

ACCESS TO JUSTICE FOR CHILDREN: ERITREA

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Eritrea¹ ratified the CRC on 3 August 1994.² The 1997 Eritrean Constitution provided a dualist perspective of international law.³ However, following a statement by President Isaias Afwerki that the 1997 Constitution is a “dead document”,⁴ the status of international law in the Eritrean legal system is unclear.

B. Does the CRC take precedence over national law?

No.

C. Has the CRC been incorporated into national law?

No. However, Eritrea has passed some legislation to implement the CRC such as Proclamation No. 158/2007 aimed at abolishing Female Genital Mutilation, Proclamation No. 71/1994, Press Proclamation No. 90/1996, Labour Proclamation No. 8/1991 as amended by Proclamation No. 118/2001, the Public Sector Pension Scheme Proclamation No. 136/2003, and Goods for the Disabled Government Assistance Regulation Legal Notice No. 82/2004.⁵

D. Can the CRC be directly enforced in the courts?

No. Eritrean courts do not have the practice of enforcing the provisions of international treaties in support of their judgments. The assumption is that, in keeping with the requirements of the dualist approach, such international treaties have to be domesticated first before they can be cited by courts.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

No. See part I.D above.

¹ Comments on this report provided by the Eritrean Law Society (ELS), October 2015.

² *Harmonisation of Children's Laws in Eritrea*, AFRICAN CHILD POLICY FORUM, 3, <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Eritrea-Harmonisation-of-Laws-on-Children.pdf> (last visited Nov. 18, 2013) [hereinafter *Harmonisation*].

³ *Id.* at 3.

⁴ Radio Erena, ‘President Isaias calls the 1997 Ratified Eritrean Constitution a ‘Dead Document’’, available at

<http://erena.org/web-links/1128-president-isaias-calls-the-1997-ratified-eritrean-constitution-a-%E2%80%99%98dead-document%E2%80%9999>.

⁵ *Harmonisation*, at 3.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Insufficient resources exist regarding the ability of children or their representatives to bring cases in domestic courts challenging children's rights violations. Challenging government authorities in a court of law is not feasible in the Eritrean political system (see part V below).

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

A person deemed a "child" in the Civil Code of Eritrea has limited juridical rights. The Transitional Civil Code of Eritrea defines a "minor" as a person of either sex who has not attained the full age of 18 years.⁶ A child under the age of 18 is placed under guardianship and the juridical acts of the minor are restricted.⁷ A child can be emancipated at 15 years of age,⁸ and a child who is emancipated is presumed to attain civil majority.⁹ Therefore, it is likely that a person under the age of 18 would not be able to bring a case by themselves unless they were age 15 or older and legally emancipated.

The Committee on the Rights of the Child reported that the government of Eritrea made efforts to implement the principle of respect for the views of the child, especially in custody and adoption cases.¹⁰ However, the Committee also expressed its concern that sufficient legal provisions had not yet been implemented to guarantee the child's right to be heard in judicial and administrative proceedings that affect the child, and recommended that the government strengthen its efforts to guarantee this right.¹¹

C. In the case of infants and young children, how would cases typically be brought?

There is a lack of resources to adequately research this aspect of Eritrean law.¹²

D. Would children or their representatives be eligible to receive free or subsidised legal

⁶ *Id.* at 4 (citing Provisional Government of Eritrea, Proclamation No. 2/1991, The Transitional Civil Code of Eritrea, The Gazette of Eritrea Laws, Vol. 1/1991, No. 1/1991, 15 September 1991, Article 198).

⁷ *Id.* (citing Provisional Government of Eritrea, Proclamation No. 2/1991, The Transitional Civil Code of Eritrea, The Gazette of Eritrea Laws, Vol. 1/1991, No. 1/1991, 15 September 1991, Article 199).

⁸ *Id.* (citing Provisional Government of Eritrea, Proclamation No. 2/1991, The Transitional Civil Code of Eritrea, The Gazette of Eritrea Laws, Vol. 1/1991, No. 1/1991, 15 September 1991, Article 329, 330).

⁹ *Id.* at 4 (citing Provisional Government of Eritrea, Proclamation No. 2/1991, The Transitional Civil Code of Eritrea, The Gazette of Eritrea Laws, Vol. 1/1991, No. 1/1991, 15 September 1991, Article 328).

¹⁰ UN Committee on the Rights of the Child, *Concluding observations on the second and third periodic report of Eritrea*, CRC/C/ERI/CO/3, 23 June 2008, para. 30, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fERI%2fCO%2f3&Lang=en [hereinafter CRC 2008]; UN Committee on the Rights of the Child, *Concluding observations on the second and third periodic report of Eritrea*, CRC/C/ERI/CO/4, 8 June 2015, para. 28,

available at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ERI/INT_CRC_COC_ERI_20798_E.pdf.

