de Haas H (2007) 12.

<sup>24</sup> Korekova L (2011) 5.

<sup>25</sup> Korekova L (2011) 5.

The ability to migrate is also related to its costs. Hence, it is neither poor countries that are sending a high flow of workers, nor is it the poorest individuals who manage to migrate.<sup>26</sup> Migration-rate patterns reveal that migration tends to escalate as a country's economy grows, since more individuals will be able to cover the cost of their movement.<sup>27</sup> Conversely, as a country continues to prosper economically, the causes that drive individuals to migrate decrease, resulting in decreased migration rate.<sup>28</sup>

### 2.1.1.2 Neoclassical Economics: Micro Theory

The micro-economics theory exists parallel to the macro-economics theory.<sup>29</sup> It holds individual choice at its centre and states that individuals move to places where they can make the best out of their professions and skills.<sup>30</sup> Individuals carefully evaluate and decide to move to places where the benefits of migration outweigh its costs of migration, thereby seeing international migration as a form of investment.<sup>31</sup> Pioneered by Sjaadstad's research in 1962, the micro-economic theory introduced the notion of human capital into migration theory.<sup>32</sup> Accordingly, Sjaadstad referred to migration as an 'investment increasing the productivity of human resources, an investment which has costs and which also renders returns'.<sup>33</sup>

This theory holds, furthermore, that socio-demographic characteristics such as expertise, age, marital status, gender, job, and market status, as well as inclinations and prospects, play an important role in determining who migrates and who does not.<sup>34</sup> Such diverse individual factors and needs play an important role in creating varying inclinations among individuals who migrate from the same place to choose diversified destinations of migration.<sup>35</sup>

Confirming this stance, Bauer and Zimmermann state that migration tends to decrease with age – that is, as individuals get older, their tendency to migrate decreases.<sup>36</sup> In a nutshell, Bauer and Zimmerman state that in terms of the theory of human capital, decisions to migrate are the outcome of not only of income differences and opportunities for employment but of the diversity

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<sup>26</sup> Korekova L (2011) 5.

<sup>27</sup> Korekova L (2011) 5.

<sup>28</sup> Korekova L (2011) 5.

<sup>29</sup> Kalinowska B & Knapinska M 'Review of Chosen Migration Theories' (2013) Department of Economics, Poznan University of Economics 46 available at [www.mikroekonomia.net/system/publication\\_files/145/original/3.pdf?1314883815](http://www.mikroekonomia.net/system/publication_files/145/original/3.pdf?1314883815) (accessed 4 October 2017).

<sup>30</sup> Massey D S, Arango J, Hugo G, et al. (2006) 37.

<sup>31</sup> Massey D S, Arango J, Hugo G, et al. (2006) 37; Korekova L (2011) 15.

<sup>32</sup> Piché V & Dutreuilh C 'Contemporary Migration Theories as Reflected in their Founding Texts; 'Population' (English Edition) Vol. 68, No. 1 (January-March 2013) 142 Institut National d'Etudes Démographiques, available at <http://www.jstor.org/stable/42778388> (accessed 26 March 2016).

<sup>33</sup> Piché V & Dutreuilh C (2013) 142.

<sup>34</sup> Korekova L (2011) 6; Piché V & Dutreuilh C (2013) 142.

<sup>35</sup> Korekova L (2011) 6.

<sup>36</sup> Bauer T K. & Zimmermann K F 'Assessment of Possible Migration Pressure and its Labour Market Impact Following EU Enlargement to Central and Eastern Europe' July 1999 *IZA Research Report No. 3 Department for Education and Employment, United Kingdom* 15.

of individuals and their needs.<sup>37</sup> As a result, individuals within the same locality can have different stances towards the idea of migrating to a certain destination.<sup>38</sup>

### **2.1.1.3 The New Economics of Migration Theory**

The theory of the new economics of migration was developed in the 1980s by a group of scholars led by Oded Stark.<sup>39</sup> According to this theory, the decision to migrate is influenced not only by individual factors but by wider societal factors, primarily family dynamics.<sup>40</sup>

The theory of the new economics of migration contains propositions and hypotheses that are quite different from those of the neoclassical theories.<sup>41</sup> In terms of this theory, families are at the heart of the analysis of the causes and determining factors of international migration in that they (families) aspire to increase joint income and status as well as minimise risks.<sup>42</sup> Additionally, the theory states that the causes of migration are not only the need to maximise income and status, but so too the need to minimise risks to the economic wellbeing of households and to slacken limitations caused by market failures.<sup>43</sup>

As such, this is the only theory that recognises remittances as the link between decisions to migrate and the outcome of migrations. In this regard, de Haas states that remittances are highly valued causes for international migration in the new economics of migration.<sup>44</sup> According to Hagen-Zanker, the risk minimisation and way of securing economic wellbeing is not only through remittances but also demonstrated through sharing costs of migration by supporting family members who are about to migrate in times of need.<sup>45</sup>

### **2.1.1.4 Dual Labour Market Theory**

The dual labour markets theory assumes that migration is largely influenced by the features of the need for human resource at receiving countries.<sup>46</sup> Piore, who developed the theory in 1979, states that the foundation for international migration lies in the economic situation of developed countries.<sup>47</sup> In other words, the theory excludes the role of push factors such as low income and employment opportunities in international migration.<sup>48</sup> Piore states that the perpetual demand for

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<sup>37</sup> Bauer T K. & Zimmermann K F (1999) 17.

<sup>38</sup> Bauer T K. & Zimmermann K F (1999) 17.

<sup>39</sup> Hagen-Zanker J (2008) 6.

<sup>40</sup> Jennissen R P W (2004) 33; de Haas H (2007) 51

<sup>41</sup> Massey D S, Arango J, Hugo G, et al. (2006) 38-9.

<sup>42</sup> Hagen-Zanker J (2008) 12.

<sup>43</sup> Massey D S, Arango J, Hugo G, et al. (2006) 39-0; de Haas H (2007) 51; Hagen-Zanker J (2008) 12 & 14-5.

<sup>44</sup> de Haas H (2007) 52.

<sup>45</sup> Hagen-Zanker J (2008) 14-5.

<sup>46</sup> Bijak J Forecasting International Migration: Selected Theories, Models and Methods Central European Forum for Migration Research Warsaw (August 2006) 10 available at

<https://pdfs.semanticscholar.org/c67f/39cc621207bf34c63f371108a6021102744f.pdf> (accessed 08 February 2018)

<sup>47</sup> Massey D S, Arango J, Hugo G, et al. (2006) 40-1.

<sup>48</sup> Massey D S, Arango J, Hugo G, et al. (2006) 40-1.

immigrant labour in the developed countries keeps attracting individuals from developing countries.<sup>49</sup> The economic situation in developed countries – rather than offering better income, which is evident in other theories – exhibits the need for recruitment, which is the basic reason for the demand for immigrants.<sup>50</sup>

The duality in this theory is exhibited by two types of organisation within the economy: businesses that require the investment of large sums of money and utilise both skilled and unskilled labour, and businesses that require high human capital where individuals with no skills prevail.<sup>51</sup> Hagen-Zanker calls these organisations the ‘primary sectors’, where there are well-paying jobs usually occupied by native employees, and ‘secondary sectors’, which do not require skills and are open to individuals migrating from other countries.<sup>52</sup> Secondary sectors constitute jobs in labour intensive factories and small-scale services mostly low-skill, low payment, uncertain and hostile.<sup>53</sup> Most of the time migrant workers are found engaged in these sectors for lack of negotiating power, particularly if they migrated without proper documents and if they find the life better than what they had.<sup>54</sup> Employers in most cases have the freedom to reduce wages as they wish.<sup>55</sup> Furthermore, the employment may be structured based on gender, race and nationality.<sup>56</sup> The sector is administered without conventional labour standards, and it may be characterised by lack of job security and high employee turnover.<sup>57</sup>

The dual labour markets theory is criticised as an incomplete picture of the migration situation for ignoring push factors and focusing on the pull factor of employment opportunities in developed countries.<sup>58</sup> Besides that, it fails to explain why developed nations of similar economic standing exhibit differences in the number of migrants.<sup>59</sup>

#### 2.1.1.5 World Systems Theory

World systems theory is a structural approach that brought a new dimension to the migration discourse.<sup>60</sup> According to this theory, international migration has a global nature in that it is the outcome of the interaction of societies, for instance through trade.<sup>61</sup> According to Hagen-Zanker, the theory takes into account historical, ideological and structural factors such as colonialism and

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<sup>49</sup> Massey D S, Arango J, Hugo G, et al. (2006) 40-1; Bijak J (2006) 10.

<sup>50</sup> Massey D S, Arango J, Hugo G, et al. (2006) 40-1.

<sup>51</sup> Bijak J (2006) 10.

<sup>52</sup> Hagen-Zanker J (2008) 7.

<sup>53</sup> Hagen-Zanker J (2008) 7.

<sup>54</sup> Hagen-Zanker J (2008) 7.

<sup>55</sup> Hagen-Zanker J (2008) 7.

<sup>56</sup> Hagen-Zanker J (2008) 7.

<sup>57</sup> Hagen-Zanker J (2008) 7.

<sup>58</sup> Arango J, *Explaining Migration A Critical Review* (2000) 165 International Social Science Journal 290.

<sup>59</sup> Arango J (2000) 290.

<sup>60</sup> Korekova L (2011) 8.

<sup>61</sup> Jennissen, R P W (2004) 33-4.

capitalism.<sup>62</sup> It asserts that advances in the capitalist system and global markets – not only in capitalist countries but former colonies – are the causes of international migration.<sup>63</sup> Capitalists that penetrate developing countries in search of both human and material resources are the reasons for individuals' willingness to migrate.<sup>64</sup>

A flow of goods and capital from capitalist countries to their former colonies, matched by a counter-flow of labour to the capitalist countries, explains the process of migration under this theory.<sup>65</sup> In addition, because of economic transformation in capitalist countries, labour-intensive and low-skilled jobs are less attractive to the local population.<sup>66</sup> The world systems theory gives due attention to macro-social processes and how economically developed countries seek cheap foreign labour in certain sectors.<sup>67</sup> The theory further provides that capitalism's expansion and introduction of new ways of life have loosened individuals' connections with their lands, making them more prone to migration.<sup>68</sup>

#### 2.1.1.6 Lee's Push and Pull Factors

Lee theorised individual level push and pull factors from the perspective of both sending and receiving countries.<sup>69</sup> According to Lee, individuals' decisions to migrate are determined by factors in their current location and future destination, as well as intervening factors such as laws, distances, and barriers.<sup>70</sup> Lee's theory recognises the power of information in paving the way for future migrants.<sup>71</sup> Lee argues that migration is expedited by push factors such as impoverishment, lack of job opportunities, lack of access to land, high birth rates, despotism, diminished prominence in society, and limited marriage prospects in the country of origin.<sup>72</sup> The pull factors that cause individuals to migrate to other countries include increased income and employment opportunities and better opportunities for education and well-being.<sup>73</sup>

While migrating, individuals have to deal with a set of impediments both personal and external. Among the external factors on the journey are distance between current destination and future destination, the amount of money needed to reach the destination, traditional hurdles including language and culture, and legal and political challenges such as crossing borders and deal with

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<sup>62</sup> Hagen-Zanker J (2008) 8.

<sup>63</sup> Bijak J (2006) 10-11.

<sup>64</sup> Massey D S, Arango J, Hugo G, et al. (2006) 42.

<sup>65</sup> Bijak J (2006) 10-11.

<sup>66</sup> Bijak J (2006) 10-11.

<sup>67</sup> Arango J (2000) 290; see also Brettell C B & Hollifield J F *Migration Theory: Talking Across Disciplines* 3 ed (2015) 72.

<sup>68</sup> Hagen-Zanker J (2008) 8.

<sup>69</sup> Hagen-Zanker J (2008) 9.

<sup>70</sup> King R (2012) 13.

<sup>71</sup> Piché V & Dutreuilh C (2013) 143.

<sup>72</sup> King R (2012) 13.

<sup>73</sup> King R (2012) 13.



immigration rules and regulations.<sup>74</sup> In Hagen-Zanker's view, even though the theory explains the heterogeneous nature of migrants, the difficulty of empirically proving its assertions and its failure to take into account structural factors such as economical variances between sending and receiving ends are the shortcomings of the theory.<sup>75</sup>

### **2.1.1.7 Mobility Transition Theory**

According to this theory, societal reconstruction is the source of change in human mobility.<sup>76</sup> Migration trends can be explained by modernisation, at the heart of which is the need for personal freedom.<sup>77</sup> In the 18<sup>th</sup> and 19<sup>th</sup> centuries in the West, which may be characterised as a period of transition from a pre-modern to modern society, migration took place across national borders and countries.<sup>78</sup> Subsequently, following industrialisation, it was mainly from rural to urban areas. In the second half of the 20<sup>th</sup> century, there was a decline in cross-border movement while at the same time migration between and within urban areas advanced as a result of tourism, work and business trips.<sup>79</sup>

Zelinsky's 1971 hypothesis of mobility transition states that migration is the outcome of advancements in the economic and social situation of a society due to modernisation.<sup>80</sup> Zelinsky introduced a five-stage model that shows patterns of personal mobility features as an essential component of the modernisation process.<sup>81</sup> In this model, each stage is associated with a different kind of movement, which he calls 'mobility transition'.<sup>82</sup>

Zelinsky's approach was described to as visionary in many respects, including for forecasting the current debate on the relationship between migration and development and bringing migration and mobility into one setting. His theory was criticised, though, for viewing development only from the perspective of developed nations. Zelinsky later recognised the shortcomings of his theory and adopted a new one called 'dependency theory', which affirms that the politics and decisions of governments in developing nations, as well as corporations in developed nations, determine patterns of migration.<sup>83</sup>

### **2.1.2 The Perpetuation of International Migration**

As discussed above, the theories postulate different factors for individuals' migration across borders. However, the factors that drive international migration differ from the ones behind the

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<sup>74</sup> King R (2012) 13.

<sup>75</sup> Hagen-Zanker J (2008) 10.

<sup>76</sup> Bijak J (2006) 14.

<sup>77</sup> Hagen-Zanker J (2008) 9.

<sup>78</sup> Bijak J (2006) 14.

<sup>79</sup> Bijak J (2006) 14.

<sup>80</sup> Hagen-Zanker J (2008) 9.

<sup>81</sup> King R (2012) 15.

<sup>82</sup> de Haas H (2007) 22.

<sup>83</sup> King R (2012) 15-6.

initial movement. The following sub-sections discuss the theories that explain why international migration is a continuous affair.

### **2.1.2.1 Network Theory**

The network theory of migration focuses on factors that preserve migration.<sup>84</sup> It was introduced by Stark and Bloom, who stressed the relationship between migrants and their families, as well as risk-handling and risk-pooling.<sup>85</sup> The theory describes how migration sustains itself by minimising costs and maximising benefits through social and information networks.<sup>86</sup> The network is the range of interpersonal relations that migrants or returned migrants have with people back in their home country; networks deliver information, provide financial assistance, expedite employment and accommodation and give support to the migration process.<sup>87</sup> Network theory explains how migration decisions are influenced by social relations with families, friends and employers, relations that create opportunities through which migrants can earn and accumulate social capital.<sup>88</sup>

Following the migration of the first individual, costs will be reduced for potential migrant friends and families, as there is an implicit obligation to support them in securing employment, accommodation and other assistance. The increase in the number of migrants, therefore, has a direct impact on their expansion of networks, which leads to reduced costs and mitigation of dangers, resulting in the self-sustenance of international migration.<sup>89</sup>

This theory is criticised for its failure to address income and employment opportunity as factors determining the perpetuation of migration.<sup>90</sup>

### **2.1.2.2 Migration Systems Theory**

Migration systems theory, also known as 'Mabojunge's Systems Approach' after its founder, discusses the general connection of countries through the movements and counter-movement of individuals, properties, facilities and information.<sup>91</sup> The causes of international migration are wide-ranging, covering economic, social, environmental, technological, and political factors.<sup>92</sup> International migration systems theory envisions a set of countries that have economic,

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<sup>84</sup> Kurekova L (2011) 10; Kalinowska B & Knapinska M (2013) 52.

<sup>85</sup> Piché V & Dutreuilh C (2013) 147.

<sup>86</sup> Bauer T & Zimmermann K F (1999) 19.

<sup>87</sup> Arango J (2000) 291; see also Massey D S, Arango J, Hugo G, et al. (2006) 43-45; Brettell C B & Hollifield J F (2015) 72; Piché V & Dutreuilh C (2013) 148.

<sup>88</sup> Brettell C B & Hollifield J F (2015) 72; Bijak J (2006) 6.

<sup>89</sup> Massey D S, Arango J, Hugo G, et al. (2006) 43-5.

<sup>90</sup> Bauer T & Zimmermann K F (1999) 19.

<sup>91</sup> De Haas H 'The Internal Dynamics of Migration Processes: A Theoretical Inquiry' (2010) 36 *Journal of Ethnic and Migration Studies* 1593.

<sup>92</sup> King R (2012) 20; Jennissen, RPW (2004) 34-5.

historical, cultural and technological connections as a result of the large numbers of people who migrate in either direction.<sup>93</sup>

The migration systems theory posits that states that are in the same migration system need not necessarily be physically close, as the main target of international migration is political and economic in nature. It is also possible for a set of receiving countries to take migrants from a list of sending countries. States can be part of more than one migration system. This scenario, however, is more common in sending countries than in receiving ones.<sup>94</sup>

### 2.1.2.3 International Migration and Development

Migration and its impact on development have been subjects of debate in the past four decades, with viewpoints shifting from optimism to negativity and back to optimism.<sup>95</sup> Until the 1970s, migration was believed to have a positive impact on developing countries through financial and technological skills transfer.<sup>96</sup> The optimistic views of development and migration were prompted by the neo-classical migration-economy and modernisation theories, which hold that migration contributes to the development of sending countries.<sup>97</sup> According to such views, migration ensures an ideal allocation of human resources between sending and receiving countries, serving the best interests of both.<sup>98</sup> Reallocation of human resources from rural to urban and from agricultural to industrial zones, therefore, is a fundamental factor in economic growth and a core component of development.<sup>99</sup>

The migration of human resources to new destinations results in the scarcity of labour in sending countries.<sup>100</sup> This scarcity is perceived as positive, leading to counter-flow of human and financial resources and driving development in sending countries.<sup>101</sup> Above all, migrants who return to their country of origin are valued and perceived as an ideal source of economic prosperity.<sup>102</sup> The migration of skilled manpower may have a negative effect on the country of origin, especially in sectors with a shortage of manpower such as health sector.<sup>103</sup> Conversely, where there is a high unemployment rate for skilled manpower, migration may even be a

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<sup>93</sup>Jennissen, RPW (2004) 34-35.

<sup>94</sup>Massey DS, Arango J, Hugo G, et al. (2006) 49-50.

<sup>95</sup>De Haas H (2007) 36.

<sup>96</sup>De Haas H 'Migration and Development: Theoretical Perspective' (2010) 44 *IMR* 230.

<sup>97</sup>The neo-classical theory states that migration has a positive impact on migration; similarly, the developmental modernisation theories, which were dominant in post-WWII development policies, state that migration has a positive influence on development through the knowledge, remittance and investment that flow back into the sending countries as a result of the active engagement of the returned migrants; see De Haas H (2007) 36-37.

<sup>98</sup>De Haas H (2007) 36.

<sup>99</sup>De Haas H (2007) 36.

<sup>100</sup>De Haas H (2007) 36.

<sup>101</sup>De Haas H (2007) 36.

<sup>102</sup>De Haas H (2007) 37.

<sup>103</sup>De Haan A 'What 'Causes Migration: Poverty or Development?' or is it the other way around?' in Marshall B *The Politics of Migration: a Survey* (2006) 36.

mechanism to ease the pressure of unemployment.<sup>104</sup> Furthermore, migration may be viewed as positive, considering remittances, the contribution of diasporas, and skill and knowledge transfer.<sup>105</sup>

In the pessimistic view of this theory, migration has a debilitating effect on the development of sending countries due to a brain-drain that accelerates dependency and inequality among nations.<sup>106</sup> Even if remittances are sent back, they are not put to use in such a way as to bring noticeable change in the development of sending countries, and hence cause disparities.<sup>107</sup> Proponents of such pessimism oppose the idea that migration enhances development and argue that it drives a non-productive consumer society that is dependent on remittances.<sup>108</sup>

As discussed above, a number of theories have been put forward to explain the factors that underlie the continuation of migration. These theories provide a distinct or combined set of reasons that may relate with individual, social, political, economic factors. The theories are not mutually exclusive but complementary. Economic variances between countries and better opportunities may lie behind the individual factors that heighten the interest in migrating. Employment opportunities and anticipation of better wages in countries with better economies are also intrinsically linked with the interests of families in seeking social security through reliance on migration.

One of the shortcomings of these theories is that they fail to conceptualise adequately the age dimension of migration, particularly in regard to adolescent migrants, who have distinct interests and capabilities and are becoming major actors in international migration. The neo-classical micro theory and Lee's push and pull factors discuss individual factors to a limited extent, with age mentioned as one socio-demographic factor that determines migration. Except for such trivial mentions, these theories fail to delve into the vast factual and conceptual dimensions of child migration in general and adolescent migration in particular.

## **2.2 Patterns, Characteristics and Causes of Children or Adolescents' Migration in Africa**

### **2.2.1 Children in the Context of Migration and its Changing Face**

Child migration is not a new phenomenon, but little attention has been given to it in literature and policies in the past.<sup>109</sup> For a long time, the main actors in migration were considered to be

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<sup>104</sup> De Haan A (2006) 36.

<sup>105</sup> De Haan A (2006) 36.

<sup>106</sup> De Haas H (2010) 230-31.

<sup>107</sup> De Haas H (2007) 36-7.

<sup>108</sup> De Haas H (2007) 36-7.

<sup>109</sup> Punch S 'Migration Projects: Children on the Move for Work and Education' Paper presented at: Workshop on Independent Child Migrants: Policy Debates and Dilemmas, University of Sussex and UNICEF Innocenti Research

adults, with children viewed as dependent on them in the migration process.<sup>110</sup> The fact that researchers, policy-makers and other pertinent actors have considered migrant children as subordinate to adults in the migration process has limited the undertaking of all-inclusive research in the area of child migration.<sup>111</sup> This view has also narrowed conceptual, policy, legal and practical advancement in the areas of child and adolescent migration.<sup>112</sup> As a result, rarely have migrant children's own perspectives been heard, which has led to misassumptions about their needs in migration discussions.<sup>113</sup> The limited attention to children migrating without parents or adults has concerned children living in dire situations of exploitation and abuse – that is, children living and working in the streets, children who have lost one or both parents to AIDS, children engaged in military service, child refugees, children exposed to child labour, and children who are trafficked and are victims of exploitation – with no or only negligible focus on adolescent independent migrants moving by their own wish and decision.<sup>114</sup>

Generally 'children on the move' or 'children in the context of migration' denotes a broad category. Save the Children, for instance, defines 'children on the move' as

children who are moving within or between countries leaving their home town upon their will or forced to do so due to a variety of causes, together with their parents or care givers or independently and at high risk of child right abuse more importantly their right to be free from any form of violence.<sup>115</sup>

Reale states that the term 'children on the move' is not a different classification of children but rather an inclusive designation that encompasses mass groupings children who migrate for different reasons.<sup>116</sup> Reale's description comprises trafficked children; children who migrate pursuing better opportunities and education, or escaping domestic abuse and exploitation; children displaced by conflict and natural disasters; and street children.<sup>117</sup>

Although the list is not exhaustive, children affected in the context of migration may be categorised as 'children migrating with their parents, unaccompanied migrant children, separated

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Centre (12 September 2007) 1 available at <https://pdfs.semanticscholar.org/69d7/f7a6fcac932670d09a056a27e104795cf482.pdf> (accessed 24 September 2017).

<sup>110</sup> Hashim I & Thorsen D *Child Migration in Africa* (2011) 13.

<sup>111</sup> ACP Observatory on Migration (2013) 5.

<sup>112</sup> Hashim I & Thorsen D (2011) 13.

<sup>113</sup> Abramovich V, Cernadas P C & Morlachetti A 'The Rights of Children, Youth and Women in the Context of Migration Conceptual Basis and Principles for Effective Policies with a Human Rights and Gender Based Approach' (2010) UNICEF 5-6 available at

[https://www.unicef.org/socialpolicy/files/The\\_Rights\\_of\\_Children\\_Youth\\_and\\_Women\\_in\\_the\\_Context\\_of\\_Migration\\_FINAL.pdf](https://www.unicef.org/socialpolicy/files/The_Rights_of_Children_Youth_and_Women_in_the_Context_of_Migration_FINAL.pdf) (accessed 08 February 2018).

<sup>114</sup> Hashim I & Thorsen D (2011) 13.

<sup>115</sup> Reale D 'Protecting and Supporting Children on the Move: Translating Principles into Practice' in IOM *Children on the Move* (2013) 66 available at [http://publications.iom.int/system/files/pdf/children\\_on\\_the\\_move\\_15may.pdf](http://publications.iom.int/system/files/pdf/children_on_the_move_15may.pdf) (accessed 10 November 2017)

<sup>116</sup> Reale D (2013) 66.

<sup>117</sup> Reale D (2013) 66.

migrant children, internally displaced children, trafficked children, smuggled children, children of migrant workers, and independent migrant children'.<sup>118</sup> Among these groups, unaccompanied migrant children, refugee and asylum-seeking children, trafficked and smuggled children, separated migrant children and independent migrant children will be briefly discussed.

The CRC Committee also used this term under General Comment No. 6 to clarify the rights of child migrants independent of their parents. Accordingly, it defined 'unaccompanied migrant children' as children or minors who have been separated from both parents and other relatives and are not under the care of adults who are legally or customarily accountable for them.<sup>119</sup> Separated children are those individuals under the age of 18 years who have parted from both parents or their previous legal or customary primary caregiver, but not essentially from other relatives, and may also include children accompanied by other adult family members.<sup>120</sup> In most legal texts and research, the term 'unaccompanied and separated children' is used to refer to migrant children without parents.

Child migrants could also be categorised as child refugees or asylum seekers in accordance with the legal procedures they go through at the destination countries, which stem from the 1951 Refugee Convention and its 1967 Protocol, and the 1969 OAU Refugee Convention, depending on the context. These international and regional refugee laws established principles that apply equally both to a child and an adult who escape a 'well-founded fear of being persecuted'.<sup>121</sup>

If a person facilitates and undertakes the migration of a child for the purpose of exploitation, it amounts to child trafficking. Such category of children fall under the definition of trafficking in children under article 3(c) of the Palermo Protocol, which makes 'the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation' a criminal offense punishable by law.<sup>122</sup> If the migration is the product of an illegal crossing of a border as facilitated by a smuggler, then the act would be categorised as child smuggling.<sup>123</sup>

Most of the time, children migrate with their parents, but a significant number of older children migrate independently of their families.<sup>124</sup> The next sub-section clarifies the term 'independent adolescent migrant', as it is the focus of this research.

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<sup>118</sup> Thatun S & Heissler K (2013) 98; ACP Observatory on Migration (2013) 6.

<sup>119</sup> CRC Committee, General Comment No. 6, para. 7; CRC art 1.

<sup>120</sup> CRC Committee General Comment No. 6 para. 8; article 1 of the CRC.

<sup>121</sup> 1951 Refugee Convention art 1(a); Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) art 1(2); see also Asylum Seekers, available at <http://www.unhcr.org/pages/49c3646c137.html> (accessed 01 June 2014).

<sup>122</sup> Protocol against Trafficking art 3(a).

<sup>123</sup> Protocol against Smuggling art 3(a).

<sup>124</sup> Yaqub S 'Independent Child Migrants in Developing Countries: Unexplored Links in Migration and Development' (2009) UNICEF Innocenti Research Centre 11, available at [https://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_01.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2009_01.pdf) (accessed 15 July 2014).

## 2.2.2 Conceptualising Independent Adolescent Migration

‘Children in the context of migration’ refers to a broad category of children moving away from their residence, independently or dependently, domestically or across borders, through force or manipulation, or voluntarily, and affected directly or indirectly by the outcome of migration. As discussed above, the phrase ‘children in the context of migration’ is not exhaustive, as new categories may emerge depending on, among other things, the nature of migration, applicable standards for definition, the development of new standards and norms, and evolving concepts.

Regarding the categories under the notion of ‘children in the context of migration’, the philosophical and notional dimensions of the study dictate contextualised discussion and categorisation of the concept of ‘independent adolescent migration’. The phrase ‘independent child migration’ in general is not used for the first time in this study; it has been used by scholars such as Bhabha (2008) and Yaqub (2009), who have given it a functional meaning in their work.

For Bhabha, independent migrant children entails those children moving in search of educational, employment and other opportunities; survival migrants seeking a safe haven from persecution, conflict, abuse, and extreme poverty; children moving for family reunification; and children moving due to trafficking and other exploitative practices.<sup>125</sup> Bhabha also stresses that as with adult migration, the causes and characteristics of these categories of child migration may overlap.<sup>126</sup>

For Yaqub, independent migrant children are those aged according to the CRC and international labour laws applicable to children’s work<sup>127</sup> who move from their habitual residence permanently – as opposed to temporary movement with the possibility of returning – and travel without parents, legal or customary guardian, living alone in their destination country.<sup>128</sup> Accordingly, Yaqub defines independent migrant children as those

who have to some extent chosen to move their usual residence across a major internal or international boundary (often entailing movements from birthplace and/or country of citizenship); and live at destination without parents or legal/customary adult guardians, although possibly do[ing] so with relatives (like many adult migrants), and also possibly have travelled independently.<sup>129</sup>

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<sup>125</sup> Bhabha J, ‘Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework’ (2008) *Innocenti Discussion Paper No. IDP 2008-02*. Florence: UNICEF Innocenti Research Centre 2 available at [https://www.unicef-irc.org/publications/pdf/idp\\_2008\\_02.pdf](https://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf) (accessed 19 October 2017)

<sup>126</sup> Bhabha J (2008) 2.

<sup>127</sup> ILO Convention No. 138 Minimum Age Convention, adopted on 26 June 1973 by the General Conference of the International Labour Organisation at its fifty-eighth session Entry into force: 19 June 1976 art 2(3) & art 7 (1) - (4); and Worst Forms of Child Labour Convention, 1999 (No. 182) adopted on 17 June 1999 by the General Conference of the International Labour Organisation at its eighty-seventh session Entry into force: 19 November 2000.

<sup>128</sup> Yaqub S (2009) 9.

<sup>129</sup> Yaqub S (2009) 10.

Yaqub's categorisation includes 'separated and unaccompanied children' as defined by the CRC Committee.<sup>130</sup> He further acknowledges the overlapping nature of categories of children.<sup>131</sup>

For the purpose of this thesis, 'independent adolescent migrants' refers to children aged between 15-18 years who have chosen to move from their home country across borders to search for better livelihoods and opportunities, such as employment, vocational or skill training, education, better income, better living standards, or a better future, and who travel independently of parents or legal or customary guardians (but not necessarily other adults), living at their destinations without parents or legal or customary guardians (but possibly with another adult who may also be a relative). It does not refer to trafficked children (victims of exploitation) or those moving due to fear of persecution (refugee children).

### 2.2.3 Child/Adolescent Migration Trends and Characteristics in Africa

International migration takes place in two forms: between developing nations, known as south-south migration; or from developing countries to relatively richer ones, which is known as south-north migration.<sup>132</sup> More than 60 per cent of international migration takes place between developing nations.<sup>133</sup> Africa tops the world with, 97 per cent of trans-boundary migration occurs within the continent.<sup>134</sup>

There is a lack of adequate and disaggregated data on the number of children migrating alone or with adults.<sup>135</sup> Likewise, the particular characteristics, causes and driving factors are not well researched and understood at the international, regional and local levels.<sup>136</sup> Moreover, there is an overall lack of age-specific approaches in migration policies, resulting in the absence of precise statistical information regarding children who take part in the international migration process.<sup>137</sup> Age-specific data first appeared in 2014, covering around 31 per cent of the total number of refugees, internally displaced persons and other targets of UNHCR.<sup>138</sup> Generally, there is also a

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<sup>130</sup> CRC Committee General Comment No. 6 para 7 & 8.

<sup>131</sup> Yaqub S (2009) 9-10.

<sup>132</sup> UNICEF 'International Migration, Children and Adolescents, Population Dynamics' (2013) 3.

<sup>133</sup> CRC Committee 'Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (2012) 6.

<sup>134</sup> UNICEF 'International Migration, Children and Adolescents, Population Dynamics' 2013 2; see also CRC Committee 'Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (2012) 6; Flahaux M & De Haas H (2016) 8.

<sup>135</sup> Yaqub S (2009) 10.

<sup>136</sup> McKenzie D J (2007) 2-3; Crépeau F (2013) 2; ACP Observatory on Migration (2013) 5; CRC Committee '2012 Day of General Discussion Outline for Participants: The Rights of All Children in the Context of International Migration' 2012 2; Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary (A/HRC/15/29) 5 July 2010 4 para 5.

<sup>137</sup> Special Rapporteur on the Human Rights of Migrants, 2009, para 20 & 24.

<sup>138</sup> Save the Children & Regional Mixed Migration Secretariat (RMMS) 'Young and on the Move: Children and youth in mixed migration flows within and from the Horn of Africa' (2016) Mixed Migration Research Series 10, 15, available at [https://resourcecentre.savethechildren.net/node/10080/pdf/young\\_and\\_on\\_the\\_move\\_sep\\_2016.pdf](https://resourcecentre.savethechildren.net/node/10080/pdf/young_and_on_the_move_sep_2016.pdf) accessed 14 August 2017).



lack of disaggregated data by gender, different stages of child development, and according to whether migrant children are moving independently or with parents or other adults.<sup>139</sup>

Nevertheless, there are some studies that show the magnitude of the problem. The UNDESA has estimated that out of the 33.3 million international migrants under the age of 20, 20 million live in the less-developed regions.<sup>140</sup> UNICEF's population dynamics report of 2013 states that these 33 million international migrants below the age of 20 make up 16 per cent of the total migrant population.<sup>141</sup> Eleven million of them were adolescents aged 15-19 years, and around 9 million were aged 10-14 years.<sup>142</sup> Young children aged 5-9 and 0-4 represent 7 and 6 million of the total migrant population under 20 years of age, respectively.<sup>143</sup> Africa held the highest number of child migrants at regional level, followed by Asia, Oceania, Europe and the Americas.<sup>144</sup> In addition, in Africa, child migrants aged 15-19 years represents around 31 per cent of the total migrant population below the age of 20 years.<sup>145</sup> In 2015, the world hosted 244 million migrants, with 15 per cent (around 37 million) being below 20 years, while the highest percentage of young migrants, 34 per cent, were from Africa.<sup>146</sup> Within the continent, in the same year, the Horn of Africa had the higher percentage of young migrants, with 1.76 million migrants aged between 0-19 years out of the total 3.64 million migrants, or 48 per cent of the total.<sup>147</sup> More recent data (UNICEF 2016) show that Africa has the largest share of children among its migrant population – nearly one in three immigrants in Africa is a child, more than twice the global average.<sup>148</sup> Africa is also home to 1 in 5 of the world's migrant children.<sup>149</sup>

## 2.2.4 Causes of Child Migration

Children leave their homes for reasons that are complex and interrelated.<sup>150</sup> Social, economic, political and structural dynamics influence an individual or group's decision to migrate.<sup>151</sup> Individual factors include children's upbringing, character and means, as well as their contacts in

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<sup>139</sup> Save the Children & RMMS (2016) 15.

<sup>140</sup> UNDESA 'The Age and Sex of Migrants' 2011.

<sup>141</sup> UNICEF 'International Migration, Children and Adolescents Population Dynamics' (2013) 1.

<sup>142</sup> UNICEF 'International Migration, Children and Adolescents Population Dynamics' (2013) 1-2.

<sup>143</sup> UNICEF 'International Migration, Children and Adolescents Population Dynamics' (2013) 2.

<sup>144</sup> UNICEF 'International Migration, Children and Adolescents Population Dynamics' (2013) 2.

<sup>145</sup> UNICEF 'International Migration, Children and Adolescents Population Dynamics' (2013) 2.

<sup>146</sup> Save the Children & RMMS (2016) 16.

<sup>147</sup> Save the Children & RMMS (2016) 16.

<sup>148</sup> UNICEF 'Uprooted the Growing Crisis For Refugee and Migrant Children' (September 2016) 55 available at [https://www.unicef.org/publications/files/Uprooted\\_growing\\_crisis\\_for\\_refugee\\_and\\_migrant\\_children.pdf](https://www.unicef.org/publications/files/Uprooted_growing_crisis_for_refugee_and_migrant_children.pdf) (accessed 19 October 2017).

<sup>149</sup> UNICEF (2016) 52.

<sup>150</sup> IDC 'Captured Childhood' Report International Detention Coalition (2012) 30, available at <https://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf> (accessed 4 September 2017).

<sup>151</sup> Davidson J O & Farrow C 'Child Migration and Construction of Vulnerability' (2007) Save the Children 16 available at <https://resourcecentre.savethechildren.net/library/child-migration-and-construction-vulnerability> (accessed 28 November 2017).

the destination country. Migration management modalities in source, transit and destination countries also play a role in encouraging or discouraging child migration.<sup>152</sup> The discussion below highlights the major driving factors – derivatives of social, economic, political, structural and individual factors – of child migration in Africa, such as poverty, the search for economic opportunity and quality education, moving to survive and stay alive, and culture. The discussion relies on, amongst others, ethnographic research based on the testimonies of children.

#### 2.2.4.1 Poverty as a Driving Factor

Poverty is multifaceted, manifesting itself in a lack of economic opportunity and employment prospects, lack of access to quality education, and difficulty in accessing health care and information.<sup>153</sup> The combination of these social and economic factors results in deep dissatisfaction that drives children to migrate.<sup>154</sup> Hashim and Thorsen identified poverty as one of the reasons for independent migration of children in rural areas of West Africa.<sup>155</sup> For instance, poverty was the reason behind the migration of 35 per cent of street children registered in street children programme in Accra in 1999.<sup>156</sup> Similarly, in South Africa poverty is a crucial factor in children's decisions to leave their families and look for work on farms and in towns.<sup>157</sup>

At the individual level, leaving a country of origin and moving to a new destination could be perceived as an answer to social and economic deprivations, which manifest themselves in the income and wealth inequalities exhibited within nations, regions and continents.<sup>158</sup> Such inequalities may also create formal and informal labour opportunities for children.<sup>159</sup> Children decide to migrate to escape the limited opportunities within their families and the community.<sup>160</sup> As an illustration, Wahabau, 17 years old, from the Far East of the Ashanti Region of Ghana stated that

it was poverty that made me come here. I wasn't in school and I was suffering there so my senior brother brought me here. I did not want to come, but poverty forced me out. [...] No one influenced my decision. I decided myself to come to see if I could get work to support myself. [...] I discussed this with my parents

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<sup>152</sup> Davidson J O & Farrow C (2007) 16.

<sup>153</sup> UNICEF 'In search of opportunities Voices of children on the move in West and Central Africa' (July 2017) 3, available at <https://www.unicef.org/wcaro/nigeria/regionalcrisis/WCAR.Migration.July2017.LRe.pdf> (accessed 15 November 2017) see also Hashim I & Thorsen D (2011) 42-3.

<sup>154</sup> UNICEF (2017) 3; see also Hashim I & Thorsen D (2011) 42-3.

<sup>155</sup> Hashim I & Thorsen D (2011) 42-3.

<sup>156</sup> Hashim I & Thorsen D (2011) 42-3.

<sup>157</sup> Reale D 'Away From Home: Protecting and Supporting Children on the Move' (2008) Save the Children Fund, UK 8, available at <https://www.streetchildrenresources.org/wp-content/uploads/2013/01/away-from-home.pdf> (accessed 10 November 2017).

<sup>158</sup> Horwood C & Reitano T 'A Perfect Storm? Forces Shaping Modern Migration & Displacement' Discussion Paper 3 (May 2016) Regional Mixed Migration Secretariat, Danish Refugee Council 4.

<sup>159</sup> Horwood C & Reitano T (2016).

<sup>160</sup> Yaqub S 'Child Migrants with and without Parents: Census-Based Estimates of Scale and Characteristics in Argentina, Chile and South Africa', Discussion Papers IDP No. 2009-02 February 2009 42, available at [https://www.unicef-irc.org/publications/pdf/idp\\_2009\\_02.pdf](https://www.unicef-irc.org/publications/pdf/idp_2009_02.pdf) (accessed 23 June 2017).

and with my senior uncles, and they were all happy and agreed that I should come. My brother paid my lorry fare and I travelled here with him.<sup>161</sup>

The general assertion of poverty as a push factor for migration was called into question, as empirical research indicates that although migrant children in their home country were leading an impoverished life, they were not destitute.<sup>162</sup> Supporting this view, Reale states that children from families with some kind of income at their disposal are able to migrate, as opposed to those living in extreme poverty.<sup>163</sup> For instance, in the profiling of migrant children in Ethiopia conducted by the IOM, it was found that, as paying for migration requires finance, child migrants and their families had to raise the money by selling the family assets, such as cattle, and using their families' land as collateral to borrow money from village lenders.<sup>164</sup> In Côte d'Ivoire, families incur debts to send their children abroad, enticed by football opportunities.<sup>165</sup>

This shows that the level of poverty – that is, extreme or relative poverty – is decisive in creating favourable conditions for, or discouraging, child migration.<sup>166</sup> Extreme poverty or destitution – that is, having no assets and income – may also be considered as a discouraging factor for migration.<sup>167</sup> This means that because migration costs are expensive, destitution might actually prevent the impoverished from migrating.<sup>168</sup>

#### **2.2.4.2 Searching for Better Economic Opportunity and Work**

Though the world is witnessing prosperity, extreme differences in income and wealth are causing people to migrate.<sup>169</sup> Job insecurity and parents' scarcity of livelihood, along with expectations that children contribute to the family income, drive children to migrate.<sup>170</sup> Job insecurity can be the outcome of various conditions, including failure of principal industries, the dense concentration of working populations in certain areas, and lack of personal development

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<sup>161</sup> Anarfi J, Gent S, Hashim I, et al. 'Voices of Child Migrants: A Better Understanding of How Life Is' (2005) Development Research Center On Migration, Globalization and Poverty 7 available at [http://www.sussex.ac.uk/Units/SCMR/drc/publications/other\\_publications/Voices\\_of\\_Children.pdf](http://www.sussex.ac.uk/Units/SCMR/drc/publications/other_publications/Voices_of_Children.pdf) (accessed 16 December 2017).

<sup>162</sup> Edmonds E & Shrestha M 'Children's Work and Independent Child Migration: A Critical Review' (December 2009) Innocenti Working Paper 21, available at [https://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_19.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2009_19.pdf) (accessed 12 February 2017); Flahaux M & De Haas (2016) 3-4.

<sup>163</sup> Reale D (2008) 8.

<sup>164</sup> International Organization for Migration 'Profiling of Ethiopian Unaccompanied and Separated Migrant Children along the Horn of Africa-Gulf of Aden Migration route' (May 2016) International Organization for Migration 43-44.

<sup>165</sup> Reale D (2008) 8.

<sup>166</sup> Reale D (2008) 8.

<sup>167</sup> Reale D (2008) 8.

<sup>168</sup> Edmonds E & Shrestha M (2009) 21.

<sup>169</sup> Horwood C & Reitano T (2016) 4.

<sup>170</sup> Schoenholtz A I 'Developing the Substantive Best Interests of Child Migrants: A Call for Action' (2012) 46 Valparaiso University Law Review (Val. U. L. Rev.) 995 Available at: <http://scholar.valpo.edu/vulr/vol46/iss4/1> (accessed 20 August 2018).

opportunities.<sup>171</sup> Out of a sense of familial obligation, a number of children migrate searching for opportunities to raise income and address the gaps in income and wealth.<sup>172</sup> Girls, for instance, migrate from rural to urban areas looking for better employment opportunities and escaping gender-biased parental restrictions.<sup>173</sup> Research in Zimbabwe revealed that 28 per cent of children said they left their town looking for jobs.<sup>174</sup> In rural areas, lack of access to land forces the youth to migrate unless they have other economic alternatives, such as borrowing money from their families or getting an inheritance. Otherwise, especially during dry seasons, such scarcity of land results in the decline of employment opportunity.<sup>175</sup> Other research finds that scarcity of land, which in most cases is aggravated by desertification, motivates the youth to migrate.<sup>176</sup>

An empirical investigation in Benin found that, among the surveyed children, 22 per cent aged 6-16 were independent migrants, among whom 9 per cent of children or 41 per cent of independent migrants stated that work was the reason for their migration. The study also found that 50 per cent of the children had the experience to migrate cross-border, with boys responsible for the lion's share of cross-border migration.<sup>177</sup> Similarly, an empirical study in Burkina Faso found that, among the surveyed children and households, 9.5 per cent of children aged 6-17 had left their parents, with 29 per cent of these migrants living abroad in their preferred destinations of Ghana, Benin and Burkina Faso. The overall percentage translates to a national estimate of about 333,000 children.<sup>178</sup> Regarding the cause of migration, 50 per cent (165,000) of the independent children migrated for work – boys take the lion's share in this regard, at 57 per cent (94,000).<sup>179</sup>

According to Yaqub's census-based estimates in three countries, including South Africa, more than 20 per cent of international independent child migrants over 15 years of age were employed, compared with a 4 per cent employment rate for non-migrant children.<sup>180</sup> Similarly, findings in the capital of Ethiopia, Addis Ababa, show that migrant boys are twice as likely to be working as their non-migrant counterparts, and migrant girls are six times more likely to work than non-migrant girls.<sup>181</sup> Another study, in Benin, also found that, among children not enrolled in

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<sup>171</sup> Glind H & Kou A 'Migrant children and child labor: a vulnerable group in need attention in *Children on the Move*' (2013) International Organization for Migration 31

[http://publications.iom.int/system/files/pdf/children\\_on\\_the\\_move\\_15may.pdf](http://publications.iom.int/system/files/pdf/children_on_the_move_15may.pdf) (accessed 6 August 2017).

<sup>172</sup> Hashim I & Thorsen D (2011) 46.

<sup>173</sup> Population Council 'Girls on the Move; adolescent Girls and Migration in Developing World: A Girls Count Report on Adolescent Girls' (Population Council 2013) 21-22 available at

[http://www.popcouncil.org/uploads/pdfs/2013PGY\\_GirlsOnTheMove.pdf](http://www.popcouncil.org/uploads/pdfs/2013PGY_GirlsOnTheMove.pdf) (accessed 24 August 2017).

<sup>174</sup> Gwenzi J, Mhlanga M, & Chikanya V K 'Exploring Factors That Influence Child Migration in Zimbabwe: A Descriptive Cross Sectional Study' (2016) 21 *Journal of Humanities and Social Science (IOSR-JHSS)* 54.

<sup>175</sup> Punch S (2007) 3.

<sup>176</sup> Yaqub S (Feb 2009) 42.

<sup>177</sup> Edmonds E & Shrestha M (2009) 9.

<sup>178</sup> Edmonds E & Shrestha M (2009) 9-10.

<sup>179</sup> Edmonds E & Shrestha M (2009) 9-10.

<sup>180</sup> Yaqub S (2009) 14.

<sup>181</sup> Glind H (2010) 10.

schools, independent migrant children work 50 per cent longer hours than non-migrant children living with their parents.<sup>182</sup>

Child migrants in Accra and Kumasi stated that the need to earn money and have the freedom to spend it is at the centre of their decision to migrate.<sup>183</sup> In addition, boys mentioned their desire to learn how to trade as a driving factor in migration.<sup>184</sup> Some girls migrated searching for jobs, while a substantial number of them migrated to join their siblings in Accra.<sup>185</sup> In the Teichman district of Ghana, migrant children stated that the needs for freedom from parental control as well as for economic security influenced their international migration.<sup>186</sup>

In another study, it was revealed that adolescents, including younger children, are regularly sent by their families from Eritrea to Ethiopia hoping that life will be better in their new destination.<sup>187</sup> Similarly, in Ethiopia, Djibouti and Sudan, it was found that poverty, economic destitution within the family, and lack of capacity to provide for children's basic needs and education are primary factors behind children's independent migration.<sup>188</sup> The unemployment rate in Zimbabwe, which reached 70-80 per cent, has led to a vast migration: annually, about 25,000 children cross borders to South Africa.<sup>189</sup>

#### **2.2.4.3 Absence of Quality Education**

Lack of formal educational opportunity is another factor resulting in school dropout and child migration.<sup>190</sup> Lack of educational opportunity as well as poor-quality education are the outcomes of a shortage of resources allocated by the state; they also stem from the unavailability of teaching materials and infrastructure needed for school education.<sup>191</sup> In rural areas, sometimes only primary education is available; if secondary education is available, it might be under-resourced and of poor quality, making migration an ideal way to access quality education elsewhere.<sup>192</sup> In a study in Burkina Faso, children were forced to migrate because the education they received in rural areas would not be of use to fulfill their need to lead decent lives in the future.<sup>193</sup> In a study in Ethiopia, education was among the reasons for adolescents' migration, as

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<sup>182</sup> Glind H (2010) 10.

<sup>183</sup> Kwankye S O, Anarfi J K, Tagoe C A, et al. 'Independent North South Migration, Child Migration in Ghana, the Decision Making Process' A Working Paper (February 2009) Development and Research Center on Migration, Globalization and Poverty, University of Sussex 19.

<sup>184</sup> Kwankye S O, Anarfi J K, Tagoe C A, et al. (2009) 19.

<sup>185</sup> Kwankye S O, Anarfi J K, Tagoe C A, et al. (2009) 19.

<sup>186</sup> Kwaku E R 'Independent Child Migration from Northern Ghana to Techiman Municipality: Perspectives of 'Kayayie' (Female Children Head Poters)' (Unpublished Master's Thesis, Norwegian University of Science and Technology (2013) 45.

<sup>187</sup> Save the Children & RMMS (2016) 32.

<sup>188</sup> Save the Children & RMMS (2016) 32.

<sup>189</sup> Gwenzi J, Mhlanga M, & Chikanya V.K (2016) 50-51.

<sup>190</sup> Hashim I & Thorsen D (2011) 49.

<sup>191</sup> Reale D (2008) 8.

<sup>192</sup> Reale D (2008) 8.

<sup>193</sup> Temin M, Montgomery M R, Engebretsen S et al. (2013) 20.

were employment and marriage, with more boys than girls reporting education as a reason.<sup>194</sup> Research in Côte d'Ivoire shows that many school children are willing to drop out of school and move away from their families should other notable possibilities be encountered elsewhere.<sup>195</sup>

Children also arrange different types of migration opportunities that will enable them to access formal education, doing so either by taking up employment opportunities simultaneously with their education, or working during school breaks to raise money to cover the costs of education.<sup>196</sup> There were instances of children dropping out for a period of a year to work to raise money for education expenses.<sup>197</sup> Alternating school and work usually happens in adolescence and they are expected to incur additional costs in secondary schools or vocational trainings.<sup>198</sup> There are also instances where adolescents migrate in pursuit of vocational and technical training and apprenticeship, as opposed to formal academic education.<sup>199</sup>

As can be seen from the above discussion, factors associated with migration in search of better quality education is not per se the cause of trans-boundary migration rather a cause for rural-urban migration.

#### **2.2.4.4 Moving to Help the Household or Family**

A child, according to African culture and practice, belongs not only to his or her parents but to the extended family and wider community.<sup>200</sup> In West Africa, as shared by several African countries, great numbers of children, usually with a higher proportion of girls, migrate to help their households or family members in crisis.<sup>201</sup> Changes in the family structure, such as illness, the birth of a new child, conflict, and death of parents, push children to migrate to help the household.<sup>202</sup> Livelihood scarcity, disruption of environmental conditions, and agricultural shocks or crop failures may also motivate children to migrate to support their families.<sup>203</sup> The scope of support might involve withdrawal from school and entering the labour force or assuming greater roles in the household in order to compensate for their absent or incapable parents.<sup>204</sup> In a study in Nigeria among migrant and non-migrant children aged between 8-17,

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<sup>194</sup> Temin M, Montgomery M R, Engebretsen S, et al. (2013) 20.

<sup>195</sup> Reale D (2008) 8.

<sup>196</sup> Hashim I & Thorsen D (2011) 51.

<sup>197</sup> Hashim I & Thorsen D (2011) 51; see also Temin M, Montgomery M R, Engebretsen S, et al. (2013).21, Glind H & Kou A (2013) 31.

<sup>198</sup> Hashim I & Thorsen D (2011) 51.

<sup>199</sup> Hashim I & Thorsen D (2011) 51

<sup>200</sup> Hashim I & Thorsen D (2011) 53. Children's responsibility to their family, community, country and continent is also recognised as the duty of the child under article 31 of the African Children's Charter.

<sup>201</sup> Hashim I & Thorsen D (2011) 53.

<sup>202</sup> Hashim I & Thorsen D (2011) 56.

<sup>203</sup> Edmonds E & Shrestha M (2009) 24.

<sup>204</sup> Edmonds E & Shrestha M (2009) 24.

one-fourth of the total 225 of study participants stated that work is the fundamental reason for their migration, as it is a tool to support their family and signals their growing maturity.<sup>205</sup>

#### **2.2.4.5 Moving to Survive and Stay Alive**

Internal civil conflict, political instability, rebellion, radicalism, domestic violence, HIV/AIDS, climate change and criminal violence force children to migrate.<sup>206</sup> The high backsliding rate and recurring instability that follow the end of conflict also motivate children to migrate.<sup>207</sup> Armed conflict is another powerful driver of children's movement, including long-distance migration.<sup>208</sup> In most cases, in the process of their escape from war, natural disasters and famine, children will be forced to separate from their families.<sup>209</sup> For instance, the Rwandan genocide resulted in the separation of more than 100,000 children from their parents or caregivers, and only 51,000 were reunited. Children in the era of armed conflict in Liberia, Sierra Leone, the Democratic Republic of Congo (DRC), Somalia and Sudan have faced similar calamities.<sup>210</sup> According to a study by Save the Children in South Africa, children migrated from the DRC, Rwanda and Burundi to flee recruitment by armed forces, to be safe from conflict, and to stay alive and survive.<sup>211</sup> In most cases, they decide to migrate independently without plans when faced with physical and sexual violence, and end up in commercial work.<sup>212</sup> In Uganda, household exploitation, hunger and desertion by strained families were among the reasons for children's migration.<sup>213</sup> Alteration in ecological conditions, such as through earthquakes, floods and droughts, are also causes for child migration.<sup>214</sup> It is estimated that by 2050 the world will have around 200 million 'climate refugees', with children being part of an increasing flow of forced migrants.<sup>215</sup>

#### **2.2.4.6 Societal Values and Practices**

Various societal practices related to peoples' movement influence the independent migration of children.<sup>216</sup> These practices link migration to seasonal movement in search of resources, ways of proving manhood, and transitioning into adulthood and maturity.<sup>217</sup> In some societies, both adolescents and parents see migration as an important learning experience. It is seen as a means to transitioning into adulthood in that adolescents get the opportunity to improve their social

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<sup>205</sup> Yaqub S (2009) 41.

<sup>206</sup> Horwood C & Reitano T (May 2016) 5; Flamm S (2010) 17.

<sup>207</sup> Horwood C & Reitano T (2016) 5.

<sup>208</sup> Reale D (2008).

<sup>209</sup> Bhabha J (2014) 209.

<sup>210</sup> Bhabha J (2014) 209.

<sup>211</sup> Reale D (2008) 9-10.

<sup>212</sup> Reale D (2013) 32.

<sup>213</sup> Yakub S (2009) 45.

<sup>214</sup> Reale D (2008) 8.

<sup>215</sup> Reale D (2008) 9.

<sup>216</sup> Horwood C & Reitano T (2016) 9.

<sup>217</sup> Horwood C & Reitano T (2016) 9; Flamm S (2010) 17; Population Council (2013) 22.

status, demonstrate capacity and maturity, gain respect among their peers, and announce their independence and declare autonomy.<sup>218</sup>

Social networks play a vital role in ensuring that such positive attitudes and practice towards migration are transferred from generation to generation.<sup>219</sup> Diasporas that have settled in a particular location have a direct effect in establishing the culture of migration regardless of the fact that the diasporic community is composed of labour migrants, irregular migrants or refugees.<sup>220</sup> The network created in such a way can sustain itself for future migrants by providing social, legal, economical, and information support from migrants who have already settled in.<sup>221</sup>

In West Africa, there is a well-established practice of sending children to live with their extended families, which may result in children domestic work.<sup>222</sup> Migration practices in Ghana, Sierra Leone, Liberia and Nigeria prove that culture indeed contributes to child migration.<sup>223</sup> In North Africa, migration has long been widely practised, with a high tendency for individuals to migrate.<sup>224</sup> In Mali, the rural community has recognised that migration has enabled migrant girls to attain maturity at different levels.<sup>225</sup> In Burkina Faso, labour migration is recognised as an ideal source of status and recognition in society.<sup>226</sup> Independent migrant girls from Mali identified the need for jewellery for marriage, and male migrants the need for a more influential position in the community, as the reason for their migration.<sup>227</sup>

Societal perceptions also contribute to children's migration by fostering the nexus between child work and migration. Most migrant children come from societies where compulsory education ends at an earlier age than in developed countries and the need for labour engagement thus becomes important.<sup>228</sup> A study in Burkina Faso revealed that close to 40 per cent of the study participants believed that children between the ages of 10-14 are capable of undertaking tasks that adults carry out.<sup>229</sup> Children who have migrated to Ghana and Gambia stated that the deeply entrenched practice that obliges children to start supporting the family at the moment they are considered able is behind their decision to migrate.<sup>230</sup> There are also cases where parents send their children away to get relief from the financial burden of raising a child as well as create an opportunity for the child to raise money and send it home.<sup>231</sup> Similarly, a family may not have

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<sup>218</sup> Flamm S (2010) 7; Reale D (2008) 8.

<sup>219</sup> Horwood C & Reitano T (2016) 9.

<sup>220</sup> Horwood C & Reitano T (2016) 10.

<sup>221</sup> Horwood C & Reitano T (2016) 10.

<sup>222</sup> Glind H (2010) 8.

<sup>223</sup> Schoenholtz A I (2012) 996.

<sup>224</sup> Horwood C & Reitano T (2016) 9-10.

<sup>225</sup> Population Council (2013) 22.

<sup>226</sup> Flamm S (2010) 17.

<sup>227</sup> Yaqub S (2009) 41.

<sup>228</sup> Schoenholtz A I (2012) 995.

<sup>229</sup> Yaqub S (2009) 41.

<sup>230</sup> Yaqub S (2009) 41.

<sup>231</sup> Schoenholtz A I (2012) 995.



opportunities for economic improvement, which could then lead them to see the migration of their children as a viable alternative.<sup>232</sup>

A study by RMMS in Ethiopia revealed that, due to individual and familial accomplishments as the result of migration, families and communities demonstrated support for the migration of children.<sup>233</sup> The possibility of achievement gained through migration has diminished the importance of education and, as a result, children are ready to drop out at any time to migrate.<sup>234</sup> Education is seen as less valuable than migration, as it does not bring about immediate solutions to individual, family and community challenges.<sup>235</sup> In Ethiopia, anecdotal evidence suggests that in nearly every household there is one family member who has migrated to another country.<sup>236</sup> Furthermore, where there is a high prevalence of adult migration, children may be induced to abandon their education before finishing compulsory schooling and follow in the footsteps of those who have migrated.<sup>237</sup>

## **2.2.5 Adolescent Migration Trends in/from Ethiopia and South Africa**

### **2.2.5.1 Adolescent Migration Trends in/from Ethiopia**

Ethiopia is located in the Horn of Africa, with an estimated population of 105,350,020, the second highest in Africa after Nigeria.<sup>238</sup> The age structure for 0-14 years is 43.47 per cent (male 22,963,502 and female 22,826,957) and for 15-24 years, 20.11 per cent (male 10,516,591 and female 10,669,695), with a total median age of 17.8 years. This age structure shows that the majority of Ethiopians are children below the age of 18 years.<sup>239</sup> The net migration rate of the country is -0.2 migrant(s)/1,000 populations.<sup>240</sup> The negative net migration rate for trans-boundary migration shows that more people are out-migrating (emigrating) than in-migrating.

Ethiopia is considered a main source, transit and destination country for refugees, asylum seekers, irregular migrants, economic migrants and other migrants.<sup>241</sup> In the context of trans-boundary emigration or out-migration, there are reports that each day up to 1,500 Ethiopians

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<sup>232</sup> Flamm S (2010) 7.

<sup>233</sup> Regional Mixed Migration Secretariat (RMMS) 'Blinded by Hope Knowledge, Attitudes and Practices of Ethiopian Migrants' (2014) 21 available at [http://regionalmms.org/images/ResearchInitiatives/Blinded\\_by\\_Hope.pdf](http://regionalmms.org/images/ResearchInitiatives/Blinded_by_Hope.pdf) (accessed 20 December 2017).

<sup>234</sup> RMMS (2014) 21.

<sup>235</sup> RMMS (2014) 21.

<sup>236</sup> RMMS (2014) 21.

<sup>237</sup> Cortes R 'Adolescents rights, Gender and Migration, Challenges for Policy-makers' (April 2011) 10, available at <http://www.globalmigrationgroup.org/system/files/uploads/gmg-topics/mig-data/Adolescents-Rights-Gender-Migration-Final-Report-April-2011.pdf> (accessed 12 September 2017).

<sup>238</sup> Central Intelligence Agency (CIA) 'The World Factbook: Ethiopia' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (accessed 12 October 2017).

<sup>239</sup> CIA 'The World Factbook: Ethiopia'.

<sup>240</sup> CIA 'The World Factbook: Ethiopia'.

<sup>241</sup> RMMS: East Africa and Yemen 'Ethiopia Country Profile'.

move out of Ethiopia to pursue better economic opportunities.<sup>242</sup> In the case of irregular trans-boundary migration, there are three major routes in the Horn of Africa: the eastern migration route,<sup>243</sup> the ‘western/northern route’,<sup>244</sup> and the ‘southern route’ transiting to Kenya, Tanzania, and other African countries, with the destination being South Africa.<sup>245</sup> It should be noted that the estimates of the number of irregular out-migrants are far from accurate and that there are no ‘single routes for the journey’. Although most of the data are not disaggregated by age and sex, in general it was reported that the number of boys who migrate is much higher than girls.<sup>246</sup>

Due to systematised registration and data management systems in destination countries in Europe, there are better data on the number of child migrants through the western/northern migration route than through the other routes.<sup>247</sup> In the Eastern migration route, which is popular with Ethiopians and other migrants from the Horn, it is estimated, despite a lack of comprehensive data, that 20 per cent of the 91,000 migrants who arrive in Yemen are children. According to UNICEF estimates for 2014, of the 71,907 Ethiopian migrants who arrived in Yemen, 20 per cent are unaccompanied and separated migrant children.<sup>248</sup>

The southern route is the poorest when it comes to the availability of data on migration in general and child migration in particular.<sup>249</sup> The data and estimates regarding this route are based on ‘anecdotal information and scattered quantitative data’, mostly based on the interceptions made or records of entry in other countries en route to South Africa, such as Kenya and Malawi.<sup>250</sup> Therefore, it hardly shows the number of unaccompanied migrant children on the route, a number which may increase significantly.

The general estimate of undocumented migrants in South Africa is between three to six million. Furthermore, it was estimated in 2009 that more than 10,000 Ethiopian migrants are smuggled on

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<sup>242</sup> Department of State, United States of America ‘Trafficking in Persons Report’ (June 2016) 167 available at <https://www.state.gov/documents/organization/258876.pdf> (accessed 13 October 2017).

<sup>243</sup> Marchand K, Roosen I, Reinold J & Siegel M (May 2016) 17.

<sup>244</sup> Also called the Central Mediterranean route by the European Border Agency, it passes through Sudan to Libya or Egypt and onwards to the Mediterranean Sea, and then to Italy and other European countries.

<sup>245</sup> Regional Mixed Migration Secretariat (RMMS) and Danish Refugee Council (DRC): East Africa and Yemen ‘Ethiopia Country Profile’ (May 2016) available at <http://www.regionalmms.org/images/CountryProfile/Ethiopia/EthiopiaCountryProfile.pdf> (accessed 09 October 2017); Marchand K, Roosen I, Reinold J & Siegel M (May 2016) 17, Save the Children & RMMS (2016) 19-25.

<sup>246</sup> Save the Children & RMMS (2016) 19 & 21.

<sup>247</sup> According to May 2016 data, the proportion of child migrants, mostly from the Horn of Africa, that arrive in Italy has risen from 11 per cent in 2015 to 16 per cent in 2016. In 2016, of the 100,264 children who arrived in Greece, Italy, Spain and Bulgaria, 33,806 (34 per cent) were unaccompanied or separated children; *see* RMMS and Save the Children (2016) 21; UNHCR, UNICEF & IOM ‘Refugee and Migrant Children Including Unaccompanied and Separated Children in the EU: Overview of Trends in 2016’ available at <https://data2.unhcr.org/ar/documents/download/55971> (accessed 12 October 2017); Flahaux M & De Haas (2016) 3.

<sup>248</sup> RMMS & Save the Children (2016) 24.

<sup>249</sup> RMMS ‘Ethiopia Country Profile’ (2016).

<sup>250</sup> RMMS & Save the Children (2016) 25.

this route every year from Ethiopia to South Africa.<sup>251</sup> According to the IOM report of 2009, the rough estimates are that up to 20,000 migrants from the Horn of Africa, predominantly from Ethiopia and Somalia, migrate with the aspiration of reaching South Africa.<sup>252</sup> Other reports show that unaccompanied child migrants move through this route to reach South Africa. For instance, ‘in June 2016, 15 unaccompanied migrant children from Ethiopia were intercepted and detained by the Zambian authorities for illegal entry’.<sup>253</sup>

Another indication of the significant number of child migrants on this route is UNICEF’s 2016 estimate that in Africa 1 in 3 migrants is a child.<sup>254</sup> Crucially, the relatively limited data about this migration route compared with others migration routes reflects the limited focus given to it, as such movement is considered to be within Africa, with no or little attention from developed countries that have been financing migration related interventions including studies and compilation of up-to-date data.

Apart from the general trends and figures on migration discussed above, there are specific empirical studies, targeting specific areas or issues, that point to trends and characteristics regarding Ethiopian adolescent migrants and show how migrants from neighbouring countries are accommodated in Ethiopia.

A profiling survey of unaccompanied and separated migration children in Ethiopia in the eastern migration route may be cited as the single major assessment in Ethiopia.<sup>255</sup> This survey found out that child migrants on the eastern migration route mostly originate from three main regions: Oromia, Amhara, and the Southern Nations Nationalities and Peoples’ Region (SNNPR) in Ethiopia. In terms of age, the study found that adolescents between the ages of 15-17 are predominant, with an average age of 15.7 years and accounting for 89 per cent of the children.<sup>256</sup> With regard to gender composition, boys are by far the most represented, at 91 per cent. The gender pattern also revealed that girl migrants, with an average age of 16.8 years, are relatively older than their boy counterparts, whose average age is 15.6 years.<sup>257</sup> The significant majority of children – 93 per cent – attended school at primary and secondary levels; the remaining 6 per cent did not receive any form of education.<sup>258</sup>

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<sup>251</sup> RMMS Ethiopia Country Profile (2016); Department of State, United States of America ‘Trafficking in Persons Report’ (June 2017) 168 available at <https://www.state.gov/documents/organization/271339.pdf> (accessed 13 October 2017).

<sup>252</sup> RMMS & Save the Children (2016) 25.

<sup>253</sup> RMMS & Save the Children (2016) 25.

<sup>254</sup> UNICEF ‘Uprooted the Growing Crisis for Refugee and Migrant Children’ (September 2016) 55.

<sup>255</sup> IOM ‘Profiling of Ethiopian Unaccompanied and Separated Migrant Children along the Horn of Africa-Gulf of Aden Migration Route’ (2016) 5. The data are from Migration Response Centers (MRCs) in Mile Afar Regional State in Ethiopia and Obock in Djibouti, and the IOM’s Assisted Voluntary Return and Reintegration (AVRR) transit centres for returnees in Addis Ababa. The study obtained the testimonies of 152 UASMC between ages 12-17 and also documented the responses of 130 individual UNSMC’s family members from selected areas of origin.

<sup>256</sup> IOM (2016) 19.

<sup>257</sup> IOM (2016) 20.

<sup>258</sup> IOM (2016) 20.

The reasons for adolescents' trans-boundary migration include unemployment; peer pressure; scarcity of land due to the high fertility rate and land fragmentation; unexpected adversity in the home setting, such as illness, death of family or job loss; inability to continue education due to child work or lack of time and resources; and lack of hope that education would translate into financial reward in future life.<sup>259</sup> Among these push factors, economic reasons were predominant, featuring among 79 per cent of targeted adolescent irregular migrants.<sup>260</sup> The term 'economic reasons', according to the testimonies of children, refers to poverty and the expectation upon children to earn and support their parents and other members of the family. The other significant 'economic reason' is lack of faith in the fruits of gaining an education and working in Ethiopia, a sentiment encapsulated in a phrase popular among adolescent migrants: 'What options do we have here [in Ethiopia]?'<sup>261</sup>

Unemployment, which accounted for 10 per cent of the responses, refers to the unavailability of economic activity in rural areas other than manual agricultural work. Peer pressure, which is among the primary push factors, is manifested through direct pressure from migrants abroad and families in Ethiopia in regard to the benefits of remittances and living abroad. Indirect pressure comes through witnessing tangible improvement in livelihoods and material standing, which encourages children to migrate across borders.<sup>262</sup>

The decision to migrate is an important aspect of the migration process of children. In the IOM's USMC Profiling Survey, it was found that 78 per cent of the children made the decision to migrate independently and thereafter obtained the blessing of their parents and other family members in order to gain financial support for their migration.<sup>263</sup> The autonomy to decide on migration and then solicit parental blessing is to be expected, given that most of the interviewed (89 per cent) were adolescents between the ages of 15-17 years. Furthermore, parents, relatives and the community at large take an active part in the migration process by financing and facilitating logistics through establishing contract with migrants in destination countries, as well as with brokers and smugglers.<sup>264</sup>

Regarding the modality of movement – that is, whether they travel alone, in groups and with adults or family members – only 20.4 per cent of the children travelled alone throughout the migration route until their interception; 79.6 per cent stated that friends, relatives, brokers, or smugglers accompanied them. Among the children who were accompanied by others, 83.3 per cent were accompanied by friends, 11 per cent by brokers or smugglers, and the remaining 6 per

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<sup>259</sup> IOM (2016) 24-8.