¹¹ CRC 2008, paras 30-32.

¹² Luwam Dirar & Kibrom Tesfagabir, *Introduction to Eritrean Legal System and Research*, GLOBALEX, 4.4 (March 2011), www.nyulawglobal.org/Globalex/Eritrea.htm.

assistance in bringing these kinds of cases?

In civil and criminal courts, defendants have the right to be present and to consult with attorneys, but the government generally did not provide legal aid to indigent detainees.¹³

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

All legal and financial affairs of a minor are taken care of by a guardian or tutor.¹⁴ Both the terms “guardian” and “tutor” are used in Eritrean law, but an explicit distinction is not provided. Article 204 of the Transitional Civil Code of Eritrea gives both parents the power of guardianship for their minor children.¹⁵ If one parent dies, then the duty is left to the remaining parent.¹⁶ Article 207(1) gives parents the right to appoint a guardian upon their death.¹⁷ Article 207(2) limits the power of the guardian.¹⁸ Articles 241-242 give the Family Council the power to appoint guardians if the spouses divorce; if there is no close relative fit to be the guardian, then the court is authorized to appoint any person.¹⁹

III. How can children’s rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

The US State Department reports that there are no civil judicial procedures for individuals claiming human rights violations by the government.²⁰ The UN Human Rights Council’s Special Rapporteur on Eritrea reported that there is an absence of due process and a lack of institutions that would enable individuals to examine their complaints and uphold their rights.²¹

Individuals, including child victims, his/her parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as “communications”) to the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”) about violations of the African Charter on the Rights

¹³ Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Eritrea Country Report on Human Rights Practices- 2013*, (2013), available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220111#wrapper> [hereinafter 2013 *Eritrea Country Report*].

¹⁴ UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, para. 113 Doc. CRC/C/41/Add.12 (Dec. 23, 2002), available at: <http://www.refworld.org/country,,CRC,,eri,,3ecb93714,0.html> [hereinafter CRC 2002].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* para. 114.

¹⁸ *Id.* para. 115.

¹⁹ *Id.* para. 115.

²⁰ 2013 *Eritrea Country Report*, at 8.

²¹ Sheila B. Keetharuth, *Report of the Special Rapporteur on the Situation of Human Rights in Eritrea*, Doc. A/HRC/23/53, 38 (May 28, 2013), available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.53_ENG.pdf [hereinafter *Special Rapporteur*].

and Welfare of the Child (“African Children’s Charter”).²² All available domestic remedies must have been exhausted before bringing a case to the African Committee.²³ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.²⁴ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.²⁵

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).²⁶ All available domestic remedies must have been exhausted before bringing a case to the African Commission.²⁷ The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.²⁸ The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.²⁹ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples’ Rights.³⁰

B. What powers would courts have to review these violations, and what remedies could they offer?

²² African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), Article 44, available at:

<http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc/acerwc-charter-full-text/>

. For more information about communications, see:

<http://acerwc.org/the-committees-work/communications/>.

²³ African Committee of Experts on the Rights and Welfare of the Child, ‘Communications’, available at:

<http://acerwc.org/the-committees-work/communications/>.

²⁴ War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Committee of Experts on the Rights and Welfare of the Child: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

²⁵ Ibid.

²⁶ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at:

<http://www.achpr.org/instruments/achpr>.

²⁷ Ibid., Article 56(5).

²⁸ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

²⁹ War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Commission on Human and Peoples’ Rights: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

³⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, Article 5, available at:

<http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rules 84(2) and 118, available at:

<http://www.achpr.org/instruments/rules-of-procedure-2010>.

See part III.A above.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

There is a lack of resources to adequately research this aspect of Eritrean law.³¹

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Ethiopian Civil Procedure Code, upon which the Eritrean laws are based, states that when several people have the same interest in a suit, one or more of those people may sue or be authorised by the court to defend on behalf of or for the benefit of all interested persons.³² Any person for whose benefit a suit is instituted may apply to the court to be a party to the suit.³³

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

The Eritrean government closed all international NGO offices prior to 2012.³⁴ No independent civil society organisations exist in the country, and only those organisations which are government-operated or have official affiliations have capacity to investigate alleged violations of human rights.³⁵ United Nations operations are restricted in the country.³⁶

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

The formal judicial system in Eritrea is composed of two different court systems: the Regular Courts that entertain legal disputes based on the laws of the State, and the Special Courts consisting of specialized courts that do not apply the laws of the state to resolve disputes.³⁷ Community courts are also recognized by the government; they apply customary law to decide cases and apply simpler forms of the Transitional Civil Procedure Code of Eritrea 1965 and the Transitional Criminal Procedure Code of Eritrea 1961.³⁸

³¹ Luwam Dirar & Kibrom Tesfagabir, *Introduction to Eritrean Legal System and Research*, GLOBALEX, 4.4 (March 2011), www.nyulawglobal.org/Globalex/Eritrea.htm.