<sup>260</sup> IOM (2016) 24.

<sup>261</sup> IOM (2016) 24-5; Tadele G 'A Critical Assessment of the Violations of Rights of Girls during the Process of Irregular Migration: The Case of Woreda *Sa'esi's Tsa's damba* in Eastern Zone of Tigray' (unpublished MA thesis, Addis Ababa University, July 2015) 56.

<sup>262</sup> IOM (2006) 25-26; Tadele G (2015) 58-9.

<sup>263</sup> IOM (2006) 28.

<sup>264</sup> Tadele G (2015) 69.

cent, by relatives.<sup>265</sup> From this we can see that the significant majority were adolescent migrants children taking the journey independently.

Adolescents also said they faced extreme hardships, including dehydration, hunger, ill-health, theft, hostile weather, kidnapping, physical assault by local gangs, and trauma.<sup>266</sup> Depending on the places they reached and intercepted, and on the availability of money to pay for smugglers, the journey took anything from a minimum of one month to a maximum of eight months.<sup>267</sup>

Another important aspect of the migration process is the future plan of adolescent migrants. To summarise the testimonies of returnees, these plans were to start a small business in Ethiopia, continue education, return to previous farmwork, work in any available sector, and earn a living in Ethiopia and find a way to emigrate.<sup>268</sup>

Regarding inward movement into Ethiopia, there are a number of migrant reception centres, depending on the ports of entry.<sup>269</sup> There are also additional reception centres in Addis Ababa and other regional cities, given that Ethiopia has started implementing an out-of-camp arrangement and urban refugee status subject to meeting certain criteria.<sup>270</sup> According to 31 August 2018 data of the UNHCR, Ethiopia is the biggest refugee host in Africa, with 905,831 registered refugees and asylum seekers in the country, most of whom come from neighbouring countries such as South Sudan, Somalia and Eritrea.<sup>271</sup> In terms of the age composition of refugees, infants between the ages of 0-4 comprise 14.1 per cent, children between the ages of (5-11), 26 per cent, and adolescents between the ages of (12-17), 19 per cent; in total, those below the age of 18 account for 59.1 per cent of the total number of registered refugees and

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<sup>265</sup> IOM (2016) 29-30.

<sup>266</sup> IOM (2016) 35; Zeratsion SY 'The situations of child migrants from Eritrea in *Mai-Ayni* refugee camp in Tigray Regional State Ethiopia (unpublished MA thesis, Addis Ababa University, July 2015) 60-1.

<sup>267</sup> IOM (2016) 33.

<sup>268</sup> IOM (2016) 39. Opening small business in Ethiopia (30 per cent); continuing education (18 per cent); returning to previous farm work (11 per cent); working in any available sector and earning a living in Ethiopia (10 per cent); and finding a way to emigrate (7 per cent); 24 per cent have no idea what they want to do in the future.

<sup>269</sup> There are 26 refugee camps, which are distributed in the north, west, south west, east and south of Ethiopia; see <https://www.unhcr.org/ethiopia.html> (accessed 19 March 2019). Also see Zeratsion SY (2015) 65. Children entering through the north, particularly those from Eritrea, are taken to Endabaguna Reception Center for verification, registration and refugee status determination. Subsequently, they move to Mai-Ayni Refugee Camp for permanent stay and care arrangements.

<sup>270</sup> Administration of Refugee and Returnee Affairs (ARRA), United Nations High Commissioner for Refugees (UNHCR), Jesuit Refugee Service (JRS), Development and Inter-Church Aid Commission (EOTC-DICAC), Norwegian Refugee Council (NRC), Opportunities Industrialization Center Ethiopia (OIC-E) 'Standard Operating Procedure for Child Protection for Addis Ababa, Ethiopia' 6 February 2018 (hereafter SOP for Child Protection in Addis Ababa Ethiopia).

<sup>271</sup> UNHCR 'Ethiopia Refugee and Asylum Seekers' 31 August 2018 <https://reliefweb.int/sites/reliefweb.int/files/resources/65728.pdf> (accessed 15 June 2019); Data by County of Origin South Sudan 422,240; Somalia 257,283; Eritrea 173,879; Sudan 44,620; Yemen 1,891; Other Nationalities 5,918.

asylum seekers.<sup>272</sup> Ethiopia hosts the largest number of migrants under the age of 18 in the world, followed by Kenya and South Africa.<sup>273</sup>

As of September 2018, there were a total of 22,885 refugees in Addis Ababa, of whom 868 were children and consisted in turn of 377 unaccompanied and 491 separated children.<sup>274</sup> In regional camps, for instance in Tigray Region, among the total refugee population, 39 per cent are children, of whom 25 per cent are unaccompanied and separated children.<sup>275</sup> Among the new arrivals of South Sudanese refugees in Ethiopia, children account for 64 per cent, of whom 21 per cent are unaccompanied and separated children.<sup>276</sup>

In the context of irregular migration in Ethiopia, governmental interventions, institutions and reports indicate that the focus is on trans-boundary trafficking of persons out of Ethiopia.<sup>277</sup> The other dimensions of irregular migration, which entail voluntary migration based on capitalising on free movement across borders to secure better livelihoods, are often ignored. Although irregular migration and exploitation may intersect, the general discourse on irregular migration and intervention should move away from automatically categorising all irregular migrants solely as victims of abuse. Even the anti-trafficking interventions and reports fail to give any coverage for children migration issues.<sup>278</sup>

#### **2.2.5.2 Child Migration Trends in South Africa**

South Africa is located at the southern tip of the continent and shares borders with six other countries.<sup>279</sup> According to the 2016 census report, it has a total population of 55.7 million.<sup>280</sup> There are nine provinces, each with its own legislature and executive. The Constitution of South Africa bestows the nine provinces with the power to pass their own laws on certain subjects provided that these laws do not conflict with national legislation.<sup>281</sup>

<sup>272</sup> UNHCR Ethiopia Refugee and Asylum Seekers 31 August 2018.

<sup>273</sup> UNICEF 'Uprooted the Growing Crisis for Refugee and Migrant Children' (2016) 56.

<sup>274</sup> UNHCR Ethiopia: Urban Refugees Factsheet (September 2018) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/66623.pdf> (accessed 19 March 2019); UNHCR Ethiopia Refugee and Asylum Seekers 31 August 2018 and UNHCR 'Ethiopia Country Refugee Response Plan: The integrated response plan for refugees from Eritrea, Sudan, South Sudan and Somalia' (January- December 2018) 17, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/62986\\_0.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/62986_0.pdf) (accessed 19 March 2019).

<sup>275</sup> UNHCR 'Ethiopia Country Refugee Response Plan' (2018) 8.

<sup>276</sup> UNHCR 'Ethiopia Country Refugee Response Plan' (2018) 9-10.

<sup>277</sup> Annual Activity Report on the National Response against Human Trafficking and Smuggling, and Trans-boundary Organized Crimes in Ethiopia (June 2017) 36 (Amharic Version).

<sup>278</sup> Annual Activity Report on the National Response against Human Trafficking and Smuggling (June 2017) 9.

<sup>279</sup> Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe are the border countries of South Africa. See Central Intelligence Agency (CIA) World Factbook: South Africa, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (accessed 10 November 2017).

<sup>280</sup> Statistics South Africa 'Community Survey 2016' (Statistical release P0301) 21 available at [http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-\\_Statistical-releas\\_1-July-2016.pdf](http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf) (accessed 10 November 2017).

<sup>281</sup> Republic of South Africa Government Communication and Information System 'South Africa Yearbook (2017/2018): Government' System 2-5 available at <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/11-GovernmentSystems2018.pdf> (accessed

In terms of age composition, children between 0-9 years of age account for about 20 per cent of the total population; young children between 10-14 account for about 9.3 per cent, and adolescents between 15-19 for about 9 per cent, of it.<sup>282</sup> The net migration rate is 0.9 migrant(s)/1000 population, which shows more immigration than emigration or out-migration.<sup>283</sup>

Generally, accurate migrant data are hard to find in any country due to migration dynamics and complexity owing to, among other things, the nature of movement, overlapping of different categories of migration and migrants, modalities of registration, socio-economic factors, and politics. Such a shortfall of data is worse in developing countries that lack adequate registration and documentation of migration.

South Africa is not immune from this dearth of reliable and accurate data on migration.<sup>284</sup> For instance, its post-2011 census shows that the number of migrants decreased from 2.1 million in 2011 to 1.6 million in 2016, which puts the census data in question as patterns of migration and other reports indicate the contrary.<sup>285</sup> The immigration pattern, for instance, indicates that the number of foreign migrants in South African since the 1996 census increased from 958,188 foreign migrants to 1.03 million in 2001, a number which almost doubled by 2011.<sup>286</sup> In addition, the fact that South Africa implements an out-of-camp arrangement for migrants and refugees makes it difficult to know the exact number of irregular migrants in the country. The problem is aggravated by lack of effective border management, lack of registration and documentation at border entries, and corruption.<sup>287</sup> South Africa's 2016 census also shows a serious discrepancy with the estimate of the UNDESA of 3.14 million international migrants in the country.<sup>288</sup> It should be underlined that the official census data might not reflect the full extent of undocumented migrants.

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6 May 2019) South African Government 'South Africa's Provinces' available at <https://www.gov.za/about-sa/south-africas-provinces> (accessed 29 April 2019).

<sup>282</sup> Statistics South Africa 'Community Survey 2016' 21.

<sup>283</sup> Central Intelligence Agency (CIA), The World Factbook: South Africa; UNICEF 'South Africa: Migration Profile' (2013) available at <https://esa.un.org/migmgmprofiles/indicators/files/SouthAfrica.pdf> (accessed 29 April 2019); UNDESA 'International Migration Report 2017: Highlights' (2017) New York 26 available at [https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017\\_Highlights.pdf](https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf) (accessed 29 April 2019); Food and Agriculture Organization of the United Nations (FAO) 'Evidence on internal and international migration patterns in selected African countries' 2-4 available at <http://www.fao.org/3/a-i7468e.pdf> (accessed 29 April 2019).

<sup>284</sup> Crush J 'Southern hub: the globalization of migration to South Africa' in Lucas R E.B (ed) *International Handbook on Migration and Economic Development* (2014) 214.

<sup>285</sup> Statistics South Africa 'Community Survey 2016' 24-5.

<sup>286</sup> Chiumia S 'Factsheet: How many international migrants are there in SA?' (website last updated on 31 July 2017) available at <https://africacheck.org/factsheets/data-migrants-numbers/> (accessed 10 November 2017).

<sup>287</sup> Chiumia S 'Factsheet: How many international migrants are there in SA?' (website last updated on 31 July 2017) available at <https://africacheck.org/factsheets/data-migrants-numbers/> (accessed 10 November 2017).

<sup>288</sup> UNDESA, Population Division 'International Migration Report 2015: Highlights' (2016) (ST/ESA/SER.A/375) 29 available at [http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015\\_Highlights.pdf](http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf) (accessed 10 November 2017).

The White Paper on International Migration for South Africa (2017) of the Department of Home Affairs (DHA) claims that, as with the number of international migrants, the number of asylum seekers has declined since 2011, and puts the current figure at 62,000. Asylum applications from African states predominate, accounting for 71 per cent of all applications; 40 per cent of these are from the Southern African Development Community (SADC) region. Zimbabwe, Ethiopia and the DRC are the three countries with the highest number of asylum applicants. The White Paper also indicates that the highest number of irregular migrants arrive from the SADC region, particularly from Mozambique, Zimbabwe and Lesotho, which also make up 88 per cent of deportations.<sup>289</sup> Although the majority of migrants are from southern Africa, people from as far afield as East Africa and the Horn move irregularly to South Africa by land, air and sea.<sup>290</sup> The DHA asserts that the high rate of irregular migration imposes the financial burden of identifying, detaining and deporting them.<sup>291</sup>

In the context of child migration, the 2016 Community Census, which was conducted to fill the gap and update the main census data, shows that among the estimated 1.6 million people in the international migrant population, 175,709 are children under the age of 19. Of them, about 33.8 per cent (59,467) are adolescents between the ages of 15-19.<sup>292</sup> This figure may not inform the actual number of migrant children, as the overall 2016 census estimate of international migrants in South Africa is less than half the UNDESA estimates. Furthermore, the available migration data are not disaggregated by age and sex.

Most sources of child migrant data in South Africa are assessment and surveys conducted by non-governmental organisations (NGOs) and academic and research institutions. In an assessment of foreign children conducted in child and youth care centres (CYCCs) in Gauteng, Limpopo and Western Cape provinces, about half (47 per cent) of the children were between the ages of 11-18, among which more than 25 per cent were adolescents between 16-18 years.<sup>293</sup> The majority of these children, according to the assessment, came from Zimbabwe and the DRC.<sup>294</sup> Those in Limpopo – contrary to what was found in Gauteng and Western Cape – had taken the

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<sup>289</sup> Department of Home Affairs 'White Paper on International Migration for South Africa' (July 2017) 27-29 available at <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> (accessed 10 November 2017)

<sup>290</sup> IOM and Save the Children 'In search of a better future: Experience of unaccompanied migrant children in Limpopo and Mpumalanga in South Africa' 6 available at [https://resourcecentre.savethechildren.net/node/10229/pdf/in\\_search\\_of\\_a\\_better\\_future.pdf](https://resourcecentre.savethechildren.net/node/10229/pdf/in_search_of_a_better_future.pdf) (accessed 17 November 2017).

<sup>291</sup> Department of Home Affairs 'White Paper on International Migration for South Africa' (July 2017) 29-30.

<sup>292</sup> Statistics South Africa 'Community Survey 2016 25; Golden L 'Do 'vast numbers' of refugee and migrant children rely on SA social services?' (Website published on 18th August 2016) available at <https://africacheck.org/reports/refugee-migrant-children-social-services/> (accessed 10 November 2017).

<sup>293</sup> Scalibrini Center Cape Town 'Foreign Children in Care: South Africa' A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces Of South Africa (July 2019) 12.

<sup>294</sup> Scalibrini Center Cape Town (2019) 12.



decision to migrate by themselves, accounting for 72 per cent of the children. Unsurprisingly, these children were unaccompanied minors.<sup>295</sup>

Of all the children surveyed, only 29 per cent migrated to South Africa due to conflict, war and persecution in the country of origin,<sup>296</sup> which makes the remaining 71 per cent unqualified for asylum and refugee status in terms of the prevailing international and domestic laws. Forty-one per cent of migrated in search for work and 34 per cent in search of a better education.<sup>297</sup> In Limpopo, which comprised the majority of unaccompanied children, 93 per cent of the children migrated in search of economic opportunities and better education.<sup>298</sup> The records in Gauteng and Limpopo show that 90 per cent entered South Africa irregularly. In Limpopo, all the children entered South Africa irregularly.<sup>299</sup>

An assessment in the Western Cape indicates that unaccompanied and separated migrant children came from 14 African countries. Most were from the DRC; significant numbers of others hailed from Burundi, Rwanda, and Zimbabwe.<sup>300</sup> In another study, conducted in four SADC countries including South Africa's Gauteng and Limpopo provinces, it was found that the age range for unaccompanied and separated children was between 11 and 21, with the majority being 14 years and older. CYCCs allow children to stay until they are 21 years of age if they have to finish school.<sup>301</sup> In terms of country of origin, Zimbabwe heads the list, followed by Mozambique, the DRC and Uganda.<sup>302</sup> Furthermore, almost half of the study participants stated that they decided to migrate to South Africa by themselves. In order of incidence, the reasons for their migration were seeking better education opportunities, better work opportunities, and family reunification or joining family members in South Africa.<sup>303</sup> Adolescents also migrate to South Africa due to lack of basic needs in their home country, such as food due to chronic poverty or the death of parents.<sup>304</sup> For children from countries with political instability such as the DRC, Rwanda and

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<sup>295</sup> Scalibrini Center Cape Town (2019) 17.

<sup>296</sup> Scalibrini Center Cape Town (2019) 17.

<sup>297</sup> Scalibrini Center Cape Town (2019) 17.

<sup>298</sup> Scalibrini Center Cape Town (2019) 17.

<sup>299</sup> Scalibrini Center Cape Town (2019) 20.

<sup>300</sup> Sloth-Nielsen J & Ackermann M 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – A Socio-Legal Study' (2016) 19 *PER/PELJ* 13.

<sup>301</sup> The IOM 'Study on Unaccompanied Migrant children in Mozambique South Africa, Zambia and Zimbabwe' (2017) 34.

<sup>302</sup> The IOM 'Study on Unaccompanied Migrant children in Mozambique South Africa, Zambia and Zimbabwe' (2017) 34-5; Hillier L 'Children on the move Protecting unaccompanied migrant children in South Africa and the region' (2007) A report by Save the Children UK 11 available at <https://resourcecentre.savethechildren.net/node/2665/pdf/2665.pdf> (accessed 17 November 2017)

<sup>303</sup> The IOM 'Study on Unaccompanied Migrant children in Mozambique South Africa, Zambia and Zimbabwe' (2017) 40.

<sup>304</sup> Palmary I 'For better implementation of migrant children's rights in South Africa (2009) UNICEF 34 available at [https://www.unicef.org/southafrica/SAF\\_resources\\_migrantchild1.pdf](https://www.unicef.org/southafrica/SAF_resources_migrantchild1.pdf) (accessed 17 November 2017); Skelton A 'Migration and repatriation laws and procedures for unaccompanied migrant children in Mozambique, South Africa and Zimbabwe (2013) Save the Children 5.

Burundi, the main driving factor over and above socio-economic reasons is in search for a safe haven from conflict and instability.<sup>305</sup>

In another assessment, conducted in Limpopo and Mpumalanga, most of the adolescent migrants said they migrated in search of better livelihood opportunities and education. These children migrated alone by their own volition, which contradicts the notion that unaccompanied migrant children are separated from parents in the course of their journey. Owing to the assumption that unaccompanied migrant children are separated from parents or victims of trafficking,<sup>306</sup> the legal and policy response has been family reunification. However, these independent adolescent migrants that are active participants in the migration process, from decision-making to reaching their target destination, know the whereabouts of their parents, have clear life goals, and have neither the need nor interest to be returned to and reunited with their parents.<sup>307</sup>

Children from neighbouring countries, particularly from Zimbabwe, revealed a pattern of entering and leaving South Africa several times. It was also found that these children that are familiar with the migration route seem to know each other and have been communicating and networking among one another.<sup>308</sup> This also raised the question of whether there exist adolescent-directed migration networks that facilitate independent adolescent migration from Zimbabwe and other neighbouring countries to South Africa.

As discussed above, the major driving factors in child migration are social, economic, political, structural and individual in nature. The general push factors in migration also apply to child migration, with some child-specific variation. The factors that promote child migration in Africa include poverty, searching for better economic opportunity and work, searching for quality education, moving to help, moving to survive and stay alive, and societal values and practices. Poverty is a cross-cutting factor that contributes to the other factors. All the factors in turn contribute to the evolution of migration as a positive social value and widespread practice. The practice of and positive attitude towards migration has been influencing children in general and adolescents in particular to view migration with enthusiasm and see it as good for their future prospects.

Consequently, the migration of adolescent migrants can be expected to keep rising, which, inter alia, calls for a tailor-made legal approach to dealing with their interests and rights. The general trend of adolescent migration in African countries is also applicable to Ethiopia as a source country in that the factors pushing Ethiopian adolescents to move across borders to reach South Africa are the same as those listed above. Children move to Ethiopia as a destination country

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<sup>305</sup> Hillier L (2007) 11; Chimbala-Kalenga R & Meda L ‘I Will Paddle My Own Canoe’: Experiences of Unaccompanied Refugee Children’ (2016) 54 *J Hum Ecol* (Journal of Human Ecology) 205-06.

<sup>306</sup> Yaqub S (2009) 1.

<sup>307</sup> IOM and Save the Children ‘In search of a better future: Experience of unaccompanied migrant children in Limpopo and Mpumalanga in South Africa’ 15.

<sup>308</sup> The IOM ‘Study on Unaccompanied Migrant Children in Mozambique South Africa, Zambia and Zimbabwe’ (2017) 40-1.

from neighbouring countries with instability, violence and war, mostly in search of a safe haven. On the other hand, South Africa is one of the most attractive migrant destination countries in Africa, particularly for children and adolescents. The pull factors to South African are its relatively better economy, social services and perceived opportunities for providing a livelihood and work, especially in the informal sector.

## 2.3 Theories of Children's Rights

Children's rights as they appear in binding international standards such as the CRC did not come about as a singular and consolidated notion, but rather through fragmented 'child saving movements' protecting children from danger, exploitation and abuse caused by industrialisation in the 19<sup>th</sup> century.<sup>309</sup> Hanson asserts there is no universally accepted agreement on the 'extent, priorities or even precise content of children's rights', proposing that there are four schools of thoughts on them: paternalism, liberalism, welfarism and 'emancipation'. Others classify theories of children into two major categories: 'protectionist' and 'liberationist'. Hanson's 'welfare' and 'emancipation' schools are founded on contemporary developments in children's issues and the evolution of international and regional child-rights norms and principles.<sup>310</sup>

Under paternalism, children's rights are to be protected and cared for by others, that is, parents, relatives, other adults, and institutions. This notion stems from the view that children are 'dependents, who are generally incompetent to make rational decisions'.<sup>311</sup> Children are not only protected from others' ill treatment but also from their own, as they lack sufficient understating of what is in their current and future best interests.<sup>312</sup> Consequently, 'what is in their best interest is completely decided by caring and loving adults who offer their help and exercise their authority over children'.<sup>313</sup> Rights and protection bestowed on children, therefore, are defined by and extended at the whim of parents and caregivers.<sup>314</sup> This notion may be an extension of the early Roman legal maxim of *patria potesta* – parents' absolute power over their children. Children become free from such complete domination by parents when they reach adulthood. The major exponent of this idea of parental domination is Thomas Hobbes.<sup>315</sup> The paternalism school, according to some critics, is 'not an effort to dignify and liberate youth, but a punitive,

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<sup>309</sup> Freeman M 'The Limits of Children's Rights' in Freeman M and Veerman P (ed) *The Ideologies of Children's Rights* (1992) 30; Hanson K 'Schools of Thoughts in Children's Rights' in Liebel M (ed) *Children's Rights from Below: Cross-Cultural Perspectives* (2012) 64.

<sup>310</sup> Breen C *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (2006) 8.

<sup>311</sup> Hanson K (2012) 73.

<sup>312</sup> Hanson K (2012) 73; Breen C (2006) 3-4.

<sup>313</sup> Hanson K (2012) (2012) 73.

<sup>314</sup> Hanson K (2012) 73-4; see also Cheney K E 'Malik and his three mothers: AIDS orphans' survival strategies and how children's rights translations hinder them' in Hanson K & Nieuwenhuys O (eds) *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (2013) 165-70.

<sup>315</sup> Archard D *Children Rights and Childhood* 2 ed (2004) 8.

romantic and intrusive effort to control the lives of lower-class urban adolescents and to maintain their dependent status'.<sup>316</sup>

The conservative, paternalistic approach to child rights may be contrary to the essence of child rights, especially the norms that aim to capacitate children by realising their evolving capacities, encouraging them to express their views, and considering their best interests in all decisions regarding their lives.<sup>317</sup> The liberal and progressive paternalistic approach, on the other hand, accepts the CRC as a guiding normative framework, especially so the universal moral obligation of every person not to harm children.<sup>318</sup> Nevertheless, the participation right – which is directly related to agency and autonomy – is rather narrow in comparison to the CRC's protection dimension: the protection of children from harm is extended to them at the price of sacrificing their right to individual autonomy.<sup>319</sup>

Indeed, there are arguments that assert that international and regional norms are informed by paternalistic notions and objectives, as the CRC and ACRWC were adopted on the assumption that children lack maturity and that there is hence a need to protect and provide for them.<sup>320</sup> Similarly, Freeman asserts that the principle of the best interests of the child under the CRC is anchored in a paternalistic approach, as its crafting under article 3(1) of the CRC fails to include child participation.<sup>321</sup>

The 'liberationist' school of child rights takes a contrary position to the paternalism school by regarding children as 'independent actual citizens ... who are competent to make well-founded, rational decisions [and] deserving the right to autonomy and full participation in society the same way as adults'.<sup>322</sup> The central notion of this approach is *de jure* equality of children with adults.<sup>323</sup> Such a view started to emerge in the 1970s with Richard Farson and John Holt's writings on children's issues.<sup>324</sup> This child liberationist movement saw itself as part of a wider effort to free oppressed groups in the West, such as women and racial minorities.<sup>325</sup> Proponents of this school assert that the dichotomy between child and adult is based on arbitrary ideological perceptions of children as 'childish'.<sup>326</sup> They assert that the law should extend the same

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<sup>316</sup> Hanson K (2012) 74.

<sup>317</sup> Archard D (2004) 60-1.

<sup>318</sup> Thomas W Simon calls the CRC the 'United Nations Convention on the Wrongs to the Child' due to its provisions related to the protection of children from harm and the corresponding obligation on others to refrain from inflicting harm and to extend protection; see Hanson K (2012) 74.

<sup>319</sup> Hanson K (2012) 74.

<sup>320</sup> Archard D (2004) 60-1.; see CRC Preamble para 9, and ACRWC Preamble para 6.

<sup>321</sup> Freeman M 'Article 3. The Best Interests of the Child' in Alen A, Vande Lanotte J, Verhellen E, et al. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 51.

<sup>322</sup> Hanson K (2012) 74.

<sup>323</sup> Hanson K (2012) 75.

<sup>324</sup> Archard D (2004) 70.

<sup>325</sup> Archard D (2004) 70.

<sup>326</sup> Hanson K (2012) 75; Archard D (2004) 70

protections to children as to adults.<sup>327</sup> Thanks to the liberationist approach, new issues that were not part of the child-rights regime received attention and support, such as children's right to vote, work, own property, travel, and take control of their own sexual lives.<sup>328</sup> The child liberationist school is criticised for its unrealistic and rhetorical assertions, crude categorisation of childhood as a single condition, and proposal to liberate children of all ages by treating them as the equals of adults.<sup>329</sup>

Another school of child rights is the 'welfare approach', which asserts that children are in the process of development – 'becoming' – and when they show the capability, they should be given the role they deserve – 'being'. Proponents of this approach accept three dimensions of rights in order of importance: protection rights, provision rights, and participation rights. Furthermore, to balance competing claims within the right's framework, child-specific rights take primacy over other rights.<sup>330</sup> Freeman states that welfare rights denote that children have interests that should be protected and promoted.<sup>331</sup>

This 'welfare approach' may be linked to Locke's approach to parenthood.<sup>332</sup> Locke asserts that, as children are vulnerable, weak, unable to provide for their own livelihood, and lacking reason, parents have justifiable power over them, which also entails the duty to care for, provide for, and protect them.<sup>333</sup> Locke recognised that, as children grow, their knowledge and reason increase, which dictates that they be treated according to their growing capacities and capabilities.<sup>334</sup> This 'welfare approach' informs the work of moral duty-bearers such as international organisations and NGOs in their interventions and initiatives in aid of children.<sup>335</sup>

The final approach to child rights is the 'emancipation' school, which is the opposite of the 'welfare approach' in terms of its order of elements: it gives primacy to 'being', and if that is not demonstrated, then children are considered as 'becoming'. In other words, children are deemed 'competent' unless they are proven to the contrary. In terms of order of the set of rights, the emancipatory approach gives priority to participation rights, followed by provision and protection rights. This school starts with the assumption of children's equal rights and in specific cases also recognises special children's rights that have an emancipatory effect.<sup>336</sup>

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<sup>327</sup> Archard D (2004) 71.

<sup>328</sup> Hanson K (2012) 75; Breen C (2006) 6.

<sup>329</sup> Archard D (2004) 74-5.

<sup>330</sup> Hanson K (2012) 76.

<sup>331</sup> Breen C (2006) 7

<sup>332</sup> Archard D (2004) 8. Locke's view of the role and power of parents over their children represents a liberal approach to the absolute parental power advocated by Hobbes. Locke specifically rejects the view that natural parents enjoy rights over their children on the grounds that they own them.

<sup>333</sup> Archard D (2004) 9.

<sup>334</sup> Archard D (2004) 4.

<sup>335</sup> Hanson K (2012) 76.

<sup>336</sup> Hanson K (2012) 77.

The global movement for working children is based on such an emancipatory approach, one that asserts, among other things, working children's distinct competencies and 'right to work in dignity'.<sup>337</sup> In this regard, authors such as Hanson argue that the international legislative framework providing for children in dire situations (such as children in armed conflicts) is anchored in protectionist than emancipatory notions.<sup>338</sup> Similarly, Archard argues that the CRC and ACRWC are based on paternalistic ideals, as seen in their preambles.<sup>339</sup>

Against this, it may be argued that although protectionist and welfare theories inform the CRC and ACRWC, the emancipation approach is also reflected in them, for instance in rights and principles such as those concerning participation and the best interests of the child. Furthermore, for children in their early stages of development, the protectionist and welfare approaches should indeed receive primacy. However, for older children, that is, adolescents between the ages of 15-18 years, unless proven otherwise, their rights to agency and emancipation should prevail over competing claims.

In the words of Freeman, the CRC recognises 'the child both as beings and as becomings'.<sup>340</sup> This stems from the fact that the CRC incorporates the best-interests principle and protection rights, which are related to the child's 'becoming', and the principle of the right to express views and be heard, which relates to the child's 'being'.<sup>341</sup> The agency of children refers to 'the power to participate, influence and control over events of children's lives and the lives of those around them and the society in which they live'.<sup>342</sup> This notion should not be confused with the full autonomy of children, which would suggest that children have, or should have, full independence akin to adults.<sup>343</sup>

### 2.3.1 Conceptions of Childhood-Adulthood

Childhood and adulthood are different but related notions that need to be elucidated. The concept of 'childhood' is intrinsically associated with adulthood: the end of childhood is necessarily the beginning of adulthood. In terms of formal and informal capacities, capabilities, roles and responsibilities, the one is arguably the opposite of the other. Their different construction is the result of differences in ideology, culture, and conceptual and philosophical approaches.

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<sup>337</sup> Hanson K (2012) 77.

<sup>338</sup> Hanson K 'International Children's Rights and Armed Conflict' (2011) 5 *HR & ILD* 62.

<sup>339</sup> Archard D (2004) 60-61.; see CRC Preamble para 9, and ACRWC Preamble para 6.

<sup>340</sup> Freeman M 'The Value and Values of Children's Rights' in Invernizzi A & Williams J (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 27.

<sup>341</sup> Freeman M (2011) 27.

<sup>342</sup> Abebe T 'Interdependent rights and agency: the role of children in collective livelihood strategies in rural Ethiopia' in Hanson K & Nieuwenhuys O (eds) *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (2013) 75

<sup>343</sup> Abebe T (2013) 75.

Furthermore, 'childhood and adulthood are not neutral or natural but rather part of the struggle for influence and authority within almost every society'.<sup>344</sup>

Legalistic notions of childhood are linked to the legal definition of a child – that is, childhood is the time in an individual's life before the 18<sup>th</sup> birthday, in accordance with international and regional child-rights norms.<sup>345</sup> Hence, the legalistic approach delineates childhood and adulthood based on chronological age. However, while some cultures, particularly in the West, may link childhood with chronological age, as defined by legal norms, other cultures, such as in Africa, Asia and Latin America, depart from this and rely on competency checks and rites of passage to delineate between childhood and adulthood.

In early philosophical accounts, John Locke refers to children's capacity. For Locke, children lack the physical and mental capacity and competence of adults. Accordingly, for Locke, childhood is a time of preparation for adulthood.<sup>346</sup> Locke asserts that children's capabilities increase with age: the older the child, the more capable he or she becomes as his or her broadens in experience and rationality. He thus argues that the treatment accorded to a child should be commensurate with his or her evolving growing.<sup>347</sup>

Philippe Aries questioned the popular 'one-size-fits-all' notion of the 'natural' construction of childhood for the first time in the 1960s and noted the emergence of the 'concept of childhood'.<sup>348</sup> For a long time children had been considered 'unfinished' humans who were in the process of completion. Such views perceive childhood development as a solely 'natural' process, as opposed to one involving social interactions and phenomena.<sup>349</sup> Another important philosopher, one often considered the father of modern ideas of childhood, is Jean-Jacques Rousseau, who argued that a child should be recognised as a child. Rousseau opposed views that 'seek the man in the child [and held that] the man must be considered in the man, and the child in the child'.<sup>350</sup> Rousseau further stressed the 'moral innocence' of a child, and argued that a child deserves to freely express himself or herself.<sup>351</sup>

In a nutshell, schools of childhood studies can be categorised into historical,<sup>352</sup> sociological, developmental-psychological, and universalist perspectives. There are also emergent theories of

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<sup>344</sup> Christiansen C, Utas M & Vigh H E 'Introduction: Navigating Youth, Generating Adulthood Social Becoming in an African Context' in Christiansen C, Utas M & Vigh H E (eds) *Navigating Youth, Generating Adulthood Social Becoming in an African Context* (2006) 11.

<sup>345</sup> CRC art 1 and ACRWC art 2.

<sup>346</sup> Archard D (2004) 3; Hanson K (2012) 66.

<sup>347</sup> Archard D (2004) 4.

<sup>348</sup> Hanson K (2012) 66; Oswell D (2004) 19.

<sup>349</sup> Hanson K (2012) 66

<sup>350</sup> Archard D (2004) 30.

<sup>351</sup> Archard D (2004) 30.

<sup>352</sup> Gittins D 'The Historical Construction of Childhood' in Mary Jane Kehily (ed.) *Introduction to Childhood Studies* 2 ed (2009) 36-48.

childhood in the age of media and technology that inquire into how childhood is shaped by technological advances such as the internet, social media and other digital interactivity.<sup>353</sup>

For sociologists, childhood is ‘a social construction’ rather than what is traditionally understood as a ‘natural’ phenomenon.<sup>354</sup> For childhood sociologists, ‘children are human beings not human becoming’.<sup>355</sup> The renowned childhood sociologist Priscilla Alderson asserts that discussions of childhood should include the needs and interests of all children of different ages and developmental stages, such as young children, infants, babies, and older children or adolescents.<sup>356</sup> This school holds that the developmental transition of a child into adulthood is the product of cultural and social forces.<sup>357</sup>

The developmental-psychology perspective is critical of the social construction of childhood and holds that development is the product of *both* nature and environment – be it social or physical – and the ability of nature to adapt to environment. Jean Piaget, whose works focused on child leaning and thinking, is among the foremost proponents of this idea.<sup>358</sup> For Piaget, the natural development account, which entails the amenities to rationalise such as intelligence and an intellectual ability, is not acquired from the environment but from nature. The critiques of Piaget’s approach are based on the applicability and validity of universal parameters to test intellect and rationality.<sup>359</sup> An influential psychologist in the 1930s, Erik H Erikson, propounded theories based on the relationship between child development and social environment. He said child development in general is a continuous process and maturity is reached through achievements attained in each of the five developmental stages he proposed.<sup>360</sup> Erikson, under his fifth developmental stage, ‘identity and role confusion’, found that:

childhood and adolescence as part of a continuum of growth [...] the individual continued to develop through stages of young adulthood[...] where the primary task was developing a sense of commitment to caring for others as opposed to self-absorption and stagnation [...].<sup>361</sup>

In general, Erikson’s model underlines the interplay between the ‘physical, intellectual, and moral development’ processes that humans pass through to reach maturity.<sup>362</sup>

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<sup>353</sup> Buckingham D ‘New media, new childhoods? Children’s Changing cultural and environment in the age of digital technologies’ Mary Jane Kehily (ed.) *Introduction to Childhood Studies* 2 ed (2009) 124-38; Woodhouse B B *HIDDEN in PLAIN SIGHT: The tragedy of children’s rights from Ben Franklin to Lionel Tate* (2008) 15-6.

<sup>354</sup> Oswell D *The Agency of Children: From Family to Global Human Rights* (2013) 9-10; Jenks C ‘Constructing Childhood Sociologically in Mary Jane Kehily (ed.) *Introduction to Childhood Studies* 2 ed (2009) 93-5.

<sup>355</sup> Hanson K (2012) 66.

<sup>356</sup> Oswell D (2013) 37.

<sup>357</sup> Archard D (2004) 42.

<sup>358</sup> Walkerdine V ‘Developmental Psychology and the study of Childhood in Mary Jane Kehily (ed.) *Introduction to Childhood Studies* 2 ed (2009) 116-117.

<sup>359</sup> Walkerdine V (2009) 116-117; Woodhouse B B (2008) 18-19.

<sup>360</sup> Woodhouse B B (2008) 19.

<sup>361</sup> Woodhouse B B (2008) 20-1.

<sup>362</sup> Woodhouse B B (2008) 20-1.



There are also other perspectives, such as universalist perspectives, that involve using age-based categorisation under the child-rights standards to define childhood and their needs.<sup>363</sup> In this regard, as international and regional child-rights standards define a child as a person below 18 years, childhood is therefore the time before that age.<sup>364</sup> The characteristics of childhood can be inferred from the rights enshrined under these child-rights standards, such as enjoying basic needs, going to school and learning, rest and recreation, survival and development.

Another dimension of this normative approach to childhood is its recognition of children's right to express views, which in principle entails recognition of the agency of children in influencing decisions that impact on their lives. In this regard, Hogan in 2005 states that the CRC places 'an unprecedented value [on] the subjective worlds of children and ... their right to be consulted and taken seriously'.<sup>365</sup> Critics of age-based classifications of childhood and adulthood argue that in some societies, individuals under the age of 18 years assume roles and duties reserved for adults; here, the transition from childhood to adulthood is marked not just by chronological age but by factors such as class, culture, race and gender.<sup>366</sup>

One dilemma in the discourse on childhood is the issue of the different developmental stages of childhood (infancy, pre-and-post adolescence) and their effect on the childhood and adulthood dichotomy. In general, the notion of childhood can be understood in two ways. First, it may be referred to simply as a stage in human development from birth to adulthood. Alternatively, it may refer to different stages with different developmental milestones and criteria regarding the boundaries of childhood and adulthood.<sup>367</sup> Early Roman law under Justinian identified three different periods of childhood: *infantia*, or early childhood; *tutela impubes*, the stage prior to puberty in which children require tutoring; and *cura minoris*, or post-puberty before reaching majority, during which children require a guardian.<sup>368</sup>

In the current context, the CRC 'sets about a global standard on child rights, thus ignoring the obvious fact that many different childhoods exist in the world'.<sup>369</sup> The ACRWC does not depart from the aforementioned limitation, as it is a copy of the CRC in terms of normative standards as well as approach in interpretation.<sup>370</sup> As Cantwell asserts, the international child-rights standards, with their blunt definition of a child as anyone under the age of 18 years, 'consciously or not ...

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<sup>363</sup> Hunner-Kreisel C and Bohne S 'Childhood, Youth and Migration: Connecting Global and Local Perspectives – Introduction' in Christine Hunner-Kreisel C and Bohne S (eds.) *Childhood, Youth and Migration: Connecting Global and Local Perspectives* (2016) 3.

<sup>364</sup> CRC art 1 and ACRWC art 2

<sup>365</sup> Morrow V 'Understanding children and childhood' (2011) *Centre for Children and Young People: Background Briefing Series*, no. 1, Centre for Children and Young People, Southern Cross University, Lismore, NSW, Australia 8.

<sup>366</sup> Woodhouse B B (2008) 26; Christiansen C, Utas M & Vigh H E (2006) 11.

<sup>367</sup> Archard D (2004) 34.

<sup>368</sup> Archard D (2004) 34.

<sup>369</sup> Freeman M 'The Value and Values of Children's Rights' in Invernizzi A & Williams J (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 27.

<sup>370</sup> Freeman M (2011) 27.

infantilise older CRC rights-holders'.<sup>371</sup> Even during the drafting process, the term 'child' and its limited scope to include older children such as adolescents was raised as a concern, especially by non-Anglophone countries.<sup>372</sup> Cantwell asserts that 'young people of 16 and 17 were – and still are – feeling forced to refer to themselves, often rather sheepishly, as children when speaking in public debate, for fear of somehow compromising their status under the CRC'.<sup>373</sup> Hence, it may be held that, contrary to the essence of the CRC, which is aimed at bestowing rights to all ages under 18 years, adolescents become 'invisible in the human rights' spectrum.<sup>374</sup>

In African tradition, the transition from childhood to adulthood is not marked by chronological age set by legal standards but cultural practices such as rites of passage or initiation ceremonies which celebrate the end of childhood and beginning of adulthood. Adulthood-marker ceremonies include 'permission to marry, departure from the parental home or assumption of the responsibility to provide for oneself'.<sup>375</sup> For instance, Vigh's ethnographic research found that in African countries, passing to adulthood is not chronologically defined but related to intergenerational conceptions of society as well as the individual's quest to make use of opportunities and build social relevance and connections.<sup>376</sup> In general, as noted by Archard, 'any conception of childhood will vary according to the ways in which its boundaries are set, its dimensions ordered and its divisions managed'.<sup>377</sup>

Increasing in age does not mean an individual necessarily acquires adult-like qualities and capabilities. As stated by Archard, 'adulthood [...] is not a plateau of age but the asymptote of life's developmental curve [...] and [...] there is no guarantee that ageing automatically brings with it maturity as understood normatively'.<sup>378</sup> He further asserts that 'adulthood is to be thought of as a state of mind rather than a question of age'.<sup>379</sup> This assertion challenges the arbitrary categorisation of adolescents as children that are in need of protection by an adult.

With regard to adolescents, researchers are in agreement that they demonstrate more advanced cognitive and intellectual abilities than younger groups of children. A number of them note:

Adolescents are increasingly able to cope with abstractions and to distinguish between the real and concrete and the abstract or possible. They can test hypotheses and think and plan about the future. They become aware of their own thought processes and become self-reflective, even introspective. Their thinking is multidimensional, with a greater use of relative, rather than absolute, concepts. These findings correlate

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<sup>371</sup> Cantwell N 'Are Children's Rights still Human?' in Invernizzi A & Williams J (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 43.

<sup>372</sup> Cantwell N (2011) 43.

<sup>373</sup> Cantwell N (2011) 43.

<sup>374</sup> Cantwell N (2011) 46.

<sup>375</sup> Archard D (2004) 32.

<sup>376</sup> Vigh H E 'Social Death and Violent Life Chances' in Christiansen C, Utas M & Vigh H E (eds) *Navigating Youth, Generating Adulthood Social Becoming in an African Context* (2006) 56.

<sup>377</sup> Archard D (2004) 35.

<sup>378</sup> Archard D (2004) 45.

<sup>379</sup> Archard D (2004) 7.

with research on the human brain which shows that the frontal lobes of the brain undergo more change in adolescence than in any other stage of life.<sup>380</sup>

As highlighted by the above discussion, childhood is not universally established but developed based on individual, familial, societal, cultural and political factors. In Africa, apart from the chronological delineation of childhood from adulthood that is employed in the formal setting, other markers such as initiations and rites of passage are used in the family and community context. Furthermore, for infants and younger children, common attributes and needs may easily be established, but for adolescents, their needs and interests – as well as what adolescence even means – vary widely depending on their personal and social contexts.

### 2.3.2 Perspectives on the Agency of Children

The issue of child agency is one where there is little consensus among academic disciplines, albeit that from a legal perspective matters are usually simple: what the law provides as a marker of agency – that is, age – can be applied straightforwardly in formal and legal affairs. A definition of child agency asserts that it is

an ability to navigate the contexts and positions of their life worlds, fulfilling many economic, social and cultural expectations, while simultaneously charting individual and/or collective choice and possibilities for their daily and future lives.<sup>381</sup>

Such abilities are influenced by the child's character, interpersonal relations and interactions, family and community. Developmental psychological perspectives regard children not as 'passive, dependent, waiting-to-be-adults in need of protection but instead as people, that is, as active, competent social beings who can participate in matters affecting their lives'.<sup>382</sup> Sociological perspectives on child agency build on the notion of childhood as a social construct.<sup>383</sup> The social structure theory of agency highlights the conflict between 'becoming' and 'being' and the place and role of children in the social structure.<sup>384</sup> The partial or situated theory of agency, on the other hand, involves situational agency models that relate to 'peer culture', 'social competence', 'hegemonic negotiation' and 'tactical agency'. The 'peer-culture' model refers to the agency of children demonstrated within children's own social groups and interactions with their peers. In such processes, children learn to express their needs, voice their concerns and strive for visibility. Nevertheless, the child's world and structure is not immune from the influence of adults.<sup>385</sup> The 'social competence' model refers to the agency acquired by accomplishments and by proving oneself, not by just claiming agency as an entitlement.<sup>386</sup> The

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<sup>380</sup> Fortin J *Children's Rights and the Developing Law* 3 ed (2009) 83.

<sup>381</sup> Abebe T (2013) 75.

<sup>382</sup> Abebe T (2013) 74.

<sup>383</sup> Oswell D (2013) 9-10.

<sup>384</sup> Oswell D (2013) 38-48.

<sup>385</sup> Oswell D (2013) 51-3

<sup>386</sup> Oswell D (2013) 53-5

'hegemonic negotiation' model refers to agency defined by 'collective settlement' among individuals – both adults and young persons – within social, political and cultural structures. In other words, it is defined by the dominant voice in the social and political structure: the adult's voice.<sup>387</sup>

The other model under the partial or situated theory, one relevant to the focus of this research, is 'tactical agency', which refers to the exercise of agency to cope with a difficult circumstance.<sup>388</sup> The next section discusses this notion in detail.

### 2.3.2.1 Tactical Agency

The notion of 'tactical agency' came to the academic discourse through Honwana in the context of child soldiers. She combines Anthony Giddens's concept of agency as intrinsically linked with power with Michel de Certeau's philosophical view of tactics, to arrive at the notion of 'a calculated action taken by someone who lacks autonomy and who is acting in the physical or social space which is not their own'.<sup>389</sup> Honwana argues that child soldiers who passed through armed conflict 'exercised tactical agency to cope with the concrete immediate conditions of their lives in order to maximise the circumstances created by their violent military environment'.<sup>390</sup> Hence, on this basis, it can be held that children passing through such a horrific situation have developed a different form of agency that does not fit inside existing models that see only the vulnerability and protection needs of such children.

Such assertion also came about with other justifications such as adolescent soldiers' capabilities as well as children's voluntary requests for recruitment that are not solely associated with pushing factors such lack of means, lack of awareness, or manipulation, but due to their informed and clear plan to fight for something that they believe in, or to gain some of the social and economic benefit that may arise out of armed conflict.<sup>391</sup>

The notion of 'tactical agency' ties in with liberationist schools of child rights because it gives a special form of agency to children who have passed through difficult circumstances, a form that puts them on par with adults. In general, the child liberationists and proponents of child agency have met with fierce criticism. For instance, Lancy argues that the liberationists are advocating a political agenda in the guise of academic scholarship and that their findings are based on limited or misleading interpretation of children's expressions.<sup>392</sup> Further, Lancy asserts that such

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<sup>387</sup> Oswell D (2013) 55-7.

<sup>388</sup> Oswell D (2013) 58.

<sup>389</sup> Honwana A 'Children in war: reintegrating child soldiers' (2009) *IDS Bulletin Vol 40* Institute of Development Studies 65-6, available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1759-5436.2009.00010.x> (15 January 2018).

<sup>390</sup> Honwana A (2009) 66.

<sup>391</sup> Vandenhole W, Parmentier S and Derlyn I 'Editorial introduction-International law on children and armed conflict: the interface between various normative frameworks' (2011) 5 *HR & ILD* 10.

<sup>392</sup> Lancy D F 'Unmasking Children's Agency' (2012) *SSWA Faculty Publications Paper 277* 2-4, available at [http://digitalcommons.usu.edu/sswa\\_facpubs/277](http://digitalcommons.usu.edu/sswa_facpubs/277) (accessed 10 February 2018).

research ignores the cultural reality of parental roles in the exercise of children's agency, and that such movements are 'counter-productive' because they can go against children's own well-being and learning.<sup>393</sup>

The purpose of this discussion, though, is not to talk about child soldiers per se, but to elucidate the notion of 'tactical agency' and contextualise it within the independent migration of adolescents, who have similar capabilities and migrate voluntarily, not through manipulation but through having a clear understanding of what dangers await them and what they wish to achieve from migration. If the 'tactical agency' of adolescent independent migrants is acknowledged, then it may assist in crafting a well-informed legislative, policy and practical intervention to efficiently and effectively address the interests and needs of independent adolescent migrants.

Karl Hanson questions how child participation as well as child agency should be perceived in the case of those affairs that are deemed 'negative', such as 'child labour, child marriage, criminal responsibility, violent criminal struggle', or independent child migration vis-à-vis the so-called positive theme, to which the society even encourages for utmost participation and early age autonomy of children. Hanson further asserts that international human rights standards provide that persons younger than 18 years or under the minimum age threshold in each standard are in principle incapable of exercising agency.<sup>394</sup> Hence, there is a huge gap between what the law is (*lex lata*), on one hand, and what the reality is as – defined by the children themselves – and what the law ought to be (*lex ferenda*), on the other.

In this regard, it is submitted that if 'tactical agency' is transformed and contextualised to incorporate both special form of agency and distinct rights, then it can serve the purpose of both capacitating children in difficult circumstances and extending a special form of child rights by prioritising their needs and circumstances. Such transformation would be rooted in the emancipatory school of child rights, and based on a progressive understanding of the CRC.

## 2.4 Conclusion

The second chapter discussed foundational notions and concepts such as theories on the cause and perpetuation of migration, the different categorisations of child migration, and the causes of child and adolescent migration among Africa countries, with a focus on Ethiopia and South Africa. It further discussed theories of child rights, childhood and child agency with the view to examining the interests and needs of independent adolescent migrants.

Although there are not adequate theories for analysing child migration in general and adolescent independent migration in particular, ethnographic research has pinpointed major driving factors for child migration. Generally, these factors relate to the social, economic, political, structural

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<sup>393</sup> Lancy D F (2012) 5, 9-12

<sup>394</sup> Hanson K 'International Children's Rights and Armed Conflict' (2011) 5 *HR & ILD* 60.

and individual circumstances of countries. The general push factors of migration that are applicable to adults – such as trans-boundary searches for employment opportunities and better income – could also be valid to child migration with some child-specific variation to take into account factors unique to child migration. The specific factors that promote child migration in Africa can be summarised as poverty, searching for better economic opportunity, searching for quality education, moving to help, to survive and stay alive, and culture. These factors are interlinked, as one factor may be the cause or effect of another. For instance, poverty may be central to all other factors, including the lack of hope for education, and the search for a better livelihood and other opportunities.

A central question is whether children choose to migrate as opposed to being pushed by external systematic, structural, familial, and societal forces. Another issue is that children respond differently to these factors. Some choose migration to another place as a solution to these problems, while others in similar circumstances choose to stay in their habitual residence or country. These individual choices, wishes, and interests ought to be recognised by law and practice. International and regional child-rights norms should be able to take into consideration such distinct interests when dealing with child migration issues.

One of the limitations of these theories is that they fail to conceptualise and incorporate the age dimensions of migration. Notably missing from the discussion are independent adolescent migrants between the ages of 15-18 years who travel across borders on their own initiative in search of better opportunities and stay in their destination country alone or without parents. Furthermore, this group of migrants is invisible in the general human rights as well as child-rights protection frameworks, normative standards, and interpretative guidelines. Independent adolescent migrants' peculiar interests, needs and capabilities are not adequately understood and addressed in such formal legal and policy frameworks.

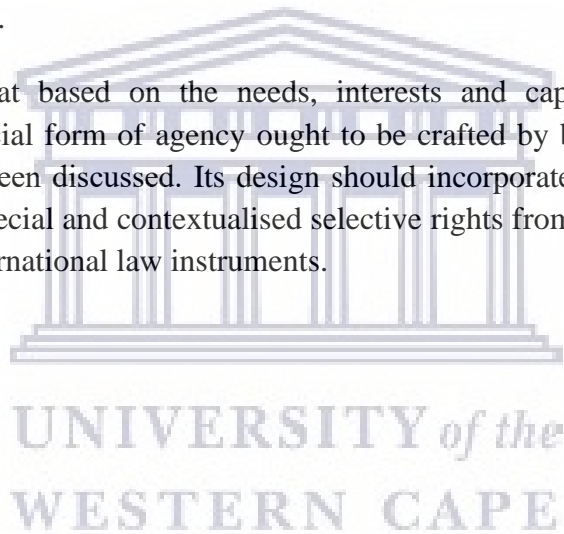
In general, approaches to child rights may be divided into those that focus on providing protection to children – the protectionist school – and those that focus on granting liberation and autonomy to children – the liberationist school. Based on the two core approaches, other views that take a middle ground, such as the welfare approach and emancipatory approach, have also been put forward. These concepts in one way or another have been reflected under international and regional normative standards.

The existence of such different ideas about child rights stems from, amongst other things, differences in conception of childhood child agency. As demonstrated by much empirical research, in Africa childhood and child agency are founded not on chronological age-markers and legalistic ideas but rather on societal norms and values, as well as individual demonstrations of capacity and other markers of competence. For instance, rites of passage are used to define childhood as well as grant agency and recognise maturity. What the term 'adolescence' means and what adolescents' needs and interests are will vary from one individual to the next.

The author is of the opinion that this mismatch of the reality on the ground with the law at international, regional and local levels has been affecting the effective implementation of the rights of children. Furthermore, the author argues that the classification of every person below 18 years as a child – with no or little cognisance of the needs, interests and wishes of different age groups (particularly of adolescents) and the universalisation of the interests of all children of the world without appreciating contextual variation – is what is behind the limited implementation of international and regional rights frameworks on children.

The author also argues that the emancipatory approach is recognised under the CRC and ACRWC in addition to protectionist and welfare approaches. The basis of this assertion is that the CRC and ACRWC recognise civil and political rights, as well as principles such as participation and the best interests of the child, which can be considered as markers of emancipatory tools for children. For older children, such as adolescents between the ages of 15-18 years, unless proven otherwise, their right to agency and emancipation should prevail over any other competing claims.

The author argues too that based on the needs, interests and capabilities of independent adolescent migrants, a special form of agency ought to be crafted by building on the notion of ‘tactical agency’ that has been discussed. Its design should incorporate granting special agency as well as recognition of special and contextualised selective rights from the CRC, ACRWC, and other human rights and international law instruments.



## **CHAPTER THREE: INTERNATIONAL AND AFRICAN REGIONAL NORMS AND PRINCIPLES ON THE RIGHT TO MOVEMENT AND FREELY CHOOSE A MEANS OF LIVELIHOOD IN THE CONTEXT OF INDEPENDENT ADOLESCENT MIGRATION**

### **INTRODUCTION**

International, regional and domestic laws that regulate independent child migration are anchored in three main approaches. These, according to Jacqueline Bhabha, are the corrective, regulatory, and protective approaches. The corrective approach entails using the conventional criminalisation modality, which dates back to migration legislation related to the slave trade of the 19<sup>th</sup> century. The current manifestation includes the criminalisation of traffickers under international conventions, which aims at punishing traffickers and protecting children from exploitative migration. The second approach, which focuses on a regulatory framework, is reflected in domestic and regional laws pertaining to migration. This approach adopts criteria for legal migration in general, including special formalities for children. In most cases, this approach is based on the notion that children of all ages lack the independent agency to migrate. The third approach is based on international human rights norms and principles focused on the protection of vulnerable groups such as children, victims of the worst forms of child labour, migrant workers and their families, refugees and stateless persons.<sup>1</sup>

Despite the lack of a specific comprehensive international and African regional instrument for the protection of children in the context of migration, fragmentary protection is enshrined in different human rights instruments that have general and specific application. Inasmuch as adolescents affected by migration are also children, international child right standards could be directly applied. International human rights instruments that have general application also extend protection to adolescent migrant children by way of interpretation.

International and regional child-rights regimes have not recognised some of the special interests and needs of adolescent children who migrate independently of their own volition. Among the interests that did not get substantive recognition under international law are adolescents' right to move freely (right to migrate) and their right to freely choose a means of livelihood, which is linked to their right to work. These two rights are fundamentally important to protect the rights and interest of these children, as there are no laws or norms to such effect and the recognition of such rights is arguably is the gateway for other rights. The formal birth registration and documentation of these children are also important to determine their age and extend adequate protection and recognition to them.

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<sup>1</sup> Bhabha J 'Independent Children, Inconsistent Adults: Child Migration and the Legal available Framework' at <http://www.migrationdrc.org/news/reports/icm/Bhabha12Sept-paper.pdf> (accessed 12 February 2015).



This chapter discusses an approach that adapts international and African regional and sub-regional norms and principles to deal with independent adolescent migration. The chapter examines modern thinking and international law on adolescents' freedom of movement and right to work. The African regional and sub-regional laws and policy instruments in this regard are also discussed. The overall purpose of the chapter is to assess the international and African regional norms and principle applicable to needs and interests of independent adolescent migrants and pinpoint gaps in the law. The chapter assesses whether these gaps are the result of an incorrect understanding of the peculiar characteristics of independent adolescent migrants.

### **3.1 International Substantive Norms and Principles on the Right to Move Freely**

Freedom of movement is an essential part of human existence and dignity. Although it is beyond the scope of this section to consider the history of formal discourse on freedom of movement, the section briefly traces its philosophical antecedents.

#### **3.1.1 Freedom of Movement in Modern Thought**

The contemporary human right to freedom of movement has its origins in early philosophical, political and legal concepts. Plato, while writing on the ideas of Socrates, said that anyone of age who wishes to leave his country for any reason might do so to wherever he pleases and take all his belongings with him.<sup>2</sup> The writings of classical philosophers such as Epictetus reveal that freedom of movement was conceived of as an integral part of personal liberty. Though the term and context may differ from the current usage in international human rights laws, Epictetus described this freedom to mean 'I go wherever I wish; I come from whence I wish'.<sup>3</sup>

Renowned international law jurists and philosophers wrote about freedom of movement in different contexts, such as territorial and trade expansion. In this regard, among the writings of Francisco de Vitoria (1492–1546), fourteen related to the right to freedom of movement. De Vitoria based his argument for freedom of movement on the no-harm rule, that is, anything that is not harmful to others ought to be permitted. The argument is based on the assertion that the earth is, intrinsically, communal property (*res communis*).<sup>4</sup>

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<sup>2</sup> McAdam J 'An intellectual history of freedom of movement in international law: the right to leave as a personal liberty' (2011) 12 *Melbourne Journal of International Law* 6 available on [http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0011/1686926/McAdam.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686926/McAdam.pdf) (accessed 17 January 2015).

<sup>3</sup> McAdam J (2011) 6: 'The Greek term he used is 'to go where one wills'', and it was understood at the time to mean the opposite of bondage.'

<sup>4</sup> Matthew P *Reworking the Relationship between Asylum and Employment* (2012) 63.

Similarly, Hugo Grotius (1583–1645) stated that the freedom of every person to travel to every other nation is the fundamental value of the Law of Nations.<sup>5</sup> Grotius also acknowledged De Vitoria's propositions on legitimate cause and the no-harm rule as criteria for entry and sojourn.<sup>6</sup> Grotius, almost a century after de Vitoria, wrote that the right of passing through a territory ought to be considered 'harmless use' of a territory and that permanent settlement in any part of the earth is lawful.<sup>7</sup> Grotius also endorsed Strabo's<sup>8</sup> notion that 'it was characteristic of barbarians to drive away strangers'.<sup>9</sup> Yet Grotius recognised that the right to emigrate is not an absolute right and could be subject to legitimate restriction on grounds such as heavy debt and when a person is required for national military service.<sup>10</sup>

Sovereignty permits states to regulate the domestic and cross-border movement of persons.<sup>11</sup> However, this principle should be considered in conjunction with the notion of international morality, as sovereignty does not preclude reliance on this doctrine. As John Austin asserted, unlike domestic law, international legal norms are not enforced by sovereign coercion but rather moral sanctions and hence they can be referred to positive international morality.<sup>12</sup> Positive international morality, in the current usage, may refer to a set of moral principles which are popularly accepted by many nations – for instance, the protection of human rights of all individuals without any discrimination, the responsibility to maintain peace, and eradicate extreme poverty. Even early theorists of international law, such as Jean Bodin, Grotius, Vattel and Pufendorf, asserted that divine law limits the 'absolute and perpetual power' of states. One manifestation of this proposition would be recognition of international morality as a limitation upon sovereignty.<sup>13</sup> International morality requires states to impose restrictions on freedom of movement on only the well-recognised grounds (such as threat to security and public health) of limitations under international law.<sup>14</sup>

The origins of the state's right to prohibit foreigners from entering a territory, according to James Nafziger, are quite recent. In countries that follow the common law tradition, the alien exclusionary maxim obtained supremacy over the right of foreigners to seek entry into another

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<sup>5</sup> McAdam J (2011) 9.

<sup>6</sup> McAdam J (2011) 9.

<sup>7</sup> Matthew P (2012) 63.

<sup>8</sup> Strabo (64 BC-21 BC), a Greek geographer and historian, wrote numerous literatures on geography, science, and history based on the countries he surveys. Available at [www.britannica.com/EBchecked/topic/567832/Strabo](http://www.britannica.com/EBchecked/topic/567832/Strabo) (accessed 30 March 2015).

<sup>9</sup> Juss S S *International Migration and Global Justice* (2006) 13.

<sup>10</sup> McAdam J (2011) 10.

<sup>11</sup> Opeskin B, Perruchoud R, & Redpath-Cross J (eds) *Foundations of International Migration Law* (2012) 123.

<sup>12</sup> Koh H H 'Why Do Nations Obey International Law?' (1997) Faculty Scholarship Series. Paper 2101. 2609 available at [http://digitalcommons.law.yale.edu/fss\\_papers/210](http://digitalcommons.law.yale.edu/fss_papers/210) (accessed 15 September 2016).

<sup>13</sup> Juss S S (2006) 12.

<sup>14</sup> Juss S S (2006) 11.

country during the 19<sup>th</sup> century. However, the right to freedom of movement persisted for a longer period in the civil law legal systems.<sup>15</sup>

The Swiss jurist, Emmerich de Vattel (1714-1767), whose works influenced the development of modern migration law,<sup>16</sup> asserted that ‘every man is born free; and the son of a citizen, when come to the years of discretion, may examine whether it be convenient for him to join the society for which he was destined by his birth’.<sup>17</sup> Vattel further asserted that the right of a person to abandon his country is a ‘right founded on reasons derived from the very nature of social compact’. Vattel contended that no one who is in need should be starving while others have property in their possession. If refused by foreign nations, individuals have a right to claim just assistance by any means necessary.<sup>18</sup>

Sir William Blackstone (1723-1780), an English jurist whose works influenced the common law legal tradition, asserted that every Englishman had an absolute right to exercise ‘the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due process of the law’. He emphasised that freedom of movement was an integral part of the right to personal liberty in the common law legal system.<sup>19</sup>

The discussion of modern thinkers and scholars before the advent of the 19<sup>th</sup> century reveals that they were proponents of the right to freedom of movement and did not envisage a contradiction between this right and the notion of state sovereignty. Yet, by the end of 19<sup>th</sup> century, with the increase in population, acquisitive economic interests, and political tensions, protectionist policies became popular among states. This was first manifested by rejecting particular groups of foreigners.<sup>20</sup>

Unlike the case with the pre-19<sup>th</sup> century philosophical notion on freedom of movement, the post-20<sup>th</sup> century world has witnessed a restrictive and protectionist approach. Since the beginning of the 20<sup>th</sup> century the world witnessed two global wars – the First World War (WWI) and the Second World War (WWII) – as a result of, among other things, the growing nationalism of some countries of the so-called ‘global north’.<sup>21</sup> Although the notions of the nation-state and

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<sup>15</sup> Juss S S (2006) 11; Nafziger J A R ‘The General Admission of Aliens under International Law’ (1983) 77 *The American Journal of International Law* 807-810.

<sup>16</sup> Juss S S (2006) 13.

<sup>17</sup> Vattel E de ‘The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury’ in Kapossy B and Whatmore R (Ed.) *Natural law and Enlightenment Classics* (2008) 220; McAdam J (2011) 10.

<sup>18</sup> Juss S S (2006) 14; Vattel E de ‘The Law of Nations’ 223.

<sup>19</sup> McAdam J (2011) 12.

<sup>20</sup> Juss S S (2006) 14.

<sup>21</sup> Ackermann M E, Schroeder M J, Terry J, et al. ‘Encyclopaedia of World History Crisis and Achievement 1900 to 1950’ (2008) Vol V, 420; see also Calvocoressi P, Wint G & Pritchard J ‘Total War: The Causes and Courses of the Second World War’ Revised 2 ed (1989) 18-57.

territorial sovereignty are said to have started as a result of the Peace of Westphalia (1648),<sup>22</sup> the 19<sup>th</sup> century in Europe can be characterised as the ‘age of nationalism’,<sup>23</sup> one manifested in strict border demarcations and closed-border policies. The two World Wars brought not only devastation but also a refugee problem in Europe and the world at large,<sup>24</sup> which led to the drafting of the 1951 Refugee Convention. This Convention is meant not only to protect persons moving in fear of prosecution but also to restrict a free and wilful movement of persons across borders through the notion of burden-sharing of refugees.<sup>25</sup>

Despite the recognition by modern thinkers of an inherent right of persons to peaceful and free movement across borders, the post-19<sup>th</sup> century era is characterised by nations’ implementation of systematic non-entry laws and policies to restrict nationals from states that are perceived to produce refugees, by implementing various restrictive mechanisms including visa restrictions and refugee interceptions at frontiers and in international waters.<sup>26</sup>

### 3.1.2 Freedom of Movement from an International Law Perspective

Freedom of movement is an internationally guaranteed right for every human being. It is also an indispensable condition for the free development of every person.<sup>27</sup> The right to free movement, which is recognised under the international human rights regime, is an integral part of the concept of individual self-determination.<sup>28</sup> Building on the philosophical basis and development of the notion of freedom of movement as discussed in the previous section, this part discusses what international law has to provide regarding freedom of movement across borders.

The atrocities committed in WWII and the need to foster international peace and security as well as protection of human dignity contributed to the development of an international human rights system under the auspices of the UN after 1945.<sup>29</sup> 1948 marked the adoption of the contemporary founding document of human rights – the Universal Declaration of Human Rights (UDHR),

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<sup>22</sup> The Peace of Westphalia was a European peace settlement reached in 1648 which ended 80 years of war between Spain and the Dutch and the German phase of the Thirty Years’ War. The peace treaty brought about the devolution of the Holy Roman Empire and marked the beginning of the modern concept of the state and territorial sovereignty. See Encyclopedia Britannica ‘Peace of Westphalia’ available at <https://www.britannica.com/event/Peace-of-Westphalia> (accessed 10 October 2016).

<sup>23</sup> Kohn H ‘Nationalism’ Encyclopaedia Britannica, available at <https://www.britannica.com/topic/nationalism> (accessed 10 October 2016).

<sup>24</sup> Gatrell P *The making of Modern Refugee* (2013) 17-20.

<sup>25</sup> Hathaway J C *The Rights of Refugees under International Law* (2005) 91-3.

<sup>26</sup> Hathaway J C (ed) *Reconceiving International Refugee Law* (1997) Vol 30 preface xx.

<sup>27</sup> HRC CCPR General Comment No. 27 ‘Article 12 Freedom of Movement’ Adopted at the Sixty-seventh session 2 November 1999 (CCPR/C/21/Rev.1/Add.9) General Comment No. 27 para 1.

<sup>28</sup> Harvey C & Barnidge R P ‘The right to leave one’s own country under international law’ A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (Sept 2005) 1.

<sup>29</sup> Shaw M N *International Law* 6 ed (2008) 271.

which paved the way for the translation of its provisions into two binding covenants in 1966 and subsequent core international human rights laws.<sup>30</sup>

Although they give sporadic recognitions of instances where children move, the CRC and other international human rights treaties do not specifically provide for children's freedom of movement per se. Nonetheless, by interpretation, as children fall under the definition of humans, all international normative standards that guarantee the right to freedom of movement also apply to children.

The UDHR provides that every human is free to move within a state where he or she resides, as well as to leave any country, including his or her own and to return to it.<sup>31</sup> Similarly, the International Covenant on Civil and Political Rights (ICCPR) recognises the freedom to move across borders.<sup>32</sup> Such right shall only be restricted in accordance with laws that are necessary to protect public order, morality, health, rights and freedom of others. Such restriction should also be consistent with the civil and political rights provided under the Covenant.<sup>33</sup> Moreover, the right to leave any country including one's own, and to return to it, should be guaranteed to everyone without any discrimination as to race, colour, and national or ethnic origin.<sup>34</sup>

In accordance with ICCPR article 12, the right to freedom of movement has three basic dimensions: the right to freely move within a sovereign border, the right to leave one's own country and move across borders, and the right to return to one's country. Any person lawfully found in a territory has a right to exercise all these three dimensions of freedom of movement. In particular, the right to move within borders and the right to return to one's own country may be considered as complete rights that could also be exercised by asylum-seekers and refugees, as the basic criteria to exercise such rights is being lawfully found in a territory.<sup>35</sup> The right to move across borders, however, may not be an absolute right because there is no corresponding duty of states to admit individuals into their territory. The right to move freely could be restricted in accordance with the law, and the restrictions should be proportionate and appropriate under the circumstance.<sup>36</sup>

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<sup>30</sup> Steiner H J, Alston P, Goodman R *International Human Rights in Context: Law, Politics and Morals* 3 ed (2008) 133; CRC; Convention on the Elimination of All Discrimination Against Women (CEDAW) adopted 18 December 1979 entry into force 3 September 1981; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) adopted by General Assembly resolution 45/158 (18 December 1990) entry into force 1 July 2003.

<sup>31</sup> UDHR (1948) art 13(1) & (2).

<sup>32</sup> International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly resolution 2200A (XXI) (16 December 1966) entry into force 23 March 1976 art 12(2).

<sup>33</sup> ICCPR art 12(3) - ICCPR recognizes a wide spectrum of civil and political rights that should be protected by States. The permissible restriction of freedom of movement, should take into account the spirit and purpose as well as the exercise of every provisions of the ICCPR.

<sup>34</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted by the General Assembly resolution 2106 (xx) (21 December 1965) entry into force 4 January 1969 art 5 (d)(ii).

<sup>35</sup> ICCPR art 12 & 1951 Refugee Convention art 26.

<sup>36</sup> CCPR General Comment No. 27 para 14-6.

The CRC, which came long after the International Bill of Rights in 1989, does not have a similar ‘freedom of movement’ stipulation but it has provisions that may imply the protection needed for a child on the move with or without parents. The CRC provides that children, irrespective of age, who are seeking refugee status, whether accompanied or unaccompanied, or who have already acquired it status should be afforded ‘appropriate protection and humanitarian assistance’ in accordance with international human rights and humanitarian laws.<sup>37</sup> Although this may not directly indicate the right to move freely from place to place or nation to nation, it is an indication of indirect recognition of instances where children may move alone or with parents and require protection.

On the occasion of the movement of parents, adolescent’s movement may also be expected. In cases where adolescent are left behind, states should make sure they get the chance to unite with their parents.<sup>38</sup> Though an adolescent or a parent as of right cannot request family unification in another country, states should deal with the issue of family reunification ‘in a positive, humane and expeditious manner’.<sup>39</sup> This implies that the best interests of the child should be at the centre of family reunification decisions by states. Additionally, with the view to maintaining regular contact, children ‘whose parents reside in different States’ have the right to leave and enter any country, including their own.<sup>40</sup>

The 1951 Refugee Convention is an international law that regulates one aspect of the movement of persons, that is, movement of refugees. It provides that every person – including an adolescent, by interpretation – is free to move across borders whenever there is a substantial threat to his or her well-being and life and to seek the protection of the destination country. This threat ought to be due ‘to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or opinion’, and the person who is subjected to such threat should be unable or unwilling to return to his country of origin or to his country of habitual residence.<sup>41</sup>

States are also duty-bound to treat every refugee ‘without discrimination as to race, religion or country of origin’.<sup>42</sup> This Convention is ‘age-neutral’ and does not make any specific reference to children.<sup>43</sup> Although it can be considered an effective means of human rights protection for refugees, it falls short of effectively protecting the rights and interest of moving children due to

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<sup>37</sup> CRC (1989/90) art 22(1).

<sup>38</sup> CRC (1989/90) art 10(1).

<sup>39</sup> CRC (1989/90) art 10(1).

<sup>40</sup> CRC (1989/90) art 10(2).

<sup>41</sup> 1951 Refugee Convention art 1(2) and Protocol on the Status of Refugees) (1967) art 1.

<sup>42</sup> 1951 Refugee Convention art 3.

<sup>43</sup> Pobjoy J M ‘A Child Rights Framework for Assessing the Status of Refugee Children’ University of Cambridge Faculty of Law, Legal Studies Research Paper Series Paper No. 27/2013 (August 2013) 6 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304601) (accessed 10 September 2016).

the 'dominant, adult-centred conception of prosecution which is based on state oppression'.<sup>44</sup> Additionally, the Convention does not provide other discrimination grounds, such as age and gender, which are also important in the context of migration. It guarantees freedom of movement within borders for migrants legally found in a country, and prohibits any unreasonable restrictions on freedom of movement within a country, such as encampment policies.<sup>45</sup>

Another instance that may dictate adolescent's movement away from their place of origin is where parents need to work abroad. According to the ICMW, migrant workers and their families are free to leave any state including their country of origin.<sup>46</sup> Restrictions to this right can only be made in the interests of 'national security, public order, public health, public moral and the rights and freedoms of others'.<sup>47</sup> Though it is non-binding on states, the UN has issued a declaration meant to protect persons living in a country other than their place of nationality.<sup>48</sup>

The only interpretative guidance regarding freedom of movement comes from the Human Rights Committee (HRC).<sup>49</sup> The HRC has adopted two separate General Comments that are related to freedom of movement. Initially, General Comment 15 was adopted in 1986 on the protection of aliens' rights under the ICCPR,<sup>50</sup> while in 1999 General Comment 27, which is a more comprehensive guide, was adopted on the freedom of movement.

General Comment 27 defines the right to freedom of movement to include both the liberty to move within and across borders.<sup>51</sup> A person may leave his or her country of origin or any other state for any purpose, including to choose his or her means of livelihood, to work, for adventure, for education, in search of a better life, or to flee from actual or potential abuse or violence. Restrictions may not be imposed on the duration of stay outside of the territory of a state, which may indicate that the freedom of movement across borders also entails the right to permanently emigrate to foreign state.<sup>52</sup> An individual is also at liberty to choose his country of destination.<sup>53</sup> Any person who lawfully enters a country has the right to move freely and choose his or her residence in any part of the territory of the state including all parts of federal states, irrespective of purpose. A person who entered a state by illegal means, once his or her status is regularised in

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<sup>44</sup> Bhabha J (2014) 139.

<sup>45</sup> 1951 Refugee Convention art 26 & 31(2).

<sup>46</sup> ICMW (1990/2003) art 8.

<sup>47</sup> ICMW (1990/2003) art 8.

<sup>47</sup> ICMW (1990/2003) art 8.

<sup>48</sup> The Human Rights of Individuals Who are Not Nationals of the Country in Which they Lives GA Res.40/144 of 13 December 1985 art 5.

<sup>49</sup> Harvey C & Barnidge R P (September 2005) 3. The Committee on Migrant Workers, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child do not provide any interpretative guidance on the issue.

<sup>50</sup> Human Rights Committee, CCPR General Comment No. 15: the Position of Aliens under the Covenant, adopted at the Twenty-seventh session of the Human Rights Committee, on 11 April 1986.

<sup>51</sup> CCPR General Comment No. 27 para 4-7 (movement within a territory); para 8-10 (movement across borders).

<sup>52</sup> CCPR General Comment No. 27 para 8.

<sup>53</sup> CCPR General Comment No. 27 para 8.

accordance with domestic laws, he or she would be considered as lawful and be guaranteed the protection of article 12 of ICCPR.<sup>54</sup>

Neither the domestic laws of a state nor its administrative measures may infringe the right to freedom of movement, particularly the right to leave one's own country. The right to move freely also bestows an obligation on an individual's country of nationality to issue a passport without unnecessary delay, as international travel in most cases depends on travel documents, particularly passports.<sup>55</sup> State practice, nonetheless, indicates that rules and administrative measures usually work against the freedom to leave one's state. In order to scrutinise whether states are discharging their obligations, the HRC enjoins them to include in their state reports the laws, administrative measures, and practices that restrict the right to freedom of movement imposed on both nationals and non-nationals.<sup>56</sup>

Despite the recognition of the right to freedom of movement in a number of human rights instruments, this right is deemed incomplete, as a corresponding duty of admission on the part of receiving state is non-existent.<sup>57</sup> In other words, the right to enter another country is not guaranteed to voluntary migrants. The only definite right in the context of freedom of movement is the right to leave one's country and return to it. States have privileges over individuals including the right to enact restrictive laws on the freedom to enter their territories.<sup>58</sup>

The freedom of children to move across borders and the required protection are not provided as a specific right of children under international human rights treaties; the general provision of the right of every person to freedom of movement, as set forth under different treaties, can be interpreted to apply to children as well.

### **3.1.2.1 Non-refoulement as One Dimension of Freedom of Movement for Migrants**

The 1951 Refugee Convention recognises the principle of non-refoulement, which refers to the prohibition of expulsion or return of refugees. A state party to the Convention must not expel a refugee to a territory where his or her life, freedom and well-being would be at stake.<sup>59</sup> The only exception to the rule is where a person has been considered a danger to the host country or has been convicted by a final judgment of a competent judicial authority of a serious crime.<sup>60</sup> The principle of non-refoulement, therefore, does not guarantee absolute protection and it may be derogated for reasons of security of the host country and the public at large.<sup>61</sup> The principle of

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<sup>54</sup> CCPR General Comment No. 27 para 4 & 5.

<sup>55</sup> CCPR General Comment No. 27 para 9.

<sup>56</sup> CCPR General Comment No. 27 para 10.

<sup>57</sup> An exception to this could be art 31(1) of the 1951 Refugee Convention which prohibits states from imposing penalties for illegal entry or presence in their territories on refugees coming from places where their life or freedom was threatened.

<sup>58</sup> *Juss S S* (2006) 7.

<sup>59</sup> 1951 Refugee Convention art 33(1).

<sup>60</sup> 1951 Refugee Convention art 33(2).

<sup>61</sup> 1951 Refugee Convention art 33(2)



non-refoulement has evolved to become a ‘norm of customary international law’ as a result of its *jus cogens* nature and state practice.<sup>62</sup> The UNHCR advisory opinion also demonstrates that the principle of non-refoulement has attained international customary law status.<sup>63</sup> Non-refoulement under customary international law entails prohibition of returning a person to a country where he or she faces persecution and to cruel, inhuman or degrading treatment or punishment.<sup>64</sup> Experts such as Hathaway contest the popular view of non-refoulement as a universally binding norm on all states, citing the strict requirements for customary law status and the practice of states as to refugee deportations.<sup>65</sup> However, Hathaway acknowledges that the principle of non-refoulement is ‘approaching near-universal respect among States’.<sup>66</sup>

The principle of non-refoulement as provided under article 33(1) of the Refugee Convention is meant to benefit persons that qualify for refugee status in accordance with article 1. According to Guy S Goodwin-Gill and Jane McAdam, its scope of application regarding personal admission and non-rejection at the frontier appears to be vague.<sup>67</sup> Even in the initial negotiations and adoption of the Convention, states did not agree on the issue of admission and non-rejection at frontiers. This may be attributed to states’ unwillingness to accept the duty to admit refugees and grant asylum.<sup>68</sup> In the current scenario, ‘to retain sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted’.<sup>69</sup>

In regard to the nature of obligation arising from non-refoulement, Hathaway argues that it does not encompass the automatic duty of states to receive refugees and grant asylum from persecution. In a strict sense, states are duty-bound not to be ‘pushing [refugees] back into the arms of their persecutor’. The other aspect of non-refoulement relates to the general refugee protection regime – in principle it is a temporary protection arrangement and does not compel states to extend protection after the risk of persecution cease to exist.<sup>70</sup>

It should be noted that, since 1951, a broader interpretation of the principle of non-refoulement can be inferred from the practice of various states in Africa, Europe and Southeast Asia that have

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<sup>62</sup> Allain J ‘The Jus cogens Nature of Non-refoulement’ (2001) 13(4) *Int J Refugee Law* 538; Duffy A ‘Expulsion to Face Torture? Non-refoulement in International Law’ (2008) 20(2) *Int J Refugee Law* 337; Supaat D I ‘Escaping the Principle of Non-Refoulement’ (2013) 2(3) *International Journal of Business, Economics and Law* 86-87; Chan P C.W ‘The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?’ (2006) 10(3) *The International Journal of Human Rights* 234-35.

<sup>63</sup> UNHCR ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) para 14-6 available at: <http://www.refworld.org/docid/45f17a1a4.html> (accessed 8 September 2017).

<sup>64</sup> Goodwin-Gill G S & McAdam J *The Refugee in International Law* 3 ed (2007) 351.

<sup>65</sup> Hathaway J C *The Rights of Refugees under International Law* (2005) 363-364; Goodwin-Gill G S & McAdam J 351; Supaat D I (2013) 88; Coleman N ‘Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary Law’ (2003) 5 *European Journal of Migration and Law* 46-9.

<sup>66</sup> Hathaway J C. (2005) 364.

<sup>67</sup> Goodwin-Gill G S & McAdam J 205.

<sup>68</sup> Goodwin-Gill G S & McAdam J 206-07.

<sup>69</sup> Goodwin-Gill G S & McAdam J 207.

<sup>70</sup> Hathaway J C. (2005) 300-30.1

allowed a large number of asylum-seekers to enter their borders and remain in their territories until a decision is made.<sup>71</sup> Although the legal status of immigrants under domestic immigration law is often raised by states to avoid their duty under international refugee law, the normative interpretation of non-refoulement entails that such status is immaterial to getting protection under this principle.<sup>72</sup> In this regard, the UNHCR in its advisory opinion asserted that ‘the principle of non-refoulement applies not to recognised refugees, but also to those who have not had their status formally declared’.<sup>73</sup>

The principle of non-refoulement has evolved to apply to unaccompanied migrant children in general and adolescents in particular.<sup>74</sup> According to the CRC Committee, states should duly respect their non-refoulement obligations outlined in international human rights, humanitarian, and refugee laws when extending treatment to unaccompanied migrant children. In particular, states shall not return children of any ages to any country where their right to life, survival and development, right to be protected from ‘torture or other cruel, inhuman or degrading treatment or punishment’, and right of liberty could be at risk of violation, irrespective of who the violator is and the actions that amount to such violation.<sup>75</sup> States need to assess the risk of violations disaggregated by age and gender, including the fulfilment of socio-economic rights such as health and food.<sup>76</sup> States should refrain from returning children or adolescents who may be recruited by the military, directly or indirectly engage in the military hostilities, or who are at risk of being subjected to sexual services for the military. Such risks could cause irreversible harm to children’s rights in general and the right to life in particular, and goes against states’ obligation emanating from international human rights, child-rights laws and humanitarian laws.<sup>77</sup>

Another international agreement that prohibits the return of persons that seek refuge is the Convention against Torture (CAT). According to article 3(1), ‘no state shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture’. To determine the existence of such grounds states must consider, among other things, the existence of ‘pattern of gross, flagrant or mass

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<sup>71</sup> Goodwin-Gill G S & McAdam J 208 & 218- 32.

<sup>72</sup> Goodwin-Gill G S & McAdam J 264.

<sup>73</sup> UNHCR ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) para 6.

<sup>74</sup> CRC Committee General Comment No. 6 para 26-8.

<sup>75</sup> CRC Committee General Comment No. 6 para 27; CRC Committee *Concluding observations on the fifth periodic report of Sweden* 6 March 2015, CRC/C/SWE/CO/5, para 49(a) available at: <http://www.refworld.org/docid/566e7e8c4.html> (accessed 28 October 2016); UN Committee on the Rights of the Child (CRC), *Concluding observations on the fifth periodic report of France*, 29 January 2016, CRC/C/FRA/CO/5, para 74(a) available at <http://www.refworld.org/docid/56c17fb64.html> (accessed 28 October 2016).

<sup>76</sup> CRC Committee General Comment No. 6 para 27.

<sup>77</sup> CRC Committee General Comment No. 6 para 28; CRC art 38; Second Optional Protocol to the CRC art 3 & 4; Pobjoy J M. *The Child in International Refugee Law* (2017) 188-191.

violations of human rights'.<sup>78</sup> The ICCPR article 7 that prohibits torture, or cruel, inhuman or degrading treatment or punishment has been interpreted by the HRC as an implied prohibition of refoulement.<sup>79</sup> The cumulative reading of articles 7 and 2 (1) of the ICCPR also imposes a duty on states to protect all persons within their territory and jurisdiction, including asylum-seekers and refugees, from expulsion, return (*refouler*) and extradition.<sup>80</sup>

### 3.1.3 The Evolution of the Standard for International Refugee Status Determination

The formal definition of a refugee under international law is provided under article 1(2) of the 1951 Refugee Convention, which is solely based on flight because of 'well-founded fear of nationality, religious, racial, and political persecution'.<sup>81</sup> Additions can be found from the regional refugee protection system in Africa. The 1969 Convention governing the specific aspects of refugee problems in Africa widened the application of the 1951 Refugee Convention to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order [...is compelled to leave his or her place of habitual residence...]'.<sup>82</sup>

The 1951 Refugee Convention criteria to grant refugee status have been a fundamental instrument under international law as well as in guiding domestic laws. At present, its traditional definition of refugees has been challenged by problems such as poverty.<sup>83</sup> Although poverty has been the main driver for many migrants and refugees across the globe, such economic flight is associated with factors such as systematic human rights abuse and oppressive governments.<sup>84</sup> This problem raises the theoretical dilemma, which has existed for decades, of how to distinguish strictly between economic and political factors.<sup>85</sup> Empirical studies on political refugees and economic migrants show that these two factors are intertwined and that any distinction between them is artificial.<sup>86</sup>

According to a number of international refugee law experts, there is no customary law obligation on states to grant protection to individuals who fall outside of the strict definition of the Refugee Convention. For these experts, the assumption that the current international refugee regime could provide protection from challenges such as poverty, general violence and civil war is 'wishful

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<sup>78</sup> UN General Assembly 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987 art 3(2).

<sup>79</sup> Goodwin-Gill G S & McAdam J 208-09; see also HRC General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 12.

<sup>80</sup> Goodwin-Gill G S & McAdam J 209.

<sup>81</sup> 1951 Refugee Convention art 1(2) & Protocol on the Status of Refugees art 1.

<sup>82</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention) (1969) by the Assembly of Heads of State and Government CAB/LEG/24.3 entered into force on 20 June 1974 art 1(2).

<sup>83</sup> Brumar C 'Definition of Refugee in International Law: Challenges of the Present Times' (2009) 16 Lex ET Scientia Int'l J. 250.

<sup>84</sup> Foster M *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 13.

<sup>85</sup> Foster M (2007) 14.

<sup>86</sup> Foster M (2007) 14.

thinking'.<sup>87</sup> However, William Thomas Worster argues that evidence from state practice and *opinio juris* as well as the practice of international organisations such as the UNHCR shows that there is a tendency to expand the definition of a refugee to other life-threatening situations such as civil wars, ethnic and communal conflicts, natural disasters or famine.<sup>88</sup>

There seems to be a consensus among international law experts that customary international law is developed as the result of the practice of states, not the practice of international institutions. However, there are international organisations that are 'capable of embodying practice and *opinio juris* of states where the act in question is not an act of the organization per se, but the act of states within and through the organization'.<sup>89</sup> Similarly, when a state delegates its functional mandate to an international organisation or accepts its supervisory mandate, then the act or function may be considered as undertaken by a state. In this regard, states' popular acceptance of the mandate of the UNHCR for refugee status determination can be cited as a good example. Worster argues that 'the practice of the UNHCR cannot easily be dismissed, and, in fact, it might be representative of the *opinio juris* and practice of states'.<sup>90</sup>

Scrutinising the practice of the UNHCR in this regard is important for independent adolescent migrants, as the underlining factor behind their solitary movement is economic deprivation and the search for better opportunity. The formal distinction between economic migrants and those migrating in fear of persecution was made by the UNHCR in 1979 in its Handbook on Procedures and Criteria for Determining Refugee Status (hereafter 1997 UNHCR Handbook):

A migrant is a person who, [...] voluntarily leaves his country in order to take up residence elsewhere [...] by the desire for change or adventure, or by family or other reasons of a personal nature. If he moved exclusively by economic considerations, he is an economic migrant not a refugee. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group.<sup>91</sup>

The UNHCR's distinction between movement due to economic claims and political claims indicates that there might be some overlap, as it qualifies the economic motive by the term 'exclusive'.<sup>92</sup> Proceeding from this premise, Michelle Foster argues that the fact that part of the

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<sup>87</sup> Worster W T 'The Evolving Definition of the Refugee in Contemporary International Law' (2012) Berkeley Journal of International Law Vol. 30:1 105-106.

<sup>88</sup> Worster W T (2012) 107 & 127.

<sup>89</sup> Worster W T (2012) 134.

<sup>90</sup> Worster W T (2012) 134-35.

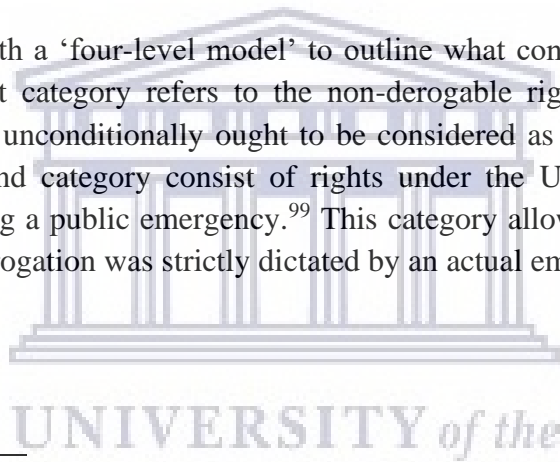
<sup>91</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee (1979 UNHCR Handbook), 1992 para 62 & 63 available at <http://www.unhcr.org/4d93528a9.pdf> (accessed 16 September 2017).

<sup>92</sup> Foster M (2007) 12.

motivation for a person's flight is 'economic' does not preclude a refugee claim, assuming the person is also fleeing traditional 'political' persecution.<sup>93</sup> Foster also argues that the 1979 UNHCR Handbook indicates that political persecution may be manifested or result from economic deprivation.<sup>94</sup>

Refugee law jurisprudence has made significant progress in moving away from strict adherence to rules to accommodate other claims under international human rights law. The approach to employing human rights protection in defining persecution was initiated in 1953 by Jacques Vernant, who asserted that 'persecution' should be linked 'with severe sanctions and measures of an arbitrary nature, incompatible with the principles set forth in the [UDHR]'.<sup>95</sup> The human-rights-based approach gained prominence through books written by Guy S. Goodwin-Gill and James C. Hathaway in 1983 and 1991, respectively. Hathaway's explanation of persecution as 'sustained or systematic failure of state protection in relation to one of the core entitlements' can be regarded as a cornerstone in defining persecution by referring to human rights.<sup>96</sup>

Hathaway also came up with a 'four-level model' to outline what constitutes a violation of the core entitlements. The first category refers to the non-derogable rights<sup>97</sup> set forth under the UDHR and ICCPR, which unconditionally ought to be considered as a ground for persecution when violated.<sup>98</sup> The second category consist of rights under the UDHR and ICCPR where derogation is allowed during a public emergency.<sup>99</sup> This category allows an exception provided that the states shows the derogation was strictly dictated by an actual emergency situation.<sup>100</sup>



<sup>93</sup> Foster M (2007) 12.

<sup>94</sup> Foster M (2007) 12. The 1979 UNHCR Handbook under paragraph 63 (last part) provides that '[w]here economic measures destroy the economic existence of a particular section of the population (e.g withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country'.

<sup>95</sup> Foster M (2007) 114.

<sup>96</sup> Chetail V 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law in Rubio-Marín R (ed) *Human Rights and Immigration* (2014) 26; see also Foster M (2007) 114.

<sup>97</sup> Foster M (2007) 114. The first category of rights that are non-derogable include arbitrary deprivation of life, protection against torture or cruel, inhuman or degrading punishment or treatment, freedom from slavery, the prohibition on criminal prosecution without an offense, the right to recognition as a person in law, freedom of thought, conscience and religion, and protection from imprisonment on the ground of failure to uphold a contractual obligation.

<sup>98</sup> Foster M (2007) 114.

<sup>99</sup> Foster M (2007) 114-15. The second category of rights include freedom from arbitrary arrest and detention, the right to equal protection for all including children and minorities, the right in criminal proceedings to a fair and public hearing and presumption of innocence unless proven guilty, the protection of personal and family privacy and integrity, the right to internal movement and choice of residence, the freedom to leave and return to one's country, liberty of opinion, expression, assembly and association, the right to form and join trade unions, and the ability to partake in government, access public employment without discrimination, and vote in periodic and genuine election.

<sup>100</sup> Foster M (2007) 114.

Hathaway's third category are the rights enshrined under the UDHR and ICESCR that require progressive realisation based on the principle of non-discrimination.<sup>101</sup> This category amounts to persecution when states fail to discharge their basic and immediate obligations. However, deprivation of some socio-economic rights such as deprivation to earn a living, or fulfilment of basic needs such as food, shelter, health care would amount to the violation of the first category of rights such as the right to life, protection from cruel, inhuman, degrading treatment.<sup>102</sup>

The fourth category includes rights under the UDHR that are not codified under either the ICCPR and ICESCR and hence are non-binding.<sup>103</sup> This category includes socio-economic rights and has been used as a ground for refugee status determination in countries such as the United Kingdom, Canada, New Zealand, and the US (in some courts).<sup>104</sup> Generally, 'economic harm' is strictly measured against the general criteria of persecution in courts. The economic deprivations, for instance in the Austrian Migration Act of 1958, include denial of access to basic services and denial of capacity to earn a living.<sup>105</sup>

An early conception of the human rights approach to interpreting the 1951 Refugee Convention appears to be 'economic proscription', which may refer to complete denial of the means for livelihood.<sup>106</sup> It was Hathaway, with his progressive interpretation of socio-economic deprivations, who defined persecution to include rights in addition to the right to work, such as the rights to education and health.<sup>107</sup> The practice of some domestic courts, such as in Canada,<sup>108</sup> also shows that in the context of children, the deprivation of education can be ground to grant refugee status.<sup>109</sup>

The reference to human rights standards and norms to measure whether harm amounts to persecution represents a fundamental evolution in refugee law jurisprudence. A good example is the incorporation of harm against women such as domestic violence, harmful traditional practices and the like.<sup>110</sup> Moreover, state practice and interpretation of international law as well

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<sup>101</sup> Foster M (2007) 115. The third category of rights include the right to work, the right to food, housing, health, basic education, protection of the family, and the freedom to engage and benefit from cultural, scientific, literary and artistic expression.

<sup>102</sup> Foster M (2007) 116.

<sup>103</sup> Foster M (2007) 116. The fourth category of rights include the right to own and be free from arbitrary deprivation of property, and the right to be protected against unemployment.

<sup>104</sup> Foster M (2007) 116; Jastram K 'Economic harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution in Simeon J C. (ed) Critical Issues in International Refugee Law: Strategies towards Interpretative Harmony (2010) 148.

<sup>105</sup> Jastram K (2010) 148-53.

<sup>106</sup> Foster M (2007) 90.

<sup>107</sup> Foster M (2007) 91.

<sup>108</sup> *Ali v Canada* (Minister of Citizenship and Immigration) Federal Court of Canada (1997) 1 FCD 26; 1996 FCD LEXIS 592.

<sup>109</sup> Foster M (2007) 103.

<sup>110</sup> Foster M (2007) 16 & 77.

as the approach by organisations like UNHCR, confirms that the use of human rights standards has been advocated as a tool for refugee status determination.<sup>111</sup>

The main argument against employing a human rights approach to refugee status determination is based on making states duty-bound to interpretations emanating from treaty obligations to which they are not a party.<sup>112</sup> This argument is based on article 34 of the Vienna Convention on the Law of Treaties (VCLT), which presupposes that consent is a fundamental criterion for being bound by a treaty. The counterargument is that using a human rights treaty for interpretation of the Refugee Convention does not mean that states have an actual and direct duty arising from the human rights treaty per se.<sup>113</sup> Another counterargument is the broad category of human rights violation could easily be equated as persecution, the effect of which approach would put an enormous burden on states.

Contrary to such concern, it may be argued that the purpose of interpretation of international law is not to rely on the traditional and pragmatic approach but to give appropriate and reasoned guidance to the treaty under interpretation.<sup>114</sup> Another argument against the human rights approach asserts that a state's domestic legal system and judiciary may not have the required knowledge to employ international human rights law as an interpretative guide for cases.<sup>115</sup> To counter to such a situation, the VCLT prohibits using domestic law as a justification for not adhering to obligations under international law.<sup>116</sup> Furthermore, the significant number of human rights standards has adequate interpretative guidance in the form of general comments and concluding recommendations that ease difficulty of understanding and employ human rights to interpret a wide range of international legal instruments.<sup>117</sup>

### **3.1.4 The Case for Progressive Definition of 'Persecution' for Independent Adolescent Migrants**

The independent movement of children has contributed to the development of new jurisprudence in the refugee protection system, especially in regard to the protection of children migrating alone.<sup>118</sup> Many countries allow unaccompanied children to access the refugee system independently.<sup>119</sup> Based on the above analysis of progressive interpretation of refugee definition using human rights norms and principles, independent adolescent migrants should be accorded

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<sup>111</sup> Foster M (2007) 36-75.

<sup>112</sup> Foster M (2007) 75.

<sup>113</sup> Foster M (2007) 75-6; Tobin J 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 13-5 & 20-2.

<sup>114</sup> Foster M (2007) 78.

<sup>115</sup> Foster M (2007) 85.

<sup>116</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155 art 27 available at: <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 12 February 2018).

<sup>117</sup> Foster M (2007) 85.

<sup>118</sup> Pobjoy J M. *The Child in International Refugee Law* (2017) 47-8.

<sup>119</sup> Pobjoy J M. (2017) 48.

tailor-made protection in the refugee protection system. To extend adequate protection to adolescent independent migrants, the definition of refugee must accommodate economic deprivations either through new protocol or progressive interpretation of existing one through systematic integration as one of the grounds of persecution. Such approach should be anchored on the peculiar characteristics, situations, deprivations and interest of independent adolescent migrants. Furthermore, the approach should take into account independent adolescent migrants' adult-like interests and capabilities, as well as vulnerabilities due to their age, and should be able to strike a balance between agency, autonomy and protection.

The UNCHR in its 2009 guideline stated that the refugee status determination of unaccompanied children does not take into account 'their unique experiences of persecution, due to factors such as their age, their level of maturity and development'.<sup>120</sup> The guideline further notes that 'a child-sensitive interpretation of the 1951 Convention does not mean, that child-asylum seekers are automatically entitled to refugee status, [that is, the elements of the refugee definition still applies]' but the entire process should be guided by the CRC and its cardinal principles.<sup>121</sup>

The CRC Committee has issued at least one recommendation to adopt a special mechanism to recognise the special attributes of children in asylum determination processes. In the words of the Committee, Ghana should 'include special guarantees for the consideration of child-specific forms of persecution and specific procedural safeguards for unaccompanied or separated asylum-seeking children'.<sup>122</sup> In general, the rights enshrined under the CRC are

tailored to take into account the fact that children experience harm in a different way than adults [and] thus provides an automatic and principled means for adapting the persecutory threshold to take into account a child's heightened sensitivities and distinct developmental needs.<sup>123</sup>

Furthermore, in accordance with article 19(1) of the CRC, states need to take all appropriate measures to protect the child from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'. Furthermore, such a protective approach should be equipped with appropriate procedural safeguards, programmes and judicial processes.<sup>124</sup> The 'child-specific forms of persecution' recommend by the CRC Committee should be read in conjunction with the protective duty of states under article 19 of the CRC. Hence, first such 'child-specific forms of persecution' should include the list of violations under article 19(1) and other serious child-rights violations such as

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<sup>120</sup> UNHCR 'Guideline on International Protection: Child Asylum Claims under Article 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees para 2 available at <https://www.unhcr.org/50ae46309.pdf> (accessed 25 October 2019).

<sup>121</sup> UNHCR 'Guideline on International Protection: Child Asylum Claims' (2009) para 4 & 5.

<sup>122</sup> UN Committee on the Rights of the Child (CRC), Concluding observations on the combined third to fifth periodic reports of Ghana, 9 June 2015, CRC/C/GHA/CO/3-5, para 60(b) available at: <http://www.refworld.org/docid/566fc3944.html> (accessed 1 October 2017).

<sup>123</sup> Pobjoy J M. (2017) 123.

<sup>124</sup> CRC art 19(2).



the worst forms of child labour, the sale of children, child prostitution and child pornography<sup>125</sup> that all children should be protected from.

Secondly, the scholarly extensions of Economic, Social and Cultural (ESC) rights contributed to three tiers of intertwined obligations to respect, protect and fulfil--and their endorsement by some treaty bodies, reaffirms the indivisibility of civil and political rights and ESC rights as well as similarity of these rights in terms of State's duty. These three tiers of obligation have been the basis for conceptualising extraterritorial obligation to ESC rights.<sup>126</sup> The deprivation of one or more ESC right, particularly to vulnerable groups such as children, may impose a duty on all states as a shared responsibility. In this regard, the CRC Committee held that

children's rights are a shared responsibility between the developed and the developing countries. State parties must respect and protect economic, social and cultural rights of children in all countries with no exceptions, and take all possible measures to fulfil these rights – whenever they are in a position to do so – through development cooperation. At the same time, countries with severe resource constraints have the responsibility to seek international co-operation and assistance.<sup>127</sup>

In line with such affirmation, it is imperative to argue that the second category of child-specific forms of persecution should be interpreted to include the deprivations of ESC rights and the extraterritorial duty of all states to fulfil them. Extraterritorial obligation towards the human rights of children including adolescents means that all states should ensure that their rights and interests are realised irrespective of jurisdiction, territory or nationality. This would necessarily mean that when the rights and interests of adolescents as provided under international norms and principles are violated, adolescents must be granted a right to move across borders and seek protection. Correspondingly, there should be a duty on the receiving country not to return (refouler) children/adolescents but to extend appropriate protection. However, it should be noted that the primary duty for the realisation of ESC rights rests upon the state of origin.

### **3.2 Adolescent's Right to Work in the Context of Migration**

Work is a fundamental aspect of an individual's life, the basis of his or her livelihood, and vital to his or her dignity. Nevertheless, it has become a danger to well-being for many and a means of systematic exploitation. There is vagueness, however, as to the notion children's work, and a lack of universal consensus on issues regarding children's right to work. Children in general and

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<sup>125</sup> Second Optional Protocol to the CRC; the explicit recognition of extraterritorial obligation of States to protect is provided under art 10(1); see also Worst Forms of Child Labour Convention, 1999 (No. 182) adopted 17 June 1999 by the General Conference of the ILO at its eighty-seventh session entry into force: 19 November 2000.

<sup>126</sup> Langford M, Coomans F & Gómez Isa F 'Extraterritorial Duties in International Law' in Langford M, Vandenhole W, Scheinin M and van Genugten W (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013) 87-8.

<sup>127</sup> Committee on the Rights of the Child, (Forty-sixth Session) 17 September – 5 October 2007 Day of General Discussion (DGD) on 'Resources for the Rights of the Child – Responsibility of States' 21 September 2007 para 51.

adolescent migrants in particular are susceptible to grave dangers of exploitation. Due to this, some labour laws provide special protection for children. The right to work is also crucial to the exercise of other socio-economic rights, such as the right to an adequate standard of living, education, health and culture. In general, everyone has a right to freely choose the kind of activity he or she wants to pursue. This general assertion, however, is subject to limitations based on, among other things, age, capacity, type of work and nationality. For example, international law provides a limitation on children of certain ages undertaking certain categories of work. This section discusses the conceptual basis of children's work, in particular the right of children/adolescents to work and freely choose their means of livelihood in the context of migration – this is pertinent as often they migrate to pursue economic activities in destination states.

### 3.2.1 Conceptual Basis for Children's Work

There are two major positions on children's work. The first position considers childhood as a time to be cared for by adults, a time for learning and leisure without the responsibility of employment and remunerative work. This position is mainly supported by Western liberal ideologies.<sup>128</sup> It should be noted, however, even in the West, the history of child labour reveals that in the pre-industrialisation era children's work was seen as having positive value in developing skills, knowledge and training for adulthood.<sup>129</sup> The issue of child labour in the formal sector flourished and advanced during the industrial revolution and declined after the mid-19th century.<sup>130</sup>

The second position considers children and childhood through different cultural and economic contexts and capabilities due to age, maturity and gender. Although it does not dispute children's need for support and protection, 'it sees childhood as continuous with the adult world, with children gradually moving into the activities of adults as their competences develop and opportunities arise'.<sup>131</sup>

The two positions on children's work also relate to the general notions of 'child welfare'- that stress on care and protection for children and 'child liberationist' approaches that emphasise on child autonomy and self-determination for children.<sup>132</sup> Scholars taking the balanced approach assert that the protection and welfare as well as autonomy-for-children approaches are not mutually exclusive but complementary. They further assert that protection and welfare should

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<sup>128</sup> Bourdillon M 'Children and Work: A Review of Current Literature and Debates' (2006) *Development and Change* 37(6) 1202.

<sup>129</sup> Cunningham H & Stromquist S 'Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence' in Weston B H. (ed) *Child Labor and Human Rights: Making Children Matter* (2005) 55-56.

<sup>130</sup> Cunningham H & Stromquist S (2005) 62.

<sup>131</sup> Bourdillon M 'Children and Work: A Review of Current Literature and Debates' (2006) *Development and Change* 37(6) 1202.

<sup>132</sup> Hanson K 'School of Thought in Children's Rights' in Liebel M (ed) *Children's Rights from Below: Cross-Cultural Perspectives* (2012) 70.

get primacy for younger children and that when children get older, autonomy and self-determination should take precedence over protection.<sup>133</sup>

Children's right to work as opposed to the right to employment refers to 'an individual child's right to freely decide whether, where, how and for how long they would like to work'.<sup>134</sup> Such assertion is aimed at broadening the scope of children's decision-making and strengthening their social role as acting subjects. Such a notion challenges the popular legal design that enables adults to formulate a framework for ensuring children's best interest as well as the protectionist approach to children rights.<sup>135</sup> Furthermore, the focus on the perceived negative effects of work and simplistically regarding child work as harmful fails to see work from the perspectives of working children. For those that consider 'children being unfit to work [...] they are seen as victims and objects in need of help, not as subjects with thoughts about their situation and ideas about how to solve their problems that they wish to articulate'.<sup>136</sup>

According to Manfred Liebel, children's views on their work and perceptions about work reveal that 'most of them show a positive attitude towards the fact that they are working and others comment that they would like to work if presented with a reason or an opportunity to do so'.<sup>137</sup> It should be noted that children's conceptions of work may not necessarily refer to the work itself, but rather the ability to get money, support their families, assist others or get experience.<sup>138</sup>

In non-Western countries, particularly in Latin America, Africa and Asia there have been various movements for children's right to work since 1980s.<sup>139</sup> The global initiative of working children started in the mid-1990s with the networking of existing movements in three continents.<sup>140</sup> In particular, a declaration adopted in Huampani, Peru in 1997 endorsed 'a right to work under humane conditions and the recognition of working children as persons who contributes economically, socially and culturally to society'.<sup>141</sup> At that meeting, children voiced their 'willingness to fight for better working and living conditions'.<sup>142</sup> Similarly, in a Dakar meeting, participants expressed the wish for 'all the world's children to be able to decide whether to work or not based on individual ability and development without any fixed age limit to children's the

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<sup>133</sup> Hanson K (2012) 70.

<sup>134</sup> Liebel M 'Do children have a right to work? Working children's movement in the struggle for social justice' in Hanson K & Nieuwenhuys O (eds) *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (2013) 225.

<sup>135</sup> Liebel M (2013) 226.

<sup>136</sup> Liebel M (2013) 237.

<sup>137</sup> Liebel M (2013) 227.

<sup>138</sup> Liebel M (2013) 227.

<sup>139</sup> Liebel M (2013) 228-32; the Peruvian Children's Movement MANTHOC was the first campaign. The 6<sup>th</sup> Latin American Meeting was held in Asunción, Paraguay and the 7<sup>th</sup> Latin American Meeting was held in 2008 in Cachiplay Colombia.

<sup>140</sup> The first international meeting was held in Kundapur, India in 1996, other consecutive mini-summits were held in Huampani, Peru in 1997 and Dakar, Senegal in 1998; see Liebel M (2013) 232-33.

<sup>141</sup> Liebel M (2013) 232-33.

<sup>142</sup> Liebel M (2013) 233.

right to work'.<sup>143</sup> Subsequent global meetings were held in Europe – Berlin, Germany (2004) and Sienna, Italy (2006) – and elaborated on ideas and decisions of previous meetings, stressing children's right to work, 'dignified work' and 'work under humane conditions'.<sup>144</sup>

### 3.2.2 Adolescent's Right to Work under International Law

From the perspective of international labour law, children may have a right to work if they have reached a certain age and if the work environment fulfils certain standards and conditions. Adolescent children's involvement in remunerative activities could be considered constructive if it does not affect their health, well-being, physical and mental development, or schooling.<sup>145</sup> This right should also be synchronised with other rights provided under the CRC such as the right to be protected from all forms of exploitation, the right to education, the right to rest, leisure and play, and the right to 'the highest attainable standard of health'.<sup>146</sup>

Based on standards set by the ILO, the minimum age required for children to undertake formal work is 15 years.<sup>147</sup> This minimum age applies irrespective of economic sectors' working arrangements, including being hired for wages or where a child works in his or her own enterprise.<sup>148</sup> The Minimum Age Convention No. 138 (ILO C-138) also introduced different categories of minimum age limitations that can be flexibly applied based on the socio-economic context of a country and where the work is not likely to affect children's health, development and schooling. Accordingly, the general minimum age can be reduced to 14 years, where the economy and educational facilities are insufficiently developed. In such a context, children as young as 12 years may perform light work. In a standard socio-economic setting, where the minimum age of 15 years applies, this age may be reduced to 13 years for light work.<sup>149</sup> 'Light work' means those activities that are not harmful to the health and development of the children as well as activities that do not interfere with the child's schooling, vocational training or other form of training program.<sup>150</sup> For hazardous work,<sup>151</sup> notwithstanding the socio-economic setting of a country, the general minimum age is 18 years, or 16 years if some stringent conditions are

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<sup>143</sup> Liebel M (2013) 233-34.

<sup>144</sup> Liebel M (2013) 234-36.

<sup>145</sup> International Labour Organisation (ILO) and Inter-Parliamentary Union, *Eliminating the Worst Forms of Child Labour: A Practical Guide to ILO Convention No. 182 (Handbook for Parliamentarians No. 3)* (2002) 15 available at [http://www.ipu.org/PDF/publications/childlabour\\_en.pdf](http://www.ipu.org/PDF/publications/childlabour_en.pdf) (accessed 04 April 2017).

<sup>146</sup> CRC art 28, art 31, art 24 respectively.

<sup>147</sup> ILO Convention No. 138 Minimum Age Convention, adopted on 26 June 1973 by the General Conference of the International Labour Organisation at its fifty-eighth session Entry into force: 19 June 1976, art 2(3).

<sup>148</sup> Handbook for Parliamentarians No. 3 (2002) 16-7.

<sup>149</sup> ILO Convention No. 138 Minimum Age Convention art 7(1) - (4); Handbook for Parliamentarians No. 3 (2002) 17.

<sup>150</sup> ILO Convention No. 138 Minimum Age Convention art 7(1)(a) & (b).

<sup>151</sup> Worst Forms of Child Labour Convention, 1999 (No. 182); considers hazardous work as one of the four worst forms of child labour. The fourth element, which refers to those activities that harm the health, safety and morals of children are also referred to as hazardous work, which is left to be defined and determined by each State. This hazardous work category are indicated under the non-binding Worst Forms of Child Labour Recommendation, 1999 (No. 190).

fulfilled.<sup>152</sup> Furthermore, the work should not be harmful to the health, well-being, and physical, mental, spiritual, or moral development of the child. The work also should not jeopardise his or her education. Work is deemed to interfere with schooling where it impedes school attendance, forces early dropping out of school, or where studies are affected by a time-consuming and heavy workload.<sup>153</sup>

In 1990, the protection of children from child labour was reaffirmed with the adoption of the CRC, which broadly reinforces provisions in ILO C-138.<sup>154</sup> It should be noted, however, that the CRC under article 32(1) provides the right to be protected from economic exploitation and hazardous work but it is not a blanket ban on children's work and right to work per se. Moreover, the CRC has fundamental principles such as the best interests of the child and survival and development, which are crucial to protect the rights of children who may be subjected to exploitative activities.<sup>155</sup>

The systematic and pervasive exploitation of children in different economic sectors has required international human rights law to further enhance its protections with the adoption of two optional protocols to the CRC on the involvement of children in armed conflict<sup>156</sup> and the sale of children, child prostitution and child pornography.<sup>157</sup> It has also become apparent that these laws fall short in protecting children from organised crime such as trafficking and smuggling children. This in turn triggered a renewed interest in the issue of trafficking. In 2003, the UN augmented the Convention against Transnational Organized Crime with a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereafter the Palermo Protocol). According to this Protocol, exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>158</sup>

These Conventions and Protocols are intended to protect children from the worst forms of child labour by supplementing the ILO Convention No. 182 on Worst forms of Child Labour (ILO C-182). Accordingly, participating states are duty-bound to prohibit and discourage by all appropriate means 'the sale of children, child prostitution and child pornography'.<sup>159</sup> Any child victims of such rights violations should be rehabilitated and victim-centred investigation and adjudication modalities should be employed.<sup>160</sup> These protection mechanisms should be

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<sup>152</sup> Handbook for Parliamentarians No. 3 (2002) 17.

<sup>153</sup> Handbook for Parliamentarians No. 3 (2002) 15.

<sup>154</sup> CRC (1989/90) art 32.

<sup>155</sup> CRC (1989/90) art 3(1) and 6(2).

<sup>156</sup> First Optional Protocol to the CRC.

<sup>157</sup> Second Optional Protocol to the CRC.

<sup>158</sup> Protocol against Trafficking art 3(a).

<sup>159</sup> First Optional Protocol to the CRC art 1-7.

<sup>160</sup> First Optional Protocol to the CRC art 8.

accompanied by public awareness programmes, and the dissemination of laws, programmes and administrative measures.<sup>161</sup>

The ILO takes two broad approaches to children's work: the labour regulation approach and the prioritisation approach. The labour regulation approach focuses on providing legal rules and minimum standards such as minimum age of work, employment relationships, and conditions of work, for instance under ILO Convention 138. The prioritisation approach focuses on providing a minimum age threshold to undertake a list of activities that may cause the greatest harm on children, for instance, the worst forms of child labour Convention 182.<sup>162</sup> The approach that balances these two is the human rights approach, which focuses on reducing harm as well as regulating children's work based on rights such as child participation and other rights under the CRC.<sup>163</sup>

Normatively, the international labour standards provide that, except for hazardous work, adolescents of 15 years of age and above are allowed to work. This may not be considered a right to work per se but, crucially, at least adolescents are not prohibited from working, even though they are not encouraged to work either; it is not explicitly provided as a right. However, adolescents in particular have been exposed to economic exploitation and hazardous work, due to, among other things, the lack of practical recognition and regulation of child work. In particular, adolescents in the context of migration that has multifaceted vulnerabilities are subjected to various rights violations associated with work. Specifically, they may be subjected to what the ILO calls 'the worst forms of child labour'. The next section deals with the connection between independent movements of children with the worst forms of child labour.

### **3.2.3 The Nexus between Independent Adolescent Migration and the Worst Forms of Child Labour**

Independent adolescent migrants mostly move irregularly without the necessary legal documents.<sup>164</sup> This could be one of the factors that make adolescents extremely vulnerable to abuse and exploitation. Those moved by traffickers for the reasons of employment are often subjected to the worst forms of child labour.<sup>165</sup> Irregular labour migration and trafficking may have overlapping characteristics, as trafficking can become an extension of irregular labour migration. While in the process of movement, voluntary migration of adolescents may also be turned to trafficking.<sup>166</sup> The definition of trafficking in the Palermo Protocol, which outlines a

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<sup>161</sup> First Optional Protocol to the CRC art 9.

<sup>162</sup> Cullen H 'Child Labor Standards: From Treaties to Labels' in Burns H. Weston (ed) *Child Labor and Human Rights: Making Children Matter* (2005) 88.

<sup>163</sup> Holly C (2005) 88.

<sup>164</sup> Glind H (2010) 5.

<sup>165</sup> Edmonds E V & Maheshwor S 'Independent Child Labor Migrants' in Constant A & Zimmermann K (eds) *International Handbook of the Economics of Migration* (2013) 99; Glind H (2010) 5.

<sup>166</sup> Glind H (September 2010) 9.

‘process of recruitment, transportation and control’, rather than a single act, can be taken as an indication of these common and overlapping characteristics.<sup>167</sup>

The worst forms of child labour include ‘the sale and trafficking of children’, ‘forced or compulsory labour’, ‘forced or compulsory recruitment for use in armed conflicts’, ‘child prostitution, or pornography’, drug trafficking, and activities ‘likely to harm the health, safety or morals of children’.<sup>168</sup> This fact is reflected in the 2009 report of the Special Rapporteur on the Human Rights of Migrants, which stated that unaccompanied migrant children are most exposed to worst forms of child labour.<sup>169</sup>

Independent adolescent/children migrants are attractive to exploiters due to their solitary movement; in addition, they are less costly than adults, easier to exploit, easily attracted by the offer of immediate gratification of needs such as food, shelter and security.<sup>170</sup> Without legal guardians, they may also depend on other adults to access basic social services. Often they are exposed to the informal economic sector – where exploitation is prevalent – to generate income and sustain their livelihoods.<sup>171</sup>

For moving adolescents, the very purpose of movement may be the aspiration to work and earn an income. To attain such goals, many adolescent migrants move irregularly across borders and may fall into exploiters’ traps and be exposed to activities that are harmful to their development and existence. The fact that the domestic laws of receiving countries do not formally accommodate the desires of such independent adolescent migrants to work contributes to their exploitation. Generally, international labour law also imposes a duty on states not to employ children below the age of 12 unless the work is deemed light work that does not interfere with their education and general well-being. However, one of the reasons for independent adolescent children to move is to work and earn money, with little or no plan to continue their education. In such cases, international labour law and human rights law are silent as to whether their interest to work should be respected at the cost of their education and other entitlements.

While analysing adolescents’ right to freely move across borders and right to work in the context of migration, the above section found out that there is no explicit recognition of the rights of children to freely move under international law. Rather, the focus of international norms in this regard is to extend automatic protection to independent migrant children, who are lumped together in the predetermined category of vulnerable children in need of protection. As seen from preceding chapters, the major reasons for adolescents to migrate are economic rather than political or based on fear of persecution on one or more grounds. Hence, they may not qualify for refugee status under the 1951 Refugee Convention. However, there are arguments for employing

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<sup>167</sup> Bastia T (2006) 27-28.)

<sup>168</sup> Worst Forms of Child Labour Convention, 1999 (No. 182), art 3(a-d).

<sup>169</sup> Bustamante J (A/HRC/11/7) (14 May 2009) 22-23.

<sup>170</sup> Edmonds E V & Maheshwor S (2013) 103.

<sup>171</sup> Glind H (2010) 9-10.

human rights violations in an effort to determine the grounds of ‘persecution’ under the refugee Convention, which is also applicable to independent adolescent migrants. In particular, in the context of children/adolescents, the CRC Committee held that there should be child-specific grounds of prosecution for refugee status determination.

Closely linked with the right to move freely is whether there is a right of children to work in general and as a way to ensure a means of livelihood for adolescent independent migrants while in the host country. It can be argued that although the recognition of children’s work is subject to various criteria, there is no recognition of the right to work for children in general and adolescents in particular. Factually, independent adolescent migrant are prone to exploitative and worst forms of child labour due to, among other things, lack of appropriate documentation, lack of regularised status in the host country, and the clandestine nature of the employment arrangement as a result of the lack of laws to allow and regulate such arrangement.

In line with the preceding sections, the next part deals with African regional and sub-regional substantive norms and principles on the right to freely move and right to work in the context of independent adolescent migrants.

### **3.3 Substantive Rights in the African Regional and Sub-Regional Context**

The African Human Rights System (AHRS) was founded under the framework of the then Organization of African Unity (OAU), established in 1963 by the OAU Charter.<sup>172</sup> Although some asserted that there was a limited focus on human rights during the initial stages of the OAU,<sup>173</sup> under its auspices a number of regional human rights laws were adopted, including the African Charter on Human and Peoples’ Rights (ACHPR) (1981), the African Refugee Problems in Africa (1969), and ACRWC (1990). The OAU was able to organise a monitoring mechanism for each of these instruments.

The African Union (AU) succeeded the OAU in 2003 with redefined objectives and the role to foster the regional integration and unity of the African continent. The AU has adopted a number of human rights instruments including the Protocol to the African Charter on the Rights of Women in Africa (Protocol on the Rights of African Women) (2003), African Charter on Democracy, Elections and Governance (2007), the AU Convention for the Protection and Assistance of Internally Displaced Persons (2009) (African IDP Convention) and Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (2018). In addition to the African regional human rights instruments and protection mechanisms, the roles of Regional

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<sup>172</sup> Olowu D ‘The Regional System of Protection of Human Rights in Africa’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 15-6.

<sup>173</sup> Murray R *Human Rights in Africa* (2004) 7; Nmehielle V O *The African Human Rights System: Its Laws, Practice and Institutions* (2001) 67.



Economic Communities (RECs) are vital to the realisation of human rights and the protection of vulnerable groups in sub-regions of Africa.

The ACHPR, the core founding human rights instrument of the AHRS, has taken inspiration from international and regional human rights systems, particularly the UDHR, ICCPR, and ICESCR. Moreover, the African Commission on Human and Peoples' Rights (hereafter the African Commission), mandated to monitor the ACHPR, and the African Committee of Experts on the Rights and Welfare of the Child (hereafter the African Children's Committee of Experts), which oversees the ACRWC, also draw inspiration from other human rights systems in interpreting and applying the rights in the charter.<sup>174</sup> This shows the complementarity of the AHRS and the international human rights system.

It should be underlined that the discussions of international law and human rights in the previous sections would also inspire the interpretation of the African human rights instruments based on the notion of complementarity under article 60 and 61 of the ACHPR and article 46 of the ACRWC. As aptly observed by Kaime, 'the unequivocal recognition of existing international children's rights standards cannot be regarded as mere political window-dressing by African states, but is in fact indicative of a commitment to the realisation of international children's rights norms within the African cultural space'.<sup>175</sup>

This section looks at normative standards in the AHRS in regard to the right to move freely and the right to work, as well as at the nexus between child poverty and child labour in the context of migration in Africa.

### **3.3.1. The Right of Adolescents to Move Freely Across Borders**

The right to move freely is an integral part of human dignity and it is protected by the African human rights framework. In particular, the ACHPR, which provides a full spectrum of civil and political rights as well as economic, social and cultural rights, is the basis of the right. The African Refugee Convention (1969/1974) is also another fundamental instrument that regulates the movement of people within Africa. It has been praised for its expanded definition of refugees, one based on, among other things, the tradition of African hospitality towards other Africans.<sup>176</sup> Similarly, the African IDP Convention provides protection for those moving within a state boundary. The ACRWC outlines the right in the context of those individuals below the age of 18 years. Among the dimensions of freedom of movement, this section focuses on the right to move across borders within Africa.

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<sup>174</sup> Viljoen F *International Human Rights Law in Africa* 2 ed. (2012) 325; Bekker G 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *AHRLJ* 4; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (hereafter ACHPR) 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 60 available at <http://www.refworld.org/docid/3ae6b3630.html> (accessed 29 April 2016); & ACRWC art 46.

<sup>175</sup> Kaime T *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 56.

<sup>176</sup> Rankin M B 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years on' in Hathaway J C. (ed.) *Human Rights and Refugee Law: Volume I* (2013) 441.

### 3.3.1.1. The Right to Move Freely: A Human Rights Perspective

The right to move freely is one of the civil and political rights recognised under the ACHPR. Article 12(1) provides for a similar right and duty as that of the ICCPR, declaring that ‘every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law’. The ACHPR further provides that every individual shall have the right to leave from and enter into his or her country as well as the right to leave any country, with permissible limitation that includes the protection of national security, law and order, public health or morality. The ICCPR, on the other hand, permits restrictions if the limitations are necessary to protect the ‘rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant’.<sup>177</sup>

The ACHPR has, in addition, a distinctive formulation regarding the right to freedom of movement, which entails the right of every individual to seek and obtain asylum in accordance with the laws of African countries and international conventions when persecuted.<sup>178</sup> Furthermore, it imposes a duty on African countries not to expel a non-national from their territory unless a decision to such effect is taken in accordance with the law.<sup>179</sup> The ACHPR is also unique in providing a wider scope of the right to freedom of movement by prohibiting mass expulsion of non-nationals that targets the expulsion of a particular national, racial, ethnic or religious group.<sup>180</sup>

In this regard, in the dispute *Recontre Africaine pour la Defense des Droits de l’Home v Zambia*, regarding a case of mass expulsion of 571 West Africans from Zambia, the African Commission held that the ACHPR ‘imposes an obligation on contracting parties to secure the rights protected in the Charter to all persons within their jurisdiction, nationals and non-nationals’.<sup>181</sup> The decision was based on a reading of article 2 (general obligation of state parties to the ACHPR) and article 12 (on freedom of movement and residence and the right to seek asylum and prohibition of mass expulsion).

Another important instrument that indirectly provides for the right to freedom of movement is the 1969 African Refugee Convention, which was adopted to deal with refugee problems not covered by the 1951 Refugee Convention. One aspect of such peculiarity of the problem may be discerned from the very definition of refugees, which was reintroduced with a wider scope of elements to include individuals forced to flee their country of origin or nationality to seek refuge in another country due to ‘external aggression, occupation, foreign domination or events seriously disturbing public order’.<sup>182</sup> The term ‘events seriously disturbing public order’ may be

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<sup>177</sup> ICCPR art 12(2) & (3).

<sup>178</sup> ACHPR art 12(3).

<sup>179</sup> ACHPR art 12(4).

<sup>180</sup> ACHPR art 12(5).

<sup>181</sup> The African Commission on Human and Peoples’ Rights (hereafter the African Commission) *Recontre Africaine pour la Defense des Droits de l’Home v Zambia* Communication No. 71/92 (1996) para 22.

<sup>182</sup> The African Refugee Convention (1969) art 1(2).

considered as ‘a basket clause capturing a generic set of refugee-producing situations’.<sup>183</sup> It could be argued that ‘events seriously disturbing public order’ is a broad concept that could cover reasons of migration, such as acute poverty, famine, drought and environmental degradation, that are generally considered economic reasons of migration. These economic grounds have not been considered as permissible for granting asylum and refugee status under international law or regional human rights systems. Relying on common law jurisprudence on what constitutes ‘disrupting’ public order, Rankin argues that the African Refugee Convention ‘by placing “disturbance” alongside “public order” ... that it is concerned with disturbance in the public context, [and] by including the term “seriously” there is an indication that the gravity of harm must be greater than emotional distress’.<sup>184</sup> Despite these individual positions, a formal legal interpretation has yet to be made by the African Commission or the African Court of Justice and Human Rights as to what amounts to ‘events seriously disrupting public order’.<sup>185</sup>

Another dimension of the African Refugee Convention is the explicit recognition to seek asylum. Although asylum is not presented as a right in the Convention,<sup>186</sup> the latter urges States to ‘use their best endeavours’ to grant asylum for individuals fleeing persecution for the reasons mentioned in the African Refugee Convention under article 1(1) and (2).<sup>187</sup> Subsequently, this provision is reformulated in rights language in article 12(3) of the ACHPR, which stipulates the right to seek and obtain asylum for reasons of persecution.<sup>188</sup> The ACHPR further imposes a duty on individuals granted asylum to refrain from involvement in subversive or terrorist activity against their country of origin or any other African State that is a party to the Charter.<sup>189</sup>

The right to move freely is also contained in other instruments that provide specific protection to children and women in Africa. The ACRWC, which provides a wide set of rights to persons below the age of 18 years, does not directly recognise the right of children to move freely within and across borders irrespective of age and level of maturity. However, like the CRC, it indirectly recognises situations in which children are forced or induced to move across borders with or without their family. In this regard, article 23 of the ACRWC provides that State Parties to the Charter are duty-bound to make sure that an accompanied, separated or unaccompanied migrant child seeking refugee status, or one who has already been granted refugee status, shall get appropriate protection and humanitarian assistance necessary for the full enjoyment of rights set forth under the ACRWC and other applicable international human rights instruments.<sup>190</sup> It further provides that in the case of unaccompanied migrant children, States shall cooperate with

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<sup>183</sup> Rankin M B (2013) 456.

<sup>184</sup> Rankin M B (2013) 457.

<sup>185</sup> Naldi G J & D’Orsi C ‘The Multi-faceted Aspects of Asylum-Law Applicable to Africa: Analysis for Reflection’ 36 *Loy. L.A. Int’l & Comp. L. Rev.* 115 (2014) 137 available at: <http://digitalcommons.lmu.edu/ilr/vol36/iss1/4> (accessed 05 May 2016).

<sup>186</sup> Bekker G (2013) 7.

<sup>187</sup> The African Refugee Convention art 2.

<sup>188</sup> Bekker G (2013) 7.

<sup>189</sup> ACHPR art 23 & the African Refugee Convention art 3.

<sup>190</sup> ACRWC art 23(1).

international organisations to protect and assist them as well as to trace their parents or close relatives for family reunification.<sup>191</sup> In case parents, legal guardians or close relatives cannot be located, an unaccompanied migrant child should be provided with the same special protection and assistance as a child permanently or temporarily deprived of his or her family environment, in accordance with article 25 of the ACRWC.<sup>192</sup>

From a reading of these provisions, the ACRWC only takes into account mass movement of adults and children for humanitarian reasons and instances of children being separated or unaccompanied in the course of migration. Trans-boundary independent migration of children in general and adolescents in particular seems to have been overlooked during the drafting process as well as in subsequent guidance on the interpretation of provisions and in recommendations to State Parties on the implementation of ACRWC.

A further major instrument in the AHRS is the Protocol on the Rights of African Women, which outlines specific rights and special protections for African women. It is especially important for the girl child in Africa. In the context of child migration, the Protocol outlines the special protection needs of women and girl migrants. The Protocol urges States to take effective measures to ensure that women access refugee status determination procedures and benefit equally from protections bestowed by international refugee laws.<sup>193</sup> The Protocol also provides that women's participation should be enhanced in local, national, sub-regional, regional and international forums and decision-making structures, with the aim being to improve the physical, psychological, social and legal protection of different categories of migrants, particularly asylum-seekers, refugees, returnees and displaced persons.<sup>194</sup> In case of armed conflicts, the Protocol urges states to accord to asylum-seeking, refugee, returnee and internally displaced women special protections against all forms of violence, rape and other forms of sexual exploitation. These protections under the Protocol are applicable to women in general as well as to independent girl adolescent migrants.

The AHRS provides that freedom of movement is one of the fundamental human rights protected on the African continent. Children's right to free movement, including moving across borders, however, is not among their basic rights provided under the ACRWC. The absence of provision for children's right to freedom of movement indicates that such right is not bestowed on adolescents. Nonetheless, the ACRWC provides that children in the context of migration shall be accorded with protection and humanitarian assistance for the full enjoyment of their rights under it. The approach of the ACRWC in providing protection and meeting the livelihood needs of children in the context of migration is very important, given the dire situations of these children

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<sup>191</sup> ACRWC art 23(2).

<sup>192</sup> ACRWC art 23(3).

<sup>193</sup> African Union (AU) *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (hereafter African Women's Protocol) 11 July 2003 art 4(2)(k) available at <http://www.refworld.org/docid/3f4b139d4.html> (accessed 30 April 2016).

<sup>194</sup> The African Women's Protocol African Union, art 10(2)(c).

in the migration process. The law, however, should be much more than needs-based service delivery and should devise a mechanism to take into account the characteristics of independent adolescent migrants, who are a special category of children. They should be conferred with special rights and privileges by taking into account their ‘best interests’ based on their own words. Although not specific to independent adolescent migrants, the African Women’s Protocol provides relatively more detailed protection of the rights and interests of girls in the context of migration than the African Children’s Act.

### 3.3.1.2 African Regional Laws and Policy Instruments on Free Movement of Persons

The African position on freedom of movement within the continent has two dimensions: freedom of movement as a pillar to achieve other ends such as development; and continental integration and migration governance, which usually focus on fostering regular movement and extending adequate protection to victims of irregular migration.<sup>195</sup>

The umbrella instrument that takes freedom of movement as a major pillar is the Treaty Establishing the African Economic Communities (hereafter Abuja Treaty), which was adopted by the OAU in 1991.<sup>196</sup> One of the main objectives of the Abuja Treaty is to foster human mobility within the continent to bring about self-reliant development for Africa.<sup>197</sup> The treaty aspires to gradually remove obstacles to the free movement of persons and the right of residence among African Member States.<sup>198</sup> To make such objectives reality, the treaty sets out six stages of implementation, organised under six categories of objectives, that are to be implemented over 34 years. The objective regarding free movement of persons and the right of residence falls under the fifth objective, and Member States further agree to adopt a protocol to such effect.<sup>199</sup>

To meet the objectives of the Abuja Treaty, a number of binding and non-binding documents are directly related to freedom of movement.<sup>200</sup> The adoption of the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment in 2018 (hereafter African Protocol to free movement of persons) is the major step in implementing the objectives of the Abuja treaty and can be regarded

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<sup>195</sup> Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children as Adopted by the Ministerial Conference on Migration and Development (22-23 November 2006) Tripoli available at [https://au.int/sites/default/files/pages/32899-file-3.\\_ouagadougou\\_action\\_plan\\_to\\_combat\\_trafficking\\_en\\_1.pdf](https://au.int/sites/default/files/pages/32899-file-3._ouagadougou_action_plan_to_combat_trafficking_en_1.pdf) (accessed 15 April 2016).

<sup>196</sup> Organization of African Unity (OAU) *Treaty Establishing the African Economic Communities* (hereafter the Abuja Treaty) adopted 3 June 1991 in Abuja, Nigeria entered into force 12 May 1994 available at [http://www.au.int/en/sites/default/files/treaties/7775-file-treaty\\_establishing\\_the\\_african\\_economic\\_community.pdf](http://www.au.int/en/sites/default/files/treaties/7775-file-treaty_establishing_the_african_economic_community.pdf) (accessed 30 April 2016).

<sup>197</sup> The Abuja Treaty art 1(b).

<sup>198</sup> The Abuja Treaty art 2(i).

<sup>199</sup> The Abuja Treaty art 6(2)(e)(iii) & 43(2).

<sup>200</sup> The International Organization for Migration (IOM), AU, ECA, IGAD Liaison Unit available at <http://iomethiopia.org/au-eca-igad-liaison-unit> (accessed 30 April 2016); the African Union (AU) *African Common Position on Migration and Development* Executive Council Ninth Ordinary Session 25 – 29 June, 2006 (EX.CL/Dec.264 on Migration and Development (VIII) Banjul, the Gambia [http://www.un.org/en/africa/osaa/pdf/au/cap\\_migrationanddev\\_2006.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_migrationanddev_2006.pdf) (accessed 30 April 2016).

as the sum of a number of declarations and initiatives.<sup>201</sup> Furthermore, the revision of the Migration Policy Framework for Africa and Action Plan (2018-2030) is another recent initiative for giving policy guidance on movement within and out of the continent.<sup>202</sup>

The African Protocol to Free Movement of Persons defines ‘free movement of persons as the right of nationals of Member States to enter, move freely, reside in and exist from another Member State in accordance with the laws of the country’.<sup>203</sup> The free movement of persons should be guided by, among other things, the founding principles of the AU and the principle of non-discrimination.<sup>204</sup> The Protocol prohibits discrimination in the implementation of the Protocol by reiterating the non-discrimination clause under the ACHPR.<sup>205</sup> The components of free movement of persons as defined under the Protocol are to be implemented progressively in three phases: allowing visa free entry for 90 days as a priority, followed by the right to residence and establishment.<sup>206</sup> The Protocol further recognises different purposes of movement, including that for the purpose of employment.<sup>207</sup> The Protocol makes reference to the local laws of Member States and declares that its provisions are to be implemented subject to these laws. The Protocol fails to recognise children in general and adolescents in particular that are active participants in cross-border movement, and it is unclear how their affairs are going to be regulated.

The Migration Policy Framework for Africa (MPFA), a non-binding guideline adopted in 2006 at Banjul<sup>208</sup> and revised in 2018, consists of eight policy directions and recommendations to AU Member States and RECs.<sup>209</sup> The MPFA highlights cross-cutting issues, which include the rights of migrants and the migration of children, adolescent and youth.<sup>210</sup>

One of the unique attributes of the MPFA is its specific policy direction on children, adolescents and youth migration and explicit separation between children in general from adolescents in the

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<sup>201</sup> The Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment January 29, 2018 (hereafter African Protocol to free movement of persons) available at [https://au.int/sites/default/files/treaties/36403-treaty-protocol\\_on\\_free\\_movement\\_of\\_persons\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf) (accessed 20 August 2019).

<sup>202</sup> AU ‘Migration Policy Framework for Africa and Action Plan’ (2018-2030) African Union Commission, AU Department for Social Affairs, Addis Ababa, May 2018 available at [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other\\_documents/35316-doc-au-mpfa\\_2018-eng.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf) (accessed 20 August 2019).

<sup>203</sup> African Protocol to Free Movement of Persons (2018) art 1.

<sup>204</sup> African Protocol to Free Movement of Persons (2018) art 3(1) & (2)(a).

<sup>205</sup> African Protocol to Free Movement of Persons (2018) art 4(1).

<sup>206</sup> African Protocol to Free Movement of Persons (2018) art 5 (1)(a-c); & 6.

<sup>207</sup> African Protocol to Free Movement of Persons (2018) art 14.

<sup>208</sup> Organization of African Unity (OAU) *The Migration Policy Framework for Africa* OAU Council of Ministers, Decision CM/Dec 614 (LXXIV) during the 74th Ordinary Session in Lusaka, Zambia in July 2001 available at <http://www.unhcr.org/4d5259049.pdf> (accessed 30 April 2016).

<sup>209</sup> The Key Policy Areas are 1) migration governance 2) labor migration 3) diaspora engagement 4) border Management 5) irregular migration, 6) forced displacement 7) Internal Migration 8) migration and trade; Migration Policy Framework for Africa and Action Plan (2018-2030) 27.

<sup>210</sup> Migration Policy Framework for Africa and Action Plan (2018-2030) 79-80.

title. Its focus on child, adolescent and youth migration reflects shifting trends in the age composition of migrants, increasing numbers of whom are children, adolescents and youth. The policy takes a holistic approach anchored on human rights and encompasses legislative and policy measures at national, regional and international levels; provision of basic services to migrant children; prevention modalities; and practical alternatives to child migration. In particular, it urges States to develop policies that promote migration and sports as well as student exchange programmes aimed at improving African integration.<sup>211</sup> Although the rationale for the focus on movement of children, adolescents and youth is clearly provided, the specific interventions fall short in giving specific policy direction for these groups.