³² C. CIV. PRO. art. 38(1).

³³ *Id.* art. 38(2).

³⁴ 2013 *Eritrea Country Report*, at 17.

³⁵ *Id.* at 17.

³⁶ *Id.* at 17.

³⁷ Dirar & Tesfagabir, part III.

³⁸ *Id.* part III.3.3; Senai W. Andemariam, *Ensuring Access to Justice Through Community Courts in Eritrea*, INTERNATIONAL DEVELOPMENT LAW ORGANIZATION, 9 (2011), [HTTP://WWW.ISN.ETHZ.CH/DIGITAL-LIBRARY/PUBLICATIONS/DETAIL/?OTS591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&LNG=EN&ID=137066](http://www.isn.ethz.ch/DIGITAL-LIBRARY/PUBLICATIONS/DETAIL/?OTS591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&LNG=EN&ID=137066).

The Regular Courts are the Zonal and High Courts, which are courts of first instance and appellate courts.³⁹ The Zonal Court has jurisdiction over issues with a value of more than 50,000 to 250,000 Nafka in movable property and 100,000 to 500,000 Nafka in immovable property. Civil cases involving movable property of more than 250,000 Nafka or immovable property of more than 500,000 Nafka fall within the jurisdiction of the High Court.⁴⁰

The High Court has exclusive jurisdiction over cases that require a high level of expertise and sophistication such as habeas corpus, nationality, filiation, expropriation, and communal exploitation of property.⁴¹ The Zonal Court has jurisdiction over other civil matters that do not have monetary value, such as the dissolution of marriage.⁴²

In criminal cases, the gravity of the offense determines which court has jurisdiction. “Grave willful injury” offenses fall into the jurisdiction of the High Court, while “common willful injury” is within the jurisdiction of the lower courts.⁴³ The Special Court has jurisdiction over theft, embezzlement, and corruption.⁴⁴ It does not have to follow basic legal principles or the Transitional Penal Code, can reopen cases settled by the regular courts, decisions are final, and executive orders have abrogated the accused’s right to an attorney.⁴⁵

The Ethiopian Civil Procedure Code, upon which the Eritrean laws are based, provides that a suit against the state or a government department or agency may be instituted in the court of the place where (1) the resident resides, carries on business or personally works for gain, (2) the contract to which the suit relates was made or was to be executed, or (3) the act giving rise to liability occurred.⁴⁶ In practice, however, challenging government authorities in a court of law is not feasible in the Eritrean political system (see part V below).

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

The US State Department reported that in civil and criminal courts in Eritrea, defendants have the right to be present and to consult with attorneys, but for those without means, government legal aid is usually not available.⁴⁷

The Ethiopian Civil Procedure Code, upon which the Eritrean laws are based, provides that a person who does not have sufficient means to pay all or part of the court fee may be deemed a “pauper” and apply for leave to sue as a pauper.⁴⁸ If the plaintiff is

³⁹ *Id.* part III.1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Dirar & Tesfagabir, part III.2.1.

⁴⁵ *Id.*

⁴⁶ C. CIV. PRO. art. 21.

⁴⁷ 2013 *Eritrea Country Report*, at 7.

⁴⁸ C. CIV. PRO. art. 467(2). The costs associated with filing an application for leave to sue as a pauper are costs in the suit. *Id.* art. 479.

declared a pauper and succeeds, then the court fees and other fees are recoverable from the unsuccessful party.⁴⁹

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

There is a lack of resources to adequately research this aspect of Eritrean law.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

There is a lack of resources to adequately research this aspect of Eritrean law.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Whether a minor can give testimony in court is governed by judicial practice. It is up to the judge to determine whether a minor can testify with or without taking the oath.⁵⁰

The laws regarding testimony may differ when dealing with customary laws. Eritrean communities traditionally engage in local dispute resolution in accordance with their respective customary laws.⁵¹ Most of these laws are codified and date as far back as the 15th century.⁵² Customary law varies along ethnic and regional lines.⁵³ Therefore, the application of different customary laws may have a different outcome. For instance, *Fitihi Mehari Woadotat* customary law states that only adults can be witnesses, but the *Higy Adgena-Tegeleba* customary law says that a person who does not have a conflict of interest can be a witness if they are at least 7 years old.⁵⁴ Note, however, that the importance and application of such customary law in the procedural laws of regular Eritrean courts is nearly non-existent.

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Guidance to answer this question could not be found.