Another policy document relevant to freedom of movement in Africa is Agenda 2063. This cross-cutting plan considers freedom of movement a fundamental pillar to achieve integration.<sup>212</sup> It provides that

the political unity of Africa will be the culmination of the integration process, which includes the free movement of people [...and...] Africa shall be a continent where the free movement of people, capital, goods and services will result in significant increases in trade and investments amongst African countries rising to unprecedented levels, and in the strengthening of Africa's place in global trade.<sup>213</sup>

Agenda 2063 had planned for there to be (by 2018) a single African passport and no visa requirement for moving across the continent.<sup>214</sup>

In an effort to accelerate mobility and integration in the continent, the AU Assembly adopted a Declaration on Migration 2015.<sup>215</sup> Under this Declaration, African States, individually and collectively, commit to expedite the implementation of visa-free movement in Africa with immediate responses such as visa issuance at ports of entry of States and reciprocal visa-free entry between States. Moreover, the existing opportunities in the RECs should be bestowed on all Africans by 2018.<sup>216</sup> The Declaration also urges States to further the implementation of a single African passport to facilitate the free mobility of Africans within the continent. The Declaration also assigns responsibility to the AU Commission (AUC) to facilitate conditions for the Executive Council to advance the issue of free mobility of Africans and take concrete steps

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<sup>211</sup> The Migration Policy Framework for Africa (2006) 39-40, 79-80

<sup>212</sup> The African Union Commission 'Agenda 2063' adopted by AU's Summit in January 2015 Popular Version (September 2015) para 1-4 & 23, 24 available at [http://www.au.int/web/sites/default/files/pages/3657-file-agenda2063\\_popular\\_version\\_en.pdf](http://www.au.int/web/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf) (accessed 16 May 2017).

<sup>213</sup> Agenda 2063 para 23, 24 & 73.

<sup>214</sup> Agenda 2063 para 71(i).

<sup>215</sup> African Union (AU) *Declaration on Migration* Doc. Assembly/AU/18 (XXV) 15 June 2015 in Johannesburg, South Africa, available at [http://summits.au.int/en/sites/default/files/Assembly per cent20AU per cent20Dec per cent20569 per cent20- per cent20587 per cent20 per cent28XXIV per cent29 per cent20\\_E.pdf](http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20per%20569%20-%20per%20587%20per%2028XXIV%20per%2029%20_E.pdf) (accessed 30 April 2016)

<sup>216</sup> African Union (AU) *Declaration on Migration* Doc. Assembly/AU/18 (XXV), para I & II available at [http://summits.au.int/en/sites/default/files/Assembly per cent20AU per cent20Dec per cent20569 per cent20- per cent20587 per cent20 per cent28XXIV per cent29 per cent20\\_E.pdf](http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20per%20569%20-%20per%20587%20per%2028XXIV%20per%2029%20_E.pdf) (accessed 30 April 2016).

such as adopting a binding protocol on the free movement of people within the continent, which materialised in January 2018.<sup>217</sup>

At the 27<sup>th</sup> Ordinary Session of the AU Assembly of Heads of State and Government on 17 July 2016 at Kigali, the long-awaited e-passport of Africa was issued to selected dignitaries of African States. This was a symbolic gesture to mark the commitment to freedom of movement of Africans within the continent and expedite the regional integration of Africa.<sup>218</sup> For now, the holders of such biometric or electronic passports are African heads of state, foreign ministers and diplomats accredited by the AU. The objective was to issue this passport to all citizens of Africa by 2018.<sup>219</sup> However, this has not come to pass.

A cumulative reading of all these documents – the Abuja Treaty, Agenda 2063 and African Protocol to Free Movement of Persons – will inform the free-movement scheme applicable in the continent. Anticipated challenges relate to, inter alia, economic inequalities between countries, unemployment and the overcrowding of some relatively developed countries, security concerns, public health concerns, and lack of capacity to regulate and implement the free movement scheme. The existing political leadership in many African countries that can be characterised by lack popular participation of the public in decision-making process as well as lack of good governance particularly the lack of transparency and accountability could also stand against fostering effective integration.<sup>220</sup>

Most of the initiatives on migration and international movement of persons are sponsored by international partners that experience migration problems due to the large numbers of persons moving from Africa to continents such as Europe. As a result, most such initiatives focus on preventionist, protectionist and regional containment strategies. Furthermore, there is a tendency to regard every migration issue – whether voluntary or involuntary – as a case of trafficking and smuggling.

The fact that continental migration initiatives are sponsored by affluent and powerful non-African nations means that little or no focus has been given to movement of persons within the continent or, specifically, adolescent independent migration within the continent, which is rising at an alarming rate. Africa should be able to objectively prioritise its problems, own its actions, initiatives and migration governance systems, and come up with suitable solutions. The current

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<sup>217</sup> AU Declaration on Migration para 1(I & III).

<sup>218</sup> Press Release 27<sup>th</sup> AU Summit ‘African Union Passport Launched during Opening of 27th AU Summit in Kigali’ available at <https://www.au.int/en/pressreleases/31182/african-union-passport-launched-during-opening-27th-au-summit-kigali> (accessed 16 May 2017)

<sup>219</sup> Monks K (for CNN) ‘United States of Africa? African Union launches all-Africa passport’ available at <http://edition.cnn.com/2016/07/05/africa/african-union-passport/> (accessed 16 May 2017); Mukeredzi T ‘Pan-Africa passport to open up borders’ (August - November 2016) Africa Renewal, available at <http://www.un.org/africarenewal/magazine/august-2016/pan-africa-passport-open-borders> (accessed 16 May 2017); see also Agenda 2063 para 72(i).

<sup>220</sup> Viljoen F (2012) 473.



initiatives on fostering free movement of persons across the continent should enable the establishment of Africa's own effective migration governance structure, among other things, by focusing on pressing issues such as the independent movement of adolescents. If such an opportunity is seized, it could be a signal way of turning the slogan, 'African solutions to African problems', into a reality.

### 3.3.1.3 Freedom of Movement in the African Sub-Regional Organs

As asserted by Viljoen, the political and economic integration of Africa in the short- to medium-term is to be achieved at the sub-regional level. As such, it is key to assess the sub-regional organisations in Africa in the context of freedom of movement to gauge how far Africa has come. Currently there are 14 sub-regional associations in Africa, with overlapping membership of states in two or more of these associations. Of these, eight were established in accordance with the Treaty Relating to the Establishment of the African Economic Community of 1991 and have been recognised by the 2006 AU's RECs Recognition Moratorium Decision.<sup>221</sup> For the purpose of this section, six are selected, based on regional representation.

In the founding texts of the RECs, human rights were not referred to in their core values and principles. However, the transformation of the OAU into the AU necessitated that human rights be at the centre of sub-regional cooperation. This can be inferred from the integration of human rights in the 1999 EAC treaty and the adoption of various treaties and soft laws on child soldiers and human trafficking in the Economic Community of West African States (ECOWAS); the Southern African Development Community (SADC) and COMESA, established in the 1990s, also put human rights among their major values.<sup>222</sup> Apart from the general reference to human rights, some RECs have given focus to a thematic right or the right of a specific vulnerable group; for instance, SADC has a focus on HIV/AIDS issues, Intergovernmental Authority for Development (IGAD) has a focus on refugees and IDPs, and ECOWAS, a focus on human trafficking and children's rights, particularly in regard to culture and child soldiers.<sup>223</sup>

The AU was late in taking the current initiatives with regard to freedom of movement, such as adopting declarations to expedite the process and issuing e-passports and free movement. The ECOWAS, for instance, since 1970s has been implementing free movement scheme for citizens from its Member States. There have been bilateral and multilateral agreements for visa-free entry among countries in the same sub-regions, such as in the Southern and Eastern African sub-regions. Seychelles, Ghana, Mauritius and Rwanda, Ethiopia, Kenya have put in place visa-on-

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<sup>221</sup> Viljoen F (2012) 474-80; see also The Regional Economic Communities (RECs) of the African Union available at <http://www.un.org/en/africa/osaa/peace/recs.shtml>, and Regional Economic Communities in Africa [http://www.claiminghumanrights.org/african\\_rec.html](http://www.claiminghumanrights.org/african_rec.html) (accessed 16 May 2017)

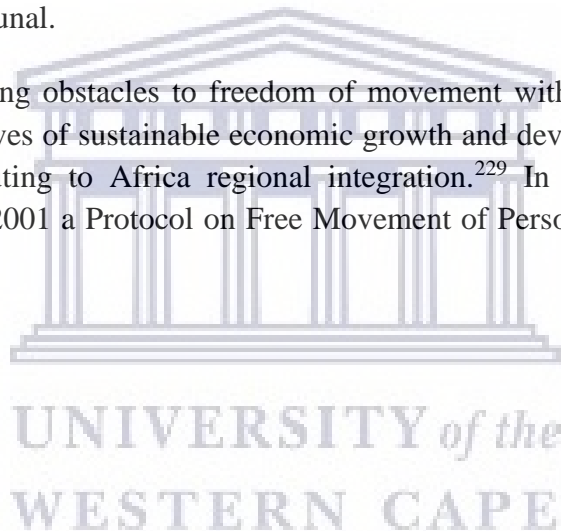
<sup>222</sup> Viljoen F (2012) 482-84.

<sup>223</sup> Viljoen F (2012) 484-87.

arrival schemes to promote investment and tourism.<sup>224</sup> In general, according to the 2016 African Visa Openness Report, 55 per cent of African countries require a visa from Africans to enter their country, 25 per cent of African countries allow Africans to get a visa on arrival, and for 20 per cent of countries, Africans are not required to have a visa.<sup>225</sup>

ECOWAS has adopted a protocol relating to the freedom of movement across the sub-region<sup>226</sup> and is implementing it. So far, it has enabled visa-free movement of citizens of Member States across the sub-region.<sup>227</sup> Indeed, the first case brought before the ECOWAS Court in 2003, *Afolabi Olajide v Federal Republic of Nigeria (the Afolabi Case)*, related to freedom of movement. The case was brought by a Nigerian businessperson who alleged that Nigeria violated the law of ECOWAS regarding free movement by closing the border with Benin.<sup>228</sup> Although the judgment, delivered in April 2004, ruled that under the protocol only Member States could bring cases to court and did not go into the merits and substantive interpretation of the freedom of movement, the case is important, as it is the first issue related to freedom of movement to be brought before an REC tribunal.

Under COMESA, eradicating obstacles to freedom of movement within the Member States is key to achieving its objectives of sustainable economic growth and development; peace, security and stability; and contributing to Africa regional integration.<sup>229</sup> In line with the COMESA establishment treaty,<sup>230</sup> in 2001 a Protocol on Free Movement of Persons, Labour, Services, the



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<sup>224</sup> Mukeredzi T 'Pan-Africa passport to open up borders' (August - November 2016) Africa Renewal; the African Union and African Development Bank Group *Africa Visa Openness Report (2016) 11-12* available at [https://www.afdb.org/fileadmin/uploads/afdb/Documents/GenericDocuments/Africa\\_Visa\\_Openness\\_Report\\_2016.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/GenericDocuments/Africa_Visa_Openness_Report_2016.pdf) (accessed 16 May 2017).

<sup>225</sup> Africa Visa Openness Report (2016) 13.

<sup>226</sup> Economic Community of West African States (ECOWAS) *Protocol Relating to Free Movement of Persons, Residence and Establishment* 29 May 1979, A/P 1/5/79 art 2 & 3 available at <http://www.refworld.org/docid/492187502.html> (accessed 17 May 2017).

<sup>227</sup> Africa Visa Openness Report (2016) 17; Viljoen F (2012) 482.

<sup>228</sup> The Community Court of Justice of the Economic Community of West African States (ECOWAS); the case between *Afolabi Olajide vs. Federal Republic of Nigeria (the Afolabi Case)* (ECW/CCJ/JUD/01/04) is available at <http://dev.ihrda.org/doc/ecw.ccj.jud.01.04/view/> (accessed 18 May 2017); The Danish Institute for Human Rights 'African Human Rights Complaints Handling Mechanisms A Descriptive Analysis' (2008) 102-03 available at [https://www.humanrights.dk/sites/humanrights.dk/files/media/billeder/udgivelser/afican\\_hr\\_complaints\\_handling\\_mechanisms.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/billeder/udgivelser/afican_hr_complaints_handling_mechanisms.pdf) (accessed 16 May 2017); see also Viljoen F (2012) 482.

<sup>229</sup> Treaty Establishing A Common Market for Eastern and Southern Africa (COMESA) signed in November 1993 in Kampala, Uganda and entered into force on 8 December 1994 art 4(6) available at [http://www.comesacompetition.org/wp-content/uploads/2016/03/COMESA\\_Treaty.pdf](http://www.comesacompetition.org/wp-content/uploads/2016/03/COMESA_Treaty.pdf) (accessed 17 May 2017).

<sup>230</sup> Treaty Establishing COMESA art 164(2).

Right of Establishment and Residence was adopted.<sup>231</sup> The protocol has not yet come into force due to limited signatures.<sup>232</sup>

In the East African Community (EAC), Member States agreed that to meet its objectives, obstacles to freedom of movement have to be removed.<sup>233</sup> The initiative for the free movement of people in EAC goes back to the 1967 Treaty for East African Cooperation between Kenya, Uganda and the United Republic of Tanzania. Moreover, such extensive experience in fostering freedom of movement in the community also brought about a common passport among these countries in 1999, one which allows free movement and stay in the region for six months.<sup>234</sup>

The SADC treaty does not provide similar provisions as other sub-regional communities on the promotion of freedom of movement among Member States of the community. Even in the initial treaty of 1992, there was no provision providing for freedom of movement. The revised treaty of 2001 indicates that it would develop policies relating to freedom of capital, labour, goods and services including those 'of the people of the region'.<sup>235</sup> In 2005, SADC was able to come up with a protocol to facilitate the movement of persons within the sub-region; however, it has not come into effect yet.<sup>236</sup>

The issue of freedom of movement was also among the objectives behind the establishment of the IGAD.<sup>237</sup> Although there has been discussion to adopt a protocol on freedom of movement in the sub-region, so far IGAD has been unable execute it.<sup>238</sup> Nevertheless, it should be noted that

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<sup>231</sup> COMESA *the Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence* Adopted at the Democratic Republic of the Congo 29<sup>th</sup> June 1998/2001 available at [https://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Free\\_Movement\\_Protocol\\_Kinshasa\\_19980629.pdf](https://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Free_Movement_Protocol_Kinshasa_19980629.pdf) (accessed 17 May 2017).

<sup>232</sup> COMESA, *Key Issues in Regional Integration Vol III* (2014), available at <http://www.comesa.int/wp-content/uploads/2016/06/Key-Issues-on-intergration-III.pdf> (accessed 18 May 2017); see also United Nations Economic Commission for Africa *COMESA - Free Movement of Persons* available at <http://www.uneca.org/pages/comesa-free-movement-persons> (accessed 18 May 2017); see also THE AFRICA-EU PARTNERSHIP *COMESA Works towards Free Movement of Persons* available at <http://www.africa-eu-partnership.org/en/newsroom/all-news/comesa-works-towards-free-movement-persons> (accessed 18 May 2017).

<sup>233</sup> The Treaty for The Establishment of the East African Community (EAC), signed on 30th November 1999 Entered into force on 7th July 2000 (Amended on 14th December, 2006 and on 20th August, 2007) art 82(1)(c) and art 104(1)(2) available at [http://www.eac.int/sites/default/files/docs/treaty\\_eac\\_amended-2006\\_1999.pdf](http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf) (accessed 17 May 2017).

<sup>234</sup> United Nations Economic Commission for Africa *EAC - Free Movement of Persons* available at <http://www.uneca.org/pages/eac-free-movement-persons> (accessed 17 May 2017).

<sup>235</sup> Treaty of the Southern African Development Community (SADC) adopted in 1992 and entered into force in 1993, (and was modified by the 2001 Agreement Amending the Treaty of SADC) art 5(2)(d) available at <http://www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf> (accessed 16 May 2017).

<sup>236</sup> Protocol on Facilitation of Movement of Persons (2005) available at <http://www.sadc.int/documents-publications/show/800> (accessed 16 May 2017).

<sup>237</sup> Agreement Establishing the Intergovernmental Authority for Development (IGAD) (1996) available at <http://www.chr.up.ac.za/undp/subregional/docs/igad1.pdf> (accessed 16 May 2017) art 7; see also Intergovernmental Authority for Development (IGAD) History available at <https://au.int/en/recs/igad> (accessed 16 May 2017)

<sup>238</sup> IGAD 'A Draft Protocol on Free Movement of Persons' available [https://igad.int/index.php?option=com\\_content & view=article & id=479:igad-discusses-a-draft-protocol-on-free-](https://igad.int/index.php?option=com_content&view=article&id=479:igad-discusses-a-draft-protocol-on-free-)

countries in the region have been allowing visa-free movement of persons based on bilateral agreements; for instance, there are bilateral agreements on visas on arrival and waivers of visa requirements between Ethiopia and Kenya, Ethiopia and Djibouti, and Kenya and Uganda.<sup>239</sup> Then, under the Community of Sahel-Saharan States (CEN-SAD), established on 4 February 1998, the movement of persons is one of its objectives.<sup>240</sup> There has been an initiative to draft an agreement on 'Free Movement and Establishment of Persons within the Territory of Member States of the Community of Sahel-Saharan States',<sup>241</sup> yet without tangible result so far.

From a normative and practical consideration of freedom of movement in the RECs, it may be observed that in sub-regions with countries with relatively stronger economies and perceived migration problems as transit or destination countries, there is no enthusiasm to adopt a specific treaty on the freedom of movement. There is also reluctance to take concrete steps to ease strict travel requirements.<sup>242</sup> Compared with other RECs, SADC, which includes South Africa, and CEN-SAD, with membership of North African states, have not taken steps to promote freedom of movement in their sub-regions. Generally, for except ECOWAS and EAC, countries in other sub-regions show similar reluctance to adopt a binding regional treaty on freedom of movement.

In conclusion, the binding and non-binding instruments under the AHRS contain provisions that deal directly and indirectly with the movement of people within the continent. The AHRS is the only system that provides for granting asylum when the life and well-being of a person is at risk due to the threat of persecution, foreign domination, discrimination or events seriously disrupting order. Although there has not been authoritative legal interpretation of what 'seriously disrupting the public order' connotes, there is a possibility to interpret severe and widespread economic deprivation in general and child-specific deprivation in particular as grounds to grant refugee status in accordance with the African Refugee Convention.

With regard to children/adolescent's movement, African human rights instruments albeit lack of explicit recognition of child migration, the provisions of the ACRWC by interpretation indicate

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*movement-of-persons & catid=44:economic-cooperation & Itemid=127* (accessed 16 May 2017); Intergovernmental Authority for Development *IGAD State of the Region Report* (January 2016) Key Recommendations 72, 74 available at [file:///C:/Users/Fasil/Desktop/-per cent20IGAD per cent20State per cent20of per cent20the per cent20region\\_v9.pdf](file:///C:/Users/Fasil/Desktop/-per%20IGAD%20per%20State%20of%20the%20region_v9.pdf)

<sup>239</sup> United Nations Economic Commission for Africa, *IGAD Freedom of Movement* available at <http://www.uneca.org/pages/igad-free-movement-persons> (accessed 16 May 2017).

<sup>240</sup> The Danish Institute for Human Rights *African Human Rights Complaints Handling Mechanisms* (2008) 143.

<sup>241</sup> IOM 'International Dialogue on Migration Inter-sessional Workshop on Free Movement of Persons in Regional Integration Processes' (18 -19 June 2007) 18 available at [https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/free\\_movement\\_of\\_persons\\_18190607/idm2007\\_handouts.pdf](https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/free_movement_of_persons_18190607/idm2007_handouts.pdf) (accessed 16 May 2017).

<sup>242</sup> Madowo L 'Why is it so hard for Africans to visit other African countries?' 8 October 2018 available at <https://www.bbc.com/news/world-africa-45677447> (accessed 24 August 2019).

that there are instances where children migrate both solitary or with adults, and due to their exceptional vulnerability a special protection ought to be extended to them by State parties.

Currently, the free movement of people in the continent is not seen from the asylum-seeker or refugee's perspective but regarded as a means of fostering political and economic integration among African states. Looking at the Abuja treaty and its recent protocol on the free movement of persons, as well as at the non-binding regional policy directions, plans and programmes on free human mobility, the initiative to issue an African passport, and the treaties in the RECs, there is, arguably, regional consensus on the free movement of persons.

However, it is clear that the issue of children in the context of free movement is not taken as a priority, as most of the documents on freedom of movement do not refer it. In all these initiatives, the independent migration of children in general and adolescents in particular is overlooked. The only exception is the MPFA, which has 'child, adolescent and youth migration' among its strategic areas. It is commendable to see that the policy, if only in its title, tried to indicate that the migration of children, adolescents and youth is a distinct phenomenon; still, a disaggregated, tailor-made and systematic policy direction based on the designated groups, particularly adolescents, is not provided.

In the current situation, a major fact is that when African countries are able to implement the free movement scheme, children in general and adolescents in particular would be a conundrum to deal with. Unless a tailor-made framework is put in place that balances their adult-like capacities with their protection needs, the current approach to adolescent irregular migration and service provision in shelters undermines the free movement scheme in that it would lead to serious and pervasive rights violations as it goes against the interests of adolescent unaccompanied migrants in Africa.

### **3.3.2 Children's Right to Work in the Context of Migration and its Implications in Africa**

In theory, children, including adolescents, should receive basic services from their parents, legal guardians or any persons assigned by law or custom to take care of them. If persons in charge of the well-being of children are not in a position to meet their basic needs, the state has to assist them in discharging their responsibilities.<sup>243</sup> In Africa, it is a reality that, due to the failure of parents and states, many children look for ways to fulfill their basic needs, such as seeking remunerative activities in the formal and informal sectors. One such way is to migrate from their homes or places of habitual residence to seek work or better opportunities. In the process, they may be exposed to rights violations, such as labour exploitation and activities detrimental to their development and health.

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<sup>243</sup> ACRWC art 20(1) & (2).

This section examines child poverty in Africa as a main driving force of child/adolescent migration and labour exploitation of children. It looks too at issues of child labour from the perspective of African regional human rights law and determines whether the law allows for instances where children have a right to work and choose their means of livelihood. It also discusses human rights violations that result from the involvement of children in income-generating activities and solitary cross-border movement in search of better opportunities.

### 3.3.2.1 Regulating Adolescents' Work in Africa

Children's work could be associated with child independent migration in many ways. Children in a foreign country are highly vulnerable as they are strangers and lack the means to meet basic needs such as food, shelter, clothes and access social services such as health care and education. Hence, they have to work to earn money for their survival in difficult situations that threaten their well-being and survival. Technically, defining children's work may create difficulties given the different cultural perspectives on what childhood is. Some cultures define childhood on the basis of biological attributes rather than chronological age. In such cultures, the child, irrespective of chronological age, may be considered fit to undertake the activities of adults owing to his or her physical growth and fitness.<sup>244</sup> This is contrary to how childhood is understood in Western cultures, an understanding that has informed international child-rights norms and principles.

The other technical problem on the definition of children's work and differentiating it from child labour is associated with the type of work that should be deemed against the interest and wellbeing of the child.<sup>245</sup> In many societies, children at a certain age start unpaid work within the family. Even in the West, young children are allowed to take on part-time employment on relatively easy activities such as newspaper delivery or babysitting. In traditional societies that are dependent on agriculture, children work on farms, which is considered training for adult life. In such cultures, 'work within the family unit may [...] be considered [...] a duty, an honour, or an expression of family solidarity'.<sup>246</sup>

There is no African regional labour standard or a regional mechanism that contextualises the international labour standards into the African context based on regional peculiarities. Of course, the nature of labour issues and the need for standardisation of employment relations and conditions of work require universal standards that ought to be respected worldwide without any discrimination. Nonetheless, regional peculiarities, as well as the possibilities of providing better protection through context-based measures, should not be overlooked.

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<sup>244</sup> Bol J 'Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System' (1998) 13 *American University International Law Review* 1139-40.

<sup>245</sup> Ennew J, Myers W E. & Plateau D P 'Defining Child Labor as if Human Rights Really Matter' in Weston B H. (ed) *Child Labor and Human Rights: Making Children Matter* (2005) 34-5.

<sup>246</sup> Bol J (1998) 1141.

The general labour right in the ACHPR provides for everyone's right to work under 'equitable and satisfactory conditions' and receive 'equal pay for equal work'.<sup>247</sup> The Protocol on the Rights of African Women provides additional work-related provisions that are anchored in granting equal access, prohibiting any form of discrimination in the workplace, and providing for conducive work environments taking the interests of women into account.<sup>248</sup> The provisions under the Protocol are a showcase of providing regional standard based on peculiar attributes of the region because it outlines in detail what the right to work would mean for African women by providing ways to address African women's perpetual problems associated with employment.

Although the ACHPR is silent on the matter, the ACRWC provides in detail for child labour. The provisions of the Children's Charter both protect children from exploitative work as well as regulate their work. The protection it provides is that 'every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral or social development'.<sup>249</sup> The regulation of children's work refers in turn to the ILO standards on children's work, with states being urged to regulate minimum wages, work hours and conditions of work, and provide appropriate penalties for contravening labour rules. Awareness raising measures about the adversaries of child labour is also provided as a modality to ensure protection of children from labour exploitation as well as ensure the right of children at work.<sup>250</sup> In regard to the girl child, the Protocol on the Rights of African Women stresses the need for compliance with minimum age requirements and the protection of girls from labour exploitation.<sup>251</sup>

Another recent law pertinent to the issue of work in the context of migration is the African Protocol to free movement of persons, which explicitly provides that Africans have a right to move across borders within the continent to seek employment, subject to the domestic laws of each Member State. This right should be implemented without discrimination.<sup>252</sup> Moving in search of work also entails different permits, including work and resident permits. In this regard, the host country is given the autonomy to issue appropriate permits in line with its laws and to observe due process, which includes the right to appeal against the rejection of work and residence permit applications.<sup>253</sup>

To stimulate employment, African countries should, through individual or multilateral arrangements, devise a mechanism to recognise academic, professional and technical qualifications.<sup>254</sup> The African Protocol to free movement of persons does not provide guidance on how adolescents' movement and employment across the African continent would be

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<sup>247</sup> ACHPR art 15.

<sup>248</sup> Protocol on the Rights of African Women (2003) art13.

<sup>249</sup> ACRWC art 15 (2)(a-d).

<sup>250</sup> ACRWC art 15 (1).

<sup>251</sup> Protocol on the Rights of African Women (2003) art13(g).

<sup>252</sup> African Protocol to free movement of Persons (2018) art 14(1), see also art 3(2)(a) & 4.

<sup>253</sup> African Protocol to free movement of Persons (2018) art 15 (1-3).

<sup>254</sup> African Protocol to free movement of Persons (2018) art 18(1-2)

regulated. The Protocol relies heavily on the domestic laws of the host country, providing no self-standing rules per se; hence, issues of movement as well as the work of adolescents still hinge on the host countries' interpretation of their laws. In a continent where 62 per cent of the population is below the age of 25,<sup>255</sup> failing to regulate their rights in the context of cross-border employment is a lost opportunity.

As noted in the preceding section, international labour standards do not prohibit children's work but rather children's exploitation. It is a fact that in Africa adolescents are expected to work, and it would be impractical to prohibit children's work. So, rather than pursue a fantasy of abolition, it is imperative to recognise children or adolescent's work and properly regulate it by granting rights to children and duties to employers. Agreement on such an approach could also extend to regulating children's work in the context of migration by both the host and destination countries. The ACRWC and the Protocol on the Rights of African Women provide appropriate regulation of children's work. The recent African Protocol on free movement of persons, despite its relevance to cross-border work, is silent on adolescents' rights in this regard, leaving them to the discretion of the domestic laws of host countries.

### **3.3.2.2 The Nexus between Child Labour and Adolescent Migration in Africa**

African children, irrespective of age, bear the burden of poverty and deprivation of basic needs, which exposes them to exploitation, violence, abuse, trafficking, forced prostitution or the worst forms of child labour. According to ILO 2016 data, sub-Saharan Africa has the highest both in percentage – one in five – and absolute number – 72 million child labourers – which represents a steep increase on the 59 million estimated to have been working in 2012.<sup>256</sup> Furthermore, sub-Saharan Africa has a large number of children involved in hazardous work, namely 28.8 million. Sub-Saharan Africa leads the chart, with 10 per cent of its working children found in hazardous work environments.<sup>257</sup>

The agricultural sector has the largest share of child labourers. Agricultural work ranges from working on a family farm to activities away from home, in areas such as fishery and livestock. The service and industrial sectors account for the second and third largest number of child labourers, respectively. Work in the service sector includes domestic work, informal work in hotels and restaurants, street selling and other forms of commerce, and work in repair shops and

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<sup>255</sup> UNDESA 'World Population Prospects Highlights (2019) 14-5 available at [https://population.un.org/wpp/Publications/Files/WPP2019\\_Highlights.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf) (accessed 21 August 2019).

<sup>256</sup> ILO 'Global Estimates of Child Labour: Results and trends 2012-2016' (2017) Geneva 12 & 28 available at [https://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/documents/publication/wcms\\_575499.pdf](https://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/documents/publication/wcms_575499.pdf) (accessed 24 August 2019); see also ILO-IPEC *Marking Progress Against Child Labour* (2013) 17; ILO *World report on child labour* (2015) 45.

<sup>257</sup> ILO-IPEC *Marking Progress Against Child Labour* (2013) 20; UNICEF Data: *Monitoring the Situation of Children and Women An estimated 150 million children worldwide are engaged in child labour Updated June 2016*. available at <https://data.unicef.org/topic/child-protection/child-labour/#> (accessed 22 May 2017); see also ILO *Child labour in Africa*, available at <http://ilo.org/ipecc/Regionsandcountries/Africa/lang-en/index.htm> (accessed 22 May 2017); ILO *Child Labour in Africa* available at [http://www.ilo.org/wcmsp5/groups/public/-/ed\\_norm/-/declaration/documents/publication/wcms\\_decl\\_fs\\_37\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/-/ed_norm/-/declaration/documents/publication/wcms_decl_fs_37_en.pdf) (accessed 22 May 2017).



in transport. The industrial sector includes informal activities in construction and manufacturing.<sup>258</sup> In terms of gender composition, the number of boys exceeds girls in all sectors except in domestic work, which by its nature is hidden from formal workplace inspection, making children more vulnerable to exploitation and abuse.<sup>259</sup>

Although numerous African countries have ratified ILO conventions on the minimum age and worst forms of child labour, there have been reports that many are unable to mitigate the plight of affected children. For instance, in Angola a significant number of children are economically active and exposed to the worst forms of child labour such as child slavery, child prostitution, and child soldiery. Similarly, in Benin and Ghana, children have been engaged in the worst forms of child labour such as child prostitution. In Ethiopia, the majority of the children between the ages of 5-14 years (83 per cent) are engaged in a productive work or undertake household chores. It is interesting to see that 97 per cent of adolescents between the ages of 15-17 years are economically active, engaged either in productive activity or in household chores.<sup>260</sup>

Empirical research informed by qualitative interviews with migrant working children often emphasises that poverty is the fundamental reason behind their decision to migrate from their homes and engage in work. There is also extensive qualitative evidence that child work and the living standards of parents or legal guardians are intrinsically linked.<sup>261</sup> In a study on child mobility in Burkina Faso and Ghana, it was found that poverty, lack of hope for education, the aspiration to work, and family breakdown – in short, economic decline – was the major driving factor for children to migrate.<sup>262</sup>

The areas of work that make use of the exploitation of migrant in Africa include domestic work, commercial sex work, commercial agriculture and plantation, mining and other hazardous industries.<sup>263</sup> In this regard, for instance, studies show that Togolese boys that are smuggled to Nigeria and other countries work in agriculture; poor children in the DRC work in copper and cobalt mining; children living in poverty in Burkina Faso work on cotton plantations; and Mozambican girls were trafficked to South Africa for commercial sex work.<sup>264</sup>

Studies from African countries show that migration trends vary according to gender. Generally, boys outnumber girls on migration. However, girls migrate at slightly younger age than boys-

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<sup>258</sup> ILO 'Global Estimates of Child Labour: Results and trends 2012-2016' (2017) 34-36; ILO-IPEC *Marking Progress Against Child Labour* (2013) 23.

<sup>259</sup> ILO-IPEC *Marking Progress Against Child Labour* (2013) 23.

<sup>260</sup> Gallinetti J 'Worst Forms of Child Labour: A View from Out of Africa' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 186.

<sup>261</sup> Edmonds E & Shrestha M 'Children's Work and Independent Child Migration: a critical review' (2009) Innocenti Working Paper, no. 2009-19, Florence, UNICEF Innocenti Research Centre 20.

<sup>262</sup> Hashim I & Thorsen D *Child Migration in Africa* (2011) 43, 46-7, and 104.

<sup>263</sup> Tsegaye S 'Child Poverty and Deprivation in Africa' (2009) 110.

<sup>264</sup> Tsegaye S 'Child Poverty and Deprivation in Africa' (2009) 111.

with average median age of 11.2 for girls and 11.8 for boys. The reasons for such differences lie in the patrilinealism of African society.<sup>265</sup>

Independent child migrants that cross international borders are extremely vulnerable due to their irregular movements without documents as well as movement without family or adult accompaniment.<sup>266</sup> Many independent migrant children are undocumented migrants that are illegal as they do not carry or have any identity documentation. Due to such illegal stays in the destination country, independent migrant children face grave dangers to their existence and well-being as well as they are unable to access social services such as schooling, health care and housing, as provided under international and regional child-rights standards.<sup>267</sup> This inability to access services and work in a regulated environment leads unaccompanied migrant children to work in the informal economy, often in a clandestine setting where severe exploitation is prevalent.<sup>268</sup> In such underground working conditions with little or no government oversight, they may be exposed to violence, abuse, sexual harassment, denial of wages and other risks.<sup>269</sup>

In conclusion, there is an interlinkage between, independent adolescent migration and child labour exploitation. Furthermore, adolescent children between the ages of 15-17 are the most vulnerable to exposure to hazardous work and other exploitative practices due to their need to work, lack of documentation, lack of basic necessities such as shelter, food, clothing in a foreign country, and their ambition to earn money to fulfil their needs and support their families at home.

The traditional and rhetorical protectionist and gatekeeper policy as a way to deal with the migration problem should be revisited. To develop appropriate legal and policy interventions in response to the pervasive right violations of independent migrant children, African states should first understand, via empirical studies, the trends, causes and characteristics of adolescent independent. Based on such evidence, there should be tailor-made normative standards, policies and practices to deal with the issue of independent adolescent migration. An integrated, holistic and cross-regional approach is required to deal with the problem.

### 3.4 Conclusion

This chapter examined on two separate but interrelated rights – the freedom to move across borders and the right to work under international and African regional and sub-regional laws. Before it was recognised under international law, freedom of movement was long a subject of philosophical inquiry and legal discourse in the medieval era. This early thinking was that, unless there is harm, any person of age may move freely across borders for legitimate and peaceful

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<sup>265</sup> Flamm S 'The Linkage between Migration and Child Labour' (2010) XII Stanford Journal of International Relations 16 available at [http://web.stanford.edu/group/sjir/12-1/fall10-final\\_2.pdf](http://web.stanford.edu/group/sjir/12-1/fall10-final_2.pdf) (accessed 15 July 2016).

<sup>266</sup> Glind H (2010) 10.

<sup>267</sup> Flamm S (2010) 18.

<sup>268</sup> Flamm S (2010) 19.

<sup>269</sup> Flamm S (2010) 19.

purposes. Contrary to the early conceptions on freedom of movement of persons, the post 19<sup>th</sup> Century witnessed restrictive policies of nations on freedom of movement.

Freedom of movement across borders entails a person's right to exit a country, as well as his or her right to enter a country and not be returned when he or she seeks protection and refuge due to life-threatening situations, as provided for under the 1951 Refugee Convention. The existing international legal framework does not provide adolescents the right to move freely across borders. Furthermore, it is anchored on the protection of all children irrespective of age, capacity and level of maturity in the context of migration. For independent adolescents who migrated by their own decision, having clarity of plans and interest and demonstrating the ability/capacity to executive their goals, the legal norms do not have any other approach to give recognition to their rights and interest.

Although adolescent independent migrants could get protection from the non-refoulement principle, currently there are no child-centred definitions of persecution under the 1951 Convention that could benefit adolescents in the context of migration and guarantee their stay in the host country. Renowned authorities in migration and refugee law have argued for a progressive interpretation of the 1951 Refugee Convention that regards pervasive economic deprivation as a human rights violation.

In the context of African regional and sub-regional laws, as the continental counterpart for most of the international instruments including the 1951 Refugee Convention, except few peculiarities, the general approach is not different. These peculiarities may be summed up as urging states to grant asylum to Africans fleeing dire situations under the African Refugee Convention, which is non-existent in other systems, and providing extended definition to refugee based on African historical legacies and realities, by including, among other things, 'events seriously disrupting public order'. Although there are no authoritative interpretations, scholars have argued that this is an indication of the admissibility of dire economic situations as reasons to extend refugee protection. African regional instruments do not provide specific recognition of the peculiarities of adolescents in general and independent adolescent migrants in particular. Even in the current situation, where Africans have been adopting new regional protocols on the free movement of persons, the issue of adolescents is still overlooked.

Adolescents' work in the context of migration is another issue closely linked with the freedom of movement across borders. There is no consensus on children's work and child labour. Although work is not provided as a right for adolescents, adolescent's work is not generally prohibited or seen as a harmful practice. The international labour standard on the minimum age (ILO 138) sets the minimum working age at 15 years. Work that is hazardous to the physical and mental well-being of the child and that amounts to the worst forms of child labour, as per ILO Convention 182, is prohibited. In the context of migration, the issue of children's work is still vague and the ILO has not set any standard on it, leaving it to the domestic law of the host country.

In Africa, there are no regional labour standards, but the ILO conventions, as global standards, are applicable. African regional laws, especially the ACRWC and African Women's Protocol, protect children from exploitative practices as well as regulate work for older children, that is, adolescents are permitted to work. The dualistic modality of bestowing both protection and recognition of child's work is commendable. Independent adolescent migrants usually move to undertake economic activities. One of the reasons for the exposure of migrant children to exploitative labour practices is the lack of proper recognition of their right to work and lack of regulation of their employment activities. Due to this fact, adolescents are forced to work in clandestine settings where their rights are violated.



# **CHAPTER FOUR: INTERPRETATION OF CHILD-RIGHTS PRINCIPLES IN THE CONTEXT OF INDEPENDENT ADOLESCENT MIGRATION: INTERNATIONAL AND AFRICAN-REGIONAL PERSPECTIVES**

## **Introduction**

Adolescents, no matter their age, capacity and maturity, are considered children in need of protection pursuant to international and regional child-rights instruments; however, ethnographic research on adolescent children in the context of migration challenges the applicability of the traditional notion of protection. With a view to revealing lacunae, if any, in the normative standards under the international and regional child-rights frameworks, this chapter examines how the rights, interests and peculiarities of adolescents are understood. The chapter relies on the four pillars of child rights: non-discrimination, the best interests of the child, the right to express views and have such views respected, the right to life, survival and development. These are interpreted in relation to adolescent independent migrants.

## **4.1 Interpretation of International Child-rights Principles in the Context of Independent Adolescent Migration**

The child-rights protection provided under the CRC rests on four principles: non-discrimination, the best interests of the child, survival and development, and child participation.<sup>1</sup> The CRC Committee considers these as having fundamental importance to the implementation of the entire Convention. Moreover, these principles ought to be at the centre of interpretation and application of any norms and principles outlining child rights, welfare and interests.<sup>2</sup> Although scholars have been challenging the centrality of these principles and call for reconceptualisation,<sup>3</sup> the principles are still prominent in the works of the CRC Committee as well as other child-rights interventions. This section dwells on contextual interpretation of these fundamental principles at various stages of the migration of independent migrant children. It considers if the current interpretation of these principles is appropriate for independent adolescent migrants.

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<sup>1</sup> CRC (1989/90) art 2(1), 3(1), 6(2) & 12(1), respectively.

<sup>2</sup> CRC Committee 'General guidelines regarding the form and content of initial reports to be submitted by States parties under article 44, paragraph 1(a) of the Convention on the Rights of the Child, adopted by the Committee at its 22nd meeting (1st session) on 15 October 1991 para 13 available at <https://digitallibrary.un.org/record/137523> (accessed 26 August 2019); CRC Committee, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003 (CRC/GC/2003/5) para 12 available at <https://www.refworld.org/docid/4538834f11.html> (accessed 26 August 2019).

<sup>3</sup> Hanson K & Lundy L 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called 'General Principles' of the Convention on the Rights of the Child' *International Journal of Children's Rights* 25 (2017) 285-306.

### 4.1.1 The Principle of Non-discrimination

Many human rights concerns affecting migrant children are the result of discriminatory practices. Non-discrimination is a well-established principle under international human rights law. The HRC defines discrimination as

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>4</sup>

In the context of children, although they qualify for the general protection of human rights norms, the child-specific non-discrimination clause of the CRC provides that

States Parties shall respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>5</sup>

This clause differs from similar provisions under international human rights – with the exception of the ICCPR<sup>6</sup> – as it provides protection not only to citizens but also to all children found in the territory of a State Party. In general, discrimination based on any of the stated grounds violates the dignity of the child.<sup>7</sup> By virtue of this provision, and irrespective of their immigration status, adolescent migrants have absolute rights set forth under the CRC. State obligations emanating from this principle may not be evaded by any form of ‘arbitrary or unilateral, territorial or jurisdictional restrictions’.<sup>8</sup> This obligation of States also extends to children that are attempting to enter a State’s jurisdiction.<sup>9</sup>

The issue of non-discrimination against migrant children has been a focus of the CRC Committee in its consideration of state reports. For instance, the Committee expresses concern at ‘persistent discrimination, in particular in the field of economic and social rights, hampering social progress, justice and non-discrimination, especially with respect to [...] asylum-seeking and refugee children’.<sup>10</sup> In a number of instances, the Committee has described its concerns about inadequate standards and measures to protect the rights of refugee, asylum-seeking and

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<sup>4</sup> CCPR General Comment No. 18 para 7.

<sup>5</sup> CRC art 2(1).

<sup>6</sup> ICCPR (1966/76) art 2(1) provides: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

<sup>7</sup> CRC Committee General Comment No. 1 para 10.

<sup>8</sup> Touzenis K (2008) 16.

<sup>9</sup> CRC Committee General Comment No. 6 para 12.

<sup>10</sup> CRC Committee, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding observation: France, CRC/C/FRA/CO/4 22 June 2009, para 30.

unaccompanied migrant children, including their registration, adequate education, access to health care and other social services.<sup>11</sup> The Committee has also focused on the issue of entering, continuing and re-entering education by unaccompanied migrant children.<sup>12</sup> The Committee has recommended that States should ensure enjoyment of the right to non-discrimination as set forth under the CRC, and urged for adequate and effective measures to guarantee USMCs access to education, health care and other social services.<sup>13</sup> Moreover, the Committee stresses that adequate budgets should be allocated to ensure that migrant children benefit from social services.<sup>14</sup> The Committee further urges States to allow unaccompanied children who do not have the necessary permits to benefit from health-care services by allocating additional resources to such effect.<sup>15</sup> The CRC Committee also urges practical implementation of the principle of non-discrimination beyond law and policy.<sup>16</sup>

A textual interpretation of article 2 as well as the jurisprudence developed by the CRC Committee concludes that the obligation emanating from non-discrimination is to adopt positive measures to address unfair disparities. Such measures may include policies, laws, strategic development, monitoring and evaluation measures as well as promotional activities, including awareness-raising, education and information campaigns.<sup>17</sup> This obligation may include affirmative action to eradicate discrimination against child migrants. The validity of affirmative action is indicated by the Comments of the HRC as well as the preamble of the CRC, which urges States to give special attention and consideration to those children living in dire situations.<sup>18</sup> It should be noted that measures must also be adjusted for different protection needs based on age and gender – in the context of migration this calls for special consideration for independent adolescent migrants.<sup>19</sup> The CRC Committee, in a recent concluding observation in regard to Italy, asserted that circumstances necessitating affirmative action include those involving ‘asylum-seeking, refugee and migrant children’.<sup>20</sup>

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<sup>11</sup> CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 February 2014, CRC/C/DEU/CO/3-4, para 24, 56 available at: <http://www.refworld.org/docid/52f8a2074.html> (accessed 28 October 2016); UN CRC Committee, *Concluding observations on the consolidated third and fourth periodic reports of India*, 13 June 2014, CRC/C/IND/CO/3-4, para 31 & 77 available at: <http://www.refworld.org/docid/541bee3e4.html> (accessed 28 October 2016); CRC Committee *Concluding observation France (2009)* para 61(e).

<sup>12</sup> CRC Committee *Concluding observation France (2009)* para 71(a).

<sup>13</sup> CRC Committee *Concluding observation France (2016)* para 74, 76; *India (2014)* para 78(b); *Germany (2014)* para 57.

<sup>14</sup> CRC Committee *Concluding observation France (2016)* para 14(b); *Ghana (2015)* para 15 (b)

<sup>15</sup> CRC Committee *Concluding observation France (2016)* para 61(e) & 62(e).

<sup>16</sup> UN CRC Committee, *Concluding observations on the fourth periodic report of the Netherlands*, 8 June 2015, CRC/C/NDL/CO/4, para 24 available at: <http://www.refworld.org/docid/566fc5a04.html> (accessed 28 October 2016); CRC Committee *Concluding observation Ghana (2015)* para 21.

<sup>17</sup> Touzenis K (2008) 18.

<sup>18</sup> Touzenis K (2008) 18.

<sup>19</sup> CRC Committee *General Comment No. 6* para 18.

<sup>20</sup> CRC Committee ‘*Concluding observations on the combined fifth and sixth periodic reports of Italy*’ 28 February 2019 (CRC/C/ITA/CO/5-6) para 15 (c) available at

Mindful of the seriousness of child-rights violations in the process of trans-boundary migration, the CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter Committee for the Protection of Migrant Workers) adopted two separate but related general comments on the rights of migrant children and the corresponding duties of States found in migration routes.<sup>21</sup>

This relatively comprehensive interpretive guidance on the rights of children in the context of migration outlines how the principle of non-discrimination should be understood. Accordingly, in the context of international migration of children, the joint General Comment No. 3 provides that children, irrespective of the cause, condition and type of movement – that is, regular or irregular, accompanied or unaccompanied, documented or undocumented – shall be entitled to the equal entitlement of their rights as per international child-rights standards. It also provides that the principle of non-discrimination should be fundamental to legislation and policy in the context of child migration. States should put in place additional positive measure to mitigate and eradicate *de facto* discrimination against migrant children.<sup>22</sup> If differential treatment is required, then it should be ‘lawful and proportional, in pursuit of a legitimate aim and in line with the child’s best interest and international human rights norms and principles’.<sup>23</sup>

The State obligation of non-discrimination to all children is crucial for migrant children found in any territory of a State. As has been witnessed in various circumstances, these children face forms of discrimination ranging from racism and xenophobia to *de jure* and *de facto* denial of access to social services and benefits.<sup>24</sup> Strict adherence to this principle would grant independent migrant children the full protection of the laws of receiving countries as well as the social services that are fundamental for their development and well-being. More importantly, in the context of adolescents, the general non-discrimination clause does not preclude justifiable differential treatment, given their special interests and capabilities.

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en & TreatyID=5 & DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en & TreatyID=5 & DocTypeID=5) (accessed 1 September 2019).

<sup>21</sup> CRC Committee and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter Committee for the Protection of Migrant Workers) Joint general comment No. 3 (2017) and No. 22(2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (CMW/C/GC/3-CRC/C/GC/22) 16 November 2017 (hereafter Joint general comment No. 3 (2017)); and Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (CMW/C/GC/4-CRC/C/GC/23) 16 November 2017 (hereafter Joint general comment No. 4 (2017)).

<sup>22</sup> Joint general comment No. 3 (2017) para 26.

<sup>23</sup> Joint general comment No. 3 (2017) paras 21-2.

<sup>24</sup> Touzenis K (2008) 18; Cernadas P C ‘The human rights of children in the context of international migration’ in Vandenhoe W, Desmet E, Reynaert D et al. (eds) *Routledge International Handbook of Children’s Rights Studies* (2015) 338-39.



## 4.2.2 The Principle of the Best Interests of the Child

The principle of the best interests of the child has attained prominence thanks to the near-universal adoption of the CRC by States.<sup>25</sup> The foundation of this principle predates the CRC in the 1959 UN Declaration on the Rights of the Child and the CEDAW in 1979.<sup>26</sup> The principle of is set forth under article 3(1) of the CRC, which states that '[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'.<sup>27</sup> This provision has become a fundamental pillar of, and basic interpretative guideline for, the provisions of the CRC as well as those in other international child standards.<sup>28</sup>

There is a range of literature interpreting as well as critiquing the best interests of the child principle.<sup>29</sup> According to Freeman, article 3(1) of the CRC 'is about best interests, and not best rights. It neither creates any rights nor for that matter does it impose any duties.'<sup>30</sup> With regard to the nature of rights, there are two theories that dichotomise 'will or choice' from 'interest or benefit'. The 'will or choice theory' asserts that the purpose of law is to grant the utmost means of self-expression and utmost discretion to the individual.<sup>31</sup> The 'interest or benefit theory', on the other hand, holds that the purpose of law is to grant certain benefits as opposed to guaranteeing individual expression.<sup>32</sup> The interest theory of rights provides that children, like adults, have interests that should be protected by law, and it dismisses denial of legal and moral rights in the pretext to protect such interests.<sup>33</sup> Freeman argues that although the CRC expressly adopts neither of the two theories, by interpretation the Convention seem to mostly recognise 'rights in terms of interests'.<sup>34</sup>

According to Zermatten, the principle of the best interests of the child is neither a specific right nor rule by itself, and nor does it impose a specific duty.<sup>35</sup> To understand the principle, it should

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<sup>25</sup> Carr B A. 'Incorporating a 'Best Interests of the Child' Approach Into Immigration Law and Procedure', (2009) *Yale Human Rights and Development Journal*: Vol. 12: Iss. 1, Article 3 5 available at <http://digitalcommons.law.yale.edu/yhrdlj/vol12/iss1/3> (accessed 15 June 2015).

<sup>26</sup> Carr B A (2009) 8; See also the UN Declaration on the Rights of the Child (1959) principle 2; CEDAW (1979) art 5 (b).

<sup>27</sup> CRC (1989/90) art 3(1).

<sup>28</sup> Hodgkin R & Newel P 'Implementation Handbook For the Convention on the Rights of the Child' 3 ed, UNICEF (2007) 35 available at [http://www.unicef.org/publications/files/Implementation\\_Handbook\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child.pdf](http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf) (accessed 15 July 2013).

<sup>29</sup> Freeman M 'Article 3. The Best Interests of the Child' in Alen A, Vande Lanotte J, Verhellen E, et al. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 2.

<sup>30</sup> Freeman M (2007) 4.

<sup>31</sup> Freeman M (2007) 4.

<sup>32</sup> Freeman M (2007) 4.

<sup>33</sup> Fortin J 'Children's Rights and the Developing of Law' 3 ed (2009) 12-13.

<sup>34</sup> Freeman M (2007) 4.

<sup>35</sup> Zermatten J 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 485.

be read in conjunction with the substantive and procedural guarantees of the CRC. However, the relationship between the best interests of the child and other core principles as well as rights under the Convention is unclear. For instance, what if the best interests, as expressed by the individual child, contravenes the rights enshrined under the CRC?<sup>36</sup> From the reading of article 3(1), the best interests of the child are not a determining consideration but ‘a primary consideration’. In this regard, the basic question would be, ‘[W]hat circumstances may dictate considerations other than the best interests of the child?’<sup>37</sup> In the context of adolescents’ migration, could state sovereignty or immigration control hold primacy against what constitutes the best interests of the child? What is the relevance of soliciting the views of the child if his or her expressed interests are superseded on the pretext of upholding the best interests of the child/adolescents subject of the provisions of the CRC?<sup>38</sup> The answer to these questions may be derived from the Convention<sup>39</sup> as well as the CRC Committee’s interpretation in General Comment No 14.<sup>40</sup> Tobin asserts that ‘a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention’.<sup>41</sup>

The other dimension of balancing the best interests of the child with his or her expressed interests involves harmonising autonomy and best interests. In this regard, Eekelaar proposes a model of ‘children’s rights within dynamic self-determinism’.<sup>42</sup> The aim of such a model is ‘to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice’.<sup>43</sup> On the other hand, Virginia Morrow argues that this requires ‘not the straightforward delegation of decision-making to children but rather enabling children to make decisions in controlled conditions the overall intention being to enhance their capacities for mature well founded choices’.<sup>44</sup> Similarly, Jane Fortin asserts that ‘the concept of children’s rights does not prevent interventions to stop children making dangerous short-term choices, thereby protecting their potential for long-term autonomy’.<sup>45</sup> In the context of adolescents, a large margin should be given to taking decisions that have implications for their future, such as moving across borders, staying in the destination country, working and earning a living, and taking up skills and vocational training, all of which are associated with independent adolescents’ migration.

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<sup>36</sup> Freeman M (2007) 6.

<sup>37</sup> Freeman M (2007) 5.

<sup>38</sup> Freeman M (2007) 6.

<sup>39</sup> Freeman M (2007) 5.

<sup>40</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14) 29 May 2013 para 43, 44, 48-51, 77-9, 80-4.

<sup>41</sup> Freeman M (2007) 5-6.

<sup>42</sup> Freeman M (2007) 7.

<sup>43</sup> Freeman M (2007) 7.

<sup>44</sup> Freeman M (2007) 7.

<sup>45</sup> Freeman M (2007) 7.

#### 4.2.2.1 The CRC Committee's Interpretation of the Best Interests of the Child

The principle of the best interests of the child is a fundamental to the CRC and mentioned in a number of its provisions.<sup>46</sup> Nonetheless, the working group that drafted the CRC did not provide an explanation of this principle. In 2013 the CRC Committee drafted a detailed General Comment on the best interests of the child that covers the interpretation and application of article 3(1) of the CRC.<sup>47</sup> It sets out preconditions for the consideration of the best interests of the child, especially in judicial and administrative decision-making, and refers to implementation measures such as the adoption of laws, policies, strategies, programmes, plans, legislative and budgetary initiatives.<sup>48</sup> Due to the dynamic nature of the concept, however, the General Comment does not provide any conclusive meaning of the principle of the best interests of the child.<sup>49</sup>

In the words of the CRC Committee, the objective of the principle is to ensure that every child fully and effectively enjoys the rights in the Convention and 'holistic development', which entails 'physical, mental, spiritual, moral, psychological and social development'.<sup>50</sup> The CRC Committee asserts that an adult's judgment cannot prevail over the obligations enshrined in the CRC, as all the rights under the Convention are in the best interests of the child.<sup>51</sup>

Zermatten's three dimensions of the principle of the best interests of the child are taken under the General Comment No. 14 as: a substantive right; an interpretative legal principle; and a rule of procedure.<sup>52</sup> As a substantive right, it should be assessed based on context to deal with different interests. As a fundamental legal principle, whenever a situation calls for an application of a legal provision open to more than a single interpretation, the one most favourable to the child should be resorted to, based on the CRC and its Optional Protocols. As a rule of procedure, any decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. The assessment and determination of what constitutes the best interests of the child should adhere to strict procedural safeguards. All three dimensions are applicable to an individual child, an identified group of children or children in general.<sup>53</sup>

While implementing the best interests of the child as well as the right to be heard, the 'evolving capacity of the child' must be taken into account. As the CRC Committee states under General Comment No. 12, 'the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform

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<sup>46</sup> CRC (1989/90) art 9(1) & (3), 18(1), 20(1), 21, 37(c) and 40(2)(b).

<sup>47</sup> CRC General Comment No. 14 paras 8 & 10.

<sup>48</sup> CRC General comment No. 14 para 11, Hodgkin R & Newell P (2007) 37; Committee on the Rights of the Child General Comment No. 5 'General Measures of Implementation' (CRC/GC/2003/5) para 12.

<sup>49</sup> CRC General comment No. 14 para 11.

<sup>50</sup> CRC General comment No. 14 paras 4 & 5.

<sup>51</sup> CRC General comment No. 14 para 4.

<sup>52</sup> Zermatten J (2010) 485.

<sup>53</sup> CRC Committee General Comment No. 14 para 6(a)(b)(c) & 46.

direction and guidance into reminders and advice, and later to an exchange on an equal footing'.<sup>54</sup> As the child matures, the weight of his or her expression should be increased accordingly.

The implementation of the best interests of the child principle should embrace both short-term and long-term aspects of the child's well-being. Its interpretation as well as application should be based on the child's own views and feelings, coupled with the consideration of his or her civil, political, economic, social and cultural rights. Any special protection needs should also be given due regard. The determination of what constitutes the best interests of the child should not be the sole decision of adults. Children, particularly those who are able to express their needs, interests, and opinions, should be actively consulted in any decision-making process affecting them.<sup>55</sup> Despite its importance in society, culture should not be used to undermine the protection afforded to a child by the CRC.<sup>56</sup> Moreover, 'best interests' should not be used as a pretext to deny rights guaranteed to children by the CRC.

The CRC Committee notes that the best interests of the child is a complex notion and its elements should be assessed and 'determined on a case-by-case basis'. This means every best-interests determination process should be based on an assessment of the situation, needs, and interests of the individual child or group of children.<sup>57</sup> In situations where there is a potential conflict between the rights under the CRC and other human rights treaties, the best interests of the child should also be used as a tool to address any conflicts. States, while adopting general implementation measures, are also under an obligation to give due regard to explaining the best interests of the child or children in vulnerable situations.<sup>58</sup>

According to the CRC Committee, the two requirements for deciding what constitutes the best interests of the child are the 'best interest assessment' (BIA) and 'best interest determination' (BID). The 'best-interests assessment' refers to

evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team – and requires the participation of the child.<sup>59</sup>

The BID denotes 'the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment'.<sup>60</sup>

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<sup>54</sup> CRC Committee General Comment No. 14 para 44 & CRC General Comment No. 12 para 84.

<sup>55</sup> CRC Committee General Comment No. 12 'The Right of the Child to be Heard' (CRC/GC/12) 1 July 2009 para 68, & 70-4.

<sup>56</sup> Kaime T *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (2011) 35-6.

<sup>57</sup> CRC Committee General Comment No. 14 paras 32 & 76; CRC Committee 'Concluding observations Italy (2019) para 36(g) CRC Committee, Concluding observations of Israel (CRC/C/IR/CO/2-4) 2013 para 70(e).

<sup>58</sup> CRC Committee General Comment No. 14 para 33.

<sup>59</sup> CRC Committee General Comment No. 14 para 47.

<sup>60</sup> CRC Committee General Comment No. 14 para 47.

In assessing the best interests of a child, special consideration should be given to a child or children in the situation of vulnerability such as refugees and those seeking asylum. In such situations, the assessment and determination of the best interests of the child should not be restricted to the rights under the CRC and its optional protocols but should include the realisation of other relevant human rights standards, such as the 1951 Refugees Convention.<sup>61</sup>

#### **4.2.2.2 The Interpretation of the Best Interests of the Child in the Context of Migration**

The best interests assessment and determination for children in the context of migration in general and independent migrant children/adolescents in particular is guided by a number of documents. These include the CRC Committee's General Comment No. 14, General Comment No. 6; joint General Comment No. 3; and the UNHCR's guidelines, especially the Guideline on Determining the Best Interest of Child.<sup>62</sup> There is no major difference between these documents, which merely expand on what has been undertaken in earlier guiding documents.

In the context of migrant children, building on the CRC Committee's General Comment No. 14, the joint General Comment No. 3 stresses that 'a largest weight must be attached to what serves the best interest'. Of course, under the CRC, the best interests of the children do not have primacy over other competing interests but instead enjoy high priority.<sup>63</sup> Furthermore, immigration laws, migration policies, individual child cases, decisions, status determinations, decisions on access to social services, decisions on durable solutions and other judicial and administrative processes pertinent to current and future aspects of a migrant child should be guided by taking full cognisance of and assigning high priority to the principle of the best interests of the child.<sup>64</sup> In the process of taking decision regarding a migrant child, the child's best interests should be methodically assessed and determined as a procedural guarantee as well as to influence and inform the final decision.<sup>65</sup>

The joint general comment urges states to, among other things, ensure comprehensive, consistent and case-by-case interpretation and application of the principle in all legislative, administrative and judicial procedures and decisions relating to migrant children. Furthermore, BIA should be undertaken by an expert other than migration authorities to ensure that the best interests of the child are properly considered. Moreover, BIA regarding the appropriate care options for unaccompanied migrant child should be guided by the UN Guideline for the Alternative Care of Children, with community-based-care options given priority.

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<sup>61</sup> CRC Committee General Comment No. 14 para 75.

<sup>62</sup> UNHCR 'UNHCR Guideline on Determining the Best Interests of the Child' (May 2008) available at <http://www.unhcr.org/4566b16b2.pdf> (accessed 24 July 2013).

UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997) General Principles 1 & para 1.5.

<sup>63</sup> Joint general comment No. 3 (2017) para 28.

<sup>64</sup> Joint general comment No. 3 (2017) para 29 & 30.

<sup>65</sup> Joint general comment No. 3 (2017) para 31.

The BID procedure for unaccompanied children should be instituted to secure a durable solution, whether it be local integration, repatriation to the country of origin, or resettlement to a third country.<sup>66</sup> BID procedures should be undertaken with the involvement of qualified experts and decision-makers, guaranteeing the child's right to be heard and to have 'his or her views [...] given due weight according to his or her age, maturity and evolving capacities'.<sup>67</sup> Among the durable solutions, the joint Committees state that the return of unaccompanied migrant child should not be considered as the only option but as one among other options. If the decision of the BID is to return the child to his or her home country, then a comprehensive individual return and reintegration plan grounded in a rights-based approach should be prepared with the involvement of pertinent stakeholders and the child him- or herself. Furthermore, a post-return follow-up procedure based on child-rights norms and principles should be established.<sup>68</sup>

According to the CRC Committee, there are steps that should be taken while determining the best interests of a child who is on the move. The first and fundamental step is to determine whether it is in the best interests of the child to admit him or her to a given territory. Once the child is accepted to a territory, the next step would be undertaking a clear and comprehensive assessment of the child's identity, which entails looking into nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.<sup>69</sup> The rights enshrined under the CRC and its optional protocols are the basic means by which to strike a balance between different considerations and the interests of the child.<sup>70</sup> Consequently, elements that contravene the provisions of the CRC should not be an acceptable ground for determining the best interests of the child.<sup>71</sup>

The next step, one intended to provide a procedural safeguard, is the speedy assignment of an appropriate guardian to the child.<sup>72</sup> Any referral to asylum or other procedures should only be carried out after appointment of a guardian.<sup>73</sup> In situations that dictate referral of a child's case to asylum, administrative or judicial procedures, a competent legal counsel should also represent the child.<sup>74</sup> If a child is placed in a temporary shelter for the purpose of care, protection or treatment of his or her physical or mental health, then the respect of the best interests of the child dictates regular 'periodic review' of the treatment of the child in accordance with article 25 of

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<sup>66</sup> Joint general comment No. 3 (2017) para 32 & 33; UNHCR 'Framework for Durable Solutions for Refugees and Persons of Concern, Core Group on Durable Solutions' (May 2003) 5-6 available at <http://www.unhcr.org/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html> (accessed 30 September 2016); also see UNHCR, Solutions available at [www.unhcr.org/solutions.html](http://www.unhcr.org/solutions.html) (accessed 30 September 2017); UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 22.

<sup>67</sup> Joint general comment No. 3 (2017) para 32 & 33; UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 8 & 23.

<sup>68</sup> Joint general comment No. 3 (2017) para 32 & 33.

<sup>69</sup> CRC Committee General Comment No. 6 para 20; CRC General Comment No. 14 para 48.

<sup>70</sup> CRC Committee General Comment No. 14 para 50 & 82.

<sup>71</sup> CRC Committee General Comment No. 14 para 51.

<sup>72</sup> CRC Committee General Comment No. 6 para 21.

<sup>73</sup> CRC Committee General Comment No. 6 para 21.

<sup>74</sup> CRC Committee General Comment No. 6 para 21.

the CRC.<sup>75</sup> For unaccompanied migrant children, the BID is also undertaken to provide an opportunity to assess the child's level of maturity where his or her age is unknown or contested.<sup>76</sup>

All stages of the assessment process should be guided by the best interests of the child and be carried out in a child-friendly and safe atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques.<sup>77</sup> All aspects of the BID process, from initiation to final decision, should be well documented.<sup>78</sup>

According to the norms and principles developed by the UNHCR and the CRC Committee, the detention of asylum-seeking children is against their best interests.<sup>79</sup> This prohibition indicates that detaining a migrant child is never in his or her best interest. In general, it can be argued that every right as provided under the CRC is in the best interests of the child, and any act prohibited for the child in the CRC and other international child-rights standards is considered as against the best interests of the child. In other words, this is to say the principle of the best interests of the child is a sum of all the substantive rights of the CRC.

The CRC Committee in its current jurisprudence expresses its concern over the limited understanding and application of the principle of the best interests of the child in asylum, migration, refugee determination and immigration detention situations. The Committee further urges States that the best interests of the child should be given priority in policies, procedures and any intervention for asylum-seeking children as well as those in, refugee and/or immigration detention.<sup>80</sup> In the recent concluding observation for Italy, the CRC Committee urges the country 'to appropriately integrate and consistently interpret [the principle of the best interests of the child] in relation to unaccompanied and separated children'.<sup>81</sup> The Committee also urges Italy to develop operational procedures to appropriately undertake BID and 'for giving the best interests

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<sup>75</sup> CRC Committee General Comment No. 6 para 22.

<sup>76</sup> UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 23-4.

<sup>77</sup> CRC General Comment No. 14 para 85-99; CRC Committee General Comment No. 6 para 19-21; UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 8 & 23.

<sup>78</sup> CRC Committee General Comment No. 6 'para 19; UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 8 & 23.

<sup>79</sup> Bhabha J 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework' UNICEF Innocenti Research Centre, Discussion Paper, IDP No. 2008-02 (May 2008) available at [http://www.unicef-irc.org/publications/pdf/idp\\_2008\\_02.pdf](http://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf) (accessed 15 June 2014); UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997) para 7.6-7.8; CRC Committee General Comment No. 6 para 61.

<sup>80</sup> CRC Committee Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Australia (CRC/C/AUS/O4) 28 August 2012 para 31 & 32; CRC Committee Concluding observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/420 October 2008) para 26 & 27; CRC Committee Concluding observation France (2016) para 73; Ghana (2015) para 23 & 24, Germany (2014) para 26 & 27; Kenya (2016) para 60(d); the Netherlands (2015) para 52(c) & 53(c); Honduras (2015) para 27 & 28(a).

<sup>81</sup> CRC Committee 'Concluding observations Italy (2019) para 16(a) & 36(a).

of the child due weight as a primary consideration [...] for unaccompanied or separated children'.<sup>82</sup>

Despite these detailed accounts of the interpretation of the best interests of children in different contexts, including migration, the particular needs and characteristics of independent adolescent migrations and the determination of their best interests may fall outside the domain of such interpretative guidance. For instance, the very choice of these children to migrate, to work, and generally to make independent decision that may go against the contents of the CRC could be considered as against their best interests. In this regard, the current guidance provided by the CRC Committee may not provide adequate direction on the steps that ought to be followed, the applicable objective and subjective criteria, the permissibility of flexibility vis-à-vis the norms of the CRC if any, and when and how to apply them. The interpretation guideline appears to leave substantial room to the expert involved to determine the best interests of a child on the move. In this regard, Bhabha asserts that 'the best interest calculation is made by adults on behalf of the child'.<sup>83</sup> However, it is a paradox that unaccompanied migrant children mostly make the best-interests decision and migrate by themselves without consulting adults.<sup>84</sup>

#### **4.2.3 The Principle of Respect for the Views of the Child**

Independent migrant children may have to engage with a wide range of legal and administrative procedures in the process of migration as well as after arrival in a country of destination. These procedures may include criminal proceedings, civil cases, or immigration and asylum proceedings. Such proceedings may call for the involvement of the child and his or her voice and story in order for a fair decision to be reached and a durable solution found. In this regard, one of the fundamental aspects of the CRC is its provision for recognition of and respect for the views of children as a right. The CRC Committee treats respect for the views of the child as a general principle of fundamental importance and core to the realisation of the rights of children as set forth in the CRC.<sup>85</sup>

One peculiar aspect of this right, as opposed to the general right to expression for persons is that only children have the right to have their views be given due weight.<sup>86</sup> The recognition of the right of children to express their views and be heard in decision-making processes affecting their lives has paved the way for a shift in 'the perception of children from objects of protection to

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<sup>82</sup> CRC Committee 'Concluding observations Italy (2019) para 16(b); see also CRC Committee 'Concluding observations on the combined fifth and sixth periodic reports of Belgium' 28 February 2019 (CRC/C/BEL/CO/5-6) para 43(b) available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en & TreatyID=5 & DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en & TreatyID=5 & DocTypeID=5) (accessed 1 September 2019)

<sup>83</sup> Bhabha J (2014) 204.

<sup>84</sup> Bhabha J (2014) 203-4.

<sup>85</sup> Hodgkin R & Newell P (2007) 149.

<sup>86</sup> Gal T & Durmay B F 'Enhancing Capacities for child Participation: Introduction' in Gal T & Durmay B F (eds) *International Perspectives and Empirical Findings on Child Participation International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (2015) 3.



subjects of their own rights'.<sup>87</sup> As Gerison Lansdown puts it, article 12 is 'a substantive right which entitles children to be actors in their own lives, not merely passive recipients of adult care and protection'.<sup>88</sup> Lansdown explains that the philosophy behind soliciting the views of the child and respecting such views is the 'commitment of valuing children as people now'.<sup>89</sup> Such an assertion contests conceptions about children being mere dependents on adults or caregivers, and about childhood as a period of training for adulthood.<sup>90</sup>

This principle, sometimes called child participation, includes the process of expressing views in formal settings such as decision-making, undertaking of different measures, policy and law making as well as evaluation.<sup>91</sup> In addition to being recognised as integral to the implementation of other rights in the CRC, it stands as a right by itself.<sup>92</sup>

The 2006 DGD held under the auspices of the CRC Committee dedicated to 'the right of the child to be heard' inspired the preparation of General Comment No. 12.<sup>93</sup> Nevertheless, it should be noted that the General Comments which precede General Comment No. 12 have the effect of applying article 12 of the CRC in different contexts and based on the subject matter they cover. The expression of views could be directly by the child or through a representative entrusted with this power, subject to national law and procedure.<sup>94</sup>

Criticism of the notion of soliciting and respecting the views of the child is mostly related to the issue of capability, which in turn dictates a top-down, adult led modality.<sup>95</sup> The issue of capability raises questions such as: 'At what age can children make rational choices? And can children make rational decisions at all?'<sup>96</sup> These questions relate to the child's ability to take part in the decision-making process and the weight that should be given to the views of the child in final decisions.<sup>97</sup> Despite such scepticism, currently there is adequate empirical evidence 'showing that child participation is not only a universal human right of children but is also a need, a coping mechanism, and a developmental milestone that benefits children of all ages'.<sup>98</sup> Child participation fosters the child's sense of control of his or her life, particularly for those in

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<sup>87</sup> Gal T & Durmay B F (2015) 2.

<sup>88</sup> Lansdown G 'Can you hear me? The right of young children to participate in decisions affecting them' (2005) Working Paper 36 1.

<sup>89</sup> Lansdown G (2005) 1.

<sup>90</sup> Lansdown G (2005) 1.

<sup>91</sup> CRC Committee General Comment No. 12 '13; also see Lansdown G (2005) 12.

<sup>92</sup> CRC Committee, Forty-Third Session 11-29 September 2006 Day of General Discussion (DGD) on the Right of the Child to be Heard 1, available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx> (accessed 02 November 2016).

<sup>93</sup> Hodgkin R & Newell P 150; CRC Committee 2006 DGD.

<sup>94</sup> CRC (1989/90) art 12(2).

<sup>95</sup> Thomas T 'Towards a Theory of Children's Participation' International Journal of Children's Rights 15 (2007) 202-204.

<sup>96</sup> Gal T & Durmay B F (2015) 2.

<sup>97</sup> Gal T & Durmay B F (2015) 2.

<sup>98</sup> Gal T & Durmay B F (2015) 4.

dire situations, builds trust in others and in the system by enhancing procedural fairness; and can create better final decisions by considering children's valid claims about their best interest.<sup>99</sup>

In the words of Roger Hart, participation is 'the process of sharing decisions which affect one's life and the life of the community in which one lives'.<sup>100</sup> More than just a right to express views, 'true participation that follows the words and spirit of the CRC means that children take part in the actual decision-making. [In other words] the participation right grants children more than a right to be heard, but less than a right to independent decision-making'.<sup>101</sup> Similarly, as Lansdown explains, the right to participation would be meaningless if the final decision did not take into account what the child has expressed.<sup>102</sup>

#### 4.2.3.1 The CRC Committee's Interpretation of the Principle of Respect of the Child's Views

A textual interpretation of article 12 reveals that the right to be heard is provided as having mandatory character. This means States are under the strict legal duty to ascertain that all requirements are fulfilled for every child to exercise this right.<sup>103</sup> The duty provided under article 12 has two fundamental elements: the child is capable of forming his or her own views, and he or she freely expresses his or her views.

The first criterion appears to be a limitation on the right. However, it imposes a duty on States to assess the 'capacity of the child to form an autonomous opinion to the greatest extent possible'.<sup>104</sup> Hence, without assessing the capacity of a child to form his or her views, States must not assume a child's incapability and disqualify him or her from having his or her views respected. In the words of the CRC Committee, the initial presumption of States is that a child has the capacity to form his or her own views.<sup>105</sup> The Committee also urges that an age limit should be imposed on this right neither *de jure* nor *de facto*.<sup>106</sup>

In order to assess how much weight the views of the child should be given, article 12 envisages two standards of 'age' and 'maturity' of the child, which ought to be taken cumulatively. Age is relatively simple to determine if a birth certificate or similar document is provided. Determining the level of maturity, however, it is not as easy. Children of the same age may not have similar levels of maturity because a child's development is subject to his or her access to information, exposure to situations, environment, and social and cultural attributes.<sup>107</sup> Children facing difficult circumstances such as war, migration, or the HIV/AIDS pandemic in sub-Saharan Africa, have to

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<sup>99</sup> Gal T & Durmay B F (2015) 4-5.

<sup>100</sup> Hart R 'Children's Participation: From Tokenism to Citizenship' (1992) Innocenti Essay No. 4 UNICEF 5.

<sup>101</sup> Gal T & Durmay B F (2015) 6.

<sup>102</sup> Lansdown G (2005) 3; Lansdown G 'Every Child's Right to be Heard: A Resource Guide on the UN Committee on Rights of the Child General Comment No. 12' (2011) Save the Children and UNICEF 23.

<sup>103</sup> CRC Committee Child General Comment No. 12 para 19.

<sup>104</sup> CRC Committee Child General Comment No. 12 para 20.

<sup>105</sup> CRC Committee Child General Comment No. 12 para 20.

<sup>106</sup> CRC Committee Child General Comment No. 12 para 21.

<sup>107</sup> Lansdown G (2005) 4-5.

deal with serious responsibilities and bear heavy burdens at a young age, which may also influence their levels of maturity and capability.<sup>108</sup> Hence, each child's level of maturity should be assessed on an individual basis.<sup>109</sup>

In the context of article 12 of the CRC, the CRC Committee proposes that maturity refers to 'the capacity of a child to express his or her views on issues in a reasonable and independent manner'. In making this assessment, the impact of the matter on the child should be given due consideration. If the impact is perceived to be determinant of the child's future, then strict assessment is required to ascertain the level of maturity.<sup>110</sup> Yet what constitute 'reasonable' and 'independent' are vague concepts that require further elaboration by the CRC Committee.

In determining maturity, the evolving capacities of the child should be given due consideration.<sup>111</sup> In fact, article 12 and 5 of the CRC, providing for the right to be heard and the evolving capacities of the child, respectively, are interconnected as, according to Lansdown, the latter implies that 'competent children should be able to exercise rights for themselves'.<sup>112</sup> The more mature and experienced the child is, the less interference is required from a parent or a caregiver. Article 5 of the CRC does not refer to the age of the child as a determining factor for the capacity of the child. Hence, it may be argued that the determining factors should be the demonstration of the required skills, experience, knowledge, and understanding of the situation.<sup>113</sup> The maturity assessment is particularly important in the case of independent adolescent migrants. Adolescents on the move alone usually have a complicated life experience, and due to their exposure to various circumstances, appear to be more mature than others in their age group. It may be argued that *prima facie* they should be able to form and express their views independently.

The reasonableness criterion for maturity, on the other hand, is a complex notion, which goes beyond legal considerations into the realms of philosophy and other disciplines. For legal considerations, different interpretations exist in different bodies of laws such as tort law, criminal law and administrative law.<sup>114</sup> The question is whether this is applicable in the context of independent adolescent migration. Although the CRC Committee fails to elaborate on the vague terms 'reasonable' and 'independent', it provides higher safeguards for serious matters that may affect the life of the child. Asylum or refugee status determinations, best interest determinations

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<sup>108</sup> Lansdown G (2005) 4-5; Lansdown G (2011) 23; FlekkØY M G 'Attitudes to Children-Their Consequences for Work for Children' in Michale Freeman & Philip Veerman (eds) *The Ideologies of Children's Rights* (1992) 143-44.

<sup>109</sup> CRC Committee General Comment No. 12 para 29.

<sup>110</sup> CRC Committee General Comment No. 12 para 30; Lansdown G (2011) 23.

<sup>111</sup> Lansdown G (2011) 36-37; CRC Committee General Comment No. 12 para 31.

<sup>112</sup> Lansdown G (2011) 36; Lansdown G 'The Evolving Capacities of the Child' (2005) Innocenti Insight, Save the Children and UNICEF 3-5.

<sup>113</sup> Lansdown G (2011) 37.

<sup>114</sup> King M 'Against Personifying the Reasonable Person' (2017) 11 *Crim Law and Philos* 725-32; Dorfman A 'Reasonable Care: Equality as Objectivity' (2012) 31 *Law and Philosophy* 369-407; Alan d. Miller A D. & Perry R 'The Reasonable Person' (2012) 87 *New York University Law Review* 325-28.

or any other administrative as well as judicial decisions in the context of migrant children have an impact on the future of the child – as such, the highest possible protection of their rights and interests is required.

The second main element of article 12 is that a child has the right to ‘express his or her views freely’. The word ‘freely’ indicates that the rights should be exercised by free will of the child without any pressure, and the views must be entirely his or her own.<sup>115</sup> In other words, this right does not impose any obligation on the child to express his views. Informed about such rights, the child may choose not to express his views in any setting or situation.<sup>116</sup>

The free-will component also entails creation of a conducive environment based on the ‘child’s individual and social situation’ and age to ensure that the child can express his or her views with the utmost liberty.<sup>117</sup> Particularly in formal court or administrative proceedings, child-friendly methods of interviewing should be employed to make sure that a child is free from ‘intimidating, hostile, insensitive or inappropriate’ situations that may hinder his or her free and meaningful participation.<sup>118</sup> Furthermore, although article 12(2) allows a child to participate in the proceedings directly or through representatives such as parents, guardians, lawyers, or social workers, the CRC Committee recommends that in any proceeding affecting the child’s interests, as far as possible the child should be given a chance to be heard directly.<sup>119</sup> Any representative of the child should be aware that he or she is appearing exclusively to further the child’s interests.<sup>120</sup> As a matter of principle, a child should not be interviewed ‘more often than necessary’ about his situation, in particular when harmful events are explored.<sup>121</sup>

Article 12(2) indicates that the views of the child ought to be solicited ‘in all matters affecting the child’. According to the CRC Committee, this phrase should be interpreted broadly to include every aspect of private, social as well as public affairs which may have a direct or indirect impact on the individual child or group of children.<sup>122</sup>

The CRC Committee outlines the stages of court or administrative proceedings: preparation, hearing, assessment of capacity, ‘information about the weight given to the views of the child’, and ‘complaints, remedies and redress’. Preparation refers to informing the child about his or her right to be heard, its impact and, the overall aspects of the case and its future effect on the life a child.<sup>123</sup> The hearing stage entails what a child has to say about the matter and is conducted in a child-appropriate manner and preferably in the format of a conversation rather than an

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<sup>115</sup> CRC Committee General Comment No. 12 para 22.

<sup>116</sup> CRC Committee General Comment No. 12 para 16.

<sup>117</sup> CRC Committee General Comment No. 12 paras 23 & 34.

<sup>118</sup> CRC Committee General Comment No. 12 para 34.

<sup>119</sup> CRC Committee General Comment No. 12 paras 35 & 26.

<sup>120</sup> CRC Committee General Comment No. 12 9 para 37.

<sup>121</sup> CRC Committee General Comment No. para 24.

<sup>122</sup> CRC Committee General Comment No. 12 paras 26 & 27.

<sup>123</sup> CRC Committee General Comment No. 12 para 41.

examination, and in an informal setting with the presence of only relevant individuals concerned.<sup>124</sup> Assessment of the capacity of the child should be carried out on an individual basis by taking into account the maturity criteria of reasonableness and independence.<sup>125</sup> The decision-maker is duty-bound to tell a child what the consequences of his or her participation are and how they are given weight. The process of informing a child about the outcomes of his or her participation process may create an opportunity to hear his or her agreement, or in case of disagreement, to seek ‘an appeal or a complaint’.<sup>126</sup> In case of grievance or dissatisfaction, children should be able to access formal complaint procedures and they should be heard. This right to complain and seek redress is not only for other rights and interests; it should be available when the right to express their views freely and to be heard is itself violated. The last stage of the implementation of the right to be heard involves putting place effective complaint and redress mechanisms.<sup>127</sup>

#### **4.2.3.2 Respect for the Views of Independent Adolescent Migrants**

The CRC Committee explains how the right to be heard should be implemented in different settings and situations. Immigration and asylum proceedings are among these special situations that require specific implementation modalities. In general, migrant children are found to be in exceptionally difficult situations as they may have had traumatic experiences and be truculent towards people in authority. Hence, it is of the utmost necessity to create a conducive environment where they can express themselves freely and be actively involved in plans and decisions for their future.<sup>128</sup>

In the context of the international migration of children, the joint General Comment No. 3 of the CRC and Committee for the Protection of Migrant Workers held that in immigration and asylum proceedings, States should ensure not only the right to express views but also the right for these views to be given due weight in accordance with age, maturity and evolving capacity. To make effective, appropriate and balanced decisions, particularly in the case of older children such as adolescents migrating of their own volition – ensuring the right to express views and have the views be given due weight is essential. In the same vein, children should be provided with comprehensive information on their rights, available services, and judicial and administrative processes related to their migration.<sup>129</sup>

The joint General Comment No. 3 also provides that migrant children going through administrative and judicial processes should be assigned a legal representative free of charge. Moreover, a qualified guardian should be assigned to unaccompanied migrant children on arrival

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<sup>124</sup> CRC Committee General Comment No. 12 paras 42 & 43.

<sup>125</sup> UNRC Committee General Comment No. 12 paras 44 & 30.

<sup>126</sup> CRC Committee General Comment No. 12 para 45.

<sup>127</sup> CRC Committee General Comment No. 12 paras 46 & 47.

<sup>128</sup> Lansdown G (2011) 76.

<sup>129</sup> Joint general comment No. 3 (2017) paras 34 & 35.

in the host country. As effective participation depends on overcoming language barriers, the joint General Comment provides that a translator who is proficient in the native language of migrant child should be assigned when required. The experts that are involved in different capacities should be qualified to handle diverse socio-cultural, religious, gender and other factors that can be anticipated in the context of migration and working with migrants.<sup>130</sup> The CRC Committee also stresses that child participation and the best interests of the child are matters that are mutually reinforcing.

In case of independent migrants, ‘identification and referral mechanisms’ should be designed to allow the children/adolescents to ‘express their needs, desires, concerns and their own personal assessment as to what actions is needed to protect their best interest’.<sup>131</sup> As already noted, the procedural safeguards that should be guaranteed in dealing with the cases of independent migrant adolescents may include, first and foremost, assigning of ‘a guardian or adviser’ free of charge to assist them in the entire process. They should also be provided with ‘all relevant information, in their own language, on entitlements and services available, including help with communication; the asylum process and other immigration procedures; and family-tracing services and the situation in their country of origin’.<sup>132</sup>

In asylum procedures involving adolescents, the entire process should be based on the free expression of the child’s experience. Particularly in procedures involving independent migrant children/adolescents, commonly the only source of information is the child him- or herself.<sup>133</sup> With asylum claims, there might be obstacles to children’s describing their situation and experiences without fear. Hence, children should be informed of their right to seek and enjoy asylum; the process and their involvement; available rights, services and care options during the process; family tracing arrangements; and their right to confidentiality. Those involved in the process should have knowledge and skills of working with children.<sup>134</sup> General Comment No. 12 gives special recognition to language difficulties with regard to migrant children.<sup>135</sup> In a recent concluding observation, the CRC Committee urges Italy to develop national operational standard to ensure that unaccompanied or separated children appropriately express their views in accordance with their age and maturity in all decisions affecting them.<sup>136</sup>

As noted in General Comment No. 12, States should revise their laws and policies to include mechanisms for effective implementation of this right, establish appropriate institutions to oversee implementation, provide training to experts working with children, establish modalities

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<sup>130</sup> Joint general comment No. 3 (2017) para 36.

<sup>131</sup> Lansdown G (2011) 76.

<sup>132</sup> Lansdown G (2011) 76.

<sup>133</sup> Lansdown G (2011) 77.

<sup>134</sup> Lansdown G (2011) 77; CRC Committee General Comment No. 12 para 124.

<sup>135</sup> CRC Committee General Comment No. 12 para 21 3<sup>rd</sup> point; CRC Committee Concluding observation Ghana (2015) para 60(b).

<sup>136</sup> CRC Committee ‘Concluding Observations Italy (2019) para 17(a).

to enable children to express their views, and eradicate negative perceptions that preclude children from freely and effectively expressing their views and being heard.<sup>137</sup>

The principle of the right to be heard and respect for the views of the child is an integral part of other fundamental principles of the CRC. The interdependence of the right to be heard and the best interests of the child is underlined by the CRC Committee. The right also has direct and indirect linkages with other provisions, such as the evolving capacities of the child, and is of the utmost importance for the implementation of the Convention.<sup>138</sup> The right to express views and have such views be respected and weighed up is particularly important in BIA and BID in asylum and immigration cases.<sup>139</sup> To sum up, the implementation of the child's right to be heard and participate should be 'transparent and informative', 'voluntary', 'respectful', 'relevant', 'child-friendly', 'inclusive', 'safe and sensitive to risk', and 'accountable'.<sup>140</sup> Furthermore, the experts in charge must acquire skills and knowledge required to work with children.<sup>141</sup>

Although the CRC Committee under General Comment No. 12 explains how the right to be heard should be implemented in administrative and judicial proceedings, including asylum and immigration proceedings, the author of this thesis argues that, given the special attributes of adolescent independent migrants, the guidance of the Committee is insufficient. Except for language barriers, the Committee does not address any hindrance specific to child migrants that might preclude a child from expressing his or her views. The Committee also fails to provide unequivocally for special, differentiated processes for adolescent independent migrants.

#### **4.2.4 The Right to Life, Survival and Development**

The right to life, survival and development is fundamental to the CRC.<sup>142</sup> This right is enshrined under article 6, which provides every child with the right to life and maximum survival and development.<sup>143</sup> The inclusion of development as a right in addition to the right to life and survival and its recognition as one of the fundamental principles demonstrates that children's right to life should be interpreted and implemented in a comprehensive manner.<sup>144</sup> According to Nowak, 'article 6 of the CRC does not speak of a general right of the child to development, but instead of the obligation of States to ensure the development of the child'.<sup>145</sup> The realisation of this principle in general and the development of the child in particular requires the fulfilment of other rights, which include the right to adequate food, shelter, clean water, formal education,

<sup>137</sup> CRC Committee General Comment No. 12 paras 48 & 49.

<sup>138</sup> CRC Committee General Comment No. 12 para 68-86. CRC General Comment No. 14 para 44.

<sup>139</sup> Joint General Comment No. 3 (2017) para 32 & 33; UNHCR 'Guideline on Determining the Best Interest of Child' (May 2008) 8 & 23.

<sup>140</sup> CRC Committee General Comment No. 12 para 134.

<sup>141</sup> CRC Committee General Comment No. 12 para 134.

<sup>142</sup> Hodgkin R & Newell P (2007) 83.

<sup>143</sup> CRC art 6(1) & (2).

<sup>144</sup> Nowak M 'Article 6. The Right to Life, Survival and Development' in Alen A, Vande Lanotte J, Verhellen E et al. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (2005) 2.

<sup>145</sup> Nowak M (2005) 6.

primary health care, leisure and recreation, and cultural rights.<sup>146</sup> Other rights, such as protection of children from abuse, exploitation, violence, and torture; cruel, inhumane, degrading treatment or punishment, and involvement in and effect of armed conflicts, are also vital to ensure the maximum survival and development of the child.<sup>147</sup> This blend of economic, social and cultural rights with civil and political rights is a unique footprint of the CRC in ‘strengthening the notion of indivisibility and interdependency of all types of human rights’.<sup>148</sup> The CRC Committee further asserts that States are expected to interpret development broadly as a holistic concept, one that embraces the physical, mental, spiritual, moral, psychological and social development of the child.<sup>149</sup>

As described by Pablo Ceriani Cernadas, ‘the denial of this core right is one of the major root causes of migration for children, and adolescents’.<sup>150</sup> Hence, children’s survival and development should be at the core of any analysis, discussion, or initiative to address the root causes of child migration in countries of origin, its characteristics as well as its impact on receiving and transit countries.<sup>151</sup> The primary obligation to realise these rights rests upon States, with a significant role also being accorded to parents.<sup>152</sup> The full realisation of the right to life, survival and development of the child also requires the realisation of all substantive rights and core principles in the CRC.<sup>153</sup> This clearly shows that the fundamental principles of the CRC are interrelated and interdependent.

The designation of the right to life, survival and development as a fundamental principle is not immune from criticism. For instance, Doek, the former chairperson of the CRC Committee (2001-2007) raises the question: ‘Why call the inherent right to life a general principle and what is the role of this principle in the implementation of the articles of the CRC?’<sup>154</sup> Others have also raised concerns about the limited scope of this right by considering how article 6(2) is framed based on a cumulative reading with article 4 of the CRC, which asserts, ‘With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resource’. Moreover, the CRC Committee’s categorisation of this right

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<sup>146</sup> CRC art 24, 27, 28, 29 & 31; Hodgkin R & Newell P (2007) 84.

<sup>147</sup> CRC art 19, 32-39; Nowak M (2005) 8-9 & 35-36; CRC Committee, General comment No. 13 (2011): The right of the child to freedom from all forms of violence (18 April 2011) (CRC/C/GC/13) available at: <http://www.refworld.org/docid/4e6da4922.html> (accessed 7 October 2016).

<sup>148</sup> Mahgoub K E *International Law on the Right of the Child to Survival and Development* (2016) 72.

<sup>149</sup> CRC Committee General Comment No. 5 para 12.

<sup>150</sup> Cernadas P C ‘The human rights of children in the context of international migration’ in Vandenhoe W, Desmet E, Reynaert D et al. (eds) *Routledge International Handbook of Children’s Rights Studies* (2015) 338.

<sup>151</sup> Cernadas P C (2015) 338.

<sup>152</sup> Hodgkin R & Newell P (2007) 83; see also CRC (1989/90) art 18.

<sup>153</sup> Hodgkin R & Newell P (2007) 93.

<sup>154</sup> Mahgoub K E (2016) 114.



under ‘Basic Health and Welfare’ in the revised State reporting guideline<sup>155</sup> may limit the scope of this principle to a welfare right.<sup>156</sup>

The more vulnerable children are – such as independent migrant children/adolescents and refugee children – the more important the States’ obligation for the realisation of the right to life, survival and development of the child.<sup>157</sup> In General Comment No. 6, the CRC Committee has emphasised the focus that ought to be given to the right to life and maximum survival and development of USMCs. In the words of the Committee,

[t]he obligation of the State Party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child’s right to life, survival and development. [T]he Committee notes that there is often a link between trafficking and the situation of [...] unaccompanied children. The Committee is of the view that practical measures should be taken at all levels to protect children from the risks [such as] priority procedures for child victims of trafficking, the prompt appointment of guardians, the provision of information to children about the risks they may encounter, and establishment of measures to provide follow-up to children particularly at risk.<sup>158</sup>

Despite this recognition of the importance of the principle to unaccompanied migrant children under General Comment No. 6, the extent of implementation only focuses on protection of such children from exploitation, abuse, organised crime and other life-threatening situations, which in a traditional sense refers to the civil and political rights of children. Such a limited view, with little emphasis on the need to fulfil the socio-economic needs of children, such as the right to work, and on corresponding positive obligations of States, can be cited as a major lacuna in the protection of the particular interests of independent adolescent migrants. It should be emphasised that the full realisation of the rights of children in general and the right to life, survival and development in particular requires holistic implementation of all rights under the CRC, given the interdependency and indivisibility of civil and political rights and economic, social and cultural rights.

In the context of adolescent migrant children, the joint General Comment No. 3 reiterates General Comment No. 20 on the rights of adolescents, which states that

while migration can provide opportunities to improve living conditions and escape from abuse, [the] migration process can pose risks including physical harm, psychological trauma, marginalization, discrimination, xenophobia and sexual and economic exploitation, family separation, immigration raids and detention.<sup>159</sup>

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<sup>155</sup> CRC Committee, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties (2015) para 7.

<sup>156</sup> Mahgoub K E (2016) 114.

<sup>157</sup> Nowak M (2005) 38.

<sup>158</sup> CRC Committee General Comment No. 6 para 23 & 24.

<sup>159</sup> Joint General Comment No. 3 (2017) para 41; CRC Committee, General Comment No. 20(2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20 para 76 available at <https://www.refworld.org/docid/589dad3d4.html> (accessed 28 August 2019).

Transit and destination states should enable undocumented unaccompanied children to exercise their right to life, survival and development by devising special protection mechanisms.<sup>160</sup> The joint committees further asserted that migrant children, irrespective of their status, should be extended the right to an adequate standard of living appropriate to their physical, mental spiritual and moral development.<sup>161</sup>

#### 4.2.5 Age Determination in the Context of Child Migration

The formal registration of a person upon birth – which is intrinsically linked with age determination – is not only an acknowledgment of his or her existence but a recognition of his or her legal personality, status before the law, and presence and importance in a State.<sup>162</sup> It also enables him or her to qualify to participate in formal and informal activities, to receive public services and to get special protection. Ascertaining the age of a child is fundamental for school admission, health services, juvenile justice systems, asylum procedures, and best interest determination in the context of independent migration, as well as for the purpose of protection from exploitative and hazardous work, from recruitment to an armed force, from entry into early marriage and for overall enjoyment of provisions under the CRC and other child-rights standards. Despite the overarching importance of birth registration, UNICEF estimated in 2017 that 1 in 4 of the global population under the age of 5 years had not been registered.<sup>163</sup>

For some public services, determining the age group of a child in early child development may not be difficult. However, it may be difficult to differentiate between an older adolescent and one who has passed the upper age for childhood, that is, 18 years. The difficulty of ascertaining the age of an adolescent in the absence of documentation can pose huge problems, for example in availing appropriate services and protection to adolescents moving independently across borders. The entirety of the CRC as well as some specific provisions are inherently dependent on the determination of age. Hence, the provision regarding birth registration is fundamental to the existence and implementation of the CRC.

One of the basic ways to ascertain age is by reference to a birth certificate or other form of registration upon or soon after birth. It is for this reason that the CRC, under article 7(1), provides that ‘every child shall be registered immediately after birth’.<sup>164</sup> This stipulation is not unique to the CRC: the ICCPR under article 24(2) provides for a similar right. The HRC in its

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<sup>160</sup> Joint General Comment No. 3 (2017) para 42.

<sup>161</sup> Joint General Comment No. 3 (2017) para 43.

<sup>162</sup> Hodgkin R & Newell P (2007) 98.

<sup>163</sup> UNICEF ‘Birth registration’ (December 2017) available at <https://data.unicef.org/topic/child-protection/birth-registration/> (accessed 28 August 2019); see also UNICEF ‘A Passport to Protection: A Guide to Birth Registration Programming’ (December 2013) 6 & 11 available at [www.refworld.org/pdfid/52b2e2bd4.pdf](http://www.refworld.org/pdfid/52b2e2bd4.pdf) (accessed 17 August 2015); UNICEF ‘Every Child’s Birth Right: Inequities and trends in birth registration’ (2013) 14 available at [http://www.unicef.org/gambia/Every\\_childs\\_birth\\_right\\_inequities\\_and\\_trends\\_in\\_birth\\_registration\\_-\\_2013\\_report.pdf](http://www.unicef.org/gambia/Every_childs_birth_right_inequities_and_trends_in_birth_registration_-_2013_report.pdf) (accessed 17 August 2016).

<sup>164</sup> CRC art 7(2), the provision does not only stipulate the right to birth registration, but also other right to a name, acquire nationality and the right to know and be cared by his or her parents.

General Comment No. 17 explains that article 24(2) of the ICCPR ‘should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child’s legal personality’.<sup>165</sup> It also provides that one of the purposes of the duty of registering a child after birth is to protect him or her from rights violations, such as abduction, sale or trafficking, that may hinder full enjoyment of the rights under the ICCPR.<sup>166</sup>

The CRC Committee also provides a standard on how to implement birth registration. While addressing the issue of implementation of the rights set forth under the CRC in early childhood, the Committee notes that States should put in place, for all children born within their territory, a universal, accessible, non-discriminatory, free, flexible and well-managed birth registration system. Moreover, States should be able to facilitate late registrations and extend basic services regardless of the availability of proof of registration.<sup>167</sup>

Despite the recognition of this right under ICCPR, which was revitalised with the adoption of the CRC, the concluding observations of the CRC Committee reveal that there is a huge gap in ensuring universal birth registration in many parts of the world. Some countries fail to establish an effective birth registration system for all births, and others fail to extend such service to all vulnerable children in their territories, such as children on the move, refugees and internally displaced persons.<sup>168</sup> In this regard, recognising the problems faced by children in the context of migration, the UN Manual on Human Rights Reporting holds that State Parties should ensure birth registration ‘to every child under their jurisdiction, including to non-nationals, asylum seekers, refugee and stateless children’.<sup>169</sup> The first interpretative guidance on the right to birth registration came from the African human rights system in 2014.<sup>170</sup>

If there exists a document that proves age, knowing the exact age is an easy task, unless there is a reasonable suspicion that the certificate has been forged – a regular occurrence in the context of the irregular migration of children. In the case of asylum procedures involving independent migrant children, age assessment should be conducted if such proof could not be furnished. For independent migrant children, BID is carried out to ascertain the age in case the exact age is unknown or contested.<sup>171</sup> In such cases, an assessment that takes into account both the physical appearance and psychological maturity of the child should be conducted. If scientific procedures

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<sup>165</sup> CCPR General Comment No. 17 para 7.

<sup>166</sup> CCPR General Comment No. 17 para 7.

<sup>167</sup> CCPR General Comment No. 17 para 25.

<sup>168</sup> Hodgkin R & Newell P (2007) 98.

<sup>169</sup> The Manual on Human Rights Reporting under six major international Human rights instruments HR/PUB/91/1 (Rev.1) (1997) United Nations Geneva 431.

<sup>170</sup> African Committee of Experts on the Rights and Welfare of the Child (hereafter the African Committee of Experts), *General Comment No. 2 on Article 6 of the ACRWC: ‘The Right to a Name, Registration at Birth, and to Acquire a Nationality’* 16 April 2014, ACERWC/GC/02 (2014) available at: <http://www.refworld.org/docid/54db21734.html> (accessed 7 October 2016).

<sup>171</sup> UNHCR ‘Guideline on Determining the Best Interest of Child’ (May 2008) 23-24.

are employed, the safety and well-being of the child as well as his or her dignity should be respected. In any case where the exact age could not be ascertained, the decision should be in favour of the child.<sup>172</sup>

In the communication brought to the CRC Committee in the case between *DD v Spain*, an issue involving the summary return of an unaccompanied minor without documentation to prove his age, the CRC Committee held that failure to undertake identity verification and assessment before taking any measures to return is contrary to the child's best interests and the protection of children deprived of their family environment. The Committee further stated that the burden of proof of age does not rest on the applicant but the State. States are also required to take positive measures to undertake all the necessary assessments at the earliest time possible, including during entry at borders.<sup>173</sup>

The positive and negative legal consequences of age assessment should not be used to deprive children/adolescents from getting the protection and special treatment they are entitled to under child-rights laws. When assessing age, the fundamental principle should be establishing whether the individual demonstrates 'immaturity' and vulnerability that requires sensitive treatment.<sup>174</sup> What constitutes 'immaturity' is still vague and subject to the assessment of experts. According to some, age-based assumptions about the decision-making capacities of children could be misleading, as they fail to take into account the actual experience and competencies of the child.<sup>175</sup> Although an objective standard applicable to all children is difficult to devise, the general assessment criteria should be anchored in child-rights principles such as the best interests of the child and the child's right to be heard. The CRC Committee also points to innovative ways to register births for children on the move in general and asylum-seeking and refugee children in particular, for instance through the establishment of mobile birth-registration centres.<sup>176</sup>

## 4.2 Interpretation of the African Child-rights Principles in the Context of Independent Adolescent Migration

The African child-rights protection regime is founded on the African Charter on the Rights and Welfare of the Child (hereafter ACRWC), which was adopted on 11 July 1990 and entered into

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<sup>172</sup> CRC Committee General Comment No. 6 para 31(a), CRC Committee 'Concluding observations Italy (2019) para 34 (d); CRC Committee 'Concluding observations Belgium (2019) para 41(a) & 42(a); CRC Committee Concluding observation Germany (2014) para 60(b); UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997) Para 5.11(a) - (c).

<sup>173</sup> CRC Committee 'Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016 in the case between *D.D. v Spain*, CRC/C/80/D/4/2016 (views adopted in 01 February 2019) para 14.2 & 14.3

<sup>174</sup> UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997) p 8 5.11 last para.

<sup>175</sup> Smith T & Brownlees L 'Age assessment practices: a literature review & annotated bibliography' 7 available at [http://www.unicef.org/protection/Age\\_Assessment\\_Practices\\_2010.pdf](http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf) (accessed 7 December 2015).

<sup>176</sup> CRC Committee Concluding observation Ghana (2015) para 30(e).

force on 29 November 1999. To date, September 2019, the Charter has been ratified by 47 out of 54 African countries.<sup>177</sup> The ACRWC has been criticised for its slow rate of ratification compared with that of the CRC – it took two years for any state to ratify or accede to it. Lloyd argues that the reason for the slow ratification of the ACRWC lies in its higher standard of provisioning and correspondingly greater obligations, as well in concerns about submitting to a strict regional monitoring mechanism.<sup>178</sup> However, the current monitoring of the ACRWC and achievements so far show that Lloyd’s arguments are far from accurate.

The CRC has been criticised for failing to address problems peculiar to African children and failing to incorporate African values. The criticism is that the CRC’s drafting process was dominated by Western ideologies and that Africa was not adequately represented. In response to pressure from CSOs, the ACRWC was drafted by taking the CRC’s principles and values and adding to them African children’s unique challenges and African human rights concepts, values and cultural heritage.<sup>179</sup>

The ACRWC is applicable to all Africans under the age of 18. Compared with the CRC, it seems that the protection extended to African children has wider scope without any exceptional grounds to lower the age for the attainment of majority.<sup>180</sup> In terms of the spirit of the law, the documents might not be very different, as the CRC also makes the age of 18 the rule for majority and lower ages as an exception to give a margin of appreciation to countries given their formal and customary laws. In a continent where the age of majority is not necessarily determined chronologically, providing such strict age margin without any exception and room for margin of appreciation may be unrealistic, given the social realities of African societies.<sup>181</sup>

The ACRWC has four basic principles that are of overarching importance in its interpretation and implementation by State Parties: non-discrimination; the best interests of the child; the expression of views and the right to be heard; and the right to life, survival and development. This is discussed in the section below, with particular focus on independent adolescent migrants. The determination of age is also be discussed with reference to the African context.

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<sup>177</sup> ACERWC available at <https://www.acerwc.africa/ratifications-table/> (accessed 1 September 2019); 22nd AU Summit the African Charter on the Rights and Welfare of the Child: 25 Years in 2015 available at <https://au.int/web/en/newsevents/29171/22nd-au-summit-african-charter-rights-and-welfare-child-25-years-2015> (accessed 25 May 2017).

<sup>178</sup> Lloyd A ‘Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet’ (2000) *The International Journal of Children’s Rights* 182.

<sup>179</sup> Lloyd A ‘The African Regional System for the Protection of Children’s Rights’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 34.; also see Viljoen V (2012) 390-93.

<sup>180</sup> ACRWC art 2.

<sup>181</sup> Lloyd A (2008) 35.

### 4.2.1 The Principle of Non-Discrimination

In 2018, the African Committee of Experts undertook a continent-wide study on children on the move, which is indicative of the importance given to the issue.<sup>182</sup> Discrimination is regarded as one of the fundamental challenges faced by migrant children in general and independent adolescent migrants in particular within Africa.<sup>183</sup> Discrimination causes rights violations against children and is a right violation by itself. Given such adversarial impact of discrimination against the realisation of the rights of children, the ACRWC almost in similar terms with the CRC provides for the right of children to non-discrimination.<sup>184</sup> Compared with the CRC, the ACRWC has additional discriminatory grounds based on the history of Africa, and provides protection to children ‘under apartheid and in states subject to military destabilization by the apartheid state’.<sup>185</sup> This emphasis on special protection for children in dire circumstance such as war, conflict and apartheid is a unique attribute of the ACRWC with regard to the eradication of discriminatory treatment and fostering of effective protection of children. The ACRWC does not have jurisdictional limitation in its non-discrimination clause, which implies that the realisation of child rights should be ensured by State Parties across the continent. This may refer to the possibility of joint efforts by African States to realise the rights of children without any discrimination as to nationality and other grounds.<sup>186</sup>

The position of the African Committee of Experts on the jurisdictional aspect of the principle of non-discrimination – that is, whether it applies to all children within a given State irrespective of nationality – can be discerned from General Comment no. 1, which states:

Article 3 provides for the equal enjoyment of the rights and freedoms of the African Children’s Charter to all children within the jurisdiction of States parties. In this context, the concept of discrimination encompasses any distinction, exclusion or preference.<sup>187</sup>

This interpretative guidance is fundamental to extending protection to migrant children in general and independent adolescent migrant in particular.

Apart from the ACRWC, other core African human rights instruments also recognise the right to non-discrimination. The ACHPR under article 2 provides that all Africans are entitled to equal

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<sup>182</sup> African Committee of Experts on the Rights and Welfare of the Child ‘Mapping Children on the Move within Africa’ ACERWC (November 2018) available at [https://www.acerwc.africa/wp-content/uploads/2019/03/ACERWC\\_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-\\_A4\\_Website-version.pdf](https://www.acerwc.africa/wp-content/uploads/2019/03/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-_A4_Website-version.pdf) (accessed 15 August 2019)

<sup>183</sup> ACERWC ‘Mapping Children on the Move within Africa’ (2018) 70.

<sup>184</sup> ACRWC art 3. See also CRC art 2.

<sup>185</sup> ACRWC art 26(2)

<sup>186</sup> Lloyd A (2008) 37-38.

<sup>187</sup> The African Committee of Experts ‘General Comment No. 1(article 30 of the African Charter on the Rights and Welfare of the Child) on ‘Children of Incarcerated and Imprisoned Parents and Primary Caregivers’ (2013) para 19 available at

[http://www.acerwc.org/download/general\\_comment\\_on\\_article\\_30\\_of\\_the\\_acerwc\\_english/?wpdmdl=8597](http://www.acerwc.org/download/general_comment_on_article_30_of_the_acerwc_english/?wpdmdl=8597) (accessed 15 January 2017).

protection of the Charter without any discrimination.<sup>188</sup> This provision is a general protection for every African, which also extends to all African children. In the context of the girl child, the African Women's Protocol provides protection from any form of gender-based discrimination.<sup>189</sup>

Similarly, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which is designed to deal with the movement of persons within borders, is anchored on the principle of non-discrimination.<sup>190</sup> It provides that State Parties should respect, protect and fulfill the rights of internally displaced persons (IDPs) without any discrimination.<sup>191</sup> The Convention further prohibits displacement as a result of discrimination based on ethnic, religious or racial grounds.<sup>192</sup> In broad terms it makes State Parties the major duty-bearer to provide for the needs and protect the rights of IDPs in their territory without any discrimination.<sup>193</sup> The Convention provides that Member States shall apply its provision to all refugees without discrimination as to race, religion, nationality, or membership of a particular social or political group.<sup>194</sup> Although grounds such as age and gender are not provided among the grounds on which discrimination shall not be justified, it may be argued that the interpretation of such clause includes age- and gender-based discrimination in view of the jurisprudence on international refugee law.

In the context of freedom of movement across the continent, the recent African Protocol to Free Movement of Persons takes non-discrimination as its core guiding principle.<sup>195</sup> Reiterating the non-discrimination clause under the African Charter, the Protocol prohibits discrimination in the implementation of the free movement of persons.<sup>196</sup> The prohibition of discrimination based on age is not explicitly provided under the Protocol, nor is it listed in the non-discrimination clause of the African Charter, to which reference is made.

On the jurisprudential front, in the case *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v the Government of Kenya (GoK)* (Nubian Children's case), the African Committee of Experts held that the fact that the GoK's failure to provide birth registration, to issue identification cards in a reasonable time, and to grant nationality is 'prima facie case of discrimination and violation of article 3 of the Charter'.<sup>197</sup> The Committee further requires 'the State to justify the difference

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<sup>188</sup> ACHPR art 2.

<sup>189</sup> The African Women's Protocol art 1(f).

<sup>190</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (hereafter Kampala Convention) 22 October 2009 preamble para 9 & 11, and art 1(d) available at: <http://www.refworld.org/docid/4ae572d82.html> (accessed 25 May 2017)

<sup>191</sup> Kampala Convention art 1(d).

<sup>192</sup> Kampala Convention art 4 (a).

<sup>193</sup> Kampala Convention art 5 & 9(1)(a), 2(a)

<sup>194</sup> The African Refugee Convention art IV.

<sup>195</sup> African Protocol to Free Movement of Persons (2018) art 3(1) & (2(a)).

<sup>196</sup> African Protocol to Free Movement of Persons (2018) art 4 (1).

<sup>197</sup> The African Committee of Experts Decision on the communication submitted by *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in*

in treatment indicating how such a treatment falls within the notion of fair discrimination'.<sup>198</sup> Due to the failure of the GoK to furnish such justification, the African Committee of Experts measured the facts and the actions of the State to see if it is a justifiable differentiated treatment. In doing so, the Committee, however, held that the actions cannot be considered as grounds of fair discrimination.<sup>199</sup>

The African Committee of Experts used the African Commission's jurisprudence to test justifiable discrimination in *Legal Resources Foundation v Zambia*. It particularly cited:

for a discriminatory treatment to be justified the reasons for the possible limitation must be founded in a legitimate state interest [...] limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.<sup>200</sup>

Based on this benchmark, the African Committee of Experts held that the treatment of Nubian children in Kenya amounts to discriminatory treatment.<sup>201</sup> Such criteria were also employed in the case *Minority Group International and SOS-Esclaves on Behalf of Said Ould Salem and Yarg Ould Salem v the Government of the Republic of Mauritania*, a case brought to the African Committee of Experts in regard to rights violation arising from the slavery of parents, which also transcends to children.<sup>202</sup>

In the Nubian children's case, although the African Committee of Experts have held that the actions of the GoK amounts to discriminatory treatment, however, it is questionable that using a criteria that has been employed by the African Commission in the context of adults would adequately serve as a precedent for the purpose of children. The prohibition of discrimination against children requires the highest safeguard, as it is a fundamental right and principle for the effective realisation of child rights. The African Committee of Experts should have introduced strict criteria for determining justifiable discriminatory treatment of children.

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*Kenya v the Government of Kenya* (hereafter Nubian children's Case) Communication: No. Com/002/2009, DECISION: No. 002/Com/002/2009 para 56; see also para 7 available at [acerwc.africa/wp-content/uploads/2018/07/ACERWC-Decision-on-the-Communication-submitted-by-IRDHA-on-behalf-of-Children-of-Nubian-Descent-Vs-The-Government-of-Kenya-1.pdf](http://acerwc.africa/wp-content/uploads/2018/07/ACERWC-Decision-on-the-Communication-submitted-by-IRDHA-on-behalf-of-Children-of-Nubian-Descent-Vs-The-Government-of-Kenya-1.pdf) (accessed 20 January 2017).

<sup>198</sup> Nubian Children's Case (DECISION: No. 002/Com/002/2009) para 56.

<sup>199</sup> Nubian Children's Case (DECISION: No. 002/Com/002/2009) para 56 & 57.

<sup>200</sup> The African Commission on Human and Peoples' Rights (ACHPR) *Legal Resources Foundation v Zambia*, Communication No. 211/98 para 67 available at

[http://www.achpr.org/files/sessions/29th/communications/211.98/achpr29\\_211\\_98\\_eng.pdf](http://www.achpr.org/files/sessions/29th/communications/211.98/achpr29_211_98_eng.pdf) (accessed 15 January 2017) (as cited in Nubian children's Case (DECISION: No. 002/Com/002/2009), DECISION: No. 002/Com/002/2009 para 57).

<sup>201</sup> Nubian children's Case (DECISION: No. 002/Com/002/2009) para 57.

<sup>202</sup> The African Committee of Experts *Decision on the Communication Submitted by Minority Group International and SOS-Esclaves on Behalf of Said Ould Salem and Yarg Ould Salem v the Government of the Republic of Mauritania* (Communication No: 007/Com/003/2015) Decision No:003/2017 para 61.



Further guidance on the principle of non-discrimination is found in the second General Comment of the African Committee of Experts, which explains how the right to a name, birth registration, and nationality should be understood and implemented.

The Committee's approach to unaccompanied migrant children, which is applicable to independent adolescent migrants, is that the status of these children should be regularised so that they are not discriminated against and enjoy equal rights and benefits in accessing social services as nationals do.<sup>203</sup> Even those that may not yet possess a valid migrant, refugee or asylum identification card should be able to access services such as basic education, health care, child protection, and birth registration.<sup>204</sup>

The African human rights system and its child-rights protection scheme do not have any general child-migration and independent-adolescent-migrants-specific interpretation of the principle of non-discrimination. In actuality, the interpretative guidance of the African Committee of Experts in the form of General Comments as well as other jurisprudence is quite limited, given the plight of independent adolescent migrants in Africa.

The other fundamental notion in interpretation under the African human rights system is the 'doctrine of implied rights', which came into existence as the result of the African Commission's decision in the case *Social and Economic Rights Action Center (SERAC) and Another v Nigeria (Ogoniland Case)*.<sup>205</sup> Under this doctrine, rights that are 'expressly guaranteed may necessarily imply the existence of rights that are not explicitly guaranteed in the text'. In other words, this is a reassertion of the indivisibility and interconnectedness of rights.<sup>206</sup> With the notion of implied rights, it can be argued that, in the context of independent migrant adolescents, the right to non-discrimination should be extended to the full spectrum of human rights, including both civil and political rights as well as economic, social and cultural rights.

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<sup>203</sup> The African Committee of Experts 'Concluding Recommendations on the Liberia's Initial Report on the Status of Implementation of the ACRWC' Section H 11, available at

[http://www.acerwc.org/download/concluding\\_observations\\_liberia/?wpdmdl=8747](http://www.acerwc.org/download/concluding_observations_liberia/?wpdmdl=8747) (accessed 05 May 2017).

<sup>204</sup> African Committee of Experts 'Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (March 2019) para 38 [https://acerwc.africa/wp-content/uploads/2019/07/Concluding\\_per\\_cent20observation\\_per\\_cent20for\\_per\\_cent20South\\_per\\_cent20African\\_per\\_cent20Periodic\\_per\\_cent20State\\_per\\_cent20Party\\_per\\_cent20Report.pdf](https://acerwc.africa/wp-content/uploads/2019/07/Concluding_per_cent20observation_per_cent20for_per_cent20South_per_cent20African_per_cent20Periodic_per_cent20State_per_cent20Party_per_cent20Report.pdf) (08 November 2019); 'Concluding Recommendations on the Republic of Lesotho's Initial Report on the Status of Implementation of the ACRWC' para 45 & 46 available at

[http://www.acerwc.org/download/concluding\\_observations\\_lesotho/?wpdmdl=9904](http://www.acerwc.org/download/concluding_observations_lesotho/?wpdmdl=9904) (accessed 05 April 2017);

'Concluding Recommendations on the People's Democratic Republic of Algeria's Initial Report on the Status of Implementation of the ACRWC' para 36 available at <http://www.acerwc.org/download/concluding-observations-algeria/?wpdmdl=9915> (accessed 05 April 2017); 'Concluding Recommendations on Gabon's Initial Report on the Status of Implementation of the ACRWC' para 44 available at

[http://www.acerwc.org/download/concluding\\_observations\\_gabon/?wpdmdl=9906](http://www.acerwc.org/download/concluding_observations_gabon/?wpdmdl=9906) (accessed 05 May 2017).

<sup>205</sup> The African Commission on Human and Peoples' Rights (ACHPR) Communication 155/96 *Social and Economic Rights Action Center (SERAC) and another v Nigeria* (2001) available at [http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf) (accessed 25 May 2017).

<sup>206</sup> Viljoen F (2012) 327.

#### 4.2.2 The Principle of the Best Interests of the Child

This principle is central to the realisation of child rights, yet it remains contentious and vague. It is a context-based principle that should be interpreted and applied by taking into account the situation of a child or group of children. The general spirit of interpretation of such principle, however, should be in line with the provisions of the child-rights standards – the ACRWC in this case – and should not be contrary to the rights set forth under it.<sup>207</sup>

In the context of Africa, the principle of the best interests of the child supersedes all other rights, duties and principles because the way in which it is formulated under article 4(1) of the ACRWC reveals the special prominence given to it.<sup>208</sup> The ACRWC stipulates that in any undertaking concerning children, the principle of the best interests of the child should be ‘the’ primary consideration. Verbatim, the ACRWC states, ‘[I]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.’<sup>209</sup>

The formulation of the provision providing for the best interests of the child principle in Africa has three fundamental elements: ‘in all actions’, ‘undertaken by any person or authority’ and ‘the primary consideration’. ‘In all actions’ refers to State Parties’ duty to respect, protect and provide for the fulfilment of such principle in every intervention and activity concerning children. The phrase ‘undertaken by any person or authority’ refers to the duty owed to children by natural persons, legal persons, other children, or authorities that have formal or informal interaction with children. Taking this principle as ‘the primary consideration’ shall ensure that the outcome of any involvement and intervention with children should be in the best interests of the child with no exceptions.<sup>210</sup> In other words, the provision is interpreted to mean that in Africa there shall be no other competing norm, principle, measure or action that is contrary to the best interests of the child when dealing with the issues of individuals below the age of 18.

Moyo argues that the existing understanding of the principle of the best interests of the child is individualistic in nature and that its relevance in communal and family-centred society in Africa is minimal. The ACRWC, according to Moyo, took this unrealistic child-primacy principle to the highest degree possible by applying the phrase ‘*the primary consideration*’ to all actions regarding a child. Instead of making the principle supersede every interest and circumstance, it should have been framed as a balancing value between different and competing interests. Moreover, its interpretation in Africa should ‘go beyond individualistic conceptions to relational rights and responsibilities between children and others’, such as parents, siblings, and the

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<sup>207</sup> CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para.1) (CRC/C/GC/14) 29 May 2013 para 43, 44, 48-51, 77-79, 80-84; Freeman M (2007) 5-6.

<sup>208</sup> Lloyd A (2008) 36-37.

<sup>209</sup> ACRWC art 4 (1).

<sup>210</sup> The African Committee of Experts General Comment No. 1 para 22.

community's interest.<sup>211</sup> Despite such criticism, the principle is very important in Africa and has been employed to protect the interests of children in cases pertaining to adoption,<sup>212</sup> custody, maintenance and guardianship.<sup>213</sup>

In an African continent that comprises many countries with diverse cultures, values and ways of raising children, determining what constitutes the best interests of the child is a complex task. Such complexity and concern to promote the best interests of the child was also the concern for the African Committee of Experts as indicated in the Concluding Observation on the Initial Report of Lesotho.<sup>214</sup> One of the modalities employed to determine the best interests of the child, according to the international child-rights jurisprudence, is parameters that are compatible with the other three fundamental principles of child rights as well as the standards set forth under the CRC – ACRWC in the African context.<sup>215</sup>

In the context of children's migration in general, the African Refugee Convention does not refer to consideration of the principle of the best interests of the child when dealing with child refugees or asylum seekers. Hence, as Kaime puts it, '[T]his lacuna left the discretion of dealing with refugee children to the host State and led to inconsistent and often harsh practices in the treatment of refugee children, particularly those that were unaccompanied.'<sup>216</sup>

The jurisprudence of the African Committee of Experts indicates that the best interests of the child is a principle that overrides all other measures and interests on every matter that affects children. In particular, countries are expected to have a legislative and policy framework that provides for the explicit recognition of the principle of the best interests of the child as provided under the ACRWC. Moreover, the provision should be clearly stated so as to be effectively interpreted, adhered to and enforced in every sector including the judiciary, and administrative organs.<sup>217</sup>

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<sup>211</sup> Moyo A 'Reconceptualising the 'paramouncy principle': Beyond the individualistic construction of the best interests of the child' (2012) 12 AHRLJ 144; 145 & 150; also see Lloyd A (2008) 37; Kaime T (2009) 113-119.

<sup>212</sup> ACPF *Africa: The New Frontier for Intercountry Adoption*. (2012) 13-15.

<sup>213</sup> ACPF *In the Best interests of the child: Harmonizing Laws in Eastern and Southern Africa* (2007) African Child Policy Forum 33-35; Alemu G & Birmeta Y *Handbook on the Rights of the Child in Ethiopia* (2012) 68-72.

<sup>214</sup> The African Committee of Experts 'Concluding Recommendations on the Republic of Lesotho's Initial Report' para 17.

<sup>215</sup> Snow R & Covell K 'Adoption and the Best Interests of the Child: The Dilemma of Cultural Interpretations' (2006) 14 *The International Journal of Children's Rights* 114-16; CRC Committee 'General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration' (2013) para 43, 44, 48-51, 77-9, 80-4.

<sup>216</sup> Kaime T 'The Protection of Refugee Children under the African Human Rights System: Finding Durable Solutions in International Law' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 186.

<sup>217</sup> The African Committee of Experts 'Concluding Recommendations on Mozambique's Initial Report on the Status of Implementation of the ACRWC' para 14, available at [http://www.acerwc.org/download/concluding\\_observations\\_mozambique/?wpdmdl=8749](http://www.acerwc.org/download/concluding_observations_mozambique/?wpdmdl=8749) (accessed 05 May 2017); 'Concluding Recommendations on Eritrea's State Report on the ACRWC' January 2017 para 7 available at <http://www.acerwc.org/download/concluding-observations-eritrea/?wpdmdl=9999> (accessed 05 May 2017).

The African Committee of Experts, in *The Center for Human Rights and La Recontre Africaine Pour Law Defense Des Droits De L'Homme v the Government of Senegal*, reiterated the CRC Committee's assertion in General Comment No. 14 that 'the major aim of the principle of the best interests of the child is safeguarding the realisation of children's rights effectively and contribute to their holistic development'.<sup>218</sup> The African Committee of Experts further echoed jurisprudence of the CRC Committee that elaborated on the scope of the principle and extended it to cover every action by 'any person' or 'private or public entities', actions that include 'omissions and commissions that are manifested in decisions, proposals, services, procedures and other measures'.<sup>219</sup> This underlines the complementarity between the international and African regional child-rights regimes.

The principle of the best interests of the child obliges States to ensure that non-State actors respect child-rights obligations. In this regard, the African Committee of Experts, in the case *The Center for Human Rights and La Recontre Africaine Pour Law Defense Des Droits De L'Homme v the Government of Senegal*, based its decision on the jurisprudence of the African Commission established in *The Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*. Accordingly, it held that States are duty-bound to ensure that non-state actors respect international and regional child-rights obligations. It further asserted that 'the individual responsibility of non-State actors to respect the rights of children does not relieve the concerned State of its obligations under human rights law to respect, protect and fulfil human rights'.<sup>220</sup>

The African Committee of Experts, in the Nubian children's case, held that the prolonged deprivation of nationality to children of Nubian descent found in Kenya is not only against the spirit and purpose of article 6 providing for the right to name and nationality, but also against the best interests of the child.<sup>221</sup> In this judgment, the Committee further asserts that statelessness in general is contrary the best interests of the child, as it deprives children of civil freedoms as well as the benefits of socio-economic rights, which include access to health care and education.<sup>222</sup>

In the case *Minority Group International and SOS-Esclaves on Behalf of Said Ould Salem and Yarg Ould Salem v the Government of the Republic of Mauritania*, the Committee, reiterating General Comment No. 14, stated that, irrespective of a final decision favouring children, prolonged judicial and administrative procedures are a violation of the best interests of the child.<sup>223</sup>

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<sup>218</sup> The African Committee of Experts 'Decision on the Communication Submitted by *the Center for Human Rights (University of Pretoria) and La Recontre Africaine Pour Law Defense Des Droits De L'Homme v the Government of Senegal*' Decision No. 003/com/001/2012 para 34; see also CRC General comment No. 14 para 4 & 5.

<sup>219</sup> The African Committee of Experts Decision No. 003/com/001/2012 para 35; CRC General comment No. 14 para 4 & 5.

<sup>220</sup> The African Committee of Experts Decision No. 003/com/001/2012 para 37.

<sup>221</sup> Nubian children's Case (DECISION: No. 002/Com/002/2009) para 42.

<sup>222</sup> Nubian children's Case (DECISION: No. 002/Com/002/2009) para 46.

<sup>223</sup> The African Committee of Experts Decision No:003/2017 para 69-70.

The jurisprudence of the African Committee of Experts shows that there has been a major focus on the best interests of the child in cases related to custody, adoption, maintenance, crime and children's imprisonment with their mothers.<sup>224</sup> However, the Committee's stance in regard to the application of the best interests principle in the context of independent adolescent migrants in Africa is not known. Most of its commentary with regard to independent migrants, asylum-seeking or refugee children of all ages relates to access to basic services. Although access to these services as a primary intervention cannot be understated in its importance,<sup>225</sup> given the needs and situation of these children, an elaborated view and recommendation on the overall protection scheme and how the best interests of these children, both as individuals and as groups, should be understood and enforced must be provided by the Committee as the guardian of child rights in Africa. The testimonies of independent adolescent migrants within Africa, as discussed in Chapter 2, indicate that they migrate in search of work and better economic opportunities. Hence, a major issue that ought to be clarified is whether the best interests of adolescent independent migrants could relate to their rights to work in the destination country.

#### **4.2.3 The Principle of the Child's Expression of Views and the Right to Be Heard**

The principle of expression of views and the child's right to be heard is fundamental to other principles: for instance, the best interests of children cannot be realised without soliciting and considering their opinions. Similarly, it is a fundamental principle in guaranteeing that children are holders of rights and have their own agency within the bounds of the law.

If the principle is central to the realisation of child rights, then attention should be given to how it is applied in closed societies that do not take the views of the children as worthy of consideration. It has been said that the idea of free expression of views and the child's right to be heard is a '[W]estern-imposed principle which conflicts with the cultural commitment to the primacy of the family in many other cultures'.<sup>226</sup> In many conservative African societies, the free expression of the views of a child is considered taboo and ill-mannered – instead, children's views are passed to parents or elders through agents such as aunts, uncles or grandparents.<sup>227</sup>

However, this does not mean that many traditional societies in Africa have not been practising letting children express their views using different modalities such as elders sharing folklores,

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<sup>224</sup> The African Committee of Experts 'Concluding Recommendations on the Federal Democratic Republic of Ethiopia's Initial Report on the Status of Implementation of the ACRWC' para 15, available at [http://www.acerwc.org/download/concluding\\_observations\\_ethiopia/?wpdmdl=8744](http://www.acerwc.org/download/concluding_observations_ethiopia/?wpdmdl=8744) (accessed 05 May 2017); Recommendations on Guinea's Initial Report on the Status of Implementation of the ACRWC para 15 available at [http://www.acerwc.org/download/concluding\\_observations\\_guinea/?wpdmdl=8745](http://www.acerwc.org/download/concluding_observations_guinea/?wpdmdl=8745) (accessed 05 May 2017); Concluding Recommendations on the People's Democratic Republic of Algeria's Initial Report para 15; Concluding Recommendations on Gabon para 18; Concluding Recommendation South Africa's Initial Report (2019) para 10; see also ACPF *Africa: The New Frontier for Intercountry Adoption*. (2012) 13-15.

<sup>225</sup> ACERWC 'Mapping Children on the Move within Africa' (2018) 26-7 & 72.

<sup>226</sup> Lansdown G 'Every Child's Right to be Heard: A Resource Guide on the UN Committee on Rights of the Child General Comment No. 12' (2011) Save the Children and UNICEF 14.

<sup>227</sup> Chirwa D M 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) *International Journal of Children's Rights* 160.

stories and songs and seeking child's opinions, and dance with the community as a self-expression of the child.<sup>228</sup> With rapid urbanisation, the relationships of the community and parents with children is changing rapidly, with nuclear families becoming more prevalent in the context of traditional extended families and impacting in turn on children's freedom of expression and right to be heard.<sup>229</sup> There have also been reports that children are engaged in initiatives that directly or indirectly affect their interests, such as legislative reform, development policy and programme design, conflict reconciliation initiatives, school clubs and parliaments.<sup>230</sup>

It may be difficult to ascertain whether the drafters of the ACRWC misunderstood or purposely ignored the cultural relevance of children's expression, as the ACRWC has incorporated a provision that resonates the right to expression of views and the right to be heard as provided under the CRC without introducing a standard that is peculiar to Africa.

The freedom of expression of views and the right to be heard under the ACRWC is not found in a single provision but scattered in two different places, under article 4(2), on the best interests of the child, and article 7, on freedom of expression. It may be argued that the linkage of child participation with the best interests of the child under article 4(2) could be exemplary of the interrelatedness, interdependence and connectedness of the fundamental principles as well as the general child-rights standards. In this regard, the African Committee of Experts in its General Comment on article 6 provides that 'the Charter considers some aspects of children participation as falling within the guiding principles for what constitutes the best interests of the child'.<sup>231</sup> The African Committee of Experts also expressed its concern about the failure of Uganda to include the principle of participation in its national legislation. The Committee further indicated that such failure to include the principle in national laws also affected the effective realisation of the best interests of the child as well as the survival and development of the child.<sup>232</sup>

One potential flaw of article 7 and 4(2) under the ACRWC is the restriction to freely express based on the criteria of ability to communicate one's views. In this regard, children that are able to form ideas but cannot communicate them would not be able to freely express their views under the ACRWC. Another problem is that for a child to be heard in judicial or administrative settings under article 4(2), he or she would have to be 'a party to a proceeding'.<sup>233</sup> Moreover, article 7 of the ACRWC provides that the freedom of expression of views and their weighting are 'subject to such restrictions as are prescribed by laws'. The ACRWC in this regard provides general, restrictive and vague criteria, compared with its counterpart article 12 of the CRC,

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<sup>228</sup> Lansdown G (2011) 17

<sup>229</sup> Stern R *The Child's Right to Participation – Reality or Rhetoric?* (2006) Uppsala, Sweden 79-80.

<sup>230</sup> Ehlers L & Frank C 'Child Participation in Africa' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 123.

<sup>231</sup> The African Committee of Experts 'General Comment No. 2' para 21.

<sup>232</sup> The African Committee of Experts 'Concluding Recommendations on Uganda's Initial Report' 3.

<sup>233</sup> Chirwa D M (2002) 161; see also the African Committee of Experts General Comment No. 1 para 31.

which provides a comprehensive provision that urges States to give due weight to child's expression based on age and maturity.<sup>234</sup>

Given the traditional views of many African societies on children's freedom of expression, the ACRWC fails to provide a suitable provision that takes into account cultural challenges and affords safeguards to promote this right in Africa. Except for the requirement to solicit the views of the child in judicial and administrative proceedings, the informal setting is not recognised.<sup>235</sup>

In the context of refugee children, the African Refugee Convention does not contain any provision that mentions children's right to express their views and be heard. Such a right is particularly fundamental to independent adolescent migrants in order to determine their status and decide on durable solution based on their best interest.<sup>236</sup>

The jurisprudence of the African Committee of Experts reveals that the Committee considers actions such as the inclusion of the principle in legislation and policy documents,<sup>237</sup> allocating budget for child participation platforms like child parliament, as a positive step towards the realisation of the right to participation.<sup>238</sup> The Committee urges States to promote the right to participation by sensitising the community to ensure the meaningful participation of children.<sup>239</sup> The Committee's focus seems to be on political participation, particularly child parliaments and similar association modalities, and the limited involvement of children in government plans and implementation.<sup>240</sup> Similarly, the lack of formal establishment and regulatory frameworks was raised as a concern that ought to be addressed by State Parties.<sup>241</sup> The Committee further urges States to establish child participation platforms, such as child parliaments in all regions of a country, and to make such structures all inclusive by allowing children from all parts of the country to have representation.<sup>242</sup>

To ensure children's participation in court cases, the Committee recommends that adequate legal representation be accorded to them.<sup>243</sup> A more comprehensive recommendation was made to Tanzania, which was asked to 'put in place mechanisms that will ensure children's participation in all matters concerning their welfare and [to] further allocate financial and technical resources

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<sup>234</sup> Chirwa D M (2002) 161.

<sup>235</sup> Chirwa D M (2002) 161.

<sup>236</sup> Kaime T (2008) 187.

<sup>237</sup> The African Committee of Experts 'Concluding Recommendations on South Africa's Initial Report (2019)' para 12.

<sup>238</sup> The African Committee of Experts 'Concluding Recommendations on Mozambique's Initial Report' para 18.

<sup>239</sup> The African Committee of Experts 'Concluding Recommendations on Ethiopia's Initial Report' para 17.

<sup>240</sup> The African Committee of Experts 'Concluding Recommendations on Guinea's Initial Report' para 20, Sudan's Initial Report 3, Ghana's Initial Report para 17.

<sup>241</sup> The African Committee of Experts 'Concluding Recommendations on Liberia's Initial Report' 6; Uganda's Initial Report 8.

<sup>242</sup> The African Committee of Experts 'Concluding Recommendations on Algeria's Initial Report' para 18; Gabon's Initial Report para 21; Madagascar's Initial Report para 14.

<sup>243</sup> The African Committee of Experts 'Concluding Recommendations on Mozambique's Initial Report' para 18.

to support those mechanisms, which should encourage advocacy in families, communities and traditional settings in this respect'.<sup>244</sup> Similarly, the Committee urged the Government of Lesotho to 'work towards changing the societal attitudes of the community that devalues the participation of children particularly in rural areas'.<sup>245</sup>

The call of the Committee to foster family, community and traditional settings for expression of views and the right to be heard is the manifestation of an integrated and holistic approach to child participation in Africa, one that takes into account the peculiar characteristics of African societies. There should be more recommendations like these; however, the Committee has not yet given comprehensive guidance on how such principle should be understood, interpreted and implemented in Africa. In particular, in the context of independent adolescent migrants, the guidance of the Committee is lacking on the issues of weighting their views while they came in contact with authorities in the migration process, status determination in host states and on decisions on durable solution.

#### **4.2.4 The Principle of the Right to Life, Survival and Development**

The principle of the right to life, survival and development has paramount importance in Africa, as many children are affected by extreme poverty, irregular movement, disease, malnourishment, war, harmful traditional practices and so on. Africa could be said to be the most child-unfriendly continent in the world. In sub-Saharan Africa, there are 34 million out-of-school children; 52 per cent of children live in extreme poverty on less than USD 1.90 per day; 247 million out of 368 million children in 30 sub-Saharan countries have experienced two to five deprivations that threaten their life, survival and development; and two-thirds of children lack the basic necessities for their development.<sup>246</sup> As one would expect, extremely vulnerable children such as migrants in general and independent adolescent migrants in particular are hit the hardest by the dire situations that threaten their life, survival and development in sub-Saharan Africa.

It is paradox that, notwithstanding the Declaration and Plan of Action on African Fit for Children adopted in 2001, the renewed Call for Accelerated Action on the Implementation of the Plan of Action Towards Africa Fit for Children (2008-2012), and countless declarations, action plans, strategies and resolutions on health, poverty alleviation, gender, and child mortality,<sup>247</sup> social

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<sup>244</sup> The African Committee of Experts 'Concluding Recommendations on Tanzania's Initial Report' 11.

<sup>245</sup> The African Committee of Experts 'Concluding Recommendations on Lesotho's Initial Report' para 20.

<sup>246</sup> African Child Policy forum (ACPF) *The African Report on Child Wellbeing 2016. Getting It Right: Bridging the gap between policy and practice. An Overview* (2016) (ACPF) 4-7.

<sup>247</sup> The Declaration and Plan of Action on Africa Fit for Children adopted in 2001 which was also Africa's contribution to the UN General Assembly Special Session on Children held in New York - May 2002; the Declaration and Plan of Action on Employment and Poverty Alleviation in Africa adopted by the Third Extraordinary Summit of Heads of State and Government held in Ouagadougou, Burkina Faso in September 2004; Decision - Assembly/AU/Dec.75 (V) on Accelerating Action for Child Survival and Development in Africa to meet the MDGs, in particular MDG 4 on reducing child mortality and morbidity – Sirte, July 2005; Decision - Assembly/AU/Dec.92 (VI) on the Second Decade of Education in Africa (2006-2015) – January 2006; the Policy Framework and Plan of Action on Sexual and Reproductive Health and Rights – January 2006; The Abuja Call for



services for children in Africa fall short of expectations. The UN Resolution on the Rights of the Child: Towards Better Investment in the Rights of the Child expressed deep concern that ‘while States have developed and improved legal frameworks for children, the lack of sufficient, efficient, inclusive and equitable public investment in children remains one of the main barriers to realise the rights of the child’.<sup>248</sup> The resolution calls on states to ensure universal access to health care and inclusive, equitable and non-discriminatory education for all children, with special attention to, inter alia, refugees, migrants, undocumented and stateless children.<sup>249</sup>

To see how far practical improvement in social services goes beyond rhetoric, the budget expenditures of African states should be assessed. According to the ACPF’s 2018 report on child wellbeing in Africa, the average health expenditure is 6.3 per cent of the national budget, with Mozambique and Sudan recording the lowest averages, at 1.2 and 18.1 per cent, respectively.<sup>250</sup> Only three countries – Sudan, Madagascar, Swaziland – allocated more than 15 per cent of their national budgets to the health sector.<sup>251</sup> In the case of education, the African median percentage of budget allocation is 4.3 per cent, with the lowest 1 per cent and the highest 11 per cent in Zambia and Lesotho, respectively. This represents a failure to meet the 2000 Dakar Education for All Conference target that requires States to allocate at least 9 per cent of their GDP to the education sector. Only Lesotho and Botswana met this.<sup>252</sup> Many African States are unable to provide adequate social services for their own children, never mind for migrant children.