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Courts of first instance operate at the regional level.⁵⁵ Each party has the right to one

⁴⁹ *Id.* art. 38(1).

⁵⁰ CRC 2002, para. 72.

⁵¹ *Andemariam*, at 1.

⁵² *Id.* at 2.

⁵³ *Legal Research Guide: Eritrea*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/eritrea.php> (July 26, 2012).

⁵⁴ CRC 2002, 73.

⁵⁵ 2013 *Eritrea Country Report*, at 7.

appeal.⁵⁶ A community court decision can be appealed to the regional court, which will apply state law, even if the community court applied customary law.⁵⁷ A regional court decision can be appealed to the next appellate court.⁵⁸ If the appellate court reverses the regional court's decision, then the opposing party can appeal to the five judge upper appellate court. If the lower appellate court upholds the regional court's decision, then there is no second appeal.⁵⁹

The Special Court has jurisdiction to retry cases decided by the regular courts.⁶⁰ The Special Court's decisions are final.⁶¹

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

There are serious indications that any action taken against the Eritrean government could lead to severe backlash and repercussions. The Eritrean government severely restricts civil liberties.⁶² There are disappearances in Eritrea, including those detained for political beliefs, individuals suspected of evading national service, and those for whom there has been no identifiable charge.⁶³ Furthermore, there is evidence of torture and extremely poor detention conditions.⁶⁴ There are also reports that the Eritrean government has detained 5,000 to 10,000 suspected political opponents without charge.⁶⁵ Many people have been jailed for opposing the Government or its policies, including zonal administrators, community leaders, government officials, and citizens who pose questions or express criticism of the government.⁶⁶

There are also particular concerns for children involved in bringing challenges. Eritrea does not have a juvenile-friendly justice system. Under the Transitional Penal Code, the age of criminal responsibility is 12 years old, and the Draft Penal Code (if implemented) would lower the age of criminal responsibility to 9 years old.⁶⁷ Criminal responsibility means that children who are 12 years of age and older can be held responsible for their criminal actions; children under the age of 12 have no responsibility for the crimes they commit.⁶⁸

Under the Transitional Penal Code, the age of criminal majority is 15, and the Draft Penal Code would lower the age of criminal majority to 12 years old.⁶⁹ The age of criminal majority means that at the age specified under the law, the person is tried under the ordinary provisions of the Penal Code, rather than the laws specified for children between the ages of 12 and 15, who are criminally responsible for their actions, but

⁵⁶ *Id.*

⁵⁷ Dirar & Tesfagabir, part III.1.

⁵⁸ 2013 *Eritrea Country Report*, at 7.

⁵⁹ *Id.*

⁶⁰ Dirar & Tesfagabir, part III.1.

⁶¹ *Id.* part III.2.1.

⁶² 2013 *Eritrea Country Report*, at 1.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 8.

⁶⁶ *Special Rapporteur*, at 49.

⁶⁷ *Harmonisation*, at 4.

⁶⁸ CRC 2002, para. 74.

⁶⁹ *Harmonisation*, at 4.

have not yet reached criminal majority.⁷⁰

Additional concerns are that children between the ages of 15 and 17 are tried as adults, there is a lack of separation of children from adults in pre-trial detention, and deprivation of liberty is not applied as a measure of last resort.⁷¹

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Although there are criminal penalties for corruption, executive and judicial corruption occurs with impunity.⁷² All of these factors would make it challenging, if not impossible, to require the government to enforce any judicial decision.

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

According to the UN Special Rapporteur on Eritrea, “[t]here is no rule of law to provide citizens with a transparent legal system to protect them from the arbitrary use of power by the State, other institutions, and individuals.”⁷³

In practice, it is not feasible to challenge government behaviour in a court of law in Eritrea. The court system is prone to executive interference in judicial proceedings.⁷⁴ The judicial system in Eritrea is the weakest of all existing state institutions in the country with no meaningful powers to dispense justice without fear and favour, particularly in areas or litigation that are considered by the government as “politically embarrassing”. Trying to bring a court challenge against abusive government practice in the area of child rights or CRC obligations (for example, the systematic and widespread practice of underage military conscription) can be tantamount to high treason, and may contradict the dominant political ideology of the ruling party.

Rural courts are common in Eritrea and follow traditional and customary law. They are headed by rural elders or elected officials. For cases that are considered less serious, local administrators in rural areas encourage parties to mediate outside of court. These cases are open to the public and heard by a panel of judges.⁷⁵

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁷⁰ CRC 2002, para. 74.

⁷¹ CRC 2008, para. 78.

⁷² 2013 *Eritrea Country Report*, at 16.

⁷³ *Id.* at 98.

⁷⁴ *Special Rapporteur*, at 40.

⁷⁵ 2013 *Eritrea Country Report*, at 8.