On the child-rights normative front, the ACRWC under article 5 provides for the principle of survival and development, together with that for the children’s inherent right to life. In the words of the ACRWC, State Parties ‘shall ensure, to the maximum extent possible, the survival, protection and development of the child’.<sup>253</sup> The provision further entails that ‘death sentence

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Accelerated Action toward Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa - May 2006; Africa Health Strategy of 2007-2015.

<sup>248</sup> HRC ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Resolution on Rights of the child: towards better investment in the rights of the child’ A/HRC/28/L.28 28 March 2015 preamble para 14 available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G15/062/49/PDF/G1506249.pdf?OpenElement> (accessed 06 May 2017); see ACPF (2016) 7.

<sup>249</sup> HRC ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’ 24 March 2015 (A/HRC/28/L.28 28) para 28 & 29 available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G15/062/49/PDF/G1506249.pdf?OpenElement> (accessed 06 May 2017).

<sup>250</sup> ACPF *The African Report on Child Wellbeing 2018: Progress in the child-friendliness of African governments* (2018) 50-51; Micah A E, Chen C S, & Zlavog B S, et al. ‘Trends and drivers of government health spending in sub-Saharan Africa, 1995–2015’ (2019) *BMJ Glob Health* 4-6, available at <https://gh.bmj.com/content/bmjgh/4/1/e001159.full.pdf> (accessed 30 August 2019).

<sup>251</sup> ACPF *The African Report on Child Wellbeing* (2018) 50-51, and see OAU Abuja Declaration on HIV/AIDS, TB and Other Related Infectious Diseases OAU/SPS/ABUJA/3 para 26 available at [http://www.un.org/ga/aids/pdf/abuja\\_declaration.pdf](http://www.un.org/ga/aids/pdf/abuja_declaration.pdf) (accessed 06 May 2017).

<sup>252</sup> ACPF *The African Report on Child Wellbeing* (2018) 48-49; also see Dakar Framework for Action Education for All: Meeting our Collective Commitments, Adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000 available at <http://unesdoc.unesco.org/images/0012/001202/120240e.pdf> (accessed 06 May 2017).

<sup>253</sup> ACRWC art 5(2).

shall not be pronounced for crimes committed by children'.<sup>254</sup> According to Lloyd, the provision is a commendable normative standard in the African child protection system, as it extends better protection than its international counterpart as it makes States duty-bound to ensure fulfilment of what is required for the survival and development of the child.<sup>255</sup> Likewise, Olowu asserts that the inclusion of development under article 5 of the ACRWC connotes a broader right by incorporating emotional, emotional, cognitive, social and cultural development on top of its dimensions of physical existence and well-being.<sup>256</sup>

The African Committee of Experts, in the case *The Center for Human Rights and La Recontre Africaine Pour Law Defense Des Droits De L'Homme v the Government of Senegal*, considers the right to life, survival and development an 'essential precondition to the enjoyment of the each of the rights under the ACRWC'.<sup>257</sup> In this decision, the Committee provides that the scope of the principle covers the right to life, the right to physical, mental, spiritual, moral, psychological and social development, access to health care, education services, access to clean water, the right to live in safe and clean environment, protection from abuse, and protection from degrading treatment and exploitation – basically, it aids in realising all the rights under the ACRWC.<sup>258</sup> The failure of a State to ensure the respect of the right to survival and development entails a violation of one or more of the rights of the ACRWC.

In the case *Minority Group International and SOS-Esclaves on Behalf of Said Ould Salem and Yarg Ould Salem v the Government of the Republic of Mauritania*, the African Committee of Experts, stressing the interlinkage between child labour and development, held that 'child labour in all its forms severely impedes the overall development and well-being of a child'.<sup>259</sup> Similarly, the Committee, in its General Comment No. 1, explains that the principle of the right to life, survival and development requires the fulfilment of other rights such as health, food, shelter, education and an adequate standard of living. Furthermore, the Committee asserts that the principle imposes a proactive duty on the government that requires, among other things, the allocation of adequate resources.<sup>260</sup>

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<sup>254</sup> ACRWC art 5(3).

<sup>255</sup> Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *AHRLJ* 21.

<sup>256</sup> Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 129.

<sup>257</sup> The African Committee of Experts *the Center for Human Rights (University of Pretoria) and La Recontre Africaine Pour Law Defense Des Droits De L'Homme v the Government of Senegal* Decision No. 003/com/001/2012 para 41.

<sup>258</sup> The African Committee of Experts Decision No. 003/com/001/2012 para 42; the African Committee of Experts Decision No:003/2017 para 71.

<sup>259</sup> The African Committee of Experts Decision No:003/2017 para 72.

<sup>260</sup> The African Committee of Experts General Comment No. 1 para 26; see also UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003 (CRC/GC/2003/5) para 6 available at: <https://www.refworld.org/docid/4538834f11.html> (accessed 24 September 2019)

According to the jurisprudence of African Committee of Experts discussed above, the principle of the right to life, survival and development is fundamental in the interpretation and application of child rights under the ACRWC. However, it should be noted that the focus of the Committee, as it seen in its concluding observations, is on children in their early development stages, with States being urged to ensure breastfeeding, disease-prevention, nutrition, sanitation, safe drinking water, prenatal and neonatal care, and the like;<sup>261</sup> in the case of adolescents older than 15, the focus so far is on criminal justice and road accidents.<sup>262</sup>

One important aspect that should be raised with regard to the approach of the African Committee of Experts in the context of fulfilling the basic services to migrant children in general and independent adolescent migrants in particular is that services should be delivered without any discrimination in terms of colour, race, and place of origin.<sup>263</sup> This fundamental principle is important for migrant children's dignity of existence as well as their growth and development. Despite the importance of providing for a means to realise such right to migrant children, many States in Africa have been reluctant to provide the necessities that are required for children's survival, well-being and development such as health care facilities, access to education, and access to basic shelters.<sup>264</sup> Independent adolescent migrants in particular are excluded from accessing social services due to their lack of pertinent documents as well as legal status. In line with the highest safeguard given under the ACRWC to all African children irrespective of nationality or legal status, there should be a special measure for independent adolescent migrants to ensure access to amenities to exercise their right to life, survival and development. To this end, the African Committee of Experts is best suited to direct State parties on how to prioritise and undertake their treaty obligations.

Examination of the four cardinal principles underlying child-rights standards in Africa – the principles that dictate the entire application of the ACRWC – shows that little consideration has been given to independent adolescent migration. Hence, lack of giving direction on how these principles should be understood, interpreted and applied on a certain child-rights thematic area would mean that generally there is lacuna to confer effective and adequate protection to independent adolescent migrants. Although inadequate, it should be acknowledged that the African Committee of Experts, in its concluding recommendations on the reports of State Parties, touches upon the issues of children in the context of migration, particularly from the perspective of rendering social services to this group of children in countries of destination.

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<sup>261</sup> The African Committee of Experts Concluding Recommendations on Initial Report of Ethiopia para 16, Liberia p 6; Mozambique para 15; South Africa 25 & 26; Lesotho para 18 & 19, Algeria para 36; Madagascar para 1.

<sup>262</sup> The African Committee of Experts Concluding Recommendations on Initial Report of Liberia p 6; Madagascar para 11; South Africa 25 & 26, Guinea 16 & 17.

<sup>263</sup> The African Committee of Experts Concluding Recommendations on Initial Report of Algeria para 36.

<sup>264</sup> The African Committee of Experts Concluding Recommendations on Initial Report of the Republic of South Africa para 55, Lesotho para 45 & 46; Republic of Algeria's para 36; Gabon para 44, Eritrea 23; Ethiopia para 33.

#### 4.2.5 Age Determination in the Context of Migration in Africa

Age determination may not be a contested issue if a formal civil registration system is available.<sup>265</sup> However, in sub-Saharan Africa, where there is a lack of civil registration systems, the issue of ascertaining age is a serious challenge. In Africa, ‘birth registration is a foreign concept and traditionally the child’s birth is marked by salutations and expressions of joy’.<sup>266</sup> The formal birth registration modality in many African countries can be linked with the time of colonisation.<sup>267</sup>

According to the UNICEF 2017 estimates, globally 1 in every 4 children under the age 5 was not registered.<sup>268</sup> Generally, according to 2016 data, African countries have the lowest levels of birth registration.<sup>269</sup> Among the top ten countries with the largest number of unregistered children under the age of 5 years, five are found in sub-Saharan Africa.<sup>270</sup> Most of the children that are affected by lack of birth registration are those disadvantaged children living in rural areas, the children of uneducated parents, street children, orphans, and generally, those children found in difficult circumstance.<sup>271</sup> Logically, if there is a general low rate of birth registration in sub-Saharan countries, then determining the age of migrant children in general and independent adolescents in particular is a serious challenge.<sup>272</sup>

At the Third African Ministers Conference on Civil Registration and Vital Statistics (CRVS), participants undertook to register all births in Africa in keeping with the motto, ‘leaving no child out and no country behind’.<sup>273</sup> One fundamental aspect of the Conference is the expression of the renewal of commitment to child rights in the context of CRVS and the recognition given to the African Committee of Experts’ General Comment No 2 on article 6 of the ACRWC.<sup>274</sup>

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<sup>265</sup> UN Department of Economic and Social Affairs (UNDESA) Statistics Division *Principles and Recommendations for a Vital Statistics System Papers Series M.No. 19/Rev.3* (2014) United Nations para 2 & 279.

<sup>266</sup> Bequele A *Universal Birth Registration: The Challenge in Africa* A paper prepared for the Second Eastern and Southern Africa Conference on Universal Birth Registration Mombasa, Kenya, September 26-30, 2005 3.

<sup>267</sup> Bequele A (2005) 3.

<sup>268</sup> UNICEF ‘Birth registration’ (December 2017); see also UNICEF ‘A Passport to Protection: A Guide to Birth Registration Programming’ (December 2013) 6 & 11; UNICEF ‘Every Child’s Birth Right: Inequities and trends in birth registration’ (2013) 14.

<sup>269</sup> UNICEF, Global Database on Birth Registration, Last update November 2017 available at <https://data.unicef.org/topic/child-protection/birth-registration/> (accessed 30 August 2019).

<sup>270</sup> Nigeria (17 Million), Ethiopia (13 Million), Democratic Republic of Congo (8 million), Tanzania (7 million), and Uganda (5 million) unregistered children, see UNICEF Every Child’s Birth Rights (2013) 15.

<sup>271</sup> UNICEF Every Child’s Birth Rights (2013) 36.

<sup>272</sup> CRC Committee *D.D. v Spain* (CRC/C/80/D/4/2016).

<sup>273</sup> Joint Media Release, Third Conference of African Ministers on CRVS (12-13 February 2015), held in Yamoussoukro, Republic of Cote d’Ivoire. First Conference of African Ministers Responsible for Civil Registration was held in Addis Ababa hosted by the African Union Commission (AUC) in August 2010 available at <http://www.au.int/web/en/newsevents/12600/third-conference-african-ministers-crvs-ends-call-decade-civil-registration-2015> (accessed 13 May 2017); the Second Conference of African Ministers Responsible for Civil Registration was held in Durban South Africa 3-7 September 2012 available at <http://www1.uneca.org/crmc/crmc2012.aspx> (accessed 13 May 2017).

<sup>274</sup> Joint Media Release, Third Conference of African Ministers on CRVS (2015).

The definition provided for birth registration in the General Comment No. 2 is quite simple and reiterates what was provided in the African Committee of Experts' decision in the Kenyan Nubian children's case: here, birth registration is defined as

the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government. It is a permanent and official record of a child's existence. Ideally, birth registration is part of an effective civil registration system that acknowledges the existence of the person before the law establishes the child's family ties and tracks the major events of an individual's life.<sup>275</sup>

Compared with the UN's comprehensive definition,<sup>276</sup> this falls short in clearly showing the features of the different types of birth. It also takes a more formal administrative and legal perspective on birth registration. Moreover, it is not a contextualised definition that takes into account the traditional and other characteristics of birth registration in Africa.

Birth registration is fundamental for the overall development of the child and realisation of rights provided under the international and regional standards. Given this core significance, it is recognised as a basic right of every child. In this regard, the ACRWC under article 6(2) provides that 'every child shall be registered immediately after birth'. The ACRWC has provided a number of steps, arguably more than in regard to any other right, on the relevance of birth registration to the realisation of all other rights and its implementation as a fundamental right on its own. The African Committee of Experts recognises that article 6, on the right to name and nationality, relates to the combination of the right to a name, nationality and birth registration.<sup>277</sup>

The Committee underlines that an effective system of birth registration anchored in comprehensive legislation is fundamental to realising the right to a name and nationality.<sup>278</sup> General Comment No. 2 outlines the components that should be covered by birth registration legislation. These include non-discrimination and the best interests of the child as principles to lead the process; measures to deal with fraud; and costs of registration.<sup>279</sup> The Committee also explains that the right to birth registration should be interpreted in view of the four basic principles of child rights<sup>280</sup> and the 'indivisibility and interdependence of child rights in general' as provided under the ACRWC.<sup>281</sup>

In the words of the African Committee of Experts, '[T]he right to birth registration is one of the rights that consistently appear not to be fully implemented by States parties.'<sup>282</sup> The Committee urges State Parties to promote it in society that children should be registered after birth, and urges governments to ensure access to birth registration in 'rural areas where illiteracy and

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<sup>275</sup> The African Committee of Experts General Comment No. 2 para 45.

<sup>276</sup> UNDESA (2014) 4 para 2.

<sup>277</sup> The African Committee of Experts General Comment No. 2 para 9.

<sup>278</sup> The African Committee of Experts General Comment No. 2 para 12.

<sup>279</sup> The African Committee of Experts General Comment No. 2 para 12.

<sup>280</sup> The African Committee of Experts General Comment No. 2 paras 13-22.

<sup>281</sup> The African Committee of Experts General Comment No. 2 paras 13 & 23-37.

<sup>282</sup> The African Committee of Experts General Comment No. 2 para 3.

poverty are prevalent'.<sup>283</sup> The Committee notes that stringent requirements and fees charged for registration discourage poor communities from accessing birth registration services and urges states to provide the service free of charge, especially in rural areas.<sup>284</sup> The Committee further recommends establishing mobile birth registration centres in remote and inaccessible areas.<sup>285</sup> It also notes that despite the existence of legislative frameworks, lack of effective enforcement mechanisms has hindered compulsory birth registration.<sup>286</sup> The Committee urges States to lift any *de facto* or *de jure* barriers to the effective and timely registration of births.<sup>287</sup>

With regard to children in the context of migration vis-à-vis birth registration, General Comment No. 2 focuses on ensuring the registration of children of irregular migrants, refugees, asylum-seekers, unknown parents and all others at the risk of non-registration who are born or found in a host territory.<sup>288</sup> The principle of the Committee in this regard is that universal birth registration is provided without discrimination.<sup>289</sup> The other interesting dimension of birth registration in the context of migrants and refugees is its benefit during return to their countries of origin by establishing concrete proof about their linkage to their home country, ownership or possession of land based on the applicable law, and to facilitate family reunification in situations where family members migrated to different countries.<sup>290</sup> The Committee stresses, however, that registering births does not amount to granting nationality, which is regulated based on a separate domestic law of the host country.<sup>291</sup>

The African Committee of Experts tries to address the issue birth registration of migrant children in general by systematically categorising them as 'children of undocumented migration status'.<sup>292</sup> However, it is not clear if the list of 'undocumented migrant children' may also refer to unaccompanied children in irregular migration situations and particularly independent adolescent migrants, given that these groups are not explicitly listed in the General Comment.<sup>293</sup> Moreover,

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<sup>283</sup> The African Committee of Experts Concluding Recommendations on Ethiopia's Initial Report para 19.

<sup>284</sup> The African Committee of Experts Concluding Recommendations on Guinea's Initial Report para 21; Liberia's Initial Report p 6 s D; South Africa's Initial Report (2019) para 13; Tanzania's Initial Report p 9; Uganda's Initial Report 3; Lesotho's Initial Report para 21.

<sup>285</sup> The African Committee of Experts Concluding Recommendations on Guinea's Initial Report para 21; Lesotho's Initial Report para 21; Madagascar's Initial Report para 17.

<sup>286</sup> The African Committee of Experts Concluding Recommendations on Tanzania's Initial Report 9; Eritrea's Initial Report para 9.

<sup>287</sup> The African Committee of Experts Concluding Recommendations on Gabon's Initial Report para 23; Algeria's Initial Report para 20; South Africa's Initial Report para 9.

<sup>288</sup> The African Committee of Experts General Comment No. 2 para 23 & 50.

<sup>289</sup> The African Committee of Experts General Comment No. 2 50 & 51.

<sup>290</sup> The African Committee of Experts General Comment No. 2 para 58.

<sup>291</sup> The African Committee of Experts General Comment No. 2 para 61-63.

<sup>292</sup> The African Committee of Experts General Comment No. 2 6 para 64; the other categories of children of undocumented migration status include children born to undocumented parents, children whose migration status became irregular because their parents or caregivers overstayed their residence visas or permits in a given country, children in regular migration status (without necessarily being documented) but whose parents or caregivers are undocumented, or children born to parents whose deportation has been suspended due to circumstances justifiable under international law or international humanitarian law, but have not been issued any documentation.

<sup>293</sup> The African Committee of Experts General Comment No. 2 6 para 64.

the explanation of the Committee as to the rights of ‘undocumented migrant children’ does not add any new protection, entitlement or safeguard to independent adolescent migrants, as it focuses entirely on parents’ legal status and documentation. The retroactive registration of births and issuance of birth certificates, which are fundamental to independent adolescent migrants who do not have any form of birth registration and documentation, is overlooked in the interpretative guidance of the Committee.

Countries that host migrants, asylum-seekers and refugees should guarantee the right to birth registration to children of these persons and other children of similar status.<sup>294</sup> The Committee notes its concern about the lack of birth certificates of foreign children born from undocumented migrant women and unaccompanied foreign children without asylum claims, who, due to their status, are unable to receive basic social services, such as health care, education, protection and care, and may also end up stateless.<sup>295</sup>

An interesting dimension of the Committee’s views on birth registration vis-a-vis migrant children is the linkage with the right of inheritance of a returnee refugee child. It has been reported, for instance in Uganda, that returnee children have been denied the inheritance of property due to the lack of a legal document attesting to their identity and family ties.<sup>296</sup> In this regard, the Committee explained that proof of identity in the form of birth registration as well as registration of all vital events would assist in resolving a dispute that may arise out of inheritance of property by providing proof of parental ties, age and other pertinent statistical data.<sup>297</sup>

Generally, it can be asserted that the issue of unaccompanied migrant children in general and independent adolescent migrants in particular lacking birth certificates or other documents attesting their age is not among the major considerations of General Comment No. 2. The limited reference to migrant and refugee children fails to provide adequate modalities to ascertain the ages of specific categories such independent migrant children who lack birth registration documents. In Africa there will be many independent adolescent migrants without birth certificates who face serious challenges owing to their lack of effective protection.

### 4.3 Conclusions

One of the ground-breaking aspects of the international child-rights regime is its recognition of four principles that are integral to any interpretation of the provisions of the CRC and ACRWC. These principles inform the CRC and its entire application. The CRC Committee has provided contextual meaning to these principles in regard to particular situations and groups of children. The joint General Comment of the CRC Committee and the Committee for the Protection of

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<sup>294</sup> The African Committee of Experts Concluding Recommendations on Ethiopia’s Initial Report para 3; South Africa’s Initial Report (2019) para 13 & 14; Lesotho’s Initial Report para 46.

<sup>295</sup> The African Committee of Experts Concluding Recommendations on South Africa’s Initial Report (2019) para 9.

<sup>296</sup> Bequele A (2005) p 6.

<sup>297</sup> The African Committee of Experts General Comment No. 2 para 35 & 36.

Migrant Workers is the most current and comprehensive interpretive guide on how the rights of children should be protected in the context of international migration. Although in the context of adolescent independent migrants pertinent interpretive guidance could be identified in the joint general comment given the peculiarities and interests of these children, the existing guidance is inadequate. While addressing the treatment of USMCs under its General Comment No. 6, the CRC Committee has dealt with how the four core principles should be understood and applied in the context of international migration. Such initial steps have also inspired the adoption of best interest determination procedures and guidelines by organs such as the UNHCR. Although the initiatives of the CRC Committee as well as the UNHCR are commendable, clarification of the principles has some notional and practical limitations in regard to adolescent independent migrants given their particular situations and experiences. Moreover, the subjective requirements that are open to the goodwill of adult experts for the determination of adherence with such principles could have the potential to undermine the interest and needs of independent migrant children.

The development of the AHRs is a major achievement in that it contextualises the international human rights regime by taking into account regional variances and peculiarities. Although the actual implementation of many of the regional human rights standards is far from adequate, the OAU and its successor, the AU, were at the forefront of adopting human rights treaties to protect all Africans as well as special groups such as children, women, refugees and IDPs.

The global problem of child migration in general and adolescent independent migration in particular is also becoming a major regional issue in Africa. According to estimates, Africa has the highest proportion of adolescent migrants out of the total migrant population. The number is projected to rise dramatically due to increasing movement of persons across borders in Africa, to extreme poverty, to drought and to lack of adequate social services in many African states.

The same as under international human rights instruments, the issue of independent adolescent migrants was not among the African regional human rights law designers' mind. This can be discerned from the limited focus given to the issue of independent child migration in the design of the African Refugee Convention, the ACHPR and Women's Protocol. Although the ACRWC as a child-specific instrument considers the heightened vulnerability of children due to migration and stresses providing equal service to these groups of children, it does not take into account the additional adult-like needs and capacities of adolescent independent migrants, who have interests in much more than basic social services such as education and health care.

Although it should be acknowledged that some reference to the issue of migrant children in general, and asylum-seekers and refugee children in particular, has been made in the jurisprudence relating to all the four principles, it may be argued that comprehensive guidance has not been given by the African Committee of Experts on child migration in general and independent adolescent migrants in particular.



Compared with the interpretation of the four cardinal principles and other rights of children in the context of independent migration, the focus given to birth registration is relatively significant. Still, the issue of birth registration seems to be seen from the perspective of parents or legal guardians perspectives, which is basically the result of the fallacious notion that children are subordinate to parents or other adults in the context of migration.

In general, for adolescent independent migrants in Africa, there should be an approach under the general child-rights framework that balances their adult-like interests and capacities with their protection needs. This can be done either through specific interpretative guidelines for this category of children or through a separate protocol to the ACRWC on the rights of children in the context of migration in Africa.



# CHAPTER FIVE: ASSESSMENT OF THE NORMATIVE FRAMEWORK PERTINENT TO INDEPENDENT ADOLESCENT MIGRANTS IN ETHIOPIA AND SOUTH AFRICA

## 5.1 Introduction

The previous chapters discussed the theoretical foundations for child migration in general and independent adolescent migration in particular, with the discussion including coverage of the international and regional normative and policy commitments for the protection of independent child migrants. Based on these discussions, this chapter puts the normative frameworks of two African countries to the test: Ethiopia and South Africa. The chapter does not intend to present either a comparative study or be representative of African countries, and therefore it is by no means exhaustive. This country-specific study is instead a three-tier evaluation of international, regional and national laws, policies and pertinent strategies and guidelines to assess whether the rights and interests of independent adolescent migrants are adequately and effectively protected. The approach this represents should, it is hoped, provide a better view of the problem.

This chapter will follow the approach of the preceding chapters in undertaking a normative interpretation of the right to move freely and adolescents' right to work in Ethiopia and South Africa. It discusses the interpretation of the principle of non-discrimination, the principle of the best interests of the child, the principle of expressing views and being heard, and the right to survival and development, all in the context of independent adolescent migration in the two countries. The chapter also examines age determination and issuance of documentation in the context of migration in Ethiopia and South Africa. The study entails analysis of legal and policy frameworks, pertinent case law, and the general treatment of independent adolescent migrants

## 5.2 Assessment of the Normative Framework in Ethiopia

Ethiopia is one of the main sources of mixed migration flows.<sup>1</sup> As noted in Chapter 2, the number of Ethiopians departing the country irregularly is enormous, with multiple routes targeting a variety of destinations.<sup>2</sup> Ethiopia has been at the forefront of ratifying international and regional legal instruments pertinent to migrants in general and independent adolescent

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<sup>1</sup> Regional Mixed Migration Secretariat: East Africa and Yemen (RMMS) 'Ethiopia Country Profile' (2016) available at <http://www.regionalmms.org/index.php/country-profiles/ethiopia> (accessed 09 October 2017). According to IOM's Glossary on Migration, mixed [migration] flows are complex population movements including refugees, asylum-seekers, economic migrants and other migrants. See IOM 'Glossary on Migration' (2004) available at [http://www.iomvienna.at/sites/default/files/IML\\_1\\_EN.pdf](http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf) (accessed 09 October 2017).

<sup>2</sup> Marchand K, Roosen I, Reinold J & Siegel M 'Irregular Migration from and in the East and Horn of Africa' (May 2016) Maastricht Graduate School of Governance 17 available at <https://www.merit.unu.edu/publications/uploads/1496241719.pdf> (accessed 09 October 2017).

migrants in particular.<sup>3</sup> In the light of these facts, Ethiopia – both as a source of and destination for migration – has been selected as a case study through which to assess how laws and policies regulate independent adolescent migration.

This section relies on discussion in preceding chapters on the trends of out- and in-migration; the laws and policies applicable to independent adolescent migrants, including the right to move freely and the right to work, are examined, as is the extent to which these laws are implemented and the gaps that arise, if any. Furthermore, the chapter examines the integration of international and regional child norms through a consideration of the four fundamental principles of child rights; it also explores birth registration and how it affects children in the migration process.

## **5.2.1 Overview of the Legislative Framework Applicable to Independent Adolescent Migration**

Ethiopia is a federal republic in which legislative, executive and judicial powers are bestowed on federal and state government structures.<sup>4</sup> The 1995 Ethiopian Constitution is the supreme law of the land, which sets general standards that are to be respected by all citizens and sectors in the country.<sup>5</sup> In line with this federal structure, the Constitution lists area of laws, policies and measures that shall be designed by the federal government with general application throughout the country. The enactment and applications of the criminal law, the labour law and other laws that are deemed necessary for the establishment of one economic community are among the federal laws with countrywide enforceability.<sup>6</sup> In particular, the federal government handles all issues related to immigration, entry and exit from the country, refugees and asylum.<sup>7</sup> Moreover, fundamental rights and freedoms under the Constitution are meant to be respected and enforced by all sectors at federal and state levels.<sup>8</sup> The Ethiopian Constitution, subsidiary laws, and policies that are pertinent to independent adolescent migrants will be discussed hereafter.

### **5.2.1.1 The Ethiopian Constitution and the Status of International Instruments in the Domestic Legislative Framework**

The Ethiopian Constitution provides various rights that shall be respected for all children within the country, including the right not to be subjected to exploitative practices and not to perform

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<sup>3</sup> United Nations Treaty Collection (UNTC) Treaty Series Online Collection available at <https://treaties.un.org/pages/UNTSOnline.aspx?id=1> (accessed 28 June 2015) and OAU/AU Treaties, Conventions, Protocols & Charters available at <http://www.au.int/en/treaties> (accessed 9 October 2016); except for the Convention of Statelessness, Ethiopia has ratified all the major instruments with direct or indirect relevance to international migrants.

<sup>4</sup> Ethiopia is composed of nine regional states that have their own legislative, executive and judiciary organs. See the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) Federal *Negarit Gazeta* 1<sup>st</sup> Year No. 1, 21 August 1995 (hereafter FDRE Constitution) art 46, 47 & 50.

<sup>5</sup> FDRE Constitution art 9(1) & (2).

<sup>6</sup> FDRE Constitution art 55(3)(5)(6). Regional States have the mandate to enact penal laws on matters that are not specifically covered by the Federal penal legislation (see art 55(5) para 2).

<sup>7</sup> FDRE Constitution art 18; the federal government is also in charge of formulating national standards and policies on issues of general nature, and negotiates and ratifies international laws and agreements (see Constitution art 51(3) & (8)).

<sup>8</sup> FDRE Constitution art 13(1).

any work that harms well-being, education and health.<sup>9</sup> According to the Constitution, every intervention undertaken by sectors working with children shall be based on ‘the primary considerations of the best interests of the child’.<sup>10</sup> Moreover, the Constitution, under its third chapter, provides general human rights and freedoms of all human beings that are also applicable to children. The provisions with general application that are pertinent to independent adolescent migrants include the right of everyone to be protected from cruel, inhuman or degrading treatment or punishment, in particular the right to be protected from slavery or servitude and trafficking.<sup>11</sup>

The Constitution further stipulates that all international agreements ratified by Ethiopia are part of the domestic legal framework.<sup>12</sup> In accordance with article 13(2), the interpretation of the human rights and freedoms under the Constitution shall be made in conformity with international human rights norms and principles.<sup>13</sup> Generally, Ethiopia’s ratification of international and regional laws is commendable. In the context of child migration, the country has ratified almost all the core international laws and ILO conventions.<sup>14</sup>

In accordance with the aforementioned provisions of the Constitution, therefore, international instruments pertinent to child migration ratified by Ethiopia can be considered as part of the domestic law of the land. Moreover, the constitutional provisions on human rights and freedoms in general and the child-specific provisions in particular shall be interpreted on the basis of international laws ratified by the country. There is uncertainty whether these international and regional laws could be directly interpreted and enforced by courts of law. Setting aside the arguments on the dualist or monist approaches to the application of international laws in the domestic sphere, in order to ensure effective protection to independent adolescent migrants, taking international norms as the minimum standard and based on the local context, the domestic legal order should proclaim subsidiary laws.

In general, it can be asserted that the constitutional duties of parents and legal guardians towards their children, and the consideration to be given to the best interests of the child in direct interventions and actions by all sectors, may be interpreted as seeking to prevent adolescents from undertaking irregular movement in its all forms, and when it occurs, availing protection to

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<sup>9</sup> FDRE Constitution art 36(1)(a-e).

<sup>10</sup> FDRE Constitution art 36(2).

<sup>11</sup> FDRE Constitution art 18(1) & (2).

<sup>12</sup> FDRE Constitution art 9(1) & (4).

<sup>13</sup> Generally, there is lack of a clear provision and practice on direct interpretation and enforcement of international human rights laws by the judiciary. The absence of an official translation to working language of courts and publication on the *Negarit Gazette* in accordance with art 71(2) of the Constitution may be cited as major challenges against the uniform application of international human rights laws at the federal and regional state levels. In practice, however, there are decisions of the Supreme Court Cassation bench which referred to the CRC and the principle of the best interests of the child.

<sup>14</sup> United Nations Treaty Collection (UNTC) Status of Treaties and OAU/AU Treaties, Conventions, Protocols & Charters; Ethiopia have not ratified the Convention Relating to the Status of Stateless Persons (1960) and Convention on the Reduction of Statelessness (1975) and International Convention on the Protection of the Rights of All Migrant Workers and their Families (1999/2003).

independent adolescents migrants given their peculiarities. As the Constitution extends protection to all children found in the country, by interpretation such protection is extended to independent adolescent migrants from and to Ethiopia. However, it should be noted that the Constitution does not make explicit mention of the issues of child migrants in general and adolescents independent migrants in particular.

### **5.2.1.2 Subsidiary Legislation Applicable to Independent Adolescent Migration**

The Ethiopian Constitution contains general legal provisions and principles that should be adhered to in the formulation of laws, policies and other measures. Depending on the context, these basic principles and general legal provisions are transformed into specific legal provisions and entitlements by subsidiary legislation such as codes, proclamations, regulations and directives. The issue of children is not found in a single body of law; rather it is scattered in different subsidiary laws that contain different age categories and designations for the term ‘child’, such as minor, young offender, and young worker.<sup>15</sup> These differences relate to the purpose and objective of each law and the need to extend special protection to children depending on their circumstances.<sup>16</sup>

The laws applicable to independent adolescent migration may be broadly categorised into laws aimed at providing standards and procedure for those moving out of Ethiopia, laws aimed at the protection of those migrating into Ethiopia, and laws aimed at criminalising illegal movement.

The laws on standards and procedures for moving out of the country relate to immigration rules and procedures provided by the Ethiopian Immigration Proclamation No. 354/2002 and its regulation<sup>17</sup> and the Ethiopia’s Overseas Employment Proclamation No. 923/2016 for those moving for domestic work and other overseas employments arranged through domestic public employment agencies.<sup>18</sup> This Proclamation sets out requirements that have to be fulfilled to leave the country regularly. Any movement across borders without fulfilling the requirements of the immigration proclamation and overseas employment proclamation is considered illegal. Depending on the way it is carried out, it is subject to criminal charge in accordance with the

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<sup>15</sup> The Civil Code of Ethiopia Proclamation No. 165, 5<sup>th</sup> May 1960 Addis Ababa art 198 (hereafter the Civil Code of Ethiopia (1960)); the Revised Family Code Proclamation No. 213/2000 Addis Ababa 4<sup>th</sup> Day of July, (2000) (hereafter Revised Family Code (2000) art 215; the Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004 (hereafter the Criminal Code of Ethiopia) art 52, 157-168 & 176; new Ethiopian labour Proclamation No. 1156/2019 under art 89(2); Federal Civil Servants Proclamation (Proclamation No. 515/2007) Art14/(1)(a).

<sup>16</sup> Center for Human Rights, Addis Ababa University, Baseline Study For Comprehensive Child Law in Ethiopia, September 2013 77.

<sup>17</sup> Immigration Proclamation No. 354/2002 9<sup>th</sup> Year No. 75 Addis Ababa 3<sup>rd</sup> July 2003 (hereafter Immigration Proclamation No. 354/2002); Immigration Council of Ministers Regulation No. 114/2004, 11<sup>th</sup> Year No. 4, Addis Ababa 20<sup>th</sup> October (hereafter Immigration Regulation (2004).

<sup>18</sup> Recently the Proclamation to Provide for Employment Exchange Services No. 632/2009 (hereafter the Proclamation on Employment Exchange Services) – which replaced the Private Employment Agency Proclamation No. 104/1998 – has been repealed and replaced by Ethiopia’s Overseas Employment Proclamation No. 923/2016 (22<sup>nd</sup> Year No. 44 Addis Ababa 19<sup>th</sup> February 2016).

Criminal Law<sup>19</sup> or the Proclamation for the prevention and suppression of trafficking in person and smuggling of migrants (Proclamation No. 909/2015).<sup>20</sup>

In the context of inward movement to Ethiopia, the new Refugee Proclamation is applicable to independent adolescent migrants moving to Ethiopia seeking refuge from persecution and apartheid, foreign domination or conditions that seriously disrupt public order.<sup>21</sup>

### **5.2.2 Policies, Strategies and Plans Relevant to Independent Adolescent Migration**

The issue of children and migration covers the mandates of multiple sectors and requires their collaboration and effective coordination. Broadly, the policies and strategies of Ethiopia that are applicable to the issue of independent adolescent migration may be categorised into three main classes: cross-cutting policies, strategies, action plans that deal with human rights, social protection, combating crimes, economic growth and development;<sup>22</sup> those that focus on combating trafficking and other exploitative practices;<sup>23</sup> and policies and plans that deal with human rights, the issues of children, and refugees.

Policies and strategies focused on human rights, children and refugees include the Second National Human Rights Action Plan of Ethiopia (HRAP II) (2015-2020), the National Child Policy (2017) and the Ethiopian National Refugee Child Protection Strategy (2017-2019). The HRAP II, which is generally aimed at providing guidance and strategic direction to fostering the realisation of human rights as provided under the Constitution of the country, contains specific plans regarding children in the context of migration.<sup>24</sup> It has a special part for children and gives priority to fostering and strengthening the protection of unaccompanied and separated migrating children and refugee children. It envisions granting access to birth registration services for children born in the migration process.<sup>25</sup> The HRAP II aims at conducting awareness-raising programmes aimed at changing perceptions surrounding the illicit movement of children and labour exploitation.<sup>26</sup>

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<sup>19</sup> The Criminal Code of Ethiopia (2004) art 243, 596, 597, 598, 599 and 635.

<sup>20</sup> Proclamation to Provide for the Prevention and Suppression of Trafficking in Person and Smuggling of Migrants No. 909/2015 (21<sup>st</sup> Year No. 67 Addis Ababa 17 August 2015) (hereafter Proclamation No. 909/2015) is in the process of revision as some of the provisions are deemed to be inapplicable given the reality on the ground.

<sup>21</sup> Refugees Proclamation No. 1110/2019 25<sup>th</sup> Year No. 32 ADDIS ABABA 27<sup>th</sup> February 2017 (hereafter Refugee Proclamation No. 110/2019).

<sup>22</sup> FDRE 'Criminal Justice Policy' (2011/12); FDRE National Social Protection Policy Ministry of Labour and Social Affairs (*Amharic Version*) November 2014 (hereafter National Social Protection Policy) see s 5 and 6.5.

<sup>23</sup> FDRE Ministry of Labour and Social Affairs, the Action Plan to Eliminate the Worst Forms of Child Labour (2013) (2012/13-2015/16) (*Amharic Version*) (hereafter the Action Plan to Eliminate the Worst Forms of Child Labour); FDRE National Plan of Action to Combat trafficking in Persons (2015/6-2020/1) Ministry of Labour and Social Affairs (hereafter the Draft NPA to Combat TiP) February 2015.

<sup>24</sup> The Second National Human Rights Action Plan of Ethiopia (2015-2020) (*Amharic Version*) adopted by the Council of Ministries in September 2017 5.

<sup>25</sup> The Second National Human Rights Action Plan of Ethiopia 114.

<sup>26</sup> The Second National Human Rights Action Plan of Ethiopia 81.

The National Child Policy (2017), which was designed with the overall objective to enhance the protection extended to children in the country, has made considerable improvements upon its predecessor draft of 2011.<sup>27</sup> The Policy is anchored on the four cardinal principles of child rights as well as other rights set forth in the CRC and ACRWC.<sup>28</sup> In the context of child migration, the Policy focuses on the issue of Ethiopian child migrant returnees, migrant children from other countries who are found in camps and shelters, and trafficked children and labour exploitation of children under the umbrella title of ‘children found in difficult circumstances’.<sup>29</sup> The Policy’s aim regarding Ethiopian child migrant returnees is facilitating their reunification with parents and reintegration with the community. With regard to migrant children from other countries in camps or shelters, the priority is create conditions to respect their social and civil rights. In case of child trafficking and labour exploitation, the Policy aims to create a conducive condition to prevent and control the problem.

One of the most pertinent documents for the protection of children in the context of migration is the Ethiopian National Refugee Child Protection Strategy.<sup>30</sup> This strategy provides for a number of interventions to protect child migrants from the time of their identification throughout the care and accommodation process. It sets out the alternative care options to be extended to unaccompanied and separated children, with family-based care preferred over other forms such as institutional care.<sup>31</sup>

Although not a national policy or strategic document, the Standard Operating Procedures (SOPs) of the UNHCR and other organisations for Gambella, Addis Ababa and Shire, Ethiopia, may be cited as the most pertinent documents for independent adolescent migrants in Ethiopia. These documents in general are designed with the overall objective to ‘provide an agreed framework based on procedural standards, for the implementation of a coordinated and consistent set of actions aimed at protecting refugee girls and boys in [their respective locations]’.<sup>32</sup> The guiding principles and the procedures are similar, with some variants based on the specific needs of their geographic focus; for instance, as there are no camps in Addis Ababa, the identification,

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<sup>27</sup> Gessesse FM & Aberra MR ‘Assessment Report of the Draft Child Policy of Ethiopia 2011 (May 2014) Center for Human Rights 56-74.

<sup>28</sup> FDRE ‘The National Child Policy’ (April 2017) Addis Ababa s 2.3.

<sup>29</sup> FDRE ‘The National Child Policy’ (April 2017) s 3.6.

<sup>30</sup> The Ethiopian National Refugee Child Protection Strategy (2017-2019).

<sup>31</sup> The Ethiopian National Refugee Child Protection Strategy (2017-2019) 3; the Strategy acknowledges that in Northern Ethiopia the majority of children (65 per cent) have been placed in semi-institutional arrangements or community-based care due to limitations of finding family-care arrangements. Furthermore, the problem has been witnessed in urban refugee placements, particularly in Addis Ababa, owing to, among other things, increasing living costs in cities.

<sup>32</sup> Administration of Refugee and Returnee Affairs (ARRA), United Nations High Commissioner for Refugees (UNHCR), Jesuit Refugee Service (JRS), Development and Inter-Church Aid Commission (EOTC-DICAC), Norwegian Refugee Council (NRC), Opportunities Industrialization Center Ethiopia (OIC-E) ‘Standard Operating Procedure for Child Protection for Addis Ababa, Ethiopia’ 6 February 2018 (*hereafter SOP for Child Protection in Addis Ababa Ethiopia*) s 1.2; SOP for Child Protection Case Management in Gambella, *Ethiopia*). s 1.2.

registration and provision of care and services are tailored to out-of-camp and urban refugee arrangements.<sup>33</sup>

### 5.2.3 The Right of Adolescents to Move Freely Across Borders

The freedom of movement for adolescents is not seen separately from the general immigration rules or framework of child laws discussed in Chapter 3. In the context of Ethiopia, the Immigration Proclamation, which sets the requirements to travel out of Ethiopia refers to a child as minor who has not attained the majority age of 18 years as provided under the Revised Family Code.<sup>34</sup> Any foreign national may enter Ethiopia using air or land only through the legally recognised ports of entry upon fulfilling the requirements of the Immigration law.<sup>35</sup> Subject to the general entry requirements, such as valid travel document, health certificate, and entry visa as applicable,<sup>36</sup> irrespective of age a child may enter into Ethiopia either accompanied by parents or an adult, or independent of an adult if there is a person who would be responsible to receive him or her in Ethiopia.<sup>37</sup> The provision should be read in conjunction with article 5(1), which provides that entry may be denied, inter alia, if the individual ‘has no visible means of support or is likely to become a public burden’.

It is noteworthy that the Immigration Proclamation allows independent entry of a person under the age of 18 to Ethiopia.<sup>38</sup> Conventionally, independent movement is only applicable to older children, particularly adolescents. However, the detailed requirements for a minor to travel alone to Ethiopia – except for the requirement of having a person to receive and support him or her in the country – do not exist either in the Immigration Proclamation or its regulation adopted to advance its proper implementation. The requirements as to the types of travel documents are not provided clearly in the context of a minor who wishes to travel to Ethiopia. In the absence of a clear rule to this effect, the meaning and purpose of having the provision on independent entry of minors is meaningless.

Once a person enters the country, the next step is defining the status of the individual. Persons moving in an irregular manner usually plan for a prolonged stay in the country. Hence, there is a

<sup>33</sup> SOP for Child Protection in Addis Ababa Ethiopia s 4.1.1; 4.1.2; 4.2.1; 4.2.4.

<sup>34</sup> Immigration Proclamation No. 354/2002 art 2(5); the provisions of Civil Code of Ethiopia applicable to family and children are repealed – the current applicable law is the Revised Family Code; see the Revised Family Code (2000) art 215. In accordance with art 319(1) & (2) of the Revised Family Code (2000), arts 198-338 and 550-825 of the Civil Code (1960) are inapplicable.

<sup>35</sup> Immigration Regulation (2004) art 34.

<sup>36</sup> Immigration Proclamation No. 354/2002 art 3(1) & (2); Ethiopia’s announced visa on arrival for all Africans since 9 November 2018; see Alfa Shaban A R ‘Ethiopia’s visa-on-arrival for all Africans starts November 9’ Africanews available at <https://www.africanews.com/2018/10/26/ethiopia-s-visa-on-arrival-for-all-africans-starts-november-9/> (accessed 21 March 2019).

<sup>37</sup> Immigration Proclamation No. 354/2002 art 3(3)(a) & (b).

<sup>38</sup> Ethiopian Airlines ‘Unaccompanied Minor’ available at <https://www.ethiopianairlines.com/AA/EN/information/special/unaccompanied-minor> (accessed 29 October 2019); Ethiopian Airlines have been allowing persons between the ages of 12-17 years to travel unaccompanied if the immigration laws of the country of departure allow this. However, the Ethiopian immigration authorities still have the final say in allowing the entry of the person into the country.



need to fall under a legally recognised status. One such status is for those fleeing their habitual residence in fear of life-threatening situations. In this regard, the new Ethiopian Refugee Proclamation, in the same way as its predecessor, gives protection to those migrants entering the country to seek refuge from prosecution based on definitions found verbatim in the 1951 Refugee Convention and the 1969 African Refugee Convention.<sup>39</sup>

The Ethiopian refugee protection framework has made great strides forward from a refugee administration and status determination legal framework to a rights-based refugee administration and protection framework thanks to the recently adopted Refugees Proclamation No. 110/2019.<sup>40</sup> This current Refugees Proclamation of Ethiopia provides a number of rights and entitlements for refugees and asylum-seekers in the country, ranging from freedom of movement to the right to work and local integration.<sup>41</sup> It is reported that the Government of Ethiopia (GoE) wishes to progressively move away from an encampment policy and to close all refugee camps within 10 years.<sup>42</sup> In this regard, Refugee Proclamation No. 110/2019 is the foundation for out-of-camp arrangements in that it provides for the right to choose a place of residence in Ethiopia and for freedom of movement within the country.<sup>43</sup> Refugee Proclamation No. 110/2019 further recognises the fundamental dimension of the right to movement in the context of migrants, that is, non-refoulement with explicit prohibition of the refusal of entry to or expulsion from Ethiopia of persons that may fall under the refugee definition.<sup>44</sup> In particular, the prohibition of refusal of entry to the country is a progressive privilege, which is not even found under the 1951 Refugee Convention and African Refugee Convention. In view of this, it may be argued that entry of persons as well as migrants to Ethiopia is permissible.

In the context of child migrants, there are rights that are particularly important to children, such as the right to education and special protection of recognised child refugees or asylum-seekers from exploitation and abuse.<sup>45</sup> However, the issue of unaccompanied migrant children in general and independent adolescent migrants in particular has not been addressed entirely. Given the data regarding the number of unaccompanied migrants in African and Ethiopia as well as the anticipated rise in the number of independent migrants, the absence of provision for their specific rights and privileges and how these children should be accommodated is a serious gap in the new law. The only mention made of independent migrant children is in the context of asylum

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<sup>39</sup> Refugee Proclamation of Ethiopia art 4 & 20.

<sup>40</sup> In the former Refugee Proclamation No. 409/2004, the only provision written in rights language was article 21, which in general terms provided that a recognised refugee would be entitled to the rights and entitlements provided under the 1951 Refugee Convention and OAU Convention, without outlining specific rights and corresponding duties in a manner that ensured legal certainty, justiciability and enforceability.

<sup>41</sup> Refugee Proclamation No. 110/2019 Part Four, arts 22-42.

<sup>42</sup> Roadmap for the Implementation of the Ethiopian Government Pledges (2017) Out of Camp Pledge.

<sup>43</sup> Refugee Proclamation No. 110/2019 art 28; also see also Roadmap for the Implementation of the Ethiopian Government Pledges (2017) Out of Camp Pledge.

<sup>44</sup> Refugee Proclamation No. 110/2019 art 11(1) & art 5. The criteria for determining refugee status are taken verbatim from the refugee definitions under the 1951 Refugee Convention and OAU Convention on the Specific Refugee Problems of Africa (1969).

<sup>45</sup> Refugee Proclamation No. 110/2019 art 24 & 38(2).

application, where it is provided that unaccompanied migrant children can make an asylum application by themselves.<sup>46</sup>

Regarding the freedom to move out of Ethiopia, the legal ports of exit are the same as the ports of entry.<sup>47</sup> Furthermore, a person moving out of the country should possess a travel document, an entry visa and a health certificate if required by the destination country.<sup>48</sup> The right to move out of Ethiopia seems to be an unconditional right of persons unless prohibited by an order of the court.<sup>49</sup> Although the Proclamation does not prohibit independent adolescents from travelling abroad, the practical hurdle is getting a national identification card, which is one of the fundamental requirements to get a passport. A person should be at least 18 years of age to get an identification card.<sup>50</sup> In this reading, although not explicitly provided, an independent child under the age of 18 – no matter his or her age category, maturity and development – may not be allowed to leave Ethiopia regularly through the ports of exit.

The freedom of movement across borders for adolescents is subject to the general immigration rules as well as the legal framework of children without any special consideration. The laws applicable to children and/or adolescents in Ethiopia are found scattered in different thematic and context-based laws, such as family law, labour law, criminal law and other laws.<sup>51</sup> However, none of these laws explicitly deals with adolescents' freedom of movement. The rationale for the absence of explicit recognition or rejection of freedom of movement may relate to limitations in international and regional legal frameworks, which generally do not provide the possibility of granting agency to older children and are anchored in a protectionist approach that does not consider age-variation among children, as discussed in Chapter 3.

#### **5.2.4 Adolescents' Right to Work in the Context of Migration**

The issue of children's work in Ethiopia is a pressing issue from the perspective not only of adolescent migrants but also of nationals. In Ethiopia, much of the literature does not provide a clear conceptual and practical dichotomy between children's work and child labour. This lack of clarity extends to the legal and policy documents applicable to the subject. However, in the current discourse on children's work, there is a philosophical, ideological and conceptual shift from a blanket prohibition of children's work to protection from exploitative child labour, as discussed in Chapter 3.

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<sup>46</sup> Refugee Proclamation No. 110/2019 art 15(5).

<sup>47</sup> The Immigration Regulation art 34.

<sup>48</sup> Immigration Proclamation No. 354/2002 art 6.

<sup>49</sup> Immigration Proclamation No. 354/2002 art 7.

<sup>50</sup> A Proclamation on the Registration of Vital Events and National Identity Card 18<sup>th</sup> Year No. 58 Addis Ababa 22<sup>nd</sup> August, 2012 as amended by A Proclamation to Provide for the Amendment of the Vital Events Registration and National ID Proclamation No. 1049/2017 23<sup>rd</sup> Year No. 74 Addis Ababa, 7<sup>th</sup> August 2017 (*hereafter* Proclamation on the Registration of Vital Events and National Identity Card) art 56.

<sup>51</sup> Child-related provisions are found, for instance, in employment laws (labour and civil service), family law, criminal law, anti-trafficking and smuggling law, and overseas employment law.

Although different data and estimates exist, according to the 2016 United States Department of Labour data on Ethiopia, children between 5 to 14 years of age account for 22 per cent (5,545,319) of the general working population. Among the children between the ages of 7-14, 17 per cent combine work and school.<sup>52</sup> The most current estimates, those of 2019, are that 10,693,164 children between the ages of 5-14 (53 per cent of the total number of children in the age group) are economically active, contrary to the labour law of the country.<sup>53</sup>

In a study conducted to assess the gender variations in child labour in Ethiopia, it was found that among the 77,008 sample data (ages of 5-17 years with balanced gender composing), 75 per cent of the children between the ages of 15-17 are working. Similarly, 48.3 per cent of the children between the ages of 5-9 are working. Migrant children are also actively engaged in child work, at 67.5 per cent compared to 62.0 per cent of non-migrant children. A high percentage of child labour, of 68.7 per cent, was recorded for children that are orphans. Children in rural areas take the lion's share, at 70.7 per cent, whereas in urban areas 52.7 per cent of children are working.<sup>54</sup> Children are employed formally or informally in multiple sectors, including in the agricultural sector in commercial and cash crop plantations; in the industrial sector, including in gold mining, quarrying, construction, and traditional weaving and pottery; and in services such as domestic work or street work such as shoe shining, street-vending and mini-bus taxi assisting.<sup>55</sup> The type of activity also has a gender dimension, with girls mostly undertaking domestic and service-related work and with boys mostly engaged in industrial and agricultural activities requiring physical strength, such as construction work, taxi assistance, ploughing and harvesting.<sup>56</sup>

The Labour and the Civil Service Proclamations are the two major laws that regulate employment and labour issues in the country.<sup>57</sup> As a rule, the new Labour Proclamation No. 1156/2019 provides that persons below the age of 15 years are prohibited from undertaking any kind of work, including traineeships.<sup>58</sup> Persons between the ages of 15 and 18 years are considered 'young workers' and may be prohibited from working in certain sectors that are deemed to 'endanger their life and health'.<sup>59</sup> The labour law provides other criteria to determine

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<sup>52</sup> United State Department of Bureau of Labour, Bureau of International Labour Affairs '2016 Findings on the Worst Forms of Child Labor' 1 available at <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/ethiopia> (accessed 03 November 2017).

<sup>53</sup> CIA The World Factbook: Ethiopia.

<sup>54</sup> Gurmu E & Tizta T 'Gender Differences in Child Labour in Ethiopia' Population and Gender Research Unit, Institute of Development and Policy Research, Addis Ababa University 4.

<sup>55</sup> United State Department of Bureau of Labour, '2016 Findings on the Worst Forms of Child Labor'1; and Guarcello L & Rosati F 'Child Labour and Youth Employment Ethiopian Case Study' (March 2007) Social Protection: the World Bank SP Discussion (Paper No. 0704) 8-12 available at <http://web.worldbank.org/archive/website01048/WEB/IMAGES/0704.PDF> (accessed 03 November 2017).

<sup>56</sup> Woldehanna T, Tefera B & Jones N 'The invisibility of children's paid and unpaid work: implications for Ethiopia's national poverty reduction policy' (2008) *Childhood* 15(2) 189-90.

<sup>57</sup> There are other laws that regulate employment relations in sectors such as the judiciary, armed forces, federal police and security agencies, and diplomatic missions that are expressly and strictly reserved for Ethiopian nationals.

<sup>58</sup> Labour Proclamation No. 1156/2019 25th Year No. 89 Addis Ababa 5th September 2019 art 89(2) & 48(2). See also Labour Proclamation No. 377/2003, 10<sup>th</sup> Year No. 12 Addis Ababa 26<sup>th</sup> February 2004 art 89(2) & 48(2).

<sup>59</sup> Labour Proclamation No. 1156/2019 art89(3) see also Labour Proclamation No. 377/2003 art 89(3).

the activities that are appropriate for ‘young workers’, including the hours of work and night, holiday and overtime work.<sup>60</sup> Taking the list of sectors prohibited for ‘young workers’ under the Labour Proclamation as a guide, the Ministry of Labour and Social Affairs (MOLSA) issued a directive on the list of activities that are prohibited for ‘young workers’ in 2013. In regard to ‘young workers’, all the criteria remain unchanged in the new labour law, except for the minimum age, which was 14 years in the former Labour Proclamation No. 377/2003.

The change in the minimum age seems to be in line with ILO Convention 138; however, what triggered it is unclear, given that nothing much has improved in the economy or access to schooling. The previous minimum age of 14 years was in line with the ILO minimum-age requirement for countries with limited economies and access to school.<sup>61</sup> In the public sector, as a general rule the minimum age of employment is 18 years.<sup>62</sup> The Federal Civil Servant Proclamation No. 1064/2017 determined that in exceptional circumstances a young worker between the ages of 14 and 18 may be employed.<sup>63</sup> The Directive that shall provide for circumstances and conditions of work for young workers in the public sector has not yet been issued by the Ministry of Public Service and Human Resources Development. In general, the Federal Civil Servants Proclamation No. 1064/2017 explicitly provides that foreigners are not eligible to be civil servants.<sup>64</sup>

In the context of migrants, the current law on refugees contains provisions that may be applicable to asylum-seekers and refugees’ engagement in economic activities. In order to benefit from the law, the migrant should be recognised as a refugee or an asylum-seeker.<sup>65</sup> Accordingly, a recognised refugee may have the right to be engaged in economic activities that include wage-earning employment, the liberal professions,<sup>66</sup> and self-employment.<sup>67</sup> The general approach to employment under the Refugee Proclamation No. 1064/2017 is the same as that in the 1951

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<sup>60</sup> Labour Proclamation No. 1156/2019 art 90 & 91; see also Labour Proclamation No. 377/2003 art 90 & 91.

<sup>61</sup> ILO Convention No. 138 Minimum Age Convention art 2(3); 7(1) - (4); Handbook for Parliamentarians No. 3 (2002) 17

<sup>62</sup> Federal Civil Servants Proclamation No. 1064/2017, 24<sup>th</sup> year No. 12 Addis Ababa 15<sup>th</sup> December 2017 art 14 (1)(a).

<sup>63</sup> Federal Civil Servants Proclamation No. 1064/2017 art 14 (4).

<sup>64</sup> Federal Civil Servants Proclamation No. 1064/2017 art 15; the exception to this general rule of non-eligibility of foreigners are the rights and privileges reserved to foreign nationals of Ethiopian origin under Proclamation 270/2002 providing for Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in their Country of Origin.

<sup>65</sup> Refugee Proclamation No. 110/2019 art 5 & art 2(10); refugee means any person or group of persons who fulfils the criteria under the provisions of article 4 or article 20 of the Proclamation, whereas an asylum-seeker means any person or group of person who presents himself or themselves at the border or frontier or within the territory of Ethiopia seeking refugee status in accordance with provisions of this Proclamation.

<sup>66</sup> ‘Liberal professions’ refer to the provision of intellectual services after acquiring special training and acting on one’s own without being employed by a state or other employer; they may include the professions of a lawyer, medical doctor, dentist, veterinarian, engineer, architect, accountant, interpreter and so on. See Atle Grahl-Madsen *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37*, Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997, Article 19 available at <http://www.unhcr.org/3d4ab5fb9.pdf> (Accessed 11 April 2017)

<sup>67</sup> Refugee Proclamation No. 110/2019 art 26(1-3).

Refugee Convention, as the basic criterion is the ‘most favourable treatment accorded to foreigners in the same circumstance pursuant to relevant laws or as favourable as possible but not less than other foreign nationals’.<sup>68</sup> The Proclamation further provides for a special approach to refugees’ employment in joint rural and urban projects by the Ethiopian government and international partners, and provides that refugees shall enjoy equal treatment with nationals.<sup>69</sup>

These provisions are not clear if the rights and privileges accorded to recognised refugees and asylum-seekers in the context of the right to work are applicable to adolescent independent migrants, as there is no explicit prohibition or permission for this group of persons under article 25 of the Refugee Proclamation. In the absence of explicit recognition or prohibition of work for independent adolescent migrants, it is necessary to interpret the Refugee Proclamation together with other employment-related laws of Ethiopia. In this regard, the labour and civil servant proclamations discussed above do not generally allow foreigners to be employed – with the exception of the labour law, which allows for work permits for foreigners with exceptional skills and expertise that are not available domestically.<sup>70</sup> In such cases, adolescent migrants are technically excluded from any exceptions that would ensure employment in the formal sector.

In regard to self-employment, it may be argued that in the absence of an explicit prohibition, adolescent migrants may be allowed to work and earn a living in various sectors such as agriculture, industry, small and micro enterprise, handicrafts and commerce, and to establish small business organisations.<sup>71</sup> However, for business and commercial activities, the issuance of licenses is a bottleneck not clearly addressed by the Refugee Proclamation – and without a Regulation to this effect, the right to self-employment for migrants remains vague.<sup>72</sup> In joint projects of the government and international partners, where refugees ought to be accorded the same treatment as nationals, independent adolescent migrants could qualify for employment in situations where Ethiopian young workers are allowed to work.<sup>73</sup>

The Ethiopian National Refugee Child Protection Strategy classifies persons between the ages of 15 and 24 as youth. For this category of persons, capacity and skill generation schemes such as vocational training are provided as a means to secure better livelihoods and employment. This is a bold step towards differential treatment of different categories of children based on their

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<sup>68</sup> Atle Grahl-Madsen *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37* (1997). See also the Refugee Convention (1951) art 17(1), 18, 19.

<sup>69</sup> Refugee Proclamation No. 110/2019 art 26(4).

<sup>70</sup> Labour Proclamation No. 377/2003 art 174 (1).

<sup>71</sup> Refugee Proclamation No. 110/2019 art 26(2) and Labour Proclamation 89(2); Commercial Registration and Business Licensing Proclamation No. 686/2010 as amended by Commercial Registration and Business Licensing (Amendment) Proclamation No. 731/2012; foreigners in general are precluded from getting a permit for commercial and business activities unless it is large-scale investment, which is regulated by Investment Proclamation No. 796/2012 as amended by Investment (amendment) Proclamation No. 849/2014.

<sup>72</sup> Gessesse FM ‘Recommendations for Reform of Ethiopia’s Refugee Legislative and Policy Framework in Light of International and Regional Standards’ (April 2017) The World Bank Group 22.

<sup>73</sup> Refugee Proclamation No. 110/2019 art 26(4) and Labour Proclamation 89(2).

developmental needs and interests.<sup>74</sup> Under such Strategy for those between the ages 15-18 years – otherwise known as adolescents – with overlapping characteristics of children and youths, there should have been explicit reference and special protection that balances their protection needs with their adult-like capabilities and interests.

One of the reasons for independent out-migration of adolescents from Ethiopia is the pursuit of overseas employment. The Ethiopia's Overseas Employment Proclamation No. 923/2016 does not make any reference, permission or prohibition in regard to the recruitment for overseas employment of persons under the age of 18 years in general or adolescents in particular. However, the former Employment Exchange Services Proclamation No. 632/2009 explicitly prohibits the recruitment of persons under the age of 18 for overseas employment.<sup>75</sup> It is not clear why the revised law fails to make specific mention of whether it is permissible or not to recruit persons under the age of 18 for overseas employment. This should be read in conjunction with the labour standard of the country, which allows children above the age of 14 to undertake light work in the country. In the absence of an explicit prohibition of recruitment of persons under the age of 18 for overseas employment, it may be argued that unless there is exploitation that could amount to the trafficking of children,<sup>76</sup> adolescent children are not excluded from recruitment and undertaking overseas employment – unless the laws of the destination country provide otherwise.

### **5.2.5 Age Determination and Documentation of Adolescents in the Context of Migration**

In the context of migration, birth and other information registration and issuance of documentation are fundamental to delineate adult migrants from adolescents and child migrants and provide appropriate interventions as per the law. In Ethiopia, where more than 80 per cent of the population lives in rural areas,<sup>77</sup> childbirth takes place mostly at home or in non-medical settings, resulting in very poor birth records. According to the 2016 Demography and Health Survey (DHS), 12 per cent of children in urban areas and 2 per cent of rural children in Ethiopia are officially registered.<sup>78</sup> There is a very low level of birth registration of Ethiopian children,<sup>79</sup> let alone of migrant children.

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<sup>74</sup> The Ethiopian National Refugee Child Protection Strategy (2017-2019) 5-6.

<sup>75</sup> Provide for Employment Exchange Services Proclamation No. 632/2009 art 16(2)(a) with art 25(1)(a).

<sup>76</sup> Proclamation No. 909/2015 art 3(3); for an action to be considered child trafficking, the 'means', such as force, deception, false promise, and abuse of power, is not required. Hence, 'child trafficking' refers to 'the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation'.

<sup>77</sup> The World Bank, Rural Population (per cent of total Population): Ethiopia, available at <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS> (accessed 10 October 2017).

<sup>78</sup> FDRE 'Demography and Health Survey' (2016) 14 Central Statistics Agency, Addis Ababa, Ethiopia available at <https://dhsprogram.com/pubs/pdf/FR328/FR328.pdf> (accessed 29 October 2019); also see Brief Note on Birth Registration: Unlocking Opportunities for Better Protection and Care of Children in Ethiopia, Save the Children UK 1; UNICEF's Media Center Report available at [http://www.unicef.org/ethiopia/media\\_14083.html](http://www.unicef.org/ethiopia/media_14083.html) (accessed 01 July 2015).

<sup>79</sup> UNICEF, Global Database on Birth Registration; last update November 2017.

The Ethiopian legal framework until 27 October 2017 did not allow migrant children in Ethiopia to access formal birth registration and documentation.<sup>80</sup> Vital Events Registration Amendment Proclamation No. 1049/2017 allows recognised refugees and asylum-seekers to access birth registration and to have a formal birth certificate issued. The law even permits the retroactive issuance of birth certificates for refugees and asylum-seekers found in the country.<sup>81</sup> The law presupposes that the bio-data fed into the initial registration, and the word of the refugee or asylum-seeker, would be acceptable for the retrospective issuance of birth certificates.<sup>82</sup>

Although the service is not fully operational, a significant number of refugee birth registration centres have been established and are starting to provide the service. Nevertheless, refugee communities need to be made aware of the benefits of birth registration and documentation, as there is a misconception that acquiring such documentation amounts to changing citizenship – a prospect refugees tend to view with cynicism.<sup>83</sup> The establishment of a birth registration system for asylum-seekers and refugees in Ethiopia is the product of the nine pledges the government made at the 2016 Refugee Summit in New York.<sup>84</sup> After making the pledges, the GoE formulated the Roadmap for the Implementation of the Ethiopian Government Pledges to ensure their effective implementation.<sup>85</sup> Although the Roadmap was presumed to provide a comprehensive plan for the protection of asylum-seekers and refugees, the focus given to children is only in the context of education and birth registration and documentation. Apart from this, no specific rights and privileges are provided for child migrants in general and independent adolescent migrants in particular.<sup>86</sup>

Birth registration and the issuance of documentation in the context of child migration are of twofold significance. The first may relate to how age is determined to extend appropriate treatment and protection for children after they reach their destination. The second is for those persons who wish to move out of a country for various purposes, including to undertake economic activities. Determining age for both purposes would be less of a problem in a country with an obligatory and organised vital registration system that issues birth certificates and where the system is freely accessible to every migrant, irrespective of legal status, and recognised

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<sup>80</sup> Proclamation on the Registration Vital Events No. 760/2012) art 26(1); UNHCR 'In a historic first, Ethiopia begins civil registration for refugees' 27 October 2017 available at <http://www.unhcr.org/news/briefing/2017/10/59f2f4757/historic-first-ethiopia-begins-civil-registration-refugees.html> (accessed 17 November 2017).

<sup>81</sup> Vital Events Registration Amendment Proclamation No. 1049/2017 art 2(2) & 4.

<sup>82</sup> Woldetsadik T K, Gessesse FM and Edosa J C 'Legal Residency, Legal Identity and Civil Documentation Rights of Refugees in Ethiopia' (Unpublished, February 2018) Norwegian Refugee Council, Addis Ababa Ethiopia 61.

<sup>83</sup> Woldetsadik T K, Gessesse FM and Edosa J C (2018) 65.

<sup>84</sup> 71<sup>st</sup> UN Summit on Refugees and Migrants held in New York; New York Declaration for Refugees and Migrants, Seventy-first Session Agenda Items 13 and 117, Resolution adopted by the General Assembly on 19 Sept. 2016. These pledges were made a day after the adoption of the New York Declaration and the Comprehensive Refugee Response Framework (CRRF).

<sup>85</sup> Roadmap for the Implementation of the Ethiopian Government Pledges (2017).

<sup>86</sup> Roadmap for the Implementation of the Ethiopian Government Pledges (2017) Education Pledge and Documentation Pledge.

refugee or asylum-seeker. Under such an arrangement, the easiest way to determine the age of a migrant child is to consult pertinent documents.

In the context of adolescent migration, the forgery of birth certificates by officials is one of the reasons that the birth registration system does not meet its goals in providing correct age information. For instance, there were reports that local *kebele*, or district, officials accepted bribes to change the ages of children on district-issued identification cards, thereby enabling children to obtain passports – something which is not allowed for a person under the age of 18 without parental consent. Reports also suggest that the authority in charge of issuing passports did not question the validity of these identification documents or the ages of applicants.<sup>87</sup>

For independent adolescents moving into Ethiopia, they are, upon arrival, taken to a Reception Center and subsequent screening is conducted by the Administration of Refugee and Returnee Affairs (ARRA) and UNHCR. This screening also involves age determination. Usually children who are moving irregularly do not carry certified documents indicating their ages. Hence, the word of the adolescent as to his or her age may be the only available information. In this regard, the child protection focal person at the Reception Center will assess the age of the child and investigate further if there is suspicion about what the child claims compared her or his physical appearance. Where the child's age cannot be ascertained, a panel of child protection experts from ARRA, UNHCR and other child protection agencies will jointly determine his or her age.<sup>88</sup>

### **5.2.6 Contextual Interpretations of Fundamental Principles of Child Rights under Ethiopian Law**

The four fundamental principles are the essential part of child-rights interpretation and enforcement.<sup>89</sup> Although some scholars have argued otherwise,<sup>90</sup> the importance of such cardinal principles is recognised in international, regional and domestic legal and policy documents applicable to all children including adolescents. The actual place where these principles are interpreted and applied in practice to impact upon the lives of children in general and independent adolescent migrants in particular is under the domestic legal order. Hence, looking at how these principles are interpreted and contextualised – in this case in relation to independent adolescent migrants – is indicative of how the latter's rights and interests are understood and interpreted in Ethiopia. Such an approach is key to assessing the adequacy of the law, identifying any gaps in it, and drawing lessons (if any) both to enhance the effectiveness of the protection extended to independent adolescent migrants in African countries and to inspire regional interventions.

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<sup>87</sup> United States Department of State, Office to Monitor and Combat Trafficking in Person, Ethiopia Trafficking in Person Report 2014 available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226721.htm> (accessed 02 July 2015); see also Department of State, United States of America 'Trafficking in Persons Report' (June 2017) 168.

<sup>88</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 6.1.1 *Registration at the Reception Centre* (a-c).

<sup>89</sup> CRC Committee General Comment No. 5(2003) para 12.

<sup>90</sup> Hanson K & Lundy L (2017) 285-306.



### 5.2.6.1 The Principle of Non-Discrimination

The Ethiopian legislative framework does not provide an umbrella non-discrimination clause that has general application to all children in the country. To begin with, the Constitution has a child-rights provision that does not include a non-discrimination clause. The non-discrimination dimension of the Constitution may be determined by interpreting the general spirit of the Constitution and the sub-provisions of article 36 that have some relevance to non-discrimination. Article 36(3) provides that children have equal rights irrespective of birth in or out of wedlock. Such specific consideration can be attributed to the prior *de jure* discrimination of children based on their birth status.<sup>91</sup>

It cannot be conclusively asserted that all the rights set forth under the Constitution are applicable to all children in the country irrespective of citizenship. In article 10, which declares that the ‘human and democratic rights of citizens and peoples shall be respected’, the inclusion of the term ‘peoples’ may refer to – taking one of the approaches of the African human rights system – ‘all persons within a State’,<sup>92</sup> which includes all non-citizens, particularly Africans.<sup>93</sup> Furthermore, in this approach there is no qualification as to immigration status and type of entry and stay in the country. In this interpretation, the human rights set forth under the Constitution are also applicable to non-citizens, with the exception of certain rights specifically reserved to citizens, such as universal suffrage. Moreover, article 36 also makes the rights set forth applicable to ‘every child’ without providing nationality or citizenship as a requirement.

Another constitutional standard pertinent to the principle of non-discrimination is article 25, which provides for equality before the law and equal protection under, and treatment by, the law irrespective of nationality and birth, among other things. Hence, it can be argued that this provision is a core non-discrimination clause, one that entitles the full protection of the law to non-citizens including independent adolescent migrants, which covers adolescent asylum seekers and refugees.

The Labour Code prohibits discrimination against workers based on nationality and other grounds, a prohibition which is also applicable to young workers above the age of 14.<sup>94</sup> This provision is fundamental to adolescent migrants, who may be allowed to work in different sectors in the country in accordance with the refugee law.<sup>95</sup> The Vital Events Registration Amendment Proclamation that extends birth registration and issuance of certificates to asylum-

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<sup>91</sup> The Civil Code of Ethiopia (1960) art 713 & 721.

<sup>92</sup> Kiwanuka N ‘The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights’ *The American Journal of International Law*, Vol. 82, No. 1(Jan., 1988) 99.

<sup>93</sup> Dersso S A ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’ (2006) 6 *African Human Rights Law Journal* 362.

<sup>94</sup> Center for Human Rights, Addis Ababa University ‘Baseline Study for Comprehensive Child Law in Ethiopia (2013) 93; see also Revised Family Code art 7; Ethiopian Labour Proclamation 377/2003 14 (1)(f).

<sup>95</sup> Refugee Proclamation No. 110/2019 art 26(1-4).

seekers and refugees in the country may also be regarded as an important measure to eradicate discrimination based on immigration status.<sup>96</sup>

Apart from these laws, there are sectoral policies and strategic documents that are applicable to children and migration, albeit that there is no specific child-migration policy. The cumulative consideration of these child-focused and other sectoral policies shows how the principle of non-discrimination is applied. One of the major policy directions of the National Child Policy (2017) is the effective protection of children from all forms of discrimination.<sup>97</sup> The non-discrimination clause under the Policy provides lists of prohibited grounds of discrimination, nonetheless, devoid of national origin/citizenship status among its grounds the same as the CRC and ACRWC.<sup>98</sup> Another dimension of the Policy is the prohibition of discrimination in the provision of services in every type of charity organisation.<sup>99</sup> The Policy is vague on its scope of protection to children, that is, it is unclear whether it applies to all children who are found within the boundaries of Ethiopia irrespective of immigration and citizenship status. A closer reading of these provisions, however, suggests that the Policy extends protection to Ethiopian children and that the non-discrimination prohibition applies only to them.

The Ethiopian Alternative Childcare Guideline is among the key documents that incorporate core child-rights principles, including the principle of non-discrimination. The Guideline, which was designed to ‘improve the quality of care and service provided for OVCs in the country’, is anchored in international and regional child-rights norms and principles.<sup>100</sup> The principle of non-discrimination is among the principles of the Guideline.<sup>101</sup> The latter provides a non-exhaustive list of categories of OVCs in difficult circumstances, among them abandoned children, trafficked children, children exposed to the worst forms of child labour, separated children and refugee children. However, in this list of vulnerable children there is no explicit recognition of either unaccompanied children as defined under international standards, or independent migrant children as defined in this thesis. Given the severity of the problem of independent adolescent migration, explicit recognition and appropriate intervention are necessary.

Although aimed at providing effective and appropriate protection to refugee children, the Ethiopian National Refugee Children Strategy has neither any child-rights orientation, nor explicit or implicit reference to child-rights norms and principles, save for the best interests of the child.<sup>102</sup> The principle of the best interests of the child cannot be applied adequately unless it

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<sup>96</sup> General Assembly, Human Rights Council Working Group on the Universal Periodic Review *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Ethiopia* (A/HRC/WG.6/33/ETH/1) Thirty-third session 6–17 May 2019 para 12; Vital Events Registration Amendment Proclamation No. 1049/2017 art 2(2) & 4.

<sup>97</sup> FDRE ‘National Children’s Policy’ (2017) s 3.1(c).

<sup>98</sup> FDRE ‘National Children’s Policy’ (2017) s 2.3.3: Children should not be discriminated against by race, religion, language, colour of skin, sex, ethnicity, and type of disability or by any other grounds.

<sup>99</sup> FDRE ‘National Children’s Policy’ (2017) s 5.5(b) & 5.6(c).

<sup>100</sup> Ethiopian Alternative Child Care Guideline (2009) s 5.1 & 5.2.

<sup>101</sup> Ethiopian Alternative Child Care Guideline (2009) s 5.2.2.

<sup>102</sup> Ethiopian National Refugee Children Strategy (2017-2019); see Goal 3 & 6.

is understood and interpreted holistically with the other three cardinal principles, including the principle of non-discrimination.<sup>103</sup>

### **5.2.6.2 The Principle of the Best Interests of the Child**

As regards the four cardinal principles of child rights, the Ethiopian Constitution explicitly recognises the best interests of the child under article 36(2). In comparison to the CRC, it is framed as an obligatory rule that has to be ‘the’ primary consideration, as opposed to ‘a’ primary consideration. In this regard, the Ethiopian constitutional consideration of the principle of the best interests of the child takes the approach of the ACRWC. The framing also shows that such principle ought to prevail over anything and everything when dealing with the issue of children.

Since the Constitution is the supreme law of the land that guides all subsidiary laws, policies and measures, this means that in principle the interests of children should be prioritised over any other interests. Among other things, it should be taken as ‘the primary consideration’ when drafting any normative and procedural laws, designing any policy, taking budgetary decisions and administrative measures, and compiling data and information. As the issue of children is cross-cutting, basically every issue, every sector and every affair should be addressed by taking into account its impact on the interests and needs of children. In keeping with the framing of the principle under the Ethiopian Constitution, it has supremacy over competing interests such as sovereignty and security.

Furthermore, article 36 does not restrict its scope of protection only to Ethiopian children by providing a nationality caveat. Hence, it may be argued that all children in the country are entitled to the rights set forth under this provision. As the focus on this research is on independent adolescent migration, emphasis will be placed on how the best interests of the child are recognised and interpreted substantively, as well as procedural safeguards upheld during legal and administrative processes.

Except for the Revised Family Law, most of the laws do not contain an explicit provision on the best interests of the child and how this principle should direct decisions regarding the child. Furthermore, the fact that child-related provisions are dispersed in different laws, combined with the absence of a comprehensive law, limits clarity of knowledge of what constitutes ‘the best interests of the child’ in Ethiopia. It is unclear what ‘the best interests of the child’ are in various local contexts, let alone what the best interests of independent adolescent migrants are. Even those laws and policies that mention the principle or provide a relatively detailed account of it simply copy article 36(2) of the Constitution without offering further clarification or providing contextual meaning. Since the principle’s recognition under the Constitution 20 years ago, it has reverberated through one law and policy after another yet without there being any indication of what it actually means, how it should be understood, and how it should be applied without inconsistency in different contexts.

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<sup>103</sup> Hodgkin R & Newell P (2007) 93; UN CRC Committee General Comment No. 5 (2003) para 12.

It may be argued that since Ethiopia recognises the CRC as an integral part of its domestic law, guidance<sup>104</sup> on the interpretation and enforcement of the principle of the best interests of the child can be found in General Comment No. 14 and other pronouncements by the CRC Committee and kindred treaty bodies. Although this argument may be tenable, it has no practical applicability. Neither the judiciary nor any administrative body that works with children has the capacity to adequately understand the contents of these interpretative guidelines. Moreover, unless the interpretive guidelines are translated into local laws, policies and guidelines, lack of certainty and uniformity adversely affects the extension of adequate protection to children.

The subsidiary laws that refer to the best interests of the child are limited. The Revised Family Law mentions this principle in relation to custody upon dissolution of marriage<sup>105</sup> and adoption,<sup>106</sup> assignment and removal of guardian and tutor, and roles of guardians.<sup>107</sup> The Criminal Code of Ethiopia, which was revised in 2005, has substantive child-related articles but does not provide explicit reference to the best interests of the child.<sup>108</sup> Surprisingly, however, the Criminal Procedure Code, which was enacted in 1961 before the adoption of the CRC and ACRWC, provides explicit recognition of the principle as a procedural safeguard to ensure that decisions are delivered in the best interests of the child.<sup>109</sup> The employment laws of Ethiopia do not have a rights approach to children's work and do not have any explicit provision on the best interests of the child or other such cardinal principles.<sup>110</sup>

On the policy front, the National Child Policy aims at 'ensuring the best interests of the child in any measure, action and decision taken by all actors'.<sup>111</sup> The Policy makes the best interests of the child its core guiding principle in any intervention regarding children.<sup>112</sup> This principle is framed in the same terms as under the FDRE Constitution. The other new inclusion relates to the roles and responsibilities of different sectors – in particular, it states that the services provided by 'indigenous charities and societies'<sup>113</sup> must take into account children's best interests.<sup>114</sup> However, except for the aforementioned inclusion of the principle, the Policy – as a child-

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<sup>104</sup> FDRE Constitution art 9(4) & 13(2).

<sup>105</sup> The Revised Family Code art 113.

<sup>106</sup> The Revised Family Code art 188(2), 191(4) & 194 (2).

<sup>107</sup> The Revised Family Code art 224, 226(4), 249(3), 226(2).

<sup>108</sup> Criminal Code of Ethiopia (2005) Chapter V art 159-177.

<sup>109</sup> Criminal Procedure Code of Ethiopia, Proclamation No. 185 of 1961 art 177(2).

<sup>110</sup> Labour Proclamation No. 377/2003 under art 89-91 provides for the working conditions of young workers and makes no reference to child-rights principles. The Ethiopian Civil Service Proclamation, although it is applicable in the context of work, sets the minimum employment age in the public sector at 18 years, so it is not pertinent in this case.

<sup>111</sup> FDRE 'National Child Policy' (2017) s 2.2.2(F)

<sup>112</sup> FDRE 'National Child Policy' (2017) s 2.3.2.

<sup>113</sup> According to the Proclamation to Provide for the Registration and Regulation of Charities and Societies (Proclamation No. 621/2009) – a law amended in March 2019 – article 2(2) indicates that 'Ethiopian Charities' or 'Ethiopian Societies' shall mean those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they not more than ten per cent of their funds are received from foreign sources. The latter distinction was removed with the advent of the new law.

<sup>114</sup> FDRE 'National Child Policy' (2017) s 5.6(C).

centred, comprehensive guideline – does nothing beyond providing a verbatim copy of the constitutional provision. Furthermore, there are no detailed directions on how the Policy achieves its objectives of ensuring adherence to the best interests of the child in interventions. In general, there is no contextualised elaboration of the principle for different groups of children or for different sectors. As the Policy is relatively new, it may be considered a missed opportunity for developing a comprehensive guiding document for effective protection of children in Ethiopia.

The Ethiopian Alternative Childcare Guideline contains a significant reformulation of the principle of the best interests of the child. To begin with, it recognises the principle as one of its core guiding principles.<sup>115</sup> The Guideline also contains extracts from the CRC as well as provisions from the Constitution and Revised Family Code that are pertinent to alternative care and those that mention the best interests of the child.<sup>116</sup> One of the objectives of the Guideline is to ensure that services extended to OVCs support the best interests of the child.<sup>117</sup> Furthermore, the Guideline gives a contextualised explanation of the principle:

[The] best interests of the child signify the situation of taking into account the most beneficial advantages of the child in every action or decisions concerning him/her. The child's best interests could be determined by consulting the child, care givers, laws and appropriate governmental bodies.<sup>118</sup>

This contextualised explanation is a novel contribution to child-related Ethiopian legal, policy and strategic discourse. Such context-based understanding of child-rights principles is key to enabling context-based responses to children's issues. One reason for this difference in approach and the integration of child-rights norms and principles in the Guideline could be that the latter's development was influenced by non-governmental stakeholders.<sup>119</sup>

The Ethiopian National Refugee Children Strategy also outlines the principle of the best interests of the child. The strategy aims to ensure access to child-friendly procedures insofar it envisages a case-management system with a 'well-functional best interest procedure'.<sup>120</sup> Among its other strategic goals are to 'achieve durable solutions in the best interests of the child'.<sup>121</sup> These durable solutions deemed to be in the best interests of unaccompanied migrant children are 'family reunification, local integration and community-based care'.<sup>122</sup> However, the solutions seem to be predetermined options as opposed to ones determined on a case-by-case basis by giving due regard to the views expressed by the child. This is particularly important in relation to

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<sup>115</sup> The Ethiopian Alternative Child Care (2009) s 5.2.1.

<sup>116</sup> The Ethiopian Alternative Child Care (2009) s 5.3.4 & 5.3.8.

<sup>117</sup> The Ethiopian Alternative Child Care (2009) 4.2.1.

<sup>118</sup> The Ethiopian Alternative Child Care (2009) 6.5.

<sup>119</sup> The Ethiopian Alternative Child Care (2009) Background para 3. The preamble of the Guideline acknowledges that the formulation of the Guideline was made possible with the assistance of the Italian Development Cooperation. However, this does not mean that other legal and policy documents are not supported by non-governmental organisations. Usually their support is mainly financial.

<sup>120</sup> Ethiopian National Refugee Children Strategy (2017-2019) Goal 3.

<sup>121</sup> Ethiopian National Refugee Children Strategy (2017-2019) Goal 6.

<sup>122</sup> Ethiopian National Refugee Children Strategy (2017-2019) Annex 2 Goal 6.

independent adolescent migrants, who have distinct interest and needs during the migration process as well as in the future they envision for themselves.

Another instance of institutional efforts to give contextualised definition and procedural substance to the principle of the best interests of the child are the activities of the Federal First Instance Court, which has formulated practical guidance on this principle while entertaining child-related claims. The Court has first-hand jurisdiction over civil law cases relating to custody, adoption and maintenance, and over criminal law cases relating to children in the criminal justice system.<sup>123</sup> The measures taken by the Court can be described as a substantive clarification of how the principle of the best interests of the child should be understood and interpreted, in addition to which there is the court's structural setups and procedural guidance. The procedural aspect is more extensive than the substantive – the latter is entirely reliant on verbatim copies of what is provided under the Constitution, with little further input.

In regard to the procedural aspect, the measures taken to restructure court proceedings are based on article 36(2) of the Constitution and the provisions of Ethiopian Criminal Law Procedure Code.<sup>124</sup> This structural shift has been implemented both for criminal and civil cases involving children in any capacity, be it as a party to the case or witness.<sup>125</sup> The procedural safeguards include conducting proceedings using a child-friendly interview process and, when necessary, closed circuit television; incorporating a psychosocial expert portfolio in the court's formal structure to assist in child-related cases; and developing a guideline on how to assess and take decisions by mainstreaming the interests and well-being of the children. Furthermore, the court assigns weekends and the time after school so as to accommodate children and parents.<sup>126</sup> The duration of the trial plays a major part in the short- and long-term interest and well-being of the child, and in this regard, the Court has been seeking to speed up trials by using a case-flow management system that prioritises child cases.<sup>127</sup> The Federal First Instance Court also developed a guideline on the enforcement of decisions and a checklist to monitor whether the best interests of the child are reflected in maintenance matters, child delinquency confinement and rehabilitation, custody decisions, guardianship, and adoptions.<sup>128</sup>

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<sup>123</sup> Federal Courts' Proclamation (Proclamation No. 25/1996) 2nd Year No. 13 ADDIS ABABA - 15th February, 1996 (as amended by Proclamation no 138/1998 5<sup>th</sup> Year No. 15. Addis Ababa 1<sup>st</sup> December 1998 and Proclamation no. No. 321/2003 (9<sup>th</sup> Year No. 41 Addis Ababa 8<sup>th</sup> April 2003)) art 14 & 15.

<sup>124</sup> Criminal Procedure Code of Ethiopia art 176(2) & 177(2).

Regarding Civil Matters, the Ethiopian Civil Procedure Code (1966) does not provide any special procedural safeguards for cases involving children.

<sup>125</sup> Berhe D 'The Experience of the Federal First Instance Court in Creating Child friendly and accessible Court System' (Amharic Article) in Kokebe Wolde (ed) Judicial Application of 'the Best interests of the child Principle in Ethiopia: Law, Policy and Praxis (2016) Center for Human Rights Addis Ababa University 83-4.

<sup>126</sup> Berhe D (2016) 88-9; 91-2.

<sup>127</sup> Berhe D (2016) 94-5.

<sup>128</sup> Berhe D (2016) 93-4.

The legal bases of such interventions are in question, as lower courts do not have the mandate to formulate binding substantive and procedural rules.<sup>129</sup> Furthermore, the guidelines are not designed in line with the Revised Family Code, which provides for the Council of Ministers or other administrative organs to issue regulations, directives or rules of procedures to implement the Code's provisions.<sup>130</sup> However, the inspirational aspect of such exercise should not be understated. Cases that involve children in the First Instance Court have entailed a child-friendly process thanks to the contextualisation of the cardinal principles of the CRC, particularly the best interests of the child. Because such interventions would tend to be the product of the goodwill of persons in charge or the influence of NGOs, their sustainability needs to be ensured by way of a mechanism that establishes their legal basis. Even in this arrangement, independent adolescent migrants may not benefit from child-friendly court proceedings because the refugee status determination process (RSD) is undertaken through an administrative procedure to determine their nationality, which is known as *prima facie* RSD.<sup>131</sup>

There have been landmark decisions that employed the best interests of the child as a guiding principle. In the guardianship case *Mr Tsedale Demisse v Mr Kifle Demisse*, the court held that parents would only be allowed to be guardians as long as they work towards ensuring the best interests of the child as provided under the Constitution, the CRC and ACRWC.<sup>132</sup> This decision set the precedent that international laws to which Ethiopia is a party could be cited directly in a domestic court of law in Ethiopia. In the case *Mrs Francis Paster v Mr Dukeman Veno & Miss Barbot Letitiya*, a claim related to adoption, the court held that the principle that primarily should be used to decide adoption cases is the best interests of the child.<sup>133</sup> Similarly, in the case *Mr Degene Werkneh (guardian of Yohannes Tariku) v Mrs Tsehay Abera (guardian of Meron Tariku)*, a matter relating to administration of the inheritance property of a child, the tutor should be guided by the principle of the best interests of the child while administering his or her pecuniary interests.<sup>134</sup>

In view of these precedents, the best interests of the child principle as provided under the Constitution, the CRC and ACRWC has been the basis of numerous decisions related to

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<sup>129</sup> Federal Courts Proclamation Reamendment Proclamation No. 454/2005 (A Proclamation to Reamend the Federal Courts Proclamation No. 25/1996) 11th Year No. 42, Addis Ababa 14th June 2005 art 2(4). The Federal Supreme Court decisions have the power of precedent over other court decisions and they are considered as laws. However, other levels of federal courts, including the First Instance and High Courts, do not have similar mandate.

<sup>130</sup> The Revised Family Code (2000) art 323(1) & (2); see also Dessalegn Berhe (2016) 94.

<sup>131</sup> The main process in nationality screening is to see if the person claiming refugee status came from a list of countries recognised to have situations that force persons to flee their country. The list is developed by ARRA.

<sup>132</sup> *Tsedale Demisse v Kifle Demisse* Federal Supreme Court Cassation Bench Division 6 November 2007 File No. 23632.

<sup>133</sup> *Mrs Francis Paster v Mr Dukeman Veno and Miss Barbot Letitiya* Federal Supreme Court Cassation Bench Division 03 March 2010 File No. 44101.

<sup>134</sup> *Mr Degene Werkneh (guardian of Yohannes Tariku) v Mrs Tsehay Abera (guardian of Meron Tariku) Letitia* Federal Supreme Court Cassation Bench Division 10 January 2013 File No. 73863.

children.<sup>135</sup> However, none of them relate to migrant children in general or adolescent migrant interests in particular.

The House of Federation, which is entrusted with constitutional interpretation, has also embarked on interpreting aspects of children's rights. So far, it has interpreted two children's rights cases related to guardianship and proof of paternity after referral from the Constitutional Inquiry.<sup>136</sup> Although reference was made to constitutional provisions on children's rights, particularly so article 36(2), no major interpretative guidance has been given as to the components of article 36 in general or the principle the best interests of the child in particular. Even the *raison d'être* for the decision and clarification of the best interests of the child is limited than the existing decisions of the Supreme Court Cassation Bench. As an organ of constitutional law interpretation, the House of Federation should have gone beyond reiterating the constitutional provisions and elaborated on how the best interests of the child should be understood and applied in Ethiopia. Here, it acted as another court of appeal rather than a forum of constitutional interpretation where detailed guidance is rendered.

In its concluding observations, the CRC Committee acknowledged Ethiopia's achievements but expressed concern about the limitations of adequately employing such principle, 'family reunification, legal proceedings and alternative care' by reiterating General Comment No. 14 on how the best interest principle should be understood, interpreted and applied in practice.<sup>137</sup>

Other documents that are fundamental to children in the context of migration even if they are narrow in scope are the SOPs (Standard Operating Procedures) for Child Protection in Addis Ababa, Gambella and Shire Ethiopia refugee camps. These are working documents designed with the general objective to foster uniform and effective protection for migrant children in their respective areas.<sup>138</sup> The four core principles of children's rights are among the guiding principles of the SOPs,<sup>139</sup> which also incorporate protection and specific procedures for unaccompanied children.<sup>140</sup>

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<sup>135</sup> *Bete Zata Children's Home Association, Mr Micheal Alan Davolt and Miss Davice A.Hernandase v X* (in absentia) Federal Supreme Court Cassation Bench Division 30 April 2010 File No. 52691; Federal Supreme Court Cassation Bench Division Decision File No. 128207 22 May 2017.

<sup>136</sup> FDRE Constitution art 62(1); see also 62(2); In the case between Mr Birhanu Regasa Urji and Mrs Meskerem Mitiku (File No. 1419/07) 22 June 2016 (case related to guardianship case) & Emuhaye Gebre Eyesus (on behalf of her child Surafel Zewde) File No. 896105 03 July 2015 (case related to proof of paternity) in FDRE Constitutional Inquiry Secretariat 'Decisions of Constitutional Inquiry Decision' Vol 1 No. 1 September 2017 Journal of Constitutional Issues 137-142 (Amharic Journal).

<sup>137</sup> CRC Committee 'Concluding Observation on fourth and fifth periodic reports of Ethiopia' (3 June 2015) 3 CRC/C/ETH/CO/4-5 para 25 & 26 available at <https://www.refworld.org/docid/566fc30b4.html> (accessed 8 November 2019).

<sup>138</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 1.2; the document was initially approved on 28/05/2014 and scheduled for revision - 1<sup>st</sup> Revision on 28/07/2014, 2<sup>nd</sup> Revision on 28/10/2014, 3<sup>rd</sup> Revision on 16/12/2015, and 4<sup>th</sup> Revision on 4/12/2016; SOP for Child Protection in Addis Ababa Ethiopia s 1.2 will also be annually reviewed and updated; see s 1.9.

<sup>139</sup> SOP for Child Protection Case Management in Gambella Sec1.3; SOP for Child Protection in Addis Ababa Ethiopia s 1.3; the latter did not place survival and development among its core principles. Additional guiding



The SOPs of Gambella and Addis Ababa prioritise cases based on urgency and risk factors that are evaluated by means of a vulnerability assessment. The categorisation of the three priority areas is based on special attributes such as age and risk due to factors such as violence, abuse and exploitation, gender and disability. Two of the areas applicable to independent adolescent migrant are the high- and medium-priority areas.<sup>141</sup> The highest or most urgent priority is given, inter alia, to unaccompanied children under the age of 10 years who are without caregivers, unaccompanied girls without caregivers, and unaccompanied children working in exploitative labour and the worst forms of child labour. For high-priority cases, the response entails immediate action and referral, a temporary care arrangement, an initial assessment to ensure safety and basic needs within 48 hours, and weekly follow-up assessments.<sup>142</sup>

The procedure for handling child migrant cases in general includes identification, registration and referral. Identification is the first step for a child who is in need of protection due to unaccompanied movement and exposure to risk factors such as exploitation and abuse. As part of BIA, an identification interview is conducted to find out what the child has experienced, to listen to the child's wishes, and to ascertain his or her protection needs.<sup>143</sup> For a child at 'heightened risk', that is, in high-priority cases, if immediate action is required, for instance, to remove the child urgently from the custody of a caregiver, the case is referred to ARRA and the BIA is carried out within a week. In serious cases, the BID is also carried out immediately. In medium-priority cases that may not require immediate action, subsequent to the identification interview a comprehensive BIA is conducted within one month. Similarly, in low-priority cases, BIA is conducted within two months.<sup>144</sup>

In any event, to render a durable solution, BID must be conducted for all independent adolescent migrants within two years.<sup>145</sup> Although BID is conducted for children under the age of 18, in cases where the child comes of age before the process is completed, the BID process may continue for his or her benefit.<sup>146</sup> Finally, through referrals, a child is directed to a child protection agency for subsequent services.<sup>147</sup> The other process that is guided by the principle of

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principles include family unity, a child-centred response, confidentiality and informed consent, do no harm, and urgency.

<sup>140</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 1.2; SOP for Child Protection in Addis Ababa Ethiopia s 4.1.2.

<sup>141</sup> The response for low priority is based on the initial assessment. Priority and referral are the same as the two categories but these 'low-priority cases can be closed if a stable care arrangement for more than 1 year is observed; after 3 follow up visits if there are no other protection concerns, and no tracing needs, then cases can be closed'. See SOP for Child Protection Case Management in Gambella, Ethiopia s 3.

<sup>142</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 3; SOP for Child Protection in Addis Ababa Ethiopia s 3.

<sup>143</sup> SOP for Child Protection Case Management in Gambella, Ethiopia, Process 3 p 4. See also s 6.1.1.

<sup>144</sup> SOP for Child Protection Case Management in Gambella, Ethiopia, Process 3 p 4 See also s 6.1.1.

<sup>145</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 7.1.1(a)

<sup>146</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 7.1.1(d); see also SOP for Child Protection in Addis Ababa Ethiopia s 5.1.1 & 5.1.2.

<sup>147</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 5.

the best interests of the child is the determination of age when the precise age of the child cannot be ascertained.<sup>148</sup>

There is a special procedure for unaccompanied children, one that supposedly also takes into account the attributes of independent adolescent migrants. However, the procedure focuses only on children who may have been separated from their parents or caregivers in the migration process or during arrivals in camps. The measures essentially involve arranging alternative care options while conducting family tracing – in situations where families are identified, the aim is to ensure that the child is reunited with his or her family.<sup>149</sup> This procedure does not deal with the special interests of older children who migrate independently for economic reasons and who have not been separated during the migration but started the journey of their own volition – that is, persons whom this thesis refers to as independent adolescent migrants.

In the case of the SOP in Addis Ababa, there are special arrangements for adolescent migrants who prefer to live independently. Although this may be the product of the Out-of-Camp (OCP), or urban refugee, arrangements in Addis Ababa, it is a measure commendable for recognising the evolving capacities of older children and their interests in living independently. Refugee Outreach Volunteers (ROVs) monitor their well-being and provide support when necessary.<sup>150</sup> If an adolescent is identified as living independently, a BIA would be conducted to ascertain that the living arrangement is suitable for him or her. If the arrangement is found inappropriate, for instance because the child is under the age of 15, alternative care options are arranged. These children would be encouraged to undergo schooling and skills training and to voice their needs in platforms such as child parliaments.<sup>151</sup>

Looking at this process, the principle of the best interests of the child is deeply entrenched in the child migrant protection scheme. The general focus is on extending protection to the child when found at risk within the country, at the border or in a camp. However, the principle does not entail any authority to influence the decision as to the future of the child. In other words, it does not amount to a tool to influence what durable solution ought to be put in place on the basis of the child's wishes. It is merely a process undertaken to reach a predetermined decision, or restrictive solution, as to what the fate of the child should be. Even durable solution options in the context of independent adolescent migrants are quite vague because they do not clearly provide procedural and substantive guidance for the child protection expert except to indicate that the decision for a durable solution would be guided by BID.<sup>152</sup> Furthermore, the procedure for finding a durable solution for children is applicable in the main to children living with their

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<sup>148</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 6.1.1(b).

<sup>149</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 6.1.2; see also SOP for Child Protection in Addis Ababa Ethiopia s 4.1.2(a-c & e-h).

<sup>150</sup> SOP for Child Protection in Addis Ababa Ethiopia s 4.1.2(c).

<sup>151</sup> SOP for Child Protection in Addis Ababa Ethiopia s 4.2.1(d).

<sup>152</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 6.2.3(c).

parents or caregivers.<sup>153</sup> This makes giving primacy to the best interests of the child based on the wish of the child just of little practical value.

### **5.2.6.3 The Principle of the Right to Express Views and be Heard**

As already noted, the right to express views and be heard is one of the cardinal principles of child rights. It is particularly important to older children to effectively and realistically interpret their rights and interests as well as to realise what constitutes their best interest. In this regard, the Ethiopian Constitution does not outline the right of children to express their views and have their views heard and respected. It is a fundamental gap that the Constitution, on the one hand, explicitly recognises the principle of the best interests of the child but, on the other, makes no reference to the right to expression and being heard.

The right of the child to express views and be heard is provided for in a better detail in subsidiary laws. In particular, the Revised Family Code contains a number of provisions that require the child to be allowed to express his or her views and be heard. This Code follows two approaches in soliciting the views of the child: subject to the discretion of the court, that is, in adoption cases and assignment of guardian or tutor;<sup>154</sup> and as a mandatory process while dealing with the child's pecuniary interests.<sup>155</sup> In this regard, for a child to be an active participant in decisions with regard to property as well as other financial management issues, he or she shall attain a minimum of 14 years. Hence, under the Ethiopian legal framework, one of the basic criteria for weighting a child's views in case of pecuniary interests is that he or she be 14 years or older.

Another situation that may be interpreted as requiring the opinions of the child is before taking a decision on the custody of the child after the dissolution of marriage. Article 113(2) provides that before the court takes its decision, it has to consider the interests of the child, which in all probability means that the child's expressed views will be taken into account. A further process that involves expression of the views of the child obtains when children appear in criminal cases. In this regard, the Criminal Procedure Code of Ethiopia provides that the proceedings should be carried out in an informal manner and that the young person be allowed to express his or her views on the matter.<sup>156</sup>

There have been reports, though, that in practice the courts are not effective in soliciting the views of the child or giving them adequate weight, with stringent qualifications, such as those to do with age, being imposed contrary to the spirit of the CRC.<sup>157</sup> The Committee in its concluding observations stated that

traditions and cultural attitudes continue to limit the full implementation of the right of the child to be heard. [Furthermore,] except for the specific provision in the Revised Family Code concerning the adoption process, there is no information on other legal provisions guaranteeing the respect of the right of the child

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<sup>153</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 6.2.3.

<sup>154</sup> The Revised Family Code art 191(3), 194 (2)(3)(a); 249(2)(3).

<sup>155</sup> The Revised Family Code art 269, 291(1).

<sup>156</sup> Criminal Procedure Code of Ethiopia (1961) art 176(2) & (3); also see art 177(2).

<sup>157</sup> Gessesse F M & Aberra R M (2014) 24.

to be heard in schools, judicial and administrative proceedings, alternative care settings, and in the family, and there is no reference to programmes and initiatives for children in vulnerable situations.<sup>158</sup>

There are commendable initiatives, especially in judicial processes, to ensure that children express their views. The experience of the First Instance Court in particular shows that normative guidelines as well as procedural guarantees have been put in place to ensure that children express their views. Furthermore, in line with the law, adequate weight has been given to these views in reaching decisions and ascertaining the best interests of the child. The guideline for interviewing and ascertaining the interests and well-being of the child is prepared by psychosocial experts; in addition, the creation of a favorable environment and informal setting to encourage the free expression of views is a further positive effort to ensure that the right is adequately implemented and employed to realise the rights of the child.<sup>159</sup>

Although limited, landmark decisions that have precedence regarding soliciting the child's views have been handed down. In the case *Mrs Tiruayehu Bitew v Mr Gashaw Andarge*, for instance, the Supreme Court held that the opinion of the child in matters affecting his or her life should be taken seriously and influence the final decisions.<sup>160</sup> Given adolescents' capabilities and clarity of interests, along with the need to give due regard to such interests, there are very few Supreme Court decisions to this effect. This is all the more necessary in the case of independent adolescent migrants, who should be able to influence final decisions through their expressed views.

As it may be seen from the discussion above, *de jure* recognition of expression of views and acknowledgement of the right to be heard are mainly associated with family law cases in adoption, custody, and assignment or removal of a guardian and tutor. Although not binding, policy and strategic documents provide in detail how and when the expression of views of the child should be sought.

In this regard, the National Child Policy declares that one of its objectives is to 'pave ways for children to actively and meaningfully participate on matters that affect them in accordance to their age and level of maturity'.<sup>161</sup> It should be observed that the notion of child participation is twofold: the first aspect concerns expression of views on matters that affect their individual interests and lives, such as asylum decisions, refugee status determination, and durable solutions; the second relates to political participation that reflects the collective interests of children and to modalities for influencing general measures and interventions.<sup>162</sup> Although these distinctions are not made clearly, the Policy seems to stress the political participation of children.<sup>163</sup> Moreover,

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<sup>158</sup> CRC Committee 'Concluding Observation on fourth and fifth periodic reports of Ethiopia' para 31.

<sup>159</sup> Dessalegn Berhe (2016) 83-94.

<sup>160</sup> *Mrs Tiruayehu Bitew v Mr Gashaw Andarge* Federal Supreme Court Cassation Bench Division 20 February 2011 File No. 85831.

<sup>161</sup> National Child Policy (2017) s 2.2.2(E).

<sup>162</sup> National Child Policy (2017) s 3.7(D) & (E); Fasil Mulatu Gessesse and Rakeb Messele Abera (2014) 25-26.

<sup>163</sup> National Child Policy (2017) s 3.7(A-F).

the *raison d'être* for the formulation of the Policy states that the context of child participation is presented from the perspective of political participation with insignificant reference to the child's personal expression of views and the weight that ought to be given to influence decisions about his or her life.<sup>164</sup>

The Ethiopian Alternative Care Guideline, as discussed above, contains progressive rights-based provisions, including recognition and definition of the principle of child participation in both the individual as well as collective, political sense.<sup>165</sup> In regard to the former, it states that

children have the right to participate in and influence matters affecting their lives and their experiences and opinions about their own situation should form an integral part of the decision-making process of organizations on issues concerning the child.<sup>166</sup>

In regard to vocational training by child-care institutions, the Guideline provides that a child who has attained 14 years of age, completed the 8<sup>th</sup> grade and expressed his or her interest could be eligible for such training. Furthermore, eligible children should have a say in the decision as to the type of vocational training they undertake.<sup>167</sup> As mentioned, this Guideline offers a comprehensive, innovative and bold interpretation of the fundamental principles of child rights, including children's participation further to influencing the outcome of a decision.

The National Child Refugee Protection Strategy, which is especially pertinent to independent adolescent migrants, states that one of its major goals is fostering children's individual and collective participation in decisions affecting their lives. Collective child-participation forums such as child clubs, child parliaments, child-protection committees, child-led protection projects, and child-community engagement modalities are planned to be established or strengthened. Furthermore, a specific strategic direction is ensuring that children individually play an active role in their own case-management cycles.<sup>168</sup> However, ensuring the inseparable nature of best interest determination and child's expression of views and right to be heard is not among the general or specific strategic goals.

The scope of protection under the Child Refugee Protection Strategy is extended to persons between the ages of 15-24 years, who are referred to as youth.<sup>169</sup> However, adolescents between the ages of 15-18 years – that is, persons who occupy the overlap between the ages of children

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<sup>164</sup> National Child Policy (2017) s 1.1.4; the only reference to the child's expression of views to influence his or her life is made from the perspective of the girl child. See s 1.1.4 para 2.

<sup>165</sup> Ethiopian Alternative Child Care Guideline (2009) s 5.2.4 & 8.2. The Guideline sets, as one of its objectives, the promotion of a participatory approach to the care and support of OVCs; see s 4.2.4.

<sup>166</sup> Ethiopian Alternative Child Care Guideline (2009) s 8.2.

<sup>167</sup> Ethiopian Alternative Child Care Guideline (2009) s 8.1.5(b)(ii) & (viii).

<sup>168</sup> Ethiopian National Refugee Children Strategy (2017-2019) Goal 2 & Annex 2 Goal 2.

<sup>169</sup> Ethiopian National Refugee Children Strategy (2017-2019) 5. There is no universally agreed definition for the term 'youth'. Within the UN system, different agencies adopt different age categories. However, for consistent statistical purposes, the UN regards the age category between 15-24 as youth. See UN Definition of Youth available at <https://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf> (accessed 22 April 2019). The Ethiopian Youth Policy considers the age category between 15-29 as youth; see FDRE National Youth Policy (12 March 2004) Ministry of Youth, Sports and Culture, Addis Ababa s 1 para 5.

and youth – are without a distinct category of recognition and protection based on their interests and needs.

Looking at these gaps, even the most current Child Refugee Protection Strategy of Ethiopia does not adequately appreciate and value the child’s expression of views, a right which is invaluable to independent adolescent migrants. One of the fundamental reasons for this is that the approach of the strategy to child protection in any context including migration is based on paternalistic notions and the ‘infantilisation’ of all child issues, with little or no consideration being given to the interests and capabilities of older children such as adolescents.

The SOPs for Child Protection in Addis Ababa and Gambella provide that child participation would be one of their guiding principles subject to the evolving capabilities of the child.<sup>170</sup> The SOP for Gambella provides that, to get information for the BID, an interview with the child would be employed as one of the major modalities. Furthermore, the SOP goes beyond the interview to recognise different age-appropriate methods for younger children, such as drawing, games, storytelling and other creative activity.<sup>171</sup> However, despite the intrinsic connection between the principle of expression of views and being heard and the determination of the best interests of the child, the SoPs have not dealt with the steps that should be taken to solicit information from older children, including adolescents, or with how adolescents’ participation should guide and define durable solutions. In this regard, the CRC Committee specifically urges the GoE to give emphasis to ensuring refugee children’s right to express their views and have these views be given due regard.<sup>172</sup>

#### **5.2.6.4 The Principle of the Right to Life, Survival and Development**

The principle of the right to life, survival and development does not refer to a specific right but a combination of all rights enshrined under the international and regional child-rights norms. It is impractical to pick a given provision that holistically provides what constitute such principle. The realisation of such principle is the sum of adequately understanding and implementing all other pillars of child rights. It also entails positive obligations on the State and other actors to eradicate the poverty and resource-scarcity that thwart the provision of the social services that are necessary to fulfil the survival and developmental needs of the child.

While the rate of extreme poverty (population living below 1.25 USD per day) decreased from 55.3 per cent in 2000 to 33.5 per cent in 2011, a significant portion of the population still lives in extreme poverty.<sup>173</sup> Such improvement is also expected to improve children’s access to social

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<sup>170</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 1.3.

<sup>171</sup> SOP for Child Protection Case Management in Gambella, Ethiopia s 7.1.3.

<sup>172</sup> CRC Committee ‘Concluding Observation on fourth and fifth periodic reports of Ethiopia’ para 31(b).

<sup>173</sup> The World Bank Group in Ethiopia ‘Ethiopia Overview’ available at <http://www.worldbank.org/en/country/ethiopia/overview> (accessed 02 November 2017); see also The World Bank Group ‘Global Economic Prospects: A Fragile Recovery’ (June 2017) 19 & 107 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/26800/9781464810244.pdf> (accessed 02 November 2017); see also The World Bank Group ‘The Ethiopian Poverty Assessment 2014 (January 2015) Poverty Global

services that have a direct impact on their right to life, survival and development.<sup>174</sup> In the current scenario, different factors are making households prone to risks, resulting in increased vulnerability. Such household ‘shocks’ are associated with drought, price escalation, particularly on food items, and health problems that are deeply felt and affect poorer households.<sup>175</sup> Such household shocks are the main driving factors in children’s irregular independent migration.<sup>176</sup>

Normatively, the Constitution of Ethiopia explicitly recognises one dimension of this principle by stipulating every person’s inviolable right to life.<sup>177</sup> The Constitution does not provide such principle in similar terms as under international and regional child-rights norms. However, the general socio-economic rights under the Constitution and the duty of the State to ensure the provisions of social services can be interpreted to be relevant and bestow direct and indirect benefits for the realisation of this principle.<sup>178</sup> The social objectives under the Constitution that are aimed at ‘providing all Ethiopians access to public health and education, clean water, housing, food and social security’ are also normative guarantees for ensuring the right to life, survival and development to a child.<sup>179</sup> Moreover, the economic objectives that are written in social justice, equality and equity terms are bases for children from poor households get the benefits of economic development and provision of social services based on their best interest.<sup>180</sup>

In line with such economic and social objectives, two successive cross-sectoral Growth and Transformation Plans (GTP I and II) have been put in place since 2010 and have direct and indirect impact on children’s right to life, survival and development through improved provision of social services such as education, health care, and other means of livelihood.<sup>181</sup> If the goals of the current Plans were to be achieved even minimally, this would have the power to eradicate the poverty that is among the basic reasons for the violation of children’s right to life, survival and development. Moreover, it plays a pivotal role in mitigating the plight of independent adolescents’ irregular migration by addressing root causes such as poverty, lack of quality education, unemployment, and lack of other opportunities.

In the context of migration, the current refugee law has a number of provisions that are pertinent to ensuring the survival and development of asylum-seekers and refugees. These include fulfilling the provision of food, compulsory primary education, vocational skills training, and

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Practice Africa Region 1 available at <https://openknowledge.worldbank.org/handle/10986/21323> (accessed 02 November 2017).

<sup>174</sup> The World Bank Group ‘The Ethiopian Poverty Assessment 2014 (January 2015) 28-34.

<sup>175</sup> The World Bank Group ‘The Ethiopian Poverty Assessment 2014 (January 2015) 39-42.

<sup>176</sup> IOM (2016) 26-7.

<sup>177</sup> FDRE Constitution art 14.

<sup>178</sup> FDRE Constitution art 41.

<sup>179</sup> FDRE Constitution art 90.

<sup>180</sup> FDRE Constitution art 89.

<sup>181</sup> Woldetsadik T K & Alemayehu Y ‘Ethiopia’s Growth and Transformation Plan and the Rights of Children: A Review of the Growth and Transformation Plan and Aspects of Its Mid-Term Implementation from the Perspectives of the Rights of the Child (May 2014) Center for Human Rights Addis Ababa University 41.

health services.<sup>182</sup> In particular, education and skills training plays a pivotal role in ensuring the mental and psychological development of children.

This principle is also among the values of the Alternative Childcare Guideline. One peculiar attribute of the Guideline is that the term OVCs is defined based on the deprivation of the child's survival and development needs.<sup>183</sup> However, the list of children who are categorised as OVCs does not include child migrants in general and independent child migrants in particular.<sup>184</sup> The one exception to this is the inclusion of trafficked and refugee children, who may be considered as affected by migration but not necessarily representative of the characteristics, interests and needs of all children in the context of migration.<sup>185</sup> Over and above the items in the family reunification checklist, the community reintegration checklist assesses career development to facilitate employment for the 'youngster', in addition to assessing 'status of self-reliance'.<sup>186</sup> The Guideline does not define the term 'youngster', but from its usage in different places it may be taken to denote older children, particularly adolescents. Hence, in the context of reintegration, the Guideline acknowledges the necessity of encouraging adolescents to be independent in their affairs and able to provide for their livelihood, among other things, by being engaged in wage-earning activities.

The National Refugee Child Protection Strategy does not explicitly make reference to the principle of the child's right to life, survival and development. It may be argued that the strategic directions to protect children in exceptionally difficult circumstances are relevant to ensuring the right to life, survival and development of a refugee child.<sup>187</sup> In a specific context, the SOP for Child Protection Case Management in Gambella indicates that ensuring the child's survival and development is among its guiding principles.<sup>188</sup> The SOP does not go beyond mentioning this, though, and otherwise fails to clarify what taking the principle as a guiding light in a child protection programme means in the context of refugees and migrants children.

As child-focused strategic and operational documents, context based elaboration on the principle, what it constitutes for different developmental categories and ages of children and its significance as a guiding principle would provide a comprehensive and effective tool for the protection adolescents in the context of migration.

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<sup>182</sup> Refugee Proclamation No. 1110/2019 art 23-25.

<sup>183</sup> Ethiopian Alternative Child Care Guideline (2009) s 6.25.

<sup>184</sup> Ethiopian Alternative Child Care Guideline (2009) s 6.25(a-p).

<sup>185</sup> Ethiopian Alternative Child Care Guideline (2009) s 6.25(e).

<sup>186</sup> Ethiopian Alternative Child Care Guideline (2009) s 5.1.3(a) & s 5.2.3(a).

<sup>187</sup> Ethiopian National Refugee Children Strategy (2017-2019) Goal 1,2 & 5.

<sup>188</sup> Administration for Refugee and Returnee Affairs (ARRA), United Nations High Commissioner for Refugees (UNHCR), United Nations International Children's Emergency Fund (UNICEF), Save the Children, International Medical Corps, IFRC, Ethiopian Red Cross, Plan International, Danish Refugee Council; designed for Gambella Operation, 6 camps (Jewi, Tierkidi, Kule, Pugnido 1 and Pugnido 2, Okugo), border entry points (Approved 28 May 2014) (hereafter SOP for Child Protection Case Management in Gambella, Ethiopia) s 1.3.



As discussed above, in recent years the Ethiopian normative frameworks applicable to persons' movement have undergone a number of revisions. In particular, laws in regard to refugees, overseas employment, vital registration, and employment have been overhauled, yet with limited to no provisions applicable to children migrants in general and adolescent independent migrants in particular. The specific needs of independent adolescent migrants – given the alarming rise in their number and their active involvement in the migration process – are not reflected and addressed in the legislative revisions, especially so in relation to the right to move freely across borders and the right to work. In line with the current categorisation of adolescents as children, an examination of how the four cardinal principles are interpreted found that there is limited context-based authoritative legal interpretation. Most of the documents that make reference to children's rights principles are policies, guidelines and other procedural guiding documents that either have a limited scope of application or lack legal authority. In the context of migration, the limited applicability of the cardinal principles, especially the best interests of the child and child participation is only found in the SoPs of non-governmental organisations.

### **5.3 Assessment of the Normative Framework of South Africa**

South Africa is a significant player on the African continent due to, among other things, its relatively strong economy. Its economy, provision of better services and anticipated employment opportunities have made it the preferred destination for irregular migrants in southern Africa as well as the wider sub-Saharan region.<sup>189</sup> Out-irregular migration may not be a problem for the country, as there is evidence that immigration far outweighs emigration. South Africa can thus be regarded as Africa's classic example of a destination country for irregular migrants; it is on this basis that it has been selected for study – specifically, to investigate how independent adolescent migrants are treated under its normative frameworks and what the limitations are in this regard.

This section takes a similar approach as preceding chapters and looks at selected rights pertinent to independent adolescent migrants, that is, the right to move and right to work. Similarly, this section casts a critical eye on how the principles of non-discrimination, the best interests of the child, the child's expression of views and being heard, and the child's right to life, survival and development are interpreted and applied in the context of independent adolescent migrants. Moreover, the issue of birth registration and documentation and how age is determined for extending special treatment and protection to independent adolescent migrants will be looked at.

#### **5.3.1 Domestic Laws of South Africa Pertinent to Independent Adolescent Migration**

Post-1994 South Africa can be characterised as a country that has been progressively and successfully adhering to human rights by both putting in place normative standards as well as

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<sup>189</sup> Mathe M 'Experiences, challenges and coping strategies of Unaccompanied Migrant Children in South Africa: Guidelines for Social Work' (unpublished PhD thesis, University of South Africa, May 2018) 194; Magaya I 'The International Law on Unaccompanied Foreign Migrants Children: An Evaluation of Whether it Reflects the Modern Realities of Economic Migrancy in Southern Africa' (unpublished LLM thesis, University of Pretoria, 2014) 30-1.

creating institutions for the effective implementation of these norms. South Africa's horrendous past of extreme racial discrimination and apartheid against black South Africans is one of the fundamental reasons why post-1994 South Africa in principle became the rainbow nation where there would be no discrimination of any form.<sup>190</sup> This philosophical and ethical value is one of the founding principles of the South African Constitution and its Bill of Rights.<sup>191</sup>

South Africa has ratified core international and regional human rights standards. These commitments are pertinent to the protection of independent adolescent migrants and include the CRC and its two substantive optional protocols; the 1951 Refugee Convention; protocols against trafficking and smuggling; CEDAW and its Optional Protocol; ILO conventions, particularly ILO 135 and 182 related to child labour; and the African Charter, ACRWC and African Refugee Convention.<sup>192</sup> These laws are considered integral to the domestic law of the land by virtue of the Constitution. They not only set minimum standards for domestic laws and policies, but are also interpreted directly by the country's highest judicial organ and the guardian of the Constitution and bill of rights – the South African Constitutional Court.<sup>193</sup>

The legislative and political structure of South Africa is based on the Constitution. Accordingly, the national government is divided between three independent but balanced branches – the executive, legislature and judiciary.<sup>194</sup> The judiciary represents the different levels of courts, which have the power to interpret laws as well as set precedent that has the power of law. The different levels of court are the Lower Court, High Court, Supreme Court of Appeal and Constitutional Court – the latter two being the highest courts of the nation. The Constitutional Court is the supreme judicial body, with the final say on constitutional and other legal matters and ensuring that proposed laws by Parliament do not conflict with the Constitution.<sup>195</sup>

The supreme law of the land that has overarching applicability on human rights, child rights, migrant rights and independent child migrants' issues is the Constitution.<sup>196</sup> Under the South African legislative framework, a number of laws are pertinent to independent child migration, among them the Children's Act, Refugee Act, Immigration Act, Citizenship Act, Births and

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<sup>190</sup> Constitution of the Republic of South Africa (1996), as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly Preamble; Currie L & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 153.

<sup>191</sup> Constitution of the Republic of South Africa (1996) art 1(a) & (b).

<sup>192</sup> United Nations Treaty Collection, Status of Treaties, available at [https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=\\_en](https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en); International Labour organization (ILO) 'Ratifications for South Africa' available at [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888) (Accessed 20 April 2019); African Union, OAU/AU Treaties, Conventions, Protocols & Charters, available at <https://au.int/en/treaties> (accessed 20 April 2019).

<sup>193</sup> Constitution of the Republic of South Africa (1996) art 39(1); Currie L & de Waal J (2005) 160; Sloth-Nielsen J 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 139-40.

<sup>194</sup> Constitution of the Republic of South Africa (1996) Chap 5 s 83-102.

<sup>195</sup> Constitution of the Republic of South Africa (1996) Chap 8 Sec 165-180.

<sup>196</sup> Constitution of the Republic of South Africa (1996) s 2.

Deaths Registration Act, Basic Conditions of Employment Act, Social Assistance Act, Schools Act, and Promotion of Administrative Justice Act.<sup>197</sup>

As stated in the 2017 White Paper Report, 90 per cent of refugee status claims do not qualify for refugee status and asylum grants as per the definition under the Refugee Act of 1998.<sup>198</sup> In the context of unaccompanied child migration, the definition under General Comment No. 6 is problematic in Africa as children are taken care of not only by their biological parents or legal guardians but by extended family members – even neighbours may have similar roles to that of a caregiver. Such a definitional conundrum is also apparent in the migration framework, the procedures of which follow the approach of the ‘nuclear family for documentation purposes’.<sup>199</sup> Similarly, these definitional issues extend to independent adolescent migrants, as there is neither *de jure* nor *de facto* recognition of them in the migration discourse.

### 5.3.2 Children’s Right to Move Freely Across Borders

Conceptually, the freedom of movement is an incomplete right that imposes a duty only on the country of origin, that is, to issue travel documents, to allow departure of the country upon fulfilling legal requirements, and to permit return; as discussed in Chapter 3, there is no corresponding duty on the country of destination to allow entry of a person. The right of a destination country to choose to accept or refuse a person at its ports of entry is closely tied to the notion of sovereignty.

As in any sovereign country, a non-national may enter the Republic of South Africa through legally recognised ports of entry by possessing a valid passport and legal permit.<sup>200</sup> The South African Immigration Act 13 of 2002 does not provide modalities for adolescents under the age of 18 years to travel alone to South Africa. However, using legal channels, an adolescent accompanied by an adult may travel to South Africa for different purposes including tourism, study, medical treatment and visiting relatives by fulfilling the requirements under the respective categories of permits, including having parents or legal guardians during travel or within the country to provide care.<sup>201</sup>

Surprisingly, the South African Immigration Regulation of 2014, by interpretation, provides that any ‘unaccompanied minor’ may regularly travel into South Africa by fulfilling certain requirements. According to the Immigration Regulation, an ‘unaccompanied minor’ is defined as

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<sup>197</sup> Palmary I ‘For better implementation of migrant children’s rights in South Africa’ (2009) UNICEF 11-13.

<sup>198</sup> Department of Home Affairs ‘White paper on International Migration for South Africa’ (July 2017) 29-30; Tuepker A ‘On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice’ (2002) 15 *Journal of Refugee Studies* 413.

<sup>199</sup> The IOM ‘Study on Unaccompanied Migrant children in Mozambique South Africa, Zambia and Zimbabwe’ (2017) Dullah Omar Institute for Constitutional Law, Governance and Human Rights University of Western Cape 33.

<sup>200</sup> The Republic of South African, Immigration Act 13 of 2002 (Gazette No. 23478, Notice No. 766, dated 31 May 2002) (Immigration Amendment Act 3/2007, Immigration Amendment Act 13/2011) (hereafter Immigration Act 2002) s 9(1-4).

<sup>201</sup> Immigration Act 13 of 2002 s 9-22.

‘a child under 18 years who travels alone’. An unaccompanied minor who is travelling into South Africa should fulfill certain criteria, such as producing a sworn declaration letter from one or both parents or legal guardians allowing the child to travel into South Africa, or a copy of court order providing for full parental responsibility when such sworn declaration is made by one parent. The other required documents are a letter providing the address and contact information of the person residing in South Africa who is to receive the child, a copy of the identity document or passport and visa or residence permit, as the case may be, of the receiver, and the contact details of the parents or legal guardians of the unaccompanied child.<sup>202</sup>

Although an independent minor may move into South Africa, the purpose of the travel and the kind of visa required and restrictions thereof are not explicitly provided. Hence, by interpretation, the purpose may be discerned from other provisions that deal with purpose and visa requirements.<sup>203</sup> These requirements should also be seen from the country of origin’s perspective – for instance, in Ethiopia, to acquire an identity card and passport, one of the fundamental requirements is to be above the age of 18 years.<sup>204</sup> Hence, although the independent entry of minors into South Africa is indicated under the immigration rules, in practice children acting independently may not qualify to acquire passports. Thus, unless they move irregularly, persons below the age of 18 would not be allowed to leave their country of origin for lack of passport and other identity documents, among other reasons.

In accordance with the Immigration Regulation, being identified and categorised as an unaccompanied minor may influence ‘the admission of a child to the Republic as well as prospects to legalize immigration status’.<sup>205</sup> The definition under the Immigration Regulation, however, does not explicitly assure the continuation of stay and protection beyond admission as in the CRC.<sup>206</sup> In accordance with section 34 of the Immigration Act, an illegal migrant could be arrested and deported in accordance with the law. The Immigration Act and its Regulation, nonetheless, provides that unaccompanied minor should not be detained in any manner.<sup>207</sup>

The Refugee Act of 1998, as it stands, does not provide any explicit child-specific modality by which an independent adolescent migrant may qualify for refugee status or seek asylum protection and receive appropriate care.<sup>208</sup> Although inadequate, the Refugee Act of 1998 explicitly provides that unaccompanied children who qualify for refugee status as per the

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<sup>202</sup> The Republic of South African, Immigration Act 13 of 2002 (Gazette No. 23478, Notice No. 766, dated 31 (Immigration Amendment Act 3/2007, Immigration Amendment Act 13/2011) Department of Home Affairs, Immigration Regulation 22 May 2014 (hereafter Immigration Regulation 2014) s 6(12)(d).

<sup>203</sup> Immigration Regulation 2014 s 10-23.

<sup>204</sup> Proclamation on the Registration Vital Events No. 760/2012) art 56(1).

<sup>205</sup> Ackermann M ‘Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care’ (September 2017) The Scalabrini Centre in Cape Town (SCCT) 8; available at <http://scalabrini.org.za/wp-content/uploads/2017/10/Unaccompanied-children-revised-5.0-Printversion-.pdf> (accessed 26 February 2019).

<sup>206</sup> Ackermann M (September 2017) 8.

<sup>207</sup> Immigration Act 2002 and Immigration Regulation 2014 Annexure B 1(d).

<sup>208</sup> Ackermann M (September 2017) 20.

ordinary meaning, that is, fleeing due to ‘fear of persecution’ and being in need of protection, ought to be referred to the children’s court for an assisted asylum process.<sup>209</sup> Furthermore, the Refugee Act recognises the principle non-refoulement by proclaiming that

no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such measures would [...] lead to persecution or impends his or her life, safety and freedom the result of [...] events seriously disturbing or disrupting public order in either part or the whole of that country.<sup>210</sup>

This provision of the Refugee Act is more progressive than the 1951 Refugee Convention, and is based on the African Refugee Convention which prohibits African states from rejecting individuals at frontiers and urges to States to deal positively with asylum claims<sup>211</sup> – a point which is fundamental to independent adolescent migrants’ entry and stay in South Africa.

Section 21(4) of the Refugee Act of 1998 provides that an asylum-seeker will not be criminally liable for his or her illegal entry to the country, which is also in line with international standards.<sup>212</sup> The practice proves otherwise, though, with reports suggesting that South Africa, contrary to its laws, has been pushing back migrants from entering and failing to provide effective protection from abuse, exploitation, xenophobic attacks, and unlawful detention.<sup>213</sup>

The Refugee Act of 1998 is criticised for failing to define what ‘unaccompanied minor’ denotes and whether its scope of protection is extended when children enter the Republic and guarantees continuation of stay. Furthermore, the Refugee Act is based on the assumption that very young children and adolescents alike – irrespective of their distinctive character and circumstance – are in need of care and protection as provided under the Children’s Act. Furthermore, it presupposes the existence of institutions in charge of identification and referral of independent migrant children to the children’s court.<sup>214</sup>

The draft Refugee Amendment Act of 2008, however, indicates a paradigm-shift in the treatment of independent migrant children. The draft amendment provides explicit recognition to the treatment of unaccompanied children and declares that

any unaccompanied child who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care contemplated in the Children's Act, 2005 (Act No. 38 of 2005) shall be

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<sup>209</sup> The Republic of South Africa, The Refugees Act, 1998 (Act No. 130 of 1998) Government Gazette 2 December 1998 (hereafter the Refugee Act, 1998) s 32.

<sup>210</sup> The Refugees Act No. 130 of 1998 s 2.

<sup>211</sup> OAU Refugee Convention art II (1) & (2).

<sup>212</sup> Smuggling Protocol art 5/6.

<sup>213</sup> Fritsch C, Johnson E & Juska A ‘The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action’ (2010) 38 *Denver Journal of International Law & Policy* 628-629; Bloch A ‘The Right to Rights? Undocumented Migrants from Zimbabwe Living in South Africa’ (2010) 44 *Sociology* 235; Mathe M (2018) 133 & 138.

<sup>214</sup> Ackermann M (2017) 20.

issued with an asylum seeker permit [and] be brought before the Children's Court in the district in which he or she was found.<sup>215</sup>

In accordance with this amendment provision, it is obligatory that if an unaccompanied migrant child is found, then an asylum permit as per section 22 of the Refugee Act shall be issued. From a reading of the provision, the basic criterion is demonstrating 'clearly' that the child is an unaccompanied migrant. The most basic way to ascertain his or her situation, among other things, is to solicit the opinion of the child.

The other dimension of protection extended to the unaccompanied migrant by virtue of this amendment is the right to be brought before the children's court to determine care options for the child as well as to be assisted for asylum application and decision in accordance with the Children's Act of 2005. It is reported that the President has signed the Refugee Amendment Act but that it is not yet effective.<sup>216</sup> Although it has not been tested in the court of law, in as much as it forms part of care and durable solutions, it should be included that children have both the option to move freely within South Africa and the option to live independently.

### **5.3.3 Adolescents' Right to Work in the Context of Migration**

In South Africa, one of the strongest economies in Africa, unemployment is among the most pressing of problems, with a rate of 27.2 per cent, according to statistics in mid-2018.<sup>217</sup> The pattern of job creation and employment in multiple sectors demonstrates a general decrease compared with the previous year, 2017.<sup>218</sup> Youth unemployment is estimated at 38.6 per cent and accounts for 58 per cent of unemployed people in the country.<sup>219</sup> As indicated in the preceding sub-section, many independent adolescent migrants move to South Africa in search of job opportunities. However, due to restrictive laws, the ambitions of undocumented migrants including independent adolescent migrants, are often not realised.<sup>220</sup> Fierce job competition due to the high unemployment rate is a further, extremely salient, challenge they face in securing employment. Such *de jure* and *de facto* restrictions in getting employment force them to accept employment in clandestine arrangements where they face serious rights violations such as lower wages, unsafe work conditions and exploitative practices.<sup>221</sup>

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<sup>215</sup> Republic of South Africa, Refugee Amendment Act, 2008 Act No. 33, (2008) Amendment 14 (to be inserted under s 21) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150609act2008.pdf> (accessed 28 February 2019).

<sup>216</sup> Ackermann M (2017) 19-20.

<sup>217</sup> Government of South Africa 'Year Book of South Africa (2017/18): Economy' 2 available at <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/6-Economy2018.pdf> (accessed 6 May 2019).

<sup>218</sup> Government of South Africa 'Year Book of South Africa (2017/18): Economy' 3.

<sup>219</sup> Government of South Africa 'Year Book of South Africa (2017/18): Social Development 5 available at <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/20-SocialDevelopment2018.pdf> (accessed 6 May 2019).

<sup>220</sup> Fritsch C, Johnson E & Juska A (2010) 629; Mathe M (2018) 5.

<sup>221</sup> Fritsch C, Johnson E & Juska A (2010) 629-31.

South Africa has ratified international and regional laws and labour standards that are applicable to children's work.<sup>222</sup> The South African Constitution does not issue a blunt prohibition of children's work; rather, it affords protection from exploitative work that is 'inappropriate for the child's age, and place child's well-being, education, physical or mental health or spiritual, moral, or social development at risk'.<sup>223</sup> This provision related to the rights of children in the context of work precedes the ratification of ILO labor standards pertinent to the minimum age.<sup>224</sup>

The general minimum age of employment, according to the Basic Conditions of Employment Act, is 15 years.<sup>225</sup> Adolescents between 15-18 years of age are protected by law from undertaking harmful and hazardous employment. In general, persons under the age of 18 may not undertake the supply or sale of alcoholic beverages or be employed in police services.<sup>226</sup> The Children's Act, in accord with the Constitution, prohibits only illicit and exploitative labour activities, slavery and the worst forms of child labour – but not children's work per se.<sup>227</sup>

For instance, refugees are entitled to seek employment in multiple sectors except in security industries.<sup>228</sup> In *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism*, a claim involving the right of refugees and asylum-seekers to employment (self-employment) and to be treated equally as citizens in this regard, the contesting parties argued that refugees and asylum-seekers do not have the same right as South African citizens and that the right to seek employment is reserved to citizens only. The decision of the High Court that was being appealed against was based on section 22 of the Constitution, which had been interpreted to reserve to citizens alone the right to right to freely choose their trade, occupation and profession.<sup>229</sup> The Supreme Court turned down the decision,

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<sup>222</sup> South Africa ratified C138, the Minimum Wage Convention; C182, the Worst Forms of Child Labour Convention and the CRC and ACRWC; see United Nations Treaty Collection, Status of Treaties; International Labour organization (ILO) 'Ratifications for South Africa'; African Union, OAU/AU Treaties, Conventions, Protocols & Charters.

<sup>223</sup> Constitution of the Republic of South Africa (1996) Chap 2 s 28(1)(e) & (f)(i & ii).

<sup>224</sup> September J 'Children's Rights and Child Labour: A Comparative Study of Children's Rights and Child Labour Legislation in South Africa, Brazil and India' (Unpublished MPhil thesis, University of Cape Town February 2014) 76.

<sup>225</sup> Basic Conditions of Employment Act (No. 76 of 1997) as amended by the Basic Conditions of Employment amendment Act (No. 11 of 2002) s 43. Act No. 20 of 2013: Basic Conditions of Employment Amendment Act, 2013 s 43.

<sup>226</sup> CRC Committee 'Consideration of reports submitted by States parties under article 44 of the Convention, Second periodic reports of States parties due in 2002: South Africa' 17 March 2016, CRC/C/ZAF/2 para 79 available at: <https://www.refworld.org/docid/57aafaa74.html> (accessed 21 June 2019); see also Act No. 20 of 2013: Basic Conditions of Employment Amendment Act, 2013 s 43.

<sup>227</sup> Children's Act 38 of 2005 s 1 (definition of child labour) & 41.

<sup>228</sup> The Refugee Act (1998) s 27(f) and Department of Safety and Security Regulation to the Police Services Act s 23(1).

<sup>229</sup> *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism*, (48/2014) [2014] ZASCA 143, South Africa: Supreme Court of Appeal, 26 September 2014 para 31-42 available at <https://www.refworld.org/cases,SASCA,5425522d4.html> (accessed 4 June 2019).

holding that asylum-seekers and refugees are entitled to self-employment and that any act going against the exercise of such entitlement is unlawful.<sup>230</sup>

In the absence of explicit legal prohibition and a special law regulating the same, the involvement of independent adolescent migrants in gainful economic activities is no different from that of South African children and is subject to the aforementioned legislation applicable to children's work. However, as independent migrant children would be kept in care centres, they would not be allowed to go out to work. Because the applicable law provides that the minimum age of employment is 15 years, adolescent independent migrants, like their South African counterparts, should be permitted to work.

It is illogical as well as contrary to basic human rights to argue that independent adolescent migrants, because they demand it, should work in whatever sector is available. Nonetheless, as the Constitution and other subsidiary laws do not entirely prohibit children's work but only exploitative practices, adolescents including independent adolescent migrants have, first and foremost, a legally guaranteed right to undertake work, as the minimum age of employment in South Africa is 15 years. This is also in line with ideologies of child work that draw on African societal values and have informed the regional movement towards guaranteeing rights to work for children, as opposed to prohibiting child labour (as discussed in Chapter 3). Independent adolescent migrants may not want to be kept in child-care centres but rather seek to fulfil the aims that drove them to migrate in the first place, aims that include working and earning money so as to shape their future and support their families at home.<sup>231</sup>

### **5.3.4 Contextual Interpretations of Fundamental Principles of Child Rights under South African Law**

As noted, although some scholars question the four fundamental principles for interpreting and enforcing international, regional and domestic children's rights, the commanding stature of these principles is visible in current jurisprudence regarding children and adolescents.<sup>232</sup> Such principles are also recognised under the South African normative frameworks applicable to children. This section, therefore, looks at how these four principles are interpreted in relation to independent migration of children under the normative framework of South Africa.

#### **5.3.4.1 The Principle of Non-discrimination**

The principle of non-discrimination has fundamental importance to independent adolescent migrants because, in a number of destination countries, there is *de jure* and *de facto* discrimination with regard to treatment, granting rights and extending social services. This principle, although not as explicit as under international and regional child-rights standards, general clauses may be interpreted to apply to children. In this regard, the South African

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<sup>230</sup> *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism* para 46.

<sup>231</sup> Magaya I (2014) 36.

<sup>232</sup> Hanson K & Lundy L (2017) 285-306.



Constitution provides for equality and non-discrimination, which by extension is also applicable to all children in South Africa.<sup>233</sup> Set against the country's history of apartheid, the South African legal system is anchored on eradicating unfair discrimination in its all forms.<sup>234</sup>

The non-discrimination general clause under the Constitution is provided under the title of 'equality', with a detailed outline of the rights and freedoms that have to be protected. The provision entails the right of everyone to be protected by and benefit from the law.<sup>235</sup> It recognises the equal enjoyment of all rights and freedoms under the Constitution and other laws. When required, affirmative measures are permissible to promote the equality of disadvantaged or specific categories of persons.<sup>236</sup> Central to the 'equality' clause is what is recognised under section 9(3) of the Constitution, namely that 'the state may not unfairly discriminate directly or indirectly against anyone based on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

Although the Children's Act does not contain a general non-discrimination clause regarding the application of the rights and duties to all children in South Africa, it contains considerable provisions that relate to this principle in a different context. One of the objectives of the Children's Act is to protect children from discrimination.<sup>237</sup> The Act provides that 'all proceedings, actions or decisions in matter concerning a child must protect the child from unfair discrimination on any ground'.<sup>238</sup> The term 'unfair discrimination' may connote the possibility of granting affirmative action or positive discrimination to address entrenched inequalities due to the legacy of racial segregation and economic inequality. Another important dimension of this provision is the inclusion of the term 'any ground', which may be interpreted to include the prohibition of discrimination based on nationality, place of origin, legal identity and documentation, and immigration status, all of which are crucially pertinent to independent adolescent migrants.

'Care' is interpreted to mean, inter alia, the protection of children from discrimination.<sup>239</sup> While setting out the responsibilities of non-parents who have a temporary or permanent obligation to care for the child, the Act explicitly provides that a caregiver must ensure non-discriminatory treatment.<sup>240</sup> This is also a fundamental clause for independent adolescent migrants in temporary or indefinite care arrangements, as it prescribes that they must not be discriminated against based on their immigration status or any other ground.

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<sup>233</sup> Constitution of the Republic of South Africa (1996) As adopted on 8 May 1996 and Amended on 11 October 1996 by the Constitutional Assembly, art 7(1) and s 9.

<sup>234</sup> Constitution of the Republic of South Africa (1996) s 1.

<sup>235</sup> Constitution of the Republic of South Africa (1996) s 9(1).

<sup>236</sup> Constitution of the Republic of South Africa (1996) s 9(2)(4) & (5).

<sup>237</sup> Children's Act 38 of 2005 Chap 1 s 2 Objective (f).

<sup>238</sup> Children's Act 38 of 2005 Chap 2 s 6 General Principle.

<sup>239</sup> Children's Act 38 of 2005 Chap 1 s 1 Interpretation 'Care' (c).

<sup>240</sup> Children's Act 38 of 2005 Chap 3 s 32.

The aforementioned provisions of the Children's Act pertinent to the principle of non-discrimination are equally important in allowing adolescent migrants to benefit from social services, as well as any judicial and administrative measures, without any distinction. Although the term 'migrant child' is not specifically mentioned in reference to a group that requires special protection and assistance under the Children's Act, the words of the former Minister of Social Development, Zola Skweyiye, indicate that the definition of the child in the Act includes all children under 18 found in South Africa, irrespective of nationality, immigration status, and documentation – which includes independent adolescent migrants.<sup>241</sup>

The words of the former Minister may be taken as authoritative, but this does not preclude the possibility that the provisions of the Act may be interpreted narrowly by the judiciary and administrative organs. To ensure legislative certainty as well as predictability of progressive decisions on the rights and care options of independent adolescent migrants, incorporating specific provisions on their peculiar needs and interests may have been an added value. It was also reported that in the initial draft of the Act, explicit mention was made to the rights of migrant children but this was taken out in the final draft, as it was argued as unnecessary by the Department of Social Development (DSD).<sup>242</sup> The CRC Committee expressed its concern and urged South Africa to address the multifaceted discrimination against migrant, asylum-seeking and refugee children, particularly in accessing public services and when encountering abuse.<sup>243</sup>

#### **5.3.4.2 The Principle of the Best Interests of the Child**

The principle of the best interests of the child is recognised under the South African children's legal framework. It is a constitutionally guaranteed right with supreme guiding value for every child-rights intervention and measure. The Constitution states that '[a] child's best interests are of paramount importance in every matter concerning the child'.<sup>244</sup> At first glance, this provision may not seem to elaborate and outline broad issues and sectors that may be pertinent to children. A close look at the text of the provision shows, however, that the 'best interests' of the child are to be considered in all sectors and initiatives that have a direct or indirect impact on the child. The phrase 'in every matter' necessarily means that every sector dealing with children should take this principle into account. Based on this umbrella provision in the Constitution, the Children's Act provides that one of its objectives is to realise the principle of 'the best interests

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<sup>241</sup> Palmary I (2009) 11.

<sup>242</sup> Palmary I (2009) 11.

<sup>243</sup> CRC Committee 'Concluding observations on the second periodic report of South Africa' 27 October 2016, CRC/C/ZAF/CO/2 para 23 & 24 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed 21 June 2019).

<sup>244</sup> The Constitutional of the Republic of South Africa (1996) Chap 2, s 28(2).

of the child'.<sup>245</sup> The best interests of the child under the South African legal system are not only a constitutional principle but an enforceable right.<sup>246</sup>

Under the Children's Act, it is clear that the principle of the best interests of the child is given special focus as it runs from the objectives of the Act to setting a particular standard on how it should be understood and be interpreted in specific cases. Explicit recognition is given to the principle in a number of specific matters, such as adoption.<sup>247</sup> This discussion, however, focuses only on matters directly relevant to independent adolescent migrants. To begin with, ensuring that the best interests of the child are of paramount importance in every child-related affair is one of the objectives of the Act.<sup>248</sup> While elaborating on the fundamental question whether children's rights trump all other rights, the Constitutional Court, in the case *MR v Minister of Safety & Security and Another*, held as follows:

Certainly not. All that the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. [W]e should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them.<sup>249</sup>

Similarly, in the case *MS v M*, the Court held that although the textual interpretation of the best interests principle in article 28 (2) necessary refers to its application in all laws and forms of public action,

the paramountcy principle should not be applied in a manner that could unduly obliterate other valuable and constitutionally-protected interests. Consequently, [t]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights [...] their operation has to take into account their relationship to other rights, which might require that their ambit be limited.<sup>250</sup>

Furthermore, it is argued that the best interests of the child, as with any other right under the Bill of Rights in the Constitution, may be subject to limitations provided these are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.<sup>251</sup> This principle, according to Sachs J, should be balanced with the interests of society and the competing rights of others.<sup>252</sup> In his words, '[the best interests of the child] does not necessitate overriding all other considerations. Rather it calls for appropriate weight to be given in each case

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<sup>245</sup> Constitution of the Republic of South Africa (1996) s 2(b)(iv).

<sup>246</sup> Reyneke M 'Realising the Child's Best Interests: Lessons from the Child Justice Act to Improve the South African Schools Act' (2016) 19 PER/PELJ 4; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 22.

<sup>247</sup> Chapter 15 of the Children's Act 38 of 2005 provides a detailed account on how best interests would be applied in the context of adoption.

<sup>248</sup> Children's Act 38 of 2005 Chap 1 s 2.

<sup>249</sup> *MR v Minister of Safety and Security (Center for Child Law Amicus Curiae)* (2016) ZACC 24 Constitutional Court Judgment case no CCT 151/15 para 59.

<sup>250</sup> *MS v M* 2008 3 SA 232 CC para 25-26.

<sup>251</sup> Moyo A 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child' (2012) 12 AHRJ 149.

<sup>252</sup> *MS v M* 2008 para 42.

to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned'.<sup>253</sup>

Based on such arguments, the child's interests are not 'more important than anything else', nor is it that anything else is less important than the child's best interests.<sup>254</sup> In the absence of these limitations, however, the best interests would be the prevailing value to be considered while dealing with the child's issues. Furthermore, 'where family or state action has the potential to affect children negatively, then the principle would necessarily override other considerations'.<sup>255</sup>

One of the central dimension of the best interests of the child as provided in the Children's Act is 'child-centeredness', which may be summed up as applicable to 'the implementation of all legislation applicable to a child, children, a specific group of children or children in general, as well as to any proceedings, actions and decisions instituted or taken by an organ of state concerning children'.<sup>256</sup> The recognition of age-appropriate and diverse delineation of needs and interests of the child, child-friendly proceedings, appeal procedure, and speeding decisions are another dimension of 'child-centeredness'.<sup>257</sup>

The Act lists features that ought to be taken into account when interpreting 'the best interests of the child standard' before handing down a decision in different cases and situations.<sup>258</sup> From the list of points of guidance, a few may be relevant to determining the best interests of the child in the context of independent adolescent migrants.

The first is giving due regard to the age, maturity and stage of development of a child.<sup>259</sup> These factors indicate that the consideration of the best interests of the child is not the same for all children. Determining what is in the child's best interest, therefore, depends on child-specific factors such as age and level of maturity. Gender is another factor that should be considered.<sup>260</sup> The provision also has two dynamic and non-exhaustive factors such as 'background' and 'any relevant characteristic',<sup>261</sup> which may refer to a wide range of areas such as the life experience of the child, his or her adult-like capacities and capabilities due to exposure to trying situations, and the clarity of future plans that are characteristic of adolescent independent migrants. This relates to the issue of vulnerability, which is moving away from status-based to situational based-vulnerability determination.<sup>262</sup> In this regard, the Constitutional Court held, in the case *S v M*:

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<sup>253</sup> *MS v M* 2008 para 42.

<sup>254</sup> Moyo A (2012) 150.

<sup>255</sup> Moyo A (2012) 149.

<sup>256</sup> Reyneke M (2016) 4-5; Children's Act 38 of 2005 Chap 2 s 6(2)(a).

<sup>257</sup> Reyneke M (2016) 6-7, 13 & 16-19.

<sup>258</sup> Children's Act 38 of 2005 Chap 2 s 7.

<sup>259</sup> Children's Act 38 of 2005 Chap 2 s 7(1)(g)(i).

<sup>260</sup> Children's Act 38 of 2005 Chap 2 s 7(1)(g)(ii).

<sup>261</sup> Children's Act 38 of 2005 Chap 2 s 7(1)(g)(iii & iv).

<sup>262</sup> European Council on Refugees and Exiles 'The Concept of Vulnerability in the European Asylum Procedure' (31 August 2017) 1218 available at [http://www.asylumineurope.org/sites/default/files/shadow-reports/aida\\_vulnerability\\_in\\_asylum\\_procedures.pdf](http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_vulnerability_in_asylum_procedures.pdf) (accessed 29 October 2019); IOM & UNICEF 'Harrowing

Every child is unique and has his or her own individual dignity, special needs and interests. [Treating the child] in a caring and sensitive manner [...] requires taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity. In short, every child should be treated as an individual with his or her own individual needs, wishes and feelings. [A] truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.<sup>263</sup>

The jurisprudence above highlights that the best interests of the child should be determined based on an assessment of each individual's case: 'There can never be a one-size-fits-all approach to determining the best interests of a child or of children'.<sup>264</sup>

Another factor that should be considered when determining the best interests of the child is the capacity of parents or caregivers to provide for his or her material, emotional and intellectual needs.<sup>265</sup> Although these factors are not directly linked, they may be considered progressively while assessing migrant children's legal status, documentation needs and other interests. One bottleneck in this regard is that the factors under the best interests standard as mentioned under section 7 are to be applied in respect only of those provisions of the Act that explicitly require the application of the best interests of the child.<sup>266</sup> On the basis of this argument, they do not apply to migrant children in general or independent adolescent migrants in particular as there is no provision that explicitly recognises these groups of children. Despite this gap in the application of the best interest principle in the context of migrant children, the general objectives of the Act, as well as the general rule under section 9, may be used to accommodate the interests of all children, including independent adolescent migrants.<sup>267</sup>

Under the Children's Act, depending on the case, 'care' shall mean 'ensuring that the best interests of the child is the paramount concern in all matters affecting the child'.<sup>268</sup> Alternative care options are fundamentally linked to child migration situations irrespective of age and interests because the logical basis for their protection is founded on the premise that these groups of children lack appropriate persons to ensure their protection as well as provision of basic needs and other social services. Children that are in need of care and protection, according to the Act, include abandoned or orphaned children, children living or working on the streets, exploited children or those living in situations that may lead to exploitation, and children found in or who

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Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking and exploitation' (September 2017) 30-5 available at [https://www.iom.int/sites/default/files/press\\_release/file/Harrowing\\_Journeys\\_Children\\_and\\_youth\\_on\\_the\\_move\\_a\\_cross\\_the\\_Mediterranean.pdf](https://www.iom.int/sites/default/files/press_release/file/Harrowing_Journeys_Children_and_youth_on_the_move_a_cross_the_Mediterranean.pdf) (accessed 29 October 2019).

<sup>263</sup> *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 47 & 48.

<sup>264</sup> Reyneke M (2016) 14; Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 8.

<sup>265</sup> Children's Act 38 of 2005 Chapter 2 s 7(1)(c).

<sup>266</sup> Children's Act 38 of 2005 Chapter 2 s 7(1).

<sup>267</sup> Children's Act s 9 states that 'in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance'.

<sup>268</sup> Children's Act 38 of 2005 Chapter 1 s 1 Interpretation 'Care' (j).

are exposed to conditions that may seriously harm the physical, mental and social well-being of a child.<sup>269</sup> Victims of child labour may also be categorised as children in need of care and protection based on the assessment of a social worker.<sup>270</sup>

The children's court, based on its jurisdiction as provided under sections 45 and 46, may order these children to be placed in alternative care arrangements,<sup>271</sup> such as with foster parents,<sup>272</sup> in CYCCs,<sup>273</sup> or in temporary safe care arrangements, with the decisions guided by, among other things, the principle of the best interests of the child.<sup>274</sup> When the best interests of the child so demand, children in such care arrangement would be removed with or without a court order.<sup>275</sup> The procedural safeguards for deciding children's care options include thorough analysis of the child's situation by a social worker and a best-interests assessment.<sup>276</sup> The Act also provides that the child's placement in a CYCC should be sought as the last option where there is no alternative available.<sup>277</sup> In general, the children's court would be guided by the principle of the best interests of the child in deciding on the care and protection options of children in need.<sup>278</sup> In any case, the care option for independent adolescent migrants, even if the child so demands, will not be to work and live independently.

Legal representation and access to free legal aid is important for independent adolescent migrants as they pass through a number of judicial and administrative proceedings. In such case, the Act as a general rule provides that in matters before a court, if the interests of the child demand representation by legal counsel, the court must direct the case to the Legal Aid Board.<sup>279</sup>

The South African judicial system has been praised for its 'excellent jurisprudence on the application on the principle of the best interests of the child in concrete situations'.<sup>280</sup> However, the courts have been criticised for failing to provide adequate interpretation as to the substantive dimensions of what is needed to positively adhere to the best interests of the child, as opposed to stating negative actions that violate the principle.<sup>281</sup> Furthermore, the impact of policies and laws on the realisation of such principle is unknown due to a lack of impact evaluation procedures.<sup>282</sup>

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<sup>269</sup> Children's Act 38 of 2005 Chapter 9 s 150(1)(a, c, e, & f).

<sup>270</sup> Children's Act 38 of 2005 Chapter 9 s 150(2)(a).

<sup>271</sup> Children's Act 38 of 2005 Chapter 11 s 167.

<sup>272</sup> Children's Act 38 of 2005 see Chapter 12; the principle of the best interests of the child is considered while assigning a guardian see Children's Act 38 of 2005 Chapter 3 s 24.

<sup>273</sup> Children's Act 38 of 2005 see Chapter 13 for details (take time to look at it in detail)

<sup>274</sup> The founding principles of the Act with regard to 'care' are defined under Chapter 1 s 1.

<sup>275</sup> Children's Act 38 of 2005 Chapter 9 s 151 & 152.

<sup>276</sup> Children's Act 38 of 2005 Chapter 9 s 155 & 156.

<sup>277</sup> Children's Act 38 of 2005 Chapter 9 s 158.

<sup>278</sup> Children's Act 38 of 2005 Chapter 9 s 156.

<sup>279</sup> Children's Act 38 of 2005 Chap 4 s 55.

<sup>280</sup> CRC Committee 'Concluding observations on the second periodic report of South Africa' para 25.

<sup>281</sup> Matiea P 'The best interests of the child in cases of deprivation of post-divorce parental contact' (Unpublished LLM thesis, the Potchefstroom Campus of the North-West University, 2016) 18.

<sup>282</sup> CRC Committee 'Concluding observations on the second periodic report of South Africa' para 25.

As discussed above, in the context of independent adolescent migrants the Act is not clear whether they are in need of care as younger children or if there may be an option of progressive interpretation of care and protection based on their peculiar characteristics, evolving capacities and interests. Furthermore, it is not clear whether the best-interests assessment and decision that ought to be based on age and level of maturity would allow independent adolescent migrants to live independently and work if their best interests so demand. The protection extended to them under the care and protection scheme in the current scenario may be based on the potentially erroneous assumption that they are categorisable as vulnerable and take no consideration of their agentic and adult-like capabilities and active role in their independent movement. In general, the Act gives no consideration to the general and specific needs of migrant children in general and independent adolescent migrants in particular.

#### **5.3.4.3 The Principle of Expression of Views and be Heard**

The principle of expressing views and being heard is a fundamental right and interpretative value, one with particular importance to adolescents because it stands to recognise their agency in shaping their destinies and to enable them to take an active part in decisions that affect their lives, as discussed in Chapters 2 and 4. The principle is not expressly provided either among the guiding principles or specific rights of children in the South African Constitution. The constitutional provisions specific to children ‘prioritise more protection-oriented rights, which conceive [of] all children as vulnerable citizens rather than as citizens with agency’.<sup>283</sup> In the South African legal system there is a limitation as to balancing child protection with according effective participation.<sup>284</sup> In a nutshell, ‘there is a lack of documented impact assessment around participatory processes in South Africa – both in terms of benefits to individual children in terms of enjoyment, learning and personal development, and resulting impact on the intended processes and outcomes’.<sup>285</sup>

In South Africa, there is limited consultation with children regarding delivery of services because of a long-standing welfarist approach to children’s rights and services.<sup>286</sup> As child participation is anchored in a child liberationist approach, as discussed in Chapter 2, the South African normative framework and practice should move from a paternalistic, welfare approach to one granting autonomy and agency, particularly to adolescents: ‘As the child grows up and his or her capacities develop, the interests of the child can be equated with his or her wishes, views and preferences.’<sup>287</sup>

This principle, however, is one of the overarching principles recognised under the Children’s Act of South Africa and referred to as ‘child participation’. The Act provides that ‘every child that is

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<sup>283</sup> Moses S ‘Children and Participation in South Africa: An Overview’ (2008) 16 *International Journal of Children’s Rights* 329.

<sup>284</sup> Moses S (2008) 337.

<sup>285</sup> Moses S (2008) 339.

<sup>286</sup> Moses S (2008) 329.

<sup>287</sup> Moyo A (2012) 165.

of such an age, maturity and stage of development has to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.<sup>288</sup> In this regard, in *Minister of Education v Pillay*, the Constitutional Court held that children must have an opportunity to participate in matters affecting their lives.<sup>289</sup> The provision of the Children's Act adequately captures the scope of such principle as provided under international standards. The age and maturity criteria, as well as the weight that ought to be attached thereto, are explicitly provided for.

The Children's Act's provisions related to child participation are mostly pertinent to older children, particularly adolescents. In this regard, the expression of interest and consent for medical treatment, taking sole decisions on the affairs of child-headed household may be taken as examples.<sup>290</sup> In principle, this may be taken as an instance of giving wider space for children to take autonomous decisions in matters affecting their own lives.<sup>291</sup>

The other fundamental recognition of such principle in the Act is in the context of court proceedings. Since the 1970s there has been a paradigm-shift from adult-focused to child-centred court proceedings.<sup>292</sup> The presiding officer must ensure that the child's views and preferences are taken into account subject to the age, maturity, stage of development, wishes and any other special needs of the child. The provision also prescribes that if the child is unable or unwilling to express his or her views, the presiding officer is obliged to take note of the reasons. Courts may question and cross-examine the child on their own or through an intermediary if it is convinced this is in his or her best interests.<sup>293</sup> Employing child-friendly means of interviewing is required in particular for younger children or children with special needs.

Given the exceptional recognition of the principle of best interests of the child throughout the Act, the scope of context-based explanation of children's right to express their views and be heard is limited. The two general provisions related to child participation under the Act can be said to be applicable to any child-related intervention. However, such provisions under the Act are not qualified by age, maturity and development. They are also provided without making a distinction between simple expression of views and giving due regard to and weighting of views – which are fundamentally different matters. Furthermore, broad discretion is given to the court or presiding officer to decide on which children are allowed to express their views and be heard, without setting a standard as to the minimum.

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<sup>288</sup> Children's Act 38 of 2005 Chap 2 s 10.

<sup>289</sup> *Ministry of Education v Pillay* 2008 (1) SA 474 (CC) 494.

<sup>290</sup> *Moses S* (2008) 329-30.

<sup>291</sup> Moyo A 'Child Participation under South African Law: Beyond the Convention on the Rights of the Child (2015) 31 SAJHR 177.

<sup>292</sup> Engelbrecht A 'Child Participation and Representation of Children in Legal Matters' (Unpublished LLM thesis, University of Pretoria 2013) 7.

<sup>293</sup> Children's Act 38 of 2005 Chapter 4 s 61(1)(a-c) & (2).



Despite a number of cases that mention the principle of the child's expression of views, a detailed interpretation standard is not provided under the South African jurisprudence. The existing brief considerations view this principle as just a procedural guarantee as opposed to a substantive right that needs detailed interpretation. The provisions for child participation under the Children's Act focus on family proceedings, which do not necessarily entail administrative processes<sup>294</sup> – processes that are indeed necessary in child immigration and RSD cases.

Administrative procedures such as asylum hearings should make adequate use of adolescents' participation as provided under the Children's Act. The Government of South Africa acknowledges that children in the context of migration go through complex and child-unfriendly RSD processes.<sup>295</sup> As a result of increasing numbers of asylum-seekers and case backlogs, RSD processes in South Africa have been criticised for the limited time they devote to conducting interviews.<sup>296</sup> These problems may also have an adverse impact on independent adolescent migrants, as their rights and interests demand a higher safeguard to participate in the process, to freely and adequately express their views and for such views to be considered seriously.

#### **5.3.4.4 The Principle of Right to Life, Survival and Development**

The principle of the right to life, survival and development entails a bundle of rights that include the rights to life, to fulfilment of the child's basic needs and to physical and mental development. Accordingly, the South African Constitution recognises that everyone has the right to life.<sup>297</sup> Furthermore, it contains various provisions that may be interpreted to refer to children's right to life, survival and development.<sup>298</sup> These rights include, but are not limited to, the right to basic nutrition, shelter, basic health-care services and social services; to be protected from maltreatment, neglect, abuse or degradation; to be protected from exploitative labour practices and not to be permitted to perform work that is inappropriate to the child's age and which puts the child's well-being, education, physical or mental health or spiritual, moral or social development at risk.<sup>299</sup>

The South African laws on children do not contain an explicit provision on the right to life, survival and development, as in the CRC and ACRWC. However, some of the provisions of the Children's Act are directly and indirectly pertinent to the principle of survival and development.<sup>300</sup> To start with, one of the general objectives of the Act is 'the protection,

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<sup>294</sup> Moyo A (2015) 177.

<sup>295</sup> CRC Committee 'Consideration of reports submitted by States parties under article 44 of the Convention, Second periodic reports of States parties due in 2002: South Africa' 17 March 2016, CRC/C/ZAF/2 para 324 available at <https://www.refworld.org/docid/57aafaa74.html> (accessed 21 June 2019).

<sup>296</sup> Amit R 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 International Journal of Refugee Law 459.

<sup>297</sup> Children's Act 38 of 2005 Chapter 2 s 11.

<sup>298</sup> ACPF 'Harmonisation of Children's Laws in Eastern and Southern Africa' (2012) African Child Policy Forum, Addis Ababa 147.

<sup>299</sup> Constitution of the Republic of South Africa (1996) art 28(1)(c-f).

<sup>300</sup> ACPF (2012) 47.

development and well-being of children', which is directly related to the principle.<sup>301</sup> The Act is also aimed at putting in place systems to 'promote and monitor the physical, psychological, intellectual, emotional and social development of children'.<sup>302</sup> By interpretation, other objectives of the Act that aim at protecting children from abuse, exploitation as well as providing protection and care for those in need are pertinent to ensuring the right of the child to life, survival and development.<sup>303</sup>

The Children's Act also sets out general principles to guide any legal interpretation and application, processes, decisions and actions taken by any organ that may affect a child.<sup>304</sup> These principles are rather similar to the general guiding principles of the CRC and ACRWC, with one exception. Except for the principle of survival and development, all the three principles are explicitly recognised as guiding principles of the Act. The rationale for leaving this principle out is not clear.<sup>305</sup> Although the Act has not explicitly incorporated the principle of the right to life, survival and development among the general guiding principles, the specific rights, entitlements, elements and pillars necessary to realise the principle are implied by various of its provisions.<sup>306</sup>

The Children's Act provides a list of children that are deemed to be in need of care and support.<sup>307</sup> This category is non-exhaustive as it refers to all children that are found in difficult circumstances of abuse, neglect, exploitation and exposure to harm that is against their 'physical, mental and social well-being'. In other words, list in section 150 of the Act includes children whose rights are not respected and who live in circumstances against their best interests as well as in situations that are harmful for their survival and development.

The child protection services may support court proceedings as well as enforcement of court decisions; in particular, support is rendered in relation to 'the reunification of children in alternative care with their parents, the integration of children into alternative care arrangements, and placement of children in alternative care'.<sup>308</sup> The norms and standards that should guide the child protection system include assessment of a child, family reunification and integration, permanency plans and education and information.<sup>309</sup>

A child without a parent or a caregiver will be admitted to alternative care, which entails foster care or placement in a CYCC or temporary safe care centre.<sup>310</sup> A CYCC is a residential care facility that provides care and support to more than six children who are outside of their home

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<sup>301</sup> Children's Act 38 of 2005 Chap 1 s 2(i).

<sup>302</sup> Children's Act 38 of 2005 Chap 1 s 2(d).

<sup>303</sup> Children's Act 38 of 2005 Chap 1 s 2(b)(iii), (f) & (g).

<sup>304</sup> Children's Act 38 of 2005 Chap 2 s 6(1).

<sup>305</sup> Children's Act 38 of 2005 Chap 2 s 6(2-5) & s 7.

<sup>306</sup> Children's Act 38 of 2005 Chap 2 s 6(2)(e); 18(2); also see s 22, 23, 24, 27 and 32.

<sup>307</sup> Children's Act 38 of 2005 Chapter 9 s 150(1)(a, c, f) & (2)(a).

<sup>308</sup> Children's Act 38 of 2005 Chap 7 s 105(5)(a) & (b).

<sup>309</sup> Children's Act 38 of 2005 Chap 7 s 106(2)(a-k).

<sup>310</sup> Children's Act 38 of 2005 Chap 11 s 167.

environment.<sup>311</sup> Such care facilities provide a broad category of temporary services that are fundamental to ensuring the survival and development of children that are deprived of their home environment, which by interpretation includes independent adolescent migrants.<sup>312</sup> Similarly, a temporary safe care refers to an institution or home setting, other than a prison or police station, that ensures the care and safety of a child until a court decision is given on the permanent placement of a child.<sup>313</sup>

Foster care is a care arrangement in which a child is placed with a person who is not related to him or her or a family member who is not his or her parent or guardian.<sup>314</sup> The purpose of this care option is to provide a family-like environment to ensure the nurturing and proper upbringing and development of a child as well as to promote permanency either by opting for family reunification or finding an alternative family-like environment.<sup>315</sup>

In general, on identification, unaccompanied migrant children including independent adolescent migrants would automatically qualify for care and protection in accordance with section 152 of the Children's Act.<sup>316</sup> In accordance with the court's decisions, independent adolescent migrants are placed under foster care or temporary safe care.<sup>317</sup>

### **5.3.5 Birth Registration and Documentation of Independent Adolescent Migrants**

South Africa is one of the leaders in Africa – even the world – in ensuring universal birth registration for its citizens. According to UNICEF, the birth registration rate reached 95 per cent in 2012. Such an impressive rate was incrementally achieved from just 24 per cent in 1990 to 50 per cent in 2000 and 75 per cent in 2005.<sup>318</sup> In the context of the birth registration and documentation of migrant children in general and independent adolescent migrants in particular, however, the data and statistics may not be as straightforward as they seem to be, given the complexity of the issue.

To show how there is mismatch between the overall birth registration and documentation data with that of migrant children's, in an assessment conducted in CYCCs in Gauteng, Limpopo and Western Cape Provinces of South Africa on foreign children among the children surveyed, 39 per cent, do not have any form of documentations. In Limpopo, where the majority of the

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<sup>311</sup> Children's Act 38 of Chap 13 s 191(1).

<sup>312</sup> Children's Act 38 of 2005 Chap 13 s 192.

<sup>313</sup> Children's Act 38 of 2005 Chap 1 s 1.

<sup>314</sup> Children's Act 38 of 2005 Chap 12 s 180.

<sup>315</sup> Children's Act 38 of 2005 Chap 12 s 181; also see s 184 & 186.

<sup>316</sup> Scalabrini Center Cape Town (2019) 18.

<sup>317</sup> Mahmoudi A & Mthapo T 'RECEPTION OF CHILDREN ON THE MOVE IN SOUTH AFRICA' (November 2018) Kids Empowerment 46-7 available at <https://bettercarenetwork.org/sites/default/files/KE-Country-Report-South-Africa.pdf> (accessed 16 May 2019).

<sup>318</sup> UNICEF 'Every Child's Birth Right: Inequities and trends in birth registration' (2013) 33; see also Statistic South Africa (Stats SA) Statistical release P0305 Recorded live birth 2017 Embargoed until 27 August 2018 11:00 7-12; available at <http://www.statssa.gov.za/publications/P0305/P03052017.pdf> (accessed 26 February 2019).

children are unaccompanied, 85 per cent of children were undocumented.<sup>319</sup> Furthermore, in a survey by the Scalabrini Centre of Cape Town (SCCT) on 109 unaccompanied and separated migrant children, 55 per cent lacked a birth certificate.<sup>320</sup> In South Africa, birth registration is a prerequisite for registration in the National Population Register, regardless of citizenship, birth, or refugee status. In order to qualify for any documentation, an individual needs registration and a birth certificate.<sup>321</sup>

As South Africa is a destination country for African migrants, the issue of birth registration and documentation has two aspects. One concerns the child born in South Africa to refugee parents; the other concerns the child who has migrated into South Africa, accompanied or unaccompanied, and requires a birth certificate.

For a recognised refugee as per the Refugee Act of South Africa, his or her dependents will qualify for the same rights and duties as the parent.<sup>322</sup> The only problems in applying for and accessing documentation relate to administrative and procedural issues such as appearing together with the parent in order to access such services.<sup>323</sup> Testimonies of experts working with refugee children show that one basic problem for children is that their refugee status is valid as long as their parents' status is valid and up to the point that their parents are still in South Africa. Those children may lose their refugee status if their parents depart South Africa and leave them to remain in South Africa.<sup>324</sup> If a refugee child is left behind by his or her parents or legal guardians, then he or she may be categorised as an 'unaccompanied minor' and the legal rules would be applicable thereof. In such a case, a social worker would be assigned to the minors to help them start the refugee status application process afresh.<sup>325</sup>

In the context of migrants and foreign children, the birth registration and documentation laws have been criticised for complex and cumbersome requirements and verification procedures.<sup>326</sup> The South African Birth Registration Act 51 of 1992 and its regulation (2012/14) have passed through a number of amendments in recent years. The current Amendment Act and its Regulation became effective on 1 March 2014.<sup>327</sup> In accordance with the laws of South Africa,

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<sup>319</sup> Scalabrini Center Cape Town (2019) 22.

<sup>320</sup> Ackermann M (2017) 23.

<sup>321</sup> Canada: Immigration and Refugee Board of Canada *South Africa: Information on the immigration status of a minor who was born in South Africa to foreign parents who are officially recognized as refugees* (2007-April 2015), 1 June 2015, ZAF105155.E available at: <https://www.refworld.org/docid/557ea8e14.html> (accessed 4 February 2019).

<sup>322</sup> The Republic of South Africa, The Refugees Act, 1998 (Act No. 130 of 1998) Government Gazette 2 December 1998 (hereafter the Refugee Act, 1998) s 3(c).

<sup>323</sup> Canada: Immigration and Refugee Board of Canada (2015).

<sup>324</sup> Canada: Immigration and Refugee Board of Canada (2015).

<sup>325</sup> Canada: Immigration and Refugee Board of Canada (2015).

<sup>326</sup> Horne K A 'Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States' (2014) 53 *Columbia Journal of Transnational Law* 136-37(116-156); Proudlock P & Martin P 'Children's rights to birth registration: A review of South Africa's law' in Paula Proudlock (ed) *South Africa's Progress in Realising Children's Rights: A Law Review* (2014) 11-2.

<sup>327</sup> Proudlock P & Martin P (2014) 11-2.

all children born in the country, irrespective of the citizenship status of their parents, qualify for birth registration.<sup>328</sup> In accordance with Regulation 8 of the Births and Deaths Registration Act of 1992, foreign children may access the birth registration and documentation system the same as nationals do but subject to special requirements. The Department of Home Affairs (DHA) stated that ‘birth certificates are issued upon request to [...] persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose’.<sup>329</sup>

Despite laws that may seem to allow all children in South Africa to access birth registration and documents, the specific requirements and the practice are far removed from what the legal texts say. Let alone independent adolescents migrating into South Africa, children born in South African from foreign migrant parents hardly access the birth registration system and acquire documentation due to stringent requirement of valid identification documentation or some sort of legal status such as asylum seeker or refugee permit of parents.<sup>330</sup>

Regardless of such compelling laws and prior expression of commitments, since 2018 the DHA has proposed draft regulation to discontinue issuance of birth certificate for foreign children in the Republic. The proposed regulation provides that foreign children may be issued ‘birth confirmation’ as opposed to ‘birth certificates’. With such ‘birth confirmation’, they are expected to seek birth certificates from the embassies of their country of origin.<sup>331</sup> This is quite unrealistic and goes against the spirit of international law protection that ought to be bestowed on migrants, refugees and asylum-seeker in host countries. The proposal has been fiercely opposed by human rights groups such as Lawyers for Human Rights, the Centre for Child Law, the Scalabrini Centre of Cape Town, and the UCT Refugee Law Clinic.<sup>332</sup>

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<sup>328</sup> The Republic of South Africa, the Refugees Amendment Act of 2011, s 6.

<sup>329</sup> Constitution of the Republic of South Africa (1996), s 28 1(a) & 9; Children’s Act 38 of 2005 Sec...; Department of Home Affairs, Republic of South Africa ‘Birth Certificate’ available at <http://www.dha.gov.za/index.php/civic-services/birth-certificates> (accessed 13 February 2019); Department of Home Affairs, Births and Deaths Registration Act (1992) (Act No. 51 of 1992) amended by the Birth and Death Registration Amendment Act, 2010 (Act No. 18 of 2010) Regulation on the Registration of Births and Deaths 2014 (hereafter Regulation on the Registration of Births and Deaths (2014)) s 8.

<sup>330</sup> Ackermann M (2017) 24.

<sup>331</sup> Births and Deaths Registration Act, 1992 (Act No. 51 of 1992) Publication of the Draft Regulations on the Registration of Births and Deaths, 2018 Regulation 1, 8(5) and Annexure 4; available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181012draftreg-registrationofbirthsdeaths.pdf> (accessed 26 February 2019); & see Joint Press Release by Centre for Child Law, Lawyers for Human Rights, the Scalabrini Centre of Cape Town, the UCT Refugee Law Clinic, ‘Home Affairs to discontinue birth certificates for foreign children’ (14 November 2018) available at <http://www.lhr.org.za/news/2018/home-affairs-discontinue-birth-certificates-foreign-children> (accessed 13 February 2019).

<sup>332</sup> Dano Z ‘Controversy at proposal to discontinue birth certificates for foreign children’

IOL News 16 November 2018 available at <https://www.iol.co.za/capeargus/news/controversy-at-proposal-to-discontinue-birth-certificates-for-foreign-children-18142181> (accessed 13 February 2019); Mabuza E ‘Foreign-born children should not be deprived of birth certificates’ Sunday Times News 15 November 2018, available at <https://www.timeslive.co.za/news/south-africa/2018-11-15-foreign-born-children-should-not-be-deprived-of-birth-certificates/> (accessed 13 February 2019); Joint Press Release by Centre for Child Law, Lawyers for Human Rights, the Scalabrini Centre of Cape Town, the UCT Refugee Law Clinic, ‘Home Affairs to discontinue birth certificates for foreign children’ (14 November 2018).

In the case *Naki & Others v Director-General: Department of Home Affairs and Another*, a claim for a birth certificate for a child born in South Africa from a South African citizen father and a non-South African mother was brought, which was initially rejected by the DHA, citing the Regulations on the Registration of Births and Deaths of 2014. The court held that the provisions of the Regulation are unconstitutional vis-à-vis article 28(1)(a) and (2) – the right to name and nationality as well as giving paramountcy to the child’s best interests – and that former jurisprudence that preclude access to birth registration are invalid.<sup>333</sup>

In general, independent migrants in South Africa do not have access to social services for reasons that include lack of documentation of any sort, such as nationality documents from their country of origin.<sup>334</sup> They also face a lack of cooperation and support from officials in South Africa in accessing documents and social services such as education, health care and social security services.<sup>335</sup> The lack of documentation poses difficulties for experts working with children, particularly social workers to extend services for lack of any sort of identification and not knowing the exact status of the child.<sup>336</sup> Accessing identification documents in South Africa is attached to citizenship status, so any foreign national is not qualified for such document.

Due to their exceptional circumstances, independent adolescent migrants are highly affected by these requirements. In general, ‘without any document that legalises their stay in the country, such children remain unrecognised in the country, and this becomes an automatic exclusion from other forms of rights, leaving them exposed to different forms of exploitation and abuse’.<sup>337</sup> Furthermore, due to lack of documentation and inability to access services legally, independent adolescent migrants in South Africa try to earn a living by undertaking work in hazardous, clandestine and dangerous situations that are out of the reach of the government regulatory agencies.<sup>338</sup> In practice, for children without any documentation, the court’s placement order is taken as evidence of an identification document, which also enables children to access public service. Nonetheless, this alternative to identity documentation does not extend a right to stay in the country.<sup>339</sup>

Migrant children face multiple problems in South Africa, such as the risk of exploitation, violence and abuse due of lack of appropriate measures to deal with their high number, lack of disaggregated data, ineffective implementation of the laws and policies, and lack of legislation to allow children to permanently settle in South Africa as a durable solution, which is resulting in

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<sup>333</sup> *Mzileni Lawrence Naki, Dimitrila Marie Ndovya Center for Child Law v The Director of the Department of Home Affairs The Minister of Home Affairs* High Court, Eastern Cape, case 4994/2016 (2018) para 33-39.

<sup>334</sup> Mathe M (2018) 46.

<sup>335</sup> UN Committee on the Rights of the Child (CRC), Consideration of reports submitted by States parties under article 44 of the Convention, Second periodic reports of States parties due in 2002: South Africa, 17 March 2016, CRC/C/ZAF/2 para 324 available at <https://www.refworld.org/docid/57aafaa74.html> (accessed 21 June 2019).

<sup>336</sup> Mathe M (2018) 51.

<sup>337</sup> Mathe M (2018) 40-1.

<sup>338</sup> Mathe M (2018) 41.

<sup>339</sup> Scalabrini Center Cape Town (2019) 11.

the deportation of children, particularly independent migrants.<sup>340</sup> This concern is particularly grave for independent adolescent migrants due to their specific interest in working and earning money and therefore staying in the country in search of a better future. The complex procedures and proceedings are also cumbersome for these children as there is no law or policy to accommodate the interest of such children to work, to earn a living, to move freely, and to stay in the country to make a better living and future for themselves and their loved ones back home.

### **5.3.6 Comparative Elements in Relation to Ethiopia and South Africa**

Although Ethiopia and South Africa are not selected for a comparative study per se, rather purposively chosen as a representative of a classical example of a sending country and a receiving country for the three-tier analysis, a brief discussion on comparative elements may give a more comprehensive picture of the normative framework and protection mechanisms available to independent adolescent migrants and the gaps that exist.

Both countries have a good track record of ratifying international and regional human rights instruments as well as ILO labour standards. These standards are fairly reflected in their respective legal systems through domestic laws and policies. However, as the peculiar needs of adolescent independent children are not adequately reflected under the international and regional standards, similar approaches are taken by the domestic laws of Ethiopia and South Africa.

In both jurisdictions, there is no explicit recognition for independent adolescent migrants in their normative frameworks. Although in their legislative frameworks, the most common terminology of unaccompanied and separated migrant children exist, this is just a mere reference to children moving alone without outlining any specific recognition of their peculiar needs.

In Ethiopia, the freedom of movement of adolescent migrants is regulated under the general immigration rules or child related laws without any distinct mechanism. In general, irrespective of age and the level of maturity, adolescents who are independent of their parents are not allowed to legally move out of Ethiopia. Although generally not a migrant source country, South Africa takes a similar approach by requiring adolescents who wish to move across borders to acquire formal consent of their parents and ensure that there is a person that receives them in the destination country.

On the receiving end, subject to the general entry requirements as applicable under the Immigration Proclamation, irrespective of age, a child may enter Ethiopia independently of an adult if there is a person who would be responsible to cater for him or her in the country. Similarly, although the South African Immigration Act does not provide modalities for adolescents to travel alone to South Africa, the Immigration Regulation of 2014, by interpretation, provides that any ‘unaccompanied minor’ may regularly travel into South Africa

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<sup>340</sup> CRC Committee ‘Concluding observations on the second periodic report of South Africa’ para 62.

by fulfilling certain requirements such as bringing sworn permission from parents to travel, and formal documents of the receiver in South Africa.

Migrants' and asylum seekers' accommodation schemes in the two countries are different. South Africa adopts an out-of-camp arrangement for adult refugees, and shelters for young migrants including adolescent migrants under the age of 18 years. Ethiopia, on the other hand, has exclusively adhered to encampment for all persons in the context of migration irrespective of status and age. Since 2019, the country revised its law to progressively allow refugees and asylum seekers to live out-of-camp by fulfilling certain criteria. Further, the Ethiopian refugee law has moved from just a mere refugee administration and status determination legal framework to a rights-based refugee administration and protection framework. Despite the recognition of a wide range of rights including freedom of movement and the right to work, adolescent focused right-based entitlements are still missing from the new law.

In Ethiopia, the policy frameworks, strategies and organizational SoPs are better equipped to recognise certain aspects of the peculiar needs of independent adolescent migrants. Some of these are allowing independent living arrangements and engagement in decisions affecting their lives, although this does not guarantee final outcomes on durable solutions. On the contrary, the South African migrant protection mechanism is significantly reflected in State's legislative and regulatory frameworks.

In terms of adolescents' work, the current Ethiopian labour Proclamation increased the minimum age of employment to 15 years, which makes it similar with the South African Basic Conditions of Employment Act. Regarding the employment of adolescent independent migrants, in both countries, there is no explicit recognition or prohibition. In Ethiopia, although the new refugee law provides three main sectors that are open to engage refugees, in similar terms as the 1951 Refugee Convention, it is vague if adolescent migrants above the age of 15 years-the same as their Ethiopian counterparts-are allowed to pursue livelihood opportunities. Although South Africa is labelled as one of the strongest economies in Africa, unemployment is still one of the major challenges for the youth, which also transcends to adolescents and youth migrants. De jure and de facto restrictions exist that preclude adolescent migrants from accessing employment opportunities. Practically, as independent migrant children are accommodated in care centres, they would not be allowed to go out to work.

In both countries, the four cardinal principles are directly and indirectly recognized in different laws ranging from their constitutions to other subsidiary laws– but not necessarily contextualised for migrant children as well as independent adolescent migrants. Among the four principles, the principle of the best interest of the child is by far the most recognised principle in laws and policies dealing with children. Especially for adolescent independent children, adequate interpretative guidance on how the principle of respect for the view of the child, how it should be understood for adolescents in the context of migration, and the extent to which it should inform and influence any final decision on a durable solution should be devised in both countries



as there is not clarity. Exceptionally, in Ethiopia there are some exercises taken by non-governmental organizations through non-binding procedures such as SOPs for child refugee case management systems which refer to the best interest of the child and the respect for the views of the child. On the other hand, although South African legal system has rich jurisprudence in the interpretation of a variety of human rights including child rights, there has not been a case regarding the interpretation of cardinal principles of children's rights. This is particular to the best interest of the child and respect for the views of the child in the context of migration in general, and independent adolescent migration in particular.

As outlined by Bhabha, the three fold approach to deal with independent child migration - corrective, regulatory and protective approaches discussed under Chapter 3 - are employed in South Africa and Ethiopia. However, a novel approach that specifies the peculiar needs of adolescent independent children within these approaches has not been devised in these countries.

## 5.4 Conclusions

The chapter examined the normative frameworks of Ethiopia and South African, which are pertinent to an investigation into how the rights and interests of independent adolescent migrants are recognised and protected. In line with the definition of independent adolescent migrants adopted for this thesis, such groups of migrants are not explicitly recognised as groups with distinct characteristics and needs in need of special protection under the Ethiopian and South African normative frameworks. Rather, they are implicitly categorised between children and youth, which puts them in legal vacuum.

Ethiopia as both a source and destination country has been embarking on legislative and policy amendments pertinent to the movement of persons. However, the focus is on refugees on the receiving end and on the prevention of irregular migration and fostering of regular labour migration to Middle Eastern countries as a source country. The intra-regional migration within Africa is often understated in the migration discussion in the country. Furthermore, the issues of child migration in general and adolescent migration in particular and of having an appropriate protection modality at the national level are often neglected, with all the interventions, both *de jure* and *de facto*, being led by non-governmental actors. The various strategies, guidelines and SOPs of the UNHCR and other NGOs are a good illustration of this.

As in previous chapters, the discussion took the approach of choosing a selection of rights that are contentious but pertinent to independent adolescent migrants, that is, freedom of movement across borders and the right to work. In this regard, the Ethiopian normative framework provides provisions that may be relevant to adolescent's right to movement across borders. It was found that adolescents have both *de jure* and *de facto* restrictions to move independently of parents or adults out of Ethiopia, such as identification card and passport restriction. Hence, they are either forced to use forged documents or forced to irregularly move out of the country. Even to enter the country, adolescents should fulfil immigration rules that are based on the assumptions that all

children under 18 years irrespective of different category of age should be accompanied by parents, legal guardians or designated adults. Furthermore, they should fulfil the requirement of having a person receiving them in Ethiopia.

With regard to adolescents' right to employment in the context of migration, the general minimum age for work is 15 years. In the public sector, although the minimum age is 18 years, a lower age may be accepted in line with the Directive of the Public Service Ministry, which has not yet materialised. Looking at the newly adopted refugee law, it is progressive in recognising the right to work for refugees and in out-of-camp arrangements subject to certain criteria. Despite this progressive approach, the new law does not deal with the independent migration of children and adolescents. Due to the absence of an explicit provision as to whether independent adolescent migrants – if they possess recognised refugee or asylum-seeker status – have the right to work, the situation is vague. As such, reference should be made to other laws of the country that regulate employment relationships in the formal sector and self-employment through trading and small business. The informal sector, especially small trading and services, is little regulated in Ethiopia. The Ethiopian employment law explicitly provides that employment in the public sector as well as performing conventional work in the labour sector is restricted to Ethiopian citizens. As a special law dealing with refugee issues, the new refugee law should have provided a provision to such effect. In the absence of such explicit provision in the special law, it is arguable that independent adolescent migrants in general are precluded from undertaking work – as the employment laws applies only to citizens.

Evidence of the paradigm-shift in the migrant and refugee accommodation policy in Ethiopia is the formal recognition of the right to birth registration and issuance of certificate for recognised refugees and asylum-seekers including independent adolescent migrants. The amendment law on vital events registration also allows the retroactive issuance of birth certificates, which is crucial for adolescent migrants from Africa, who mostly lack any form of documentation.

In the case of the interpretation of the four cardinal principles, particularly the best interests of the child and the right to express views and be heard, the normative frameworks do not provide contextualised interpretation for the rights and interests of adolescent independent migrants. The only exception where context-based recognition of the principle of the best interests of the child and child participation exists is in soft guidelines in the form of SOPs with limited scope of application. The interpretation given by courts is restricted to adoption, custody and guardianship cases, with no reference to the issue of migration in general. The administrative process is *prima facie* refugee status determination and the decisions on care options are mostly predetermined with no place for thorough interviewing of adolescents to properly determine their interests and future plans.

The analysis of the normative framework of South Africa is used to show how the normative framework of a richer country in Africa attractive to economic migrants accommodates the rights and interests of independent adolescent migrants. It is found that the laws are progressive in

recognising different rights of migrants including the right to move freely within the Republic as out of camp policy is administered. However, this general right to move freely within South Africa is not applicable to adolescent migrants, as all of them, after having been identified and brought before a children's court, are accommodated in CYCCs.

The right to move freely across borders, including the right of adolescents to freely move into South Africa, is not clearly provided under the Immigration Act. The Immigration Regulation in this regard provides that unaccompanied migrants may regularly travel to South Africa if they fulfil certain criteria that include having proof of a person accepting him or her in the Republic. Independent adolescent migrants from another African country may find it impossible to fulfil the immigration requirements to regularly enter to South Africa. It should be acknowledged that even in the international and regional jurisprudential development of the right to freedom of movement, the right is deemed an incomplete right as it does not confer an automatic right of a person to enter a country and a corresponding duty to allow a person to enter into the receiving country. This general requirement applies to all persons irrespective of age. However, there is a stricter requirement for adolescents, as they are deemed children in need of protection. Hence, the only option they may have is to move irregularly, hoping to get refugee status by claiming that they have fled in search of refuge from persecution or other forms of violence, which is far from the real reasons of economic deprivation that commonly drive migrancy. Although it is the case that those who move irregularly are ensured entry to the Republic and are categorised as children in need of protection, the rights granted do not include the right to work – which is one of the wishes of these children – because the laws and policies of South Africa do not explicitly allow adolescent migrants to work.

The other important right enabling adolescent migrants to be recognised as 'persons' is the right to access birth registration and documentation, which are requirements for accessing services. Generally, birth registration and issuance of certificates and other identity documents is very low for migrant children compared with the overall national census and statistics. Although in practice the initial registration or court registration enables access to social services, given its fundamental importance for being formally recognised as a 'person' found in the Republic, enhancing access to registration and documentation is vital and the rights of adolescents so demand it.

From the discussion above of general substantive rights, the four pillars of child rights – particularly giving priority to adolescents' best interests and the right to express views and be considered seriously – appear to be in peril, as the needs of these adolescent migrants are far from being decided upon in their best interests. While any intervention should be guided by consulting these children and seriously considering their wishes, what has been done so far is pre-determined consideration of best-interests in the context of adolescent migrants which is anchored in providing social services until durable solutions such as family reunification, return to country of origin are undertaken.



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## CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

In each chapter, conclusions were given, and hereunder the summary of these findings, along with recommendations, are provided. This research was conducted with the overall objective to see if, under the international, African regional and domestic (Ethiopian and South African) normative frameworks, independent adolescent migrants as defined in this thesis<sup>1</sup> are provided with adequate recognition and protection based on their interests, needs and wishes. This three-tier evaluation entails a comprehensive analysis seeking to better understand the issues involved. This research aimed in particular at answering the questions of (1) whether the existing international and regional normative frameworks adequately address the freedom of movement and right to work; (2) how the fundamental principles of child rights are interpreted and applied in the context of adolescent migration and vis-à-vis competing interests such as state sovereignty; and (3) if the domestic laws of Ethiopia and South Africa are compatible with international and regional norms, and if so, if there are any best practices that can be replicated in other jurisdictions as well as inspire regional mechanisms.

The thesis discussed, as a foundation, a number of theories on the factors underlie the continuation of migration. The causes of migration may be summarised as economic and developmental variation between countries; political and ideological ties; globalisation and modernisation processes; and individual interests arising from socio-demographic factors such as age, gender, education and qualification; and societal and familial efforts to mitigate market failures and household shocks and risks.

Theories such as migration network theory hypothesise that migration persists thanks to linkages that are created between those who have already migrated, potential migrants, and their families – linkages that minimise the cost of migration, mitigate risks in the journey, provide information, and facilitate swift settlement in the destination country. It was found out that, except for trivial mentions in neoclassical micro theory and in Lee's account of push and pull factors, such theories do not adequately conceptualise the age dimension of migration, particularly in regard to the concerns of adolescent migrants, who as a group have distinct interests and capabilities.

Much of the literature as well as most of the normative frameworks use the term 'unaccompanied children' to include this group of persons, yet it does not necessarily lead to a precise categorisation of independent adolescent migrants per se as defined in this thesis. The term

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<sup>1</sup> This refers to children aged between 15-18 years who have chosen to move from their home country across borders to search for better livelihoods and opportunities such as employment, vocational or skill training, education, better income, better living standards, and a better future; and who travel independently of parents, legal or customary guardians (but not necessarily other adults), and live at their destinations without parents or legal/customary guardians (but possibly with another adult who may also be a relative). It does not refer to trafficked children (victims of exploitation) or those moving due to fear of persecution (refugee children).

‘unaccompanied children’ is a generic designation given to all children who in the context of migration are travelling without their parents, caregivers, or legal guardians but not necessarily adults. The criteria are, first, whether accompanied or not and, secondly, being a person below 18 years; as such, they do not take into account any differentiation in age, role in the migration process, demonstration of agency in taking decision and undertaking the journey and their future plan. Therefore, migration theorists should adequately conceptualise, through empirically grounded studies, the age dimension of migration with a particular focus on adolescent migration. Furthermore, the individual child’s choices, wishes and interests ought to be recognised in law and practice. In the current context, international and regional child-rights norms should take into account such distinct interests in the context of migration when dealing with children’s migration in general and that of adolescents in particular.

The ideological, cultural, legal and practical understanding of children brought about varied approaches to children’s rights: that is, ‘paternalism’, ‘liberalism’, ‘welfare’, and ‘emancipation’. These schools see children as having different capabilities and grant protection and autonomy to a varying degree. For paternalists, children are dependents that should be provided with protection and care by others. By contrast, liberationists understand children as complete and rational beings who are capable of full autonomy. The welfare approach sees children as persons in the process of development who should be granted autonomy progressively as they show the necessary competence. In an opposing perspective, the emancipatory approach asserts that children are capable and autonomous beings who should be treated otherwise only if they demonstrate incapability.

From these differing premises, differing views arise as to how children’s rights should be understood and applied to various age groups. For Hanson, the international legislative framework providing for children in dire situations (such as children in armed conflicts) is grounded in protectionist rather than emancipatory notions. Similarly, Archard argues that the CRC and ACRWC are based on paternalistic ideas.

The author of this thesis argues that, with older children such as adolescents between the ages of 15-18 years, their rights to agency and emancipation should prevail over any other competing claim unless there are reasons to the contrary. The author also argues that it is obsolete to categorise all persons under the age of 18 as children. Furthermore, arbitrarily viewing childhood based on chronological age, effort to shape every child of the globe- especially African child- based on the needs, interests and wishes of the perfect Western child has been one of the main reasons behind the limited realisation of international, regional and national laws on children.

From among the perspectives of agency discussed in the second chapter, ‘tactical agency’ is taken as a form of agency relevant to independent adolescent migrants. The author argues that, based on the needs, interests and capabilities of independent migrant children, a special form of agency may be crafted by building on the notion of ‘tactical agency’. Hence, a blend of granting

agency as well as recognition of special and contextualised selective rights from the CRC and other instruments may serve the interests of adolescent migrants and extend adequate protection.

Although the ideological, cultural, philosophical, developmental disciplines on adolescents argue otherwise, adolescents in the current international normative standards are categorised as vulnerable children in need of need protection. In this regard, the CRC, which is directly applicable to adolescents, does not explicitly provide different categories of rights for different age groups of children. In the case of independent adolescent migrants, their peculiar capacities, interests and needs in general and their right to move freely across borders and right to work in the context of migration, are not explicit under international law – particularly so under the CRC. Rather, the focus of international norms is to extend automatic protection to independent migrant children through a predetermined categorisation that all children – including adolescents – are vulnerable in the migration process. Although the vulnerabilities of children in general should not be denied, the extent of their vulnerability differs according to their age category. Adolescent children, in this regard, may be categorised as less vulnerable than children in lower ages or developmental levels.

The secondary data analysis shows that most of the reasons that adolescents migrate are economic in nature as opposed to political or grounded in fear of persecution. Hence, in the existing scenario, children moving for economic reasons may not qualify for refugee status under the 1951 Refugee Convention. However, there are arguments for employing human rights, child rights and economic deprivations of children as an approach to determine what constitutes grounds of ‘persecution’ under the Refugee Convention. In particular, in the context of children, the CRC Committee held that there should be child-specific grounds of persecution for refugee-status determination. The author recommends that, based on an empirically informed understanding of the needs, characteristics and situation of adolescent migrants, there should be a tailor-made interpretation of the criteria to grant status and protection to this groups of persons.

The other issue that is closely linked with the right to move in the context of adolescent migration is whether they have a right to work in the host country. Children’s work may be allowed subject to fulfilling a certain age, condition and types of work under international labour law as well as CRC. However, it may be argued that there is no general recognition of the ‘right to work’ for children in general and adolescents in particular. The international labour law provides different age categories for permissible work, based, among other things, on the economic performance of a country. The central problem here is not only the right of children to be involved in permissible work but the granting of the right to work in such permissible activities to adolescent migrants in line with their interests and needs. Due to the absence of explicit rights and lack of regulatory laws, independent migrant children have been facing exploitative labour practices due to, among other things, lack of appropriate documentation, lack of regularised status in the host country, and the clandestine nature of the employment arrangement.

In the context of Africa, the plight of child migration and adolescent independent migrants is becoming a major regional issue, with Africa having the highest proportion of adolescent migrants relative to the total migrant population. So far most of the policy and legislative interventions at regional and sub-regional levels focus on prevention of irregular migration and trafficking from Africa to other continents through effective prosecution because they have been sponsored by external actors such as the EU. This approach has had little to no impact in reducing the number of migrants even though it has been making the migrants' journey very risky. In general, African regional and sub-regional migration policy directions and initiatives fail to promote intra-regional movement of persons.

Within the AHRS and other regional and sub-regional arrangements, the issue of freedom of movement of individuals has become a major continental issue, with legislative steps to foster free movement of persons having been taken. The free movement of persons within the African continent that was envisioned in the Abuja Treaty in 1991 became tangible with the adoption of the African Protocol to Free Movement of Persons in 2018. Nonetheless, given the paradigm-shift in the cross-border movement of independent children and adolescents, the issue of children and adolescents is not taken as a major agenda in most of the legal and policy documents pertinent to freedom of movement. As an exception, the MPFA (2018-2030) regards, at least in general terms, the issue of adolescent migration as a cross-cutting policy issue.

Some of the RECs such as ECOWAS took the agenda of free movement of persons seriously and have been taking concrete steps way before the African regional institutions. Despite this, the issue of solitary cross-border movement of children in general and independent adolescent movement in particular has been overlooked. As a young continent with a median age lower than 18 years, it is expected that most of the persons that would be moving across borders in accordance with the sub-regional and regional free-movement scheme would be adolescents. Hence, there should be a regional mechanism to move away from the traditional legal conception of allowing only persons above the age of 18 to move legally across borders independently by accessing travel documents.

Furthermore, granting the right to movement across borders to adolescents in Africa should be seen not from a legalistic perspective but a human- and child-rights dimension. It may be illogical to argue that adolescents should be just liberated from being treated as children and be granted full right and duty as adults but rather to emancipate them to exercise some rights where they show competence. In this regard, the author argues that through some form of special agency such as 'tactical agency', adolescents should be granted some autonomy to exercise some rights as well as be granted basic rights that have been granted to children. For instance, adolescents may be treated as autonomous and capable to move across borders legally. Within the refugee protection system and child-specific areas of persecution, the international and regional systems should also come up with adolescent-specific grounds to grant asylum and refugee status. While adolescents are going through the asylum process, they should also be



granted a right to work if they wish to undertake remunerated work. As the current ILO conventions stand, they do not prohibit adolescents from engaging in work per se but rather in exploitative and hazardous work. Hence, adolescent independent migrants, in the same way as with other adolescents in a given country, should be allowed to take up work.

In the current international, regional and national legal frameworks, adolescents are categorised as children and their rights frameworks may be interpreted to apply to their needs and rights. In line with this hypothesis, the fourth chapter discussed how the core principles of children's rights (the principle of non-discrimination; the best interests of the child; expression of views and being heard; and the right to life, survival and development) are interpreted in the context of independent adolescent migrants. These four principles infuse the entire application of the CRC and ACRWC.

The CRC Committee, and to a limited extent the African Committee of Experts, has been providing contextual meaning to these principles, depending on particular situations and groups of children. Until the advent of General Comment No. 6 in 2006, the issue of independent migrant children was not among the focus areas of the designers of international and regional legal and human rights instruments. Currently, the most comprehensive guidance on how the four cardinal principles should be interpreted in the context of international migration comes from the joint General Comment of the CRC Committee and the Committee for the Protection of Migrant Workers. The joint General Comment may be considered a fusion of the existing fragmented interpretations on the rights and interests of migrant children that were found in different general comments, advisory opinions, UNHCR guidelines and concluding observations of the CRC Committee, and other treaty bodies. Although pertinent interpretative guidance may be identified in the joint General Comment in regard to adolescent independent migration, given the peculiarities and corresponding interests of these groups, the existing guidance is inadequate.

The principles of non-discrimination and the right to life, survival and development are cross-cutting. Even the limited references to the migration of children in the CRC and ACRWC focus on the provision of social services to all children – because the rationale for their protection is their vulnerability, their being in dire situations, their being mostly forced or tricked into migrating, and their being in need of social services without discrimination.

Among the fundamental principles, the right to express views and be heard and the best interests of the child are particularly important to independent adolescent migrants. First, the best interests of the child cannot be ascertained without allowing the adolescent to express his views freely and have them seriously taken into account in final decisions. Secondly, the best interests of the child should not be a predetermined and one-size-fits all arrangement. A case-by-case determination of best interests is possible only through individual assessment which is intrinsically to the child's free, active and meaningful participation and which, in the final decision, reflects his or her wishes as expressed by he or she him- or herself. The interpretative guidelines discussed in this

study appear to leave substantial room to the experts involved to determine the best interests of adolescent migrants. In this regard, Bhabha asserts that ‘the best interest calculation is made by adults on behalf of the child, [h]owever, it is a paradox that unaccompanied migrant children mostly make the best interest decision and migrate by themselves without consulting adults’.<sup>2</sup>

It is understandable that the dynamic nature of the principle may not allow the setting of an objective standard. Even setting an objective standard may go against the best interests of any individual child as every individual has his or her own distinct interests based on the context as well as his or her experience. However, the subjective requirements should only be applicable to the child’s interest but not be used as an opening for adult experts or the State to make any arbitrary decisions.

In the African regional child-rights frameworks, in the context of children’s migration the focus is given to birth registration over other rights as well as the applicability of the four cardinal principles. Still, the issue of birth registration seems to be seen from the perspective of parents or legal guardians, which may be the result of the misconception that children are subordinate to parents or other adults in the context of migration.

The third tier of evaluation, which relates with the last research question, is the investigation of the laws of Ethiopia and South Africa from the perspective of international and regional norms. Ethiopia is selected to represent a source as well as destination country and South Africa, a destination country. Within the scope of the definition adopted under this thesis, both the Ethiopian and South African legal and policy frameworks do not have a distinct protection regime for independent adolescent migrants and fail to explicitly recognise the interests and rights of such groups in their different laws.

With regard to the right to movement of adolescents, the Ethiopian normative frameworks, specifically the child provisions scattered in different bodies of law as well as the immigration rules and refugee law, do not have any direct implications and applicability for lack of any explicit permission or prohibition of this group from moving across-borders independently. Regardless of such absence, the practical requirements for travel – a passport and other travel documents – may be accessed independently only by persons above the age of 18 years. With the consent of parents, and with travel documents acquired by parents, a person under the age of 18 but above 12 years, may be allowed to travel out of the country if he or she fulfils the visa and other entry requirements of the destination country.

With regard to employment of independent adolescent migrants, the Ethiopian employment laws are applicable exclusively to Ethiopian nationals, with the exception of foreigners with special expertise. Migrants in general and recognised refugees and asylum-seekers in particular were until 2018 not allowed to undertake any remunerated activities in the country. The status quo was

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<sup>2</sup> Bhabha J *Child Migration and Human Rights in a Global Age* (2014) 204.

transformed with the new Refugees Proclamation No. 110/2019, which permits refugees and asylum-seekers to be employed as well as undertake their own remunerated activities. However, even though this law allows for the general right of refugees and asylum-seekers to work, the minimum age of employment as well as the specific criteria and conditions under which adolescent independent migrants may undertake work are not covered.

In case of overseas employment of Ethiopian adolescents, the applicable Proclamation No. 923/2016 is silent on whether young persons above the age of 15 – as in the new Ethiopian labour Proclamation No. 1156/2019 – would be allowed to undertake work abroad. In such absence, in line with the labour law, it may be argued that persons above the age of 14 may be recruited for overseas employment. This may only be prohibited in case an element of trafficking in person as in Proclamation 909/2015 is considered to exist.

As in the international and regional normative frameworks, adolescents are still considered children in need of protection. The Ethiopian legislative framework follows a similar approach. Ethiopia does not have a consolidated children's law; instead, as noted, child-related provisions exist in different bodies of law. Except for the principle of the best interests of the child – which is explicitly provided for in the same terms as under the ACRWC – the other fundamental principles are not explicitly acknowledged under the Constitution. The Revised Family Law is the only subsidiary law to recognise the principles of the best interests of the child and child participation – for adoption, custody and assignment of guardians and tutors. Non-discrimination and the right to life, survival and development may be established indirectly through interpretation of different provisions. The practice of the First Instance Courts of Ethiopia in adopting the best interests of the child and child participation in court cases is commendable and open to replication through contextual interpretation and application in different child- and adolescent-related interventions. To fill the current legal vacuum regarding the protection of independent migrant children, measures could include harmonisation via a comprehensive child law and using the Supreme Court Cassation Bench's mandate to hand down decisions on child migration issues, with such decisions having the power of precedence over other laws and decisions.

The laws of Ethiopia that are pertinent to child migrants in general and independent migrant adolescents in particular do not contain systematic interpretation of the four cardinal principles or take a child-rights approach to dealing with concerns of these groups. Contrary to the laws, children- as well as migration-related guidelines, policies, strategies and SOPs have been recognising such principles. It was found that the non-legal documents of the government as well as inter-governmental organisations and NGOs such as UNHCR and Save the Children lean towards child-rights norms and a child-friendly approach to dealing with the issues of migrant children and independent adolescent migrants. For instance, the SOP for Addis Ababa has moved away from the traditional protection modality and recognised that adolescent migrants may live independently if their best interests so demand. The promotion of vocational and skills training that would prepare them for work is also recognised in such documents. This may be

taken a good lesson and one that could inspire similar regional, sub-regional and national interventions for the effective and appropriate protection of independent adolescent migrants.

Another paradigm-shift in the context of refugees and asylum-seekers, one that occurred even before the adoption of the new Refugee Proclamation, was granting access to birth registration and documentation. In this regard, the Vital Events Registration Amendment Proclamation No. 1049/2017 not only grants access to the registration of vital events but also enables retroactive issuance of documentations based on bio-data and the testimony of the refugee or asylum-seeker. This is a fundamental step for recognising migrants as persons before the law and enabling them to access social services and benefit from the application of the Refugee Law, which allows for a broad spectrum of rights including the right to move freely within borders and the right to work.

South Africa is the other classical African migrant destination selected for study, one which has also been implementing out-of-camp arrangement for migrants. South African is recognised for its advanced laws on child rights as well as migration, as well as for interpreting its constitutional and other laws progressively in line with international and regional standards.

With regard to the free movement of adolescent migrants, especially in relation to entry to the country, the Immigration Act is silent on the matter but the Immigration Regulation of 2014 provides the criteria for an independent child to travel to South Africa regularly. The criteria indicate that consent of parents or legal guardians as well as the details and willingness of the receiver of the person in South Africa should be presented. This means adolescents may not be able to independently access the immigration system without the involvement of adults – to send him or her from the source country as well as receive him or her in South Africa.

The non-refoulement principle in the Refugee Act of 1998 is provided in similar terms as in the African Refugee Convention as it prohibits refusing entry of migrants to South Africa. This is fundamental to independent adolescent migrants, who may seek protection due to situations defined by the 1951 Refugee Convention and African Refugee Convention. Furthermore, once independent adolescent migrants ensure entry, they may present their case to courts of appeal and administrative bodies using progressive interpretations of migrant rights based on human rights principles.

In case of securing employment, there are both *de jure* and *de facto* challenges for adolescent migrants in securing employment in the formal setting. The Basic Conditions of Employment Act provides that children above the age of 15 years may work in selected sectors, but such privilege is not explicitly provided for adolescent migrants. The practical challenges relate to the high unemployment rate in South Africa, which may also preclude migrants from securing employment in the formal setting. The only option for them is to opt for private undertakings and small business – in this regard, the Constitutional Court affirmed that refugees have the right to work and undertake business. The Children's Act in this regard takes a merely protectionist approach in keeping adolescent migrants in care arrangements, as they are considered as children

in need of care and protection. Independent adolescent migrants do not want to be kept in child-care centres but rather want to fulfil their aims that in the first place pushed them to migrate, which includes working and earning money to change their future and support their families at home.

As in the international and regional normative frameworks and in many jurisdictions including Ethiopia, the South African legislative framework treats adolescents as children who are in need of protection due to their vulnerability, that is, it takes a protectionist approach. Although the Children's Act recognises the four cardinal principles, particularly the best interests of the child and child participation, there is no specific approach to dealing with older children such as adolescents.

The guiding principles provided as relevant in adoption, custody, court hearing and care and protection options but not specified in case of adolescents protection as well as independent adolescent migrant's situations. In such context, the Children's Act only provides protection of children in difficult circumstances without any alternatives and context-based determination of the protection, best-interests determination and durable solutions. For independent adolescent migrants who wish for an alternative treatment, who wish to work, stay in the country and travel outside, the law as it is does not accommodate any other interests. The only options may be to be kept in temporary care arrangements; subsequently, in cases where the court finds that they do not qualify for refugee status as per the ordinary meaning of the law, they are returned to their country based on family reunification, and return as the primary durable solutions.

South Africa has nearly universal birth registration and issuance of documentations for its citizens, but its performance in regard to migrants is inadequate – more than half of unaccompanied migrants in South Africa are without birth registration and any form of documentation. Although the court's placement order may be taken as an identity document enabling access to social services, this may not be taken as formal recognition of identity, registration and documentation for migrant children in South Africa. As a fundamental right by itself as well as a key to exercising other rights – as in Ethiopia – migrants in South Africa should be allowed to access registration modalities and receive documentation, a measure that should include retroactive issuance of documentation based on bio-data, testimony and/or scientific assessment of children and adolescent migrants.

Independent adolescent migration has become a glaring reality and is anticipated to increase dramatically not only in Africa but throughout the world. Independent adolescent migrants can be seen as either an opportunity or a human-rights-protection disaster, depending on how a nation or a continent views them: an opportunity if they are properly managed by taking into account their characteristics, needs, interests and human rights; and a protection disaster if they are seen as threats and burdens that ought to be returned to their country of origin or any other place than their destination.

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